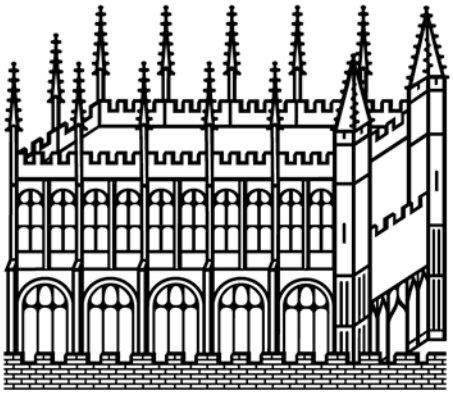

REPORTS

OF

CASES

DECIDED IN THE

HIGH COURT OF CHANCERY,

IN 1851 AND 1852,

BY

THE RIGHT HON. LORD CRANWORTH,

AND

SIR RICHARD TORIN KINDERSLEY,

VICE-CHANCELLORS.

By NICHOLAS SIMONS, M. A.,

and Barrister-at-Law.

WITH SOME CASES REPORTED BY

C. STEWART DREWRY, ESQ.

of the Inner Temple, Barrister-at-Law.

BEING

VOL. II. OF THE NEW SERIES OF SIMONS'S REPORTS.

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MDCCCLII.

*** The Cases contained in this Volume, down to p. 191, are reported by MR. SIMONS. The remaining Cases are reported by MR. DREWRY, by whom the Reports of Cases determined by Vice-Chancellor KINDERSLEY will be henceforth continued.

Lord Truro	Lords Chancellors.
Lord St. Leonards	
Sir John Romilly	Master of the Rolls.
Sir James Lewis Knight Bruce	Lords Justices.
Lord Cranworth	
Sir George James Turner	Vice-Chancellors.
Sir James Parker	
Sir Richard Torin Kindersley	
Sir A. Cockburn	Attorneys-General.
Sir F. Thesiger	
Sir W. Page Wood	Solicitors-General.
Sir Fitzroy Kelly	

TABLE

OF THE

CASES REPORTED

IN THIS VOLUME.

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLORS

LORD CRANWORTH AND SIR R. KINDERSLEY.

PARKIN *v.* THOROLD.

1851:
2nd and 14th June.

Specific performance. Vendor and Purchaser. Agreement.

A purchase was to be completed on the 25th of October. Before that day arrived, the purchaser, at the vendor's request, extended the time to the 5th of November. The title, however, was not completed on that day. Held that the purchaser was at liberty to abandon the contact.

THIS was a suit for specific performance, by the vendors against the purchaser of a freehold estate in *Devonshire*. The agreement was dated the 25th of July 1850, and stipulated that the abstract should be delivered within ten days, and that the purchase-money should be paid and the purchase be completed on or before the 25th of October following.

The abstract was delivered on the 1st of August 1850; and, on the same day, the Defendant's solicitors went to the office of a solicitor in *Exeter*, in whose custody the Plaintiff's solicitor informed them the deeds were, for the purpose of comparing the abstract with the deeds: but only some of the deeds were produced; and, in particular, a settlement dated in September 1804, which was very material to the title, and was very imperfectly abstracted, was not produced. In consequence of this, the

1851.

PARKIN v. THOROLD.

Defendant's solicitors wrote to the Plaintiff's solicitor, on the 8th of August, requesting that a full abstract of the settlement might be sent to them, and desiring to be informed where the original might be inspected, On the 28th of August, the Plaintiff's solicitor answered that the settlement, as he was informed, was in the office of the Defendant's solicitors, or in the possession of a gentleman named *Rawden*, one of their clients. On the 31st, the Defendant's solicitors replied that the settlement was not in their possession; that Mr. *Rawden* had been dead some years, and that they did not believe that the settlement had ever been in his custody. Several other letters on the subject of the settlement, passed between the solicitors: and, on the 10th of September 1850, the Defendant's solicitors, who had then procured a document which purported to be a copy of the settlement, wrote, to the Plaintiff's solicitor, as follows:—"As desired, we beg to forward, to you, this copy settlement, which was made from a copy obtained from our agents in *London*, who have promised us to make a further search for the original:" and three days afterwards, they wrote, to the Plaintiff's solicitor, as follows:—"Have you ascertained where the original settlement of 1804 is, that we may inspect it; which we are desirous of doing without delay?" On the 17th of October 1850, the Plaintiff's solicitor, in answer to a letter from the Defendant's solicitors, pressing the completion of the purchase, wrote as follows:—"I only require time to be able to find the settlement. I believe I have found out where it is." On the 21st of October, at which time the Plaintiff's solicitor had not produced the settlement or informed the Defendant's solicitors where it was, the latter gave the former notice, in writing, that, unless the settlement was produced, and the other requisitions and observations on the title (which they had sent to the

1851.

PARKIN
v.
THOROLD.

Plaintiff's solicitor on the 14th August preceding), were complied with and satisfied on or before the 5th of November following, the Defendant would consider and treat the contract as at an end, and require the deposit which he had paid, to be returned. The notice was not complied with: in consequence of which the Defendant's solicitors wrote, to the Plaintiff's solicitor, on the 7th of November, requesting that the deposit might be returned. On the 8th, the Plaintiff's solicitor informed the Defendant's solicitors, that he had found the settlement, and should be able to produce it in a very few days. On the 9th, the Defendant's solicitors peremptorily demanded the deposit, and added that, if they did not receive it in a few days, they should issue a writ for the recovery of it. On the 8th January 1851, the Plaintiff's solicitor informed the Defendant's solicitors that he was then in a situation to produce the settlement, and that they might inspect it, in *London*, at any time convenient to themselves, upon giving him reasonable notice. On the same day, the Defendant's solicitors replied that their client (as they had repeatedly informed the Plaintiff's solicitor) had abandoned the contract, and that they had been expecting, for a long time, the deposit to be remitted to them; and that, unless they received it at once, they should have no alternative but to commence proceedings for the recovery of it: which they did in the following month.

On the 1st of March, the bill was filed charging that time was not of the essence of the contract; that no damage had arisen, to the Defendant, from the noncompletion of the contract at the time mentioned in the agreement, and that the Plaintiffs had not been guilty of any unreasonable delay, but had proceeded, with all reasonable despatch, to complete the contract: and praying that the Defendant

1851.

PARKIN
v.
THOROLD.

might be decreed to perform the agreement, and might be restrained from proceeding with his action.

The Defendant, in answer to the charge that no damage had arisen to him from the noncompletion of the contract at the time mentioned in the agreement, said that he had lost the interest on his deposit-money, and incurred costs and charges to a considerable amount in and about the investigation of the vendors' title to the estate; and that, between the time of the sale and the 5th of November 1850, he was prevented from seeking any other investment for the purchase-money he had agreed to pay for the estate; and that he had lost the benefit he expected to derive from the purchase of the estate; which, at the time when the contract was entered into, was let on lease; but, since the said 5th of November, the lessee had quitted with the assent of the vendors, although the term granted by the lease had not expired, and the estate had been ever since and still was on the vendors' hands.

The injunction prayed for by the bill having been obtained, and an order *nisi* for dissolving it having been made,

Mr. *Stuart* and Mr. *Terrell*, for the Plaintiffs, showed cause against making the order *nisi* absolute.

Mr. *Speed* appeared for the Defendant.

14th June.

The VICE-CHANCELLOR:

The agreement which is the subject of this suit, was dated on the 25th of July 1850. It stipulated that the abstract of the vendors' title to the estate contracted to be sold, should be delivered, to the purchaser, within ten days from the 25th of July, and that the purchase should

1851.

PARKIN
v.
THOROLD.

be completed on or before the 25th of October following, which was three months from the date of the agreement. The abstract was delivered on the 1st of August, which was within the time specified. On the same day, the Defendant's solicitors went to the office of a solicitor at *Exeter*, for the purpose of comparing the abstract with the original deeds. Some of the deeds were produced; but others, and amongst them, a settlement dated in 1804, was not produced. On the 8th of August, the Defendant's solicitors applied to the Plaintiff's solicitor for a full abstract of the settlement, and desired to be informed where they could inspect the original. On the 14th, they sent, to the Plaintiff's solicitor, their observations on the title as it then stood, one of which was that the settlement must be fully abstracted and the original produced for their inspection. On the 28th the Plaintiff's solicitor wrote to the Defendant's solicitors, stating that the settlement was in their office. On the 31st, the Defendant's solicitors sent an answer, denying all knowledge of the settlement. On the 10th of September the Defendant's solicitors acknowledged the receipt of a paper purporting to be a copy of the settlement. On the 13th they wrote, to the Plaintiff's solicitor, as follows:— "Have you ascertained where the original settlement is that we may inspect it, which we are desirous of doing without delay?" On the 17th of October the Plaintiff's solicitor wrote, in answer, that he only required time to be able to find the settlement, and that he believed he had found out where it was. On the 21st, the Defendant's solicitors gave the Plaintiff's solicitor notice that, unless the settlement was produced and the title to the estate completed by or before the 5th of November then next, the Defendant would consider the contract as at an end and require his deposit to be returned. The settlement was not produced by the 5th of November; and, on

1851.

PARKIN
v.
THOROLD.

the 7th, the Defendant's solicitors demanded the deposit, and, afterwards, brought an action to recover it. On the 1st of March 1851, the present bill was filed; shortly after which the Plaintiff obtained an injunction to restrain the action, for want of answer. The answer was filed on the 23rd of April; and, an order *nisi* for dissolving the injunction having been thereupon obtained, cause was shown against dissolving it on the 2nd of this month: and I have now to decide whether the cause then shown was sufficient.

The Plaintiff admits that he has failed to perform his contract according to its legal construction; that is, that it was an essential term of the contract, according to its legal construction, that he should make out a title before a certain day, and that he has failed in doing so. The question then is whether he has any equity to prevent the Defendant from asserting his legal right.

The jurisdiction of this Court to decree specific performance depends, entirely, on contract: and the principle upon which it exercises that jurisdiction, is that damages, which are the only redress that a party complaining of a breach of contract can obtain at law, are an inadequate remedy. The relief is different; but the foundation for it is the same in both Courts, namely, the contract. Consequently, the first point to be ascertained, is what is the contract? This must be decided from the terms of the contract itself; and not at all from the peculiar doctrines of the Court in which a party injured by the breach of it, may happen to seek redress. In the case of a written contract, the same words must, surely, have the same meaning, whether they are construed by a Court of Law or a Court of Equity. When, therefore, it is once ascertained that the contract of a purchaser is

that he will purchase if a title is made by a given day, but, otherwise, that he will not, I apprehend, if there is nothing more, that a Court of Equity cannot, any more than a Court of Law can, give relief to a vendor who has failed to make a title at the day specified. Lord *Thurlow's dictum* importing that a purchaser could not so stipulate, manifestly rests on no principle, and has been often repudiated as not truly expressing the doctrine of this Court. Such a restriction would be a most unwarrantable interference with the freedom of contracts, without any principle for its justification. When, therefore, a contract has been entered into by which a Court of Law decides that the purchaser is not bound unless a title be made before a given day, if a Court of Equity gives relief, it must be, not on the ground that it puts, on the words of the contract, a construction different from that put on it at Law, but because there are grounds, collateral to the contract, on which it can found a jurisdiction warranting its interference. What then are those grounds? I answer the conduct of the contracting parties. Though the terms of the agreement stipulate for the completion of the purchase on a given day; yet, if the parties have dealt together on the footing that the contract should be construed as a contract to complete in a reasonable time, this Court acts on *that* as the real contract to be enforced. There is, no doubt, some difficulty in reconciling this, which is certainly the doctrine of the Court, with the Statute of Frauds. A contract to purchase if a title is made on a given day, is not the same contract as a contract to purchase if a title is made in a reasonable time; and so, to admit parties, by agreement not in writing (and conduct is but evidence of agreement), to substitute the latter for the former contract, is, in truth, to give effect to a contract relating to lands not reduced into writing and signed by the party to be

1851.

PARKIN v. THOROLD.

charged; and this cannot be done consistently with the Statute of Frauds, as was decided, by the Court of Common Pleas, in *Stowell* v. *Robinson* (*a*). Perhaps this Court has acted on the ground that it would be a fraud in a purchaser, after dealing with a vendor on the footing that he did not consider the time fixed as material, to turn round and insist on the strict terms of the written contract; or it may be that the Court has, from the conduct of the parties, felt itself warranted in inferring that the day named was intended only as a security for performance in a reasonable time; and so, has dealt with it as in the nature of a penalty. Be this, however, as it may, whatever be the foundation of the doctrine of the Court, there is no doubt of its existence; that is, though the contract, according to its terms, is that the purchase shall be completed on a given day, and is so framed that, if not completed on that day, the purchaser is, at Law, entitled to recover back his deposit; yet, if the parties deal together on the footing of having disregarded the appointed day; as having, according to the ordinary language used, agreed to treat time as not being of the essence of the contract, then this Court will give relief, although the day for completion may have passed. But this relief is, as I have already stated, given, solely, on the ground of such dealing of the parties. I have not been able to discover any case, in modern times at all events, in which the Court compelling the purchaser to complete the purchase after the appointed day, has not proceeded on this ground. In *Seton* v. *Slade* (*b*) (a leading case on this subject), Lord *Eldon* expressly says: "There is no authority that has not some reference to the conduct of the parties:" and I find similar expressions in almost all the subsequent cases. Whether the

(*a*) 3 Bing. N. C. 928. (*b*) 7 Ves. 265.

1851.

PARKIN
v.
THOROLD.

facts have, in all the cases, been such as fairly to warrant the inference relied on; whether this Court has not, sometimes, made a new contract for the parties, and so enforced, on the purchaser, the performance of what he never undertook to do, is not the point for decision. It is sufficient to say that the ground on which the Court has professed to proceed, has always been that the parties have so acted as to enable it either to give, to the original contract, a meaning different from its *primâ facie*, obvious import, or else to say that the original contract, so far as relates to the time fixed for its completion, has been abandoned, and a new and more extended one has been, by implication, entered into.

Applying these principles to the present case, *I can see nothing whatever warranting me in saying that the Defendant ever abandoned his right to insist on the completion at the specified day.* Within a few days after the delivery of the abstract, he insisted on the production of the settlement of 1804: and he had a right so to insist. The production was necessary to the establishing of the title; otherwise the Defendant's action for the recovery of the deposit would fail, and no injunction would be necessary. Many letters passed, and the Defendant, by his solicitors, continued to insist on the production of the deed. The contract was to be completed on the 25th of October, that is, three months from its date; and, on the 17th of that month, the Plaintiff's solicitor wrote to the Defendant's solicitors, asking for further time to enable him to procure the settlement. On the 21st, the Defendant's solicitors wrote and sent, to the Plaintiff's solicitor, a formal notice giving him what he had asked for, namely, an extension of time to the 5th November, but stating that, unless by that day the settlement was produced and the title made good, the

1851.

PARKIN v. THOROLD.

Defendant would consider the contract as at an end. The settlement was not produced; and so, on the 7th of November, the Defendant's solicitors finally gave notice of abandonment: and I think they had a perfect right so to do. The Defendant was at liberty to insist on completion on the 25th of October. *He never did any act to forfeit this right, except by voluntarily extending the day, for the convenience* and at the request of the Plaintiff, to the 5th of November: and, default having been then made, the Defendant was in the same position as if he had never allowed any extension, and had refused to go on with the contract after the 25th of October.

I may remark, as indeed I did at the time of the hearing, that the case of *King* v. *Wilson* (*c*), has no bearing on the present question. There, the parties had clearly waived the day fixed for completion, and negotiations proceeded, after that day, on the subject of the title. Pending these subsequent negotiations, the purchaser gave notice that, unless everything was completed in a week, he would be off his bargain. Lord *Langdale* held that he could not do this: but the ground of that decision was that, by dealing with the vendor after the appointed day, the purchaser had agreed to treat the contract as an open contract, to be performed if the title was completed in a reasonable time, and that a week was not a reasonable time. This has obviously no bearing on the case.

The result is that the Defendant in this case, was at full liberty to bring his action for recovering back his deposit; and so, the order *nisi* for dissolving the injunction, must be made absolute.

(*c*) 6 Beav. 124.

IN THE MATTER OF THE WINDING-UP ACTS, AND OF THE CHEPSTOW, GLOUCESTER, AND FOREST OF DEAN RAILWAY COMPANY.

1851: 7th and 19th July.

Joint-stock Companies Winding-up Acts.

A petition to discharge a winding-up order, dismissed with costs, on account of delay in presenting it.

THE attempt to form the above-mentioned Company, was abandoned in 1846; and, on the 25th of January 1850, an order for winding up its affairs, was made on a petition presented by a gentleman named *Mann*, who had been a shareholder in the Company. More than a twelvemonth after the making of that order, and after an official manager had been appointed and other proceedings under it had taken place in the *Master's* office, the directors of the Company presented a petition praying that the order might be discharged, on the ground that *Mann*, when he obtained it, had no interest in the affairs of the Company; inasmuch as, not long after the abandonment of the undertaking, the directors returned him a certain portion of the deposits on his shares, and he agreed to accept the amount in full satisfaction of all demands upon the Company and the directors.

Mr. *Stuart* and Mr. *Terrell*, supported the petition.

Mr. *Bethell* and Mr. *Glasse* opposed it.

The VICE-CHANCELLOR said that, as the petitioners had suffered more than a twelvemonth to elapse before they applied to discharge the order, and as an official manager had been appointed, and the winding-up of the

1851.

IN RE THE CHEPSTOW, GLOUCESTER AND FOREST OF DEAN RAILWAY COMPANY.

Company had been proceeded with, and, thereby, expense had been incurred, he should dismiss the petition with costs.

HARCOURT *v.* SEYMOUR.

1851: 14th, 16th 21st and 23rd July.

Conversion. Election.

21st September 1778. Settlement or articles on the marriage of *William* afterwards Earl *Harcourt.*

BY the settlement or articles for a settlement made in contemplation of the marriage of *William Harcourt* with *Mary Lockhart* widow, dated the 21st of September 1778, *William Harcourt* assigned the sums of 5000*l.*,

By a marriage settlement, dated in 1778, 32,000*l.* was directed to be invested in land which was to be conveyed to the use of the husband for life; to the use that the wife might receive a jointure of 300*l.* a year; to the use of trustees for a term to secure the jointure and to raise 5000*l.* for the wife after the husband's death; to the use of trustees for another term, to raise portions for the children of the marriage, and to the use of the husband's right heirs. There never was any issue of the marriage. The trustees invested 20,000*l.* of the 32,000*l.* on mortgage, and the rest, in the funds. In 1823, the husband made a statement of *his personal property*, in which he included both the mortgage-money and the stock. In 1828, he and the mortgagee and one of the trustees executed a deed by which the mortgage-money as well as the interest of it was treated as payable to him, *his executors or administrators*, and by which he covenanted that the principal should not be called in, for five years, by him, his *executors or administrators*, or by the trustees, in case the interest should be regularly paid. Afterwards, in the same year, he made his will, by which he made a provision for his wife (which she accepted) in satisfaction of the provision made for her by the settlement; and devised all his real estates to trustees in trust to convey them to certain of his relations for their lives, successively, with remainders to their first and other sons in tail male, and, ultimately, to his own right heirs: and he gave 80,000*l.* to the same trustees, and directed them to invest it in land, and to settle the land in the same manner as he had directed his real estates to be settled. He died in 1830.

Held that he had elected to treat and had treated the 32,000*l.* as part of *his personal estate*, and that it remained personalty at his death.

2000*l.*, and 25,000*l.*, to which he was entitled as therein mentioned, to his brother, *George Simon* Earl *Harcourt*, *William Danby*, and two other persons, in trust, with the consent of *William Harcourt* and *Mary Lockhart*, and, after both their deaths, of the proper authority of the trustees, to lay out those sums in the purchase of freehold or copyhold lands in fee simple, in possession, which were to be settled to the use of *William Harcourt* for life, with remainder to the use of trustees and their heirs during his life, in trust for him; and, after his decease, to the use that *Mary Lockhart* should receive, thereout, a yearly rent-charge of 500*l.*; and, subject thereto, to the use of other trustees, for 500 years, for better securing the payment of the rent-charge, and for raising 5000*l.*, and paying the same to *Mary Lockhart*, her executors, &c., in case she should survive *William Harcourt*, (and which, together with the rent-charge, was to be in bar of her dower); and, subject thereto, to other trustees, for 1000 years, for raising portions for the children of the marriage; and, subject thereto, *to the use of the right heirs of William Harcourt*; and it was provided that the settlement to be made of the lands so to be purchased should contain powers for leasing, selling and exchanging such lands and for investing the proceeds of the sale in the purchase of other lands, which, as well as the lands taken in exchange, should be settled to the uses thereinbefore declared: And it was declared that, until the 5000*l.*, 2000*l.*, and 25,000*l.* should be invested in the purchase of lands, the interest thereof, or of so much thereof as should not be so invested, should be paid to *William Harcourt* during his life, and that, after his decease, those sums and the interest thereof, or so much thereof as should not be so invested, should be subject to the payment of the 500*l.* a year and 5000*l.* to *Mary Lock-*

1851.

HARCOURT v. SEYMOUR.

hart, and also to the payment of the portions of the children of the marriage, and that the residue of such trust-monies *should be paid to such person or persons as, by virtue of the limitations aforesaid, would be entitled to the immediate freehold, reversion and inheritance of the lands thereby agreed to be purchased and settled.* And it was provided that, if *William Harcourt*, his heirs, executors or administrators, should, at any time thereafter, procure an estate, called *Pipwell Abbey*, then belonging to his brother, to be settled to the uses thereinbefore declared (but which he never did), then the sum of 32,000*l.*, the amount of the 5000*l.*, 2000*l.* and 25,000*l.* *should be paid, assigned and made over to him, his executors, administrators and assigns.*

Before the year 1808, 1000*l.*, part of the 2000*l.*, was paid to *William Harcourt*, and he applied it to his own use: and, in that year, the residue of the 2000*l.*, and the 5000*l.* and 25,000*l.* were paid to *George Simon* Earl *Harcourt* and *William Danby*, the only trustees of the settlement or articles who were then living. *George Simon* Earl *Harcourt* died in April 1809, and, thereupon *William Harcourt* and *Mary* his wife, became Earl and Countess *Harcourt*. In the same month *Danby*, at the request of the Earl and Countess, lent 20,000*l.*, part of the trust-monies, to Sir *George Lee*, on a mortgage, of estates in *Bucks*, made to *Danby* his heirs and assigns; and, in the same month, 11,000*l.*, the residue of the trust-funds, was laid out in Exchequer bills, which were afterwards sold, and the proceeds invested in the purchase of 12,735*l.* 3*s.* 4*d.* Navy Five *per Cents*, in *Danby's* name.

1813. Covenant by Earl *Harcourt*, to in-

By an indenture dated in 1813, *William* Earl *Harcourt* covenanted *to indemnify* Danby, *his heirs, execu-*

tors and administrators, against any loss or damage *which he or they might sustain by reason of any laches or neglect which might be imputed, to him, in consequence of the trust-funds not having been invested in the purchase of real estate, as directed by the settlement*, or in consequence of *Danby* having acquiesced *in the misapplication* of the 1000*l.* by *William* Earl *Harcourt*.

demnify *Danby*, for not having invested the trust-funds in the purchase of real estate.

By an indenture dated the 16th of April 1818, after reciting that the Earl and Countess, and *Danby* were desirous of appointing Sir *Harry Calvert*, Sir *Howard Douglas* and *George Samuel Collyer* trustees of the settlement, and that the 12,735*l.* 3*s.* 4*d.* stock had been transferred into the joint names of them and *Danby*, and that it was forthwith intended to convey, to them, the 20,000*l.** secured on mortgage of Sir *George Lee's* estates: the Earl and Countess and *Danby* appointed those gentlemen trustees of the settlement jointly with *Danby*; and it was declared that they should stand possessed of the stock and of the 20,000*l.* when the same should be conveyed to them, on the trusts of the settlement. In July 1822 the 12,735*l.* 3*s.* 4*d.* Five *per Cents*, were converted into 13,371*l.* 18*s.* 6*d.* New Four *per Cents*. The Earl never repaid the 1000*l.*: and the other part of the trust-funds continued invested as before mentioned until after his death.

16th April 1818. Appointment of new trustees of the settlement.

* *Sic.*

The Earl made his will dated the 24th of March 1828, and thereby gave 10,000*l.* to the Countess, absolutely, and the interest of 80,000*l.*, to be set apart as thereinafter mentioned, and his mansion-house at *St. Leonard's Hill, and all his lands, tenements and hereditaments there or elsewhere, which were not otherwise disposed of by his will*, for her life; and he declared that the provision thereby made for her, *was in lieu and full satisfaction of all jointure, dower*,

24th March 1828. Will of *William* Earl *Harcourt*.

1851.

HARCOURT v. SEYMOUR.

thirds or other estate or interest whatsoever to which she would otherwise have been entitled, in, from or out of the property comprised in their marriage articles, or the real or personal estate whereof he might die seised or possessed; and, after her decease, he gave his mansion-house at *St. Leonard's Hill, and all the other lands and hereditaments thereby devised to her for her life*, to *Danby*, *Henry Seymour* and *G. C. Heath*, and their heirs, in trust to pay the rents to *Sophia*, the wife of his relation, *Charles Amedee* Marquis *D'Harcourt*, for her life, and, after her death, to convey, settle and assure the said hereditaments to *William Bernard Harcourt*, the eldest son, and to the second and other sons of the Marquis and Marchioness *D'Harcourt*, for their lives, successively, with remainders to their first and other sons in tail male; with remainder to *George Simon Harcourt*, of *Cooper's Hill*, for life, with remainders to his first and other sons in tail male; with remainder to *Mary*, the daughter of the Marquis and Marchioness *D'Harcourt*, for life, with remainders to her first and other sons in tail male; with remainder to his own right heirs: and he gave 80,000*l.* to his trustees, in trust to invest it in Government or real securities, and to pay the interest to the Countess for life, and, after her death, to the Marquis *D'Harcourt* for life, and, after the decease of the survivor of them, in trust to lay out the same in the purchase of freehold lands in fee simple, or of lands of copyhold or leasehold tenure convenient to be held with such freehold lands, yet so that such purchase should be made with the consent in writing of the person or persons who, for the time being, would be entitled to the rents of the hereditaments thereby directed to be purchased, and to settle and assure the same hereditaments in such manner as was thereinbefore directed with respect to his mansion-house and lands at *St. Leonard's Hill* after the Countess's decease:

1851.

HARCOURT v. SEYMOUR.

and he gave all the residue of his personal estate, subject to the payment of his debts, &c. to the Countess, her executors &c. or, in case of her death in his lifetime, to the Marquis, his executors &c.: and he appointed the Countess, *Heath*, *Collyer*, and *William Cowden*, Esq., his executors.

The Earl, by a codicil dated the 27th of May 1828, revoked the trust, in his will, for payment of the rents of the hereditaments to be purchased with the 80,000*l.* to the Marchioness *D'Harcourt* during her life, and declared that it should be lawful, for the trustees of his will, to invest the 80,000*l.* in the purchase of lands, during the lives of the Countess and the Marquis or the life of the survivor of them, with their consent in writing, and after their deaths, with the consent in writing of the person for the time being entitled to the rents of the hereditaments to be purchased, and that the same hereditaments should be settled and assured to the use of the Countess, of the Marquis and of *William Bernard Harcourt* for their lives successively, with remainder to the same uses as were directed, by his will, to be limited of and concerning his estate at *St. Leonard's*, after the death of *William Bernard Harcourt*.

June 1830. Death of *Wm.* Earl *Harcourt* &c.

The Earl died in June 1830 without having had any issue by the Countess. She survived him, *and accepted the provision made for her by his will, in lieu of the provision made for her by the settlement.* Lord *Vernon* was the Earl's heir-at-law. Shortly after the Earl's death, his executors paid the legacy of 80,000*l.* to the trustees of his will.

Jan. 1833. Death of Coun-

The Countess died in January 1833, having, by her

1851.

HARCOURT v. SEYMOUR.

will dated in 1832, given a legacy of 15,000*l.* and her residuary personal estate to *William Bernard Harcourt*, and appointed *George Simon Harcourt*, *G. C. Heath* and *G. S. Collyer*, her executors.

tess *Harcourt*: will dated in 1832.

In 1834 the trustees invested the 80,000*l.* in the purchase of an estate, which was conveyed to them upon the trusts of the will and codicil.

Opinions of Counsel taken in 1834.

Until September or October 1834, the 32,000*l.*, and the monies and funds representing it, had been considered to form part, first, of the residuary personal estate of the Earl and, afterwards, of the Countess; but it then occurred to Messrs. *Forster* and *Frere*, the solicitors to the trustees and executors of the Earl's will, that it was questionable whether those monies and funds formed part of the Earl's residuary personal estate: and, accordingly, they laid a case before Mr. *Walters*, a gentleman at the bar, who was of opinion, from the materials laid before him, that those monies and funds did not form part of the Earl's residuary personal estate, but were liable, by virtue of the settlement or articles of 1778, to be laid out in the purchase of land. *William Bernard Harcourt*, on the opinion being communicated to him, caused a case to be laid before Mr. *Pemberton Leigh* and Mr. *Christie*, two other gentlemen at the bar, who also were of opinion, from the statements contained in the case, that the settlement or articles converted the monies and funds into real estate, and that they passed, as such, under the residuary devise in the Earl's will.

8th and 9th May 1835. Conveyance executed by *W. B.*

On the faith of this opinion, certain indentures of lease and release, dated the 8th and 9th of May 1835, were prepared and executed. The release was made be-

1851.

HARCOURT v. SEYMOUR.

tween *William Bernard Harcourt* of the first part; the Marchioness *D'Harcourt*, who had survived the Marquis, of the second part; Sir *H. Douglas* and *G. S. Collyer*, the surviving trustees of the settlement of 1778, of the third part, and *H. Seymour* and *G. C. Heath*, the surviving trustees of the Earl's will, of the fourth part; and, after reciting the settlement and the Earl's will and codicil and his death without issue by the Countess, and the Countess's death; and after also reciting that the trust-fund comprised in the settlement, was not, nor was any part thereof ever invested in the purchase of real estate, in pursuance of the trust for that purpose contained therein, but that the same was, with the consent of the Earl and Countess, from time to time, invested on Government and real securities, which were altered as occasion required; and that the same then consisted of 34,338*l.* 7*s.* 4*d.** sterling; and that the Earl's will and codicil did not contain any specific disposition of the said fund or any part thereof; and, after further reciting (most erroneously, as the bill alleged) that no act was done to discharge the fund from the trust to lay out the same in real estate; and after further reciting (erroneously, as the bill also alleged) that the Earl being, in the event, which happened, of his having no issue by the Countess, absolutely entitled, subject to the provision made for her by the settlement, to the hereditaments to be purchased with the fund, the hereditaments so to be purchased, were comprehended in the general devise contained in his will;

Harcourt in consequence of the opinions of Counsel.

* This sum was composed of the 1000*l.*, which the Earl's executors repaid to the trustees of the settlement, of 13,338*l.* 7*s.* 4*d.* the proceeds of the Four per Cents, which were reduced to Three and a Half per Cents in July 1830, and sold in August following, and of the 20,000*l.*, the mortgage for which was paid off in 1834.

1851.

HARCOURT v. SEYMOUR.

and after further reciting that the Countess accepted the provision made for her by the Earl's will and codicil, in lieu of the provision made for her by the settlement, and that she was dead; and after further reciting that Sir *H. Douglas* and *G. S. Collyer*, the surviving trustees of the settlement, in execution of the trust therein contained to lay out the said trust fund in the purchase of real estate which, in the events aforesaid, would, when purchased, be subject to a trust to convey the same to the surviving trustees under the Earl's will, upon the trusts thereby declared concerning the hereditaments thereby devised to trustees as aforesaid, had contracted, with *William Bernard Harcourt*, for the absolute purchase of the messuages and other hereditaments thereinafter particularly mentioned, for the said sum of 34,338*l.* 7*s.* 4*d.*; and after further reciting that the said purchase was agreed to be made as aforesaid with the consent of the Marchioness *D'Harcourt*: It was witnessed that, in pursuance of the said contract, and in consideration of 34,338*l.* 7*s.* 4*d.* paid to *W. B. Harcourt* by Sir *Howard Douglas* and *G. S. Collyer*, as trustees under the settlement, with the privity of *H. Seymour* and *G. C. Heath*, *W. B. Harcourt* conveyed, with such privity as aforesaid, and by the direction of Sir *H. Douglas* and *G. S. Collyer*, an estate in the county of *Bucks*, which he had shortly before purchased, unto and to the use of *Seymour* and *Heath*, their heirs and assigns, upon the trusts in and by the Earl's will declared, concerning the hereditaments thereby devised, from and after the Countess's decease, to trustees and their heirs as therein and hereinbefore mentioned, or such of the said trusts as were then subsisting and capable of taking effect.*

* *Sic.*

The Marchioness *D'Harcourt* died in June 1846. She had issue, by the Marquis, two sons, *William Ber-*

nard Harcourt, *George D. T. B. Harcourt*, and a daughter, *Mary Harcourt*, named in the Earl's will. *Mary Harcourt* married the Count *de Castries*, and had issue a son. *George D. T. B. Harcourt* had three sons; and *George Simon Harcourt* had one son.

Death of *W. B. Harcourt.*

In May 1847, *William Bernard Harcourt* died intestate, leaving *Elizabeth Georgiana Harriet Harcourt*, his widow, and three infant daughters, his co-heirs and only next of kin. His widow was his administratrix.

Bill in *Seymour* v. *Vernon.*

In August 1847 *Seymour* and *Heath*, as the surviving trustees of the Earl's will, filed a bill against Lord *Vernon*, the Earl's heir, *George D. T. B. Harcourt* and his sons, *George Simon Harcourt* and his son, the Count and Countess *de Castries* and their son, *Elizabeth Georgiana Harriet Harcourt*, the widow and administratrix of *William Bernard Harcourt* and *G. S. Collyer*, praying that the Earl's will and codicil might be established and the trusts thereof performed under the direction of the Court, and that the rights and interests of all parties, under the will and codicil, in and to the real estates thereby devised and the real estates purchased with the 80,000*l.* and 34,338*l.* 7*s.* 4*d.* might be ascertained and declared, and that a proper settlement of such real estates might be executed in conformity to the trusts and directions contained in the will and codicil.

After that bill was filed, Messrs. *Henderson* and *Leach*, the solicitors of *Elizabeth Georgiana Harriet Harcourt*, discovered at *St. Leonard's Hill* and in the office of Messrs. *Forster* and *Frere*, the solicitors to the Earl and his executors, certain documents and papers which were considered to lead to the conclusion that the

1851.

HARCOURT v. SEYMOUR.

Bill in *Harcourt* v. *Seymour*.

Earl *had elected to take the funds subject to the trusts of the settlement, as personal estate.*

In consequence of that discovery, the bill in *Harcourt* v. *Seymour*, the suit in which this case is intituled, was filed in June 1848, by the daughters of *William Bernard Harcourt*, against the parties to *Seymour* v. *Vernon*. It stated and charged, amongst other things, that *William Bernard Harcourt* executed the indentures of the 8th and 9th of May 1835, in ignorance of his rights as to the trust-funds and of very material facts bearing thereon which had been discovered since his decease; and that he had no knowledge of any facts beyond those contained in the cases laid before Counsel as aforesaid: That the 34,338*l.* 7*s.* 4*d.* was his absolute property, and, if that sum had been treated and dealt with as such, instead of his receiving it as the consideration for the conveyance made by him in May 1835, he would have continued the absolute owner of the estates comprised in that conveyance, and those estates would have descended to the Plaintiffs as his coheirs, and they were then entitled to have the same conveyed to them: That Earl *Harcourt* became absolutely entitled to the trust-funds by virtue of divers acts done and declarations made by him in his life-time, and that so the Countess always believed and considered: and, as evidence of the matters aforesaid, that the trust-funds were considered and treated, by him, as his own personal estate, previously to and at the dates and execution of his will and codicil and, thenceforth, until his death; and he corresponded with divers persons and treated the same as his own *personal* property in such correspondence; and also executed divers deeds, with reference to the mortgage for 20,000*l.*, having a similar purport or effect; and made divers entries, in his pass books or banking account

1851.

HARCOURT v. SEYMOUR.

books with *G. S. Collyer* (who was his banker and agent as well as one of his executors and a trustee of the settlement) wherein he stated the trust-funds to be, "trust-*money*:" that the trust-funds were properly dealt with, *as personalty*, throughout the whole of the Countess's lifetime, and they ought always to have been, and would have been so dealt with, if *William Bernard Harcourt* and his advisers had been aware of his real rights and interests and of the facts, documents and circumstances referred to in the bill:* that *George Simon Harcourt*, *G. C. Heath* and *G. S. Collyer* (the Countess's executors), ought to have taken proceedings in respect of the matters thereby complained of, but they had declined so to do; and that *Elizabeth Georgiana Harriet Harcourt* (the mother of the Plaintiffs) had declined to join as a co-plaintiff with them.

The bill prayed that it might be declared that Earl *Harcourt elected and intended to treat and take and did treat and take the trust-funds*, comprised in the articles of settlement of the 21st of September 1778, *as personalty*; and that the Countess became absolutely entitled thereto as his residuary legatee; and that *William Bernard Harcourt*, as claiming through her and as such legatee and residuary legatee as in the bill and hereinbefore mentioned, was, under the circumstances therein mentioned, in like manner, absolutely entitled thereto; and that it might be also declared that he executed the indentures of the 8th and 9th of May 1835, in error and mistake, and in ignorance of his real rights and interests with reference to the trust-funds; and that those indentures were void: and

* These facts, documents and circumstances are stated in the *Master's* report, *post*, page 24 *et seq.*

1851.

HARCOURT v. SEYMOUR.

that *Seymour* and *Heath* (the surviving trustees of the Earl's will) might be decreed to convey the estates comprised in those indentures, to the Plaintiffs, subject to such right of dower (if any) as *Elizabeth Georgiana Harriet Harcourt* might be considered entitled to: and that an account might be taken of the rents of the same estates received by *Seymour* and *Heath*, and that the same might be secured for the benefit of the Plaintiffs: or that the 34,338*l.* 7*s.* 4*d.* and interest thereon might be made good, to the Plaintiffs, by sale of the estates, or, otherwise, out of the Earl's assets, or in such other manner as, to the Court, might seem meet.

16th November 1848. Order for preliminary inquiries.

By an order dated the 16th November 1848, the *Master* was directed to inquire and state (amongst other things) how and in what manner and under what circumstances the sums of 2000*l.*, 5000*l.* and 25,000*l.*, making together the sum of 32,000*l.*, comprised in the settlement of the 21st of September 1778, were dealt with and invested, from the date of such settlement, up to the time of the Earl's death; and how and in what manner and under what circumstances the same had been dealt with and invested since the Earl's death.

10th April 1850. Report in pursuance of that order.

On the 10th of April 1850, the *Master* made his report in obedience to that order,* and thereby, after finding the facts contained in the statement of this case, found the following matters, all of which he stated to have been ascertained after the bill in *Seymour* v. *Ver-*

* The documents comprised in this report, were much relied upon both in the argument and in the judgment; and, therefore, the reporter thought it advisable not merely to state the substance of them (which could not be done satisfactorily) but to set them forth.

1851.

HARCOURT v. SEYMOUR.

non was filed: That Earl *Harcourt* made entries in his pass books or banking account books with *G. S. Collyer*, wherein he stated the trust-funds to be, "trust-money," and, "trust-stock;" and wrote against several of the entries therein of dividends received on the trust-funds in 1812, 1822 and four following years, "Interest of trust-money:" That various arrangements were come to with reference to the mortgage for 20,000*l.* and the interest thereof (which originally was 5*l. per cent.*) between Sir *George Lee* and the Earl, and, subsequently, between the Earl and *John Lee*, who succeeded to Sir *George's* mortgaged estates: and that a deed dated the 19th of February 1828, and expressed to be made between *Danby*, Sir *Howard Douglas* and *Collyer* of the first part, *John Lee* of the second part and the Earl of the third part, and which was executed by *Collyer*, *John Lee* and the Earl, after reciting the mortgage for 20,000*l.*, and showing that it was vested in *W. Danby*, Sir *H. Douglas* and *Collyer*, proceeded in part as follows: "And whereas the said sum of 20,000*l.* was not the proper monies of the said *William Danby*, Sir *H. Douglas* and *George Samuel Collyer*, but was held by them upon the trusts expressed and declared, concerning the same, in and by a certain indenture of settlement executed previous to the marriage of the said Earl *Harcourt* with his present Countess, under and by virtue of which, the said Earl is entitled to the interest of the said sum of 20,000*l.* during his life, and the said Countess is afterwards entitled to the interest thereof during her life * and, in the event of the said Earl dying without issue, he is entitled to the absolute property in the said principal money: And whereas it has been agreed, between the said Earl and the said *John Lee*, but without prejudice as

Deed of the 19th February 1828.

* This recital was erroneous.

1851.

HARCOURT v. SEYMOUR.

hereinafter mentioned, that the said sum of 20,000*l.* shall remain vested, upon the security of the said manors and other hereditaments, for the term of five years from the 27th day of September 1827, at the rate of 4*l.* 10*s. per centum per annum*, under and subject to the provisoes and conditions hereinafter expressed and declared: Now these presents witness, and it is hereby agreed and declared, between and by the parties hereto, and the said *John Lee* doth hereby, for himself, his heirs, executors and administrators, covenant with the said Earl, *his executors, administrators* and assigns, that he, the said *John Lee*, his heirs, executors or administrators, shall not be at liberty to pay the said sum of 20,000*l.* or any part thereof, until the end of five years to be computed from the said 27th day of September last past, unless the said Earl, *his executors, administrators or assigns*, shall call in the same in consequence of default being made in payment of the interest of the said sum of 20,000*l.*: And it is hereby agreed and declared, between and by the parties hereto, and particularly the said Earl doth hereby, for himself, his heirs, executors, administrators and assigns, covenant with the said *John Lee*, his heirs and assigns that, in case the said *John Lee*, his heirs or assigns, shall pay to the said Earl, *his executors, administrators* and assigns, interest for the said sum of 20,000*l.* after the rate of 4*l.* 10*s. per centum per annum*, by equal payments, on the 27th day of March and 27th day of September in every year during the said term of five years, he, the said Earl, his *executors, administrators* and assigns, *or the said* William Danby, *Sir* H. Douglas *and* G. S. Collyer, or any of them, their or any of their heirs or assigns, shall not nor will call in the said sum of 20,000*l.* or any part thereof, until the end of the said term of five years: But it is hereby agreed and declared, between and by the parties to these presents, that if, at

any time during the said term of five years, default shall be made, by the said *John Lee*, his heirs or assigns, in payment of the interest of the said sum of 20,000*l.*, it shall be lawful, to and for the said Earl *Harcourt*, *his executors*, *administrators* or assigns, and *for his or their trustees*, to call in and compel payment of the said sum of 20,000*l.* and the interest thereof then in arrear and thereafter to accrue due, at the rate of 5*l. per cent. per annum.*"

The *Master* found that the last-mentioned deed was binding on the Earl from the date of its execution and was regularly acted on, and that the Earl had treated the mortgage-money *as money*, previously to the date of the deed; and that there was found, at *St. Leonard's*, a letter with the following endorsement in the handwriting of the Earl:—"4th October 1827, Mr. *Rose*,* respecting *my* mortgage upon Sir *George Lee's* estate."

12th October 1823. The Earl's statement of his personal property.

The *Master* next set forth the following document, and which also had been found at *St. Leonard's*, and the whole of which was in the Earl's handwriting and was endorsed by him: "Statement of *my* property, 12th October 1823:"

"Supposed amount of *my* property, 12th October 1823.

£	s.	d.		£	s.	d.
42,688	1	1	Three per Cents. 83 .	35,431	0	0
13,371	18	6	Four per Cents. 103 .	13,772	0	0
1,162	11	4	Ditto Ditto . .	1,196	0	0
4,032	3	9	Three per Cents. do. .	3,346	0	0
1,000	0	0	India Stock . .	1,850	0	0
3,018	17	4	Four per Cents. . .	3,108	0	0
				£58,703	0	0

* Mr. *Rose* was Sir *George Lee's* solicitor.

1851.

HARCOURT v. SEYMOUR.

	£	s.	d.
Mortgage upon Sir *George Lee* . .	20,000	0	0
30 Shares Gas Light . . .	1,500	0	0
House, *Portland Place* . . .	5,000	0	0
To arrears of Rent from several Tenants to Michaelmas last . . .	4,114	19	2
To be received by my executors within six months after my decease from the person who comes into possession of the House &c. *Nuneham*, and *Harcourt* House, being the value of Stock and crop and plate in 1809 . .	6,883	0	9
N.B. Whether in case the stock and crop at my decease should be worth more than 369*l.* 3*s.* 2*d.* *my executors* have not a fair claim for the difference.			
City Bonds purchased June 1822 .	20,000	0	0
Russian Stock, valued at . .	1,700	0	0
	£117,900	19	11"

The *Master* then found that the two items of 13,371*l.* 18*s.* 6*d.* Four *per Cents*, and mortgage upon Sir *George Lee*, 20,000*l.* contained in that statement, represented the stock and mortgage whereof the trust premises consisted: and that, in many of the letters and documents which had been discovered, there were repeated references, in the handwriting of the Earl, to the trust-funds, as being "trust-money;" and that, among certain correspondence which had been found and produced by *Collyer*, were references of a similar nature; and, amongst other things, there was the following letter, from the Earl to *Collyer*, dated the 3rd March, 1822: "I have not yet come to a final deter-

The Earl's correspondence with *Collyer* and *Frere*.

* The Five *per Cents.* remained unconverted at the date of this letter.

mination respecting *my* Five *per Cent. stock*;* but I feel inclined to accept of the offer of Government, in which case I conclude, it will not be necessary for me to go to London;" and another letter from the Earl to *Collyer*, dated 14th March 1822, containing this passage: "Upon reverting to my stock account, I find *that I have* in the Five *per Cents.* 19,720*l.* 7*s.* 8*d.*; *trust-money* ditto, 12,735*l.* 3*s.* 4*d.*" And in a postscript of a letter from the Earl to *Collyer*, dated the 22nd October 1822, there was this passage: "If I understand this matter, the interest of the 12,735*l.* 3*s.* 4*d.* *trust-money* and the 1107*l.* 4*s.* 2*d.* was received to 6th July, when these two sums were vested in the New Four *per Cents.* Query whether it would not be expedient to transfer them into the Three *per Cents.*, as well as the 3018*l.* 17*s.* 4*d.* now in the Old Four *per Cents.* In short, *I feel the situation of landed property to be so much worse than persons in London are aware of*, that I see a strong inclination in the public and, particularly, in Opposition, to throw a part of the burthen upon the fundholders. Under this impression, therefore, I look to the Three *per Cents.* as the only stock that can be considered as exempt from any financial operation, and consequently secure." The *Master* then found as follows: That the Earl wrote a letter, to *Collyer*, dated 2nd December 1822, which was partly as follows: "*It is fortunate for me that I have other resources besides landed property*, for I am sorry to say I hear nothing but complaints from the farmers, although the rents of some of my tenants have been reduced above 30*l.* *per cent.* within the last four years:" That the Earl wrote a letter, to *Collyer*, dated the 14th February 1824, in the following words: "As I have a good reason to believe that it is a part of the Chancellor of Exchequer's plan of finance to reduce the Four-and-a-half *per Cents* to Three, or, at least, to Three-and-a-half *per Cents*, I very much wish you, without loss of time, to consult, with your adviser in money matters, whether it might not be expedi-

1851.

HARCOURT v. SEYMOUR.

ent to sell out the whole or a part of the 14,534*l.* 9*s.* 10*d.* now in that stock, and vest it in any other fund, or, if judged safe, in any of the foreign funds: I have written, to my friend *Willimott*, and have desired him to inform you whether any more of the *City* bonds were to be disposed of, in which case I should wish to lay out a part of the money in preference to any other mode whatever:" That the sum of 14,534*l.* 9*s.* 10*d.* mentioned in the last-mentioned letter, comprehended the sum of 13,371*l.* 18*s.* 6*d.* New Four *per Cents*, part of the trust-funds comprised in the settlement: That the Earl wrote a letter, to *Collyer*, dated the 2nd March 1824, part of which was as follows: "Although I have not acknowledged your letter of the 16th February as soon as I should have done, I must beg you will believe I do not feel the less obliged to you for the information you have procured for me respecting the future application of *my* Four *per Cent* stock: in consequence of which and of the information I have received from other quarters upon this subject, I have made up my mind to accept of Mr. *Robinson's* proposal as far as *my private property*, viz. 1162*l.* 11*s.* 4*d.*, is concerned; reserving to myself the vesting it in *City* bonds whenever an opportunity may offer. If I do not misunderstand the business, the old Four *per Cents* 3018*l.* 17*s.* 4*d.* remain in their present situation and are not affected by this new financial operation, but you best know whether it will be necessary for me to give or procure, *from Mr.* Danby, *the surviving trustee, a consent to the removal of the Three to the Three-and-a-half per Cents,* 13,371*l.* 18*s.* 6*d.*, *trust-money*,* and have the goodness to inform me how to act accordingly:" That the Earl wrote, to *Collyer*, a letter dated the 13th March 1824, which contained the following passage: "*I conclude it will be necessary for me to have the consent of my trustees, viz., Mr.* Danby, *Sir* H. Calvert *and Sir* Howard Douglas, *to the transfer of the* 13,371*l.* 18*s.* 6*d.*

* *Sic.*

1851.

HARCOURT v. SEYMOUR.

trust-money in the Four, to the Three-and-a-half *per Cents*; for which you will have the goodness to transmit the authority in due time:" That the Earl wrote to *Collyer*, a letter dated the 17th March 1824, part of which was as follows: "I have received your letter of the 15th instant, by which I perceive I have mistaken respecting the 13,371*l.* 18*s.* 6*d.* stock in the Four *per Cents.*, which, you very justly observe, had better remain as at present vested:" That the Earl wrote a letter to *Collyer*, dated the 2nd of October 1827, inquiring whether the deeds relating to the mortgage for 20,000*l.* which he called *his* mortgage-deeds, were in *Collyer's* house, or at his bankers', or at Messrs. *Coutts's*, and adding *that they were his only security for the* 20,000*l. advanced by him*:" That the Earl wrote two letters to Mr. *Frere*, dated the 27th of May 1828 and the 18th of January 1830, the former of which contained as follows: "I have to acknowledge your letter of the 23rd inst., with the draft of the codicil, which, I conclude, will answer the purpose; and I have executed it accordingly, trusting that no doubt will arise upon the intentions of the testator as expressed in the two documents:" and the latter of which contained as follows: "Having received the enclosed letter from Mr. *Collyer*, conveying a proposal, from Mr. *Lee's* agent, for the reduction of the interest *on my mortgage*, to four *per cent.*: *I shall be much obliged to you for your opinion upon the expediency of accepting that proposal*; *and, also, if the mortgage is to be paid off, whether I have not a right to twelve months' notice of the mortgage being called in.* Enclosed, you have a notice, from the *Oxford* Canal proprietors, respecting a further loan of about 80,000*l.* upon which I wish also to receive your opinion *as to laying out the whole or a part of the money in question.*"

1851.

HARCOURT v. SEYMOUR.

The *Master* also found that, on the 2nd of March 1828, the Earl wrote a letter, to *Collyer*, which contained as follows: "As my property has increased since the date of my will, I am desirous to ascertain the present value of *my* funded property; and I shall, accordingly, beg of you to give me a memorandum of it:" and that, on the 3rd of March 1828, *Collyer* wrote, in answer, as follows: "I will thank your Lordship to name an early day that you may sign my ledger and take up your vouchers. On that day, I shall present you with a valuation of your funded property:" That, on the 6th of March 1828, *Collyer* received a letter, from the Earl, stating that he was unable to leave his place of residence, in consequence of the illness of the Countess, until the end of that week or the beginning of the next, and ending with the following passage: "I shall be glad of a line to inform me of the value *of my funded property*:" and that, on the same day, *Collyer* wrote the following answer: "I am honoured with yours of the 5th inst., and beg to transmit your Lordship the enclosed statement of your funded property. I have sent your account-books by the *Windsor* stage this day:" That the last-mentioned letter contained the following statement:—

6th March 1828. Statement of the Earl's funded property, made out by Mr. *Collyer*.

	Money. £	s.	d.
"In the name of Lord *Harcourt*, Three per Cent. Consols, 70,481*l.* 14*s.* 2*d*; supposed value at 84 . . .	59,204	0	0
In the names of trustees marriage settlement, 13,371*l.* 18*s.* 6*d.* New Four per Cents; supposed value at 100 .	13,371	18	6
In the name of Earl *Harcourt*, New Four per Cents, 1162*l.* 11*s.* 4*d.* .	1,162	11	4

	£	s.	d.
In the name of Earl *Harcourt*, Three and-a-half per Cents, late Four per Cents, 3018*l.* 17*s.* 4*d.*; supposed value at 82	2,777	0	0
India stock in the name of Earl *Harcourt*, 1000*l.*; supposed value at 244	2,440	0	0
	£78,955	9	10

"N. B.—When a great part of a person's property is in the funds, it is better to leave, to the parties, so much stock, and not money, as the stocks are ever fluctuating; and, should ever the times become serious, they might fall below 60."

The *Master* also found that, on the 7th May 1828, the Earl wrote, to *Collyer*, as follows: "I send you, enclosed, a letter just received, from my friend, Mr. *Willimott*, respecting a post-office bond to be disposed of; in answer to which I have told him that I should leave it to you to determine whether it will suit the state of my finances to become a purchaser at, I conclude, an advanced price, as upon a former occasion; in which case, if you do not see very strong arguments against this measure, the purchase-money might be provided by applying a part of my credit, after leaving about 4000*l.* balance in your hands, and making up the remainder of the purchase-money from any of the items of my funded property, *trust-money excepted.* I have only to add that the money to complete my late purchase of land, viz. about 1500*l.* will be called for in about two months, and, on the other hand, I shall have to receive, immediately, the half-year's rent of *Harcourt House.*"

1851.

HARCOURT *v.* SEYMOUR.

23rd January 1829. Statement of the Earl's funded property.

And the *Master* found that the following statement, dated the 23rd of January 1829, was found at *St. Leonard's:*

"THE COMPUTED PRESENT VALUE OF EARL HARCOURT'S PROPERTY IN THE FUNDS, &c.

Description.	Amount of Stock.	Price per Cent.	Value.	
	£ s. d.	£	£ s. d.	
Three per Cent. Consols	79,790 18 6	86	68,619 0 0	
New Four per Cents.	1,162 11 4	101	1,173 0 0	
Ditto . . .	13,371 18 6	101	13,504 0 0	*Marriage Settlement.*
Three-and-a-half per Cents, late Old Four per Cents. . .	3,018 17 4	96	2,897 0 0	*Vide* Messrs.
East India Stock .	1,000 0 0	238	2,380 0 0	Coutts's Memor-
Russia Stock . .			1,908 12 8	andum herewith.
City Bonds . .	30,000 0 0		30,000 0 0	
Gas-light Shares .	2,400 0 0		2,400 0 0	
			122,881 12 8	
Irish Tontine			1,102 1 8"	

And that the said statement was endorsed: "The computed present value of Earl *Harcourt's* funded property, 23rd January 1829;" and that it was prepared by *Collyer*, by the direction and for the use of the Earl, and was, accordingly, in or about January 1829, sent, by *Collyer*, to the Earl. The *Master* also found that the Earl wrote a letter to *Collyer*, dated the 14th January 1830, which contained the following passage: "I am not by any means disposed to agree to Mr. *Lee's* proposal; although I will not give him a definitive answer until I have an opportunity of consulting Mr. *Frere* upon the subject. You are, however, at liberty to tell his agent that, considering the circumstances of the loan, and, particularly, that, at the period I consented to receive four-and-a-half *per cent.*, when the usual interest was five *per cent*,* I cannot but be astonished at such a proposition, and that, at any rate, I conceive I

* *Sic.*

have a right to a twelvemonth's notice. You are aware also that I have an offer of four *per cent.* upon the *Oxford* canal, payable to a day, and with an augmentation of one-half *per cent.*, in the event of the reduction of the Three *per Cents* to eighty."

The *Master* also found that the existence of the deed of the 19th of February 1828, and the said statements of property and the aforesaid correspondence between the Earl and *Collyer* and *Frere*, were not known to *William Bernard Harcourt* or his advisers, nor was he ever aware of any such deed having been executed or correspondence having taken place.

On the Cause coming on to be heard,

Argument for Plaintiffs.

Mr. *Bethell*, for the Plaintiffs, said:

The bill is filed by the next-of-kin of *W. B. Harcourt*, who derive their title under the will of *Mary* late Countess *Harcourt*, the widow of *William* late Earl *Harcourt* and the residuary legatee under his will. The main proposition which I have to support, is that the 32,000*l.*, the amount of the 5000*l.*, 2000*l.*, and 25,000*l.*, comprised in the settlement on the marriage of the Earl and Countess, or the funds that represented that sum at the Earl's death, passed, by his will, to the Countess, as part of his personal estate. The other proposition is that the deed executed by *W. B. Harcourt* in 1835, and which lies in the way of the relief sought by the Plaintiffs, was prepared and executed under a general misapprehension and in ignorance of material facts determining the nature of the Earl's interest, and, consequently, the operation of his will; and, therefore, that that deed ought to be set aside. Assuming that the

1851.

HARCOURT v. SEYMOUR.

32,000*l.* was converted into real estate by the settlement, I submit that the Earl was perfectly competent to discharge it, and that the facts of this case are abundantly sufficient to show that he did discharge it of its artificial character or quality. It is true that there was an interest in the Countess, which was interposed between the limitation to the Earl for life, and the limitation to his right heirs; but the Earl became a purchaser of that interest, by making a provision in satisfaction of it, by his will, which the Countess accepted: and, if he had not become a purchaser of it, it would have made no difference; for it was only an interest by way of charge. The next question is whether the Earl did any act which showed that he intended to discharge the property of its artificial character, and to leave it impressed with its original character: and I submit that the slightest act, the slightest evidence of intention is sufficient for that purpose. The rule, upon that subject, is very correctly laid down in a Treatise on the Equitable Doctrine of Conversion, by Leigh and Dalzell, page 170: "The slightest expression by those absolutely entitled to the property, denoting a change as to its quality, will be quite sufficient." Here we have an abundance of instances in which the owner of the fund in question, spoke of it, treated it and dealt with it as personal property, in his letters, in his banker's pass-books, and in statements of his property: *Chichester* v. *Bickerstaff* (*a*), *Pulteney* v. *Lord Darlington* (*b*), and *Stead* v. *Newdigate* (*c*). I cite this last case, not for the decision in it, but to show, from the expressions of Sir *William Grant*, that if this case had come before him, he would have held that the primitive character of

(*a*) 2 Vern. 295.
(*b*) 1 Bro. C. C. 223; and 7 Bro. P. C. 530.
(*c*) 2 Mer. 521.

the fund, was restored. Sir *William Grant* says, in page 531, that the period for the sale of the estate, did not arrive in the husband's lifetime, and that his wife might have insisted on a sale. But, in this case, the period for investing the fund in land, did arrive in the Earl's lifetime, and the Countess could not have insisted on its being invested; for her interest was purely pecuniary. Besides, the Earl had, in fact, become the absolute owner of the fund, subject to the interest of the Countess; for, when he made his will, he had been married fifty years to the Countess without having had a child by her; and, therefore, there was then no probability, indeed I might say, possibility, of his having a child by her. Another ground on which Sir *William Grant* relied, was that the will, in the case before him, not only did not show any intention to divest the property of its artificial character, but showed an intention to the contrary. Whereas, in this case, the Earl satisfied the interest provided for the Countess by the settlement, in order to give effect to the bequest, made by him, of the 80,000*l.*, which could not have had effect given to it, except by attributing the 32,000*l.* to it. Therefore, the will, instead of showing an intention that the settlement should be carried into effect, shows an intention to defeat its operation: and, consequently, the will alone, would have been sufficient to restore the fund to its natural character. Again, the trustees of the settlement, instead of investing the fund in land, laid out a very large portion of it on mortgage; and, in February 1828, they were parties to a deed which contained a covenant, by *John Lee*, the owner of the equity of the redemption, with the Earl, *his executors, administrators* and assigns, that the money *should not be paid off for five years, unless the Earl his executors, administrators* or assigns should call it in. That deed too stipulates

1851.

HARCOURT v. SEYMOUR.

that the interest shall be paid not only to the Earl during his life, but to his executors or administrators after his death. But, if the fund retained its artificial character, the interest would not be payable to his *executors or administrators: Lingen* v. *Sowray* (*d*). This case is much stronger than that, for, there, it was held that the husband, by merely declaring the trust, of the 250*l*, for his executors, restored the fund to its pristine quality. Therefore, without resorting to the Earl's letters or the entries which he made in his pass books, or the statements of his personal property, which are set forth in the *Master's* report, there is amply sufficient to divest the fund of its artificial quality of land, and to restore it to its natural quality of money. I shall, however, make a few observations on those documents; but, before I do so, I will refer to two other authorities: *Triquet* v. *Thorton* (*e*), and *Cookson* v. *Cookson* (*f*).

Mr. *Bethell* next drew the attention of the Court to the *Master's* report, and relied on the entries made, by the Earl, in his pass-books, and on the statements of his personal property and the letters written by him, and particularly those dated the 3rd of March 1822, the 22nd October 1822, the 17th March 1824, and the 2nd of March 1828, as showing that he considered the funds representing the 32,000*l*., as part of his personal estate, and as property which the trustees of the settlement had no longer any right to interfere with.

He concluded by reading the cases laid before

(*d*) 1 P. W. 172, see 176.

(*e*) 13 Ves. 345. This case and the next were read at great length.

(*f*) 12 Cl. & Finn. 125; and 5 Beav. 22, *nom. Cookson* v. *Reay*.

Counsel in 1834, in order to show that they did not mention the deed of February 1828 or any of the other matters contained in the *Master's* report; and, consequently, that the opinions on those cases, were given in ignorance of most material circumstances: and, he submitted that, as the conveyance of May 1835, was made on the faith of those opinions, it ought to be set aside.

Mr. *Giffard*, who was with Mr. *Bethell*, said that no part of the 32,000*l.* was paid to the trustees of the settlement, until 1808; at which time, as the Earl and Countess had been married thirty years without having had a child, it was almost certain that they never would have one: that the trustees invested the whole of that sum, except the 1000*l.* which was paid to the Earl, either in the funds or on mortgage, although there was no trust, in the settlement, to invest any part of it in anything but land: that *Wheldale* v. *Partridge* (*g*) tended to show that the quality of land was not definitively fixed, upon the 32,000*l.*, by the settlement, and, if it was, that it might be contended that the bequest of the 80,000*l.* in the Earl's will, was a satisfaction of the obligation to invest the 32,000*l.* in land: but that it was not necessary to argue in support of those propositions, as the following authorities were abundantly sufficient to show that the Earl had elected to take the 32,000*l.* as personalty: *Chaplin* v. *Horner* (*h*), *Edwards* v. *Countess of Warwick* (*i*), *Pulteney* v. *Lord Darlington* (*k*), *Crabtree* v. *Bramble* (*l*), *Chaloner* v. *Butcher* (*m*), *Curling* v.

(*g*) 5 Ves. 388, and 8 Ves. 227, see 236.
(*h*) 1 P. W. 483.
(*i*) 2 P. W. 171.
(*k*) 1 Bro. C. C. 223.
(*l*) 3 Atk. 680.
(*m*) *Ibid.* 686, cited.

1851.

HARCOURT v. SEYMOUR.

May (*n*), *Chichester* v. *Bickerstaff* (*o*), *Bowes* v. *Lord Shrewsbury* (*p*), *Walker* v. *Denne* (*q*), *Bradish* v. *Gee* (*r*), *Inwood* v. *Twyne* (*s*), *Kirkman* v. *Miles* (*t*), *Triquet* v. *Thorton* (*u*), *Van* v. *Barnett* (*v*), *Bayley* v. *Boulcott* (*w*), *Ashby* v. *Palmer* (*x*), *Davies* v. *Ashford* (*y*) and *Cookson* v. *Cookson* (*z*).

Mr. *Stuart* and Mr. *G. S. Law* appeared for *Seymour* and *Heath*, the surviving trustees of Earl *Harcourt's* will.

Mr. *Calvert* appeared for *Elizabeth Georgiana Harriet Harcourt*, the mother of the Plaintiffs.

Argument for Defendants.

Mr. *Rolt*, for *George D. T. B. Harcourt* and his sons, the first tenant for life and tenants in tail male under the Earl's will, said:

George D. T. B. Harcourt acquiesces in the view taken of this case by Mr. *Bethell* and Mr. *Giffard*; but it is my duty, as Counsel for his sons who are infants, to contend that the 32,000*l.* was converted into real estate by the settlement, and that it passed, as such, by the will of Earl *Harcourt*. Where personalty stamped with the character of land, is claimed as personalty, it is not sufficient to show that the person absolutely entitled to it, supposed it to be personalty. There must be evidence which leaves no doubt, on the mind of the Court, that

(*n*) 3 Atk. 255, cited.
(*o*) 2 Vern. 295.
(*p*) 5 Bro. P. C. 144.
(*q*) 2 Ves. 170.
(*r*) Amb. 229.
(*s*) 2 Eden, 148.
(*t*) 13 Ves. 338.
(*u*) 13 Ves. 345.
(*v*) 19 Ves. 102.
(*w*) 4 Russ. 345.
(*x*) 1 Mer. 296.
(*y*) 15 Sim. 42.
(*z*) 5 Beav. 22, and 12 Cl. & Fin. 125.

he knew that there was a trust which stamped it with the character of real estate, and, knowing that fact, that he did something which clearly showed it to be his intention to defeat the trust, and to take the fund as it stood. How can you impute to him an intention to reconvert the fund, unless you first show that he knew that it had been converted? His speaking of it in its actual condition, is nothing more than a description of it. You must show that he knew of the existence of the trust, and that he did some act which showed his determination that the trust should not take effect.

The *Vice-Chancellor*.—The Counsel for the Plaintiffs say that it is sufficient to show that he dealt with the fund as personalty.

Argument resumed.—The dealing with the fund must be such as to show an intention *to change* the character impressed upon it: simply dealing with it as personalty, is not sufficient.

Such being, as I submit, the principle of the cases on the subject of conversion, I proceed to observe upon the peculiar circumstances of this case, as they appear on the *Master's* report; and which, I submit, show that Earl *Harcourt* did not intend to defeat the trust for conversion contained in the settlement.

The *Master* finds that 1000*l.* of the 32,000*l.*, was received by Earl *Harcourt*; that 11,000*l.* was laid out in the purchase of 12,735*l.* 3*s.* 4*d.* Navy Five *per Cents* in the name of *William Danby*, the only trustee of the settlement who was then living, and that the remaining 20,000*l.* was invested on a mortgage of Sir *George Lee's* estates, made to *Danby* in fee.

1851.

HARCOURT v. SEYMOUR.

Then, in 1813, Earl *Harcourt*, who had then been married thirty-five years without having a child, covenanted to indemnify *Danby* against any loss or damage which he might sustain by reason of any laches which might be imputed to him, in consequence of the trust-fund having been invested as before mentioned, *instead of the same having been invested in the purchase of real estate, as directed by the settlement*, or in consequence of *Danby* having acquiesced in the *misapplication* of the 1000*l.* by the Earl. This is strong evidence that, up to 1813, it was the Earl's intention to treat the settlement-fund as real estate.

Then, by a deed dated in April 1818 and executed by the Earl and Countess, they join with *Danby* in appointing new trustees of the settlement; and it was thereby agreed and declared that *Danby* and the new trustees should stand possessed of the 12,735*l.* 3*s.* 4*d.* Navy Five *per Cents*, which, shortly before, had been transferred into their names, and of the 20,000*l.* secured on mortgage, when the same should be conveyed to them, upon *the trusts of the settlement.* So that the Earl, in 1818, when he had been married forty years, and when it was quite clear that there would be no issue of the marriage, treated the funds as subject to be laid out in real estate.

In 1822, the 12,735*l.* 3*s.* 4*d.* Navy Five *per Cents* was converted into 13,371*l.* 18*s.* 6*d.* New Four *per Cents* The Earl never repaid the 1000*l.*; and the 20,000*l.* and the 13,371*l.* 18*s.* 6*d.* New Four *per Cents*, remained secured and invested as before mentioned, until after the Earl's death. In March 1828, the Earl made his will; but it does not contain anything which affects the present question; nor is the mode in which the trust-funds

were considered and dealt with after the Earl's death, of any importance.

Then the *Master* states that, from some time in the year 1812 down to the 10th of February 1826, the Earl made entries in his pass-books, in which he termed the sums of Five *per cent.* and Four *per cent.* stock, sometimes "*trust*-money," and sometimes "*trust*-stock." Now, he had distinctly recognized the trusts of the settlement as existing in 1818: and, as no new trust had been declared between that year and 1826, he must have referred to the trusts declared by the settlement, when he used the expressions, "trust-money," and "trust-stock."

I now come to the deed of the 19th of February 1828, on which the Counsel for the Plaintiffs have so much relied. That deed recites that the 20,000*l.* was not the proper monies of *W. Danby*, Sir *H. Douglas* and *G. S. Collyer*, but was held by them *upon the trusts of the settlement*, under which the Earl was entitled to the interest thereof for his life, and, in the event of his dying, without issue, to the absolute interest in the principal. That recital is perfectly correct; for the Earl was entitled to the absolute interest in the principal; and, for that reason, the expression, "his executors or administrators," is used throughout the deed. And it is to be observed that the trustees of the settlement are associated, with the Earl and his executors, administrators and assigns, as the parties by whom the money is to be called in; and, therefore, it recognizes the existence of the trusts of the settlement. Consequently, if it had stood alone, it would not, at all, assist the case of the Plaintiffs. Besides I shall show from other documents set forth in the report, that, subsequently to the date of that deed, the Earl recognized the trusts of the settlement as existing trusts.

1851.

HARCOURT *v.* SEYMOUR.

The *Master* then sets forth certain letters and statements of property in which the Earl speaks of the mortgage and the stock, as his property. But those expressions are quite as consistent with my case as they are with the case of the Plaintiffs. The question, is not whether the 20,000*l.* and the stock were the Earl's property, but whether they were real or personal estate. Besides, in those documents, he speaks of the stock as "*trust*-money:" he distinguishes it from his private property; and asks advice as to the procuring of the consent of the trustees to its being converted into stock of a different denomination. Then, on the 6th of March 1828, which was subsequent to the date of the deed of the 19th of February 1828, Mr. *Collyer* received a letter from the Earl, in consequence of which he sent the Earl a statement of his funded property containing this item: "In the name of trustees, marriage settlement, 13,371*l.* 18*s.* 6*d.* New Four *per Cents*:" and, on the 7th of May 1828, the Earl wrote a letter, to Mr. *Collyer*, respecting the purchase of a Post-office bond, which contained the following passage: "If you do not see any very strong argument against this measure, the purchase-money might be provided by applying a part of my credit, after leaving about 4000*l.* balance in your hands, and making up the remainder of the purchase-money from any of the items of my funded property, *trust-money excepted*." That expression shows that the Earl meant to leave the money subject to the trusts of the settlement. Then the *Master* states that there was found, at *St. Leonard's*, a statement dated the 23rd of January 1829, which *Collyer* had prepared by the direction and for the use of the Earl, in which the words: "marriage settlement" were written against the 13,371*l.* 18*s.* 6*d.* New Four *per Cents.*

1851.

HARCOURT v. SEYMOUR.

I submit, therefore, that the contents of the *Master's* report, not only do not show that the Earl intended to convert the settlement-funds into personalty, but that they negative that intention.

Mr. *Leach*, who was with Mr. *Rolt*, cited 1 Jarman on Wills, 534, 535, *Lingen* v. *Sowray* (*a*), and *Guidot* v. *Guidot* (*b*).

Mr. *Selwyn* (Mr. *James Parker* was with him) appeared for *George Simon Harcourt* and his son, who also were tenants for life and in tail male under Earl *Harcourt's* will.

Mr. *Malins* and Mr. *Messiter* appeared for Lord *Vernon*, Earl *Harcourt's* heir.

Mr. *Hobhouse* appeared for *G. S. Collyer*, the surviving trustee of the settlement, and an executor of the Earl's will.

The VICE-CHANCELLOR, without hearing the reply, delivered the following judgment:

Judgment.

I take the law upon this case to be perfectly clear. Where, by a settlement, land has been agreed to be converted into money, or money to be converted into land, a character is imposed upon it, until somebody entitled to take it in either form, chooses to elect that, instead of its being converted into money or instead of its being converted into land, it shall remain in the form in which it is actually found. There can be no doubt that that is

(*a*) 1 P. W. 172; see 176. (*b*) 3 Atk. 254.

1851.

HARCOURT v. SEYMOUR.

the law; and the only question in each particular case, is whether there have been acts sufficient to enable the Court to say that the party has so determined.

I confess that, in this case, it seems to me that there is a superfluity of circumstances which show, perfectly clearly and incontrovertibly, that Lord *Harcourt* intended to take the funds which represented the 32,000*l.*, as money and not as land. It was argued, indeed, by Mr. *Rolt*, that there must be an intention strictly to convert; that is to say, that, knowing that the money was impressed with the character of land, the party must say: "I mean that it shall no longer be land, but it shall be in its actual form of money." I do not, however, think that that is the correct view of the law. It is quite sufficient if the Court sees that the party means it to be taken in the state in which it actually is. Whether he did or did not know that, but for some election by him, it would be turned into land, is quite immaterial. If, being money, the party absolutely entitled, indicated that he wished to deal with it as money, and that it should be considered as money, whether he knew or did not know that, but for that wish, it would have gone as land, appears to me to be wholly immaterial.

There are several circumstances here; but I shall advert to a few of them only; because they seem to me to prove, irresistibly, that Lord *Harcourt* meant to deal with the fund in question, as money.

In the first place, I think the will itself affords a very strong argument, from this circumstance; namely, that he directs 80,000*l.* to be laid out in the purchase of land; that is, to be laid out by those persons whom he there

constitutes his trustees. If, having 32,000*l.* to be laid out in land by one set of trustees under one trust, he meant to give 80,000*l.* more to be laid out in land, it would be a very extraordinary thing if he did not allude to it in some way or other, and say: "In addition to the 32,000*l.*, I give 80,000*l.* more." It is scarcely possible to imagine that a party could intend that there should be two trusts, going on concurrently, to purchase different trust estates. It is entirely contrary to what persons wishing to increase the property and influence of their family, ordinarily do; they wish their property to be consolidated as much as possible. Therefore, that, of itself, affords, to my mind, almost irresistible evidence that Lord *Harcourt* could not but suppose that he was disposing of this 32,000*l.* just as he was disposing of the rest of his property. That, however, it may be said, is mere conjecture. To a certain extent it may be so; but, in cases of this sort, it is impossible to define the exact limits between conjecture and evidence.

There are, however, circumstances here, which, according to my view of the case, are evidence, in the strictest sense of the word. Nothing can be so strong to show that a party intends to take, as money, that which is invested with a *quasi* real character, as his saying so under his own hand; and Lord *Harcourt* has said so under his own hand. The *Master* finds that, in 1823, he made a statement or an estimate of his *personal* property. It is not, I observe, so headed by Lord *Harcourt* himself; it is headed, "Statement of my property." Now, I might say that, there having been no exception to the *Master's* finding, I am bound by that finding. But I should be sorry, on a question of this sort, to deal with the matter technically: and, therefore, if I saw that this was not a statement of personal estate, but

1851.

HARCOURT v. SEYMOUR.

merely, as it purports to be, a statement of his property real and personal, I should direct some further inquiry as to what the *Master* meant by describing it as a statement of his personal estate. But the fact is that it alludes to personal estate only. The testator had a large real estate; namely, the *St. Leonard's Hill* estate, which was an old family estate, and which he disposes of by his will. When, therefore, he makes a statement of what is popularly called personal property, and calls it: "Statement of my property," and does not include that which is clearly real estate, I must understand that he means what the *Master* represents to be his meaning; that is to say, a statement of his *personal* property. Then, in doing that, he, in terms, includes, as part of that property, the 13,772*l.* as the value of the trust stock, and the 20,000*l.* secured on the mortgage. I take that as a statement, by the testator, that he meant to treat those two sums as his personal estate.

Then, that being so, the next act is one which seems to me to be incapable of explanation, except upon the hypothesis that he meant to deal with the 20,000*l.* as personal property. I allude to the deed of the 19th February 1828. That sum had more or less impressed upon it, under the original trust, the character of land; but with which, for all practical purposes, it was obvious, to the mind of Lord *Harcourt*, that he had a right to deal in any way; because he had a life interest in it; his wife had no life interest in it, but she had a charge upon it; and, ultimately, it was to come to Lord *Harcourt*. He had, therefore, a clear right, if he chose, to treat that as a personal estate instead of land. He had the means of providing amply for his wife, and meant to provide, and he did provide amply for her. Therefore, practically,

not as a lawyer but as a man of the world, he would consider that he had a right to deal with this sum just as he did with the rest of his property.

Looking, then, at this deed, with that as our guide, let us see what it states. The deed states that, by virtue of the settlement, the Earl was entitled to the interest of the 20,000*l.* during his life, and that the Countess was, afterwards, entitled to the interest thereof during her life (that is a mistake), and, in the event of the Earl dying without issue, that he was entitled to the absolute property in the said "principal *money*." That is not, by any means, a conclusive circumstance; but it is a circumstance relied upon, by Sir *William Grant*, in *Triquet* v. *Thorton*, in which he adverts to the fact that the testator described the property as stock, not as land. Then the deed proceeds thus: "And whereas it has been agreed that the said sum of 20,000*l.* shall remain vested upon the security of the said manors and hereditaments for the term of five years from the 27th September 1827, at the rate of 4*l.* 10*s. per cent. per annum*, under and subject to the provisoes and conditions hereinafter expressed and declared: Now these presents witness, and it is hereby agreed and declared between and by the said parties hereto, and the said *John Lee* doth hereby, for himself his heirs, executors, administrators and assigns, covenant, with the said Earl *Harcourt*, his executors, administrators and assigns, that he the said *John Lee*, his heirs, executors or administrators or any person for the time being entitled, in equity, to redeem the said mortgaged premises, and claiming to be so entitled under him the said *John Lee*, shall not be at liberty to pay the said principal sum of 20,000*l.* until the end of five years to be computed from the said 27th September now last past, unless the said Earl *Harcourt*,

1851.

HARCOURT v. SEYMOUR.

his executors, administrators or assigns, shall call in the same." When you observe that, a few years before, the Earl had done that which, in terms, amounts to a declaration that he treated this sum as part of his personal estate, and that he afterwards covenants that it shall not be called in under five years, unless with the consent of him, his executors and administrators, it appears to me that the evidence in this case, is, beyond all comparison, stronger than it was in any of those cases of which so long a list was cited by Mr. *Giffard*, and that it puts the question beyond all possible controversy. There are other expressions in the deed, all leading to the same result.

Finding, then, these two important facts, I do not think it necessary to advert, minutely, to the expressions which are used in the letters subsequently set forth in the *Master's* report. On the one side, reliance was placed upon the expression, "trust stock," as showing that the Earl treated it as personalty. On the other side, that expression was relied upon as showing that he treated it as being still impressed with the character of real estate under the trusts of the settlement. The only observation I shall make upon that expression, is that the most I can say, in favour of the one side or the other, is that it is an equivocal one; and if that had been all, I should have felt it exceedingly difficult to rely upon it as indicating, conclusively, that the Earl meant to treat the stock as personal estate. However, every one of the letters is as consistent, at the least, with the supposition that he meant both the stock and the mortgage-money to form part of his personal estate, as it is with the supposition that he meant them to remain impressed with the character imposed upon them by the settlement. But all that is necessary to

1851.

HARCOURT v. SEYMOUR.

be said upon those letters, is that they may be dismissed from consideration: and, if they are dismissed, there is this strong fact; that the Earl treated both the stock and the mortgage-money as part of his personal estate (which he had a right to do) and that he afterwards dealt with the mortgage-money, which was more than two-thirds of the total amount, in a way utterly inconsistent with the notion of his not having intended to deal with it as his personal estate.

The evidence, however, does not rest here. His banker, by his desire, made out and sent to him two statements of *his* funded property: (one just previous to the date of his will, and the other afterwards) in both of which the stock in which part of the 32,000*l* had been invested, was included; but distinguished, I admit, from the other stock mentioned in that statement. The Earl kept both those statements among his papers, as papers on which he was to act; and there is not the least allusion to the stock in question as being property which was to be dealt with differently from the other stock.

Finding then that the Earl included both the stock and the mortgage-money in a statement, made out by himself, of his personal property in the year 1823; finding that he afterwards dealt with the mortgage-money, (which was more than two-thirds of the settled property) as personal property, and stipulated that it should not be paid off for five years; and finding that he made a will, in which he not only indicates no contrary intention, but disposes of his property in a way in which, I think, no man would have disposed of it, if he had meant the fund thereby created to be invested in land independently of the 32,000*l*., I come, irresistibly, to the conclusion that he has given cogent and complete evidence that he

1851.

HARCOURT v. SEYMOUR.

meant to deal with the 32,000*l.* as personal estate, and that he has so dealt with it.

As to this authority that has been handed up to me—the case of *Stead* v. *Newdigate*—it is a case that has no bearing upon the question. In that case there was a settlement of real estate, with what Sir *W. Grant* considered to be an absolute covenant to convert it into personalty. Nothing whatever was done, and merely doing nothing, does not alter the case at all.

Merely doing nothing was, apparently, the state of things upon which the opinions of Counsel in 1834, were given; and they were exactly in conformity with *Stead* v. *Newdigate*, and were, clearly, quite right. But the facts that have come out since, are such that I cannot but feel the most perfect conviction that, if those facts had been before the gentlemen who gave those opinions, the result at which they would have arrived, would have been totally different from that which they did arrive at.

The only other question is with respect to the conveyance executed by *W. B. Harcourt* in May 1835. As that conveyance was clearly executed under a mistake, it must be set aside.

Declare that Earl *Harcourt*, at the time of making his will and thenceforth until his death, intended to treat and did treat the funds representing the 32,000*l.* comprised in the settlement of September 1778, as being of the quality of personal estate, and that it passed, in that quality, by his will: and declare that the deeds executed by *W. Bernard Harcourt* in May 1835, were executed under a mistake, and, therefore, ought to be set aside.

CROSS *v.* BEAVAN.

1851:
28th July.

Decree.
Infant.
Maintenance.
Practice.

In a suit for the administration of an estate in which an infant is interested, it is not necessary to present a petition for a reference as to the maintenance of the infant. The Court will direct the reference by the decree.

THIS was a suit for the administration of a testator's estate, one moiety of which was bequeathed in trust for an infant.

At the hearing of the Cause,

Mr. *Simons*, for the infant, submitted that the decree ought to direct the *Master*, to inquire and state whether the father of the infant was of ability to maintain the infant, and, if the *Master* should find in the negative, to approve of a proper allowance, for the maintenance of the infant, out of the income of the moiety of the testator's estate to which the infant was entitled.

Mr. *Nicholls* appeared for another party.

The VICE-CHANCELLOR, at first, thought that the proposed direction could not be inserted in the decree, but that a petition must be presented for the purpose of obtaining it. But, after conferring with the *Registrar*, his Lordship held that the direction might be inserted in the decree.

1851:
7th August.

Father and Child. Infant. Habeas Corpus.

A father left his home where he was residing with his wife and children, infants, four daughters then ten, nine, eight, and four years of age, and two sons aged six, and three years. He was apprehended, committed, and arraigned for the commission of an unnatural crime, but no witnesses appearing he was acquitted. He immediately left *England* and remained abroad eight months. Five years after the trial he petitioned this Court praying that his wife might be ordered to deliver up the children (the daughters being fifteen, fourteen, thirteen, and nine years old, and the sons eleven and eight years), and, if necessary, that writs of *habeas corpus* might issue for that purpose. The petition was supported by the affidavit of the Petitioner, and was served on the wife only. Affidavits were filed on behalf of the Respondent, and amongst them an affidavit of the solicitor of the wife, who had been the solicitor for the Petitioner, and in that capacity had interviews with him while in gaol awaiting his trial offering to state conversations that took place between them, if authorized by the Petitioner so to do, and an affidavit by another witness referring as an exhibit to the depositions taken before the magistrates. The Petitioner himself made two affidavits in reply, in one of which he denied the charge against him, and in the other sworn three days later he again denied the charge, and gave an explanation of the cause why he was at the place where, and in the company in which, he was when apprehended. The Court being satisfied upon the materials before it that the Petitioner had so conducted himself as that he ought to be treated as if he were a guilty man dismissed the petition.

The Court will refuse to give possession of children to their father if he has so conducted himself as that it will not be for the benefit of the infants, or if it will affect their happiness, or if they cannot associate with him without moral contamination—or if, because they associate with him, others will shun their society. If it be established to the satisfaction of the Court that the father of children from ten to two years of age is to be considered as guilty of the perpetration of an unnatural crime, it is impossible to permit any sort of intercourse with his children even after he has escaped conviction. *Semble*, that under such circumstances, if the children were with their father, it would be the duty of the Court to remove them.

ANONYMOUS (*a*).

THIS was a petition presented by a father, a clergyman, to have the custody of his infant children. It was entitled in the matter of the infants (naming them), and stated his marriage in 1835 with his present wife, and

(*a*) This case was heard in his Lordship's private room. The reporter has been furnished with the following note of it by Mr. *Bone* one of the Counsel for the Respondent.

1851.

ANONYMOUS.

that the above six infants were their lawful children, and were infants of the ages following: three daughters, fifteen, fourteen, and thirteen, a son eleven, a daughter nine, and a son eight years of age. That the wife had since the month of January 1846 been and still was living separate and apart from him. That the Petitioner's children were then in her custody, and that contrary to the wishes of the Petitioner, and without sufficient cause, she refused to permit him to have the care or custody of them, or any of them, or to have access to, or to see them or any of them. That in reply to an application made on behalf of the Petitioner by his agent to the solicitors acting for his wife in a certain Cause pending in this Court between the Petitioner and his wife and other persons, and by which application it was requested that the Retitioner might at all reasonable times have interviews with his children, the solicitors wrote a letter to the Petitioner's agents dated 27th day of June 1851, wherein they stated among other things that they were instructed to decline acceding to such request, and to say that any application by the Petitioner for that purpose would be opposed to the uttermost. That the Petitioner's wife had abetted and assisted in withholding from him the care and control of his children by divers persons, and that the Petitioner was apprehensive that any attempt on his part to enter the residence of his wife and to obtain possession of or to have access to his children would lead to a breach of the peace, and under the circumstances aforesaid he was unable to procure access to his children, or any of them without the interference of this Court. That the Petitioner was willing and desirous to receive, sustain, and support his children, and he therefore prayed that his wife might be ordered to produce and deliver up the

1851.

ANONYMOUS.

above-named infants to him, and that if necessary a writ or writs of *habeas corpus* directed to his wife might issue for that purpose, or that such other order might be made as to the Court should seem fit. This petition was served on the wife only, and no other affidavit was filed in support of it than that of the Petitioner which echoed the petition excepting only in the following passages: "I say that the said children are now, as I believe, supported and maintained by and out of the monies belonging to me, but which my said wife claims to be entitled to and for her separate use by virtue of certain deeds, the execution whereof was improperly obtained from me in the year 1846, and that I have lately instituted a suit in this Honourable Court for the purpose of setting aside such deeds, and the same is now pending." "I say and assign as a reason for making this application during the pendency of the said suit that being deprived of my said children I am utterly desolate, and in great distress of mind as well on account of their future position as my own." The only Respondent, the Petitioner's wife, filed affidavits bearing testimony to her religiously and carefully training the children, and to her being a fit and proper person to have them in her custody, and to have the direction of their education. No imputation whatever was made on her by the Petitioner. The wife's affidavit contained the following passages: "I say that said children are now residing with me except my eldest son, and that I am living separate and apart from my said husband the Petitioner. I say that in January 1846, the said Petitioner executed certain deeds respectively bearing date the 24th day of the same month whereby or by some of which property in the funds, and secured on bonds and transfers of mortgage, were assigned to certain trustees for the benefit of myself

1851.

ANONYMOUS.

and my children by the said Petitioner, with power to me to direct the income thereof, or of any part thereof to be paid to said Petitioner. I say that the said infants were voluntarily left in my custody by the said Petitioner on the 5th of January 1846, and for some time thereafter remained in such custody, with the privity and approbation of the said Petitioner; but since that time the said Petitioner has withdrawn his approbation of such my custody of the said infants, but I say that, although such approbation has been withdrawn, the said Petitioner has not ever, from January 1846 down to the commencement of the suit referred to in his affidavit, required that the custody of the said infants should be given up to him. I say that my income applicable to the maintenance and education of the said infants (over and above the annuity appointed by me in favour of the said Petitioner, by virtue of one of the aforesaid indentures) amounts to 750*l.* *per annum* or more, and that from the said month of January 1846 to the present time, the said income by the family arrangement effected by the said indentures has been duly and faithfully applied by me in the maintenance, education and support of said infants. I say that I am ready and willing to continue the application of the said income, in the said manner and according to the position, and station and future prospects in the world of said infants and in pursuance of said family arrangement so effected as aforesaid." * * * "I say that all the said infants are carefully and religiously educated under my own personal care and superintendence, and that said female infants have the attendance of a governess, who was selected and appointed by said Petitioner prior to January 1846, and the said eldest male infant is at school at ———, and the said younger male infant has also the attendance of the said governess, and is educated with the female infants, and all the said infants

1851.

ANONYMOUS.

have other proper instructors, duly qualified to educate them. I say I believe that it will be material to the benefit of said infants, that they should remain in my custody and under my care." The affidavit then, after denying that the wife was abetted by any one, proceeded: "but I admit it to be true that, for the safety and advantage of said infants I do keep them under my own care, and as far as I can from the control and management of said Petitioner, and because the said infants remaining in my custody is conformable to the intention of said family arrangement intended to be effected by the said deeds of the 24th of January 1846, and because their so remaining is, as I believe, essential to their welfare. I say that I have been twice subjected to the pain and humiliation of my eldest son being refused admission into two schools, the masters of such schools alleging, as the reason for their refusal, the injury likely to arise to the repute of such schools if it were known that a child bearing the name of said Petitioner, and known to be his son, was there. I say that I verily believe that the said governess so selected and appointed by the said Petitioner, would immediately relinquish the education of said infants if said Petitioner was allowed to have any interview with them. I say that said governess is the niece of ———, and that when her uncle was acquainted with the fact of the said infants having been left in my custody as aforesaid, he stipulated by express agreement to the effect that so long as she continued to act as governess no communication or access by said Petitioner with or to said infants should be had or permitted, and that if any such communication or access did take place, she should be at liberty immediately thereupon to resign her said situation. I say that my said eldest son is now placed at school, but he was only admitted thereto on the condition that he should pass, and

1851.

ANONYMOUS.

he does pass, by an assumed name, and upon the assurance that no communication or interview should take place between my said son and the said Petitioner while at such school. I say that a master who is engaged to instruct the said female infants inquired, before he would enter upon his duties, whether there was to be any communication with the said Petitioner, and only entered on the performance of his duties after he was assured that there would not be any such communication. I say that several persons of respectability, and whose acquaintance is valuable to children of the ages of the said infants, have only permitted the visits of the said infants to their families on the distinct understanding that there was to be no communication between the said infants and their father. I say I believe that any intercourse or interview whatever between the said Petitioner and the said infants, or any of them would be in the highest degree injurious to them, and as to one of them, namely, my said eldest daughter, would be dangerous to her health."

A surgeon, who resided at the place where the wife of the Petitioner lived, deposed thus: "I say that I am intimately acquainted with many of the most respectable persons in this town and neighbourhood, and, judging from my own feelings as the father of a large family, I conscientiously believe that, if the said Petitioner were permitted to have access to or communication with said infants, in however qualified or restricted a manner such access or communication might be, such persons would refuse to hold any intercourse with said infants or permit them to visit in their said families."

The solicitor of the Respondent, in the matter of this petition (and who was formerly the solicitor for the Petitioner), in his affidavit, spoke as follows: "I say that

1851.

ANONYMOUS.

I have been informed and believe it to be true, as alleged in the bill of the Petitioner, filed in this Court, and which suit is mentioned in the affidavits of the Petitioner, that the Petitioner was, on 5th of January 1846, apprehended and conveyed to the police office ———, and from thence on the same day to the ——— prison, on a charge of having committed an unnatural and capital crime: that, on the evening of said 5th of January 1846 I went to said prison and saw the Petitioner, having in the meantime ascertained the nature of the charge brought against him, and of the depositions which had been taken in support thereof: that on the 6th of January 1846, the Petitioner was again brought up before the magistrates and was committed to the gaol ———, to abide his trial on said charge: that, on the Petitioner's apprehension he gave the false name of ———, and that the alleged participator in the said alleged capital crime was a private soldier: that the grand jury on the said 6th day of January 1846, found a true bill against both: that application was made to the Judges for a postponement of the trial until the next session, which was granted, and that, on Wednesday the 4th of February in the same year 1846, the Petitioner was, by his false and assumed name, together with the soldier, placed on his trial for said capital felony, when the Counsel for the prosecution applied for the further postponement of the same, which was granted, until the end of the said session; and that, on Saturday the 7th day of the same month, the Petitioner, by his false and assumed name, and the soldier were again placed at the bar, and after another and ineffectual attempt on the part of the Counsel for the prosecution, to have the trial postponed, the Petitioner, described as a labourer (being the occupation by which he described himself when he was before the magistrates), and the soldier were arraigned on the capital charge, but no witnesses appearing the

1851.

ANONYMOUS.

learned Judge who presided addressed the jury, telling them it was impossible to say whether the witnesses had been kept out of the way or not, but that it would be unjust to keep persons in custody when there was no evidence offered against them, and that it was therefore the duty of them, the jury, to return a verdict of not guilty; whereupon the jury did return a verdict of not guilty accordingly." * * * "I say that, during the imprisonment of the said Petitioner on the said capital charge, I had many interviews with him in the said gaol, at which interviews conversations took place between us the effect of which I do not feel warranted, on account of the professional relation existing between us, to disclose, unless required by him so to do; and during such interviews, I acted as his solicitor, and, in that character, prepared certain deeds, which bear date the 24th day of January 1846, by some or one of which trusts were declared of such part of the property of the said Petitioner as he had transferred, and, by some other of which, the remaining parts of the property of said Petitioner were conveyed and assigned to trustees, and certain trusts were by such deeds declared thereof, and that in all said indentures it is recited that the same were executed for making further provision for said Petitioner's said wife and children. I say, as alleged in the aforesaid bill of the said Petitioner, which is so as aforesaid referred to in the said Petitioner's said affidavit, that, on the aforesaid 7th day of February 1846, immediately after the said Petitioner was so acquitted of the said capital felony as aforesaid, the said Petitioner was discharged from the said gaol, and, acting under my advice, and in order that the said Petitioner might not be apprehended on a charge of a minor offence founded on the depositions already taken against him, which, I was advised by Counsel learned in the law, the said Petitioner could

1851.

ANONYMOUS.

have been, he was conveyed by a clerk in my service to the ——— railway station, whence he proceeded to ———, and on the same evening crossed over to the continent, where he remained (excepting two short visits to England) down to the 5th day of October in the same year, 1846. I say that I have been informed, and believe it to be true, that the said Petitioner, in consequence of the said charge and trial, and notwithstanding his aforesaid acquittal, at the instance of the patron of the living he held, and in order to prevent the official superior of the said patron from taking proceedings to enforce a resignation thereof, did resign in due form the said office, and thereby deprived himself of the income derived therefrom, amounting, as I have been informed and believe to be true, to the sum of 450*l. per annum*, or more. I say that I have not acted as solicitor for the said Petitioner since the end of the year 1846: that I have heard and believe it to be true, that the said Petitioner, on the 14th day of February 1848, acting upon the advice and recommendation of a physician, entered into a lunatic establishment or asylum at ———, and remained an inmate of the same until the 5th day of March 1848, when he was discharged therefrom by order of the Commissioners of Lunacy, as sane."

A brother of the Respondent, in his affidavit, thus deposed: "I say that, acting for the said Petitioner's said wife, I endeavoured to place the said infant, her eldest son, at two several schools, one being at ——— and the other at ——— ; but the mistress of one and the master of the other positively refused to receive the said infant, on the express ground, stated by each of them, that the reputation of their said schools would suffer if a child, known to be the son, and bearing the name of the said Petitioner, were received therein: that, not-

1851.

ANONYMOUS.

withstanding the acquittal of said Petitioner, he surrendered his said living sometime about the end of said month of February 1846 to the patron thereof: I know that the bishop of the diocese in which said vicarage is situate required the Petitioner to resign his benefice, as did also the patron thereof, each of them having full knowledge of the acquittal of the Petitioner: that I have heard and believe the same to be true that, at the time of the apprehension of the Petitioner on said charge, he was at a private room in a public-house in company with the said soldier, and that the Petitioner paid for a pint of a beer, called half-and-half, which he had ordered for himself and the soldier. I say that I have heard, and believe it to be true, that the Petitioner was, at an earlier part of the said 5th January 1846, in another public-house in company with the said soldier, and that the Petitioner and his said companion were turned out of the public-house by the landlord thereof; and that, on the Monday before the said 5th January 1846, he was in company with said soldier, both in ——— street and also in a public-house in a street leading out of ——— street." The witness then deposed to the fact of the engagement of the governess and the stipulation relating to the non-access of the father, as stated in the wife's affidavit, and proceeded: "I say that I have heard, and believe it to be true, that the said infants would be totally excluded from the society of other children of their own station in life by the parents of such other children, if such parents were made aware of any intercourse, however limited or however carefully guarded, taking place between the said Petitioner and his said children, or any of them: I say I have been informed and believe that the heads of families where said infants are now admitted have admitted them on the condition

1851.

ANONYMOUS.

that no intercourse be permitted between them and their said father."

A surgeon, residing near the Petitioner's former place of abode, deposed thus: "I say that I am intimately acquainted with many of the most respectable persons in the neighbourhood of the living of the Petitioner, and who have known him: that I believe such persons would, if any communication were known to take place between the infants and their father, refuse to hold any intercourse with such infants, or permit such infants to visit in their families, as they now do at the houses of some such persons; and that were any communication known to exist between the said children and their father, they would be wholly excluded from respectable society."

A surgeon, living where the Respondent (the petitioner's wife) resided, swore thus: "I say that the above-named infants are accustomed to visit my family and associate with my children, but that their visits and association are on the understanding that their father shall not have access to or communicate with said infants: that if said Petitioner shall be permitted to have, and shall have access to, or communicate with said infants, in however qualified or restricted a manner, I shall feel it a duty I owe to my own family to forbid them or any of my children to receive any visits from or have any association with the said infants: that my reason for considering such a course a duty on my part is that I consider the said Petitioner to be a person of so much disrepute that any association or connection with him, or with any person known to be associated with him, by my family or my children, would tend materially to damage their character and reputation in the world."

1851.

ANONYMOUS.

A clergyman of the same neighbourhood thus deposed: —"I say that the above-named infants are accustomed to visit my family and associate with my grandchildren, but that their visits and association are on the understanding that their father shall not have access to or communication with the said infants: that if the Petitioner shall be permitted to have and shall have access to or communication with the said infants in however qualified or restricted a manner I shall feel it a duty I owe to my own family and character to forbid them, or any of my grandchildren, to receive any visits from or have any association with the said infants: that my reason for considering such a course a duty on my part is that I consider the said Petitioner to be a person of so notoriously bad character and of such disrepute that any association or connection with him, or of any person known to be associated with him, by my family, or my grandchildren, would tend materially to damage their and my character and reputation in the world."

A justice of the peace also of the same neighbourhood in his affidavit said:—"I say that the above-named infants are accustomed to visit my family and associate with my children, but that their visits and association are on the understanding that their father shall not have access to or communication with the said infants: that if said Petitioner shall be permitted to have and shall have access to or communication with said infants in however qualified or restricted a manner I shall feel it a duty I owe to my own family to forbid them or any of my children to receive any visits from or have any association with said infants: that my reason for considering such a course a duty on my part, is that I consider the said Petitioner to be a person of such profligate and disreputable character that any association or connection

1851.

ANONYMOUS.

with him, or with any persons known to be associated with him, by my family or my children, would tend materially to damage their character and reputation in the world."

A copy of the depositions of the witnesses sworn before the magistrate, and on which the Petitioner was committed for trial was proved, from which it appeared (if they were true) that the capital felony had been committed, the Petitioner being the passive instrument in the offence. This was the Respondent's case.

In reply to the above evidence the Petitioner filed two affidavits, in one of which he swore thus:—"I say that I was and am wholly innocent of the charge of having committed the unnatural and capital crime mentioned in the affidavit of the said —— (the solicitor) sworn in this matter, and that I never did commit or permit, or attempt to commit or permit the same or any such crime. I say that when in prison I told the said ——— (solicitor) that the charge against me was false, as in fact it was, and I was then ready to answer the said charge or any other charge. I say that I observe that the said ——— (the solicitor) has alleged in his affidavit that several communications took place between him and me the effect of which he says he does not feel warranted in disclosing on account of the professional relation between us, but I say that the said ——— (the solicitor) after he had caused all my property to be taken from me in manner aforesaid, turned round upon me and acted for my opponents, and said all he could to my injury and that if he were to speak the truth he could not say otherwise than that I always said that I was not guilty, and that the witnesses were false witnesses against me."

1851.

ANONYMOUS.

Three days later the Petitioner by his other affidavit swore as follows:—"As to divers interviews alleged to have been between the said soldier and myself, I say that I never to my knowledge saw the said soldier but once before the day on which I was apprehended on the said charge. I say that on that occasion I met him casually in the street, and that he demanded money which I had not in my possession. And I also say on the day on which I was apprehended I met him for the purpose of giving him the money which he had so demanded: but I altogether deny that on either of the occasions aforesaid, or on any other occasion, I or said soldier did commit or permit, or attempt to commit or permit the said unnatural and capital crime mentioned in the affidavit of said ——— (the solicitor) sworn in this matter, and that I never did commit or permit, or attempt to commit or permit the same or any other such crime."

In addition to these affidavits six medical men and one clergyman deposed to the excellence of the Petitioner's character, their testimony extending to an acquaintance from 1847 to 1851. No evidence was offered by the Respondent in denial of the statements made in the Petitioner's second and third affidavits, or of the testimony of his witnesses.

Mr. *Malins* and Mr. *Hamilton Humphreys* for the Petitioner stated their willingness to abandon so much of the Petition as sought the delivery up of the children to the father, if an order were made for his access to them, at such times, and regulated in such manner, as the Court might think proper.

The *Vice-Chancellor*: All I could do would be to

1851.

ANONYMOUS.

order that the children should be delivered to the father, were I disposed to do anything on this petition. I could not, however, do that, for the purpose or with the view of forcing the wife to accede to a claim, however reasonable that claim might be, of access to the children. I could not affect the children by means of force put, in this manner, on the wife.

Mr. *Malins* and Mr. *Hamilton Humphreys* then proceeded to argue on the strict legal right of the father to have the custody of the children, and cited *Shelley* v. *Westbrooke* (*a*), *Lyons* v. *Blenkin* (*b*), *Wellesley* v. *The Duke of Beaufort* (*c*), *Lord Westmeath's case* (*d*), *Warde* v. *Warde* (*e*), *In re Spence* (*f*), and *In re Fynn* (*g*).

Mr. *Bethell*, Mr. *Willcock*, and Mr. *Bone* for the Respondent.

Mr. *Malins* in reply.

The VICE-CHANCELLOR:

The ground for granting the writ of *habeas corpus* by this Court is not the same as for the grant of it by a Court of law. At law the issue of the writ is *ex debito justitiæ*, and in a sense it is so here; but the Court of Chancery has a jurisdiction respecting it, infinitely beyond that of a Court of law. Although this is a petition asking for a *habeas corpus*, if I saw my way, which I do not, I could make a modified order respecting access.

(*a*) Jacob, 266.
(*b*) *Ibid.* 245.
(*c*) 2 Russ. 1.
(*d*) Jacob, 251.
(*e*) 2 Phill. 786.
(*f*) *Ibid.* 247.
(*g*) 2 De Gex & Sm. 457.

1851.

ANONYMOUS.

Under the circumstances of this case, whether I am to do anything or not, must depend on this question, not whether I am perfectly satisfied of the Petitioner's guilt, but whether I am satisfied that he has so conducted himself, as that I ought, upon the materials before me, to treat him as if he were a guilty man? Because once suppose it to be established that he is to be treated as a guilty man, the duty of the Court is plain. No case has been cited before me to-day applicable to a case of this kind,—at all applicable to the case in hand. When the Court refuses to give possession of his children to the father, it is the paramount duty of the Court to do so for the protection of the children themselves, and the Court will perform that duty if the father has so conducted himself, as that, it will not be for the benefit of the infants that they should be delivered to him,—or if their being with him will affect their happiness,—or if they cannot associate with him without moral contamination,—or if, because they associate with him, other persons will shun their society. My opinion is, that if it be established to my satisfaction that the father of children from ten to two years of age, is to be considered by me as guilty of the perpetration of an unnatural crime, it is impossible to permit any sort of intercourse with his children, even after he has escaped conviction. Had he been convicted, it is needless to say that no intercourse could take place for he would have been sentenced to death. A party may escape conviction of the crime, and yet the Court may be convinced of his guilt—may experience an overwhelming conclusion as to his criminality. Such is the impression made on my mind on the present occasion upon the evidence before me. Direct and absolute proof of guilt seems now to be beyond our reach: the truth must remain a secret between this man and his Maker. I say, however, that I never saw indications of guilt so clear. The case is this,

1851.

ANONYMOUS.

and I read it from the solicitor's affidavit, and which is so far uncontradicted, "I say that I have been informed and believe it to be true that the said Petitioner was, on the 5th of January 1846, apprehended and conveyed to the police office, and from thence on the same day to prison on a charge of having committed an unnatural and capital crime. I say that, on the evening of said 5th of January 1846, I went to said prison and saw the said Petitioner, having in the mean time ascertained the nature of the charge brought against him, and of the depositions which had been taken in support thereof: I say that, on the 6th of January 1846, the said Petitioner was again brought up before the magistrates, and was committed to abide his trial on said charge. I say that, on said Petitioner's apprehension, he gave a false name, and that the alleged participator in the said alleged capital crime was a private soldier." The deponent then goes on to detail the postponement of the trial and says: "That, on Wednesday the 4th of February 1846 the said Petitioner was by his said false and assumed name, together with the said soldier, placed on his trial for the said capital felony, when the Counsel"— and so on, describing the further postponement, and then the trial and acquittal for want of the appearance of the witnesses. The depositions of the witnesses sworn before the magistrates, show that, if true, a capital felony was undoubtedly committed. Three witnesses depose to certain facts, two of them to the fact of the offence, and to rushing into the room, the confusion of the parties and the state of the dress of the accused persons, and a third witness to the latter circumstance. Upon these depositions, which are sworn to with great distinctness, and perhaps in terms in some degree gross, but with no more clearness than it was the duty of the witnesses to give; upon these depositions I say the Petitioner and the sol-

1851.

ANONYMOUS.

dier were committed for trial. Was then the charge true or false? The trial followed, and that is narrated in the affidavits of the solicitor from which I have just read. The absence of witnesses might arise from the consciousness that they could not substantiate the charge they had deposed to before the magistrates, or it might arise from their being bribed to stay away. If their absence is to be accounted for by their being bribed to stay away from the trial, I must deal with the Petitioner as if he were guilty of the offence. That he was in an upstairs room of a public-house with a common soldier, and that he paid for beer, is by him not disputed. Is the rest of the charge true? What is his conduct? He sends for his solicitor and conveys away all his property before conviction. That is one indication of a consciousness of guilt. Whether it was well conveyed away so as to defeat the right of the Crown in case of conviction, is a question. There are very nice distinctions on that question stated in the books. There is a difference between the period at which the forfeiture is worked as relates to real estate, and as relates to personal property. It is quite sufficient for me to know that it is a common and prevailing notion that property may be well conveyed away before conviction, and that this person conveyed all his property away before his trial. The question whether the Crown would interfere in such a case is quite another matter. But this person's conduct after commitment is to me the strongest indication of guilt, and of his guilt of the whole of the capital charge, for unless the crime were capital the Crown would acquire no right, and need not be defeated.

Then comes one of the strongest facts indicative of guilt. The solicitor has sworn that he had communica-

1851.

ANONYMOUS.

tions with the Petitioner when in gaol, but says he does not feel warranted in disclosing the effect of these communications on account of the professional relation existing between himself and the Petitioner, unless required by him so to do. If the Petitioner were innocent, would he not release the solicitor from the obligation of concealment? Would he care about the disclosure of what passed between him and his solicitor in professional confidence? Would he object to the disclosure by his solicitor of what passed between them in their conversations in gaol? Would he not rather permit, or still more, would he not imperatively demand the whole of the conversations which passed relative to these transactions to be disclosed? But of this he says, in his affidavits, nothing at all. He does not meet the suggestion in the affidavit of the solicitor. His not doing so, coupled with the execution of the deeds, appears to me the strongest mode of proving that the claim of the Crown (which claim could only arise on a capital conviction) was one that would arise. I may here also remark that there is a very common, general knowledge that this claim of the Crown can only arise on a conviction for felony, and that it does not arise on conviction for a misdemeanour. There is no direct evidence before me of the mode in which the witnesses were got out of the way, if they were so; but when we see the description of the witnesses, one the son of a public-house keeper, another what is called a town traveller, and the other a hawker, and that they all frequented a public-house, and were in a humble station of life, we cannot fail to see that their absence may be accounted for by supposing that high bribes were given them to get them out of the way. At any rate, the witnesses were not forthcoming at the trial, and this person was acquitted. Then, after the trial, he immediately goes away; he quits the coun-

1851.

ANONYMOUS.

try. He says, and it has been remarked upon, that he went by the advice of his solicitor. What of that? He does not release that solicitor from the obligation arising from professional confidence, as to why that advice was given. He in fact goes away. If innocent, why has he not set the solicitor's tongue free? Any tying of a man's tongue who can speak to the truth, seems conclusive. If innocent, the Petitioner would be anxious to demand that everything he had said relative to a charge of the commission by him of such an odious, horrible and abominable crime should be freely disclosed. To say the least, it was odd that, when discharged, the Petitioner should go abroad, and not to the bosom of his family, or, at any rate, that he should not have sent for them, or described to them his position. He has given no evidence on this petition of any communication between him and his family for six years, or nearly that time. He having gone abroad, this affair comes to the ears of the bishop of the diocese in which the living held by the Petitioner is situate. His lordship and the patron threaten proceedings, and require him to resign, the bishop and patron having, as the affidavits say (and on that point they are uncontradicted), full knowledge of the acquittal. The resignation takes place without opposition or remonstrance. This person then remains abroad till about the end of the same year, and then comes back. Does he go then to his family? I do not know; I am uninformed; the affidavits on that point are an entire blank. In the beginning of 1847, he is in England, and, by advice, goes into a lunatic asylum. Now, that advice may have been very judicious, under the circumstances, to be given by the physician named. I confess I should like to have had an affidavit from that gentleman; his evidence on that point would have been desirable. No one says in these affidavits that the

1851.

ANONYMOUS.

Petitioner was a lunatic. He does not say he was a lunatic; all he says is that he was detained "as a lunatic." He himself even does not say he was a lunatic. Now, what is the explanation of all this? The hypothesis of his Counsel is that, having been threatened by a soldier, he gave money, rather than have his name mentioned in conjunction with such a crime, and that, with a view to allow matters to pass over, he went at first, by advice, into the asylum. In the affidavits of the Respondent's brother in support of her case, so far as it relates to the resort by the Petitioner to public-houses, there is this passage: "I say that I have heard, and believe the same to be true, that, at the time of the apprehension of said Petitioner on the said charge, he was in a private room at a public-house in company with the said soldier, and that the said Petitioner paid for a pint of beer, called half-and-half, which he had ordered for himself and the said soldier. I say that I have heard and believe it to be true, that the said Petitioner was, at an earlier part of said 5th January 1846, in another public-house in company with the said soldier, and that the said Petitioner and his said companion were turned out of the said last-mentioned public-house by the landlord thereof; and that, on the Monday before the said 5th January 1846, the said Petitioner was in company with the said soldier in ——— Street, and also in a public-house in a street leading out of ——— Street." Now, what does the Petitioner profess to say to this? "I say that I was and am wholly innocent of the charge of having committed the unnatural and capital crime mentioned in the affidavit of the said solicitor sworn in this matter, and that I never did commit, or permit or attempt to commit, or permit the same or any such crime." So far as to the crime itself. In his other affidavit, sworn three days after the one I have just

1851.

ANONYMOUS.

read from, he goes on: "And, as to divers interviews alleged to have been between the said soldier and myself, I say that I never, to my knowledge, saw the said soldier but once before the day on which I was apprehended on the charge mentioned in the affidavits of the said solicitor." This denial, if it be one, is quite consistent with the statement made in the affidavit of the Respondent's brother. The Petitioner's account, as we shall presently see, is that he, a man utterly unconscious of the existence of the soldier, is met by that soldier, who demands money of him, and, not having money to give, agrees to meet him again and give him what he demands. Now, it might be that a man, having money about him, and having such a demand made upon him, accompanied by such a threat as is supposed, but not stated, might be weak enough to comply rather than hazard publicity, although he might be innocent. But it is quite impossible to believe that an innocent man, unless utterly a fool, would meet the extortioner again for the purpose of complying with the demand. Yet this person thus proceeds with his account;—"I say that, on that occasion, I met him casually in the street, and that he demanded money, which I had not in my possession. And I also say that, on the day on which I was apprehended, I met him for the purpose of giving him the money which he had so demanded; but I altogether deny that, on either of the occasions aforesaid or on any other occasion," he then goes on very much in the same way as before to deny the crime or attempt. Coupled with all this it is to be remarked that the solicitor states, and the Petitioner does not deny, (and, however horrible it may appear, it must be taken as true) that the Petitioner performed divine service in his church on the Sunday, and that, on the very next day, he was in the situation which he has himself admit-

1851.

ANONYMOUS.

ted. Thus we see that he says he appoints a meeting, and he does not deny that they did meet, the place selected being a public-house, and there he orders beer for the refreshment of himself and the soldier in a private room. Now such an account, so absolutely and absurdly incredible, is submitted by this person to the Court as an explanation, and, coupled with the fact of an acquittal, is relied on by him as a proof of innocence. In one sense there has been an acquittal, if there had not he would or might have been hanged for the capital felony. I must deal now with this case on the supposition of this man being guilty. I think the Court ought to go a very great way, when the application is for the removal of children from the mother, to see that they are protected, and although the Court will act for the benefit and protection of children, it will act in all respects with as favourable a feeling as possible towards the father, even when it refuses to give the children up to him. It is impossible, however, here not to see that contact of these children with their father, implies utter exclusion of them from every one else. It is my duty to see that as his society (who I am bound to take as guilty of an unnatural crime in its most aggravated form) would contaminate them, they shall not be placed in any situation —shall not enter into any society—in which they may come into contact with him, or where he may have any chance of meeting them. And were the children with their father I should deem it my duty to remove them. I have omitted to observe, and I now do so, that these witnesses gave their evidence so long ago as January 1846, and yet if they swore falsely they have not been indicted for perjury, as they might have been either at the instance of the Petitioner or of the soldier. The wife is greatly to be pitied—she is to be pitied that she must keep the existence of the father a matter of mystery

1851.

ANONYMOUS.

to her children; must keep him to their vision as it were, in a mist. I do not entertain any doubt what course it is my duty to take. I never did entertain any doubt after I had once satisfied my mind that I must deal with the Petitioner as a guilty man. Believing him to be guilty, the custody of the children by him is out of the question. That their education should be entrusted to him, is equally out of the question: and in my opinion, under the circumstances of this case, so proved to my satisfaction, any interview between the father and children is equally to be prevented. All I shall do will be to dismiss the petition.

A short discussion then took place respecting the costs, but in consequence of the peculiar situation of the Petitioner, so far as regarded the property, the subject-matter of the suit alluded to in the affidavits, no order was made beyond that of the dismissal of the petition.

1851: 17th and 18th July, and 6th August.

Injunction. Establishment of Plaintiff's title at law. Acquiescence.

THE ROCHDALE CANAL COMPANY *v.* KING.

The Defendants, the owners of a cotton-mill on the banks of a canal belonging to the Plaintiffs, were authorized, by the Act of Parliament under which the canal was made and the Plaintiffs incorporated, to draw water, from the canal, for condensing steam, but not for any other purpose: nevertheless, they used the water for other purposes. In consequence of which the Plaintiffs brought an action and obtained a verdict against them, *but only for nominal damages.* The Defendants moved to arrest the judgment in the action, but without success; and, afterwards, the judgment was affirmed on a writ of error in the Exchequer Chamber. The Defendants, however, continued to use the water as before. Whereupon the bill was filed for an injunction to restrain them from so doing. The answer stated a case of acquiescence on the part of the Plaintiffs.

Held that the Plaintiffs had sufficiently established their title at law, and that, but for their acquiescence, they would have been entitled to the injunction, notwithstanding they had recovered only nominal damages in the action.

IN 1830, *James King* a cotton manufacturer, erected a cotton-mill within twenty yards of the canal; and, as the Act of Parliament under which the Canal Company was incorporated and the canal made (34th Geo. III. c. lxxviii) authorized the owners of land within twenty yards of the canal, to draw water from the canal for condensing the steam used in working the steam engines in their mills, (provided they returned, daily, an equal quantity of water on the same level, the inevitable waste by consuming the steam excepted) he laid down metal pipes for the purpose of conveying water from the canal to his steam engines. In 1840, he took his son, the Defendant *James King*, into partnership with him; and, in 1844, they took the other Defendant, *Holdsworth*, into partnership. In May 1848, the Plaintiffs brought an action against the firm, for having, as the Plaintiffs alleged, drawn more water, from the canal, than was sufficient for condensing the steam used in working their engines and applied it for generating steam and other purposes, and for not having returned an equal quantity to the canal, the inevitable waste by condensing the steam ex-

1851.

THE ROCHDALE CANAL COMPANY. *v.* KING.

cepted. Messrs. *King* pleaded, to the action, first, not guilty, and, secondly, leave and licence. At the trial in August 1848, a verdict was taken for the Plaintiffs, by arrangement between the Counsel, with one shilling damages; with leave, for Messrs. *King*, to move for a new trial or a nonsuit, or to enter up judgment for themselves notwithstanding the verdict. In November 1848, Messrs. *King* obtained a rule for the Plaintiffs to show cause why the verdict should not be set aside and a nonsuit entered, or why the judgment should not be arrested, or why a *venire de novo* should not issue. The rule was discharged, after argument, in June 1849; and, thereupon, judgment was entered up for the Plaintiffs. *James King*, the father, retired from business in September 1849; after which the Defendants carried on the business in copartnership together: and, as they continued to commit the grievance complained of in the action, the bill was filed in February 1851, praying for an injunction to restrain them from drawing water from the canal for any other purpose than the condensing of steam used in working their engines, and from drawing it for that purpose, without returning an equal quantity, daily, on the same level; the inevitable waste by condensing the steam, excepted.

The answer stated that, in 1830, metal pipes were laid down, by *James King*, the father, after notice given, by him, to the Plaintiffs, of his intention to make a communication between the water in the canal and the steam-engines in his mill, in order to draw, from the canal, such quantities of water as should be sufficient to supply the engines with water for the purpose of condensing the steam used for working the engines, raising steam, making sow (a preparation of flour and water for stiffening cotton) and cleansing the boilers; and that the

1851.

THE ROCHDALE CANAL COMPANY v. KING.

servants and agents of the Company, superintended the laying down of the pipes, and well knew the capacity thereof, and the purposes for which water from the canal was to be drawn or conveyed through and by means of the pipes; and that they acquiesced therein and were cognizant of the expense incurred in laying down the pipes for such purposes: That *James King*, the father, from the time when he erected the mill, down to September 1849, when he retired from business, drew water from the canal, by means of such pipes, with the knowledge of the Plaintiffs, for the purpose of condensing and raising steam, heating the mill and making sow, without any objection on the part of the Plaintiffs, except the bringing of the action in 1848; and that, in 1840, he expended many thousand pounds, with the knowledge of the Plaintiffs, in enlarging the mill and erecting additional engines in it, which he would not have done (as the Plaintiffs well knew) if any objection had been made or had been likely to be made, by the Plaintiffs, to the use of water from the canal for the purposes aforesaid: That the rain which fell on the mill, was conducted to the canal, by pipes, and that the Defendants had always returned more water to it than they had drawn from it: That the Defendants had brought and were prosecuting a writ of error from the judgment in the action: That, from the time when the mill was erected, the Plaintiffs had frequently inspected it by their agents and servants, and they knew of the mode in which water was drawn from the canal and used and afterwards returned, and had, by their acts, encouraged the Defendants and *James King*, the father, to expend large sums of money on the mill and the engines and the fittings thereof, upon the faith and the implied understanding that the use of the water mentioned in the answer, was proper and would not be interfered with by the Plaintiffs: That there was always

more water in the canal than was required for the navigation thereof: That the Defendants would not, and they believed that *James King*, the father, would not have expended any money upon the mill and premises, if there had been any reason to believe or suspect that the use of the water in the canal for the purposes and in the manner before mentioned, would have been questioned or interfered with by the Plaintiffs; and that the Plaintiffs had encouraged the Defendants to expend money on the mill and premises, by permitting the use of the water for so many years; and that, under the circumstances appearing in the answer, the Plaintiffs were not entitled to any relief against the Defendants, or to prevent or interfere with the Defendants in the working of their mill and the use of the water in the canal as before mentioned, and that, if the Plaintiffs ever had any right to prevent such use, they had lost the same by having permitted the Defendants and *James King*, the father, (under whom they claimed) to expend money on the mill and premises, without interference and on the presumption that they might continue to use the water as it had been always previously used; and that, after the length of time during which the Plaintiffs had permitted the Defendants and *James King*, the father, to use the water as before mentioned, they had no right or claim to interfere therewith and ought not to be permitted so to do.

After the answer had been filed, the writ of error was argued in the Exchequer Chamber, and the judgment in the action was affirmed.

On the hearing of a motion for the injunction prayed for by the bill, the questions were; first, whether the Plaintiffs had sufficiently established their title at law; secondly, whether, if the Plaintiffs had sustained any

1851.

THE ROCHDALE CANAL COMPANY. v. KING.

injury, it was not so trifling that the Court ought not to interfere; and, lastly, whether the Plaintiffs had not precluded themselves, by acquiescence, from asking the assistance of the Court.

Mr. *Bethell* and Mr. *Baily* supported the motion.

Mr. *Malins* and Mr. *Glasse* opposed it.

The cases cited were *Goodman* v. *Be Beauvoir* (*a*), *Elmhirst* v. *Spencer* (*b*), *Hilton* v. *Lord Granville* (*c*), *Barret* v. *Blagrave* (*d*), *The Att.-Gen.* v. *The Manchester and Leeds Railway Company* (*e*), *Barnard* v. *Wallis* (*f*), *Waters* v. *Taylor* (*g*), *Fielden* v. *The Lancashire and Yorkshire Railway Company* (*h*), *Harrow School* v. *Alderton* (*i*).

The *Vice-Chancellor*, after hearing Mr. *Baily* in reply, said that his opinion was that the Plaintiffs were entitled to the injunction, unless they had precluded themselves, by acquiescence, from asking the assistance of a Court of equity: as to which he should reserve his judgment until he had had an opportunity of minutely examining the evidence in the case.

6th August.

The VICE-CHANCELLOR:

This was a motion to restrain the Defendants from using water, drawn from the canal, for any other purpose

(*a*) 4 Railw. C. 380.
(*b*) 2 Macn. & Gord. 45.
(*c*) Cr. & Phill. 283.
(*d*) 6 Ves. 104.
(*e*) 1 Railw. C. 436.
(*f*) 2 Railw. C. 162.
(*g*) 2 Ves. & Beam. 299.
(*h*) 2 De Gex & Sm. 531.
(*i*) 2 Bos. & Pull. 86.

than that of condensing steam. The Defendants are the owners and occupiers of a cotton-mill near the banks of the *Rochdale Canal.* The Plaintiffs, the Canal Company, were incorporated by the 34th Geo. III. c. lxxviii. The 113th section of that Act is set out in the bill, and is as follows: "And whereas steam-engines are become of great use in various manufactures carried on within the said counties," that is, *Yorkshire* and *Lancashire,* "and, as such engines consume considerable quantities of coal, they will, by the rates which will be payable for such coal, tend to promote the interests of the said navigation: but, the said engines can only be made use of where cold water can be obtained to condense the steam used in working them; on which account, as well as for the better supply of the same with coals, it will be convenient to erect such steam-engines as near as may be to the said navigation: Be it, therefore, further enacted that it shall be lawful for the owners of any land within the distance of twenty yards from the said canal, to make a communication, between the water therein and any steam-engine or engines, by means of one or more metal pipe or pipes of sufficient strength and thickness, and so constructed as to prevent any leakage or waste of water; and to draw, from the said canal, such quantities of water as shall be sufficient to supply the said engine or engines with cold water, *for the sole purpose of condensing the steam used for working any such engines as aforesaid:* Provided always that the proprietor of every such engine, shall return, to the canal, in every day on which he shall use such engine, a quantity of water, on the same level on which it shall be taken, equal to the quantity so taken, in every such day, from the said canal, (the inevitable waste thereof by condensing such steam only excepted); so that no obstruction shall arise, therefrom, to the said na-

1851.

THE ROCHDALE CANAL COMPANY v. KING.

vigation: Provided also that such water so taken shall be applied to the working of the said engine, and to no other use or purpose." Then subsequent acts passed in the 39 & 40 Geo. III. and the 46 Geo. III.; and the 13th sect. of the 46 Geo. III. is as follows; "And whereas the power of taking water for the condensing of steam in the engines near to the canal, may be abused; and it is expedient that the provisions relating thereto should be explained and amended: Be it, therefore, further enacted that, from and after the passing of this Act, it shall be lawful, for any agent or servant or agents or servants appointed by the committee of the said Company for that purpose, on making information in writing, on oath to be administered by any justice of the peace, that such agent suspects or believes that such power is abused, and on depositing, in the hands of such justice, the sum of 20*l.* for the purposes hereinafter mentioned, and delivering, to the person or persons using such water, a copy of such information, at all seasonable times, to enter into any building containing such steam-engine, for the purpose of examining any pipe used for the conveying of such water and ascertaining the use made of such water, and that the same is not applied to any other purpose than that of condensing the steam of any such engine."

The mill of the Defendants was built, in 1830, by the father of the Defendant *King*; and, under the authority of the first-mentioned Act of Parliament, pipes were then laid, from the mill to the canal, so as to supply the mill with water. In the year 1847, disputes arose, between the Plaintiffs and the Defendants, as to the use of the water so derived from the canal, the Plaintiffs alleging that the Defendants had no right to draw water for any other purpose than that of condensing steam. On

1851.

THE ROCHDALE CANAL COMPANY *v.* KING.

the 8th of May 1848, an action was brought, by the Plaintiffs against the Defendants, for using the water for other purposes than that of condensing steam. The particulars of the action are set out in the bill. It was an action, in the Court of Queen's Bench, against *King* the father and against the Defendants; and the declaration stated the first-mentioned Act of Parliament, and the making of the canal, and that, before and at the time of committing the grievances therein complained of and at the date of the action, the Defendants were the owners and possessed of certain lands within the distance of twenty yards from the canal, and of a certain cotton mill containing two steam-engines, such engines being erected and used, by the Defendants, for the purpose of working the mill. Then it states that the Defendants had given notice of their intention to make, and had made a communication between the water of the canal and the steam-engines, according to the provisions of the Act, in order to draw, from the canal, such quantities of water as should be sufficient to supply the engines with cold water for the purpose of condensing the steam used for working the engines. Then the declaration alleged that, although large quantities of water were drawn, from the canal, through and by means of the pipes, which water the Defendants ought to have used for the sole purpose of condensing the steam used for working their engines; nevertheless, they had used it for other purposes. Then there were other grievances complained of, which are not material to be considered. To this there were two pleas; first, a plea of not guilty, secondly, a plea of leave and licence. The Cause was tried at the Summer Assizes of 1848: when a verdict was found for the Plaintiffs, with 1*s.* damages. Afterwards, in November 1848, a rule *nisi* was granted, by the Court of Queen's Bench, to show cause why the judgment should

1851.

THE ROCHDALE CANAL COMPANY v. KING.

not be arrested. That rule was argued in June 1849, when the Queen's Bench gave judgment for the Plaintiffs; and this judgment was afterwards affirmed on a writ of error in the Exchequer Chamber; and so the legal title of the Plaintiffs, was conclusively established. In October 1850, *James King*, the father, died. The bill was filed on the 6th of February last; and it states all these facts, and also that the Defendants, who now work the mill, continue, in defiance of the judgment, to abstract and use the water of the canal for other purposes than the condensing of the steam used in working the engines in their mill: And it prays for an injunction to restrain them from so doing, without returning, daily, an equal quantity of water, on the same level, the inevitable waste by condensing the steam, excepted.

This motion is made, on the filing of the bill, upon notice, in conformity to the prayer of the bill.* It was resisted on two grounds: first, because the subject-matter was too trifling for the interference of a Court of Equity; the damages recovered having been only 1*s.*; and, it was said, they never would be more; and, therefore, the Court ought to leave the Plaintiffs to bring actions at law. But, to this proposition, I do not assent, as I stated at the hearing of the motion.

If the title of the Plaintiffs is once clearly established, the right is one of great value, though the damages recovered in each particular action, might be very small or merely nominal; for the necessities of the Defendants would oblige them to pay water-rent for the right re-

* The notice of motion was dated in February 1851. The answer to the bill was not filed until April following. In the mean time, affidavits had been filed on both sides.

quired. I see no reason to alter the opinion which I expressed on this part of the case, when I heard the motion.

The *Harrow School case* went on the special nature of an action of waste; which can only be supported when the act complained of is done to the disherison of the Plaintiff. Cases of nuisance, when the injury, if any, is inappreciably minute, as in *Elmhirst* v. *Spencer*, proceed on the ground that the party complaining of such acts is entitled to no relief beyond what the strict assertion of his legal right gives to him; and so this Court refuses to interfere.

It is not necessary, however, to consider to what case that doctrine is applicable; because, here, what is complained of, is not a nuisance, but a wrongful invasion of the right of the Plaintiffs, without making to them compensation for that for which they have a right to claim compensation.

But the motion was further resisted on the ground that the Plaintiffs had, by acquiescence, precluded themselves from asserting the legal right on which they now insist.

The mill in question was erected, in the year 1830, by *James King*, the father of the Defendant *King*; and the Defendants insist that, at that time, it was well known, to the Plaintiffs, that *King* erected the mill in the belief that he might lawfully take and use, and that, ever since that time, he and the Defendants deriving title under him, have, in fact, taken and used the water of the canal for all purposes for which they had need of it, and not merely for condensing steam; and that all this

1851.

THE ROCHDALE CANAL COMPANY v. KING.

was well known to and acquiesced in by the Plaintiffs. Whether this be so is a question, not of law, but of fact. The rule of equity in such cases, is clear and is stated by Lord *Eldon* in *Dann* v. *Spurrier* (*b*). "This Court," his Lordship says, "will not permit a man, knowingly though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on, is, in many cases, as strong as using terms of encouragement. A lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done but upon an expectation that the lessor would not throw an objection (obstacle *qu.*) in the way of his enjoyment." I must remark that there is some inaccuracy in the language of the report: at least, it is not grammatical; there is a nominative case without a verb, but the sense is plain enough.

This doctrine being well established, the only matter for my consideration on this motion, is whether the facts of this case are such as to bring these parties within the rule. I think they are. The Defendants, by their answer, swear that, to their belief, when the mill was originally built by *James King*, the father, in 1830, express notice was given by him, to the Canal Company, of his intention to make a communication with the canal in order to draw from it water, not only for the purpose of condensing steam, but also for the purpose of raising it and of making sow, and for other purposes; and that the servants and agents of the Company superintended the laying down of the pipes, and were aware of the uses to which they were to be applied, and made no objection, though they were cognisant of the great

(*b*) 7 Ves. 231, see 235.

expense incurred. Now, unquestionably, if this be true, the Plaintiffs can have no relief in this Court. Such conduct, even if it be not sufficient to sustain a plea of leave and licence in bar to an action, certainly incapacitates the Plaintiffs from obtaining any assistance in a Court of Equity. It is not necessary to go further, and say whether it would not entitle the Defendants to restrain them from proceeding at law, according to what was stated by Lord *Eldon* in *Barret* v. *Blagrave*. The allegation of acquiescence rests, it is true, mainly on the answer. From the nature of things, it would not be likely there could be much of confirmation; but there is some. *Murray*, in his affidavit, says that he and all the other mill-owners on the banks of the canal, use the water for all purposes: that this is perfectly notorious, and has always been well known to the Plaintiffs' overlooker. Mr. *Radcliffe* says he erected his mill twenty-seven years ago, and put up a sluice by means of which he might obtain water from the canal, and that he did this with the full knowledge of the Plaintiffs. And *Bullock* and *Taylor* both speak of facts of similar import. Now I entirely assent to the argument, very ably urged by Mr. *Baily*, that mere acquiescence (if by acquiescence is to be understood only the abstaining from legal proceedings,) is unimportant. Where one party invades the right of another, that other does not, in general, deprive himself of the right of seeking redress, merely because he remains passive: unless, indeed, he continues inactive so long as to bring the case within the purview of the Statute of Limitations.

If, therefore, from 1830 to 1847 when the disputes began, the Plaintiffs might have asserted the legal right on which they now insist, their not having done so during that period, would not preclude them. But the evi-

1851.

THE ROCHDALE CANAL COMPANY. v. KING.

dence of long-continued use of the water, for all purposes, by the adjacent mill-owners. may be very important, as tending to satisfy this Court that, when the mill of the Defendants was erected, the Plaintiffs must have known that *King* who was building it, was laying out his money in the expectation that he would have the same privilege of using the water as was enjoyed by all his neighbours. Whether however the weight attributable to the affidavits be more or less, I think that, the issue being distinctly raised in the answer, I ought not, under the circumstances of this case, to interfere on this interlocutory application.

There is one point on which evidence may be obtained at the hearing, which may have a material bearing on the result: I mean whether, when *James King*, the father erected his mill in 1830, there were any other means, practicably available to him, for getting water, besides the canal: for, if there were not, it will be difficult to satisfy the Court that the Plaintiffs could have been unaware that *King* must have been acting on the belief that he would be allowed to take, from the canal, water for all purposes. Again, it may be important to show, by evidence, how far, from the construction of and the mode of working a steam-engine, it may or it may not be practicable to use water, derived from one source, for condensing, and water from a different source, for raising steam. If this be practicable, as, from the affidavit of *Henry Eaton* filed on the 2nd of March, it would seem to be, it will remove one difficulty in the way of the Plaintiffs' case. If, on the other hand, it is impracticable, or even very unusual, it will strongly tend to confirm the Defendants' proposition, and to bring the Plaintiffs within the principle enunciated in *Dann* v. *Spurrier*.

On these grounds I shall refuse this motion, reserving the question of costs till the hearing.

1851.

THE ROCHDALE CANAL COMPANY. *v.* KING.

BOURNE *v.* BUCKTON. EX PARTE J. C. HAIG AND MARIA HIS WIFE.

1851. 15th, and 21st Nov.

Accumulation. Thellusson Act.

A testator gave his residuary personal estate to *A.* and *B.* in trust to accumulate the income during the life of his niece, and, on her death, to transfer the capital and accumulations to her children, in equal shares; the shares to be vested, in her sons, at twenty-one, and, in her daughters, at that age or marriage. The niece lived more than twenty-one years after the testator's death. Held that the direction to accumulate, was not a provision for raising portions within the meaning of the second section of the Thellusson Act, and that, therefore, it became void, under the first section, at the expiration of twenty-one years from the testator's death: and that his next of kin were, thenceforth, entitled to the income of the capital and accumulations.

THE will of *William Stains*, the testator in the Cause, contained a trust for accumulating the rents of his real estates, and also a trust for accumulating the income of his residuary personal estate. The former was the subject of a petition presented by his niece, *Elizabeth Stains* (*a*); the latter was the subject of the present petition.

The testator gave his residuary personal estate, to *John Buckton* and *Thomas Bourne*, in trust to invest the same or any part or parts thereof, in their names, in the purchase of freehold lands in Kent, and which he directed to be forthwith settled, conveyed and assured to such and the same uses and upon such and the same trusts as were, thereinafter, by him declared of and concerning such part or parts of his residuary personal estate as should not be, by his said trustees, laid out and invested in such purchase or purchases aforesaid, or as near thereto as the deaths of parties and other contingencies would admit of; and upon further trust, at their

(*a*) See *Halford* v. *Stains*, 16 Sim. 488.

1851.

BOURNE v. BUCKTON.

or his discretion, as to such parts of the said residue as should not be laid out and invested in such purchase or purchases as aforesaid, and also, in the mean time and until such purchase or purchases should be made as aforesaid, as to the whole of the said residue, to lay out and invest the same in their names, on Government or real securities, and to accumulate the income of the securities during the life of *Elizabeth Stains;* and, from and immediately after her decease, upon trust to transfer the securities and accumulations unto the child, if only one, and, if more than one, to the younger children of *Elizabeth Stains*, equally as tenants in common, and to be vested in sons, at twenty-one, and in daughters, at twenty-one, or on marriage. He then declared trusts, as to *the shares* of the children of *Elizabeth Stains* who should die in her lifetime leaving issue, for the benefit of their issue, and, as to *the shares* of those who should not leave issue, for the survivors of them. And he empowered the trustees, after the decease of *Elizabeth Stains*, to apply the income of *the portion* of each of the said children and issue being minors, for their maintenance, and to apply one half of their then vested or expectant *shares*, for their advancement, and he declared that all sums which should be advanced to or for each of such children or issue, should be considered as a part of his or her said *portion or share*, and should be deducted out of the same, notwithstanding his or her death before his or her *portion* should be absolutely vested; and that so much of the income of the *portion or share* of each of the same children and issue, as should not be applied for their maintenance and advancement, should be added to and accumulated together with the principal of the same *portion or share*, and be subject to all the limitations, trusts and dispositions thereinbefore and thereinafter contained concerning the principal of

1851.

BOURNE v. BUCKTON.

the same *portion or share,* until the principal should become payable. The testator then declared that, on failure of the preceding trusts, the trustees should stand possessed of the securities and accumulations, upon the same trusts for the benefit of the children and issue first of *Edwin Stains,* secondly, of *Henry Palmer*, and lastly, in trust for his own next of kin.

The testator died in 1827. His brother *James* was his sole next of kin. *James* died in 1828. The Petitioner, *Maria Haig*, was his personal representative.

The Petition stated, amongst other things, that the Petitioners were advised that the trust for accumulation during the life of *Elizabeth Stains*, (who was still living,) as regarded the testator's residuary personal estate, *was good only for the period of twenty-one years which had elapsed from the day of his death*, and which period expired on the 24th of September 1848; and it prayed that the Petitioner, *J. C. Haig,* in right of the Petitioner, *Maria* his wife, the personal representative of *James Stains,* might be declared to be entitled to all the income which had arisen or been received or made, since the 24th of September 1848, from or in respect of the testator's residuary personal estate or any previous accumulations thereof, and to all the income which should or might arise or be received or made, of or from such residuary personal estate or accumulations, during the life of *Elizabeth Stains.*

At the hearing of the petition,

Mr. *Rolt* and Mr. *Fooks* appeared for the Petitioners; and,

1851.

BOURNE v. BUCKTON.

Mr. *Stuart*, Mr. *Bethell*, Mr. *Goodeve*, Mr. *Erskine*, and Mr. *Jessel*, for the Respondents.

The following cases were cied, *Halford* v. *Stains*, *Beech* v. *Lord St. Vincent* (*b*), *Shaw* v. *Rhodes* (*c*), *Elborne* v. *Goode* (*d*), *Ellis* v. *Maxwell* (*e*), and *Morgan* v. *Morgan* (*f*).

21st Nov.

The VICE-CHANCELLOR :*

The question in this case, is whether the bequest, made by the testator, of his residuary personal estate, is, according to the terms of the second section of the 39th and 40th Geo. III. c. 98, commonly called the Thellusson Act, a provision for raising portions for the child or children of any person taking an interest under such devise; for, if it is not, it is not disputed that, under the first section of that Act, the direction to accumulate the income of that estate, became invalid at the expiration of twenty-one years from the testator's death.

The question with regard to the real estate, has been already disposed of, by the decision of the late *Vice-Chancellor of England*, in the case of *Halford* v. *Stains*. In order to see whether the bequest of the personal estate, which is all that I have to do with, is or is not within the provisions of the second section of the Act, it is necessary to see what the provisions of the will are.

(*b*) 14 Jur. 731.
(*c*) 5 Myl. & Cr. 135, and 5 Cl. & Fin. 114, *nom. Evans* v. *Hellier*.
(*d*) 14 Sim. 165.
(*e*) 3 Beav. 587.
(*f*) 20 Law Journ., N. S., 109, and 441.

* Sir R. Kindersley.

1851.

BOURNE v. BUCKTON.

The will runs to very great length; but it is very accurately abridged in the report of *Halford* v. *Stains;* and I shall state the provisions of it from that report.

The testator was possessed of real and personal estate; and he first makes a devise of his realty and then of his personalty. The devise of the realty is thus: &c. &c. &c. Then we come to the bequest of the personal estate. The testator bequeaths all the residue of his personal estate to trustees in trust &c. &c. &c.

It is to be observed, with respect to the personal estate, that neither *Elizabeth Stains*, *Edwin Stains* nor *Henry Palmer* whose children are the last provided for, takes any benefit in it. *Elizabeth Stains* is still living, and has survived the period of twenty-one years from the death of the testator: and, it being admitted that the trust for accumulation, beyond the period of twenty-one years, is void under the Thellusson Act if it does not come within the meaning of the second section, the question is whether that trust is a provision for raising portions for the child or children of any person taking an interest under such devise; for that is the language of the second section. Now there are two questions raised here: the first is, are the shares of the accumulated personal estate, which the children are intended to take, 'portions,' within the meaning of the second section; and, if they are, are they portions for the children of any person taking a benefit under such devise?

With regard to the real estate, the late *Vice-Chancellor of England* decided, in *Halford* v. *Stains*, that,

1851.

BOURNE v. BUCKTON.

although *Elizabeth Stains*, whose children were provided for, took a contingent interest; and although *Edwin Stains*, whose children also were provided for, took a life-estate in remainder, yet the trust for accumulating the rents, did not come within the meaning of the second section of the Act, The reasons that he gave were, first, that the portions spoken of in the second section of the Act, were portions created by some instrument prior to the will; and, secondly, that the testator, himself, had called what the children were to take, 'shares,' and, therefore, they could not be considered as coming within the meaning of the term, 'portions.' Now I must say, with all deference and respect for the opinion of that learned Judge, that I cannot concur in either of the reasons assigned for the judgment. I do not conceive that the second section of the Act, was intended to apply only to portions created by another instrument. On the contrary, although I am persuaded it was not meant to exclude portions created by another instrument, I believe the portions in the contemplation of the Legislature, were the portions created by the very instrument itself. With respect to the other reason, that they are called, 'shares,' it is to be observed that the testator as often calls them, 'portions,' as, 'shares.' Sometimes he calls them 'shares;' sometimes he calls them, 'portions,' and sometimes he terms them, 'portions or shares:' and I must say that there is no difference between the meaning of the two words. But, though I dissent from the reasons for the decision, I entirely assent to the propriety of the decision itself.

There is some difference between the case as to the personal estate, and the case as to the real estate; but,

my opinion is that the trust for accumulating the personal estate can, in no proper sense, be said to be a provision for raising portions within the meaning of the second section of the Act. Observe what it is. It is not a direction, out of rents and profits, or out of the income of the estate, or by felling timber on the estate, or by any of the ordinary modes, to raise a certain sum for the benefit of younger children or children generally, or to raise a sum of money for each child; but it is a direction that the whole residuary personal estate shall be accumulated during the life of *Elizabeth Stains*, for the purpose, not of raising portions but of increasing a fund the aggregate amount of which is given, after the death of *Elizabeth Stains*, first, among her children, next, among the children of *Edwin Stains*, and, lastly, among the children of *Henry Palmer*. It is very true, with respect to this Act of Parliament which has often been made the subject of commentary by different Judges, that it is extremely difficult to lay down, *a priori*, a definition of the term, 'portions,' which includes all those cases which ought to be included, and which excludes all those which ought to be excluded: but my opinion is that, when a testator directs the income of his personal estate to be accumulated for a certain period, and, at the expiration of that period, gives the accumulated fund amongst children, the shares which the children are to take, are not portions within the meaning of that term as used in the second section of the Act, and, consequently, the direction for accumulation, is not a provision for raising portions within the meaning of that section.

That opinion, which I formed independently of any authority, is corroborated by the decision of the late *Master of the Rolls*, in *Eyre* v. *Marsden* (*a*), which was

(*a*) 2 Keen, 564.

1851.

BOURNE v. BUCKTON.

not cited when this case was argued. In that case the testator, who had three children living and had had another child who was dead leaving children, gave certain annuities, out of his residuary estate, to his three surviving children, and requested the surplus of the annual income to be applied in accumulation of the capital of his property for the benefit of his grandchildren, and which was to be divided between them after the death of the survivor of his three children. Thirty years elapsed between the death of the testator and the death of the survivor of the three children; and it was held that the direction for accumulation beyond twenty-one years from the testator's death, was void under the first section of the Thellusson Act; and that the case did not come within the exception in the second section. That statement of the case, which I have read from the marginal note, shows that there were annuities given, out of the general estate, to the testator's three children who were living at the date of his will and who survived him. But he had had another child, who had died, leaving issue, in his lifetime, before the date of his will, and the parties to whom the accumulated fund was to go at the death of the survivor of the three children living, were all his grandchildren, that is, the children of his deceased child as well as the children of the survivors. The *Master of the Rolls* decided that the gift did not come within the second section, but was void under the first, for two different reasons; one not applicable to this case, and the other clearly applicable to it. One was that the grandchildren for whom provision was made, were partly the children of persons who took a benefit under the will, and partly the children of a person who took no benefit, namely, the deceased child. The other reason, (which applies to the present case,) was that the accumulation which was directed, was not a provision for raising por-

tions, but a provision for making additions to the capital, for the purpose of making one gift of an aggregate fund: therefore, I am perfectly satisfied that Lord *Langdale*, if the present case had come before him, would have decided that the direction to accumulate in this case, was given, not for the purpose of raising portions for children, but for the purpose of increasing the amount of the fund which the children are to take; and, therefore, that it did not come within the exception in the 2nd section of that Act.

There is also a little allusion to this point in the judgment, given by Mr. Justice *Bosanquet*, in the case of *Shaw* v. *Rhodes*. He just touches on the point, and indicates, as it appears to me, that his opinion, also, would have been to the same effect.

Having stated one reason why the case did not fall within the exception, in the Thellusson Act, respecting provisions for raising portions for the children of persons taking an interest under the devise, he says, in page 159 of the report: "But, independently of this answer, I do not think the case falls within the meaning of the exception. Where the whole rents and profits are given, in the first place, to persons during the lives of their parents," (he is referring to the particular provisions in *Shaw* v. *Rhodes*, which are very peculiar,) "with the exception of small annuities only, to be paid, thereout, to the parents themselves for their own lives, and a gift to the same persons after the death of their parents, is superadded, to be paid out of the subsequent rents and profits, I cannot think that the superadded gift is to be considered, within the meaning of the Statute, in the nature of a portion to the children of persons taking an interest under the devise." The circumstances of *Shaw* v. *Rhodes* are so peculiar that it makes that observation

1851.

BOURNE v. BUCKTON.

less distinctly applicable to the present case; but I think it shows that Mr. Justice *Bosanquet* considered that it was not merely because it was a gift to the children of persons, to be divided among them, that, therefore, it was a provision for raising portions for those children.

I think I ought to refer to another point which has been the subject of discussion and ingenious argument; which is this. As I have already observed, the second section enacts that the Act shall not extend to a provision for the raising of portions for the children of a person taking an interest under such devise. Now, it is very difficult to know what is exactly meant by, "such devise." The word, "devise," does not appear in any part of the Statute. The word, "devisor" or, "testator," does appear. I have observed, before, that neither *Elizabeth Stains*, whose children are first to take, nor *Edwin Stains*, whose children are to take in the second place, takes any benefit in the personal estate; but each of them does take some sort of interest in the real estate, which is a separate devise altogether. And it was argued that the words, "such devise," must mean taking an interest under the will, and not under the particular gift. But I cannot conceive that, by any inaccuracy of expression, the word, "devise," could ever be used to signify the whole will. You never could say, even with the utmost latitude of inaccuracy, that the testator made his last devise and testament; that his executors proved his devise in the Prerogative Court; but you may, with a very common inaccuracy of expression, apply the term, "devise" to either the real or the personal estate. It is very common, although not very correct, to say: "he devised all the residue of his real and personal estate to trustees on trust," &c. It would be more correct to say: "he devised and bequeathed,"

1851.

BOURNE v. BUCKTON.

that is, devised the real estate and bequeathed the personal; but still, it appears to me that the meaning of the expression, "such devise," is that the parent must take an interest under the particular gift, devise or bequest which contains the provision for accumulation. Because, if it were not so, a man might say, "I give my silver watch to *A. B.*," and then, "I give all my real and personal estate to trustees, to accumulate for a period of fifty years, if *A. B.* shall so long live;" and then give it all to the children of the person to whom he had given the silver watch. It is called by Counsel, in arguing the case on the appeal from *Shaw* v. *Rhodes*, the case of *Evans* v. *Hellier*, a fraud on the Act of Parliament to put such an interpretation on it; and Vice-Chancellor *Knight Bruce*, in the case of *Morgan* v. *Morgan*, held that a gift of specific chattels to the parents of a child for whose benefit a sum of money was directed to be accumulated for more than twenty-one years from the death of the testatrix, would not bring the case within the operation of the second section of the Act.

It is, however, unnecessary for me to decide this second point, if I am right on the first point, that these are not portions within the meaning of the second section; and, being of that opinion, I shall declare that, from the expiration of the twenty-one years from the death of the testator, the provision for accumulating his personal estate, is void.

Then comes the question to whom is it to go? It was contended that it should go to the heir-at-law of the testator, by reason of the direction to lay it out in real estate. But it must be remembered that the heir-at-law can take nothing as heir, but what was the testator's own real estate. No direction in the will to lay

1851.

BOURNE v. BUCKTON.

out the testator's personal estate in realty, will make the land purchased pursuant to that direction, the testator's realty. He may give and devise it as if it had been his own real estate, and then it would go to his heir-at-law; but, in the absence of any such particular gift or devise, what was his personal estate must go to his next of kin, if undisposed of by his will. Therefore, I shall make a declaration, in the terms of the prayer of this petition, that the Petitioners, who are the personal representatives of *Edwin Stains*, the brother and sole next of kin of the testator at his death, are entitled to receive the income of the testator's residuary personal estate and of the accumulations thereof, from the expiration of twenty-one years from the death of the testator until the death of *Elizabeth Stains*.

The costs of all parties must be paid out of the property which I determine to be undisposed of.

In the course of the judgment, Mr. *Malins*, *amicus Curiæ*, mentioned a case of *Swabey* v. *Hamer*, decided by V. C. *Knight Bruce* but not reported.

The *Vice-Chancellor* said that it was precisely in point, and that it confirmed the opinion which he had formed upon the case before him.

IN THE MATTER OF BRYAN'S TRUST, *EX PARTE* W. DARNBOROUGH.

1851. 4th Nov.

Will. Construction.

Testatrix gave legacies to her son, *John Bryan*, and to her daughters, *Ann*, the wife of *James Winson*, *Harriet*, the wife of *William Darnborough*, and *Mary*, the wife of *William Dadley*: and she gave her stock in the bank to her said daughter, *Mary Dadley*, for life, and after her death, to be equally divided between *the husbands of her said daughters and her son, or such of them as might be living at* Mary Dadley's *decease*. All the husbands named in the will, survived the testatrix; but *William Darnborough* was the only one of them who survived *Mary Dadley*. *Ann Winson*, however, married a second time, and her second husband was living at *Mary Dadley's* death, and he claimed a share of the stock. But the Court held that, by the words: "the husbands of my said daughters," the testatrix meant their husbands *whom she had named;* and, therefore, that *William Darnborough* was exclusively entitled to the stock.

ANN BRYAN made her will, dated the 16th of May 1808, in the following words:

"I give and bequeath unto my son, *John Bryan*, the sum of twenty pounds; unto my daughter, *Ann*, the wife of *James Winson*, ten pounds and my diamond ring; unto my daughter, *Harriet*, the wife of *William Darnborough*, ten pounds, also my gold watch and seal; unto *Mary Bryan*, the wife of my son, *John Bryan*, my pearl hoop ring. I also give and bequeath unto my friend, Mr. *Burrell*, of *Surrey Place*, two guineas for a ring; likewise, to Mrs. *Burrell*, a like sum for the same purpose, in remembrance of me: Lastly, I give and bequeath unto my daughter, *Mary*, the wife of *William Dadley*, the ring given me in remembrance of the late *John Weatherhall*, also all my wearing apparel and the several articles of furniture particularized in the schedule affixed hereto: And, further; after my funeral expenses and the aforesaid legacies being duly discharged, I will and direct that the interest arising from the stock then remaining in my name in the Bank of *England*, be received and paid, half-yearly, to my said daughter *Mary*, during her life, and for her own use, by my executor, his heirs or assigns; and that her receipt only for the same be his or their discharge. I also will and direct, notwithstanding what is directed in the preceding clause, that, should my executor

1851.

BRYAN'S TRUST.

think proper to sell the principal of the said stock out of the Bank, and purchase an annuity, with the proceeds of the said stock, for the life of my said daughter, to be received by him and paid to her receipt only, I do hereby authorize and empower him so to do; but, should he not so dispose of the said stock, then I give and bequeath, after the decease of my said daughter *Mary*, the whole of the said stock to be equally divided between *the husbands of my said daughters and my son, or to such of them as may be living at the time of her decease.* And I do hereby appoint my son, *John Bryan*, whole and sole executor of this my last will and testament."

The testatrix died on the 9th day of March 1809. Her son and her three daughters named in her will, and their husbands therein also named, survived her. *John Bryan*, her son, died in 1824. *James Winson*, the husband of her daughter, *Ann Winson*, died in February 1829. In July following, *Ann Winson* married *Joseph Strutt*. *William Dadley*, the husband of the testatrix's daughter, *Mary Dadley*, died in May 1849. *Mary Dadley* did not marry again. She died in April 1850. *Joseph Strutt* and the Petitioner, *William Darnborough*, were the only husbands of the testatrix's daughters who were living at the death of *Mary Dadley*; and *Darnborough* claimed to be entitled to the whole of the testatrix's stock which remained after payment of her debts and legacies, because *Strutt* married *Ann Winson* after the death of the testatrix.

Mr. *Bethell* and Mr. *E. F. Smith*, in support of the petition, cited *Garratt* v. *Niblock* (*b*).

Mr. *C. P. Cooper* appeared for the testatrix's personal representative.

(*b*) 1 Russ. &. Myl. 629.

1851.

BRYAN'S TRUST.

Mr. *Grenside*, for *Joseph Strutt*, said that *Strutt* was the husband of one of the testatrix's daughters named in her will, and that he was living at *Mary Dadley's* decease; and, therefore, he was entitled to a moiety of the stock: that, in *Garratt* v. *Niblock*, the testator used the expression: "My beloved wife;" which showed that he meant his *then* wife and not an after-taken one: that, under a gift to the children of *A. B.*, after-born children would take: besides, the gift in this case was not immediate, but a gift in remainder, after a life-interest.

Mr. *E. F. Smith*, in reply, said that the testatrix named the husbands of her daughters and referred to her daughters as their wives: and that the gift in question was not a gift to a class, as a gift to children was, but a gift to certain individuals, *nominatim*.

The VICE-CHANCELLOR:

The case of *Garratt* v. *Niblock* does not govern this; because the testator there used the expression: "My beloved wife;" which showed that he meant a particular person.

The question, here, is whether the testatrix, when she used the words: "the husbands of my said daughters," had in view a class, or certain individuals. She designates her son as a person who was to share, in the gift, with the husbands of her daughters; and it is evident that she meant not any son of hers who might survive the tenant for life, but her son, *John Bryan*, whom she had before named: and, that being so, the necessary inference is, that, by the words: "the husbands of my said daughters," she meant the persons whom she had before named and described as such, and whom she knew and probably was attached to. Therefore, I am of opinion that Mr.

1851.

BRYAN'S TRUST.

Darnborough is entitled to the fund in Court, to the exclusion of Mr. *Strutt*.

1851.
12th and 14th Nov.

Will. Construction. Petition. Costs.

Testator directed that a sum of stock standing in his name should be divided between and amongst the relations of his late wife, in such manner, shares, and proportions as would have been the case, in case she had died possessed of it, a spinster and intestate. The wife had sixteen next-of-kin living at her death. Five of them died before the testator.

Held that the eleven survivors took only a sixteenth each, and that the other five shares lapsed into the residue; and ought to bear the costs of the Petitioners and Respondents.

IN THE MATTER OF HAM'S TRUST. EX PARTE BILES.

JOHN HAM executed a bond in the penalty of 1600*l.*, to *Joseph Kingston Warne*, dated the 7th of September 1799: and, after reciting that a marriage was intended shortly to be solemnized between *John Ham* and *Eleanor Biles;* and that it had been agreed, between them, that 800*l.* should be settled and secured in manner and form as thereinafter mentioned, namely, that *Ham* should have the use and benefit of the 800*l.* during his life, and that, from and after his decease, *Eleanor Biles* should have the interest of it during her life; and, after both their deaths, that the principal should be divided between the children of their marriage in such manner and proportion as the survivor of them should give, direct or appoint by his or her will, and, in default thereof, to and amongst such children equally, share and share alike; and, in case there should be no child or children of the marriage, then that the 800*l.* should be paid to such person or persons as *Eleanor Biles* should, by her last will and testament in writing (which she was thereby empowered to make notwithstanding her coverture) give, direct, or appoint: the condition of the bond was expressed to be that if *Ham's* heirs, executors, or administrators should pay 800*l.* to *Warne*, his heirs, executors, administrators, or assigns within six calendar months after *Ham's* decease, with interest from his decease, in trust nevertheless for *Eleanor Biles,* if she should be then living, and for her

1851.

HAM'S TRUST.

to receive the interest for her life; and, in case of her death, then in trust to pay the 800*l.* and the growing interest thereof, to and amongst such child or children of *Eleanor Biles* by *Ham*, in such manner and proportion as the survivor of them should, by his or her will, give direct, or appoint; and, in default of such gift, direction or appointment, to and amongst such child or children equally, and, in case of no child, then in trust to pay the 800*l.* and the growing interest thereof, unto such person or persons as *Eleanor Biles* should, by her will, give, direct, or appoint, and, in default of such gift, direction, or appointment, to her executors or administrators; then the bond should be void.

Eleanor Ham died, in July 1844, intestate, without having made any appointment of the 800*l.* secured by the bond, and without having had any issue. On the 17th of September following, her husband took out letters of administration to her effects. On the 13th of the same month he made his will and, on the same day, a codicil thereto. The codicil was as follows:—

"Memorandum.—Whereas, on my marriage with my late wife, *Eleanor Biles*, I entered into a bond to leave her the sum of 800*l.* on my death, as in the said bond is mentioned; and I intend, shortly, to sell out 6000*l.* stock, part of the sum of 20,000*l.* stock now standing in my name in the Three-and-a-half *per Cent.* Annuities, and to distribute the same, in my lifetime, *amongst her relations* in such manner as I intend, in lieu of any claims for the said sum of 800*l.* under the said bond. Now I do hereby will and direct that, in case of my death before carrying such my intention into effect, the said sum of 6000*l.* stock shall not be considered as part of my residuary estate, but shall be divided, *between and amongst*

1851.

HAM'S TRUST.

the said relations of my said late wife, in such manner, shares and proportions as would have been the case in case my said late wife had died possessed of the said sum of 6000*l. stock, a spinster and intestate.*"

Mr. *Ham* died on the 15th of February 1849, without having carried the intention expressed in his codicil into effect.

In obedience to an order made on a petition presented by a person who alleged that he was one of the relations and next of kin of Mrs. *Ham*, the *Master* found that the Petitioner and fifteen other persons were the nephews and nieces and next of kin of Mrs. *Ham*, *living at her death;* and that the petitioner and ten of the fifteen were her next of kin living *at her husband's death.*

The Petitioner then presented a petition praying that the *Master's* report might be confirmed; and that the Petitioner and the other next of kin living *at Mr.* Ham's *death, might be declared to be the parties entitled to the fund in Court which represented the* 6000*l. stock*, and that that fund might be equally divided amongst them.

Mr. *Walker* and Mr. *Sandys*, for the Petitioner, and Mr. *Malins*, Mr. *Grove*, and Mr. *Wolstenholme* for the other surviving next of kin of Mrs. *Ham*, contended that a gift to the relations of *A. B.*, was a gift to a class; and that only those members of the class who were living at the period of distribution, that is, at the death of the testator, were entitled under it.

Mr. *Bethell* and Mr. *Giffard*, for the personal representatives of the deceased next of kin of Mrs. *Ham*, said that the words: "in case my said late wife had died pos-

sessed of the said sum of 6000*l.* stock, a spinster and intestate," meant; "in case my wife had been possessed of the 6000*l.* stock at her death, and had died unmarried and intestate."

Mr. *K. Parker* and Mr. *Milne*, for the residuary legatees under the testator's will, said, first, that the testator, when he made the gift, evidently supposed that he was subject to some liability under the bond; but, as he was his wife's personal representative, he was subject to no such liability; and that the gift was void, as having been made under a mistaken notion of liability: secondly, that the gift was void for uncertainty; for there was nothing to show what relations of his wife the testator meant by the words: "the *said* relations of my late wife," none having been previously specified; and, lastly, that, if the gift was good, it was a gift to the next of kin of Mrs. *Ham* living at *her* death; and, therefore, the shares of the five who died before the testator, fell into the residue.

Mr. *Attwood* appeared for the testator's executors.

The following cases were cited. *Doe* v. *Over* (*a*), *Lee* v. *Pain* (*b*), *Doe* v. *Sheffield* (*c*), and *Viner* v. *Francis* (*d*).

Mr. *Walker* replied.

The VICE-CHANCELLOR:

The first question is whether the gift in the codicil is

(*a*) 1 Taunt, 263.
(*b*) 4 Hare, 201.
(*c*) 13 East, 526.
(*d*) 2 Cox, 190.

1851.

HAM'S TRUST.

void, as having been made on a mistaken supposition of legal liability to a debt.

The testator, certainly, refers to what he calls claims, on the part of his wife's relations, for 800*l.* under the bond: and I admit that that language may be considered to show that he supposed that they had some legal claim upon him. But it is clear that it may refer, and my impression is that it does refer to claims of a very different nature from claims constituting a legal liability. The testator may have thought that his wife's relations had a moral claim to his consideration, in consequence of his having succeeded to property which they would have taken if his wife had survived him and died intestate, or which she might have left to them if she had died testate. It is clear that he had liberal intentions towards her relations; else, why did he give 6000*l.* stock, to satisfy a liability which could not exceed 800*l.*? There is, therefore, no ground for saying that the gift is void, as having been made under an erroneous supposition of legal liability.

The next question is, is it void for uncertainty in the description of the persons to take?

The testator recites that he intended to sell out the 6000*l.* stock, and to distribute the same, in his lifetime, amongst his wife's relations: and, if he had sold it out, he might have done as he pleased with the money; he might have excluded some of his wife's relations, if he thought proper to do so, and might have given the others what he pleased. But he is there speaking of what he intended to do *by some act in his lifetime.* And he afterwards directs what is to done in case he does not do that act in his lifetime. He says: "Now I do, hereby, will

1851.

HAM'S TRUST.

and direct that, in case of my death before carrying such my intention into effect, the said sum of 6000*l.* stock shall not be considered as part of my residuary estate, but shall be divided between and amongst the said relations of my said late wife." When we look back to see who, "the said relations" are, we find they are, "her relations." Therefore, the gift is to be interpreted as if it were a gift of the 6000*l.* to be divided between and amongst, "the relations of my late wife." Now, a gift to the relations of a person named, is not void for uncertainty: it has been, generally, held to be a gift to the next of kin of that person. There may be something else in the will which makes it void for uncertainty; but it is not void of itself.

Being then of opinion that the gift is not void, either on the ground of mistaken supposition of debt or on the ground of uncertainty, the next point that I shall consider is, what the testator meant by the words: "in case my said late wife had died possessed of the said sum of 6000*l.* stock, a spinster and intestate." It seems to me to be clear that he meant, in case his wife (whom he calls his *late* wife) had been possessed of the 6000*l.* stock at her death, and had died a spinster and intestate.

The next point is this. It is said that the gift is a gift to a class of persons; and that, according to the decided cases, if some of the members of the class die in the interval between the date of the will and the period of distribution, that is, the death of the testator, those who survive take the whole fund: and I admit that that would have been the case here, if the gift had been simply to the relations of the testator's wife. But the testator directs that the stock shall be divided between and amongst the relations, that is, the next of kin, of his wife

1851.

HAM'S TRUST.

in such manner, shares and proportions as would have been the case, in case she had died possessed of it a spinster and intestate. He means, by those words, that the stock shall go to the persons who, at her death, would have been entitled, by law, to her personal estate, in case she had died a spinster and intestate; and that each of those persons shall take, not only in the same manner, but the same share and proportion as he would have taken under the Statute of Distributions.

It appears that the wife, at her death, left sixteen nephews and nieces her next of kin: and, if she had died a spinster and intestate, the manner in which they would have taken her personal estate, would have been as tenants in common, and the shares and proportions in which they would have taken it, would have been sixteenths. But, if I were to hold that the eleven who survived the testator are to take the whole fund among them, they would not take it either in the same manner or in the same shares and proportions as the testator says they are to take it; and, therefore, I should set aside the direction, contained in the codicil, as to the manner, shares and proportions; which I am not at liberty to do.

Taking the whole of the codicil together, my opinion is that the persons to whom the testator gave the 6000*l.* stock under the designation of the relations of his late wife, are her sixteen next of kin who were living at her death, and that it is given to them as tenants in common. The consequence is that the shares of the five who died in the lifetime of the testator, lapsed and belong to the residuary legatees.

After the judgment had been delivered, a discussion arose as to the costs of the petitioner and respondents.

Mr. *Malins* contended that they ought to be paid out of the testator's residuary personal estate, and cited *In re Sharpe's Trustees* (*a*).

Mr. *K. Parker* and Mr. *Milne* contended that they ought to be paid out of the fund in Court; and cited *In re Ross's Trust* (*b*), *In re Bartholomew's Trust* (*c*), *In re Croyden's Trust* (*d*).

The *Vice-Chancellor* said that he had no jurisdiction over the residue; indeed, he could not tell whether there was any or not; but he had jurisdiction over the whole of the fund which had been paid into Court; and that, five-sixteenths of that fund having lapsed, he should, in exact accordance with the principles of the Court, direct the costs of all parties to be paid out of those five-sixteenths.

(*a*) 15 Sim. 470.
(*b*) *Ante*, Vol. I. p. 196.
(*c*) 16 Sim. 585.
(*d*) 19 Law Journ. 172.

1851: 7th, 8th and 10th Nov.

Estate tail. Executory devise. Will. Construction.

IN THE MATTER OF THE WILTS, SOMERSET AND WEYMOUTH RAILWAY COMPANY'S ACT, AND OF THE LANDS CLAUSES CONSOLIDATION ACT, 1845.

EX PARTE MATTHEW DAVIES, THE YOUNGER.

A testator who died in 1833, devised his residuary real and personal estate to his eldest son and his heirs, executors, &c.: provided and his will was that, in case his said son *should die without leaving any lawful issue of his body*, such part of his said residuary estate as was freehold, and situate in certain places, should, *at his death*, be divided into two equal parts; one of which parts he gave to his second son, and his heirs; and the other, to his daughter and her heirs.

MATTHEW DAVIES, the elder, by his will dated the 23rd of October, 1832, gave, devised and bequeathed, to his son *Charles*, his messuages, tenements, out-houses, gardens, hereditaments and premises, with the fixtures thereto belonging, in *Warminster*, which he purchased of Mr. *Slade*, and then in his own occupation and in the occupation of Mr. *Lawes* as his tenant; to hold to his said son, his heirs, executors, administrators, and assigns, subject to the payment of an annuity of 50*l.* to his wife for her life: and he willed that the sum of 1000*l.* settled on his late daughter *Ann*, might be paid, to the trustees named in her marriage settlement, as soon after his death as might be: and, after giving some specific and pecuniary legacies, he gave, devised and bequeathed all the rest, residue and remainder of his monies, securities for money, goods, chattels, effects, property and estate, both real and personal, to his wife, his two sons *Matthew* and *Charles* and his daughter *Frances*, their heirs, executors and administrators,

Held, as to such part of the testator's residuary estate as was freehold and situate in the places named, that his eldest son took, not an estate tail in it, but an estate in fee, with an executory devise over to take effect at his death, in case he should have no issue then living.

1851.

EX PARTE DAVIES.

upon trust to permit his wife to receive the rents, issues, profits, dividends, interest and income thereof for her life; and, at her death, he gave the sum of 2500*l.*, part of such residuary estate, to his son *Charles*, on condition that he joined in the execution of the trusts of the will and assisted in the management of the testator's affairs; such legacy, nevertheless, to become a vested interest in him at the time of the testator's death. And the testator gave and bequeathed the sum of 4000*l.*, other part of such residuary estate, to his trustees and executors thereinafter named, in trust for the separate use of his daughter *Frances;* and, upon her death, he gave the 4000*l.* to her children in such parts, shares and proportions, manner and form, as she should, by any deed or deeds, instrument or instruments in writing to be by her executed and attested as therein mentioned, or by her will duly executed and attested, appoint, give or bequeath the same; and, in default of such appointment, gift or bequest, upon trust to pay the said principal sum of 4000*l.* unto and equally amongst and between all her children who should be living at her death and the issue of any such children or child who might die in her lifetime, and their respective executors, administrators and assigns, as tenants in common (the issue of such children or child, so dying, to take their parents' share only); and, if but one child, then to such only child, his or her executors, administrators or assigns: And he gave the sum of 3000*l.*, other part of such residuary estate, unto and equally amongst and between all the children of his late daughter *Ann*, share and share alike, to be paid them in three months after the decease of his wife: And, as to the remainder of his residuary estate, both real and personal, not thereinbefore disposed of, he gave, devised and bequeathed the same (*subject to the proviso thereinafter contained*) *to*

1851.

EX PARTE DAVIES.

his son Matthew, his heirs, executors, administrators and assigns, hoping that his children might never meet with the troubles and anxiety of mind which he had undergone, and that they might use their best endeavours to live in love and unity with each other: Provided also, and it was his will that, in case his son, *Matthew, should die without leaving any lawful issue of his body*, such part of his said residuary estate so given to him as might be in the nature of freehold, situated in *Warminster* and *Westbury*, should, *at his death*, be divided into two equal parts; and he gave, devised and bequeathed *one-half of such freehold property to his son Charles, his heirs and assigns, and the other half to his daughter Frances, her heirs and assigns; his son Matthew having it in his power to give sufficient to the children of his late sister Ann*, (if he thought proper, but not otherwise) out of the personal estate which he had already had and would have on the death of his mother.

The testator died in September 1833. His widow died in August, 1850.

The question was whether *Matthew Davies*, the son, took an estate-tail, or an estate in fee with an executory devise over, in such parts of the testator's residuary estate, as was freehold and situate in *Warminster* and *Westbury*.

Mr. *Malins* and Mr. *Berkeley*, for *Matthew Davies*, said that the words: "in case my said son, *Matthew*, shall die without leaving any lawful issue of his body," referred to a failure of issue of *Matthew, whenever it might take place*, and cut down the estate in fee given to *Matthew* by the preceding words, to an estate-tail; and that the words, "at his death," which

were subsequently used, made no difference. *Walter* v. *Drew* (*a*), *Doe* v. *Cooper* (*b*), *Dunk* v. *Fenner* (*c*), *Broadhurst* v. *Morris* (*d*).

Mr. *Selwyn*, for the testator's daughter, *Frances*, and her husband, contended that *Matthew Davies* took an estate in fee, with an executory devise over, to take effect on his dying without leaving issue living at his death. He cited *Doe* v. *Frost* (*e*), *Doe* v. *Webber* (*f*), *Lytton* v. *Lytton* (*g*), *Nichols* v. *Hooper* (*h*), and *Baker* v. *Tucker* (*i*). And he distinguished the principal case from the cases cited for *Matthew Davies*, on the following grounds: that the first gift was a gift in fee, and not for life; that the property was given over in case *Matthew* should die without *leaving* issue; and the gift over was to take effect *at* his death, and not *after* his death. He also referred to the words at the end of the proviso: "*he, my said son, Matthew*, having it in *his* power to give sufficient unto the children of his late sister *Ann*, (*if he thinks proper*, but not otherwise) out of the personal estate which he has already had and will have on the death of his mother;" and said that those words showed that the testator contemplated, not an indefinite failure of *Matthew's* issue, but a failure of his issue at his death; and that it was immaterial that they referred to personal estate.

Mr. *Malins*, in reply, said that the personal estate was given absolutely to *Matthew:* that the words relied on by

(*a*) Comyn's Rep. 373.
(*b*) 1 East, 229.
(*c*) 2 Russ. & M. 557.
(*d*) 2 Barn. & Ad. 1.
(*e*) 3 Barn. & Ald. 546.
(*f*) 1 Barn. & Ald. 713.
(*g*) 4 Bro. C. C. 441, see 459.
(*h*) 1 P. W. 198.
(*i*) 14 Jurist, 771.

1851.

EX PARTE DAVIES.

Mr. *Selwyn* related, solely, to personal estate; and, therefore, they could not control a proviso which related solely to real estate: that the expression, "at his death," meant, "at his death without issue;" and, in *Broadhurst* v. *Morris*, the gift over was to take effect in default of issue of *W. Broadhurst*, *at* his decease; and yet the Court held that *W. Broadhurst* took an estate-tail: that the proviso showed that the testator, when he gave the property to *Matthew and his heirs*, meant his lineal heirs: *Doe* v. *Ellis* (*j*).

The VICE-CHANCELLOR:

The right of *Matthew Davies*, the son, to what he asks by his petition, depends upon the construction to be put upon his father's will; and the question is, whether he takes an estate in fee, with an executory devise to take effect in the event of his dying without issue living at the time of his death, or whether he takes an estate-tail, with a remainder limited upon it.

By the will, the testator, after giving certain specific gifts not material to the present question, devises all the rest, residue, and remainder of his money, securities for money, goods, chattels, and effects, property and estate, both real and personal, to his wife and his two sons, *Matthew* and *Charles*, and his daughter *Frances*, in trust, to permit and suffer his wife to take the rents, &c., during her life; and, at her death, he gives the sum of 2500*l.*, part of his residuary estate, to his son *Charles*, on certain conditions as to executing the trusts of his will and assisting in the management of his affairs. Then he gives another sum of 4000*l.* to his trustees and executors, upon certain trusts for the benefit of his daughter

(*j*) 9 East, 382.

1851.

Ex parte Davies.

Frances: and another sum of 3000*l.* among the children of his deceased daughter, *Ann:* and then follows the devise upon which the question immediately turns: "And, as to the remainder of my residuary estate, both real and personal, not hereinbefore disposed of, I give, devise, and bequeath the same (subject to the proviso hereinafter contained), unto my son, *Matthew Davies*, his heirs, executors, administrators, and assigns:" so that, thus far, all the residue, both of the realty and of the personalty, is given to *Matthew Davies*, his heirs, executors, administrators, and assigns. Then comes this proviso: "Provided also, and it is my will that, in case he, my said son, *Matthew*, shall die without leaving any lawful issue of his body, such part of my said residuary estate so given to him as before mentioned as may be in the nature of freehold, situate in *Warminster* aforesaid and *Westbury*, shall, at his death, be divided into two equal parts or shares. One equal half part or share of such freehold property I give, devise, and bequeath unto my said son, *Charles Davies*, his heirs and assigns; and the other half part or share thereof I give, devise, and bequeath unto my said daughter *Frances*, her heirs and assigns." Then he adds this clause, which was called to my attention after I was prepared to give my judgment; and, though I continue of the same opinion as I had then formed, it is still of service, as I shall hereafter show; "He, my said son *Matthew*, having it in his power to give sufficient to the children of his said sister *Ann* (if he thinks proper, but not otherwise), out of the personal estate which he has already had and will have on the death of his mother." The question, as I said before, is whether *Matthew*, in respect of the freehold part of the general residue devised to him, takes an estate in fee with an executory devise to take effect in

1851.

EX PARTE DAVIES.

the event of his not leaving issue at his death, or an estate-tail?

Now, the general principle applicable to the construction of a will with respect to a question of this sort, is that you are to look at the whole will, to see whether you are satisfied, upon the general effect of it, that the testator, when he speaks of the devisee dying without leaving any lawful issue of his body, is pointing to a failure of issue at the death of the devisee, or to an indefinite failure of issue. In the case before me, there is no question but that, by the first devise, *Matthew Davies* would be tenant in fee of the freehold, as well as absolute owner of the personal property; and, if he is cut down to an estate tail, it is by virtue of the words, "in case my said son shall die without leaving any lawful issue of his body;" and no doubt, according to the law, as it stood before the late Wills Act, those words: "In case he shall die without leaving any lawful issue of his body," would have made him tenant in tail; the word "leaving" being held not to fix the time to his death. But that was not the case with respect to personalty; and, in the case of *Forth* v. *Chapman* (*k*), those words were held to mean one thing with repect to realty, and to mean a totally different thing with respect to personalty. But I am now to interpret this will according to the law as it stood before the Wills Act, and without reference to that Act at all.

With respect to the cases cited, I will refer to two or three of the principal ones, in order to see how they help us.

(*k*) 1 P. W. 663.

1851.

EX PARTE DAVIES.

In *Walter* v. *Drew*, the testator willed that, if *Richard*, his eldest son, should happen to die and leave no issue of his body, then, after the death of *Richard*, he gave his lands of inheritance in a certain place, to *William*, his youngest son, to hold the same, after the death of *Richard*, to him and his heirs. It is to be observed that, in that case, there was no direct devise at all to the eldest son; but the Court held that he took an estate by implication, until he should die and leave no issue of his body; in other words, an estate tail. So that the Court considered that the time of the decease of *Richard* was not pointed out by the testator as the time at which the limitation to *William* was to take effect. We know that it is a rule that a limitation, if it can take effect by way of remainder, shall not take effect by way of executory devise; and the Court there came to the conclusion that there was an estate tail in the eldest son, and an estate in fee in remainder in the youngest son. I do not, however, think that that case at all governs the present.

The case of *Broadhurst* v. *Morris* was a case sent from a Court of Equity for the opinion of a Court of Law, in a suit for specific performance; and the question was whether the vendor had such an estate as enabled him to make a good title to the purchaser. The devise there was to *William Broadhurst* and his children lawfully begotten for ever. Stopping there, it was decided, and I think rightly, that *William Broadhurst* took an estate tail. But then came this limitation over: "But, in default of such issue at his decease, to *Alexander Bridoak*, his heirs and assigns for ever." Now, that limitation might have been read in two ways, by placing the comma, first before, and then after the words, "at his decease." But no opinion was given as to what estate the devisee over took. The only question

1851.

EX PARTE DAVIES.

put and answered was what estate the first devisee, *William Broadhurst*, took. The Court may, perhaps, have thought that the devise over was not an executory devise, to take effect in defeasance of the estate-tail, but that it was a contingent remainder, to take effect in the event of the estate-tail determining in a particular mode, namely, by *William Broadhurst* dying without issue living at his death. But, however that may be, that authority does not appear to me to govern this case.

The only other case referred to, which I think it necessary to make any particular observations upon (and I think that it is the most material one), is *Doe* v. *Frost.*

There, the limitation was to *William Frost* and his heirs for ever; and, in that particular, it resembles this. There was a clear devise in fee to the first taker. Then the limitation over was:—"And, if *William Frost* should have no children, child, or issue, the said estate is, on the decease of the said *William Frost,* to become the property of the heir-at-law, subject to such legacies as he, the said *William Frost*, may leave, by will, to any of the younger branches of the family." Now, the words in that case were, "on the decease." The words in this will, are; "at the decease:" and I confess I do not see any distinction between the two. I ought to have mentioned that the decision in that case, was that *William Frost* took an estate in fee, with an executory devise over to take effect in the event of his dying without leaving children at the time of his decease. It was contended that the ground of that decision was the last clause: "subject to such legacies as he, the said *William Frost*, may leave, by will, to any of the younger branches of the family." But, when I look at the judgments given

1851.

EX PARTE DAVIES.

by the learned Judges who decided that case, Lord Chief Justice *Abbott*, Mr. Justice *Bayley*, Mr. Justice *Holroyd*, and Mr. Justice *Best*, I find that, with regard to Mr. Justice *Bayley* and Mr. Justice *Holroyd*, each of them gave his judgment that it would be an estate in fee with an executory devise, independently of the clause relating to the giving of legacies. After giving that opinion, Mr. Justice *Bayley* adds that the clause about legacies corroborated the opinion which he had formed. Mr. Justice *Holroyd* decides that the limitation itself, created an estate in fee with an executory devise, and does not refer to that clause, even as corroborating his opinion. He rests his judgment, entirely, on the ground that, having regard to the words used, and, particularly, to the words: "on the decease of the said *William Frost*," the testator intended to give a fee, but a fee so far limited as that, if the devisee died without leaving issue living at his death, then the estate was to go over to some other person. However, Lord Chief Justice *Abbott* refers to the clause in question, and founds his judgment upon it. Mr. Justice *Best* simply stated that he concurred with the other Judges.

Now if, from the will in *Doe* v. *Frost*, you expunge the clause relating to legacies, I confess I do not see any distinction between the language of the will in that case, and the language of the will now before me: and, therefore, I must conclude, that the Judges who decided *Doe* v. *Frost*, would, upon this will, have decided, as they did there, that it was an estate in fee with an executory devise over. When I look at this will, I feel quite satisfied that the testator was referring to the period of the death of the devisee, as the period at which he intended, if there was then a failure of *Matthew's* issue, that there should be a devise over.

1851.

EX PARTE DAVIES.

Now there is, in this will, a clause certainly very different from the clause, relating to the giving of legacies, in *Doe* v. *Frost*. I collect, from the will itself, that the testator had three children living, and that he had had another child, a daughter, who was dead, leaving children. His eldest son, *Matthew*, his second son, *Charles*, his daughter, *Frances*, and the children of his deceased daughter, *Ann*, are the only members of his family who are at all referred to by his will; and that seems to have been the state of his family.

He has, first of all, given the whole of his real and personal estate to his wife for life. Then, after her death, there are certain sums to be appropriated upon certain trusts for the benefit of different children and their issue; and then he devises all the rest and residue of his property to his son *Matthew*, and in terms which make it an absolute gift. He does not put any limitation upon the absolute quality of the gift of any part of the estate, except a particular real estate, the estate at *Warminster* and *Westbury;* and, as to that, he says that, if *Matthew* shall die without leaving any lawful issue of his body, then it shall, at his death, be divided into two equal parts; and he gives one part to his second son *Charles,* and the other part to his daughter, *Frances;* not giving any share to the children of *Ann*, his deceased daughter. But then he adds this:—"He, my said son, *Matthew,* having it in his power to give sufficient to the children of his late sister *Ann* (if he thinks proper, but not otherwise) out of the personal estate which he has already had and will have on the death of his mother." It is true that he does not point to any legacy in terms: he does not say that *Matthew* shall have it in his power to give *by will;* nor does he point to anything as being given out of the estate which he is devising over. But,

1851.

EX PARTE DAVIES.

why did he insert that clause at all? He did not insert it for the purpose of giving any additional power to *Matthew;* for he had, already, given the whole personal estate to him, and had not cut down that gift at all. But his object in inserting it was to show that he did not include the children of *Ann* in the devise over, because *Matthew* had it in his power to make such provision for them as he might think fit out of the personal estate: and he may naturally enough have thought that, without his putting *Matthew* under any obligation, *Matthew* would do something for the children of his deceased sister *Ann.*

I wish it to be understood that I do not, in the least, decide this case on the ground of that last clause. Indeed I was prepared to deliver my judgment before that clause was brought to my attention; but it certainly is a matter which influences my mind to a certain extent, in coming to the conclusion that the period to which the testator points as the period at which, by reason of the failure of issue of *Matthew*, the devise over is to take effect, is the precise period of the death of *Matthew;* and that he did not intend it to take effect on an indefinite failure of the issue of *Matthew.*

1851: 13th Nov.

Joint-stock Companies winding-up Acts. Liability of the members of a joint-stock company.

The members of a completely formed joint-stock company, are not liable for the expenses incurred in attempting to form the company, unless they have made themselves liable, either expressly or impliedly, after the complete formation of the company. Therefore, where the charges in a solicitor's bill, for business done, for the company, before its complete formation, could not be distinguished from the charges for business done subsequently, the Court held that the Master charged with the winding-up of the company, had rightly allowed the bill only as a claim, with liberty to the solicitor to bring such action as he might be advised.

IN THE WINDING-UP OF THE INDEPENDENT ASSURANCE COMPANY.

TERRELL'S CASE.

THE above-mentioned Company was provisionally registered on the 13th of February 1847. Mr. *Terrell*, a solicitor, had done business for the Company prior to that day; and, at a meeting held on the 15th day of May following, at which he was present, he was appointed solicitor to the Company, and it was resolved that no director should be personally liable for the salary of any officer of the Company; and that no officer should obtain payment for his services, until a sufficient sum should be obtained, by the funds of the Company, for that purpose; nevertheless, the first fund which should be formed by the payment of the deposits on the shares to be taken by the directors and others, should be appropriated to the payment of the expenses of the formation of the Company. The deed of settlement was dated the 24th August 1848; and, at a meeting of the directors held on the 4th October 1848, it was resolved that 60*l.* should be paid to Mr. *Terrell*, on account of stamps required for the deed of settlement prior to complete registration. On the 25th October 1848, it was resolved that the provisional appointment of certain members of the board of directors, and of Mr. *Terrell* and certain other officers of the Company, should be confirmed. On the 29th the Company was completely registered. The winding-up order was made on the 3rd of February 1850.

1851.

TERRELL'S CASE.

Mr. *Terrell* having delivered his bill for business done for the Company during the whole of the time that he had acted as solicitor to the Company, the *Master* charged with the winding-up of the Company, allowed the bill only as a claim, and gave Mr. *Terrell* liberty to bring such action as he might be advised.

Mr. *Malins* and Mr. *W. H. Terrell*, for Mr. *Terrell*, now moved that the *Master's* order might be discharged. They contended that the *Master* ought to have allowed *the whole* of the bill as a debt due from the Company, on the ground that Mr. *Terrell's* appointment had been recognized by the Company after its complete formation. They cited *Cope's case* (*a*), and *Prichard's case* (*b*).

Mr. *Bethell* and Mr. *Roxburgh* appeared for the official manager, and cited *Lloyd's case* (*c*).

The VICE-CHANCELLOR:

The object of the resolution to which Mr. *Terrell* was privy, was merely to protect the persons who were then endeavouring to form the Company from being personally liable to the officers of the Company; and I have not heard a word that raises a doubt, in my mind, that Mr. *Terrell* is a creditor of the Company for the business done by him for the Company subsequent to the 24th August 1848. But the members of a company, when formed, are not liable to the expenses incurred in forming the company, unless they have, either expressly or impliedly, made themselves liable. There is, however, no sufficient evidence, in this case, to satisfy me that there was any contract, or anything in the nature of a contract,

(*a*) *Ante*, Vol. I. p. 54.
(*b*) *Coram Knight Bruce*, V. C., but not reported.
(*c*) *Ante*, Vol. I. p. 248.

1851.

TERRELL'S CASE.

that the Company should be liable for the preliminary expenses. Nor, on the other hand, am I satisfied that there are not matters in this case, from which it may be held that there was an implied contract that the Company should be liable for those expenses: I allude to the resolution, of the 4th October 1848, that 60*l.* should be paid, to Mr. *Terrell*, on account of the stamps required for the deed of settlement, and to the resolution of the 25th of that month, that his provisional appointment to be solicitor to the Company should be confirmed. Therefore, if I could distinguish between that portion of the bill as to which I have no doubt that the Company are liable, and that portion of it as to which I am not satisfied of their liability, I should direct the former portion to be taxed, and an action to be brought with respect to the latter. But, as one portion of the bill cannot be distinguished from the other, I think that the *Master* has done rightly in allowing the whole as a claim; and, therefore, I shall not interfere with his order.

Motion refused. The costs of the Official Manager to be paid out of the estate.

IN THE MATTER OF SPOONER'S TRUST, *EX PARTE* ISABELLA MOURITZ, WIDOW, AND OTHERS.

1851.
12th Nov.

Wills Act. Construction. Appointment. Power.

A testatrix having a general power of appointment over a sum of stock under the will of *T. S.*, appointed the stock to her sons, *Joseph* and *John* and her other children, equally: and she left any other sum of money or property to which she then was or might thereafter become entitled under the will of *T. S.*, to be divided amongst such of her children as might be living at her death: and she constituted *Joseph her residuary legatee*. *John* died before her.

Held that *Joseph* was entitled to the share of the stock intended for *John*.

THE will of *Thomas Spooner*, dated the 4th of March 1833, was partly as follows:—

"I direct my executors to lay out and invest the sum of 2000*l.* in their names, in the purchase of Bank Three *per Cent.* Annuities, and to pay the dividends thereof to my cousin, Mrs. *Ann Duncan*, widow, and to her assigns, for the term of her natural life; and, after her decease, to transfer the annuities so to be purchased unto such person or persons, and in such shares and proportions as my said cousin, *Ann Duncan*, shall, by her will, or any codicil thereto, to be respectively signed in the presence of at least one witness, direct and appoint."

The testator died on the 2nd of March 1839. His executors, in pursuance of the above direction in his will, invested 2000*l.*, part of his personal estate, in the purchase of 2209*l.* 15*s.* 11*d.*, Consols, in their names, and paid the dividends of the stock to Mrs. *Duncan* during her life. She died on the 26th of August 1850, having made her will, dated the 13th of August 1841, in the following words:—

"I, *Ann Duncan*, do hereby, in exercise of the powers in this behalf given to me by the will of *Thomas Spooner*, Esq., deceased, dated the 4th day of March 1833, *direct and appoint that the sum of* 2000*l.*, *in which I have a life interest under such will, and the Bank Annuities upon which the same may be invested, shall, after my de-*

1851.

SPOONER'S TRUST.

cease, be paid and transferred to my daughters, Isabella Mouritz, *widow*, Mary Ann Duncan, Rachel Duucan, *and* Dora Duncan, *spinsters, and my sons*, John Duncan *and the Rev.* Joseph Duncan, *clerk, share and share alike.* And, as to any further or other sum of money, or other property to which I now am or may hereafter become entitled unto under the will of the said late *Thomas Spooner*, who was my cousin german, I leave to be divided amongst such of my children as may be living at my decease, share and share alike. I hereby nominate, constitute, and appoint my said son, the Rev. *Joseph Duncan*, and *John Woolsey, Esq.*, executors of this my last will and testament, *constituting my said son, the Rev.* Joseph Duncan, *my residuary legatee.*"

John Duncan died, without issue, in the testatrix's lifetime. The petition was presented by his brothers and sisters named in their mother's will, stating, amongst other things, that, by the death of *John Duncan* without issue, one-sixth of the 2209*l.* 15*s.* 11*d.* stock, *lapsed and fell into the residue bequeathed to the Petitioner, Joseph Duncan*, and praying that the stock might be sold, and that two-sixths of the proceeds might be paid to *Joseph Duncan*, and one-sixth to each of the other Petitioners.

Joseph's claim to the one-sixth of the stock intended for *John*, was founded on the 27th sect. of the Wills Act, 7 Will. IV. & 1 Vict. c. 26, which enacts that a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an

execution of such power, unless a contrary intention shall appear by the will; and, in like manner, *a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.*

The petition now came on to be heard.

Mr. *Lewin,* in support of it, said that every person was presumed to know the law; and, therefore, the testatrix must be taken to have known of the 27th sect. of the Wills Act, and consequently to have meant, by constituting *Joseph* her residuary legatee, that he should take the one-sixth of the stock that had lapsed: *Carter* v. *Taggart* (*a*).

Mr. *Chandless*, for the widow and one of the next of kin of the testator (whose residuary personal estate was undisposed of), contended that it appeared, by the will, that the testatrix intended to exclude her residuary legatee from the property which was the subject of her power: for her will showed that she was well aware of the distinction between that property and the property which was the subject of her ownership, and that she intended the one to go in one channel, and the other to go in another channel. He cited *Easum* v. *Appleford* (*b*), and said that *Carter* v. *Taggart* had no application to the present case.

(*a*) 16 Sim. 423.

(*b*) 10 Sim. 274, and 5 Myl. & Cr. 56.

1851.

SPOONER'S TRUST.

Mr. *Lewin*, in reply, said that *Easum* v. *Appleford* supported his case; and he read the following passage in the judgment: "The residuary clause is understood to be intended to embrace everything not otherwise effectually given; because, as Sir *William Grant* expresses it in *Cambridge* v. *Rous*, the testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee; so that, upon failure of the particular intent, the Court gives effect to the general intent" (*c*).

The VICE-CHANCELLOR said that the words, "I constitute *A. B.* my residuary legatee," meant the same as, "I give all the rest and residue of my personal estate to *A. B.*:" That, with regard to a testator's own personal property, *A. B.* would take under such a residuary bequest, not only all that the testator had not attempted to dispose of by a particular bequest, but also everything which was the subject of an ineffectual particular bequest, whether such particular bequest failed by lapse or otherwise: That, under the 27th section of the Wills Act, a general residuary bequest operated as an appointment of the personal estate which the testator had power to appoint in any manner he might think proper: That, as a general residuary bequest would operate to pass all the personal estate over which a testator had such power of appointment as well as the testator's own personal estate, there would be an inconsistency in holding that such bequest would pass all that was ineffectually attempted to be specially *bequeathed*, but not that which was ineffectually attempted to be specially *appointed:* That the testatrix, in this case, had not manifested any intention to exclude, from the operation of the

(*c*) See 5 Myl. & Cr. 61 and 62.

residuary bequest, that which was ineffectually attempted to be specially appointed; and, therefore, *Joseph Duncan* was entitled, as residuary legatee of the testatrix, *Ann Duncan*, to the share of the stock that had lapsed; and an order must be made according to the prayer of the petition.

1851.

SPOONER'S TRUST.

SOLTAU *v.* DE HELD.

1851.
9th, 10th, 11th, and 23rd Dec.

Nuisance.
Bell-ringing.
Injunction.
Pleading.

PREVIOUSLY to 1817, a mansion-house in *Park Road, Clapham*, was divided into two messuages, but without there being any party-wall between them; and, on the 25th of March 1817, the Plaintiff took a lease of one of the messuages for sixty-nine years: and, with the exception of two intervals, he had, ever since, resided in it with his family. The other messuage was occupied as a private residence up to July 1848, when it was purchased by a religious order of Roman Catholics, called "The Redemptorist Fathers;" and they converted the ground-floor into a chapel, and appointed the Defendant, who was a priest of the Roman Catholic church, to officiate in it. In August 1848, the Defendant caused a wooden frame to be erected on the roof of the last-mentioned messuage, and a bell to be hung in it, which was rung, by his direction, five times on Monday, Tuesday, Wednesday, Thursday, and Friday; six times on Saturday, and oftener on Sunday, in every week: the ringing ordinarily commenced at five in the morning, and continued for ten minutes, to the great discomfort and annoyance of the Plaintiff and his family. On the 12th of October 1848, the Plaintiff sent the following letter to the Superiors of the establishment:—

"Sir or Sirs: As well on the part of myself and neighbours, *as the parish generally*, I have to complain of the great annoyance of the bell you have caused to be erected

Injunction granted, after a trial at law, to restrain the ringing of the bells of a Roman Catholic church, so as to occasion any nuisance, disturbance and annoyance to the Plaintiff, who resided very near to the church.

A *bill* may be filed to restrain a *public* nuisance, without making the *Attorney-General* a party, if the Plaintiff sustains special damage from the nuisance.

1851.

SOLTAU
v.
DE HELD.

on the roof of your house, and which is loudly tolled as early as five o'clock, and very frequently afterwards, during the morning, afternoon, and evening: we hope, on your receiving this representation, you will take immediate measures to abate this great nuisance, and thereby relieve me and my neighbours *and the rest of the inhabitants of this parish*, from any further disturbance." No answer was returned to that letter; and the ringing being continued, to the great annoyance of the Plaintiff and his neighbours, they, on the 21st December, 1848, (before which time the messuage had been duly certified and registered as a place of religious worship for Roman Catholics (*a*),) signed the following notice and served it upon Cardinal *Wiseman*, who exercised ecclesiastical jurisdiction over the Defendant as the priest of the chapel:—"To the Superiors, Directors, Managers, and Occupiers, of the Roman Catholic house and establishment at *Park Road*, *Clapham*, and to all others whom it may concern: we, the undersigned occupiers of dwelling-houses in the vicinity of the house and establishment above mentioned, desire to represent that we are subjected to a great inconvenience and annoyance from the loud and frequent ringing (often at unseasonable hours) of the large and harsh-sounding bell some time since erected upon an open frame on the roof of the said house. The practice we complain of, is offensive alike to our ears and feelings; disturbs the quiet and comfort of our houses; molests us in our engagements, whether of business, amusement, or devotion; and is peculiarly injurious and distressing when members of our household happen to be invalids: it tends also to depreciate the value of our dwelling-houses. Under these circumstances, we trust you will immediately take

(*a*) See 31 Geo. III. c. 32, and 2 & 3 Will. IV. c. 115.

1851.

SOLTAU
v.
DE HELD.

the present complaint into your serious consideration, and voluntarily redress the grievance, instead of constraining us to have recourse to the law, to abate what we all, from experience, deem a very grave, indeed, intolerable nuisance." A copy of that notice was served on Mr. *Harting*, the solicitor of the Cardinal and Defendant: and, on the 1st of February 1849, the Plaintiff's solicitor had an interview with Mr. *Harting*, who stated that he had seen the Cardinal and some other persons, on the subject of the notice; and added that the bell was never rung for any but public purposes; namely, purposes interesting to the Catholic population, and not for any household purposes; and that, in deference to the wishes intimated in the Plaintiff's letter of 12th October 1848, the hour of the early bell had been altered from five to six o'clock, and that, willingly, if they could, they would meet the desires of their neighbours still further; but *that* they could not do.

In May 1851, a Roman Catholic church with a steeple, was erected on the ground adjoining the chapel, and was opened on the 14th of that month, and, on that occasion, six bells, which had been placed in the belfry of the steeple, were rung nearly the whole day. The chapel bell was rung at five o'clock and a quarter before seven every morning: the steeple bell,* at a quarter to nine every morning, and a quarter before and a quarter past seven every evening. On 13th May 1851, a peal of six bells was rung several times: on the 14th, the peal continued, at intervals, during the whole day: on Sunday, the 18th, the chapel bell rang at five o'clock, the steeple bell, at a quarter to seven, and again at a quarter to nine. The chapel bell again rang at half-past ten. A peal of chimes was rung at eleven, and, again, at a quarter before one; again at a quarter before six, and again at a quarter be-

* *Sic.*

1851.

SOLTAU
v.
DE HELD.

fore eight. On Saturday the 24th May, the chapel bell rang, as usual, the three times above mentioned, and the steeple bell twice, and, in addition, a peal of the six bells was rung from half-past eight till a quarter to ten at night. On Sunday the 25th May, the chapel bell was rung at two different times, and the steeple bell seven different times. On Monday evening, the 2nd June, a peal of the bells was rung; and, on Saturday the 7th, a peal was rung from a quarter to eight to a quarter to nine. On Saturday the 8th of June, in addition to the ordinary bells, the chimes were rung several times up to nearly nine in the evening. The chapel bell and church bells were, subsequently to 20th of May, rung, daily, upon an average, as great a number of times as they had been rung upon the several occasions before mentioned, down to the time when the Plaintiff obtained a verdict in the action after mentioned.

The bill was filed on the 20th of November 1851, and, after stating as above, it alleged that, when a peal of the church bells was rung, the noise was so great that it was impossible for the Plaintiff, or the members of his family, to read, write, or converse in his house: that the ringing of the chapel bell and church bells was an intolerable nuisance to the Plaintiff, and, if the said bell or bells was or were permitted to be rung in the manner in which the same were so rung as aforesaid, it would be impossible for the Plaintiff to reside, any longer, in his house: that, in consequence of the before-mentioned grievance, the Plaintiff applied to the Defendant, to desist from ringing the said bells or any of them, so as to occasion any annoyance to the Plaintiff; and, the Defendant having refused to comply with that application, the Plaintiff, in June 1851, commenced an action against the Defendant to recover damages for the nuisance committed, to him, by means or

1851.

SOLTAU
v.
DE HELD.

in consequence of the before-mentioned ringing of the said bell or bells: that the action was tried on the 13th August 1851, when a verdict was found for the Plaintiff, with forty shillings damages and costs: that, on the 10th November 1851, judgment in the action was signed, and it remained unreversed.

The bill further alleged that, some time after the commencement of the said action, the chapel bell was removed, from the roof, to one of the sides of the chapel, and, after the 13th August, neither that bell nor the church bells were rung until Sunday the 9th November 1851; when the Defendant caused the church bells to be rung as follows: that is to say, one bell at a quarter before nine in the morning, for five minutes: one bell at twenty minutes past ten, for the like time: three bells at a quarter before eleven, for the like time: one bell at half-past six in the evening, for five minutes, and three bells at ten minutes to seven, for five minutes; and, on Sunday the 16th November 1851, the Defendant caused the said bells to be rung in the same manner and for the same times; and he threatened and intended not only to continue ringing the last-mentioned bells every Sunday in manner last aforesaid; *but also to ring peals of the said six bells, and to ring on week days, and also to ring the chapel bell;* and that the weights and sizes of the said six bells were as follows:—

	cwt.	qrs.	lbs.	Size in diameter. feet	in.
The 6th bell	9	0	20	3	3
5th „	7	3	7	2	11
4th „	6	1	3	2	9
3rd „	6	0	20	2	7
2nd „	4	3	9	2	4
1st „	4	1	11	2	3
	38	2	14		

1851.

SOLTAU
v.
DE HELD.

The bill further alleged that the tolling and ringing of the church bells on the 9th and 16th November 1851, caused considerable annoyance to Plaintiff and his family, and, when some of the more weighty of the bells were rung, it was impossible for the Plaintiff to read or converse without great difficulty: That, one of the Plaintiff's daughters being in a delicate state of health, the Plaintiff, during the period that the Defendant caused the church bells to be rung previously to the commencement of the action, was obliged to remove her to some more quiet place of residence; and, since the verdict and before the commencement of the ringing on the 9th November, the Plaintiff had caused his daughter to be brought back to his house; but, if the ringing was continued, he should be obliged again to remove her: That the ringing on the 9th and 16th November 1851, was and constituted a nuisance to the Plaintiff; and, if it was continued, the value of his house would be considerably diminished; and, if he should be obliged to leave it in consequence of the continuance of the ringing, he should have great difficulty in disposing of it, or would only be able to dispose of it at a considerable pecuniary sacrifice: That, if it were necessary, for the purposes of the performance of the ceremonies practised by persons professing the Roman Catholic religion, that their chapels and churches should have a bell for the purpose of its being rung occasionally; yet the ringing of peals of bells, or the ringing of bells or a bell for any purpose, religious or otherwise, ought not to be permitted if it occasioned a nuisance or annoyance to any person or persons residing in the neighbourhood; and that the Plaintiff's bedroom was not more than twenty yards distant from the chapel bell and the church bells.

The bill prayed that the Defendant and all persons acting under his directions or by his authority, might be

1851.

SOLTAU
v.
DE HELD.

restrained from tolling or ringing the chapel bell and the church bells, or any of such bells, and from permitting the said bell and bells, or any of them, to be tolled or rung: or that the Defendant and such persons as aforesaid, might, in like manner, be restrained from tolling or ringing the said bell or bells, or permitting the same or any of them to be tolled or rung, so as to cause or occasion any nuisance or annoyance to the Plaintiff or any of the members of his family residing at his residence in *Park Road, Clapham.*

On the day after the bill was filed, the Plaintiff served the Defendant with notice of a motion that the Defendant and all persons acting under his directions or by his authority, might be restrained from tolling or ringing the chapel bell and the church bells or any of them, or permitting them or any of them to be tolled or rung.

The Defendants put in a general demurrer to the bill, which now came on to be argued.

Mr. *Campbell* and Mr. *Bagshawe*, in support of it, said, first, that the bill stated a case of public nuisance; for it alleged that the ringing of the bells was a nuisance not only to the Plaintiff, but to his neighbours, and, therefore, the suit ought to have been commenced by information, or, at all events, by information and bill, if the Plaintiff was particularly affected by the nuisance: 3 Blackst. Comment. 219, *Iveson* v. *Moore* (*a*), Mitf. Plead. 168, *Baines* v. *Baker,* (*b*) *Anon.* (*c*), *Crowder* v.

(*a*) Com. Rep. 58.
(*b*) Amb. 158.
(*c*) 3 Atk. 750. This is the same case as that reported by Ambler.

1851.

SOLTAU v. DE HELD.

Tinkler (*d*), *Hudson* v. *Maddison* (*e*), *The Att.-Gen.* v. *The Foundling Hospital* (*f*), *Att.-Gen.* v. *Nichol* (*g*), *The Fishmongers' Company* v. *The East India Company* (*h*), *The Att.-Gen.* v. *Johnson* (*i*), *Squire* v. *Campbell* (*k*).

Secondly, that the Plaintiff had not established his right at Law; and, until he had done so, he had no right to come into Equity for relief; that it was true that there had been a trial at law, but it had no bearing on the case made by the bill; for the ringing in respect of which the action was brought, was a ringing on every day of the week, and several times in every day; it began early and ended late: but the ringing complained of in the bill was a ringing, not of the chapel bell, but of the church bells, and on only one day of the week; that it commenced at a quarter to nine, and did not last more than twenty-eight minutes in the whole twenty-four hours: Mitf. Plead. 168 *et seq.*, *Lord Teynham* v. *Herbert* (*l*), *Anon.* (*m*), *The Fishmongers' Company* v. *The East India Company*, *Weller* v. *Smeaton* (*n*), *The Att.-Gen.* v. *Cleaver* (*o*), *Crowder* v. *Tinkler*, *Elmhirst* v. *Spencer* (*p*): that, under 31 Geo. III. c. 32, and 2 & 3 Will. IV. c. 115, Roman Catholics were as much entitled to make use of bells for the purposes of religious worship, as the rest of her Majesty's subjects were; and that the bells of every parish church were rung for a greater length of time than bells of the church in this case were.

(*d*) 19 Ves. 617; see 622.
(*e*) 12 Sim. 416.
(*f*) 4 Bro. C. C. 165.
(*g*) 16 Ves. 338.
(*h*) 1 Dick, 163.
(*i*) 2 Wils. C. C. 87.
(*k*) 1 Myl. & Cr. 459.
(*l*) 2 Atk. 483.
(*m*) 2 Ves. sen. 414.
(*n*) 1 Cox, 102.
(*o*) 18 Ves. 211.
(*p*) 2 Macn. & Gord. 45.

1851.

SOLTAU v. DE HELD.

Mr. *Malins* and Mr. *Tripp*, in support of the bill, said, first, that any individual who was aggrieved by a public nuisance, might institute a suit to restrain it, without making the *Attorney-General* a party: *The Att.-Gen.* v. *Forbes* (*q*), *Crowder* v. *Tinkler* (*r*), *Spencer* v. *The London and Birmingham Railway Company* (*s*), *Sampson* v. *Smith* (*t*), *Haines* v. *Taylor* (*u*), *Walter* v. *Selfe* (*x*). Secondly, that the action was brought and the verdict recovered for ringing the church bells as well as the chapel bell: besides, the bill charged and the demurrer admitted that the Defendant threatened and intended to ring the chapel bell and to ring the church bells *on week-days*; and that the Court had never decided that a bill to restrain a nuisance was *demurrable* because an action had not been brought; though it might, perhaps, refuse to grant the injunction on that ground.

Mr. *Campbell* replied.

The *Vice-Chancellor* said that he was of opinion that the demurrer could not be sustained; but that he should not then state his reasons, lest he should prejudice the argument on the motion, and that, when he had heard the motion, he would give his reasons for overruling the demurrer.

Mr. *Malins* and Mr. *Tripp* then made the motion.

Mr. *Campbell* and Mr. *Bagshawe* opposed it.

(*q*) 2 Myl. & Cr. 123. See Judgment.
(*r*) 19 Ves. 617; see 622.
(*s*) 8 Sim. 193.
(*t*) *Ibid.* 272.
(*u*) 10 Beav. 75; 2 Phil. 209.
(*x*) 15 Jurist, 416.

1851.

SOLTAU
v.
DE HELD.
23rd Dec.

The VICE-CHANCELLOR:

This case came before me, in the first instance, by way of demurrer; and, the demurrer having been overruled, a motion for an injunction was made. I abstained from expressing, at the time, my reasons for overruling the demurrer, from an apprehension that I might intimate some opinion or drop some expression that might prejudice the argument on the motion. I shall now state my reasons for overruling the demurrer, and then I shall give my opinion on the motion.

The demurrer is a general demurrer for want of equity; and, of course, by that demurrer, the Defendant undertakes to show that, upon the statements contained in the bill, the Plaintiff would not be entitled to any relief at the hearing of the Cause.

The statements of the bill are as follows, &c. &c. &c.

The first ground of demurrer to this bill is that the nuisance complained of is a public nuisance; and, therefore, the suit should have been instituted by the *Attorney-General;* and that it is not competent to the Plaintiff to file a bill respecting it.

With regard to that ground of demurrer, my opinion is that it is extremely questionable (to say the least) whether this is a public nuisance at all. But, in the view which I take of the case, it is scarcely, if at all, necessary to consider whether it be or be not a public nuiance. I entertain, however, very great doubt whether it be a public nuisance. I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance—an injury or a damage, to all persons who come within the sphere of its operation, though it may be so in a greater degree to

1851.

SOLTAU
v.
DE HELD.

some, than it is to others. For example, take the case of the operations of a manufactory, in the course of which operations volumes of noxious smoke, or of poisonous effluvia, are emitted. To all persons who are at all within the reach of those operations, it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that, to those who are nearer to it, it may be a greater nuisance, a greater inconvenience than it is to those who are more remote from it; but, still, to all who are at all within the reach of it, it is more or less a nuisance or an inconvenience. Take another ordinary case, perhaps the most ordinary case of a public nuisance, the stopping of the king's highway: that is a nuisance to all who may have occasion to travel that highway. It may be a much greater nuisance to a person who has to travel it every day of his life, than it is to a person who has to travel it only once a year, or once in five years: but it is more or less a nuisance to every one who has occasion to use it. If, however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operations, but is no nuisance or inconvenience whatever, or is even advantageous or pleasurable to those who are more removed from it, there, I conceive, it does not come within the meaning of the term public nuisance. The case before me is a case in point. A peal of bells may be, and no doubt is an extreme nuisance, and, perhaps, an intolerable nuisance to a person who lives within a very few feet or yards of them; but, to a person who lives at a distance from them, although he is within the reach of their sound, so far from its being a nuisance or an inconvenience, it may be a positive pleasure; for I cannot assent to the proposition of the Plaintiff's Counsel that, in all circumstances and under all conditions, the sound of bells must be a nuisance. And it

1851.

SOLTAU
v.
DE HELD.

is rather curious that one of the witnesses who was examined on the trial on the part of the Plaintiff, and who deposed, strongly, to the bells being an intolerable nuisance when he was in Mr. *Soltau's* house, says: "But, where I live at *Clapham*, which is about a furlong from the bells and with the intervention of trees, so far from their being a nuisance to me, they are a positive gratification; and I confess I should be extremely sorry if they were done away with." I mention *that* only by way of illustrating that, in this case, to some persons who live within the sound of these bells, they may be no nuisance at all; and, no doubt, are none; and, therefore, I very much doubt, indeed, my opinion is that the nuisance complained of in this case, could not be indicted as a public nuisance.

But, as I have said, it is of very little moment in the view I take of this case, whether the thing complained of be or be not a public nuisance. I may further make this observation, that it does not follow, because a thing complained of is a nuisance to several individuals, that, therefore, it is a public nuisance. One may illustrate that, very simply, by supposing the case of a man building up a wall which has the effect of darkening the ancient lights of half a dozen different dwelling-houses. It does not follow that, because half a dozen persons or a dozen persons are suffering by the darkening of their ancient lights by the one act, that, therefore, it is a public nuisance which can be indicted at the suit of the Crown, or for which the *Attorney-General* can file an information in this Court. It is a private nuisance to each of the several individuals aggrieved. However, in my further observations on this ground of demurrer, I will proceed on the assumption that it is a public nuisance; that is to say, that the Defendant is right in his contention that it is a

1851.

SOLTAU v. DE HELD.

public nuisance, and let us see what the consequence will be if it be so. Now, in the case of a public nuisance, the remedy at Law, is indictment; the remedy in Equity, is information at the suit of the *Attorney-General.* In the case of private nuisance, the remedy at Law, is action; the remedy in Equity, is bill. And this is the distinction which is pointed out in those passages cited, by Mr. *Campbell*, from the 3rd vol. of Blackstone's Commentaries and from Mitford's Treatise on Pleading. But it is clear that that which is a public nuisance, may be also a private nuisance to a particular individual, by inflicting on him some special or particular damage: and, if it be both, that is, if it be, in its nature, a public nuisance, and, at the same time, does inflict, on a particular individual, a special and particular damage, may not that individual have his private remedy at Law, by action, or, in Equity, by bill? That is the question which is to be determined with respect to this ground of demurrer. The Defendant's Counsel insist that he cannot; and several cases were cited in support of that proposition. But, on referring to those cases, it appears to me that they do not support that proposition.

In *Iveson* v. *Moore,* the case which was first cited and which is a very important one, the Judges of the King's Bench were divided in opinion: but the Counsel who cited that case considered that they had the authority of Lord *Holt*, (a very high authority,) for the proposition that an individual could not maintain an action at law for the damage to himself, where the subject of the action, was a public nuisance. Now, on examining the case, so far from supporting that proposition, it proves directly the contrary. I think it right to refer to the details of that case, rather par-

1851.

SOLTAU
v.
DE HELD.

ticularly. It is reported not only in Comyn, but much more fully in the first vol. of Lord Raymond's Reports (*y*). There the Plaintiff and Defendant were the owners of two adjoining collieries, and the action was an action on the case, and the declaration alleged that the Plaintiff had dug, from his own colliery, a considerable quantity of coals which he had for sale; and that the Defendant, in order to alienate and seduce customers and buyers from the Plaintiff's colliery and to appropriate those customers and procure them to go to his own colliery, stopped up a certain place in, through and over which the highway led; and that it continued so stopped up for a month; so that the carts for conveying the Plaintiff's coals could not pass that way. Now, so far, that was a public nuisance. But then the declaration went on, and alleged the special damage *per quod* the Plaintiff, during all that time, lost the benefit and profit of his colliery; and his coals dug out of his said colliery: "*magnopere deteriorati et depretiati devenerunt pro defectu emptorum, ex causâ prædictâ, sic impeditorum et obstructorum.*" That was the way in which he laid the special damage to himself. The jury found a verdict for the Plaintiff; and it was moved, in arrest of judgment, that the action could not be sustained; and a rule was obtained to show cause why the judgment should not be entered for the Defendant instead of the Plaintiff. The Judges of the Court of King's Bench were equally divided in opinion as to whether judgment ought to be for the Plaintiff or for the Defendant. *Gould* and *Turton* thought that judgment should be for the Plaintiff. *Rokeby* and *Holt* were of the contrary opinion, and thought judgment should be for the Defendant. But why? Not because

(*y*) Com. 58; 1 Ld. Raym. 486.

1851.

SOLTAU
v.
DE HELD.

either of them entertained the least doubt as to whether an individual could (although it was a public nuisance) maintain an action for a special damage to himself; but because they considered that the special damage was not laid, in the declaration, with sufficient accuracy and minuteness; and only on that ground. *Rokeby*, who coincided with *Holt*, expressed himself distinctly, and begins his judgment with the very proposition which is against the contention of the Plaintiff. He said that he would admit that no particular person could have an action for the general stopping of a way; first, because the offender is punishable at the King's suit; secondly, because multiplicity of actions is to be avoided; and if one man may have an action, for the same reason, one hundred thousand may. But: "*If the stopping be a particular damage to a particular person, he may have an action;* but then the particular and special damage must be particularly and certainly alleged; which is wanting in this action, and therefore it does not lie." So *Holt*, in the same way, gives his reasons at great length. He considers, first, the question whether an action would lie for the mere stopping the way, on the ground that the Plainiff's coal mine was situate near to the highway. He says no; it is a public nuisance. Secondly, he considers whether there ought not to be, further, some special damage to support the action, and whether this damage is specially enough shown. So it is clear that both he and *Rokeby* concurred, with the other Judges, in opinion that the action would lie, provided the *per quod* in the declaration laid the special damage with sufficient accuracy and particularity. But, when I look at *Holt's* own report of the case (*z*), it is put beyond all question: he concludes by mentioning this as

(*z*) Holt's Rep. 16.

1851.

SOLTAU
v.
DE HELD.

the result of the whole case. He says: "In this case it was agreed, by the whole Court, that, where an action arises from a public nuisance, there must be a special damage; for he that did the nuisance is punishable, at the suit of the public, by indictment or information; and, to allow all private persons their actions without special damage, would create an infinite multiplicity of suits." And, further than this, it appears, by the note which is appended to the report in Lord *Raymond*, that the case was re-argued before the four Judges of the Common Pleas and the four Barons of the Exchequer, and that the eight were unanimously of opinion that the action lay, and that the special damage was sufficiently laid, and that judgment should be for the Plaintiff. That case appears to be one of no slight importance. It was the opinion of all the twelve Judges at that time, with Lord *Holt* at their head, that, in a case beyond all question a case of public nuisance, a particular individual may have an action for a damage sustained, provided he lays that damage with sufficient particularity in his declaration, and of course proves it by sufficient evidence. Therefore, that case, so far from establishing the proposition contended for by the Defendant, establishes the direct contrary.

Another case cited was *Baines* v. *Baker*, reported by *Ambler* and also by *Atkyns*. It was a bill to restrain the erection of the Small-pox Hospital in *Cold Bath Fields*. Both the reports are jejune; and, unfortunately, there is no trace of the facts of the case in the *Registrar's* book. It appears, as far as one can collect from the reports of the case, which are very unsatisfactory, that the intended erection of the Small-pox Hospital spread dismay and terror through the neighbourhood; and that the Plaintiff was the owner of some houses in *Cold*

1851.

SOLTAU
v.
DE HELD.

Bath Fields, and that his tenants (it does not appear that he himself resided there) were giving him notice to quit their houses. That was the only way in which any special damage was alleged at all, as far as I can collect. But the *Lord Chancellor*, Lord *Hardwicke*, decided that the hospital was not a private nuisance; and doubted whether it was a public nuisance; and he refused the injunction. But I cannot collect that he expressed any opinion that, if it had been a public nuisance and special damage arose to the Plaintiff from it, the Plaintiff might not come into a Court of Equity to restrain that nuisance.

Another case cited, was the case of the *Attorney-General* v. *The Foundling Hospital;* but it has nothing to do with either public nuisance or private nuisance. It was only the case of an information filed by the *Attorney-General* on behalf of the charity, the Foundling Hospital, to restrain the persons who had the management of that Hospital from dealing with the charity property, by building upon it in a way that was alleged to be a breach of trust and a mismanagement of the property. It was not a case of nuisance at all.

The Fishmongers' Company v. *The East India Company* shows only that the Fishmongers' Company could maintain a bill for an injunction to restrain the Defendants, the *East India* Company, another corporation, from building a wall so as to darken their ancient lights; but the injunction was refused, because the distance of the wall complained of from the Plaintiffs' lights was so great that it was considered not to amount to a nuisance.

The Attorney-General v. *Nichol* was a suit on behalf of a charity; and, on that account, and not on the

1851.

SOLTAU
v.
DE HELD.

ground of public nuisance, an information was filed by the *Attorney-General.*

In *Crowder* v. *Tinkler* the bill was filed, by a private individual, to restrain the erection of a corning-mill, for the manufacture of gunpowder, near to his premises, on the ground that it would endanger the safety of his property: and the *Lord Chancellor* directed the Plaintiff to indict the building as a nuisance, that is, as a public nuisance; and, in the mean time, he put the Defendant on terms as to how he should use the mill, with liberty to apply on the result of the trial. That case is against the proposition contended for by the Defendant; because there the nuisance was a public nuisance; yet Lord *Eldon* sustained the bill.

Hudson v. *Maddison* was the case of five persons joining together to complain of an act which was a separate nuisance to each of them: and all that was decided in that case was that the five could not sue together.

Squire v. *Campbell* was the case of the erection of the statue of *George* the Third near *Pall Mall East*; and the *Attorney-General* was made a Defendant to the suit, not in respect of nuisance, but because the freehold of the ground on which the statue was erected was in the Crown.

The Attorney-General v. *Cleaver* was the case of a public nuisance; and there an information was filed by the *Attorney-General.* But that proves nothing. It only shows that, where the object is to restrain a public nuisance, an information must be filed. It does not at all show that an individual may not file a bill, if he can show special damage arising to himself out of a public nuisance.

These are the cases cited in support of the proposition that the bill will not lie.

Several cases have been referred to on the part of the Plaintiff; such as *Spencer* v. *The London and Birmingham Railway Company*, *Sampson* v. *Smith*, *Haines* v. *Taylor*, and *Walter* v. *Selfe*, in all of which it was held that, if an individual sustains a special and particular damage from an act, he may have the interference of the Court on a bill, although the act complained of be, in its nature, a public nuisance. Two other cases were cited: *The Attorney-General* v. *Forbes*, and *The Attorney-General* v. *Johnson*. Those cases show only that there may be both an information and bill; that is, that the *Attorney-General* may file an information to restrain the act complained of as a public nuisance, and that an individual who sustains a particular injury may join as Plaintiff as well as Relator, and have the remedy for himself also in the same suit. I am of opinion, therefore, that the first ground of demurrer is not tenable.

The next ground insisted upon in support of the demurrer, was that the Plaintiff had not established his right at law. Now, it is true that Equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law: there is no such thing as an equitable nuisance: but it is no ground of demurrer that the matter has not been tried at law. It very often is a ground for refusing an injunction; but it is not ground of demurrer, as appears from *Berkley* v. *Ryder*, 2 Vesey, sen., p. 533, and from Lord *Cottenham's* judgment in *Elmshirst* v. *Spencer*, where his Lordship expresses himself thus: "The Plaintiff, before he can ask for the injunction, must prove that he has sustained such a substantial injury, by the acts of the Defendant, as would

1851.

SOLTAU
v.
DE HELD.

have entitled him to a verdict at law, in an action for damages." And then, in another part of the same judgment, he says: "This Court will not take upon itself to adjudicate upon the question whether this is a nuisance or not: that must be ascertained in a Court of Law, as laid down by Lord *Eldon* in *The Attorney-General* v. *Cleaver*." Now, in *The Attorney-General* v. *Cleaver*, which was a case of public nuisance, Lord *Eldon* directed the indictment, which had been already brought and was pending, to be prosecuted, and ordered the motion to stand over until the hearing of it. Therefore Lord *Cottenham*, in that case, is referring to this; that you cannot ask for the injunction if there be a question about its being a nuisance at law. But I do not know where it is laid down that a bill will not lie, that is, that it is ground of demurrer because the action has not yet been brought. However, whether that be so or not, the Plaintiff in this case has brought his action at law, and obtained a verdict.

Then this ingenious argument was adduced. It was said: "There has been an action at law; but what is now being done, and which you call a nuisance, has never been tried at law. When the trial took place we were ringing every day in the week: we were beginning at five o'clock in the morning, and we were ringing a considerable period of time on each occasion: but now we ring only on Sundays. We ring a fewer number of times, and do not ring so long at a time. Therefore you must bring your action for this, and try whether this is a nuisance." If that argument were to prevail, see what it would come to. Supposing that, after the trial of the action, the Defendant, instead of ringing seven days in the week, had rung six; or, instead of beginning at five o'clock in the morning, had begun at six; or, in-

stead of ringing for a quarter of an hour, had rung ten minutes each time; and, when the Plaintiff came into Equity to restrain him, he had said: "You have not tried this. When you brought your action, I rang seven days in the week. I ring only six now. I began at five o'clock: I now begin at six in the morning." If that were yielded to, and another action brought and damages recovered, the Defendant would reduce the number of days' ringing from six to five, and say you have not tried this; and so on *toties quoties*. It is clear the argument, if pushed to its full extent, must result in that which is contrary to all reason and to all justice. The questions to be tried were, whether the Plaintiff's right in his house was such as to entitle him to come for relief at all, and whether the ringing of the bells was in its nature, a nuisance at law. Both those questions have been tried; but the exact extent or *quantum* of injury or nuisance inflicted, need not be ascertained. Besides, the whole argument upon this ground is put an end to by an allegation in the bill, which the demurrer, of course, admits to be true; "that the Defendant threatens and intends, not only to continue tolling or ringing the last-mentioned bells every Sunday in the manner last aforesaid; but he also threatens and intends to ring peals of the said six bells, and also to toll and ring, on week days; and he also threatens and intends to toll and ring the bell of the before-mentioned chapel or religious house." Therefore, upon this demurrer, it is quite clear that the argument that the Plaintiff has not established his right at law, cannot be maintained.

There was one point raised by the Plaintiff which I do not think it necessary to go into. The plaintiff insisted that it was illegal for Roman Catholics to ring and toll bells in a steeple annexed to their place of worship.

1851.

SOLTAU
v.
DE HELD.

It appears to me that whether that be so or not, is perfectly immaterial to this case; because, if it be illegal, I am not to grant an injunction to restrain an illegal act merely because it is illegal. I could not grant an injunction to restrain a man from smuggling, which is an illegal act. If it be illegal, the illegality of it is no ground for my interfering. Therefore, I do not at all go into the question, whether, under the numerous Acts of Parliament relating to Roman Catholics, it be or be not now lawful to have a steeple and bells. For the reasons which I have mentioned, I overrule the demurrer.

Judgment on the motion.

I now proceed to give my opinion with regard to the motion. And many of the observations which I have made upon the demurrer, necessarily apply, more or less, to the motion: for I find that the facts alleged by the bill are verified by affidavit. I have already stated those facts, and, therefore, I need not repeat them. But I must observe that the six bells in the steeple of the church, are not, in respect of size, such as are used in most chapels and district churches in and near *London:* but they are unusually large bells; and the effect produced by ringing them is thus described by Mr. *Soltau* in his affidavit: He says, "That, when a peal of the bells of the said Roman Catholic church was rung, the noise was so great that it was impossible for me or the members of my family, to read, write, or converse in my dwelling-house: And I further say that the tolling and ringing of the said bell and bells, was and is an intolerable nuisance to me; and, if the said bell or bells is or are permitted to be tolled or rung in the manner in which the same was so tolled and rung as aforesaid, it will be impossible for me to continue to reside, any longer, in my said house." That is the description of the effect produced by the ringing of the bells as it was

1851.

SOLTAU
v.
DE HELD.

practised antecedently to the trial in August last. It appears that the chapel bell has been since removed from the top of the building to the side furthest from the Plaintiff's house. The affidavit then describes the effect of the ringing which took place on the 9th and 16th November last, that is, as it is now practised: "And I further say that the tolling and ringing of the said bells of the said Roman Catholic church in the manner in which they were so tolled and rung on the said 9th day of November instant and 16th day of November instant, caused considerable annoyance to myself, and disturbed the devotions of the members of my family; and that, during the time or times when some of the more weighty of the said bells are rung or tolled, it is impossible for me to read or converse without great difficulty." Then he mentions the fact of his daughter having been removed from the house, which I do not dwell upon, and he proceeds thus: "And I further say that the tolling and ringing of the said bells on the said 9th and 16th days of November 1851, was a great annoyance and nuisance to me and my family; and I further say that, if the said bells of the said church are permitted to be tolled and rung in the manner in which they were so tolled and rung on the 9th and 16th days of November as aforesaid, the value of my said dwelling-house and premises will be considerably diminished, and that if I and my family are compelled to leave, I could only dispose of it at a great pecuniary sacrifice; and I further say that the distance of my bedroom from the bell of the said chapel and the bells of the said church, does not exceed twenty yards." There is another affidavit, that of Mr. *Gadsden*, in support of the Plaintiff's case, which thus states the nuisance as it exists according to the present practice of ringing: "I further say that I have heard the said bells, as they now ring and toll since the 13th August,

1851.

SOLTAU v. DE HELD.

when I was in the Plaintiff's residence, on the 30th November now last past;" that 30th November being a Sunday; "and I consider the ringing and tolling of the said bells, both as they were rung and tolled, prior to the 13th day of August 1851, and as they are now rung and tolled, to be peculiarly annoying and distressing to any person occupying the said residence of the said Plaintiff; and, in my opinion, the value thereof is greatly decreased by reason of such ringing and tolling." Then he goes on to state: "That, if the said bells were not rung and tolled as aforesaid, in my opinion, the said house would still let for 130*l.* *per annum*, the rent which I am informed the said Plaintiff now pays for it; and I say that I consider, from the peculiar position of the said church with reference to the Plaintiff's residence, that any ringing or tolling the bells of the said church, even on a Sunday only, as they are now rung and tolled, would have the effect of deteriorating the value thereof; because I do not believe any private gentleman or lady or person who could afford to pay such a rent, would become a tenant thereof." That is the account given of the effect of the present nuisance. Now it struck me, at the time when the motion was made, that more persons ought to have been brought forward to depose to the fact of the nuisance. But, when I consider that, in fact, there is no controversy about it, and that there is no contradictory evidence, I think that the plaintiff was perfectly justified in not producing any further evidence than his own affidavit and the affidavit of one disinterested person. It is not, however, quite correct to say that there is no controversy about the nuisance; for there is an affidavit on the part of the defendant, made by Mr. *Wright*, a builder and house agent at *Clapham*, who says: "I live near the church in the pleadings mentioned and within full hearing of the bells

1851.

SOLTAU
v.
DE HELD.

in the pleadings also mentioned; and I say that I do not consider them any nuisance; and I say that I know, from frequent communication with my neighbours, that the said bells are not considered a nuisance to persons generally." And then he adds this: "and I say that the four Protestant churches in *Clapham*, have and use bells which ring several times, for half an hour at a time, on Sundays, and twice on Wednesdays and Fridays, besides frequent ringings, during the day, for deaths and funerals." That is the only affidavit which at all contradicts the fact of this being a nuisance: but what does it amount to? This gentleman says: "I live near the church." The question is how near? He says; I live within full hearing of the bells;" yes, but how near to the bells? He says that his neighbours do not consider them a nuisance. But where do those neighbours live? How near to the bells? It really comes round to what I observed upon the demurrer, that the ringing of these bells, is a great nuisance to a person living as near as the Plaintiff does, but is not only no nuisance, but may be a cause of pleasurable sensations to those who live further off: and, as Mr. *Wright* has not thought fit to tell me how near he lives to the church, I am left to conjecture: it may be 50 yards, 100 yards, 500 yards, or 1000 yards; and although he may live sufficiently near to the church to hear the bells, yet he may hear them in a way which may be gratifying, or, at all events not annoying. So, also, with respect to the neighbours: we have no means of knowing who those neighbours are, or how near they live. All that we are told is that they do not consider the ringing a nuisance. Therefore I consider the fact of its being a nuisance, sufficiently established by the affidavits which have been made by and on the part of the Plaintiff. Moreover one ought to take into consideration the actual circumstances proved and not at all disputed,

1851.

SOLTAU
v.
DE HELD.

namely, that these bells are of a most unusual weight, and size; that they are placed in a steeple which is almost in front of the Plaintiff's house; and in a place which was the court-yard of the mansion-house, before it was divided into two houses. When you consider those circumstances, it is hardly necessary to produce affidavits to show that it must be an intolerable nuisance to have such large bells ringing, though for a short period of time and only on Sundays, so near to the Plaintiff's house: and it is to be remembered that the Plaintiff has not gone to the bells, but the bells have come to him. Then I may further observe, in connection with this point, that the Plaintiff swears that he is informed and believes that the Defendant threatens and intends not only to continue tolling or ringing the last-mentioned bells every Sunday, in manner last aforesaid, but also to ring peals of the said six bells; and also to toll and ring on week days, and also to toll and ring the bell of the chapel: and there is no contradiction to that; and therefore I must take it that there is the intention, or, at all events, the reservation of the right, on the part of the Defendant, to ring as much as he pleases.

Then it is said that part of what is alleged, by the Plaintiff, as the mischief arising to him, is the diminution in value of his house; and it is said, and with perfect truth, by the Defendant's Counsel, that diminution in value does not constitute nuisance, and is no ground for the Court's interfering. But, although it is perfectly true that mere diminution of value does not, *per se*, constitute nuisance, yet, surely the extent of the nuisance, if it be a nuisance, may be materially shown by this; that so great is the nuisance that no person who can afford to live in such a house as the Plaintiff's, would take it with such a nuisance; and the only person who could be

expected to take it, would be one who would pay only a very small rent, and to whom it was a great object to have a very large house at a very small rent, and who would bear with the nuisance for the sake of the small rent which he paid. I say, in that way, the diminution of value is of very great moment, not as constituting a nuisance, but as an *indicium* of the extent of the nuisance.

Under those circumstances the question that I have to determine is a question which I cannot do better than state in the language of Vice-Chancellor *Knight Bruce*, when he decided the case of *Walter* v. *Selfe*. He says: "The important point next for decision may properly, I conceive, be thus put: Ought this inconvenience to be considered, in fact, as more than fanciful, or as one of mere delicacy or fastidiousness; as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living; but according to plain, sober and simple notions among the English people?" That, I think, enunciates distinctly the question which is to be tried upon such an occasion as this; and I must add, in the very words of Vice-Chancellor *Knight Bruce*, that I am of opinion that this point is against the Defendant; that this is such an inconvenience, and such an invasion of the domestic comfort and enjoyment of a man's home, that he is entitled to come and ask this Court to interfere. And, upon that point, I will just refer to the language of Lord *Eldon*, in the case of *The Attorney-General* v. *Nichol*. He says: "The foundation of this jurisdiction," (that is, interfering by injunction) "is that head of mischief alluded to by Lord *Hardwicke*; that sort of material injury to the comfort of the existence of those who dwell in a

1851.

SOLTAU
v.
DE HELD.

neighbouring house, requiring the application of a power to prevent, as well as remedy, an evil for which damages, more or less, would be given in an action at law." That is the ground for interference by injunction, and that is the ground upon which, I conceive, that I ought to grant an injunction in this case.

Before I conclude I will just make an observation upon a point which was raised by the Defendant's Counsel: namely, that these bells are no more a nuisance than the bells of a parish church are. It is said that, in this parish, there are four parochial district churches or parish churches; they have all their bells; they ring on Sundays; and they ring on Wednesdays and Fridays; and, if this be a nuisance, why is not that a nuisance, or, if that be not a nuisance, why is this a nuisance? Now it seems to be overlooked that the building to which these bells are attached, although called a church by those who have erected it and those who use it, is not a church in the eye of the law. It is no more a church than the chapel or meeting-house of any denomination of Protestant Dissenters is. A church, in law, is that building of which there is but one in the parish, or but one in the parochial district, where the parish has been divided by Act of Parliament. It is a building the freehold of which and of the yard attached to it, is vested in the parson of the parish; and of which there are churchwardens; to which bells are an appendage recognized by law; the special property in which bells, is, by law, vested in the churchwardens, but for the benefit of the parishioners at large, and, in respect of which bells, it has been held that an action of trover will lie by a succeeding churchwarden, in his official capacity, against the retiring churchwarden, to recover the value of the bells, on the ground of the special property vested by law in the church-

1851.

SOLTAU v. DE HELD.

wardens; and in which action the property must be laid as being the property of the parishioners. The law recognizes the bells as an appendage to a parish church, and, by law, the churchwardens are to have the custody and care of the belfry in which the bells are suspended and tolled. Moreover, with regard to churches, unless in special cases of churches founded by the Crown, or special cases of churches founded by Act of Parliament, not parish churches, they are under the jurisdiction of the Bishop of the Diocese. There is but one Bishop of the Diocese. Is it said that this building is under the jurisdiction of the Bishop of *Winchester*, in whose diocese *Clapham* is situated? Certainly not: it is but a chapel; it is no church; it has no legal privilege of having bells in the same way as a parish church has. I do not mean, in what I say, to intimate, in the slightest degree, that it is unlawful for Roman Catholics to have bells attached to their places of worship. I avoid that question entirely, as I have hitherto done. But it seems to be assumed that this church stands on the footing of a parish church, and, therefore, that it is as much privileged and entitled to have bells, whether they are a nuisance or not, as a parish church is: and, for that reason I have made these observations.

There has been no acquiescence in this case. The Plaintiff has diligently asserted his rights: and I think that he is entitled to an injunction; but not quite in the terms in which it is asked by the notice of motion. The bill asks for an injunction to restrain the ringing of these bells altogether; or, in the alternative, to restrain the ringing of them so as to cause or occasion any nuisance or annoyance to the Plaintiff or any of the members of his family residing in his house: and it appears to me that the latter is very nearly the form in which

1851.

SOLTAU
v.
DE HELD.

the injunction ought to be granted. Therefore I shall order an injunction to issue to restrain the Defendant and all persons acting under his direction or by his authority, from tolling or ringing the bells in the Plaintiff's bill mentioned or any of them, so as to occasion any nuisance, disturbance and annoyance to the Plaintiff and his family residing in his dwelling-house in the bill mentioned. In thus wording the injunction, I am following what was done, by Vice-Chancellor *Knight Bruce*, in *Walter* v. *Selfe*.

I cannot say that it is absolutely impossible that any one of these bells may not be rung so as not to occasion any nuisance or annoyance to the Plaintiff. It is possible: and, therefore I do not think it right to say that none of the bells shall be rung again.

WOOD *v.* SUTCLIFFE.

1851:
1st, 3rd, and
4th Dec.

Injunction.
Water-right.
Acquiescence.

What conditions are required in order to induce a Court of Equity to grant an injunction to restrain the infringement of a right, acquired by long user, to use the water of a stream for certain purposes.

FOR above twenty years, the Plaintiffs had carried on the business of worsted-spinners, at mills situate on the banks of a beck or stream in *Yorkshire*, called *The Bowling Beck*, and, by long user, had acquired the right of using the water of the stream for washing wool and generating and condensing steam; the first two of which purposes required that the water of the stream should come pure and unpolluted to their mills. The Defendants were the proprietors of works situate higher up the stream, at which they carried on the business of dyers; but the construction of those works was not begun until the year 1844, nor did the Defendants commence business in them until February in the following year. At different times between the erection of the Plaintiffs' mills and the construction of the Defendants' works, about sixteen hundred houses, forming a suburb to the town of *Bradford*, were built on or near to the banks of the stream, between the Plaintiffs' mills and the Defendants' works. In January, 1850, the Plaintiffs brought an action, and in July following obtained a verdict, but with only a farthing damages, against the Defendants, for having polluted the stream by pouring the refuse of the matters used in their business into a drain communicating with the stream. At the trial of the action, the Defendants did not dispute the right of the Plaintiffs, but contended, merely, that the Plaintiffs did not sustain any damage from the acts complained of. In January 1851, the Plaintiffs entered up judgment in the

1851.

WOOD
v.
SUTCLIFFE.

action; and, in the next month, they filed a bill for an injunction to restrain the Defendants from discharging or pouring into the stream, either directly or by means of the drain, any filthy, noxious, or offensive substances or materials, or foul or impure waters, so as to render the water of the stream, above or at the Plaintiffs' mills, foul or unfit for the working of the said mills.

Mr. *Bethell* and Mr. *Daniel* moved for the injunction.

Mr. *Rolt*, Mr. *Malins*, and Mr. *Elderton* opposed the motion.

Mr. *Daniel* replied.

The Rochdale Canal Company v. *King* (*a*), and the cases there cited, were referred to in the course of the argument.

The *Vice-Chancellor*, after stating the facts of the case and observing that the Plaintiffs had established, at law, their right to use the water of the stream for the above-mentioned purposes, indeed, that the Defendants did not dispute that right, and that the Plaintiffs had also established that the Defendants had infringed it, proceeded in these words:

Such being the case, the question which I have to decide, is whether the Plaintiffs are entitled to apply to a Court of Equity for an injunction? It is not my intention to enter into a general disquisition as to the grounds on which Courts of Equity will interfere in all the differ-

(*a*) *Ante*, p. 78.

1851.

WOOD
v.
SUTCLIFFE.

ent sorts of cases in which applications may be made for injunctions; but I shall confine my observations to the precise sort of case that this is.

Now, I conceive that if parties have established such a legal right as the Plaintiffs in this case have established, and another person comes and erects works on the same stream, above their works, and, by his manufacturing process, so fouls the water of the stream as seriously and continuously to obstruct the effective carrying on of their manufacture; and, if the granting of an injunction will restore or tend to restore those parties to the position in which they previously stood, and in which they have a right to stand; and if the injury complained of is of such a nature that damages will not be an adequate compensation, that is, such a compensation as will in effect, though not *in specie*, place them in the position in which they previously stood; and if, moreover (for there are several conditions), they use due diligence in vindicating their rights, they have, in general, a right to come to a Court of Equity and say: "Do not leave us to bring action after action for the purpose of recovering damages; but interfere, with a strong hand, and prevent the continuance of the acts we complain of, in order that our legal right may be protected and preserved to us." I say, in general; because, whenever a Court of Equity is asked for an injunction in cases of such a nature as this, it must have regard not only to the dry strict rights of the Plaintiff and Defendant, but also to the surrounding circumstances; to the rights or interests of other persons which may be more or less involved: it must, I say, have regard to those circumstances before it exercises its jurisdiction (which is unquestionably a strong one), of granting an

1851.

WOOD
v.
SUTCLIFFE.

injunction. I have used the terms, "seriously obstruct," because I cannot assent to the proposition that, on the mere dry fact of the Plaintiffs having the abstract right, a Court of Equity will, as a matter of course, on that right being established at law, grant an injunction if the right be infringed ever so minutely. On the other hand, I am far from saying that because, in the action at law, the jury has given only a shilling or a farthing damages, *that* is a ground for concluding that the injury is not serious, and that the case is one in which an injunction ought not to be granted. I have used, also, the terms, "continuously obstruct," by which I mean to indicate, "obstruction frequently recurring," not "never ceasing."

Having stated the conditions which are requisite to induce the Court to grant an injunction in such a case, I proceed to consider how far those conditions are satisfied in the present case. One of those conditions is that the injunction, by stopping the acts complained of, will restore or tend to restore the party complaining, to the enjoyment of that right which he has established against the Defendant. I say: "restore or tend to restore," because I conceive it is no answer to an application of this sort, for the Defendant to say that other persons as well as he are polluting the stream, and that therefore the injunction will not restore the Plaintiff to the enjoyment of his legal right, inasmuch as it will not prevent those other persons from continuing to pollute the water; for the Plaintiff must sue each of the wrong-doers separately; unless, indeed, they are acting in partnership or in concert together; and the obtaining of an injunction against any one of the wrong-doers, though it may not actually restore, does tend to restore the Plaintiff to

the enjoyment of his right, as it is a step towards obtaining an injunction against each of them.

Now, the Plaintiffs require water for three purposes; namely, washing wool, generating steam, and condensing steam; for the first two of which, purity is an essential quality. Not only the Defendants, but the Messrs. *Ripley* and other persons, have manufactories on the banks of the stream, above the Plaintiffs' mills. The works of Messrs. *Ripley*, who are dyers, were established long before the Plaintiffs' mills were; but the works of the other persons were established at a comparatively recent period. Besides those various works, a very large and dense population has gradually grown up on or near to the banks of the stream. No doubt, however, there was a time, and probably not a very remote one, when the stream, or that portion of it which lies between Messrs. *Ripley's* works and the Plaintiffs' mills, flowed through open fields, pure and unpolluted, to the Plaintiffs' mills. But whenever human beings congregate, in large numbers, on the banks of a stream, the inevitable consequence is that a great quantity of sewerage is discharged into the stream, which necessarily has the effect of polluting it. Therefore, to some considerable extent, the pollution of this stream is inevitable. Not all the Courts of Law and Equity in the kingdom can prevent it; for they cannot remove the mass of human beings who are congregated on the banks of the stream. The Plaintiffs, themselves, have been obliged to submit to the inevitable consequence of this increase of population, and have been compelled to procure pure water from another source, by sinking a well on their own premises for that purpose; and, for many years before the Defendants commenced their works, the Plaintiffs ceased

1851.

WOOD
v.
SUTCLIFFE.

to use the water of the stream for washing wool, and used it only occasionally, that is to say, when the machinery of the well was out of order, even for the purpose of generating steam. Therefore, if this injunction were granted, it would not have the effect of restoring or tending to restore the Plaintiffs to the position in which they originally stood; for the water would still flow to their mills in so polluted a state that they could not use it, as they originally did, for either washing wool or generating steam.

On the other hand, to grant the injunction would have the effect of seriously injuring, if not ruining the Defendants. Weighing, then, the injury that may accrue, to the one party or the other, by granting or refusing the injunction, I think that, if my decision were to turn upon this point alone, I should be bound to refuse it.

Another condition which, as I have said, is necessary in order to induce a Court of Equity to interfere, by injunction, in a case similar to that now before me, is that the mischief complained of is such that it cannot be properly and adequately compensated by pecuniary damages. Now, let us see how the matter stands in this respect. Many years before the Defendants' works were commenced, Mr. *Dixon*, Messrs. *Greenwood*, and other individuals, had works in what is, aptly enough, called the nest of factories immediately above the Plaintiffs' mills; and they, also, having polluted the stream, the Plaintiffs threatened to bring actions against them: whereupon they entered into deeds of arrangement with the Plaintiffs, by which, in order to avoid litigation, they agreed to pay the Plaintiffs at the rate of 2*l.* *per annum*, per horse power, for the right of polluting the water.

1851.

WOOD
v.
SUTCLIFFE.

Now, if such an arrangement as that can be made, ought I to grant an injunction in order to compel the Defendants to enter into it, when the bringing of an action would be almost (I will not say quite) as efficacious? If the Plaintiffs desire to apply to the Defendants a certain pressure in order to bring them to terms, I think that I ought to leave Plaintiffs to that pressure which may be applied by means of an action or actions at law. If the Plaintiffs brought an action, and, the matter being represented to the jury, the jury were satisfied that the Defendants ought to come to terms, they might give the Plaintiffs 50*l.* or 100*l.* damages, instead of a farthing, a shilling, or forty shillings. On the ground, therefore, that the Plaintiffs themselves have shown that the injury they complain of is one which, in some way, may be compenated by money, I think that I ought not to grant the injunction.

But I do not rest my decision upon either of the grounds which I have mentioned. The principal ground upon which I conceive that I must refuse this injunction, is that the Plaintiffs have not used due diligence in vindicating their rights. They stood by whilst the Defendants were constructing their works, and they suffered the Defendants to use their works after they were constructed, from the beginning of 1845 until the beginning of 1850, a period of very nearly five years, without giving them any hint that they were doing anything that they had not a lawful right to do; and, if there had been nothing else in this case, I should have been of opinion, on this ground alone, that the Plaintiffs were not entitled to the injunction.

I incline to think also that the injunction ought to be

1851.

WOOD
v.
SUTCLIFFE.

refused on the ground that the injury complained of is capable of being compensated by money; and, in my opinion, it ought also to be refused on the ground that the granting of it would inflict serious damage upon the Defendants, without doing any real practical good to the Plaintiffs.

Injunction refused. Costs of the motion reserved until the hearing of the Cause.

PLOWDEN *v.* HYDE.

1851: 12th and 13th Dec.
1852: 10th Feb.

Will.
Revocation.
Election.

A PETITION in this Cause, presented by the Plaintiff, *Charles Hood Chicheley Plowden*, prayed (amongst other things), that a deed of re-conveyance of the 7th of December 1813, therein stated, did not, as to the hereditaments comprised in that deed, operate as a revocation of the will of *Henry Chicheley Plowden*, the testator in the Cause, and that the legal estate in the same hereditaments descended, upon the death of the testator, to his heir-at-law, as a trustee for the devisees, under his will, of the equity of redemption thereof; and that it might be declared that the hereditaments comprised in the deed of conveyance of the 9th of November 1811, also stated in the Petition, were devised by the will of the testator, he having contracted to purchase the same

In April 1811, *A.* conveyed an estate (which stood limited to him and his trustee *to the usual uses to bar dower*) to a mortgagee in fee, subject to a proviso for the reconveyance thereof to him, *his heirs, appointees, or assigns, or to such other person or persons, to such uses and in such manner as he or they should direct.* In May following, he devised all his messuages, lands, &c. and all other his real estate, or which he had contracted to purchase, situate in or near the parishes of *B.* and *S.* or elsewhere in *England*, of or to which he or any person or persons in trust for him, was or were seised or entitled for any estate of freehold and inheritance or of freehold only, in possession, reversion, remainder, or expectancy, or which he had power to dispose of or appoint by his will, to *J. D.*, a stranger to him in blood, and his heirs, to certain uses and upon certain trusts. In 1813, he paid off the mortgage, and took a reconveyance, by which, after reciting the mortgage, the premises were limited to him and his trustee, *to the usual uses to bar dower.*

In 1809 he purchased an estate in one of the parishes mentioned in his will, at an auction, and, in Nov. 1811, that estate was conveyed to him and his trustee, *to the usual uses to bar dower.*

Held, that the reconveyance of 1813, and the conveyance of 1811, revoked the will as to the mortgaged premises and purchased estate, respectively, and that the testator's heir, (who was entitled to benefits under the will,) was not bound to elect.

1851.

PLOWDEN v. HYDE.

prior to the date thereof; and that, if the Court should be of opinion that the devise of the last-mentioned hereditaments was revoked by the said conveyance, then that it might be declared that the Defendant, *James Chicheley Plowden* (who was the son and heir of *James Chicheley Plowden*, the testator's original heir) was bound to elect between the last-mentioned hereditaments, and the monies to which he would become entitled under the same will, by virtue of the bequest, mentioned in the petition, to his late father; and that, if he should elect to confirm the will, then that he might be declared a trustee of the same hereditaments for the devisees under the testator's will.

The facts of the case are stated shortly in the marginal note, and more fully in the judgment; where, also, the arguments and cases cited are noticed.

Mr. *Willcock* and Mr. *Jessel* appeared for the Petitioner.

Mr. *Malins*, Mr. *Hetherington*, Mr. *H. Stevens*, Mr. *Wood*, and Mr. *Erskine* supported the petition for other parties.

Mr. *James Russell* and Mr. *Lewin* appeared for the Respondent, *James Chicheley Plowden*, the son.

1852. Feb. 10.

The *Vice-Chancellor* delivered judgment in the following words:—

Two questions are raised in this case: first, whether certain acts done by the testator in the Cause, after making his will, with respect to certain real estates of

1851.

PLOWDEN v. HYDE.

which he was the owner in Equity at the date of his will, and which, but for those acts, would have passed by his will, have had the effect of revoking the devise of those estates; and, second, if such revocation has resulted from those acts, whether the testator's heir, claiming those estates by descent, ought to be put to his election?

These questions arise with respect to two different portions of the real estates of the testator, under somewhat different circumstances.

With respect to the first portion, which, for convenience, I will call the mortgaged property, the following are the facts: The testator, *Henry Chicheley Plowden*, having, in 1809, mortgaged this estate in fee, afterwards paid off the mortgage, and, by indentures of lease and release, dated respectively the 22nd and 23rd of April 1811, the estate was reconveyed to him to the common uses to bar dower, that is to say, to the use of such persons and for such estates as he should, by deed or will, appoint, and, in default of appointment, to the use of the testator and his assigns for his life, and, after the determination of that estate by any means in his lifetime, to the use of *John Dyneley*, his executors, administrators and assigns, during the testator's life, upon trust for the only benefit of the testator, to the intent that any wife of the testator might be excluded from dower; and, after the determination of the estate so limited to *Dyneley*, to the use of the testator, his heirs and assigns.

Very shortly afterwards the testator borrowed 3000*l.* of *William Newton* on mortgage of this estate, and, by indentures of lease and release, dated respectively the 30*th* of April and 1st May 1811, after reciting the in-

1851.

PLOWDEN v. HYDE.

dentures of lease and release of the 22nd and 23rd April 1811, the testator, in consideration of the 3000*l.* advanced by *Newton*, appointed and conveyed the estate to *Newton* in fee, subject to a proviso for redemption, by which it was declared and agreed that, if the said *H. C. Plowden*, his heirs, appointees, executors, administrators or assigns, should pay, or cause to be paid, to the said *William Newton*, his executors, administrators or assigns, the sum of 3000*l.*, with interest at the rate of *five per cent. per annum*, on the 1st of November then next ensuing, then the said *William Newton*, his heirs and assigns and all persons claiming under him or them, should and would, upon the request and at the costs and charges of the said *H. C. Plowden*, his heirs, appointees, or assigns, reconvey and re-assure the premises unto the said *H. C. Plowden, his heirs, appointees, or assigns, or to such other person or persons, to such uses and in such manner as he or they should direct*, free from incumbrances.

On the 15th May 1811, the testator made his will of that date, whereby he devised, to *John Dyneley*, his heirs and assigns: "all and every my messuages, lands, tenements, and hereditaments, and all other my real estate whatsoever, or which I have contracted to purchase, situate in or near the parishes of *Boldre* and *South Baddesley*, in the county of *Southampton* or elsewhere in *England*, of or to which I or any person or persons in trust for me, am, is, or are seised or entitled for any estate of freehold and inheritance or of freehold only, in possession, reversion, remainder, or expectancy, or which I have power to dispose of or appoint by this my will, with their rights, members, and appurtenances," to hold to *Dyneley* and his heirs, to certain uses and upon certain trusts therein mentioned.

1851.

PLOWDEN v. HYDE.

In December 1813, the testator paid off the mortgage, and took a reconveyance of the estate by indentures of lease and release, dated respectively the 6th and 7th December 1813, whereby, after reciting the mortgage to *Newton*, with the proviso for redemption, *Newton*, in consideration of the 3000*l.* then repaid to him by the testator, conveyed the estate to the testator, his heirs and assigns, to the use of such persons and for such estates as the testator should, by deed or will, appoint; and, in default of appointment, to the use of the testator and his assigns for his life, and, after the determination of that estate by any means in his lifetime, to the use of *Dyneley*, his executors, administrators and assigns, during the testator's life, upon trust for the benefit of the testator, to the intent that any wife of the testator might be excluded from dower; and, after the determination of the estate so limited to *Dyneley*, to the use of the testator, his heirs and assigns.

The testator died on the 12th January 1821, without republishing his will. The question as to this mortgaged property, is whether, by reason of the conveyance of December 1813, the will was revoked so far as it operated to devise that property?

With respect to the second portion of the testator's real estates now in question, which, for convenience, I will call the purchased property, the following are the facts:—

In 1809 certain lands at *South Baddesley* having been put up for sale by auction by the then owners, the testator bid for and became the purchaser of lot 1, at the price of 1800*l.* This lot 1 comprised the freehold land

1851.

PLOWDEN v. HYDE.

now under consideration, and also certain leaseholds. No written contract for the purchase is forthcoming, nor is there any evidence of the terms of the contract, except so far as anything can be collected from the language of the conveyance, which I shall presently mention.

Before any conveyance was executed to the testator, he made his will, dated 15th May 1811, to the effect I have before stated. After the date of the will, the freehold part of the lands comprised in lot 1, was conveyed to the testator by indentures of lease and release, dated respectively the 8th and 9th November 1811, whereby, after reciting the sale by auction in 1809, and that the testator had bid 1800*l.* for lot 1, comprising those freehold lands and certain leaseholds, and that he was allowed and declared to be the highest bidder for and purchaser of all the lands comprised in that lot, at the said price of 1800*l.*; and reciting that it had been agreed that 400*l.* should be the apportioned part of the 1800*l.* to be paid as the purchase and consideration money for the lands thereinafter expressed to be thereby conveyed* (being the freehold part of the lands); it was witnessed that, in pursuance of the said agreement and in consideration of 400*l.* paid to the vendors by the testator, the lands in question were conveyed to the testator, *to the common uses to bar dower*, *Dyneley* being the trustee, as he was in the conveyance of the mortgaged property before mentioned.

The question as to this purchased property, is whether, by reason of the conveyance of November 1811,

* In the brief, the words: "and the fee simple and inheritance thereof," followed the word, "conveyed."

1851.

PLOWDEN v. HYDE.

the will was revoked so far as it operated to devise that property.

With respect to this question of revocation, as applicable both to the mortgaged and the purchased property, several cases have been cited in the argument, and many others are to be found in the books. In some of those cases the testator, at the date of his will, had the legal estate in the lands, and, in others, he had only an equitable estate or interest. In the case now before me, the estate or interest which the testator, at the date of his will, had in each of the two portions of property in question, was an equitable estate or interest; and, therefore, it is to the cases comprised in the latter class that more especial reference must be had, in order to deduce the established doctrine on the subject, as applicable to the case now under consideration.

The general rule of law to be deduced from this latter class of cases, may be thus stated: that if, after the date of the will, the land is so conveyed to the testator that the legal estate therein, which becomes vested in him by the conveyance, is the same, in quality, as the equitable estate which he had at the date of the will, the conveyance does not revoke the devise. And so, in the case where the testator's interest in the land at the date of the will consists in a contract which he had entered into for the purchase of the land, if the land is afterwards conveyed to him by the vendor, in accordance with the terms of the contract between them, the conveyance does not revoke the devise. But, on the other hand, if the legal estate which the testator acquires by the conveyance, differs, in quality, from the equitable estate which he had at the date of the will, the conveyance revokes the devise. And so, in the case of the contract for pur-

1851.

PLOWDEN v. HYDE.

chase, if the legal estate which the testator acquires by the conveyance, differs from that which, by the terms of the contract, the vendor agreed to convey to him, the conveyance revokes the devise. And this revocation equally takes place, even though the testator, after the conveyance, has as absolute a power of disposing of the property as he had before. And the revocation takes place without regard to the testator's intention, and even in direct contravention of his intention. Eminent judges have heretofore expressed, in strong terms, their disapprobation of the principle of this rule of revocation, and their regret that it should have been established, or, at least, that it should have been carried so far as it has been carried; but they have felt themselves constrained to follow it. While I fully participate in that disapprobation and that regret, I am equally obliged to recognise it as the long-established rule of the Courts, and, if the occasion requires, to act upon it.

Now, with respect to the mortgaged property, if we are to inquire what estate the testator had in the equity of redemption at the date of his will, I think it would be very difficult to say that he had any other than an estate in fee simple. And, if I were compelled to confine myself to this view of the matter, it would follow that a subsequent conveyance of the legal estate, to the testator, in any other form than in fee, would be a revocation of the devise. But the devisee has a right to refer to the particular terms of the proviso for redemption in the mortgage deed, as showing an agreement between the mortgagor and mortgagee that, upon repayment of the mortgage money, the premises should be reconveyed, not simply to the mortgagor in fee, but in some other special form; and, if the legal estate was, in fact, reconveyed in the form in which, by the terms of the proviso,

1851.

PLOWDEN v. HYDE.

it was agreed to be reconveyed, the reconveyance does not operate as a revocation of the devise. What, then, are the terms of the proviso for redemption as to the reconveyance of the premises, on payment of the mortgage money? They are to be reconveyed "unto the said *H. C. Plowden*, his heirs, appointees, or assigns, or to such other person or persons, to such uses and in such manner as he or they shall direct." A question here arises whether the words "unto the said *H. C. Plowden*, his heirs, appointees, or assigns," are to be construed as designating the person or persons to whom the premises were to be reconveyed, or the form in which the reconveyance was to be made to *Plowden*. The language of the proviso, throughout, seems to favour the former construction, for it imports that the appointees of *Plowden*, as well as *Plowden* himself, or his heirs, or his assigns, may pay off the mortgage debt; that the reconveyance is to be made upon the request and at the costs and charges of *Plowden*, or of his heirs, or of his appointees or assigns, and that not only *Plowden* himself or his heirs or assigns, but his appointees also should have the right to direct to what persons, and to what uses, and in what manner the estate should be reconveyed; the word "appointees," which is used several times in the proviso, seeming, in every instance, to be used to designate some person or persons to whom *Plowden* might appoint the estate previously to its being reconveyed. If this is the construction which ought to be put upon the words, "unto the said *H. C. Plowden*, his heirs, appointees or assigns," that is, if the parties agreed, by this proviso, that the premises were to be reconveyed to *Plowden*, or to his heirs, or to his assigns, or to his appointees, in the alternative, *that* could only mean to one or other of those persons in fee; and then it is clear, upon the authorities, that the reconveyance which was

1851.

PLOWDEN v. HYDE.

made to *Plowden*, not in fee but to the common uses to bar dower, would be a revocation of the devise, and the addition of the words "or to such person or persons, &c., as he or they may direct," would not have any effect to prevent the revocation.

But let us now take the other supposition, and assume that the words "unto the said *H. C. Plowden*, his heirs, appointees, or assigns," are to be construed as designating the form in which the premises were to be reconveyed to *Plowden*; which is the view most favourable to the devisee. Upon that assumption, I think that the word "appointees," would be sufficient to justify the introduction, into the reconveyance, of a power of appointment; and that if the reconveyance had been made to the use of such persons and for such estates as *Plowden* should, by deed or will, appoint, and in default of appointment, to the use of *Plowden*, his heirs and assigns, such reconveyance would have been in conformity to the proviso, and would not have worked a revocation. If so, the question is reduced to this: Do the other words, "unto the said *H. C. Plowden*, his heirs or assigns," justify the reconveyance to the use of *Plowden* for life, and after the determination of that estate, by any means, in his lifetime, to the use of a trustee during his life, with remainder to the use of *Plowden* in fee? Or, to put the same question in another form, if, by the proviso for redemption, it had merely been agreed that, on repayment of the money, the estate should be reconveyed to *Plowden*, his heirs or assigns, and the reconveyance had been made to the use of *Plowden* for his life, and then to the use of a trustee during his life, and then to *Plowden*, his heirs and assigns, would this have been a reconveyance in conformity to the terms of the proviso, so that the devise would have remained unrevoked? It appears

1851.

PLOWDEN v HYDE.

to me that, if I were so to decide, I should be acting in direct opposition to the principle of all the decided cases. An estate to a man for his life, with an estate in fee simple by way of remainder (the union of the two estates being prevented by an intermediate limitation to a trustee during his life), is a very different estate from an estate in fee simple in possession. If the testator's estate, previously to the conveyance, had been an equitable estate in fee, his taking a conveyance of the legal estate in such a form as to vest in him, not a legal estate in fee, but only a legal estate for his life, with a legal fee by way of remainder, the two estates being kept from uniting by the interposition of a limitation to a trustee, is not, in the language used in some of the cases, simply taking the estate home; but it is creating a new and different limitation of it. And, according to all the authorities, if the effect of the reconveyance is to create a new limitation of the estate, different from the equitable estate which the testator had at the date of his will, or different from that which would be created by pursuing strictly the terms of the contract for the reconveyance, the effect is a revocation of the devise.

It has, indeed, been argued before me that the words: "unto *A. B.*, his heirs, appointees or assigns," constitute an apt and appropriate formula for expressing, briefly, all the limitations ordinarily contained in a conveyance to the common uses to bar dower, including not only the general power of appointment, but also the limitation for life to the party in whose favour the conveyance is made, and the remainder to him in fee, with the intermediate limitation to the trustee, to prevent the union of the life estate, and the remainder in fee. And it was contended, that the formula in question is often used for that purpose; and that there is the more reason for con-

1851.

PLOWDEN v. HYDE.

sidering it to have been used for that purpose in the present case, because the indenture of mortgage to *Newton* recites the indenture of April 1811, by which the estate had been conveyed to the testator to the common uses to bar dower, and that, therefore, in effect, the proviso for redemption ought to be read as if it had stipulated that on repayment of the mortgage money, the premises should be reconveyed to the same uses to which they had been limited by the indenture of April 1811.

I should have been well pleased if I could have acceded to this argument, but I look, in vain, to the language of the proviso for redemption, to find any reference to the indenture of April 1811; in fact, it does not contain the slightest trace of any such reference. If it had been intended that, upon the repayment of the mortgage money, the premises should be reconveyed to the same uses to which they had stood limited by the indenture of April 1811, it would have been easy to have so worded the proviso for redemption as to have expressed that intention. The recital of that indenture in the mortgage deed cannot, in my opinion, be considered as introduced for the purpose of showing that the parties intended the reconveyance to be made to the same uses as were expressed in that indenture; in fact, such recital was introduced for another purpose, namely, that, as the assurance to the mortgagee must be by an exercise of the power of appointment as well as by lease and release, it was necessary to recite the indenture creating the power, and that recital would have been equally introduced whatever might have been the intention of the parties as to the form of the reconveyance by the mortgagee, when the mortgage debt should be paid off. And, with regard to the suggestion that the words, "unto *A. B.*, his heirs, appointees or assigns," are often used as a formula

1851.

PLOWDEN v. HYDE.

for expressing all the limitations ordinarily contained in a conveyance to the common uses to bar dower, I answer that they are so used only in loose parlance, and not in the formal and appropriate language of a deed; and that such use of them is inapt and inaccurate; for, granting that those words sufficiently indicate a power of appointment, and that they would constitute an apt and appropriate formula for expressing a limitation to the use of such persons and for such estates as *A.* shall appoint, and, in default of appointment, to the use of *A.* in fee, how do they indicate the dividing and parcelling out the fee into a life estate, and a remainder in fee, with an intermediate limitation to the use of a trustee during the life of the tenant for life? I cannot decide that a contract to convey to *A.*, his heirs, appointees, or assigns, does, *ex vi terminorum*, import that the conveyance is to be made in the special form of limitations, to the use of such persons and for such estates as *A.* shall appoint, and, in default of appointment, to the use of *A.* for life, and after the determination of that estate in his lifetime, to the use of a trustee during his life, and, after the determination of the estate so limited to the trustee, to the use of *A.*, his heirs and assigns.

I may refer to the judgment of Lord *Langdale*, in *Bullin* v. *Fletcher* (*a*), as a clear and, as I think, unimpeachable authority on this part of the case.

I am, therefore, constrained to conclude, with respect to the mortgaged property, that, by the reconveyance from *Newton* to the testator, of the 6th and 7th December 1813, the devise of that property was revoked.

With respect to the purchased property the case is

(*a*) 1 Keen, 369.

1851.

PLOWDEN v. HYDE.

even still more clear. Indeed, the only argument that could be offered as a ground for holding that the conveyance from the vendors by the indenture of the 9th November 1811, did not revoke the devise, was this: that, as that indenture expressed that the conveyance was made in pursuance of the agreement for the purchase, it is to be inferred that there was a special contract, between the testator and the vendors, that the purchased lands should be conveyed to the testator, not in fee, but to the common uses to bar dower. Even, if the fact were as assumed by this argument, that the conveyance was expressed to be made in pursuance of the agreement for the purchase, I could not have concurred in the conclusion. The purchaser of a fee simple estate, has a right to have the estate conveyed to any uses or in any manner he may please to direct; and, to whatever uses or in whatever manner the estate may be conveyed by the purchaser's direction, the conveyance might, with equal propriety, be expressed to be made in pursuance of the agreement for the purchase, although there was no special provision, in the contract, as to the particular uses to which the estate was to be conveyed by the vendors. But, further, the very foundation of this argument fails; for, upon examining the language of the indenture of the 9th November 1811, it will be found that the conveyance is not expressed to be made in pursuance of the agreement for the purchase. It will be remembered that Lot 1, for which the testator had bid 1,800*l.* at the sale, comprised the freeholds in question, and certain leaseholds. The indenture of the 9th November 1811, which only conveys the freeholds, recites that *Plowden* was allowed and declared to be the highest bidder for and purchaser of the premises comprised in Lot 1, at the price of 1,800*l.*; and that it had been ascertained that the hereditaments intended to be thereby conveyed,

1851.

PLOWDEN v. HYDE.

which formed the freehold part of the said Lot 1, were of the value of 400*l.*; and that it had been agreed that the said 400*l.* should be the apportioned part of the said sum of 1,800*l.* to be paid in respect of and as the purchase and consideration money for the hereditaments thereinafter expressed to be thereby conveyed;* and the indenture witnesses that, in pursuance of the said agreement, and in consideration of 400*l.* paid to the vendors by *Plowden*, the vendors convey the freehold hereditaments in question to *Plowden*, to uses to bar dower. So that the words, "in pursuance of the said agreement," refer, not to an agreement for the purchase of the land, for no such agreement is specified, but to the agreement, which is specially mentioned, as to the 400*l.* being the apportioned part of the whole purchase money, which was to be paid in respect of the freeholds.

With respect then to the purchased property, I am of opinion that, by the conveyance of the 9th November 1811, the devise of that property was revoked.

The only question which remains for consideration is this: whether the testator's heir claiming these lands by descent, and claiming also certain benefits under the will, ought to be put to his election as regards either the mortgaged or the purchased property?

It is to be observed that the mortgaged property is not specially mentioned in the will, but the will does specially mention, among the real estates devised, the lands which the testator had contracted to purchase, situate in or near the parishes of *Boldre* and *South Baddesley*, in the county of *Southampton*. I will assume,

* In the brief, the words: "and the fee simple and inheritance thereof," followed the word, "conveyed."

1851.

PLOWDEN v. HYDE.

in favour of the devisee (although the fact is not clearly ascertained), that the purchased property now in controversy, is part of the hereditaments thus specially mentioned and devised by the will. And in considering the proposition that the heir ought to be put to his election, I will have regard, more particularly, to the lands thus specially mentioned and devised; because, if the proposition cannot be maintained as to those lands (as in my opinion it cannot), *à fortiori*, it cannot be maintained as to those lands which are not specially mentioned and devised.

The argument on behalf of the devisee, is this: That the effect of the testator acquiring, by the subsequent conveyance, a different estate from that which he had at the date of his will, is not, properly speaking, revocation, but ademption; that the estate or interest which he had when he made his will, is, indeed, gone from him; and, therefore, the devise cannot operate upon it; but the words of the devise are not expunged from the will; that they are still capable of expressing and do express the testator's intention to devise the lands there specially mentioned; so that, at the testator's death, when the will comes into operation, the devise of the particular lands still stands part of the will, and the testator died seised of those very lands; and, although by the rule of law, the devise cannot actually pass the estate which the testator acquired by the subsequent conveyance, yet, as the heir, by asserting his right to take the estate by descent, would defeat or disturb the express disposition of that estate by the will, he ought, according to the plain principle of election, to give up his right to take the estate by descent, or abandon the benefits intended for him by the will. Now, it may be admitted that, if the heir, by asserting his right to take the estate by descent, would defeat or disturb an express disposition made by the will

1851.

PLOWDEN v. HYDE.

of that estate which he thus claims by descent, he ought to be put to his election according to the decisions in *Thellusson* v. *Woodford* (*b*), and *Churchman* v. *Ireland* (*c*): and, therefore, the only question is, whether the testator has, by his will, made an express disposition of that estate which the heir claims by descent? What is the estate which the heir claims by descent? It is that estate in fee simple in remainder expectant on the determination of the estate limited to the trustee during the testator's life, which became vested, in the testator, by the conveyance made to him after the date of his will. Has then the testator, by his will, made an express disposition of the estate which became vested in him by that subsequent conveyance? The devise in the will, is of "all and every my messuages, lands, tenements, and hereditaments, and all other my real estate whatsoever, or which I have contracted to purchase, situate in or near the parishes of *Boldre* and *South Baddesley* in the said county of *Southampton* or elsewhere in *England*, of or to which I, or any person or persons in trust for me, am, is or are seised or entitled for any estate of freehold, and inheritance, or of freehold only, in possession, reversion, remainder or expectancy, or which I have power to dispose of or appoint by this my will." In this language, there is nothing which points to any estate or interest which the testator might have at a future time; on the contrary, the terms of the devise refer, exclusively, to such estate and interest as he then had. At the time when he penned that devise, he had an estate or interest to which the language was properly applicable, and which, but for the subsequent conveyance, would have passed by the devise. What is there which indicates the slightest intention to devise another estate and interest

(*b*) 13 Ves. 209. (*c*) 1 Russ. & Myl. 250.

1851.

PLOWDEN v. HYDE.

which was not then vested in him, but which he might thereafter acquire? It is a rule which ought to be strictly adhered to, that, to put the heir to his election, the testator's intention to devise or dispose of such estate or interest as he might thereafter acquire, must be expressly and unequivocally manifested by the will, and in this will there is not the slightest trace of any such intention. To show that the language, here used by the testator, must be held to refer, exclusively, to the estate or interest which he had at the date of his will, I may refer to the cases of *Rudstone* v. *Anderson* (*d*), and *Hone* v. *Medcraft* (*e*), and the judgment of Lord *Eldon*, in *James* v. *Dean* (*f*). It is true that these were cases of leaseholds, but that is immaterial with respect to the question whether the words of the devise are to be construed as pointing only to the testator's present estate or interest, or to such estate or interest as he might thereafter acquire.

Being then of opinion, that the testator has expressed his intention to devise only the estate or interest which he had in the lands at the date of his will, and not such other estate or interest as he might thereafter acquire, I am brought to the conclusion that the heir does not, by claiming these lands by descent, defeat or disturb any disposition made or intended to be made by the will, of that estate which has descended upon him, and that, therefore, he ought not to be put to his election. In truth, the disposition which the testator had made, by his will, with regard to these lands, has been defeated, in his lifetime, by his own act in taking such a conveyance as put an end to the estate or interest which he

(*d*) 2 Ves. sen. 418. (*e*) 1 Bro. C. C. 261.
(*f*) 11 Ves. 388.

1851.

PLOWDEN *v.* HYDE.

then had, and which alone was intended to be disposed of by his will, and vested in him a new and different estate, which the will does not manifest any intention to dispose of.

Upon the whole of the case, I am of opinion that the devise in the testator's will, so far as relates to the lands comprised in the indentures of the 7th December 1813, and the 9th November 1811, respectively, was revoked by those respective conveyances, and that those lands did not pass by the will, but descended on the testator's heir-at-law, and that the heir ought not to be put to his election. I must therefore dismiss the Petition.

SEWELL *v.* MOXSY.

1852: 19th January.

Creditor's Suit. Voluntary Deed. Plaintiff.

A voluntary assignee of a debt due from a person deceased, cannot maintain a suit for the administration of the deceased's estate.

IN February 1851, *N. Stallwood* died indebted to *T. Sanders*. *Sanders* died in the next month. In the following November, his widow, who was his executrix and the sole legatee of his personal estate, executed a deed-poll, containing a power of attorney, by which, in consideration of five shillings, she assigned the debt to the Plaintiff, *Sarah Sewell*, for the Plaintiff's own use and benefit. The Plaintiff alleged the debt to be due to her from *Stallwood's* estate, and claimed to be paid it: and, in default thereof, to have *Stallwood's* real and personal estate administered on behalf of herself and all his other unsatisfied creditors. *Sanders's* widow was made a Co-defendant with *Stallwood's* executor and the persons interested in his real estates under his will: and her execution of the deed-poll was proved, and evidence was given that the debt was still unpaid. The question was whether the voluntary assignee of a debt, could sue for the administration of the debtor's estate?

1852.

SEWELL v. MOXSY.

Mr. *Pole* appeared for the Plaintiff.

Mr. *Buxton*, for Mrs. *Sanders*, said that she did not dispute the assignment, and submitted the question to the decision of the Court.

Mr. *Steere* appeared for *Stallwood's* executor.

Mr. *Stuart* and Mr. *Giffard*, for the parties beneficially interested in *Stallwood's* real estate, said that an assignment of a *chose in action*, was a mere agreement; and, if it was voluntary, a Court of Equity would not enforce it; and, therefore, the Court would not make any order in this case; though it might, perhaps, have made an order if the Plaintiff had sued in Mrs. *Sanders's* name.

The *Vice-Chancellor.*]—Might not the Plaintiff and Mrs. *Sanders* have joined as Co-plaintiffs?

Argument resumed.—They could not have joined as Co-plaintiffs; because Mrs. *Sewell* has no interest, or which is the same thing, no enforceable interest: *Cholmondeley* v. *Clinton* (*a*).

Mr. *Stuart* and Mr. *Giffard* cited the following cases upon the principal question in the case: *Squib* v. *Wyn* (*b*), *Edwards* v. *Jones* (*c*), by which, it was said that *Fortescue* v. *Barnett* (*d*) was, in effect, overruled; *Ward* v. *Audland* (*e*), *Mac Fadden* v. *Jenkyns* (*f*), *Meek* v. *Kettlewell* (*g*), and *Fulham* v. *Mac Carthy* (*h*).

(*a*) 2 Jac. & W. 1, and 4 Bli. see p 81.
(*b*) 1 P. W. 378.
(*c*) 1 Myl. & Cr. 226; see 237, *et seq.*
(*d*) 3 Myl. & K. 36.
(*e*) 8 Beav. 201.
(*f*) 1 Hare, 458, and 1 Phill. 153.
(*g*) 1 Hare, 464, and 1 Phill. 342.
(*h*) 1 Ho. Lds. Ca. 703; see 718.

1852.

SEWELL
v.
MOXSY.

Mr. *Pole* replied.

The VICE-CHANCELLOR, after stating the facts of the case, and observing that it was not disputed that the debt was due from *Stallwood's* estate; and that Mrs. *Sanders,* the assignor of the debt, was made a Defendant and appeared by her Counsel, who, no doubt very discreetly, took no part in the argument, but submitted the question to the decision of the Court, proceeded thus:

The question is whether the debt is due to the Plaintiff; for, to entitle her to sue, she must be a creditor of *Stallwood?* She says that she is a creditor by virtue of the assignment made to her by Mrs. *Sanders.* But an assignment of a *chose in action,* does not convey any legal right. In the view of a Court of Equity, it operates only as an agreement: and, if it is voluntary, the Court will not enforce it, at the suit of the assignee, against the assignor. Now, the assignment under which the Plaintiff claims to be a creditor of *Stallwood* was voluntary; and, consequently, the Plaintiff could not enforce it against Mrs. *Sanders,* the assignor. And, that being so, I cannot decide that she is a creditor of *Stallwood,* or entitled to sue as such. Therefore, the claim filed by her, must be dismissed with costs.

1852:
March 6.

Will, vesting and divesting. Construction of "dying without issue."

A testator, who had two sons and one daughter, gave the interest, dividends and annual proceeds of 3000*l.* stock, standing in his name, to *W.*, one of his children, for life, and after his decease, he gave the said principal stock or sum of 3000*l.* unto all and every the child and children of *W.* to be equally divided between and amongst them, if more than one, share and share alike; and if but one, the whole to such one, to be paid or transferred to him, her or them, on his, her or their attaining twenty-one, and the interest to be in the mean time applied for maintenance and education; he gave similar legacies to each of his other two children and their children; *and upon the death of either of my said sons or daughter without issue, then I direct that the interest, dividends and produce so as aforesaid given and bequeathed to him, her or them so dying, shall be paid and payable to the survivors or survivor of them my said sons and daughter in equal shares and proportions.*

The testator's son *W.* survived him, and had one child, who predeceased him.

Held, that the limitation over referred to the death of either of the testator's children without leaving issue living at his death; that the child of *W.* took a vested interest at his birth, but liable to be divested by the death of *W.*, without leaving issue living at his death, and that the gift over therefore took effect. (*Billingsley* v. *Wills*, 3 Atk. 219, and *Battsford* v. *Kebbell*, 3 Ves. 363, commented upon.)

WESTWOOD *v.* SOUTHEY.

IN this case there were two petitions praying for payment of a sum of 3,000*l.* stock; one was presented by the two surviving children of *John Westwood*; the other by *S. Westwood*, the widow of *William Westwood*, as administratrix of her deceased child. The question was as to the vesting of a legacy of 3,000*l.* stock under the will of *John Westwood*, in the deceased child of *W. Westwood*, and its subsequent divesting. By his will, *J. Westwood*, who had then two sons and one daughter, gave the interest, dividends and annual produce of 3,000*l.* stock, standing in his name, to *W. Westwood* (one of his children) for life; and from and after his decease, he gave the said principal stock or sum of 3,000*l.* unto all and every the child and children of *W. Westwood*, to be equally divided between and amongst them, if more than one, share and share alike; and if but one, the whole to such one, to

1852.

WESTWOOD v. SOUTHEY.

be paid or transferred to him, her or them, on his, her or their attaining twenty-one, and the interest to be in the mean time applied for maintenance and education. He gave similar legacies to each of his other two children and their children. And then there was this gift over: "And upon the death of either of my said sons or daughter *without issue,* then I direct that the *interest, dividends and produce so as aforesaid* given and bequeathed to him, her or them so dying, shall be paid and payable to the survivors or survivor of them, my said sons and daughter, in equal shares and proportions."

W. Westwood had a son, who pre-deceased him.

Mr. *Malins* and Mr. *Welford,* for Mrs. *Westwood,* the representative of the deceased child of *W. Westwood.*

The interest vested in the deceased child of *W. Westwood* immediately on his birth. The postponement of the gift of the principal till after the death of the tenant for life, is only on account of the life interest, and does not prevent the vesting. So far the interest clearly vests. The gift over on the death of *W. Westwood,* without issue, if read generally, would be void for remoteness; but it will not be read generally, but in a limited sense, viz., in case of his dying *without having had issue: Yates* v. *Madden* (*a*), *Halifax* v. *Wilson* (*b*), *Jones* v. *Jones* (*c*), *Doe* d. *Todd* v. *Duesbury* (*d*), *Re Bartholomew's Trust* (*e*). The gift over is only of the interest; there is no gift over at all of the capital. The intention was, that, in the event of the death of any of the children of

(*a*) 16 Jur. 45.
(*b*) 16 Ves. 168.
(*c*) 13 Sim. 561.
(*d*) 8 Mees. & Wels. 514.
(*e*) 1 Macn. & Gord. 354.

1852.

WESTWOOD v. SOUTHEY.

the testator without issue, only his life interest should go over.

Mr. *Wigram* and Mr. *Faber*, for the surviving children of the testator.

No interest vested till the death of the tenant for life: *Billingsley* v. *Wills* (*f*). The gift to *W. Westwood* was of dividends only; there was no gift of the principal at all till his death. It is said that the gift over was only of dividends; but being of dividends generally, it passes the capital: *Page* v. *Leapingwell* (*g*). In the cases where the interest has been directed to vest at twenty-one, the Court has struggled to prevent a limitation over from defeating the vesting. But in this case the object of the limitation over on failure of issue was to benefit the survivors of the testator's children: *Hughes* v. *Sayer* (*h*), *Ranelagh* v. *Ranelagh* (*i*), *Cromek* v. *Lumb* (*k*). They cited also *Massey* v. *Hudson* (*l*), *Battsford* v. *Kebbell* (*m*), *Haigh* v. *Swiney* (*n*).

Mr. *Welford*, in reply.

In *Billingsley* v. *Wills*, the doubt was whether there was any vesting at all. Here the gift is for life to the testator's children, and then a gift to the grandchildren, and a direction for the maintenance and education of the grandchildren, which is of itself an indication of intention to vest the grandchildren's interests on their births. The gift over without issue, means dying

(*f*) 3 Atk. 219.
(*g*) 18 Ves. 463.
(*h*) 1 P. Wms. 534.
(*i*) 2 Myl. & K. 441.
(*k*) 3 Y. & Coll. 565.
(*l*) 2 Mer. 130.
(*m*) 3 Ves. 363.
(*n*) 1 Sim. & Stu. 487.

without having *had* issue. If there were no vesting in the grandchildren till their parents' death, and a grandchild were to marry and have children, and die, living his parent, there would be no provision for the children of such grandchild, which could not be the intention.

The VICE-CHANCELLOR:

The questions on these two petitions arise on the construction of the will of *J. Westwood.* At the date of his will, *J. Westwood* had three children, all under age, viz. *Henry F. Westwood, Elizabeth Westwood* and *William Westwood.*

The question here is on the gift of a legacy of 3,000*l.* stock for the benefit of *W. Westwood*; but as there are similar legacies for the benefit of the other children, and one of the material clauses in the will applies to the three legacies, they must all be considered.

After certain specific bequests to his eldest son, which are not now in question, the testator proceeds to give in these terms: "I give and bequeath to my son *Henry F. Westwood* the dividends, interest and annual profits to arise from a sum of 3,000*l.*, New 3½ Bank Annuities, now standing in my name in the books of the Governor and Company of the Bank of *England,* for and during the term of his natural life; and from and immediately after his decease, I give and bequeath the said principal sum or stock of 3,000*l.* unto all and every the children of my said son, to be equally divided between and among them, share and share alike if more than one; but if there shall be but one such child, then the whole of the said principal stock or sum of 3,000*l.* to such only child, the same to be paid or transferred to him, her or them on their severally and respectively attaining the age of

1852.

WESTWOOD v. SOUTHEY.

twenty-one years, the interest and produce thereof to be in the mean time applied for and towards their maintenance and education."

A similar legacy of 3,000*l.* stock is given in the same terms for *E. Westwood* and her children; and a third legacy of the same amount of stock is given in the same terms for the benefit of *W. Westwood* and his children.

In each case the legacy is specific. The testator expressly points to the subject of legacy, as being a sum of 3,000*l.*, New 3½ Bank Annuities, "now standing in my name." So far there would not be much ground for doubt; but after giving the three legacies, the testator proceeds (first directing, which, however, is not material to the present question, the interest and dividends to be applied for the maintenance and education of his children while under twenty-one,) to the clause containing the limitation over, which it is very material to consider: "And also upon the death of either of my said sons or daughter without issue, then I direct that the interest, dividends and produce, so as aforesaid given and bequeathed to him, her or them so dying, shall be paid and payable to the survivors or survivor of them my said sons and daughter in equal shares and proportions."

The testator then gives some small legacies to other persons, and then he gives the residue to his daughter and his younger son *W. Westwood*.

The parts of the will on which the questions in these petitions turn, are those which relate to the legacy to *William Westwood* and his children. As regards *William* the material facts are these: He attained twenty-one, and married and had one child only, who died without having

any issue (having in fact died in infancy) during the lifetime of his father. Then *William* died leaving no issue of any degree living at his death. One of the claimants to the fund is the representative of *William's* deceased child (who is the petitioner in one of these petitions), claiming the legacy as having vested in *William's* child, and not having become divested. The other claimants are the two surviving children of the testator, who claim under the gift over.

There might be a third alternative, for which, however, no one has contended, viz. whether the residuary legatees are not entitled? whether, if *William's* child took no vested interest, and if the remainder over is void, the residuary legatees did not take? This was not argued, but it is a possible construction.

In order to determine the question before me, the matter divides itself for consideration into two parts: firstly, whether, under the previous gift, *William's* child took a vested interest? If he did not, the second point does not arise. If on the other hand *William's* child did take a vested interest, then it is material to consider the second point, viz. what is the effect of the gift over, in the event of *William's* dying without leaving any issue living at his death?

On the first point, whether the interest of *William's* child vested, it has been contended that in this case there is no gift of the *corpus* of the stock until the death of *William*; that the gift to *William* is only of the dividends and interest; that the gift to his children is only to take effect upon his death; that that is the first gift of the principal, and that therefore *William's* child did

1852.

WESTWOOD v. SOUTHEY.

not take a vested interest. For this the authorities cited were, *Billingsley* v. *Wills* and *Battsford* v. *Kebbell*.—[The Vice-Chancellor stated the facts of *Battsford* v. *Kebbell*, and continued:] The question there was, whether *R. Endly* had a vested interest; and it was held, and quite justly, that he had not, because the language of the will showed that the testatrix did not mean him to take anything but the dividends, unless he attained the age of thirty-two.

Billingsley v. *Wills* is a little more complicated, but the principle can be easily perceived.—[The Vice-Chancellor referred to the terms of the bequest in *Billingsley* v. *Wills*, and proceeded:]

When the testator in that case made his will, his brother *Capel Billingsley* had three children, one son and two daughters, and Lord *Hardwicke* said no child could have a vested interest until the death of the father, *Capel Billingsley*. In the first place, the eldest son was to be excluded; that is clear from the passage: "But my express will and meaning is that no elder son," &c.; and if there should be no son, but only a daughter, then the eldest daughter was to be excluded. Lord *Hardwicke* said the words "living at his decease" applied not only to the passage "if there be only daughters," but to the preceding words, "in case there shall be more than one son." Therefore the limitation over was to a class of persons which could only be ascertained at the death of *Capel Billingsley*.

These cases have very often been relied upon in support of a proposition, which they do not at all establish, viz. that if in the first instance there is a gift of dividends only, and then the gift of the principal, with a

limitation over, for that reason only, there is no vesting. That principle is not, in my opinion, established by these cases; and to show that there is no such principle, I refer to two cases of *Chaffers* v. *Abell*, reported in the 3rd Jur. 577 and 578. These cases refer to two different wills; the first, as stated in the marginal note, is this: A testator bequeathed a certain sum of stock to trustees to pay 40*l.* per annum to his daughter for life, and, after her decease, "to pay, assign and transfer the sum of 1,000*l.* stock equally amongst all and every the child and children of his daughter, share and share alike, to be paid and transferred to them when and so soon as the youngest should attain his or her age of twenty-one years." At the death of the testator, the daughter had four children, one of whom died before the youngest attained twenty-one; the youngest only survived the daughter. It was held that the four children took vested interests in the stock.

It might have been contended in that case, as in this, that there is no gift of the principal till the death of the daughter; indeed, the argument would have been stronger; for there was not even a gift of the dividends, but only a direction that out of the dividends 40*l.* should be paid to the daughter. It is true there was a gift of the aggregate stock to trustees in the first instance, a circumstance frequently relied upon; but in the next case, in p. 578 of the report in the 3rd Jur., there is no gift to trustees at all, and the case is in fact extremely like this. There the gift was of "the interest of 500*l.*, Navy 5 per Cents., to the textatrix's sister, and at her death the said 500*l.* stock to be divided between her children, share and share alike." The sister had three children at the death of the textatrix,

1852.

WESTWOOD
v.
SOUTHEY.

but only one survived her; it was held that the three children took vested interests.

Now, that is exactly like this case; no gift to trustees at all, but a gift to the sister during her life of the dividends of a specific sum of stock, without any gift of the principal, and, after the death of the tenant for life, the principal sum of stock given over.

It is, indeed, seldom that one finds an authority so exactly on all fours with the case before the Court; but even if there were not that case, I should have come to the same conclusion. *Billingsley* v. *Wills* and *Battsford* v. *Kebbell* have been much misapprehended, as determining that where there is a gift of dividends in the first instance for life, and then on the death of the tenant for life a gift of the principal, that, without more, prevents the vesting of the principal. On the whole, I am of opinion that *W. Westwood's* child took a vested interest at his birth. It must be further observed, in aid of this construction, that, after the gift to the children, there is a direction that the time of payment shall be on their attaining twenty-one, which ordinarily indicates a vested interest.

Then, assuming that there was a vested interest in the child of *William* at his birth, the next point is, what is the effect of the limitation over on the death of *William* without issue? Does that divest the interest vested? The words, "upon the death of either of my three children without issue," are capable of three constructions; the first, that they refer to an indefinite failure of issue; the second, that they refer to a dying without the particular class of issue before mentioned;

the third, that they refer to dying without issue living at the death of the person dying.

As to the first construction, if that were the right one, the gift over would necessarily be void, as that gift can only be valid by assuming the dying without issue to be either without leaving issue living at the death, or without the particular issue. And the Court will always lean towards a construction which will give effect to the gift over.

Then do the words mean dying without *such* issue; that is, the issue before mentioned, or dying without issue living at the death? In order to arrive at a conclusion, regard must be had to the fact that the limitation over is not confined to the particular legacy to *W. Westwood*, but is applicable to all the three legacies, the language being this: "Upon the death of either of my said sons or daughter." On the death, therefore, of either without issue, there is a gift over of the interest and dividends, to be payable to such one or two of the other children as shall survive. Now the general rule (not certainly without exception) is, that where there is a gift over to the survivor or survivors of several persons after the death of either without issue, the words "dying without issue" mean without issue living at the death. [His Honor referred to the judgment in *Ranelagh* v. *Ranelagh*, p. 443 of the report in 2 Myl. & K., and proceeded thus:] In this case there is no larger interest given to *W. Westwood* than for his life; and the limitation over on his dying without issue, is to pay the interest and dividends to the survivors or survivor. There is no mention here, as in *Massey* v. *Hudson* (*a*), of

(*a*) 2 Mer. 130.

1852.

WESTWOOD v. SOUTHEY.

the executors, administrators or assigns of the survivor and it is not a simple gift of the stock, but a direction to pay the interest and dividends to the survivors or survivor; I think the words "survivors and survivor" here must be read in their natural sense, that is, such as are living at the death of *William*. If the word "survivors" meant "others," why did the testator say survivors *or survivor?* He knows how many children he has; he speaks of them in specific terms as his eldest son, his daughter, and his youngest son; and if both survived, the direction is to pay the dividends to the two; if only one, to pay the dividends to such one, showing a clear intention to confer a personal benefit on the survivors or survivor. For this reason, I am of opinion that the limitation over on the death of any one of the testator's children without issue, refers to the death of any one of them without leaving issue living at his death.

The remaining question is, how does this conclusion affect the construction of the word "issue" in the limitation over? It is true, that where there is a legacy to one for life, and after his death to his children, with a gift over if he die without issue, and there is nothing to restrain those words, the words "without issue" are limited to the issue before mentioned. But the ground on which the Court has used violence with the words and interpolated the word "such" is this, that if there were no restriction on the generality of the words "dying without issue," the limitation over would be void; you refer therefore the language of the gift over, to that of the preceding gift, in order to limit the general term "issue" to the particular issue before mentioned. But when the dying without issue is either in terms, or by the proper construction, limited to dying without issue

living at the death, there is no reason for interpreting the words as meaning "such issue as before mentioned." I am not aware of any case in which a legacy to one for his life, with remainder to his children, and a gift over if he dies without issue in the sense of issue living at his death, the limitation has been restricted as if the words had been such issue as before mentioned. Such a construction might in fact wholly defeat the testator's intention; for if the words were construed to mean "such issue," the effect might be this: the tenant for life might have an only child, who might attain twenty-one, marry, and have children, and die before the tenant for life, and then the child and the issue of that child would be excluded.

I am of opinion then that *W. Westwood's* child took a vested interest at his birth; but that that vested interest was liable to be divested by the death of *W. Westwood* without leaving issue living at his death; and that event having happened, the gift over takes effect. This construction does no violence to any of the clauses of the will; it interpolates nothing; it rejects nothing; and it gives to every word used its primary and legitimate sense; moreover, its results would, in any of the events that might have happened, be most in accordance with the testator's apparent general intention.

The two surviving children of the testator are, therefore, entitled to the stock now representing the legacy in question, and one order will be made on both petitions according to the prayer of the petition of the surviving children*

* This case was afterwards heard on appeal before the Lords Justices, but was compromised.

1852:
March 8th.

Nuisance.
Acquiescence.

WOODMAN *v.* ROBINSON.

A bill was filed by a single parishioner against some of the churchwardens of the parish, alleging an intention on the part of the Defendants to execute works in the church which would be injurious to himself, and praying an injunction. The Plaintiff did not allege any right of property in a particular pew, but did allege that he was a parishioner, and that he was in the habit of attending divine service in the parish church.

THE bill in this case was filed by *Woodman*, a parishioner of the parish of *Morpeth*, against three, not being the whole number, of the churchwardens, and there were no other parties to the suit. The object of the bill was to have an injunction to restrain the Defendants from warming the parish church by means of hot air or hot water pipes, which it was alleged they intended to lay under the floor of the church; and it was alleged that great injury to health would be thereby produced, by reason of the earth beneath the floor of the church being filled with graves. The Plaintiff alleged by his bill that he was a parishioner, and that he was in the habit of attending the parish church, but he did not allege any specific title to a pew.

Query, whether this is a private nuisance, and whether such a bill can be sustained by a single parishioner against the churchwardens.

A Plaintiff complained of works intended to be executed by the Defendants, churchwardens of his parish, which he alleged, in the way in which it was proposed to execute them, constituted a nuisance; much negotiation took place, in the course of which the Defendants showed a continued acquiescence in the suggestions made by the Plaintiff as to the mode of executing the works, and suspended their execution. While these negotiations were still going on, and before any works were commenced, the Plaintiff filed his bill for an injunction, and obtained special leave to give notice of motion, and served the notice of motion. On the day following the service of the notice of motion, the Defendants, in order to avoid litigation, passed a resolution at a vestry, at which the Plaintiff was present, that the works should be wholly abandoned. After that the Plaintiff brought on his motion. Held, without going into the question whether there would be any nuisance, that, under the circumstances, the motion was useless and improper, and it was refused with costs.

1852.

WOODMAN v. ROBINSON.

On the question whether a nuisance would be created by the mode in which it had been proposed to execute the works, there was much conflict of evidence, on which it is not material to state anything further, as the decision turned on other facts fully stated in the judgment.

Mr. *Stuart* and Mr. *Bates*, for the motion.

Mr. *Malins* and Mr. *Dickenson*, for the Defendants, objected to the form of the suit, that it was defective for want of parties. If the bill proceeded on the ground of private nuisance, the Plaintiff must show an injury to property; but he did not show that he had any right of property, for he did not allege title to a pew; and the mere right of user of a church is not a right of property. If the bill proceeded on the ground of public nuisance, the Attorney-General ought to have been a party.

Mr. *Stuart*, on this point, referred to *Spencer* v. *London and Birmingham Railway Company* (*a*).

The VICE-CHANCELLOR:

On this application one serious and material question arises, viz. how far such a bill can be entertained by a single parishioner against the churchwardens. If my decision were to turn on that point, I should take time for looking into the authorities. At present I consider

(*a*) 8 Sim. 193. See on this point *Haines* v. *Baker*, Amb. 158. A parishioner has a right to a seat in the parish church; and he can proceed against the churchwardens to enforce such right in the Ecclesiastical Court: see *Walter* v. *Gunner and Driver*, 1 Hag. Cons. 317; and see also *per* Sir *J. Nicholl* in *Fuller* v. *Lane*, 2 Add. 425, 426.

1852.

WOODMAN v. ROBINSON.

it a very doubtful question whether a single individual can sustain such a bill. However, on the circumstances of this case I am of opinion that I can decide it without determining that point.

The injunction sought is to restrain the churchwardens from proceeding with a plan entertained, and originally intended to be carried into effect, for warming the parish church, by means of hot water pipes to be laid under the floor of the church. That plan, in its original form, was brought to the attention of the select vestry on the 5th of November 1851. Of the meeting of that vestry notice was duly given, and at that meeting a statement of the expenses was made, and the plan was fully explained by the rector to the members, and no objection was made; on the contrary, the plan was approved, and a rate was made by the vestry to defray the expenses. The Plaintiff was not, it is true, shown to have been present, nor was any special notice served on him. However, the churchwardens considered the plan desirable; nobody objected; and the churchwardens determined to carry it into effect.

In pursuance of the resolutions of the vestry, the churchwardens entered into a contract with a person named *King*, to carry into effect the plan, which was this:—to lay the pipes which were to contain the hot water, in a casing of brickwork, so as to separate the pipes from the soil under the floor of the church, by brickwork. On the 5th January 1852, that is, two months after the resolution come to by the vestry, the Plaintiff, himself a parishioner, had an interview with one of the churchwardens, and suggested objections to the plan, and this was the first time the churchwardens heard of there being any objection. On the 6th January, *Wilkinson*, one of the

1852.

WOODMAN v. ROBINSON.

churchwardens, received from the Plaintiff a letter addressed to the churchwardens, and stating in substance that the ground of objection to the plan proposed was, that the soil in which it was intended to lay the pipes, was full of the *debris* of dead bodies. After conversing with the other churchwardens on the subject, *Wilkinson* called on the Plaintiff on the 6th January, and explained to him fully the intended plan, and the precautions which it was proposed to take. The Plaintiff stated himself not satisfied, and *Wilkinson*, on behalf of the churchwardens, expressed their surprise at the objections, when the Plaintiff replied that he had spoken on the subject to the rector a month before, so that it seems the Plaintiff had known of the intended plan a month before he made any objection to it. However, in consequence of the Plaintiff's objections, the churchwardens agreed not to commence their works, but to lay a statement of the case before the General Board of Health; and they did accordingly prepare such a statement and lay it before the Plaintiff himself for his approval, and for him to forward it to the Board; he did approve it with some slight alterations, and himself sent it to the Board of Health; and an answer was sent to him dated the 15th January, which he communicated to the churchwardens on the 20th. The material contents of this answer were to the effect, that the Board did not entirely approve the plan of the churchwardens, and they suggested certain alterations. It was natural to suppose when the opinion of the Board was thus invited and given, that the Board meant that if their plan was adopted, the apprehended mischief would be avoided; accordingly, the churchwardens, acting upon that supposition, abandoned their old plan, and adopting that of the Board, arranged with their contractor to proceed according to the opi-

1852.

WOODMAN
v.
ROBINSON.

nion of the Board; the Plaintiff, however, considered that the Board did not mean to say that their plan would be sufficient.

On the 21st January, *Wilkinson* called on the Plaintiff, and left word that the plan of the Board of Health would be adopted. The Plaintiff on the same day gave notice to the contractor not to proceed, and on the following day a similar notice to the churchwardens; on the same day, the Plaintiff saw one of the Defendants and stated to him that the opinion of the Board of Health was not clear, and added that Mr. *Charlton*, another churchwarden, suggested another meeting of the vestry. The Defendant upon this proposed that a second letter should be sent to the Board, and that was supposed to be the arrangement; nothing at least passed from which the Plaintiff could infer that the Defendants intended then to carry out their plan as first amended by the Board. On the 22nd January, *Wilkinson* wrote to the Board, and asked whether their plan might safely be adopted; and in the mean time suspended all proceedings and issued notices for a further vestry meeting. The earliest day on which they could meet was the 29th. On the 25th, the Sunday following the issue of the notices, notice was put up on the church door, and also at another church, so that every one concerned might know of the intended meeting.

Up to this point, there was no ground for the Plaintiff to say that there was that degree of danger, that unless a bill was filed and special leave obtained to give a notice of motion, such mischief would ensue as would entitle him to an injunction. On the 27th of January the position of the parties was in fact the same as it had been from the beginning; both parties up to that time

acting properly; the Plaintiff making objections; the churchwardens, with great consideration for a single individual objecting, suspending their operations, and doing what he required, and sending to the Board of Health for their opinion.

Can I say then that on the 27th, matters were in such a state, that the peremptory interference of the extraordinary jurisdiction of this Court was requisite, and that it was necessary that a bill should be filed, and a notice of motion served on special leave obtained on the ground of imminent danger? There was no ground for any apprehension of danger on the Plaintiff's part on the 27th January (that is, danger of the Defendants proceeding with their works); and it is not denied by the Plaintiff that when he filed his bill, he knew that notices for a meeting on the 29th had been issued, and that there had been a further application for the opinion of the Board of Health. There was in fact nothing to justify any apprehension that anything would be done by the churchwardens with the works, until after the meeting of the 29th. Nevertheless, on the 27th, the Plaintiff wrote to the Defendants that a bill was filed; and in that letter called on the Defendants to give a pledge that no further steps would be taken, and stated that if such a pledge were not given, further proceedings would ensue. On the 28th, *Wilkinson* replies, that as there was to be a meeting on the 29th, and as the churchwardens would in a great degree be guided by the conclusion come to by the vestry, he could not before the 29th say that the churchwardens would give any positive pledge that they would not adopt any plan. The Plaintiff had no right at that time to exact such a pledge, and ought to have waited till after the 29th, and till the further answer of the Board of Health had been received. He knew

1852.

WOODMAN v. ROBINSON.

that no work was actually done, and that the proceedings had been suspended at his own instance. Nevertheless, on the 28th, counsel applied for leave to give a special notice of motion on the ground of danger. Now there was, as I have said, no ground for any apprehension of danger at that time. On the 29th, the answer of the Board of Health came, and the substance of it was to add to their former suggestions, a recommendation that every part of the floor of the church should be closed carefully, otherwise effluvium might arise; and they added that even the heat caused by the presence of the congregation, might itself cause the generation of effluvium. This answer having been received, the vestry held its meeting, at which the Plaintiff and the Defendants were present; and a resolution was then come to that, in consequence of the proceedings taken by the Plaintiff, and to avoid expense, the whole project should be abandoned. This resolution is said by the Plaintiff to be an admission by the Defendants that the Plaintiff was right throughout; but I think that is not so; it was merely that rather than incur expense and litigation, the vestry would abandon their works.

On the same 29th January, a copy of the resolution was given to the Plaintiff; on the 31st was the sale; and the motion of which notice had been given was mentioned, when counsel for the Defendants asked that it might stand over. By this time the Plaintiff ought to have felt that he had been hasty. On the 6th February the Defendants made an offer to put an end to the case, on the terms of each party paying his own costs. The Plaintiff refused to compromise, unless his outlay was paid to him; otherwise, he insisted on going on with his bill, although the works were abandoned. The motion was therefore made, not for the purpose of

obtaining an injunction, but in reality to have it decided that the Plaintiff had a right to an injunction on the 31st, in order to entitle him to his costs.

If an injunction were granted in this case, it would be an injunction to restrain the Defendants from doing acts which they never had any intention of doing, except in the performance of their duty, and which they have, in pursuance of the Plaintiff's suggestions, formally resolved not to do at all. And I am of opinion that the injunction must be refused. The only remaining question is as to the costs of the motion. I am clearly of opinion that the motion was uncalled for; it was a motion to restrain parties on the ground that they intended to do wrongful acts. At the time when the notice was given, and when the motion was brought on, there was no intention on the part of the Defendants of doing the alleged wrong; they were, on the contrary, doing what was quite right; they were attending to the Plaintiff's objections, and doing all in their power, with the Plaintiff's concurrence, to have it ascertained by application to the Board of Health, what was the best course for them to pursue. On the whole I think this motion must be refused with costs (*a*).

(*a*) See on this subject *Millington* v. *Fox*, 3 Myl. & Cr. 338; *Geary* v. *Norton*, 1 De G. & Sm. 9.

1852:
March 29.

Will.
"And" read "Or."
Annual Profits.

STAPLETON *v.* STAPLETON.

THIS was a special case upon the construction of the will of *Thomas Stapleton*, taken in connection with a deed of settlement dated the 7th June 1826.

Under the settlement, *T. Stapleton* was, at the time of making his will, tenant for life of the manor of *Berwick Hill* and other lands, with remainder to the first and other sons of his body successively, and the heirs male of the respective bodies of such sons, remainder to *Gilbert Stapleton* (the Plaintiff), a brother of *T. Stapleton*, for life, with remainder to his sons in tail male;

Testator, tenant for life under a settlement of the *B. H.* estate and other lands, remainder to his first and other sons in tail male; remainder to *A.*, his brother, for life, with remainder to his first and other sons in tail male; remainder to other brothers of the testator in like manner; and after other intermediate limitations, remainder over to the sisters of the testator as tenants in common in tail general.

The testator by his will gave certain specific things to be enjoyed by the person or persons who for the time being should be entitled to the freehold *or* inheritance of the family estate at *Stapleton*, as and in the nature of heir-looms. He gave his furniture, plate, &c., to his brother *A.* He directed a sum of 1000*l.*, secured to him on the *B. H.* estate and other estates, to sink into the freehold *and* inheritance of the said estates, that the same might merge them; and the rents and arrears of rent, with timber felled, and *other annual profits* due to him at the time of his decease from the *B. H.* estate, *unto the person or persons who should be entitled to the freehold* AND *inheritance of the same estate, in possession on his decease. He gave his residue to his two brothers B. and C.; and he appointed his brother A. his sole executor.* *B.* died in the testator's lifetime.

Held, first, that in the gift of the rents, &c., the word *and* must be read *or*, and that they passed to *A.*, although he was entitled only to the freehold; secondly, that certain prepared brick earth dug out of the estate by the tenant for life, and lying upon it at his death, and certain tiles so made and remaining on the estate, were comprised in, and passed by the words *other annual profits;* thirdly, that certain apportionable parts of the rents which, under the Apportionment Act, went to the testator's executor as part of his assets, passed under the words *due to him at the time of his decease.*

remainder to other brothers of *T. Stapleton* and their sons in tail male in like manner; and after other limitations, there was a limitation over to the sisters of *T. Stapleton* as tenants in common in tail general.

T. Stapleton made his will on the 3rd January 1841, which was, so far as is material to the points decided in this case, in the words following:—

"I give and bequeath to my executors, hereinafter mentioned, all my plate marked with the family arms and crest, or either of them, and also all my books, manuscripts, maps, pedigrees, and library, and all other my property of a like nature, in trust to permit and suffer the same to be held, used, and enjoyed by the *person or persons who for the time being shall be entitled to the freehold or inheritance of the family estate* of *Stapleton*, in the township of *Carlton*, in the said *West Riding* of the county of *York*, as and in the nature of heir-looms, and for that purpose to cause inventories thereof to be made at the expense of my personal estate; and I direct that one copy of such inventory shall be signed by my said executor, and another copy thereof shall be signed by the person who for the time being shall be entitled to the possession of the freehold or inheritance of the said family estate of *Stapleton*. And I do hereby declare my will and mind to be that no person or persons who shall be tenant in tail or tenant in tail male of the said family estate, shall be entitled to an absolute vested interest in the said legacy, unless he or she shall live to attain the age of twenty-one years, or die under that age leaving lawful issue living at the time of his or her decease; but so nevertheless that such tenant in tail male shall be entitled to the use and enjoyment of the said legacy during his or her minority. I bequeath all and singular

1852.

STAPLETON v. STAPLETON.

my household furniture, pictures, china, linen, glass, and other effects whatsoever (except plate and plated articles, money and securities for money), being at the time of my decease in or about the house of my late father *Thomas Stapleton*, called the *Grove*, at *Richmond*, in the *North Riding* of the said county of *York*, or in or near the town of *Richmond* aforesaid, to my brother *Gilbert Stapleton*, his executors, administrators, and assigns, to and for his and their own use and benefit. I bequeath to my said brother my silver gilt dressing-case. I bequeath all and singular my plate and plated articles which I shall be possessed of at the time of my decease, and not hereinbefore by me bequeathed, to my brother *John Stapleton*, his executors, administrators, and assigns, to and for his and their own use and benefit. I direct the sum of 1000*l.*, or thereabouts, now secured to me on mortgage of the *Berwick Hill* estate, in the said county of *Northumberland*, and certain estates at *Drax*, or elsewhere, in the county of *York*, or some or one of them, or some parts thereof, *to sink into the freehold and inheritance of the said estates* respectively, so that the same estates may thenceforth be absolutely freed and discharged from the said mortgage debt and all interest in respect thereof, and the same mortgage and interest may merge in the freehold and inheritance of the same estates respectively. I bequeath all the rents and arrears of rent, with timber felled, and other annual profits due to me at the time of my decease from my *Berwick Hill* estate, *unto the person or persons who shall be entitled to the freehold and inheritance of the same estate in possession at my decease.* And as to all the rest, residue, and remainder of my personal estate and effects, whatsoever and wheresoever, I bequeath the same unto my brothers *Henry Stapleton* and the said *John Stapleton*, their executors, administrators, and

1852.

STAPLETON v. STAPLETON.

assigns, for their absolute use and benefit. And, lastly, I do hereby appoint my brother, the said *Gilbert Stapleton*, sole executor of this my will."

T. Stapleton died on the 3rd of December 1849, a bachelor, at the age of forty-three. The Plaintiff, *Gilbert Stapleton*, was his next brother, and was two years younger than the testator. He was also unmarried at the date of the will. The yearly rent of the *Berwick Hill* estate was, in 1849, about 1707*l.* 11*s.* 5*d.*, and due at May day, and *St. Martin's* day. Certain parts thereof were let upon lease for seven years, from May day 1843, and the rent made payable May day and *St. Martin's* day. And other parts were let by parol at yearly rents, payable on the 13th May and 23rd November. There were rents and arrears of rents thereof up to *St. Martin's* day 1849, to the amount of about 1035*l.* due to the testator, *T. Stapleton*, at his death, and certain rents to a small amount accrued due between *St. Martin's* day 1849, and the time of the death of *T. Stapleton;* there was also upon the *Berwick Hill* estate, at the time of the testator's death, a considerable quantity of tiles and bricks, which had been burnt in a kiln built upon the estate about a year before the death of the testator, and had been made out of earth and clay taken out of the estate; and there was also a certain quantity of prepared brick earth or clay for the purpose of making bricks, dug out of the estate and standing upon it. Tiles made in a similar manner had, in the lifetime of the testator, been used for draining parts of the estate. Certain of the remaining tiles upon the estate at the death of the testator, had been made for the purpose of being used in draining the estate, and all the tiles and bricks and brick earth or clay were made or prepared during the year preceding the death of the testator. *Henry Stapleton*,

1852.

STAPLETON v. STAPLETON.

one of the residuary legatees named in the will, died in the lifetime of the testator.

The case for the opinion of the Court was, Whether the Plaintiff, or the Defendant, the surviving residuary legatee, was entitled to the said rents and arrears of rent of the said *Berwick Hill* estate, due and owing to the said testator, *T. Stapleton*, at his death, and to the rents from *St. Martin's* day 1849, until his death; and whether the said Plaintiff or Defendant was entitled to the said bricks and tiles, and the said brick earth and clay.

Mr. *Fleming*, for the Plaintiff *Gilbert Stapleton*.

The point is, whether in the clause of the will giving the rents and arrears, the word *and* should be read *or*. On the death of *T. Stapleton* there was nobody who was entitled to the freehold *and* inheritance of the *Berwick Hill* estate. To carry the general intention into effect, "and" will be construed "or": *Jackson* v. *Jackson* (*a*). Here the intention will not be carried out if the word "and" is read in its usual sense; for if you so read it, the testator must die intestate as to any special gift of the rents. I admit that the construction contended for is not the only possible one, but it is the most reasonable: *Maberley* v. *Strode* (*b*), *Bell* v. *Phyn* (*c*), *Wilson* v. *Bayley* (*d*).

In this case, in the first part of the will when the plate is given as heir-looms, the word *or*, the proper word, is

(*a*) 1 Ves. sen. 217; 1 Shep. Touchst. ed. Atherley, 85, n.

(*b*) 3 Ves. 450.

(*c*) 7 Ves. 453; see p. 458; 1 Pow. Dev. ed. Jarm. 384, note.

(*d*) 3 Bro. P. C. ed. Tomlinson, 195.

used; so, in the direction to merge the mortgage, the word *and*, which for that purpose is the proper word, is used. In the gift of the rents the word *or* would be the proper word to carry the obvious intention into effect, and the Court will assimilate for that purpose the language of the latter clause to that of the former, and read the word "and" as "or": *Stubbs* v. *Sargon* (*e*). When *T. Stapleton* made his will both he and his brothers were unmarried. He says the person or persons who shall be at his death entitled to the freehold and inheritance, is or are to be entitled to the rents. Now, he could not have contemplated that under this gift, if his death had happened immediately after making his will, any one except his brother *Gilbert* should take; for if *Gilbert* was then living, there would be no person capable of taking strictly under the description of being entitled to the freehold *and* inheritance. To satisfy these words strictly, he must have contemplated the deaths of all his brothers in his lifetime, and that his sisters should take, as having the freehold and inheritance under the ultimate limitation to them: but this could not be the state of things contemplated by him; he clearly based his whole will on the supposition that *Gilbert* would survive him, for he makes him his executor; he knew that if *Gilbert* survived him, he would come into possession of the freehold as tenant for life, and not into the inheritance. He must therefore be taken to have intended to include *Gilbert* under the words used by him, and that intention is effectuated by reading the word "and" "or."

It is immaterial that he has used the proper word "or" in the gift of the plate: words may be construed differ-

(*e*) 2 Keen, 255, see p. 273.

1852.

STAPLETON v. STAPLETON.

ently in different parts of a will: *White* v. *Briggs* (*f*). Secondly. As to the rents accruing due after the testator's death, so much of them as arose upon the demises under written instruments is apportionable. The bricks, tiles, &c., pass as annual profits, though not strictly profits arising every year. The testator expressly includes in annual profits the timber felled, which is not a profit accruing every year.

Mr. *Bates*, for the Defendant *John Stapleton*, the residuary legatee.

The testator was himself a barrister, and knew the legal effect of the words used. In the earlier part of the will, when, in a gift of things to be enjoyed with the freehold merely, he uses the words freehold *or* inheritance, he shows that he knew and had in his mind, the difference between the inheritance and the mere freehold. To construe the words, it is not the events that have happened that are to be looked at, but those which might have happened. The estate was so settled under the deed of 1826, that it might have vested in possession at the testator's death upon the sisters, who as tenants in tail in possession would have satisfied all the words of the will. We are not to assume that a testator has immediate death in his contemplation, in order to arrive at the construction of his will. In this case it was much more likely, having regard to his age, that the testator would contemplate the possibility of his surviving his brothers. That there was no person at the testator's death answering the description actually used, is no reason for altering the will. If all the brothers had died living the testator, an event which he must have been taken to have

(*f*) 2 Phil. 583.

contemplated as at least possible, there would have been persons having the inheritance *and* the freehold of the *Berwick Hill* estate, and all the words of the will would then have been satisfied.

Mr. *Fleming*, in reply.

The contention of the Defendant that the testator contemplated the deaths of all his brothers before his own, is inconsistent with his having made *Gilbert* his executor. I admit that all the words of the will must be satisfied, but that can only be done by adopting the construction for which I contend. The words used are "the person or persons." If *Gilbert* succeeded, the word person in the singular would be satisfied. The word *persons* would be satisfied if the sisters succeeded, but not the word person. If the succession of the sisters only was contemplated, the word freehold would have been unnecessary; for the sisters taking the inheritance in possession would of necessity take also the freehold; and the testator must not be taken to have used the word freehold unnecessarily, or without attaching to it any meaning, and to give it a meaning and use, the word *and* must be construed *or*.

The VICE-CHANCELLOR:

In this case, looking at the whole of the will, it is clear that the testator's intention was to give different portions of his property in different ways. He was a bachelor; his brothers were all bachelors. He had sisters who had, under the settlement, an ultimate limitation to them; that is, each of his brothers would take successively an estate for life, with remainder to his sons in tail, and with an ultimate limitation over to his sisters, as tenants in common in tail.

1852.

STAPLETON v. STAPLETON.

Now, first, as to his plate marked with his crest, and all in fact that he treats as heir-looms, he gives it to the person or persons who for the time being shall be entitled to the freehold *or* inheritance of the family estate of *Stapleton*, &c. "as and in the nature of heir-looms." Here he uses the word *or*, and he meant those subjects of his gift to go to those persons in succession who should be in the enjoyment of the possession of the estate. About that there cannot be much doubt. Then he gives his furniture, &c., except his plate and plated articles, money and securities for money, to his brother *Gilbert*, his executors, administrators and assigns, and he gives him certain other chattels, and then he gives all his plate, other than those before given by way of heir-looms, to his brother *John*, who was his third brother. Then there was a mortgage, as to which he directs that it shall sink into his estate, in order that it may merge in the freehold *and* inheritance, and immediately after that comes the clause on which the question turns. [The Vice-Chancellor read the clause stated in p. 214.]

Now, if according to the strict meaning of the words, the word *and* were here to receive its natural construction, the subject of this bequest could go to no one except a person entitled, not only to the freehold, but to the freehold and inheritance. Now, the only event in which a person, in the singular, could be entitled to the freehold and also to the inheritance, would be in case of the brother of the testator, who would be the next tenant for life, dying in his lifetime, and leaving a son who would be the first tenant in tail. And the only way in which persons, in the plural, could take, would be in the event of all the testator's brothers dying in his lifetime without leaving issue, and then his sisters under the ultimate limitation, would be entitled as

1852.

STAPLETON v. STAPLETON.

tenants in common in tail. Now, it cannot be said that he may not have considered the happening of these events as possible; on the other hand, it is clear that neither of those events is that which he contemplated as most probable at his decease; for, in either of those events happening, he must have supposed his brother *Gilbert* would be dead; and he obviously does not consider that a probable event, because he not only gives him certain specific articles, but appoints him sole executor of his will. That circumstance, though not conclusive, shows that he contemplated *Gilbert's* surviving him. Now, it is extremely improbable that he meant that, if his brother *Gilbert* survived him, not only *Gilbert* should not take the rents, but nobody should take them; and nobody could take them if *Gilbert* surviving is excluded, because there could be nobody then having the freehold *and* inheritance. What the testator meant was, that when he died, the rents should go to the person or persons who should next succeed him in the enjoyment of the estate. I am not going at all beyond the authorities in saying that in this case, *and* must be read *or*. I think the testator used it in error, and the error arose probably in this way:—In the preceding clause, the testator used the word *and* correctly, and then immediately following that clause, comes the one on which this question arises, and the testator appears inadvertently to have used the same word. I am of opinion that *Gilbert* having survived, although only entitled to the freehold, is entitled to whatever ought to be held to pass under the words, "all the rents and arrears of rents;" and the next question is what passes under those words. Now, at the death of the testator, there was not only rent accrued due previously to his death, but current rent for the half year following his death under demises. It is clear that, under the Apportionment Act of 1834, rent

1852.

STAPLETON v. STAPLETON.

reserved under written instruments is to be apportioned; that is, the legal personal representative of the testator is entitled to an apportioned part. But here the question is, Whether, under the will, the apportionable part passed. In one sense, under the words "rent due," the portion of rent apportionable was not due at the death. But the Act speaks of executors, and vests the rent in the representatives of the tenant for life, as part of his assets. I think it would be unreasonable to hold that, by the words used, the testator meant only "what is due to me." He meant what was due to him as part of his assets; therefore, although there may perhaps be a question, I think the apportionable part of the rents reserved under written instruments, did pass. The only remaining question is as to the tiles and bricks made on the estate from the soil of the estate, and the brick earth prepared. Do these things pass under the words "other annual profits due to me"? Now, the testator gives himself a key to his meaning, by the words immediately preceding, "*with timber* felled." Timber is not necessarily annual profits, but here the testator shows that he means it to be taken as annual profits, and there is a close analogy between that and the other profits which he was entitled to receive, although not profits accruing every year. That is the case with the tiles, brick earth, &c., which he was in the habit of taking as part of the profits of the estate, and which the person succeeding him would be entitled to take. I think the fair construction is, that the tiles, bricks, and brick earth do pass.

PIDDUCK *v.* BOULTBEE.

1852:
April 19.

Practice. Irregularity. Motion by Infants.

In a suit by adults and infants, the next friend was changed by an order of the Court, on the application for which the original next friend appeared. The adult Plaintiffs obtained an order of course at the Rolls for changing the solicitor, on a petition representing the original next friend as next friend, and stating incorrectly that the order changing the next friend had not been drawn up, passed, or entered. Held: that the order so obtained at the Rolls was irregular.

A motion by the next friend of infants, describing himself as such in the notice of motion, is irregular. The motion should be by the infants by their next friend.

IN this case a motion was made on behalf of one Dr. *Wardell*, describing himself in the notice of motion as, and being in fact the next friend of the infant Plaintiffs in the suit, to discharge, on the ground of irregularity, an order made as of course at the Rolls, for changing the solicitor of the Plaintiffs. The bill was filed by *Elizabeth M. Pidduck* and *Sarah Pidduck*, both adults, and by four infants, for whom *E. M. Pidduck* had been originally the next friend. In December 1851, an order had been obtained from Vice-Chancellor *Kindersley*, for changing the next friend, and substituting Dr. *Wardell* for *E. M. Pidduck*. On the application for this order, *E. M. Pidduck* appeared by Counsel, and the order was duly drawn up, passed, and entered. Afterwards the order complained of was obtained at the Rolls by the adult Plaintiffs, on a petition of course, which purported to be presented in a cause entitled, The suit of the adult Plaintiffs and of the infant Plaintiffs by their next friend *E. M. Pidduck*, and stated the order made for changing the next friend, but incorrectly stated that it had never been drawn up, passed, or entered.

Mr. *Stuart*, for Dr. *Wardell*, now moved to discharge the order at the Rolls.

1852.

PIDDUCK
v.
BOULTBEE.

Mr. *Follett*, for trustees in the same interest.

Mr. *Wilcock* objected, on behalf of the adult Plaintiffs and the infant Plaintiffs, alleged by the adult Plaintiffs to be still represented by the original next friend, that the motion could not be heard on behalf of Dr. *Wardell*, as the next friend. That he was no party to the suit, and could not move; secondly, that if he could be heard, the order at the Rolls was not wrong, for that *E. M. Pidduck* had not authorized the appointment of a new next friend; and he read an affidavit by her to support this statement.

Mr. *Stuart*, in reply, on the question of form said, the next friend on being appointed subjected himself, by the very order appointing him, to costs, and therefore had a right to be heard on the question what solicitor was to conduct the Plaintiffs' cause.

The VICE-CHANCELLOR:

As to the question whether the order at the Rolls was regular, I am clearly of opinion that it was not. It was obtained on a suggestion representing *E. M. Pidduck* as the next friend of the infant Plaintiffs, and representing also that the order of December 1851, had not been duly drawn up, passed, and entered; both of which suggestions were untrue. The order would, therefore, be discharged, if the application to discharge it were made by the parties having a right to move. Now, on the question whether a next friend may, simply as an individual, ask for any order, I will not say that under no circumstances a next friend can be so entitled; but certainly the general rule is, that a next friend can only apply as such, or rather that the application is the application of the infants by their next friend.

1852.

PIDDUCK
v.
BOULTBEE.

In this case, after the order of December 1851, Dr. *Wardell* was the next friend of the infant Plaintiffs, and the suit was constituted thus:—There were two adult Plaintiffs, *E. M. Pidduck* and *S. Pidduck*, and four infant Plaintiffs by Dr. *Wardell* their next friend. Now, the solicitor on the record is the solicitor of all the Plaintiffs,—of the infant Plaintiffs by their next friend, as well as of the adult Plaintiffs. When, therefore, the adult Plaintiffs, behind the back of the next friend, obtained an order to change the solicitor, they infringed on the rights of the infant Plaintiffs, and the infants are the parties who should come to the Court to complain. The next friend has no title to do so as an individual, but only as representing the infants. The application here is by their next friend, as an individual. It should have been by the infant Plaintiffs, by their next friend. On this technical ground only, I must hold the objection to the motion good, and refuse the motion with costs.

1852:
30th April and
1st May.

Will.
Gift, whether specific or residuary.
Repugnancy.

WIGGINS *v.* WIGGINS.

THIS was a petition in a suit for the administration of the estate of *Clark Wiggins*, the testator. The will was as follows:—

"This is the last will and testament of me *Clark Wiggins* of *Blewett's Buildings*, *Fetter Lane*, in the city of *London*, working jeweller; being of sound mind, memory, and understanding. First, I will and direct that all my just debts, funeral expenses, and the expenses of proving this my will be fully paid and discharged by my executrix, hereinafter named, as soon as conveniently may be after my decease. And I hereby give and bequeath to my dear wife, *Ann Wiggins*, all and every my stock in trade and implements of every description whatsoever, and also all my book debts, sum and sums of money due or owing to me from any person or persons whomsoever,

A testator gave various specific portions of personal estate to his wife *for and during her natural life, if she should so long continue his widow;* but at her death, or in case she should marry again, then he gave all the things before given, adding the words "and effects, and also all my household furniture, which I hereby give to her for her sole use and benefit for and during the term of her natural life, if she shall so long continue my widow," to be equally divided among *the children that he then had or might thereafter have by his said wife;* but in case his wife should not marry again after his decease, he gave her "all and every his personal estate and effects whatsover" for her life, and the same to be equally divided to and amongst *such of his children as should be living at her decease*, share and share alike. The testator died within three weeks after making his will.

Held: first, that the first gift was not merely specific, but passed the whole of his personal estate; secondly, that the two clauses were not repugnant, but the first was intended to apply to the case of the widow marrying again, and the second to the case of her not marrying again; and the latter event being that which happened, the children living at the death of the widow were alone entitled, to the exclusion of representatives of deceased children.

1852.

WIGGINS v. WIGGINS.

all the ready cash that may be in my house at the time of my decease, money in the public stocks or funds, bills, bonds, notes, or other securities whatsoever, *for and during the term of her natural life, if she shall so long continue my widow.* But it is my mind and will that *at her death, or in case she marry again after my decease*, then that the said stock in trade, monies, debts, and effects, *and also all my household furniture*, which I hereby give to her for her sole use and benefit for and during the term of her natural life, if she shall so long continue my widow, shall belong to, and I do hereby give and devise the same to be equally divided to and among *the children that I now have or may hereafter by my said wife*, to be equally divided between them, share and share alike. But in case my said wife, *Ann Wiggins, shall not marry again after my decease*, then I do hereby will and direct that she shall peaceably have and enjoy, and I do hereby give and bequeath to her *all and every my personal estate and effects whatsoever*, for and during the term of her natural life, and the same to be equally divided to and amongst *such of my children as shall be living at her decease*, share and share alike. And I do hereby appoint my said dear wife sole executrix of this my will; hereby revoking all former wills by me at any time heretofore made."

The will was dated the 17th September 1809; the testator died almost immediately after the date of his will, which was proved on the 5th October 1809. He left his widow and five children surviving, and a sixth child was born three months after his death. The widow died in March 1852, leaving three of the testator's children surviving her, three having died during her life. The petition was presented by the three surviving children to have a sum of 2729*l.* 8*s.* 9*d.*, 3 per Cent. Consols,

1852.

WIGGINS v. WIGGINS.

sold, and the proceeds divided in equal shares between the Petitioners. The Respondent was the executor of the mother, who claimed in right of the deceased children.

Mr. *Malins* and Mr. *Eddis*, for the Petitioners.

The testator contemplated two contingencies; first, that his wife, for whom he wished to make a provision, should die his widow; and, secondly, that she should remarry. The only way of reconciling the clauses of the will would be that, in case she marries again, the first gift should take effect; but in case she does not, then the second gift should take effect.

[*The Vice-Chancellor.*—What strikes me is, that there is a question whether, in the first bequest, the testator thought he was giving his whole estate. In the first gift to his wife for her life, he does not give his furniture, but at her death or in case she shall marry again, then he gives his household furniture. That not being comprised in the first bequest, suggests the inference that when in the first gift he enumerates various subjects of gift, he did not intend to give his whole personal estate, and he therefore, by a separate clause, gives his furniture. The question is, did he, by the last gift, mean to give his residuary estate, thinking he had not given it by the first?]

Mr. *Eddis*.

We say that the first clause extends to the whole of the personal estate. The reason for particularly naming the furniture is, that the testator wished his wife to have it in specie. The words are very comprehensive. The first clause uses the word "effects," a word which will carry

1852.

WIGGINS v. WIGGINS.

all the personal estate. [He referred to 1 Jarm. 692, and the cases there collected.] The will contemplates the alternative, first, in case the widow shall marry again after his decease; and, secondly, in case she shall not marry again after his decease. If the first clause does not carry the whole personal estate, there would be as to the second gift, an intestacy during the remainder of the life of the wife, if she should marry again. The conclusion is, therefore, that, by the first clause, the testator bequeathed his whole residue. If that be so, then the case becomes one of repugnancy, and upon that the well-established rule is that, if there are two clauses in a will so inconsistent that the repugnancy cannot be got over, then if the second clause comprises a distinct gift, it must prevail over the first. The surviving children are therefore alone entitled. [They cited *Sherratt* v. *Bentley* (*a*) and *Morrall* v. *Sutton* (*b*).]

Mr. *Chandless* and Mr. *Fischer*, for the executor of the widow.

The argument on the other side is, that the first gift is residuary; but it is not so: there are many things that would not be included in the language used; it would not include, for example, railway shares or leaseholds. The evident intention on this will is to provide for all the children. All is clearly specific in the first gift, unless the word *effects* would carry the whole residuary personalty; but though used generally, it would do so, here it is restricted by the antecedent words, and means effects *ejusdem generis: Cook* v. *Oakley* (*c*), *Rawlings* v. *Jennings* (*d*), and *Woolcomb* v. *Wool-*

(*a*) 2 My. & K. 149.
(*b*) 1 Phill. 533.
(*c*) 1 P. Wms. 302.
(*d*) 13 Ves. 39.

1852.

WIGGINS v. WIGGINS.

comb (*e*). But if the first gift is residuary and the two clauses repugnant, it is not of necessity that the second is to prevail. If the testator's last intention is to prevail, it is the signature that expresses the last intention, and that restores the first of the two gifts as well as the last. [They referred on this point to Lord *Brougham's* judgment in *Sherratt* v. *Bentley*. They referred also to *Sims* v. *Doughty* (*f*).] The general intention must prevail if it can be collected, whether it be found in the earlier or in the latter parts of the will; and the general intention here is to provide for all the children. (*Morrall* v. *Sutton*.)

The VICE-CHANCELLOR:

This will is inartificial; but one thing is quite clear as to the intention, viz. that the testator's wife was to have the whole of his personal estate during her life, if she remained his widow; and it is equally clear that after her death or second marriage, his property was to go, either to all, or to a class of his children. There is no doubt also that the widow's life interest was determinable by her second marriage. The last clause is as distinct as possible: "In case my wife shall not marry again after my decease," &c.; and this is the event that has happened. So far it is clear. If the widow remains single, she is to enjoy the whole: "all and every my personal estate and effects whatsoever, during the term of her natural life, and the same to be equally divided," &c. If there were nothing more in the will, it would be quite clear who would take in the event of the widow dying without remarrying; and that is the event that has happened. But then there is the clause contained in the prior part of the will, on which the question arises

(*e*) 3 P. Wms. 112. (*f*) 5 Ves. 243.

whether that prior part does not vary the construction which ought to be put on the plain words of the last clause. Now, by the prior clause, the testator has purported to give, certainly not in terms *all* his personal estate, but various descriptions of personal estate—"all and every my stock in trade" (that is a specific portion of his estate), "and also all my book debts" (another specific portion), "all the ready cash that may be in my house," &c. (another specific portion), and so on; he gives a variety of kinds of personal property, not in terms comprising the whole, and clearly not intended to comprise the whole, for in the very next sentence he mentions other personal property, viz. his household furniture. Thus far he describes particular portions only, and those he gives to her "for and during the term of her natural life, if she shall so long continue my widow;" and then he goes on, "but it is my mind and will that, at her death or in case she marry again after my decease, then that the said stock in trade, monies," &c. (that is, the whole of what he has described before), "and also all my household furniture" (he adds here another specific portion). And then all the things given are to go, not to his children living at her death, but to "all the children I now have or may hereafter have by my said wife." Now, I observe that the testator's will is dated the 17th September 1809; the date of his death is not stated; but I find the will was proved on the 5th October 1809, viz. eighteen days after the date of its execution. I must therefore presume that the testator died almost immediately after making his will. I think I must also presume that his personal estate at the time of his death was the same as at the time of making his will. It is not a strictly necessary conclusion, but it is a fair and reasonable presumption, that the personal estate that he left, and his per-

1852.

WIGGINS v. WIGGINS.

sonal estate at the date of his will, were no other than the particulars he had described; and therefore I must suppose that in the prior part of his will, although he did not in terms, he did in fact, describe the whole of his personal estate. At the first blush, I confess I thought that, upon the construction of the prior clause, it gave only specific portions, and that the latter clause might be construed as a general residuary clause; but I think that I must assume that if the said testator had supposed that, by the first clause, he had not given all his property, the subsequent clause would have been expressed by him, if meant to give the remainder, in such terms as "all the residue," or "all the remainder," and not in the terms used, "all and every my personal estate and effects whatsoever." Those words might be construed to be a residuary clause; but, taking the whole will together, and considering that it is inartificially expressed, and considering the language in which the clauses are introduced, I am of opinion that the fair construction is, that the first clause was meant, though the intention is inartificially expressed, to apply to the case of his widow marrying again; and the second to the case of her not marrying again; but in both he meant to deal with the whole of the property. Why he should wish, if his widow did marry again, to make a different disposition with regard to the class of his children to take, from that which he makes in the event of her not marrying again, I confess I do not see any good reason. The testator may, however, have had a reason. He does not appear certainly to have considered that it might have happened that a child might have married and died, leaving children, during the life of the widow, and that such children, if the wife did not marry again, would be unprovided for, upon the construction now given to the first clause. That consideration is, how-

ever, not sufficient to bring me to the conclusion that the prior clause merely gives specific portions of the property; and another consideration which tends to confirm this view is this, that if the latter clause is residuary, and the prior carries only a specific gift, then, in the event of the widow marrying again, the residuary personalty would not be disposed of during the remainder of her life. This is not conclusive, but it aids the construction that I put on this will, that the first clause passes the whole, and is intended to apply to the case of the widow marrying again, and that the latter was only introduced to provide for the case of her not marrying again. I must declare that, in the events which have happened, the whole personal estate is divisible between the three children of the testator who survived his widow.

1852:
March 22.

Executors, power of, to mortgage Assets. Pleading. Misjoinder.

When loans are made to an executor upon his personal security without any security or contract for a security upon the assets being made at the time, and afterwards a security on the assets is given, the Court will not assume that the loan was for the purposes of the administration of the estate, but will direct an inquiry whether it was so applied.

A., the surviving executor of *B.*, filed a bill to set aside a mortgage of the assets, made by *C.*, the deceased executor of *B.* *A.* was also the representative of *C.* Held, that *A.* could not sever his character of representative of the original testator, in which he had title to sue, from that of representative of *C.*, in which he could not sue, to set aside his testator's deed; and on this ground the bill was dismissed.

MILES *v.* DURNFORD.

A BILL was filed by *Miles*, the surviving executor of *John Punter* the elder, to restrain the sale, alleged to be irregular, of some premises, part of the testator's estate, which were in mortgage to the Defendant Mrs. *Durnford*, and to set aside the mortgage altogether, or otherwise to redeem, the Defendant paying what should be found due from the testator's estate. A motion had been made in the suit for an injunction, and the Defendant submitted to an order being made. The cause now came to a hearing. The Defendant alleged that the mortgage was made to her by *J. Punter* the younger, the deceased executor of *J. Punter* the elder, as executor, to raise money for executorship purposes. The Plaintiff contended that *J. Punter* the younger made the mortgage for his own private debt, with notice actual or constructive to the mortgagee. *J. Punter* the younger died in September 1849. The Plaintiff *Miles* was his administrator, as well as executor of *Punter* the elder. The answer admitted the will of *Punter* the elder; his death, and probate of his will; the attempt to sell by the Defendant without giving three months' notice, in respect of which an injunction had been granted and submitted to; and the mortgage deed, by

which, among other things, it was provided that no sale should be made without three months' notice. It was also admitted that after advances had been made by the Defendant, and before the execution of the mortgage deed, an equitable mortgage had been made to the Defendant, in respect of which she had filed an ordinary equitable mortgagee's bill. The only other evidence given in support of the bill was a recital in the mortgage deed to the following effect, that "on the application and request of the said *J. Punter* the son, the said *Durnford* at divers times, between the months of October 1846 and February 1848, advanced and lent to the said *J. Punter* the son, several sums of money amounting together to the sum of 600*l.*, and that the sum of 350*l.* part of the said sum of 600*l.* was so advanced and lent to the said *J. Punter* the son, for the purpose of enabling him as such executor as aforesaid, to pay off or discharge a certain mortgage debt of 250*l.* and interest, to *Henry Smart*, charged upon the three houses in *Earl-street* aforesaid, and also to pay certain charges which the said *J. Punter* the son had incurred as such executor as aforesaid, and in and about the testator's estate, and that the said *E. Durnford* had taken other security for the remainder of the said sum of 600*l.*, and that there was then due from the said *J. Punter* the son, as such executor as aforesaid, to the said *E. Durnford*, in respect of the said sum of 350*l.* and the interest thereon, the sum of 370*l.*" The mortgage was only for 370*l.* There was a cross bill seeking to set up the deed, and embracing some other questions not material to be stated.

Mr. *Stuart* and Mr. *Nalder*, for the Plaintiff, said the bill asked that the mortgage might be declared void, or that the Plaintiff might redeem on payment of all that was due. The circumstance that the money had been

1852.

MILES v. DURNFORD.

advanced long before the mortgage was sufficient to cast suspicion on the deed, and put the Defendant to prove that the money was advanced for executorship purposes: *M'Leod* v. *Drummond* (*a*). They referred also to *Keane* v. *Robarts* (*b*). The Plaintiff is entitled at the least to an inquiry whether any part of the money advanced was applied for executorship purposes.

Mr. *Wilcock* and Mr. *Giffard*, for the Defendant.

The bill ought to be dismissed at once. There is nothing to show that the money was not advanced for executorship purposes: and it must be presumed that the executor acted consistently with his duty: *Eland* v. *Eland* (*c*). The bill was, therefore, founded on no equity in reference to the deed; and if so, it was equally improper with reference to the injunction, which could only be obtained on the assumption that the case could be made out at the hearing. As to the alleged equity, the rule is not as stated, that where advances are made before any mortgage, the money is not to be taken to be advanced for executorship, but for private, purposes. The true rule is that, where, from all the circumstances, an inference can be drawn that the money was advanced for the personal use of the executor, the security fails. Further, the bill cannot be sustained in its present form; for *Miles* the Plaintiff being the representative of *Punter* the mortgagor, cannot sue to set aside his testator's deed.

Mr. *Bacon* and Mr. *Pole* appeared in the cross cause, for a Defendant in that cause, who was not interested in the principal question.

(*a*) 14 Ves. 353. (*b*) 4 Madd. 332.
(*c*) 4 Myl. & Cr. 420.

Mr. *Stuart*, in reply.

On the question of the Plaintiff's incapacity to sue, he is entitled, as the executor of *Punter* the elder, to an inquiry into the true nature of the transaction; he asks it as executor of *Punter* the elder alone, leaving the liability of *Punter* the younger wholly untouched. This is not a case of misjoinder; there happens to be a union of two characters in one person; but the Court is bound to separate the two. The Plaintiff is bound, as the executor of *Punter* the elder, to sue to protect his testator's estate, and he cannot, by reason of his being also the administrator of *Punter* the younger, be prevented from protecting the estate that he represents. He does not sue in his double character, but in that of executor of *Punter* the elder exclusively. Besides, if he did sue in his double character, he is a trustee, and as such, though he might be liable personally, he is not precluded from suing even to set aside his own deed, for the protection and administration of the trust estate.

The VICE-CHANCELLOR:

The testator, *J. Punter*, died in May 1847; his son, *J. Punter* the younger, proved the will alone. At different periods between October 1846 and February 1848 *J. Punter* the younger applied to Mrs. *Durnford* the Defendant, to lend him several sums of money, representing that he wanted it for purposes connected with the estate; she lent him the sums. It was represented that the testator owed to a person named *Smart* 250*l.*, that *Smart* required payment, and 50*l.* was paid by *Punter* the younger in 1847, and that 200*l.* more was paid on the 2nd February 1848. When the advances were made by the Defendant to *Punter* there was no undertaking or

1852.

MILES
v.
DURNFORD.

agreement to give any security for the advance, and the effect at the time of making the advance was that they were made on the personal security of *Punter*, and gave no lien whatever on the testator's property, and any remedies for the Defendant would have been only against *Punter* personally. The loans to him, although stated to be for executorship purposes were not made to him in his character of executor, but were made to him personally, there being no agreement for giving any security on the testator's assets. Now, some months after the last of the advances, viz. on the 30th October 1848, *Punter* deposited certain deeds relating to the testator's leasehold property, with the Defendant, by way of security for the money advanced to him, and thus an equitable mortgage was created for the whole of the advances amounting to 600*l.* That equitable mortgage having been given, in February 1849 the Defendant attempted to enforce it by a bill in this Court to compel payment or sale. It was a common equitable mortgagee's bill, and in that suit the transaction was not treated otherwise than as the private transaction of *Punter*; that, however, was not necessary as between the Defendant and *Punter*. In a proceeding to obtain payment or sale, it was not necessary to make such a case, and therefore not much, or perhaps no, weight can be attributed to the debt having been treated in that suit as the personal debt of *Punter*. But shortly after, viz. on the 14th April 1849, *Punter* executed an actual mortgage deed to the Defendant for the purpose of securing not the 600*l.*, but 370*l.*, and the recital puts it in this shape:—[The Vice-Chancellor read the recital set out in p. 235], and the mortgage was for 370*l.* only. Now, it is clear that the equitable mortgage of 1848 having been for 600*l.* was a security given for what was an advance to him partly as executor and partly for money not so advanced, and the recitals in the

1852.

MILES v. DURNFORD.

mortgage deed rest only on the statement of the parties that 350*l.* had been advanced to *Punter* in his character of executor. Now, the authority of an executor dealing with his testator's assets rests upon this principle. It is of importance to give to executors an uncontrolled power over the assets, and therefore the law gives him the right of dealing with the assets to raise money for the purposes of his testator's estate, and then the *onus* of showing that it was wanted for such purposes is not thrown upon the parties advancing the money. It is sufficient for him to show that he had no fair ground or reason to believe that the money was not wanted for executorship purposes. It is quite true that in such a case as that of the private banker of the executor to whom he owes a personal debt, if the banker accepts from him assets of the testator, knowing them to be so, then the banker is a party to the *devastavit*. But, although the principle of this Court is to allow an executor to deal with the assets of his testator, the principle does not apply when, having obtained money without security, he afterwards gives security on the testator's property for the antecedent loans. If there is a contract for a security at the time the advances are made, then a subsequent mortgage stands on the same footing as if it had been made at the time of the advance; but when the advance is made on the private security of the executor, his subsequently giving a security on the testator's property is not for the purpose of securing moneys advanced at the time, but is given as a security for amounts previously advanced on the credit of the testator's estate, with no obligation to give it, that is, without any legal necessity for giving it. Then, when a party being applied to, to advance money on the representation of an executor that it is for the pur-

1852.

MILES
v.
DURNFORD.

poses of the estate, and he advances the money on the mere personal security of the executor, and without taking any security or agreement for security, if he afterwards takes a security on the assets, the *onus* of proof is on the person who advances the money to show that the moneys advanced *were applied* to the purposes of the testator's estate. That rule is just and proper, and I am not aware of any case in which the contrary has been decided. If here there were no further difficulty, I should refer it to the Master to inquire whether any and what sums out of the 600*l.* were applied in the administration of the testator's estate. But I think that the Plaintiff who seeks to set aside the mortgage, being the representative of the party who executed it, cannot be heard to impeach that deed. It is true the bill is filed by *Miles*, wishing to repudiate for the purpose of this suit, another character which he fills, and he purports to file the bill only as representative of the testator. If that were the only character filled by him, he would be entitled to sustain it; but unfortunately after proving the will of *J. Punter* the elder, he took out letters of administration to *Punter* the younger. He stands therefore in the character of representative of *Punter* the younger, and he cannot be heard to say that, filling two characters, in one of which he could not sue, he has a right to be heard in that character in which, if he filled that only, he might sue. It is quite clear that if *Punter* the younger were living, and *Miles*, assuming him to be his co-executor, had joined in a bill, such a bill could not be sustained. It is clear also that, if *Punter* alone had filed a bill, it could not have been sustained. As the Plaintiff in this case has taken on himself the mixed character of a person who could not sue, and of representative of one who could,

1852.

MILES v. DURNFORD.

I think he cannot be allowed to separate them and to sue in one of those characters only. For these reasons I am of opinion that I can make no decree as to impeaching the mortgage, and I must dismiss the bill so far as it seeks to impeach the deed, with costs.

1852: 21st April and 5th May.

Practice. Decree for wilful Default. Executors. Liability to pay Interest on Balances.

Between THOMAS JONES and FRANCES ESTHER his wife (since deceased), Plaintiffs,

AND

R. MORRALL, MICHAEL W. BELLEW NUGENT and EMILY his wife, CYRUS MORRALL, EDWARD MORRALL, T. MORRALL, and H. MORRALL (out of the jurisdiction), Defendants.

THIS was the hearing on further directions of a suit to administer the estate of *Frances Morrall*, of *Plas*

In an administration suit, the pleadings raised questions of wilful default, and liability to pay interest on balances in hand against executors; but the decree taken at the original hearing neither contained any declaration against the executors, nor any inquiries as to wilful default, but was merely a decree for the common account of what had been received. Held, that the Court could not, on further directions, make any decree for wilful default; but that the question of interest on balances in hand was still open.

General principle on which the Court proceeds in making declarations in directing inquiries as to wilful default, and interest on balances in the hands of executors or trustees.

The balances remaining in the hands of the executors were very small. The testatrix died in 1823. The Plaintiff became a bankrupt in 1829; and in 1834, procured his assignees to re-assign all his interest to him. Neither he nor his assignees up to that time had made any application for payment. In 1835, the Plaintiff filed his bill for an account, and allowed it to be dismissed for want of prosecution in 1840; in 1842, he filed the present bill, and asked for interest on balances. Held, that, under these circumstances, he was not entitled to it.

1852.

JONES v. MORRALL.

Yallen, who died in December 1823, having, by a codicil to her will, made in January 1823, directed that the household goods, farm horses, cattle, farming implements, and other effects (except money and plate), being in and about the manor house of *Plas Yallen*, should remain there for the use of her son *William Morrall* during his life, and, after his decease, should be equally divided amongst all her children that should be then living; and after giving certain specific bequests, she gave the residue of her personal estate, not thereinbefore particularly disposed of, after payment of her debts and funeral and testamentary expenses, equally to be divided among all her children; and she appointed her sons *Charles Morrall*, and *Robert Morrall*, one of the Defendants, and her son-in-law *Thomas Jones*, the Plaintiff, executors of her said codicil. She left *W. Morrall* and seven other children living at her death. The codicil was proved by all the executors. The Plaintiff *Jones* became bankrupt in May 1829, and obtained his certificate in September 1829. In 1834, *Jones* and his assignee assigned to one *Edwards* all his interest in *Jones's* property, and by a subsequent deed *Edwards* declared himself a trustee for *Jones*. In 1835, *W. Morrall* died (the Defendant *R. Morrall* was his representative); and in the same year, the Plaintiff and his wife filed a bill for the administration of the testatrix's estate, which was dismissed for want of prosecution after answers had been duly put in, and other proceedings taken. In 1839, *C. Morrall* died, and the Defendants *Nugent* and wife were his representatives. In 1842, the present bill was filed; it alleged that, at the time of the death of the testatrix, household furniture, goods, horses, cattle, farming implements, and other effects, to a very considerable amount and value in the whole, being part of the personal estate of the testatrix, remained in and

about the mansion-house at *Plas Yallen*, and that the same were taken possession of by *W. Morrall* under the codicil. "That an inventory or valuation of the same goods and effects so remaining and so taken possession of by *W. Morrall*, was, at the decease of the textatrix, made out by and under the authority of *R. Morrall* and *C. Morrall*, as executors of the testatrix." It alleged the removal and misapplication of many of these things by *W. Morrall* during his life, with the sanction of *R. Morrall* or *C. Morrall*; that after his death, and down to the death of *C. Morrall*, *R.* and *C. Morrall* had allowed the remainder of the things to remain at *Plas Yallen* without taking any inventory thereof; "and that the same goods and effects were not, at the death of *W. Morrall*, nor had they ever been, converted into money or divided between the children of the testatrix as by the codicil was directed; but that, on the death of *C. Morrall*, *R. Morrall* took possession of them, and still continues in possession of the same, which have now become greatly deteriorated in value."

The bill then alleged that improper payments of rent of some of the leasehold estates of the testatrix, amounting to 760*l.* 17*s.* 11*d.*, had been permitted to be made by *R. Morrall* and *C. Morrall* to *W. Morrall*, and that the Plaintiff's wife never received more on account of her share of the rents, than 58*l.* 6*s.* 6*d.*

It then alleged that, at the death of *C. Morrall*, portions of the testatrix's personal estate remained in his hands, to be accounted for by him; and that both he and *R. Morrall* retained in their hands nearly the whole of what was due to the Plaintiff, *F. Jones*, in respect of her share of the residue of the testatrix's estate, and the

1852.

JONES v. MORRALL.

rents and produce of certain sales of timber. And it charged that *R. Morrall, and the estate of* C. Morrall, *ought to be charged with interest in respect thereof.*

It then contained the usual allegations of applications for an account, and refusals to account.

It charged that it was a breach of trust in *R. Morrall* and *C. Morrall* to have neglected to divide at the death of *W. Morrall*, the goods and effects at *Plas Yallen*. It prayed the usual administration accounts of the testatrix's personal estate, including the household goods, &c., directed to remain at the mansion-house, and the rents and profits of the leasehold estate; that the outstanding personal estate, if any, might be got in; *that it might be declared that the Defendant* R. Morrall *and* C. Morrall, *deceased, were guilty of breaches of trust, in permitting the rents and profits of the leasehold estate of the testatrix to be received and applied to his own use by* W. Morrall, *and also in neglecting to get in and divide the furniture remaining in the mansion-house at* Plas Yallen *at the death of* W. Morrall, *according to the directions and trusts contained in the testatrix's codicil*; and that the Defendants *R. Morrall, Nugent* and his wife, and the estate of *C. Morrall*, might be decreed to make good the loss occasioned by the last-mentioned breach of trust; and might also be charged with, *and with interest upon* all such sums of money as had from time to time been remaining in the hands of, or due from them, or in the hands of, or due from the estate of *C. Morrall, or which, but for the wilful default of the said Defendants respectively, or of the said* C. Morrall, *they might respectively have received.*

R. Morrall, by his answer, admitted that the Plaintiff

1852.

JONES v. MORRALL.

Jones had not acted as executor, except by proving the codicil; and that he and *C. Morrall* had alone acted in the administration of the estate.

The cause came on to be heard in July 1845, and by the decree then made, it was referred to the Master to take an account of the personal estate of the testatrix not specifically bequeathed by the codicil, including the household furniture, goods, horses, cattle, and farming implements, by the codicil directed to remain at *Plas Yallen* for the use of *W. Morrall* for his life, and of the rents and profits of the leasehold estate, and of the moneys produced by sales of timber, &c., come to the hands of Plaintiff since her bankruptcy (if any), or to the hands of *R. Morrall, C. Morrall*, and the Defendants *Nugent* and his wife, or of any of them, or to the hands of any other person or persons by their or either of their orders, or for their or any of their uses; and the Master was to inquire whether any, and, if any, what part of such personal estate remained outstanding or undisposed of. Then there was the usual inquiry as to debts, and to ascertain the clear residue of the testatrix's estate, *and liberty to state special circumstances relating to the matters aforesaid.*

The decree did not contain any direction to inquire what might have come to the hands of the Defendants but for their wilful default, nor any declaration or inquiry as to interest on balances in the Defendants' hands.

The Master found that there were seven children of the testatrix living at the death of *W. Morrall*, and he found that no part of the testatrix's personal estate was outstanding. The other material facts and parts of the

1852.

JONES
v.
MORRALL.

pleadings, and of the Master's report, and the nature of the questions raised on further directions, are stated in the judgment.

Mr. *Stuart* and Mr. *Haddan*, for the Plaintiffs.

Mr. *Malins* and Mr. *Piggott*, for the principal Defendant, *R. Morrall*.

Mr. *K. Parker*, for *Cyrus Morrall*.

Mr. *C. Hall*, for *Nugent* and wife.

The VICE-CHANCELLOR:

May 5th.

This is a suit to administer the estate of a lady who died in the year 1823. The questions raised on the cause coming on, on further directions, are these:—First, it is contended by the Plaintiff, who represents the interest of a residuary legatee, that one of the Defendants, who is the surviving executor, and others, who represent the estate of a deceased executor, ought to be declared liable for the value of certain furniture and other effects remaining at the death of the testatrix in the mansion-house at *Plas Yallen*; Secondly, that those Defendants are liable to pay interest on balances in their hands from time to time, and for an account of the rents and profits of certain leasehold property; and Thirdly, that the Defendants ought to pay the costs of this suit; first, because of a refusal to account; and secondly, because they have disputed the Plaintiffs' claim. Now the facts, so far as they are material, are as follow:—The testatrix, Mrs. *Morrall*, in the lifetime of her husband, made, under a power so to do, a will, and appointed certain property, as to which bequest no question arises. Then her husband

died, and she made a codicil, by which she disposed of certain leasehold estates. She by this codicil directed, "all her household goods," &c. [The Vice-Chancellor referred to the direction for the disposition of the furniture and effects at *Plas Yallen.*]—That is the furniture and effects, as to which the first point is raised. Now, according to the terms of the will, *W. Morrall* the eldest son, was entitled to the benefit of the furniture and effects during his life, and after his death, the testatrix disposed of his residuary personal estate, "equally to be divided among all her children," and she appointed *Charles Morrall*, the Defendant *R. Morrall*, and the Plaintiff *Jones*, executors of her will. The Plaintiff *Jones* married a daughter of the testatrix. After the death of the testatrix, which took place in December 1823, the will and codicil were proved by the three executors, the Plaintiff proving as well as the others. In May 1829, *Jones* became a bankrupt. It must be observed that, at that time, he was entitled in right of his wife to one equal share of the testatrix's residuary estate. The testatrix left eight children, so that the Plaintiff, in right of his wife, was entitled to one-eighth of the residuary personal estate. And as to the furniture and other effects at the house called *Plas Yallen*, at the death of *W. Morrall*, if Mrs. *Jones* survived *W. Morrall*, she was entitled to one share of the furniture and effects, &c. Now, on the bankruptcy of the Plaintiff, his share of the residuary personal estate of course passed to his assignees. The Plaintiff *Jones* obtained his certificate in September 1829. From his bankruptcy till the time which I shall next mention, viz. till 1834, he had no interest in the testatrix's residuary personal estate. It appears that a person named *Chattock* was, in the lifetime of the testatrix, employed as bailiff to receive the rents of her leasehold estate, and he continued so to act after her

1852.

JONES v. MORRALL.

death. In December 1834, the share of Mrs. *Jones*, of the testatrix's residuary estate, was assigned by *Jones's* assignees, and by *Jones*, to one *Edwards*, who was in fact merely a trustee for *Jones* himself. In March 1835, *W. Morrall* died, and then the furniture and other effects in and about *Plas Yallen* became divisible amongst the children then living, and there were then seven living, so that the Plaintiff *Jones* was entitled to one-seventh of the furniture and effects, &c. On the death of *W. Morrall*, or shortly afterwards, that is, on the 7th April 1835, *Edwards*, to whom the Plaintiff's share was assigned, executed a deed declaring that he was a trustee for the Plaintiff, and on the 25th April *Jones* and his wife filed a bill against the other children, including the two who were the legal personal representatives of the testatrix, for an account of her personal estate, and of course *W. Morrall* being dead, that bill must have sought and did seek an account of the furniture and effects which were then divisible into seven parts, as well as of the general personal estate which was divisible among the eight children. That bill was not actively prosecuted, but lingered for some years, that is, from 1835 to 1840. In the meantime *C. Morrall*, one of the executors, died, and his daughter Mrs. *Gooch*, whom he appointed his executrix, proved his will, and then the suit was revived, and a bill of revivor and supplement was filed to seek an account of what *C. Morrall* had received. So matters stood till August 1840; answers were put in, and in the answers put in by *R. Morrall* and by *C. Morrall* an account of the personal estate come to their hands, in fact all the accounts asked for, had been furnished, but no decree was taken. In August 1840 the Defendants in that suit moved to dismiss for want of prosecution; and by an order, dated 3rd of August 1840, that bill, which had been pending for about five years and a quarter, was dismissed

with costs for want of prosecution. The Master taxed the costs, and on the 23rd December 1840, he certified the amount; and the general costs of the suit and certain other costs of proceedings in the suit were directed to be paid by the Plaintiffs. They were not and to this day are not paid. So matters remained till the 3rd November 1842, when *Jones* and his wife filed the present bill. A decree was made in July 1845. These are the facts so far as they are material.

The first point is this: the Plaintiffs say that *Robert Morrall*, the surviving executor, as well as the estate of *C. Morrall*, is responsible for the value of the furniture, &c. which the testatrix directed should remain at the house at *Plas Yallen*; that is, ought to be held liable to the Plaintiff for one-seventh of the value of that furniture, &c. Now this point as to the furniture is raised by the pleadings, and was before the Court on the hearing; the decree however not only declared nothing respecting it, but gave no directions for any inquiry as to it, on the result of which the Court could, on further directions, proceed. But what the decree did direct, was an account of the personal estate; that is, of what had been received by the executors, and it directed an account of the furniture and other things, no further than as to what part thereof had been received. The direction in the decree is:—[His Honor read the passage set out in p. 245.] There is no direction for any inquiry on which to charge them with what, without wilful default, they might have received. If it had been intended to raise that point, the Court ought at the hearing to have been induced to make some declaration, or to direct some inquiry, on the result of which on further directions it might act. The rule on this subject I conceive is this:—If the pleadings do not raise the point, it cannot

1852.

JONES
v.
MORRALL.

be raised either at the original hearing nor on further directions, but if the Plaintiff's pleadings do, as in this case, raise the point whether the Defendants are liable for wilful default, it is the duty of the Plaintiff if he can make a case for it, to get a declaration by the decree, or if he cannot make a sufficient case for an immediate decree, to get an inquiry of such a character, that on the result of it, the Court may on further directions make a declaration. But if the point is raised on the pleadings, and the Court by its decree passes it by, and neither makes any declaration, nor directs an inquiry, it must be taken that the Court did not mean to give any such relief; either that it was passed by by the Plaintiff, or that being urged by the Plaintiff, the Court did not think fit to give it. Now here the Court has not only made no declaration, and directed no special inquiry, but in directing the common account of the general personal estate has said, "take that account also as to the furniture," &c.; that is, an account of what has been received, not of what might have been received. But further, the decree directs an inquiry as to what is outstanding. Now, if any part of this furniture, &c. which might have been received has not been received, it would be outstanding estate. But the Master finds that there is no outstanding estate, and no exception has been taken to this finding, so that the question is concluded. But if it were now open, I think the Plaintiff could not have the relief now asked. *Jones* was himself one of the executors; he proved the will, and thereby took upon himself the execution of the trusts as much as his co-executors. And if a party thus under the obligation to perform a trust, does not choose to perform it, but leaves it to his co-executors, he cannot then say to his co-executors, because neither you nor I have realised this furniture and effects and divided them, I am entitled to call on you to

account, not for what you have actually received, but for what you and I might have received. I am of opinion that for all these reasons, there is no ground for making the Defendants liable for the value of the furniture and other effects which ought to have been realised and divided.

The next point is this, the Plaintiff says the Defendants ought to be held liable for interest on the balances from time to time in their hands. Now the Master's report says the balance of the personal estate is 767*l.* 18*s.* 5*d.*, of which the Plaintiff's share is 95*l.* 19*s.* 9*d.* *R. Morrall*, the surviving executor, is found liable for 88*l.* 14*s.*; and the Plaintiff's share of the rents of the testatrix's leasehold estate as against *C. Morrall*, the deceased executor, or his personal representative, is 158*l.* 5*s.* 9*d.*, out of which 154*l.* 3*s.* 9*d.* has been paid into Court. Except these small sums then, every part of the Plaintiff's share, as well of the general personal estate, as of the leasehold rents, has been duly paid to the Plaintiff.

Now, the Defendants, sought to be charged, insist that applying the rule to which I have referred, the Plaintiff cannot now claim interest on balances, because there was no declaration or inquiry as to balances at the hearing. But it appears to me that, correctly applying the rule, the Plaintiff has a right to raise the question. It is true, there was no declaration at the hearing, but there was that which is the first step towards such a declaration—there was a direction to take the common account of what had been received. The Court was not able, at the original hearing, to say whether there were any balances; but the direction to take an account of the personal estate, if properly answered by the Master,

1852.

JONES v. MORRALL.

ought to show what personal estate has been received from time to time, and the state of the receipts and of the payments should be shown upon the schedule; and then, on that report with the schedule, the Court may hear it argued whether there are any balances, in respect of which the Court may either make an immediate declaration, or direct further inquiry. It is still competent therefore to the Plaintiff, under a decree directing a reference, the result of which affords the Court the materials on which to form an opinion, to raise the question. In this case, then, are the circumstances such that, if there are balances, there ought to be interest on those balances? Now, I have said that, in 1829, viz. twenty years ago, the Plaintiff *Jones*, who now claims interest, was a bankrupt, and all his interest passed out of him to other persons; and not only could he not then ask for payment, but no payment could properly have been offered to him. Now, it does not appear that he ever asked for payment; but, in 1834, he procured his assignees to assign his share to a trustee for him; in effect he bought it back in December 1834. Then he was again in a position to ask for accounts in respect of the personal estate of the testatrix; and directly afterwards, that is, in April 1835, after the death of *W. Morrall*, he filed his bill, but he let it linger and be ultimately dismissed with costs for want of prosecution. He files a fresh bill in 1842; and the testatrix having died in 1823, he now claims to have interest on the balances in the hands of the executors. In order to give a claim for interest, there must be a clear case of improper retention of balances to a considerable or substantial amount; but here the total balance retained, arising from the personal estate, amounts to less than 96*l.*, and the total share of the rents of the leasehold estate is a little more than 88*l.* As to the latter balance, in an early

stage of the proceedings after the testatrix's decease, it was erroneously considered that the leasehold was freehold. If it had been so, *W. Morrall* would have been entitled to the rents; however, he in fact received them, and the executors have been made liable to repay what was so received; and, under these circumstances, the Plaintiff claims interest on the balances. There is, in my opinion, no ground, under all these circumstances, for decreeing interest on the balances.

The remaining point is as to the costs, and it is said that the Plaintiff ought to have them on the ground of a refusal by the Defendants to account. Now, on that point, the circumstances to be attended to are these: on the 10th April 1835, three days after the execution of the deed by which *Edwards* became trustee of the Plaintiff's share for him, a solicitor for the Plaintiff wrote to *Robert* and *Charles Morrall*, the other executors, the two acting executors, as they have been called, as if for *Edwards* (who was a mere trustee), asking, on behalf of *Edwards*, for an account. Within fourteen days an answer was returned that an account should be rendered. Within fifteen days after the first application, the bill was filed. In the answers to that bill, the accounts were set out; and then that bill was dismissed. In 1842, two years after the dismissal, another solicitor for the Plaintiff called for the accounts, and proposed an arbitration. The answer was, "You have had the accounts; you have them on oath:" that at least was the substance of the answer. It was not suggested that the accounts were not fully given. This, then, does not amount to a refusal, the accounts having already been given. Then it is said that the Defendants have resisted, by their answer, the Plaintiff's claim. Now, the Defendants have, by their answer, suggested that the purchase

1852.

JONES
v.
MORRALL.

by *Jones* from his assignees was without a sufficient concurrence by the creditors. If this suggestion had led to any expense, I should so far have directed that to be borne by the Defendants; but it has caused no expense beyond, perhaps, the few lines stating it, adding to the length of the answer. Even that I would make the Defendants pay, if the expense to the Plaintiff of the inquiry into the amount, would not be more than he could have to receive; for I accede to the principle that, if a Defendant questions the title of the Plaintiff, and fails, and by that course puts the Plaintiff to any costs, the Defendant should pay so much of the costs as has been caused by the objection. But I do not act upon it, because here no perceptible increase of costs has been occasioned. The costs must go, therefore, according to the usual course in administration suits.

LLOYD *v.* LLOYD.

1852:
March 4. 5. 18.

Will.
Construction.
Condition against Marriage.
Charitable Use.

GEORGE LLOYD, by his will of the 13th October 1842, gave particular directions about his burial, and directed that his body should be interred in the vault in

A testator, by his will, directed that his residuary personal and real estate should be sold, and *the proceeds vested in some government annuity* for the benefit of his wife, *L. Lloyd*, and of *A.*, for their joint lives, and at the death of either of them her share to go to the survivor; "and in case either *L. Lloyd* or *A.* should marry or to live in a state of adultery, then her share shall pass to the other, the same as if death had taken place; and should *L. Lloyd* and *A.* both marry, then their shares and interest shall pass to my nephew *H.* in case *L. Lloyd* and *A.* fails in fulfilling the conditions of this my will." And he directed *L. Lloyd* and *A.*, out of the annuities they received, to keep in good and sound repair a certain tomb and vault belonging to him, and to paint it, "and in default or failure they shall lose and forfeit their claims to the annuities, and any person hereafter that shall receive the annuities shall be bound to perform the same conditions."

Held, that, as between *L. Lloyd*, the widow, and *A.* the gift over to *A.* upon *L. Lloyd* marrying, was good; but the condition against *A.* marrying was void; that the gift over in the case of both marrying, was void; and that the condition annexed to the gift of the annuities to *L. Lloyd* and *A.* to keep his tomb in repair was good.

By a codicil, the testator gave the rent of a copyhold house for the benefit of his wife and *A.*, to be applied as in his will set forth, subject to all the conditions contained in his will, share and share alike; and after the death of his wife and *A.*, or in default of their, *L. Lloyd* and *A.*, not fulfilling the conditions contained in his will, he gave the said house upon trust for the minister and churchwardens of *St. Mary's, Chatham*, to apply the rents as follows: to take 5*l. per annum* for themselves out of the rents, to keep the tomb in repair; and the residue and remainder of the rent to be applied for the benefit of his nephew, and, after the death of his nephew, the remainder of the rent to be applied for the benefit of the Church Missionary Society. At the original hearing, the devise to the ministers and churchwardens was declared void, and they were dismissed.

Held, that this decree was conclusive against the whole of the gift to the churchwardens, and that all the trusts failed; that the widow and *A.* took the legal estate in the rents during their joint lives, and the life of the survivor; with remainder to the customary heir of the testator.

1852.

LLOYD
v.
LLOYD.

St. Mary's church-yard at *Chatham*, and he then proceeded thus: "and that no person or persons whomsoever may be deposited in the said vault after my remains are there interred, save *Mary Martha Lockley*, if she continues a single woman and living a chaste life. And further I give and bequeath to *Mary Martha Lockley* my household furniture, glass, china, silver plate, jewellery, linen, &c. &c., for her own use and benefit, save and except hereinafter-mentioned bequests. And further, I direct and empower my executrix or executor to pay my funeral expenses and collect in all moneys, securities for money, and all other property of whatsoever description, of which I may die possessed now and hereafter, and that my said executrix or executor shall sell or cause to be sold to the best advantage, the whole of my personal and real estate, and shall invest the proceeds of such sale in some government annuity for the benefit of my wife *Lucy Lloyd* and *Mary Martha Lockley*; and when the amount of the said government annuity is ascertained, then the said sum of money so raised by the way of an annuity, on the joint lives of my wife *Lucy Lloyd* and *Mary Martha Lockley*, is to be equally divided share and share alike, between *Lucy Lloyd* and *Mary Martha Lockley*; and at the death of either of the above-named *Lucy Lloyd* or *Mary Martha Lockley*, her share at her death shall pass to the survivor of the two above-named *Lucy Lloyd* and *Mary Martha Lockley* on the day of their decease; *and in case either* Lucy Lloyd *or* Mary Martha Lockley *should marry, or to live in a state of adultery*, then her share shall pass to the other, the same as if death had taken place; *and should* Lucy Lloyd *and* Mary Martha Lockley *both marry*, then their shares and interest shall pass to my nephew *Samuel Hayes*, of *Woolwich, Kent, in case* Lucy Lloyd *and* Mary Martha Lockley *fails in fulfilling the conditions of this my will.* And further, I desire that my wife *Lucy*

1852.

LLOYD v. LLOYD.

Lloyd and *Mary Martha Lockley* shall, out of the annuity they receive, *keep in good sound repair the tomb and vault* in *Chatham* church-yard, that belongs to me, and cause to be painted the said tomb and vault every four years, or, if required, more frequent, and in default or failure they shall lose and forfeit their claim to the annuity, and any person hereafter that shall receive the annuity, shall be bound to perform the same conditions."

The testator made a first codicil, by which he gave to *J. W. Pyle* a certain house at *Barnes-terrace,* in the county of *Surrey*, in the occupation of *J. W. Pyle,* if he chose to comply with certain conditions. He made a second codicil, referring to the property mentioned in the first codicil, the material parts of which were as follow: "I further desire that my house at *Barnes*, *Barnes-terrace*, in the county of *Surrey*, now in the occupation of Mr. *Pyle*, shall not be sold, but let at a yearly rental or on lease to the best advantage, for the benefit of my wife, *Lucy Lloyd*, and *Mary Martha Lockley*, and the proceeds of the rent applied as my will sets forth, subject to all the conditions contained in my will, the same as if the house had been sold, share and share alike; and after the death of my wife, *Lucy Lloyd*, and *Mary Martha Lockley* (or in case Mr. *James Wilhelm Pyle*, of *Barnes*, refuses to accept of my offer to him in a codicil dated the 12th day of October 1844 as respects the said house at *Barnes*), or in default of them, *Lucy Lloyd* and *Mary Martha Lockley*, not fulfilling the conditions contained in my will, I give and bequeath upon trust the said house at *Barnes*, in the county of *Surrey*, to the minister and churchwardens of *St. Mary's* Church, *Chatham*, in the county of *Kent*,

1852.

LLOYD v. LLOYD.

for the said minister and churchwardens, to apply the proceeds of the rent of the said house at *Barnes* as follows: first, to take for themselves 5*l.* every year for their expenses out of the rent or proceeds of the said house at *Barnes*; and further to keep in good sound repair the vault and tomb, and cause the said tomb to be painted every third year that belongs to me in *Chatham* church-yard; then the residue and remainder of the said rent to be applied for the benefit of my nephew, *Samuel Hayes*, of *Woolwich*, in the county of *Kent*, and after the death of the above *Samuel Hayes*, of *Woolwich*, then the residue and remainder of the said rent is to be applied for the benefit of the Church Missionary Society attached to *St. Mary's* Church, *Chatham, Kent.*"

A bill was filed for the administration of *G. Lloyd's* estate by his widow, *Lucy Lloyd*, against *A. M. Lloyd*, the customary heir-at-law of the testator, *Mary Martha Lockley*, *S. H. Hayes*, the nephew of the testator, *J. W. Pyle*, to whom the option was given by the first codicil, and the minister and churchwardens of *St. Mary's, Chatham, Kent.* These last-named Defendants were dismissed at the original hearing, on the ground that the devise to them was void. The cause now came on for further directions upon the questions arising on the construction of *G. Lloyd's* will.

Mr. *Torriano*, for the Plaintiff.

The first question for the discussion of the Court is, whether the Plaintiff, *L. Lloyd*, and the Defendant, *M. M. Lockley*, take the interests given to them in the annuity, discharged from the conditions contained in the

1852.

LLOYD v. LLOYD.

will. The condition in restriction of marriage is void; and *L. Lloyd* and *M. M. Lockley* take the annuity discharged from it. It is a general condition subsequent, and applies to both the annuitants. Therefore, whether it is good or not as to the widow, being clearly void as to the unmarried woman, it is wholly void, because it is indivisible; and a general restraint on marriage by a condition subsequent, as against a single woman, is clearly void: *Rishton* v. *Cobb* (*a*), *Morley* v. *Rennoldson* (*b*), *Grace* v. *Webb* (*c*), *Webb* v. *Grace* (*d*). The next question is, as to the rents of the copyhold house at *Barnes*. The question as to that is, whether, under the second codicil, the condition contained in the will against the marriage of *L. Lloyd* and *M. M. Lockley* takes effect. As to these rents, the two female legatees take life estates to them and the survivor of them, discharged of the condition against marriage; and the only remaining question upon this part of the will is, whether the reversion in fee goes to the copyhold heir or to the devisee over. The third question is, whether *L. Lloyd* and *M. M. Lockley* are bound to repair the testator's tomb under the directions contained in the latter part of his will. In another part of his will he has directed that nobody should be buried in his tomb other than himself, except *M. M. Lockley*, and then only if she remained single. Whether, therefore, the direction to keep up his tomb if he only were to be buried in it, would be good or not; yet, as the tomb is also to be the tomb of a stranger, the direction to keep it up is a charitable use, being partly for the maintenance of the

(*a*) 9 Sim. 615, and 5 Myl. & Cr. 145.
(*b*) 2 Hare, 570.
(*c*) 15 Sim. 384.
(*d*) 2 Phil. 701.

1852.

LLOYD
v.
LLOYD.

tomb of a stranger; therefore it is void: 1 Jarm. on Wills, 193; *Mellick* v. *President of the Asylum* (*e*).

Mr. *Haldane*, for *M. M. Lockley*, argued in the same interest as the Plaintiff.

Mr. *Malins* and Mr. *Collins*, for *A. M. Lloyd*, the customary heir-at-law.

The condition annexed to the gift of the annuity is in restraint of marriage or adultery. As to the condition against adultery, it is clearly good, being in restraint of *malum in se*. As to the condition against marriage, *Webb* v. *Grace* in 2 Phil. is an authority that a man may determine a gift to his widow, or to any other woman on her marrying. In this case the clause is not strictly a condition in restraint of marriage. It is merely a form of gift to a woman, terminating it on her marriage, implying an expectation in the mind of the testator that the woman is to be provided for by her husband. *Webb* v. *Grace* is opposed to *Morley* v. *Rennoldson*. It is true that *Webb* v. *Grace* was a case of covenant, but the covenant was voluntary, the claim was merely to the bounty of the covenantor, as in a will. Even if the condition is not altogether good, at any rate it is good as regards *L. Lloyd*, the widow: *Lusford* v. *Cheek* (*f*). With reference to the residue of the rents referred to in the second codicil, the gift by that codicil to the minister and churchwardens of *St. Mary's, Chatham*, is upon trust for purposes which, by the original decree in the cause, have been declared void; and the gift of the residue, after fulfilling such purposes, to the testator's nephew, *S. Hayes*, passes

(*e*) 1 Jac. 180. (*f*) 3 Lev. 125.

nothing to him, because such residue cannot be ascertained. The gift therefore fails, and the residue of the rents goes to the customary heir-at-law: *Chapman* v. *Brown* (*g*), *Cherry* v. *Mott* (*h*).

Mr. *Begbie*, for the nephew, *S. Hayes.*

The condition against the marriage of *L. Lloyd* and *M. M. Lockley* is good. In the case cited of *Morley* v. *Rennoldson*, by the will property was given to the testator's daughter, recognising her capacity for marriage, and in the codicil the testator referred expressly to her incapacity for marriage; but the codicil adopted the will; therefore it would have been inconsistent with the will to allow the restraint on marriage imposed by the codicil. But in this case the effect of the words used is to create a limitation till marriage; not a condition subsequent, but a conditional limitation; and therefore it is good. As to the condition for repairing the testator's tomb, Jarman on Wills and *Mellick* v. *President of the Asylum* have been cited, to show that there is a distinction when the tomb is that of a stranger, and when it is the testator's. Here the tomb is the testator's only, and not *M. M. Lockley's*. For the testator does not direct that she shall be buried there, but only that no other person shall. The direction to keep up the tomb is clearly not a perpetuity.

[Upon the question whether the gift of the residue of the rents of the house at *Barnes*, in favour of the testator's nephew, could take effect, the Vice-Chancellor intimated that a difficulty arose whether the original decree, which declared the gift to or in favour of the trus-

(*g*) 6 Ves. 404. (*h*) 1 Myl. & Cr. 123.

1852.

LLOYD v. LLOYD.

tees of the fund for repairing the tomb void, and dismissed them from the suit, did not decide that all interest in them ceased.]

Mr. *Begbie.*

The devise, so far as it is void, is not so by force of decree, but was so before it. The Court dismissed the trustees, but left the gift subsisting as to the beneficial interests given. This equitable gift will not fail because the legal estate fails: *King* v. *Denison* (*i*), *Hill* v. *Bishop of London* (*k*). The gift of the rents to *S. Hayes* gives him an estate in fee; the remainder over after his death is void, and he takes an absolute fee: *Mitford* v. *Reynolds* (*l*).

Mr. *Torriano,* in reply.

18th March.

The VICE-CHANCELLOR:

This case turns upon the construction of the will of *G. Lloyd.* It appears that the testator was a married man and left a widow, but no child, and he left also a person surviving him named *M. M. Lockley*, a spinster, who was a friend, or at any rate a person for whom he desired to make a provision, but she was not a relation. He left also a nephew, *S. Hayes.* The principal objects of his bounty were his widow and *M. M. Lockley,* and in some degree his nephew *S. Hayes*; he appointed a person named *Brown* and *M. M. Lockley* his executor and executrix. Then he gave directions as to his funeral, and then he adds these words, which may not be immaterial in assisting the construction:—"That no person

(*i*) 1 Ves. & B. 260.
(*k*) 1 Atk. 618.
(*l*) 1 Phil. 185.

1852.

LLOYD v. LLOYD.

or persons whomsoever may be deposited in the said vault after my remains are therein interred save *M. M. Lockley*, if she continues a single woman and living a chaste life," thereby indicating one object of the testator's wishes to be that *M. M. Lockley* should continue a single woman. Then he gives to *M. M. Lockley* certain chattels for her own use, and then he goes on :—" I further direct and empower my executors," &c. [His Honor read the clause of the will directing the purchase of a government annuity, and the disposition of it, and then proceeded :] If the will stopped here, there would be no difficulty. The testator intended his executors to convert his real and personal estate into money, and to invest the proceeds in a government annuity for the joint lives of *M. M. Lockley* and his widow, and the life of the survivor, not confining the annuity to the period of their joint lives, but giving it, after the death of either, to the survivor. Then he goes on, " And in case either *L. Lloyd* or *M. M. Lockley* should marry," &c. ; the intention of the testator was, that if either his widow or *M. M. Lockley* should marry, the whole annuity should go to the survivor. Now with regard to that which is an apparent condition subsequent, annexed to the estate of a tenant for life, by the rule of law it is void as to *M. M. Lockley*, but according to the authorities such a condition is not void as to the wife, the law recognising in a husband such an interest in his wife's widowhood as to make it lawful for him to restrain her from making a second marriage, by imposing a condition that on such marriage any provision he may have made for her shall cease. And with regard either to his wife or to any other woman, a testator may make a gift so long as she shall remain single ; but if he first gives a life estate to a single woman, a stranger to him, and then annexes a condition that in case she marries at all, it shall go

1852.

LLOYD v. LLOYD.

over, that, being in general restraint of marriage, is not a good condition. The effect, therefore, of the clause referred to is, that if his wife shall marry, her share shall go over to *M. M. Lockley*; but *M. M. Lockley* will lose nothing by marrying, she will still continue entitled. Then follows another condition: "And should *L. Lloyd* and *M. M. Lockley* both marry," &c. Part of this is intelligible, but on the whole it is not easy to say what is meant by it. So far as it shows an intention to give the provision over in the event of both marrying, that is void as to *M. M. Lockley*, and the gift over in the event of both marrying is therefore void. But the next condition is, "in case *L. Lloyd* and *M. M. Lockley* fail in fulfilling the conditions of this my will." It is difficult to say whether the testator intended to say if *L. Lloyd* and *M. M. Lockley* should marry *or* fail, in the disjunctive, or whether he meant if both should, in the conjunctive, marry *and* fail. My impression is that he meant that if both should marry, the gift over was to take effect, and that is void. He then adds another condition to be fulfilled by his widow and *M. M. Lockley*. [His Honor read the directions for repairing the tomb.] I am satisfied that a direction simply for keeping a tomb in repair is not a charitable use, and is not of itself illegal. It may be illegal to vest property in trustees in perpetuity for such a purpose. But the direction that the widow and *M. M. Lockley* shall, out of their life-interests, keep the tomb in repair, &c. is quite lawful, and they are under an obligation out of their annuities to do so according to the directions of the will. [The Vice-Chancellor then referred to the first codicil, by which an option was given to Mr. *Pyle* to purchase the copyhold house at *Barnes*, the questions arising upon which it became immaterial to consider, *Pyle* having refused to purchase, and proceeded:] The testator by the second

1852.

LLOYD
v.
LLOYD.

codicil to his will, refers to his copyhold house mentioned in the first codicil, showing by that reference that his mind was directed to the fact that he had by the first codicil d.ected a sale. If therefore *Pyle* did not accept the house, it was, by the second codicil, to be let, and the rent paid to his widow and to *M. M. Lockley* in the same manner as the annuity, that is, to them for their joint lives, and for the life of the survivor. There is no disposition of the *corpus* till after the death of the survivor, and then the gift is as follows:—[His Honor read the clause giving the rents of the copyhold house over after the death of *L. Lloyd* and *M. M. Lockley*.] Now, stopping here, the language is inartificial, and if read literally, does not express the meaning which is to be gathered from the whole scope of the codicil. What the testator meant was, if Mr. *Pyle* does not accept the offer, the house is to be let, the rent to be paid to the widow and *M. M. Lockley* for their joint lives and the life of the survivor, then to the minister and churchwardens. And also to the churchwardens, &c. if the widow and *M. M. Lockley* fail in performing the conditions. Now as to the condition in restriction of marriage as against *M. M. Lockley*, that is void; but the other condition as to maintaining the tomb is valid, and the limitation over in the event of the widow and *M. M. Lockley* not fulfilling that condition is good, if the devise over itself is valid. But the devise to the minister and churchwardens is upon trust to take 5*l.* yearly for themselves, &c. Now the gift of the 5*l.* a year would not of course be illegal, if the duty created by the trust were valid; but the next trust is to keep the tomb in repair, &c. Now this being a devise of the inheritance on trust to repair, &c., the trust is in fact a perpetuity; and I suppose it was on that ground that the Court at the original hearing declared the devise to the minister and churchwardens wholly

1852.

LLOYD
v.
LLOYD.

void and dismissed them from the suit. Whether that decree is right or not (and I think it was) I must assume it to be so, and am bound by it. The effect of it is, that everything that is contained in the gift, and every trust engrafted on it, is void. The devise *to*, as well as *for the benefit* of the minister and churchwardens, is void by the decree. It is therefore unnecessary to consider what is to be done with the surplus rents after providing for the repairs of the tomb. The gift over to the Church Missionary Society is clearly void. The effect of the whole is, that the testator's property after payment of the costs must be invested in the purchase of a government annuity for the joint lives of the widow and of *M. M. Lockley*, and for the life of the survivor. There must be a direction to pay the income to them during their joint lives, they undertaking to perform the condition as to repairing, painting, &c. the tomb, with liberty to apply on the death of either of the two annuitants, or in any other event. While both remain single it is not material (although I have expressed my opinion) to make any declaration what may be the result of the widow marrying again, or not performing the condition about repairing the tomb. It must be declared as to the copyhold house, that the widow and *M. M. Lockley* are entitled to it during their joint lives and the life of the survivor, they taking the legal estate by the devise during their lives and the life of the survivor; and that after the death of the survivor, it goes to the customary heir.

WEBB *v.* WOOLS.

1852:
27th March and
26th April.

Will.
Construction.
Trust.
Precatory Words.

THIS was a suit for the administration of the will of *Richard Webb*, who by his will appointed his widow and *Edward Wools*, his executrix and executor; the Plaintiff was the widow; the Defendants were *Wools* the executor, and the children of the testator. On the cause coming on for further directions, the principal question turned on the construction of the will, the material parts of which are stated in the judgment.

Mr. *Shapter*, for the Plaintiff.

Mr. *Murray*, for the children.

Mr. *Beavan*, for the executor *Wools*.

The following cases were cited:—*Crockett* v. *Crockett* (*a*), *Raikes* v. *Wood* (*b*), *Woods* v. *Woods* (*c*).

The VICE-CHANCELLOR:

This is a case of a gift to a parent with words in the will which raise a question whether there is a trust for the children or family of the parent. In the present case the words of the will are short; they are as follow: "This is the last will and testament of me, *Richard Webb*, of *Langley March*, *Bucks*, miller; all my property of whatsoever description, whether in possession,

Testator by his will gave "all my property of whatever description, whether in possession, reversion, remainder, or expectancy, or which I may be possessed of at the time of my death, and I give and bequeath the same and every part thereof unto my dear wife *Jane*, *her executors, administrators, and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children.*"

The Court gave an opinion that there was no trust created for the children; but, declining to make a positive declaration to that effect, held, that it would be right to order the residuary personal estate to be transferred and paid to the widow, and decreed accordingly.

(*a*) 1 Hare, 452; 5 Hare, 326, and 2 Phil. 553.
(*b*) 1 Hare, 445. (*c*) 1 Myl. & Cr. 401.

1852.

WEBB v. WOOLS.

reversion, remainder, or expectancy, or which I may be possessed of at the time of my death, I give and bequeath the same and every part thereof unto my dear wife *Jane*, her executors, administrators, and assigns, to and for her and their own use and benefit."

If the will stopped there, there could be no question: the will expressly declares that the parties to benefit are the wife, her executors, administrators, and assigns. There is a gift to her of the whole legal interest, and of the whole beneficial interest; if she was alive at the time when the fund was realised, it would go to her; if dead before it was realised, it would go to her executors and administrators as part of her assets; and if she had made an assignment, it would go to her assigns; and if that be so, then if the following words are to be read as importing any benefit to other parties, they are clearly contradictory to the language which I have just read. The words immediately following in the will are these: "Upon the fullest trust and confidence reposed in her *that she shall dispose of the same to and for the joint benefit of herself and my children*, and I hereby appoint my said wife, and my friend *Edward Wools*, of *Uxbridge*, executrix and executor of this my last will and testament, hereby revoking all previous testamentary papers at any time heretofore made by me."

The question is, whether the last clause, "in the fullest trust and confidence," &c., raises a trust for the benefit of the widow and the testator's children, contradicting the express gift in the previous part of the will to the wife for her own use and benefit. Now there is one rule of construction almost elementary which appears to me to apply to this case; viz. that if there are two clauses, or sentences, or two branches of one sentence in a will, capable of two different constructions, accord-

ing to one of which the two clauses would be contradictory, but according to the other of which the two clauses would be in accordance with each other, the rule is to adopt that construction which reconciles the two, instead of that which makes them contradictory. Now, here there are, not two sentences, but two parts of the same sentence; and if I put on the latter a construction which will have the effect of creating a trust for the benefit of the children, I shall make the two branches of the sentence contradictory; is there then any construction which can be put on the last branch which will prevent a contradiction? I think there is, and that I may fairly put this construction on the latter branch of the clause, that it is not introduced for the purpose of creating any trust for the benefit of the wife and children, that is, a trust which the children could enforce, but merely for the purpose of declaring that, giving all his property to his wife for her own use and benefit, making her absolute mistress of it by the first branch of the clause, he means by the latter branch of it, to indicate that he reposes in his wife full confidence that she will dispose of it for the benefit of herself and children, but without intending to impose on her any obligation which this Court could enforce. In looking over the cases to which I have been referred I find none in all respects the same as this.* The nearest or

* The following list of cases, in addition to those already referred to, had been handed up to the Court:—*Hamley* v. *Gilbert*, Jacob, 354; *Hammond* v. *Neamer*, 1 Swanst. 35; *Foley* v. *Parry*, 2 Myl. & K. 138; *Brand* v. *Bevan*, 1 Russ. 511; *Cooper* v. *Thornton*, 3 Bro. C. C. 96, 186; *Collier* v. *Collier*, 3 Ves. 33; *Andrews* v. *Partington*, 2 Cox, 223; *Curtis* v. *Ripper*, 5 Madd. 434; *Robinson* v. *Tickell*, 8 Ves. 142; *Conolly* v. *Butcher*, 8 Beav. 347; *Costobadie* v. *Costobadie*, 6 Hare, 410; *Cafe* v. *Bent*, 3 Hare, 245; *Leach* v. *Leach*, 13 Sim. 304; *Bowden* v. *Laing*, 14 Sim. 113; *Wetherell* v. *Wilson*, 1 Keen, 80.

1852.

WEBB v. WOOLS.

one of the nearest is, *Crockett* v. *Crockett* (*d*); in that case the language of the will was this: "My last desire is, that all and every part of my property shall be at the disposal of my most true and lawful wife, *Caroline Crockett,* for herself and her children, in the event of any unforeseen accident happening to myself." The difference between that case and the present case is, that there is not in that case in the first instance a gift to the wife, her executors, administrators, and assigns, for her and their own use, but merely a direction that the property shall be at the disposal of the wife for herself and her children. Vice-Chancellor *Wigram* held in that case, that the wife and children took as joint tenants. When the case came on upon appeal, Lord *Cottenham* reversed the declaration made by the *Vice-Chancellor*, and the direction to pay a share to one of the children; but his lordship declined to declare the rights of the parties. He said, "the wife had a personal interest in the fund; and as between herself and her children she was either a trustee with a large discretion as to the application of the fund, or she had a power in favour of the children, subject to a life estate in herself;" and there he left it, and probably on account of the great difficulty of saying which of the two was the right construction. Very little instruction is to be obtained from that case; but if it had been fully decided, it does not bear very strongly upon the present case. Here the will sets out by declaring, and that, in the same sentence which contains the declaration of confidence, that the gift to the wife is for her own use and benefit. There was no such clause in *Crockett* v. *Crockett.* Then there is another case of *Woods* v. *Woods* (*e*) which has a little bearing on the

(*d*) 1 Hare, 451; 5 Hare, 326; and 2 Phil. 553.
(*e*) 1 Myl. & Cr. 401.

present case, but not enough to make it material to go through it. Then there is the case of *Raikes* v. *Ward* (*f*), which is more like *Crockett* v. *Crockett*. There the will was—"I give to my dear wife, *Marianne*, all my moneys, securities for money, goods, chattels, and personal estate whatever, to the intent that she may dispose of the same for the benefit of herself and our children, in such manner as she may deem most advantageous." The difference between that case and the present is this, that there the gift was in form, so far from being a gift for the wife's own benefit, a gift to her that she might dispose of it for the benefit of herself and the children. In that case the *Vice-chancellor* gave his opinion that there was a trust, but that the Court would not deprive the widow of the exercise of the discretion reposed in her. In that case there was an express direction that the wife was to have a discretion, and though there was no decree, the *Vice-chancellor* expressed an opinion, and, as I think, a correct one, that this was a trust with a discretion in the wife with which, if honestly exercised, the Court could not interfere. *Raikes* v. *Ward*, and *Crockett* v. *Crockett* are the two cases which most nearly approach the present case, but neither of them governs it. And I must in this case declare that the wife is entitled to have the whole residue of the personal estate transferred and paid to her for her own use and benefit. In making this declaration, I think I am putting the right construction on the will; and there are two cases which, though not governing this, may tend to show that at any rate the declaration that I make is right. I refer to *Cooper* v. *Thornton* (*g*), and *Robinson* v. *Tickell* (*h*). In *Cooper* v. *Thornton* the bequest was "to *Thomas Cooper*, 100*l.*, to be equally divided between himself and his family," and Lord *Alvanley* decided that the 100*l.* was rightly paid to *Thomas Cooper*; and, on appeal, Lord *Thurlow*

(*f*) 1 Hare, 445. (*g*) 3 Br. C. C. 96, 186. (*h*) 8 Ves. 142.

1852.

WEBB v. WOOLS.

affirmed the decision. *Robinson* v. *Tickell* was decided on the authority of the preceding case. [His Honor referred to the language of the will, and continued:—] This was in effect a gift of 2000*l.* stock to Mrs. *Robinson* for her and her children; and on the authority of *Cooper* v. *Thornton*, Sir *W. Grant* directed the 2000*l.* to be paid to her, leaving her to execute the trust. In these cases there was no declaration that there was no trust; but the declaration was that, if there was a trust, the money was rightly paid to the legatee, the parent, leaving the parent to deal with it according to the children's rights, if any.

Those cases do not govern this, but they show that even if there is a trust here for the children, still I might properly direct the property to be transferred to the parent. I must confess that were it not for those cases, if there were a trust in this case, I do not see the propriety of handing over the property to be dealt with in such a way that the children might never receive it. I should have thought that the children would be entitled to have it secured; and in *Woods* v. *Woods* (*i*), which is a case not altogether unlike this, Lord *Cottenham* held that the children might sustain a bill against the widow and her executor. [His Honor referred to the language of the will and proceeded:—] In effect there was a declaration that if there was a sale, then, after paying his debts, &c., any overplus was to be for his wife for her support and that of her family. One would think that, having regard to the case of *Cooper* v. *Thornton*, and *Robinson* v. *Tickell*, this would have been a case for directing payment to the mother; and accordingly, on a bill being filed by the children, a demurrer was put in and allowed by the late *Vice-Chancellor of England*, but on appeal Lord *Cottenham* overruled it.

If in this case I were of opinion that there is a trust,

(*i*) 1 Myl. & Cr. 401.

1852.

WEBB *v.* WOOLS.

I do not see how it would be on principle right to part with the fund; but, being of opinion that the testator's expressions of trust and confidence in his wife did not create a trust as against the wife; but that, being in the same sentence in which he makes an absolute gift to her, they are stated only by way of expressing his reasons for the gift—for these reasons, and finding no case governing the present case, I am of opinion that there is no trust. But without actually declaring that there is no trust, I shall declare the widow entitled to have the residuary personal estate transferred and paid to her for her own use and benefit. And the decree will be accordingly (*k*).

(*k*) See *Ware* v. *Mallard*, 16 Jur. 492.

GRAY *v.* GRAY.

1852:
April 21st.
May 8th.

Trust. What Acts constitute a binding Trust.

A testatrix gave to *A.* and *B.*, in trust for the benefit of *C.*, her sister, a sum of 2000*l.* 3*l.* per Cent. Consols. She afterwards expressed to *B.*, whom she also appointed her executrix, an intention that *C.* should have a further sum of 2000*l.* Consols, but she did not alter her will. *A.* died in her lifetime; after her death *B.*, the surviving trustee and executrix, sold 2000*l.* Consols, and invested the produce in her name in the 3*l.* per Cent. Reduced, and shortly afterwards she invested a further sum of 2000*l.* 3*l.* per Cent. Reduced in her name; she was proved to have declared frequently her intention of carrying out the testatrix's intention. Held, that the second sum of stock was duly impressed with a trust in favour of *C.*

THE question in this case was, whether a particular sum of stock added by a trustee to another sum standing in her name on admitted trusts, was impressed with the same trusts. *Mary Margaret Cave*, the sister of the Plaintiff, being, at the time of her decease, possessed

1852.

GRAY v. GRAY.

of large personal estate, consisting, among other things, of several thousand pounds invested in the 3*l.* per Cent. Consolidated Bank Annuities, made her last will, dated the 21st of November 1843, and thereby, after bequeathing to her brother, *David Cave*, the sum of 2000*l.* 3*l.* per Cent. Consolidated Bank Annuities, part of a larger sum then standing in her name, she gave and bequeathed the sum of 2000*l.* 3*l.* per Cent. Consolidated Bank Annuities, to her brother *David Cave* and her sister *Cecilia Cave*, upon trust, during the joint and natural lives of her sister, the Plaintiff, and of *George Gray*, her husband, to pay the interest, dividends, and annual or other produce of the said sum of 2000*l.* stock, as the Plaintiff should appoint, but not by way of anticipation; in default of appointment, for the Plaintiff, for her separate use, in the usual manner; and after the death of *George Gray*, in case the Plaintiff should survive him, upon trust to transfer the 2000*l.* stock to the Plaintiff absolutely, to and for her own proper use and benefit, or otherwise, as she should direct or appoint; but in case the Plaintiff should die in the lifetime of *George Gray*, her husband, then the same 2000*l.* was, immediately after the decease of the Plaintiff in the lifetime of *George Gray*, to sink into, and become part and parcel of, and be enjoyed with, the rest and residue of her estate and effects thereinafter given and bequeathed to her said sister *Cecilia Cave;* and the 2000*l.* stock was, on the decease of the Plaintiff in the lifetime of *George Gray*, to be paid and transferred according to the events aforesaid, and the residuary bequest thereinafter contained; and as to the rest, residue, and remainder of the funded property of the said testatrix, and all other her property, estate and effects whatsoever, wheresoever and of whatever kind or quality the same might be, and not thereby otherwise given, bequeathed or disposed of, but in-

cluding the said last-mentioned sum of 2000*l.* 3*l.* per Cent. Consolidated Bank Annuities, and accrued interest thereon, in the event of the same becoming part of such residue upon the contingency above mentioned of the Plaintiff dying in the lifetime of her said husband, the testatrix gave and bequeathed the same rest, residue and remainder, and every part and parcel thereof respectively, unto and to the use of her said sister *Cecilia Cave*, to hold to her and her executors, administrators and assigns, absolutely, for ever for her and their use and benefit.

The testatrix died on the 12th June 1845; the will was proved by *Cecilia Cave* alone on the 27th June 1845.

The bill was filed by *Harriet Gray*, and it stated that for some months previous to the decease of the testatrix, she was in a very weak and infirm state of health; and had not sufficient strength, except at great personal inconvenience, to attend to any alteration in her will; but that, in consequence of the death of *David Cave*, her brother, in her lifetime, whereby the bequest to him of 2000*l.* 3*l.* per Cent. Consolidated Bank Annuities became lapsed, she intimated to her sister, *Cecilia Cave*, a wish to alter her will, and to leave the 2000*l.* stock so bequeathed to her brother, to her sister the Plaintiff, in addition to the 2000*l.* stock already bequeathed to her by her will; that the health of the testatrix gradually declined until her decease, and that she died without ever having been able to carry her before-mentioned intentions into effect. The Plaintiff stated that very shortly previous to her sister's decease, she exacted from *Cecilia Cave* a promise which was given to her by *Cecilia Cave*, that the 2000*l.* bequeathed in her will to her said brother *David* should be

1852.

GRAY
v.
GRAY.

given to the Plaintiff by her, *Cecilia Cave*, in addition to the 2000*l.* already bequeathed to her, making in all the sum of 4000*l.* 3*l.* per Cent. Consolidated Bank Annuities. It then went on to state the material circumstances on which the equity of the bill rested, and which were proved by the following evidence, given by *W. Woodward*, a nephew of the testatrix. He deposed as follows: "*Harriet Gray*, the Plaintiff, and *Cecilia Cave*, one of the Defendants in this suit, are my mother's sisters, and I have known them from my earliest recollection. I have known *George Gray*, the husband of the said Plaintiff, and another Defendant in this suit, for about twenty years. I cannot speak from personal observation to the state of the health of *Mary Margaret Cave*, who was another sister of my mother's, for the few months preceding her death, as I did not see her for at least two years prior to that event; but up to that time I had been in the habit of calling upon her whenever I came to *London*, and know that she was, during that time, a person of retired habits, and of a very nervous and excitable temperament, and also of infirm bodily health, being now and then confined to her room for days and weeks together; and from the accounts which I used to hear of her in the family, I believe that she remained much in the same state during the last few months of her life; and from what I knew of her habits and state of health, and peculiarly nervous temperament, I consider that it would have been a great effort to her during the latter part of her life to make an alteration in her will. I do not mean to say that she was incapable, either in point of bodily or mental capacity of attending to such a matter; but she would have thought it a very serious and important business, and it would, I have no doubt, have been with great difficulty that she could make up her mind to undertake it, and either attend upon or receive any professional gentleman for that purpose.

1852.

GRAY v. GRAY.

"I accompanied my aunts, the said Plaintiff and the said Defendant, *Cecilia Cave*, to the Bank of *England* on the 29th July 1845, and was present when the said *Cecilia Cave* made two transfers of stock from the name of the said *Mary Margaret Cave* (who was then deceased, and of whose will the said *Cecilia Cave* was the sole surviving trustee and executrix,) into her own name. The first of these transactions consisted of, first, a sale of 2000*l.* part of the 3*l.* per Cent. Consols, then standing in the name of the said *Mary Margaret Cave*, and a reinvestment of the proceeds in the purchase of 3*l.* per Cent. Reduced Stock, in the name of the said Defendant, *Cecilia Cave;* and the second of the transactions was a transfer of the remainder of the consols, then standing in the name of the said *Mary Margaret Cave*, from her name into that of the said *Cecilia Cave*. These transfers were made in execution and performance of the directions of the will of the said *Mary Margaret Cave*, by which 2000*l.* consols was bequeathed to the said Plaintiff, and the said *Cecilia Cave* was named residuary legatee.

"Mr. *Chant*, then a stockbroker having offices in *Throgmorton-street*, was the broker employed by the said *Cecilia Cave* in effecting the transactions referred to in my answer to the last preceding interrogatory. I believe that the said Mr. *Chant*, if living, is quite incompetent to give evidence as a witness in this suit. The last time I saw him was in the year 1848, and he was then very advanced in age, and quite childish and imbecile; and his memory was so completely gone, that it was with great difficulty that I could bring to his recollection his ever having done any business for my said aunts. It was at the said Mr. *Chant's* suggestion that the legacy of 2000*l.* stock bequeathed to the said

1852.

GRAY v. GRAY.

Plaintiff by the said *Mary Margaret Cave's* will, was transferred into the 3*l.* per Cent. Reduced Stock instead of the 3*l.* per Cent. Consols; and the reason he gave for that advice was that it would make a distinction between the stock which the said *Cecilia Cave* held as trustee for her sister, the said Plaintiff, and that which was her own property; and that she, the said *Cecilia Cave,* could give the said Plaintiff a power of attorney to receive the dividends on the said reduced stock held for her.

"On the aforesaid occasion of the said transfers being made, the said Defendant, *Cecilia Cave,* stated to me that she should very shortly make an addition of 2000*l.* to the stock held by her as trustee for her sister, the said Plaintiff, saying that she knew that it had been the intention of her late sister, the said *Mary Margaret Cave,* to increase the legacy to the said Plaintiff to 4000*l.* stock, and to make an alteration in her will to that effect, and that the said *Mary Margaret Cave* had mentioned this to her on several occasions, and had assigned as her reason for making this alteration, that her brother *David,* to whom she had given a legacy of 2000*l.*, had died since she made her will, and that she wished her sister, *Harriet Gray,* to have it upon the same trusts as the original legacy bequeathed to her; and the said *Cecilia Cave* declared to me that she should carry out her said late sister's instructions, though she had not altered her will, or the said Defendant made a statement to that effect.

"I was not privy to any transfer of stock made by the said *Cecilia Cave* subsequent to the said 29th July 1845; but I believe that on the ensuing 12th August she added 2000*l.* stock to the said 2000*l.* 3*l.* per Cent. Reduced stock, which she held as aforesaid as trustee for the said Plaintiff, making that sum 4000*l.* of said last-

mentioned stock, instead of 2000*l.* For I was informed of this having been done very shortly after it took place, and I was shown a stock receipt, from which the fact appeared; and I have learnt from the said Plaintiff that she has received the dividends on the sum of 4000*l.* said reduced stock."

Mr. *Walker* and Mr. *Terrell*, for the Plaintiff. They cited *Ex parte Pye* (*a*), *Thorpe* v. *Owen* (*b*), *Ouseley* v. *Anstruther* (*c*).

Mr. *Willcock* and Mr. *Taylor*, for the Defendant, *Cecilia Cave.*

Mr. *A. H. Welch*, for *G. Gray*, the husband of the Plaintiff.

The VICE-CHANCELLOR:

The question in this case is, whether a sum of stock, 2000*l.* Reduced Annuities, is so completely impressed with a trust in favour of the Plaintiff, that it is capable of being enforced in a Court of Equity. I must confess that when the case was argued I felt some doubt, but I have, after consideration, come to the conclusion that there is a complete trust impressed upon the stock. The circumstances are somewhat peculiar, but they are short and simple. There were three sisters, *Mary M. Cave*, the testatrix in the cause; the Plaintiff, *Harriet Gray*, a married sister; and the Defendant, *Cecilia Cave*; they had a brother, *David Cave*. *M. M. Cave*, the testatrix, was possessed of considerable property, principally consisting of 3*l.* per Cent. Consols. By her will, dated in November 1843, she gave 2000*l.* 3*l.* per Cent.

(*a*) 18 Ves. 140. (*b*) 5 Beav. 224. (*c*) 10 Beav. 461.

1852.

GRAY
v.
GRAY.

Consols, part of her stock standing in her name, to her brother *David* absolutely. She gave a similar sum of 2000*l.* Consols to *David Cave* and *Cecilia Cave*, as trustees for the benefit of the Plaintiff; and the trusts were, during the joint lives of Mrs. *Gray* and her husband, to her for her separate use; if she survived him, then the stock was to be for her own use; if she died in his lifetime, then it was to fall into the testatrix's residuary personal estate. And she gave the residue to her sister, the Defendant, *Cecilia Cave*, so that there was a legacy of 2000*l.* stock for the absolute benefit of *David Cave*, and 2000*l.* for the benefit of the testatrix's sister, Mrs. *Gray*, on such trusts, that if she should die in the lifetime of her husband, she would not have the absolute benefit.

After the date of the will, the testatrix's brother *David*, one of the trustees of the 2000*l.* given for the benefit of the Plaintiff, died in the lifetime of the testatrix. Now, there is no doubt that the testatrix, during her life expressed her intention to her residuary legatee, *Cecilia Cave*, to give the 2000*l.*, originally intended for her brother, for the benefit of Mrs. *Gray*; and it is clear also upon the evidence, that the Defendant, *Cecilia Cave*, represented that such was the desire of the testatrix. After the death of the testatrix, which took place on the 12th June 1845, the will was proved by *Cecilia Cave* on the 27th June 1845. On the 29th July, the Defendant *Cecilia Cave*, the surviving executrix and the residuary legatee, accompanied by her sister *Harriet Gray*, the Plaintiff, and a nephew, a Mr. *Woodward*, went to the Bank, and, with the assistance of a stockbroker, one *Chant*, for the purpose of executing a transfer of the 2000*l.* stock given for the benefit of Mrs. *Gray*. Mr. *Chant*, it appears, suggested that,

1852.

GRAY v. GRAY.

as the testatrix had a considerable sum of consols, which would have to be transferred to the executrix, *Cecilia Cave*, if the 2000*l.* was transferred into the name of *Cecilia Cave* as trustee for Mrs. *Gray*, there would be nothing to distinguish that from the rest of the stock, and that it would be better, in order to distinguish the stock held in trust for Mrs. *Gray*, that the 2000*l.* 3*l.* per Cent. Consols should be converted into 3*l.* per Cents. Reduced. This suggestion was adopted by *Cecilia Cave*, and the stock bequeathed for Mrs. *Gray* was sold out, and with the proceeds they bought 2000*l.* Reduced 3*l.* per Cents., which were transferred into her name to answer the 2000*l.* given for the benefit of Mrs. *Gray*. Now, there is no doubt that the sum of 2000*l.*, 3*l.* per Cents. Reduced, bought and transferred on the 29th July into the name of *Cecilia Cave*, was a complete appropriation of the stock to satisfy the legacy to Mrs. *Gray*, for it was transferred into her name as the sole surviving trustee. If *Daniel Cave* had been living, it must have been transferred into their joint names; there is no doubt, then, that the stock was duly defined and appropriated as Mrs. *Gray's* legacy. On the occasion of this transfer, *Cecilia Cave* stated and represented, and this is proved by the nephew, *Woodward*, who does not appear to have any interest whatever, that it was the intention of the testatrix, after the death of her brother, to increase the legacy given for the benefit of her sister, the Plaintiff, by the addition of a sum similar to that given to her brother. There is, it is true, no direct proof that the testatrix made these declarations, but it is sufficiently proved as against *Cecilia Cave* herself that such was the intention of the testatrix; and *C. Cave* further stated her own intention to carry out the desire of the testatrix, and that she should very shortly make an addition to the stock held by her as trustee. She knew that the

1852.

GRAY
v.
GRAY.

intention of her sister was to increase the legacy to Mrs. *Gray* to 4000*l.* stock, and she is proved to have stated that the testatrix had mentioned her intention to her on several occasions, and had assigned as a reason that her brother *David* was dead, and said she wished her sister to have it on the same trusts as the original legacy bequeathed to her; and *Cecilia Cave* said she should carry out her sister's intention, although she had not altered her will. It has been suggested that the testatrix would have carried out her intention, but that she was in a state of nervousness or ill health, which made the transaction of any business a great burthen to her, and that she did not, on that ground, carry it into effect. Of this there is no proof, except the evidence of *Woodward* as to the state of health of the testatrix. However, it is clearly proved that *Cecilia Cave* said that the testatrix had expressed *her* intention, and that she *Cecilia Cave* expressed her own intention to carry out the intention of the testatrix; and then the question is, whether *C. Cave* did carry it out so as to impress the additional sum of stock with a trust in favour of *Harriet Gray*. Now the first transfer was on the 29th July. On the 12th of the following August, *C. Cave* went again with Mr. *Chant*, the stockbroker, and sold out stock, and bought the second sum of 2000*l.* 3*l.* per Cents. Reduced, and had it transferred into her own name, making 4000*l.* Reduced Annuities standing in her name; and she executed a power of attorney, by which *Harriet Gray* was authorised to draw the dividends of the whole 4000*l.* stock. Now, the doubt which I have had is, whether *C. Cave* parted with the stock. She retained the legal title. But it must be borne in mind that if she really did mean to carry out the intention she had expressed, the only way to do so would be by doing exactly what she did. She could not

1852.

GRAY v. GRAY.

part with the legal control; for if she desired to add 2000*l.* to the sum given by the will, she was bound to place the additional sum in the same way, in the name of the same trustee, and for the same purposes, as the original stock. Now, the original stock, the first 2000*l.*, was given to *David* and *Cecilia* as trustees, and it passed to her as surviving trustee, and the original sum was transferred into her name. The only way of carrying out the intention would be to invest the additional sum in the name of the same trustee. It is said that *C. Cave*, the trustee, is the same as *C. Cave*, the residuary legatee and executrix, and the donor of the second sum of stock; but if they had been different persons, if the original legacy had been given to *A. B.* in trust for Mrs. *Gray*, and *C. Cave* had added 2000*l.* and placed it in the name of *A. B.*, she would have done all that could be done to impress the stock with the original trust. What more, being herself the trustee, could she do than she has done? She might, it is true, have executed a deed declaring the trusts of both sums. But that was not necessary with reference to the legacy; that is, it was not necessary, in order to make the investment of the first 2000*l.* a due appropriation, that any deed should be executed; and if not necessary for the original legacy, neither was it necessary in order to constitute a trust in respect of the further sum. The rule with regard to the question whether a binding trust is constituted is this: if the founder of the trust has not only distinctly expressed the purpose of his act, but has done all that is necessary to complete the design expressed, the Court holds the trust completely imposed. But however clear the intention, still if nothing is done by the party, whether from incapacity or indisposition to do it, the Court will say it cannot decree the performance of the intended

1852.

GRAY
v.
GRAY.

trust. This case, I think, comes within the former rule. *C. Cave* did all that it was necessary to do, in order to impress a trust on the stock in question. She has unfortunately, since these transactions, become of unsound mind, and Mr. *Chant* the stockbroker, who could have given evidence, has, though still living, become subject to infirmity of memory, so that no assistance can be obtained from him; I must therefore decide this case on the evidence of *Woodward* alone; he has no interest whatever in the matter, and his evidence is supported and confirmed by the transactions themselves. I shall therefore declare that the second sum of 2000*l.* was invested on the same trusts as the original legacy.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

ACCUMULATION.

ACQUIESCENCE.

AGREEMENT.

ANNUAL PROFITS.

CONVERSION.

ELECTION.

FATHER AND CHILD.

INFANT.

INJUNCTION.

MAINTENANCE.

MISJOINDER.

MOTION.

NUISANCE.

PRECATORY WORDS.

RENTS.

See WILL, 5.

REPUGNANCY.

REVOCATION.