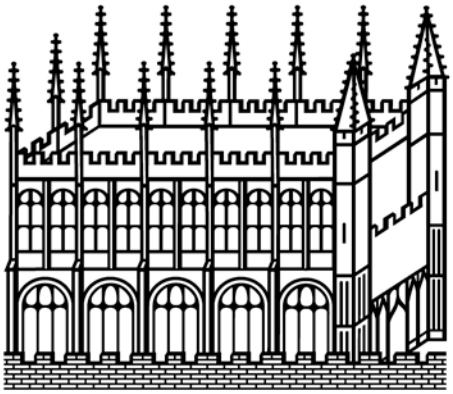

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VOL. I. PART I.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Exchequer.

BY JOHN WILSON, Esq.

OF THE MIDDLE TEMPLE,

BARRISTER AT LAW.

VOL. I. PART I.

Containing CASES *decided by* LORD CHIEF BARON RICHARDS, *on the Equity Side of the Court,*

IN EASTER AND TRINITY TERMS, 57 GEO. 3. 1817, AND THE INTERMEDIATE SITTINGS.

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TABLE

OF

CASES REPORTED.

Vol. I. Part I.

Page

Andrews *v.* Mowbray. In Chancery. (*A land-steward or agent is not incapacitated to purchase of his employer, and the sale, though beneficial to the purchaser, will not be set aside in equity if there was no imposition on the part of the agent and no concealment of information as to the value. Bill charging such agent, and another defendant the plaintiff's solicitor, with fraudulently combining to procure the estate for the agent at an undervalue, dismissed with costs, the charges of fraud, &c. not being proved.*) - - 71

Armstrong *v.* Hewitt. (*Where a vicar had no endowment, but was stated in the ecclesiastical survey and in several terriers to be entitled to the tithe hay of the parish, and proved a perception of such tithe in the parish generally, and also in the district where the defendants' lands were situate, but it was proved that no tithe hay of those particular lands had ever been paid to the vicar, and that former vicars had declared that they were not entitled to them: the court refused to decree an account, but directed an issue.*) 119

Cockshutt *v.* Pollard. (*An administrator cannot resist a creditor's bill for an account, on the ground of length of time, without either pleading or claiming the benefit of the statute of limitations.*) - - - - 132

Davies *v.* Dodd. (*A court of equity will decree payment of a lost bill of exchange on a sufficient indemnity being given, though there may be a remedy at law by action on the bill.*

To

TABLE OF CASES REPORTED.

Page

To a suit by the indorsee against the acceptor of a lost bill, accepted for the accommodation of the drawer and without consideration, the drawer need not be a party.) - 110

Dorman *v.* Currey. (*Where an endowment gave a vicar all small tithes excepting hay, and also gave him the hay tithes of a particular district called* S., *and the vicar had immemorially received the corn tithes of* S. *without any express endowment, and the rector had in several instances during the last* 80 *years received tithes of seeds of clover and artificial grasses out of* S. :—*Held that this was not sufficient to warrant a presumption of an exchange between the rector and vicar, of the corn tithes of* S. *for the tithes of seeds out of* S., *there being also some evidence of perception of the latter by the vicar. Where a rector claims in opposition to an express endowment, he must prove his case, the presumption being against him.* Semble, *that clover, tares, &c. cut green and given to horses employed in husbandry are not titheable, if there be no fraud.* Semble, *a horse employed generally for the purposes of husbandry, does not lose its exemption by being occasionally used as a riding horse.)* - - - - 46

Gillibrand *v.* Scotson. (*A defendant in his answer to a bill for the tithes of his farm called A. H. F. stated that the farm is parcel of* the demesne lands of a mansion called *A. H.* which demesne lands are usually called *A. H. D.* and comprise 219 acres, 3 roods, 36 perches: *that* 40s. *a year was immemorially payable to the rector by the proprietor* of the said mansion-house and demesne lands, *in lieu of all the tithes arising* on the whole of the said demesne lands, *and the defendant examined a witness who described* A. H. F. *by its abuttals: Held that this modus was ill laid, for want of a sufficient description of the lands called* A. H. D.) - - - - - - 113

Hamill *v.* Stokes. (A. *on his own proposal takes* B. *into partnership for five years, in consideration of* £500 *paid and* £550

Page

£550 secured: soon afterwards A. *procures a commission of bankrupt against* B. *and thereby dissolves the partnership:—The security decreed to be delivered up, and the payments refunded, allowing for the time the partnership continued.)* - - - - - 39

Hitchcock *v.* Giddings. (*Relief given against a bond entered into for the purchase-money of a remainder expectant on an estate tail, and the interest paid on the bond decreed to be refunded, it appearing that the remainder had without the knowledge of either party been barred by a common recovery suffered previous to the sale.*) - - 32

Jackson *v.* Radford. (*Where a bill by the executors of a creditor against executors and devisees of a debtor, prayed the specific performance of an agreement by the defendants' testator for a mortgage of part of his real estate for securing the debt, and also prayed the usual accounts of his personal estate, and a sale of the other parts of his real estate: held that these parts of the prayer were inconsistent, and the plaintiffs were compelled to elect to confine themselves either to the mortgage or to the account. In a suit by creditors against devisees and the heir at law, if a sale may be necessary, the court never dismisses the bill against the heir though he admit the will.*) - - - 129

Kynaston *v.* The East India Company. (*Warehouses, &c. in* London *occupied by the owners, are chargeable for tithes under* 37 H. 8. c. 12. *according to the improved value, there being no evidence of any letting.*) - - 25

Leonard *v.* Franklin. (*The abstract of an endowment of the vicarage of* N. *in the diocese of* L. *contained in an ancient book in the registry of that diocese called bishop* Wells's *collection, was received in evidence in a suit by the vicar for small tithes, though the book was without date, and it did not appear by whom or for what purpose it was compiled.*) - - - - - 128

Rumney

TABLE OF CASES REPORTED.

Page

Rumney *v.* Beale. (*Where there are several defendants, some of whom do not appear when the cause is called, it cannot be heard unless the plaintiff will dismiss his bill against them: and the defendants who appear are entitled to the costs of the day.*) - - - - 127

Sanders *v.* Longden. (*On a bill by the rector of* W. *for a moiety of the tithes of lands in another parish, and for a commission to ascertain the lands, the court refused the commission until the rector's title to the portion should be determined on the trial of an issue; although by a decree of this court and a trial at law in* 1671, *the then rector's right was established: it appearing that subsequent to the decree the tithes had never been paid in kind, but an annual payment of* 40s. *had uniformly been made.*) - - 64

The Warden and Minor Canons of St. Paul's *v.* The Dean of St. Paul's. (*The deanery-house or residence of the dean of* St. Paul's *is liable to tithes at* 2s. 9d. *in the pound on the full value, under the statute* 37 Hen. 8. *cap.* 12. *No house is exempt from paying tithes under that statute, except the houses thereby expressly exempted.—The maxim* ecclesia decimas non solvit ecclesiæ, *applies only between rector and vicar of the same parish. Under the statute* 37 H. 8. c. 12. *the incumbents of parishes in* London *are entitled to tithes at* 2s. 9d. *in the pound on the value and not merely on the rent. A court of equity is not bound to limit an account of tithes to six years, though it adopts that rule in general.*) - - - - 1

CASES

IN THE

EXCHEQUER.

THE WARDEN AND MINOR CANONS OF ST. PAUL'S *v.* THE DEAN OF ST. PAUL'S.

EXCHEQUER CHAMBER.

May 13, 1817.

Before the Lord Chief Baron alone.

The deanery house or residence of the dean of *St. Paul's* is liable to tithes at 2*s.* 9*d.* in the pound, on the full value under the statute 37 *H.* 8. *c.* 12,

THE original bill stated letters patent of King *Henry* the sixth, dated the 22d *November,* in the 24th year of his reign, whereby he gave licence to the dean and chapter of the cathedral church of *St. Paul, London,* and their successors, to appropriate the church of *St. Gregory,* in the city of *London,* then in the patronage of the dean and chapter, and held of his majesty in pure and free alms, to the use and benefit of *John Good,* the then warden of the college of the twelve minor canons of the said cathedral, and the canons of the said college and their successors for ever. The bill further stated, that the appropriation was duly made, whereby the warden and minor canons became, and had ever since been the parson and proprietors of the said church, and as such, entitled to all the tithes, &c. growing due within the parish. The bill then stated the decree, dated the 23d of *February,* 1545, made in pursuance of the act of parliament (*a*), " for tithes

(*a*) 37 *H.* 8. *c.* 12.

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S. v. The DEAN of ST. PAUL'S.

in *London*," by which decree it was ordered (*a*), "that the citizens and inhabitants of the city of *London*, for the time being, should yearly, without fraud or covin, for ever pay their tithes to the parsons, vicars and curates of the said city and their successors for the time being, after the rate following: For every 10*s.* rent by the year of all houses, shops, warehouses, cellars, stables, and every of them within the said city and liberty thereof, 16½*d*, and of every 20*s.* rent, by the year, 2*s.* 9*d.* and so above the rent of 20*s.* by the year, ascending from 10*s.* to 10*s.* according to the rate aforesaid: and that where less sum than 16½*d.* in the 10*s.* rent, or less sum than 2*s.* 9*d.* in the 20*s.* rent, had been accustomed to be paid for tithes, then in such places the said citizens and inhabitants should pay but only after such rate as had been accustomed." The bill also stated the act (*b*), for rebuilding the city of *London*, which united the parishes of *St. Mary Magdalen Old Fish Street*, and *St. Gregory*, and the act (*c*), fixing the tithes of those two parishes at £120; both those acts saving expressly the right of the warden and minor canons, parson and proprietors of the rectory of *St. Gregory*, to receive all tithes, &c. within that parish as before. The bill further stated, that the defendant, as dean of *St. Paul's*, had been in every year since 1792, in the possession and occupation of a certain dwelling-house with various buildings and appurtenances, within the rectory of *St. Gregory*, or the titheable places thereof, being the deanery house belonging to the deanery of *St. Paul's*, for which house, &c. tithes, or yearly payments in the nature of tithes were payable in manner directed by the act of 37 *Hen.* 8. and the decree, according to the full value thereof to be let by the year; and the bill prayed an account and payment of tithes for the said dwelling-house, buildings and premises, from *Michaelmas*

(*a*) *Sect.* 2.
(*b*) 22 *Car.* 2. *c.* 11.
(*c*) 22 & 23 *Car.* 2. *c.* 15.

1792,

1792, after the rate of 2*s.* 9*d.* in the pound, on the full value or worth of the premises to be let by the year.

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S. *v.* The DEAN of ST. PAUL'S.

The defendant by his answer stated his belief, that from time whereof the memory of man is not to the contrary, the dean of *St. Paul*'s had been seised in his demesne as of fee, in the right of his deanery, of a certain piece of ground on which the deanery or house of residence of the dean in right of his deanery formerly stood, and on part of which the present deanery-house with part of its appurtenances now stands:—that some time during the rebellion in the time of King *Charles* the first, the mansion-house and buildings belonging to the then dean in right of his deanery, were pulled down and destroyed, and divers small tenements, &c. were afterwards built upon the site or some part of the site of the mansion-house and buildings, which small tenements, &c. were afterwards let; and that in or about the year 1666, the whole of such small tenements, &c. were destroyed in the great fire of *London:* that in or about 1670, Doctor *Sancroft*, the then dean, applied to parliament for leave to build a mansion-house with suitable out-buildings, &c. for the use of himself and his successors the future deans, upon part of the site of the old deanery, and for leave to demise the residue of the site of the old deanery: and that accordingly by an act passed in the reign of King *Charles* the second, and in the year 1670, it was enacted, that after the dean had set out a proportion of the site of the old mansion-house, and of the out-houses, &c. thereunto belonging, as by the lord chancellor, or lord keeper, and the bishop of *London* for the time being, should be judged meet and convenient for the building of a new mansion-house for him and his successors, and should be so declared in writing, attested under their hands and seals, it should be lawful for the dean, at any time before the 24th of *June*, 1672, to demise the residue thereof for the term of 60 years, reserving such yearly rent or rents as by the lord chancellor or lord keeper, and the

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

bishop of *London*, for the time being, should be directed or appointed: and from and after the expiration, or other sooner determination thereof, it should be lawful for the dean and his successors for ever thereafter, to demise the residue of the said site for the term of 40 years, under the rent or rents appointed to be reserved as aforesaid, or more; with a proviso, that before the dean should make any lease by virtue of the act, he should give such security as the lord chancellor, or lord keeper, and the bishop of *London* for the time being should approve, to expend a sum of money in building upon the ground aforesaid, a convenient house for himself and his successors. The answer further stated an instrument under the hands and seals of lord keeper *Bridgman*, and *Humphrie*, bishop of *London*, dated the 19th *December*, 1670, whereby, after reciting that Doctor *Sancroft*, in pursuance of the act, had set out a proportion of the site of the old mansion-house, and of the out-houses, &c. thereunto belonging, for the purposes mentioned in the act; and after particularly describing the proportion of the site so set out by metes and bounds, the lord keeper and the bishop did thereby judge the said proportion of the site of the old mansion-house, and of the out-houses, &c. thereunto belonging, as before described and mentioned to be so by the dean set out, to be meet and convenient for the building of a new mansion-house for him and his successors, according to the act: and they further directed that the yearly rents by the dean to be reserved for the residue of the site upon the leases to be made by him in pursuance of the act, should in the whole amount to £12. The answer further stated, that a proper security, as required by the act, was given by Dr. *Sancroft*, for the purposes in the act mentioned; and that certain leases were granted by him in pursuance of the act, and of the direction and appointment of the lord keeper, and the bishop of *London*, of the residue of the site of the old mansion-house, and of the out-houses, &c. thereunto belonging, a certain proportion of the site having been so set out by Dr. *Sancroft*,

croft, for the erecting the new deanery house. The answer further stated the defendant's belief, that Dr. *Sancroft*, the then dean, erected the new deanery house and the out-houses, &c. belonging thereto, upon that part or portion of the site of the old mansion-house, so set out in pursuance of the last-mentioned act, and that the deanery house so rebuilt by Dr. *Sancroft*, is the present deanery house, and that the same, and the buildings, gardens, and yards belonging thereto, stand upon the same site (being part of the site of the old deanery) as was so set out by the lord keeper and the bishop of *London*, and built upon by Dr. *Sancroft*, with the additions mentioned in the subsequent part of the answer.

The answer further stated the defendant's belief, that from time whereof the memory of man is not to the contrary, no tithes, or any pecuniary payments whatsoever in the nature or in lieu of tithes, were ever paid or were of right due or payable, or ought now to be paid or made to the warden and minor canons for the time being of the said cathedral, or the rector of the rectory of *St. Gregory*, or of the united parishes of *St. Mary Magdalen Old Fish Street*, and *St. Gregory*, or to any other person, for or in respect of the deanery house of the cathedral church of *St. Paul*'s, and the premises thereto belonging, of which the dean of the said cathedral church hath been seised during the time aforesaid, or of any part thereof, for so long as they remained in his own tenure and occupation: and that the defendant doth now occupy, and ever since he was presented or appointed to the deanery in the year 1787, hath occupied, as dean of *St. Paul*'s, the said deanery house with the out-buildings, &c. thereto belonging: and that the present deanery and the premises thereto belonging, consist of the premises which were so set and marked out by the lord keeper and the bishop of *London*, with the additions after-mentioned, (that is to say) such part of the garden of the present deanery as is after mentioned, formerly belonged to a certain tavern

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

tavern formerly called the *Feathers*, and which the defendant believed was added to the garden belonging to the deanery, soon after the time of building such deanery; and that part of the present court-yard and garden of the deanery consists of the former sites of four shops or sheds, and of three houses in *Scollop Court*, which the defendant believed were also added thereto at the time after-mentioned. The answer then stated an indenture, dated the 20th *June*, 1683, between *Nicholas Pedley* and *Henry Mortlock*, of the one part, and Dr. *Stillingfleet*, then dean of *St. Paul's*, and the chapter of the same church of the other part, whereby, after reciting a conveyance in fee, dated the 19th *June*, 1668, from the archbishop of *Canterbury*, to *Pedley* and *Mortlock*, of the toft, soil, or parcel of ground, whereupon before the fire of *London*, stood a tavern called the *Feathers*, situate in *St. Paul's* church-yard, in consideration of £325, expressed to be paid by *Pedley* and *Mortlock* to the archbishop:—and further reciting, that the conveyance was made to *Pedley* and *Mortlock*, in trust for Dr. *Stillingfleet*, and that the £325 paid for the purchase, was his proper money: and that Dr. *Stillingfleet* had laid and taken in part of the said ground unto other ground belonging to the deanery house and thereto adjoining, designed for and then made a garden, to make the said garden ground straight and uniform, and to prevent annoyances and other inconveniences to the mansion-house of the deanery; and that the residue of the ground so purchased, together with a small parcel of ground belonging to the deanery, lying westward, and extending north behind the ground so purchased, was united and built upon by agreement between Dr. *Stillingfleet* and the chapter of *St. Paul's*, there then being four single houses erected, with an entry leading unto them from *St. Paul's* church-yard, and a yard and other passages and conveniences allotted and set out for the said four houses: it was witnessed that Dr. *Stillingfleet* acknowledged to have received from the chapter the said sum of £325, which was by him paid for the purchase of the

the ground: and that *Pedley* and *Mortlock* should stand seised of the premises, upon trust that Dr. *Stillingfleet* and his successors, deans of *St. Paul's*, should for ever enjoy all that part, and so much of the premises as was then divided from the residue thereof, and laid on to the ground designed for and then made a garden for the mansion-house of the dean and his successors, and then in his actual possession; and as to the residue of the purchased premises, upon such trusts, &c. as the dean and chapter should appoint.

The answer further stated the defendant's belief, that subsequently to the time when the ground, formerly part of the *Feathers Tavern*, was so added to the garden belonging to the deanery, and for very many years last past, down to the year 1779, the sum of 12*s.* 6*d.* had been paid by the defendant's predecessors, to the warden and minor canons for the time being, for or in lieu of the tithes of the piece of ground so added to the garden; and that since the piece of ground formerly belonging to the *Feathers Tavern*, was so taken in and added to the garden of the deanery, the said piece of ground had never been letten: and the defendant insisted, that for the reasons after-mentioned, the said annual sum of 12*s.* 6*d.* cannot now be increased, diminished, or varied. The answer further stated the defendant's belief, that it appears from certain rate-books belonging to the plaintiffs and their predecessors, that for very many years back, down to the year 1769, and from thence down to the year 1779, the said yearly sum of 12*s.* 6*d.* was paid by the respective deans for the time being, to the warden and minor canons for the time being, for and in respect of certain tithes which in the said books are stated to have been "*for the tithes of the said deanery*," but which the defendant believes were *for such part of the said deanery only as was so added to the garden thereof in the year* 1683; and that such entry ought not in any manner to prejudice the defendant and his successors. The answer further stated the defendant's belief, that

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

that the said annual sum of 12*s.* 6*d.* was collected by half-yearly payments, by or on behalf of the warden and minor canons, from the respective deans for the time being, for or in respect of such tithes, and that immediately or shortly after the year 1769, the tithes which were due to the warden and minor canons, in respect of four shops or sheds adjoining to the premises belonging to the deanery, and which, as the defendant believed, were at that time taken into the occupation of the then dean and added to the court-yard, were for the first time charged upon and collected half-yearly from the dean and his successors, after the rate of 1*s.* 4*d.* *per annum*, for each of the said four shops or sheds; which said sum of 12*s.* 6*d.* *per annum*, and 1*s.* 4*d.* *per annum* each, for the said four shops or sheds, made, in the whole, the annual sum of 17*s.* 10*d.* which was collected by half-yearly payments of 8*s.* 11*d.* each from the dean, from the year 1769 down to the year 1776: that in the year 1776, the tithes which were due to the warden and minor canons for three houses situate in *Scollop Court*, and which were, as the defendant believed, about that time taken into the occupation of the then dean and made a part of the deanery, were for the first time charged upon and collected half-yearly from the then dean, and his successors, and from the defendant down to the year 1792, after the rate of 2*s.* *per annum* for each of the three houses, and which several sums of 12*s.* 6*d.* *per annum*, 1*s.* 4*d.* *per annum* each for the said four shops or sheds, and 2*s.* *per annum* each for the said three houses, made in the whole the annual sum of £1. 3*s.* 10*d.* which was collected by half-yearly payments of 11*s.* 11*d.* from the deans, in and after the year 1776 down to the year 1779, from which period down to the year 1792, as the defendant believed, from mistake or accident, the annual sum of £1. 5*s.* *per annum* was illegally and improperly collected by or on behalf of the warden and minor canons, instead of the aforesaid yearly sum of 12*s.* 6*d.* for or in respect of the tithes of such part of the deanery as aforesaid, exclusive of the four shops or sheds, and of the three houses in *Scollop Court;* and the defendant insisted, that

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

that as dean of *St. Paul's*, he is, and all other deans of the said church are entitled to hold the said premises part of the site of the ancient deanery so set out by the lord keeper and the bishop of *London* for the site of the present deanery, and all erections and buildings thereon, freed and exempt from all and all manner of tithes and payments or compositions in lieu thereof, whilst the same shall be in the tenure and occupation of the dean of such church for the time being.

The answer then stated, that by the decree of the 23d *Feb.* 1545, it was amongst other things ordered and decreed (*a*) "that every owner or owners, inheritor or inheritors of any dwelling-house, or houses, shops, warehouses, cellars, or stables, or any of them, within the said city and liberties, *inhabiting or occupying the same, himself or themselves,* should pay after such rate for tithes as thereinbefore mentioned, *after the quantity of such rent as the same was last letten for,* without fraud or covin." The answer then stated the defendant's belief, that for many years previous to the year 1779, and from the time when such land, formerly part of the *Feathers Tavern,* was added to the new deanery, the before-mentioned annual sum of 12*s.* 6*d.* only was paid to the warden and minor canons, which the defendant believed was paid for such addition as aforesaid, and that when the four shops or sheds, and the three houses in *Scollop Court,* were added to the deanery, such addition of 1*s.* 4*d.* for each shop, and 2*s.* for each house was made, and that no other payments had at any time, to the defendant's knowledge, been made for any part of the said premises, except such annual sum of 12*s.* 6*d.*: which annual sums of 1*s.* 4*d.* each, and which three annual sums of 2*s.* each, make together £1. 3*s.* 10*d.* save and except, that from the year 1779 to 1792 such annual sum of £1. 5*s.* was paid instead of the annual sum of 12*s.* 6*d.* as aforesaid, which the defendant believed was done by mistake: and that the premises for which sums were so

(*a*) *Sect.* 4.

paid

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

paid as aforesaid, had never been letten since the same were taken into and made part of the deanery: and the defendant therefore submitted and insisted that the same must be presumed to have been assessed according to the rent at which the said premises were last letten, without fraud or covin, before the same were taken into and made part of the deanery, and could not therefore be raised until the said premises should be again letten.

The answer further stated, that in case the court should be of opinion that the part of the deanery which stands upon such part of the ancient site as was so set out by the lord keeper and bishop of *London*, is not exempted from paying tithes by such prescription as aforesaid, or as being the ancient possessions of the deanery, and which the defendant therefore submitted, was even without any prescription, not liable to pay tithes when in the hands and occupation of the dean: yet that it was by the said decree provided (*a*), "that the said dues should not extend to *the houses of great men, or noblemen, or noblewomen*, kept in their hands and occupation, and not letten for any rent, *which in times past had paid no tithes*, so long as they should continue unletten:" and he submitted, that the dean is a *great man* within the meaning of such decree, and that under the circumstances aforesaid, so much of the ancient site of the deanery as was so set out by the lord keeper and bishop of *London*, is therefore exempt from the payment of tithes: but that if such ancient site was not absolutely exempted from the payment of tithes in manner aforesaid, yet that the deanery was the residence of the dean for the time being, and as the defendant believed had not, (except the messuages and sheds and three dwelling-houses lately taken in as aforesaid) been demised or let since the erection thereof by Dr. *Sancroft;* and that no further or other sum than 12*s.* 6*d.* *per annum* was paid in respect of the tithes of the deanery or any part thereof (including that part

(*a*) *Sect.* 16.

of

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

of the garden which was formerly part of the *Feathers Tavern*) from the time of such erection till the times when such shops or sheds were added to it as aforesaid, upon which occasion, and on the occasion of such three houses being added to the same as aforesaid, such additions were made to the same as aforesaid, and that no other alterations or additions were ever made in or to such payments except as before mentioned; and therefore the defendant submitted and insisted, that in case the court should be of opinion that the deanery, out-buildings, and premises thereto belonging (save and except such parts thereof as are before in that behalf excepted) are not exempt from the payment of tithes to the warden and minor canons, then, that under the circumstances aforesaid, it ought to be presumed that the said annual sum of 12*s.* 6*d.* was the proper sum to be assessed upon the deanery and its appurtenances as marked and set out by the lord keeper and bishop of *London*, and the premises part of the *Feathers Tavern* as added thereto, for or in respect of the tithes thereof due to the warden and minor canons, after the quantity of such yearly rent as the said small tenements or dwelling-houses and shops which were built upon the site or ground where the ancient deanery stood, were last letten for without fraud or covin: and the defendant therefore submitted, that the plaintiffs had not any right to demand any further or other payment from the defendant in respect of the tithes of the premises belonging to the defendant in right of the said deanery, exclusive of the four shops or sheds, and the said three houses in *Scollop Court*, save and except the said annual sum of 12*s.* 6*d.* unless the said premises, exclusive of the four shops or sheds, and the three houses aforesaid, should be again let.

The answer further stated the defendant's belief, that for very many years back, and as far as any trace could be found of any payments in the nature of tithes having been ever made in respect of the deanery, or any part thereof, down to the year 1779, no other payment or annual sum, save and except the said sum of 12*s.* 6*d.* was ever made to the warden and minor

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

minor canons, for or in respect of tithes of any part of the deanery, exclusive of the said four shops and three houses: and that although from the year 1779 down to the year 1792, the annual sum of £1. 5*s.* appeared to have been paid to the warden and minor canons in respect of the deanery, exclusive of the four shops and three houses aforesaid, yet the defendant insisted, that the dwelling-house and premises belonging to the deanery, were not let in the year 1779, or about that time or subsequent thereto: the defendant therefore insisted, that as no new letting ever took place, the warden and minor canons had not any right to increase the said annual sum of 12*s.* 6*d.* to the said annual sum of £1. 5*s.* or to any other larger sum than the 12*s.* 6*d.* and that such increase or additional payments (beyond the said annual sum of 12*s.* 6*d.*) as took place between the years 1779 and 1792, were illegal and could not be supported: or that in case they could be supported upon the presumption that they were warranted by some evidence having been discovered of what was the last rent for which the said small tenements or dwelling-houses and shops so erected and built upon the site of the ancient deanery, and afterwards burnt down as aforesaid, were last letten for, without fraud or covin; yet that if such last-mentioned presumption could arise and be supported, and if the plaintiffs should be able to produce any evidence from which such presumption might be warranted, then the defendant insisted, that the plaintiffs were not entitled to demand or take more than the annual sum of £1. 5*s.* in respect of the tithes of the deanery, exclusive of the four shops and three houses in *Scollop Court*; and that in all events the plaintiffs were not entitled to demand or take any sum of money whatsoever in respect of the tithes of the said deanery, for more than six years immediately preceding the filing of their bill; and the defendant, for the reasons and under the circumstances before-mentioned, insisted that he ought not to pay tithes or any sums of money in the nature of tithes, in respect of the premises belonging to him in right of the said deanery, according to the present improved value thereof.

It

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

It was charged by the amended bill, that divers letters had passed between the plaintiffs and their solicitors and the defendant, touching the plaintiffs' demands on the defendant for tithes, by which it would appear, that the defendant promised and undertook to pay the plaintiffs their full demands for tithes, as soon as the questions then litigating between the plaintiffs and certain other of the parishioners, touching the rights of the plaintiffs to be paid 2*s.* 9*d.* in the pound were settled: and the amended bill charged, that their right to take 2*s.* 9*d.* had been finally and fully established, and that it was upon the faith of such promise the plaintiffs omitted to make the defendant a party to the said suit: and that the plaintiffs' demand for the arrears of tithes due from the defendant, ought not to be limited to six years, but that they ought to be paid such arrears for the time in respect whereof they recovered tithes from the defendants in the aforesaid suit, and during the whole of the period from thence up to the present time.

To this the defendant answered, that not having kept copies of such letters as were written by him previously to the final decision of the other suit mentioned in the bill, and which was finally decided in the house of lords, in favour of the plaintiffs, on the 26th *April*, 1809, he could not set forth with certainty, whether he thereby promised to pay and satisfy to the plaintiffs, their full demands upon him for tithes, as soon as the suit then depending between the plaintiffs and certain other parishioners respecting the plaintiffs right to be paid 2*s.* 9*d.* in the pound was determined; but the defendant thought he never made any such promise: and that if he did in any of such letters make any acknowledgement of the alledged right of the plaintiffs, or any promise to pay them their full demand for tithes, yet he submitted and insisted, that by the words "full demands" if any such words were used, must be intended their full legal demands, and

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

and not such demands as the plaintiffs had no right to make, or any means to establish against the defendant and his successors; and that even if he had promised to pay the plaintiffs their full demands in the most unqualified manner, and without any regard to the circumstance of those demands being legal or illegal, yet that such promise being made by the defendant when he was ignorant of his own rights, and under a misconception arising from a knowledge that the sums set forth in his answer had been in fact paid, without knowing exactly at the time, in respect of what part of the premises whereof the deanery now consists, such payments were made or how they arose, the supposed promise could not be insisted upon or set up as an acknowledgement of the plaintiffs alledged right to enforce payment of tithes against the defendant in respect of the deanery, after the rate of 2*s.* 9*d.* in the pound according to the full improved value thereof: and such letters being also written under terms of compromise, the defendant insisted that they could not be received in evidence against him touching the question in this cause.

The letters referred to were dated *May* 1, 1809, and *May* 5 in the same year. The first contained the following passage: "Not long since, a communication was made to me upon the subject by Mr. *Moore*," (the warden) "and I was then advised to wait till the decision of the house of lords, to which the minor canons acceded." The other letter acknowledged that a proposal was made to the defendant by the plaintiffs in *May*, 1807.

The case, having been argued by *Wetherell* and *Hall* for the plaintiffs, and *Dauncey* and *Spranger*, for the defendant, stood for judgment (*a*).

(*a*) This case having been argued before the period at which the reporter began his attendance in court, he is unable to give an abstract of the argument. He is informed, however, that the points

RICHARDS

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

RICHARDS Ch. B. This is a suit instituted by the warden and minor canons of *St. Paul's*, as parson of the parish of *St. Gregory*, in the city of *London*, against the bishop of *Lincoln*, in his character of dean of *St. Paul's*, for tithes, under the statute of *Henry* 8. which relates to the city of *London*. That the statute is a general statute, is admitted on all sides, and that regularly it gives the parson of the parish the tithes which belong to every house: and it is incumbent upon him who declines payment of tithes, to shew his exemption under some customary payment. It is also admitted, that the deanery of *St. Paul's* is within the parish of *St. Gregory*, and therefore according to the acknowledged law, the dean of *St. Paul's* is liable to the payment of tithes for the house called the *Deanery*, unless he can shew some legal excuse for not paying them. The defences which are made are several, and certainly not consistent with each other. The first defence is independent of the statute. It seems that the parsonage of *St. Gregory* once belonged to the dean of *St. Paul's*, and that it was granted by him sometime in the reign of *Henry* the sixth to the warden and minor canons: that circumstance is relied upon in some measure as shewing a connection between the dean and the living, and is used to shew a ground for a presumption, that there might have been some contract between the dean who granted the benefice, and the parson who took it, in order to excuse the dean from the payment of tithes. However, there is no trace of such a contract, and without any evidence on the subject, the dean of *St. Paul's* is to be considered as any other person occupying, unless he has some exemption personal to himself. It is then said,

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insisted on and the authorities referred to on both sides, are fully stated by the lord chief baron in his judgment, with the exception of the stat. 2 *R.* 2. *c.* 5. *de scandalis magnatum*, the table of precedence in *Bl. Com.* 405., and the statute of precedence 31 *H.* 8. *c.* 10. which were cited for the plaintiffs in opposition to the defendant's claim of exemption as a great man, and *Burn's Eccl. Law*, vol. ii. page 76. where a dean is styled "a governor over the prebendaries and canons," which was referred to by the defendant's counsel in support of the exemption.

that

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

No house is exempt from paying tithes under 37 *H.* 8. *c.* 12. except the houses expressly exempted by the act.

that independent of the statute, he has another title to exemption, namely, that he is an ecclesiastical person, and that the deanery is part of his possessions as an ecclesiastical person, and allusion is made to the maxim *ecclesia decimas non solvit ecclesiæ*. With respect to that, it seems to me that the act of parliament has charged every house in the parish except the houses which the act itself has excepted, and that certainly is the general notion, for in a very early case, *Green* v. *Piper* (*a*), it was held, that a house in *London*, belonging to a priory that was discharged of paying tithes of its possessions, yet by the statute of 37 *Henry* 8. *c.* 12. should be charged for tithes according to the ordinance there, for before that statute, the case says, no dwelling-house was chargeable for tithes, because no profit ariseth of it, and that only noblemen's houses are excepted. By noblemen's houses must be meant that rank of houses which are excepted afterwards in the act. In respect therefore of the circumstance of the dean of *St. Paul's* being an ecclesiastical person living in the parish, and being called upon to pay tithes, for premises occupied by him in the parish, it appears to me that the act of parliament does not at all discharge him, or diminish his liability to pay tithes. It is not necessary now, to enquire how tithes in *London* were paid before (if any tithes were paid) or how ecclesiastical persons, ministers of churches, were provided for. This act is the *magna charta* of the clergy of *London*, and it affects persons who occupy houses in her parishes just as much as the common law gives the tithes to the rector of a common parish. The maxim *ecclesia decimas non solvit ecclesiæ*, cannot, I conceive, in its general acceptation, apply to any case but that of rector and vicar: it is that the same *ecclesia* shall not pay tithes to itself. Where the tithes are distributed between the rector and vicar, and the vicar is in possession of glebe, or the rector is in possession of glebe, the tithes shall not be paid to

(*a*) *Cro. Eliz.* 276.

the

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

The maxim *ecclesia decimas non solvit ecclesiæ*, applies only between rector and vicar of the same parish.

the rector, or to the vicar, as the case may be; but in other cases I take it to be very clear, that an ecclesiastical person cannot decline by law the payment of tithes unless he prescribes in *non decimando*, as an ecclesiastical person may; the case of *Blincoe* v. *Barksdale* (*a*), quoted by Mr. *Spranger*, was a case of parson and vicar, and all the authorities will, I believe, be found to apply only to cases of that description. It is so stated in *Watson's Complete Incumbent* (*b*), and the author adds, "If the parson's or vicar's glebe be in another parish than where the church is to which it belongs, tithes of such glebe shall be paid to the incumbent of the church where the glebe is, unless the parson or vicar to whom the glebe belongs can prescribe in *non decimando*;" he collects it from the cases to which he refers and which I have frequently had occasion to consider. There is no doubt that the glebe of one clergyman which happens to be in the parish of another, is liable to pay tithes to the latter; and as between the rector and vicar, if the rector or vicar lets his glebe to another person it must pay tithes; it is, as I conceive, a privilege confined precisely to the parish in which the property lies; but that is not necessary to be decided here, because I am clearly of opinion that the maxim cannot apply in this case under the act of parliament, for the act itself has pointed out where the exemption shall be, and by making the exception, it certainly denies any exemption to any part of the parish but that which it excepts: besides, there is, as we shall find presently, another answer which is quite decisive, when we consider the claim of a total exemption or discharge from tithes, we shall find the deanery has paid tithes beyond all question; this is independent of the statute. The defence then takes up the statute, and says I am exempted by the very words of the statute; if so, there is an end of the case. The defence is under the sixteenth section, which provides, that the decree shall not extend to the

(*a*) *Cro. Eliz.* 573. (*b*) 513, 514.

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

houses of great men, or noblemen, or noblewomen, kept in their own hands, and not letten for any rent, *which in times past had paid no tithes*, so long as they should so continue unletten, nor to any halls of crafts or companies, so long as they be kept unletten, so that the same halls in times past had not used to pay any tithes. In the first place, it would be necessary, in order to bring the defendant within the proviso, to shew that he had never paid any tithes in ancient times; that, however is disproved; but independent of that, the question is, whether the dean of *St. Paul's* is within the intent of this act of parliament, what is called *a great man*. I have not been able to find any case upon the construction of the act with respect to the words *great men*, but I find that almost all the cases refer to noblemen, as forming the class of persons excepted by the act of parliament; I confess, I cannot help thinking with Mr. *Hall*, that the order of the words shews, that they must be great men, superior to noblemen or noblewomen, for we know, that according to the rules of composition, things are to be stated in their proper order, and when I see noblemen or noblewomen, and afterwards halls, crafts, and companies, I incline to think according to Mr. *Hall's* argument, that great men must be persons superior to noblemen and noblewomen, but there has been no case cited in which a dean has been considered as a great man within this act of parliament. A person may be of very high rank without being a peer, and we know that when this act was passed, it was much more usual for persons of rank to reside in the city of *London* than it is at present: it was no uncommon thing for the nobility to live in the city at that time. The object is, that wherever great men, or noblemen, or noblewomen, reside in houses that have paid no tithes, they shall not be subject after that act passed, but then it must be shewn that they never paid tithes before. The act then refers to commerce, and mentions "halls of crafts or companies, which have not been used to pay any tithes." Every house and hall is to pay tithes

primâ

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

primâ facie, under this act of parliament, but there are three descriptions of persons who are exempted under the act: first, great men; secondly, noblemen and noblewomen; and thirdly, commercial corporations who have any halls, crafts, or companies. Now this is not that case in any point of view. The defence alledges, first, that the deanery is not within the act at all; secondly, that it is exempted within the act, because it never has paid tithe, and therefore it is to be proved that it has paid tithe before the plaintiffs can recover, as against a person occupying as a great man; or thirdly, that he has paid tithes from time to time, and therefore within the act of parliament is protected from paying more. First, the defendant states an exemption independently of the act of parliament, notwithstanding which, he next claims an exemption, under the force of the act, and then, abandoning his exemption, he says, he is within the act, because the deanery has paid tithes in point of fact. Now let us consider what the case is with respect to the payment of tithes. Supposing I am wrong in my opinion on the other parts of the case, it is impossible to say he is exempted on the ground of not having paid tithes, for it is quite clear he has paid them. If as an ecclesiastical person, he could be exempted in particular cases, it is quite clear he cannot be exempted upon the ground of non-payment. If he is a great man, yet it is clear he has paid. The ground of exemption proceeds on his never having paid, and therefore it is said, that is evidence of his being the person intended under this act as exempted; but he has paid tithes in point of fact: the evidence is quite clear. I cannot say whether he paid tithes in his own wrong or not, as the argument supposes, for I have no evidence given me to shew that the payment of the tithes was not according to the acknowledged right, a right acknowledged by the deans themselves, but I see payment of tithes from time to time constantly, not only for those things which were charged separately, but charged for the deanery, *quà* deanery, and the sum of 12*s.* 6*d.* is paid for that for a considerable time, and

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

then I see also what is very extraordinary, when I recollect the argument: I see that sum afterwards doubled, so that in truth the 12*s.* 6*d.* cannot be considered a settled sum to which you are to refer, for I see it is what they were not guided by at the time. In regard to the argument of non-payment, it will be said that the dean bought the public-house called the *Feathers* and added it to the deanery, and that the 12*s.* 6*d.* is applicable to that. My answer is, that there is no evidence of that. That the *Feathers* was taken into the deanery, I admit, but there is no evidence to shew that the 12*s.* 6*d.* was paid for that house, and the rate is always charged in the book upon *the deanery*, not upon that small part of the premises of the dean, which is only part of the garden; therefore, it seems to me quite clear that the dean comes now under the effect of evidence which shews he has always, as far as the court can see, paid tithes for the deanery, and that at a certain period of time that payment was increased and doubled. The question then is, whether the dean is to pay tithes now? here is no customary payment; I have looked through the answer, and I see it is very candidly stated: it is not stated in the answer to be a customary payment, it comes then shortly to this:—no customary payment, no exemption, but a payment to a certain time of 12*s.* 6*d.* for the deanery, and then that sum doubled. With respect to the 12*s.* 6*d.* it is said to have been paid in the dean's own wrong, and that the doubling was in his own wrong; but of that I see no evidence. It was doubled and continued to be paid in the double shape of £1. 5*s.* down to the time of the present dispute. Then the question is, whether the £1. 5*s.* shall be considered now as the rate on which the warden and minor canons, filling the character of parson, are to obtain satisfaction for the tithes? I confess, I do not know upon what ground that shall be binding upon the warden and minor canons. The meaning of the statute, is beyond all question,

Under the stat. 37 *H.* 8. *c.* 12. the incumbents of parishes in *London* are entitled to tithes at the rate of 2*s.* 9*d.* in the pound on the value, and not merely on the rent.

to

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S. v. The DEAN of ST. PAUL'S.

to give the tithes at the rate of 2*s.* 9*d.* upon the value. Rent is considered in some parts of it as value: when a person leases property, if he leases it fairly, the minor canons take 2*s.* 9*d.* upon that rent, it being supposed the rent is fairly reserved, as it may be fairly concluded that the landlord will take as much as he reasonably can ask upon the lease. But in the present case where there is no letting at all, and where the payment has been *as for tithes*, is that payment (which I cannot consider as a customary payment) to be considered as a perpetual payment? surely that is not within the act of parliament, nor within the cases. There is nothing to which to refer this 12*s.* 6*d.* that can belong to any rent or value fairly set at some time, and which therefore must continue the same; that would have the effect of a customary payment: here there is no rent to refer it to. I see only that there was a payment of 12*s.* 6*d.* which was increased to £1. 5*s.* Now if you look into the act of parliament, it is quite clear that it was intended to give the rector the same benefit as the rector of any country parish, that he should have the benefit of the depreciation of money; by the 20th section of the statute it is provided, that if any person shall take any tenement for a less rent than it was accustomed to be letten for, by reason of great ruin or decay, burning, or such like occasions or misfortunes, that then such person or persons, his executors or assigns, shall pay tithes only after the rate of the rent reserved in his or their lease, and not otherwise, as long as the same should endure. That is a binding article upon both, but it is only till the end of the lease: when the end of the lease arrives, and the value is raised in consequence of the repairs and improvements of the tenant during the time, then the clergyman is to have his fair tithes upon the rent to be reserved or upon the value, which comes to the same thing, for if the person does not choose to lease, it is not to follow that the clergyman is not to have his tithes, therefore it appears to me to be a case within the act of parliament,

and

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

and within all the cases upon it. In *Ivatt* v. *Warren* (*a*), the court held, that the inhabitants ought to pay according to the true value the same was worth to be let. The same was determined in *Grant* v. *Cannon* (*b*), and in *Williamson* v. *Gosling* (*c*), all these are referred to in *Antrobus* v. The *East India Company* (*d*). In *Ivatt* v. *Warren*, the court declared, that if the building had been a shed, it ought to be discharged no longer than it continued a shed, and being converted into a dwelling-house, it ought to pay tithe according to the value: and in case the inhabitants have paid fines for their leases, those leases are considered as not governing the clergyman who is not at all bound by the rent. It amounts to the same thing, for if the rent is £10 a year upon a fine of £100, you must of course refer to the real value, for £10 cannot be the value. I think it is impossible to read this act of parliament, or any of the cases decided upon it, without being satisfied what is its true meaning. The clergyman is to have his tithe upon the value, unless the rent is near the value, so as to make it unnecessary to enter into a discussion upon the subject. In *Ward* v. *Hilder* (*e*), the defendant confessed that he had been an inhabitant of the parish of *St. Lawrence Poulteney*, for nine years, and still was a housekeeper there, and that for some of the years he had paid £1. 16*s.* rated and assessed upon him for the dwelling-house, shop, and ground, in lieu of tithes, oblations, &c. but for how many years he did not remember, and that after he had lived some time in the parish he found he was over-rated and refused to pay the same; he also confessed, that his house was worth £40 *per annum*, and that as he was over-rated, he had not paid any tithes for the same for the time in the bill mentioned. The decree was, that he should pay to the plaintiffs the arrears of the tithes of the said house and premises. He had been rated constantly at £1. 16*s.* and yet when the question came, the court said, you shall pay 2*s.* 9*d.*

(*a*) 3 *Gwill.* 1054.
(*b*) 2 *Gwill.* 541.
(*c*) 3 *Gwill.* 902.
(*d*) 13 *Ves.* 9.
(*e*) 2 *Gwill.* 538.

in

1817.

The WARDEN and MINOR CANONS of ST. PAUL'S v. The DEAN of ST. PAUL'S.

in the pound upon the rent or value of the house and premises, the same to be rated and valued after the rate of £30 *per annum*, though proved to be of greater value in the cause; the court decreed payment upon £30 *per annum*, not the payment of £1. 16*s.* according to the former payment, but according to that which he admitted to be the fair value: he proved the house to be worth £40 *per annum*, and the decree was, that the defendant should pay 2*s.* 9*d.* in the pound upon the value of the house and premises which appeared to be £40, but the plaintiffs being satisfied with the less sum of £30, the court gave a decree upon that. The payment was charged after the rate of 2*s.* 9*d.* in the pound, with costs, "according to the yearly value of the premises." I wish to observe, that in *Gwillim* you have not those last words, "according to the yearly value of the premises," which is a strong expression in the decree itself. We find the same thing done in *Bramston* v. *Heron* (*a*). Whether *Kynaston* v. The *East India Company*, mentioned in *Antrobus* v. The *East India Company*, has been decided in the house of lords, I do not know (*b*), I think it is precisely this case: but if not decided in the house of lords, I would avoid citing it, otherwise than as it shews the general opinion of all the courts to have been according to the construction I put upon the act. The decree in *Antrobus* v. The *East India Company*, was affirmed in the house of lords. I think it is impossible to read that case, (I do not say that it is precisely in point) without seeing that the principles there laid down, apply imperatively to the case now before us. Under these circumstances, I am of opinion, that the plaintiffs are entitled to have their decree in this cause. With respect to the time from whence the decree is to go, I really do not think, that the plaintiffs have made out any case against the defendant; he has said in his letter, that which I think any other person would have said, and in truth, that could only relate to a year before; but I do not think the dean has bound himself by that letter.

(*a*) 4 *Gwill.* 1314. (*b*) *Post*, 25.

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1817.

The WARDEN and MINOR CANONS of ST. PAUL'S. v. The DEAN of ST. PAUL'S.

A court of equity is not bound to limit an account of tithes to six years, although it adopts that rule in general.

It is a great mistake to say that a court of equity cannot go beyond six years; that is not the case, although a court of equity generally confines itself to six years, because it is more convenient and more consistent with justice in general, and I should always bind myself by six years, unless I saw reasons to the contrary, which I do not in the present case. I must therefore confine the decree to an account for six years. The dean states in his answer, what he conceives to be the value of the premises; if the warden and minor canons assent to that statement, a calculation of what is payable may easily be made: if there is to be an account of the value of the premises, it must go to the deputy remembrancer to ascertain the value in the usual way of making a decree of that kind. In a case of this sort I feel great reluctance to give costs: they are rare cases, and though I think the principles of the other cases govern this, yet it is a case which may, without being very much considered, be held to be singular. I do not myself think it a very singular case, according to my view of it, but still *primâ facie*, it is a new case. If costs have been paid in all the other cases, I shall of course give costs here, but if they have not been given in all the other cases, I will not give them here.

Note.—It being afterwards ascertained that costs had been given in the other cases, a decree was made with costs.

KYNASTON

KYNASTON *v.* The EAST INDIA COMPANY *(a)*.

(Referred to in the foregoing case.)

June 23, 1805. *Before Macdonald, Ch. B. Thomson, Graham, and Sutton, Barons.*

Warehouses, &c. in *London*, occupied by the owners, are chargeable for tithes under 37 *H* 8 *c.* 12. according to the improved value, there being no evidence of any letting.

THE bill stated, that the plaintiff was seised of the rectory impropriate of *St. Botolph without Aldgate*, and was as such impropriate rector, entitled to the tithes, rates for tithes, and customary payments or other duties in lieu of tithes, which became due from the citizens and inhabitants, for all their houses, shops, warehouses, cellars and stables, situate within the parish. The bill then stated the decree made pursuant to the statute for tithes in *London* (*b*), and that the defendants had ever since the year 1794, been in the possession and occupation of several messuages, warehouses, &c. within the parish, under certain yearly and other rents or reservations or otherwise, or that certain yearly or other rents or reservations in the nature of rents, had been, or were formerly, or at some time or times paid or reserved in respect of the said houses, &c. or some or one of them, or of some other houses, &c. which formerly were erected, or stood upon the site of or upon the same ground on which the houses or warehouses, &c. in the possession of the defendants had been since erected, and that therefore, the tithes were, during the time they were in such occupation and possession, and still were payable by them for the said messuages, &c. in manner mentioned by the decree, in proportion to the rents respectively paid by the defendants for the same, or the payments made by them in the nature or in lieu of rent for the same, during all the time last-mentioned, to the plaintiff as rector.

(*a*) The papers in this cause, including a copy of the judgment from a short-hand writer's note, have been obligingly communicated to the editor, by a gentleman professionally engaged in it.

(*b*) 37 *H.* 8. *c.* 12.

The

1805-6.

KYNASTON v. The EAST INDIA COMPANY.

The bill insisted, that the tithes were payable and ought to be calculated after the rate directed by the decree, according to the present improved or last known rents or value of the said houses, warehouses, &c. and not otherwise: and prayed an account and payment of the tithes.

The defendants by their answer admitted that they had, since the year 1794, occupied, and were the owners of several stacks of warehouses, and dwelling-houses for their warehouse keepers and servants, and of waste ground within the parish, but that having built, and being themselves the owners of the said warehouses and dwelling-houses, they never did hold the same or any part thereof under any yearly or other rent, or for any consideration in the nature or in lieu of rent, and that no yearly or other rent had at any time been paid for the said warehouses, &c. The defendants further stated their belief, that certain dwelling-houses or some edifices or buildings, were formerly erected and did stand upon the site of or upon the same ground on which the defendants' warehouses, &c. had been since built and did then stand, and that some yearly or other rents or payments in the nature of rents were reserved and made payable for such dwelling-houses, &c. or the ground whereon they stood, but the defendants were unable to set forth what such rents or payments were, or whether they were paid or not, except that the defendants had always understood and believed that such houses, &c. were inhabited and occupied by persons of very low descriptions and necessitous circumstances, and therefore not likely to pay or make good any rents or payments whatever in respect thereof: and that the defendants did not occupy any messuages, &c. in the parish, save as aforesaid.

The case was argued by *Plumer* and *Leach* for the plaintiff, and *Adam*, *Alexander* and *Wyatt*, for the defendants, and the following authorities were cited: *Grant* v. *Cannon* (*a*),

(*a*) 2 *Guill.* 541.—1 *Wood.* 312. S. C.

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Ivatt v. *Warren* (*a*), *Bramston* v. *Heron* (*b*), *Williamson* v. *Gosling* (*c*), *Sayer* v. *Mumford* (*d*), *Dunn* v. *Burrell* (*e*), and a passage in 2 *Inst.* 660.

MACDONALD Ch. B. delivered the judgment of the court. These warehouses, it is stated by the answer, were built upon the site of ancient sheds and some waste grounds, or of some small tenements which probably never paid any rent at all, and which, in the absence of all proof of payment, must be taken to have never paid any rent. The *East India Company*'s defence is founded upon the statute of 37 *Hen.* 8. They say, inasmuch as no rent can be found out ever to have been paid for those old tenements, therefore according to the act, no criterion is to be found, upon which an annual value or a payment in respect of tithes can be charged and insisted upon, and according to the doctrine cited from *Lord Coke*'s Second Institute (*f*), that this is a *casus omissus* in the act, and that therefore there is no ground for enforcing the payment of them. Several cases were cited upon this subject, some of which turned upon an expression which is in the decree-book explained, namely, that they are to pay according to the *rent or value*; on looking into the decree-book, it appears that *value* is there a synonymous word with *rent*, because in the reports made by the deputy remembrancer, and in the schedules to answers in several of these cases, it appears that the *value* was upon the footing of the *rent* then actually payable, therefore there is no distinction between rent and value, for they are used in the same sense. But there are two cases which seem to go home to this point: the first is *Bramston* v. *Heron*. *Bramston*, impropriate rector, filed his bill against *Heron*, it appeared that his house was built upon the site of an old one, he paid the rent of that old house, but claimed an exemption in this way, inasmuch as

(*a*) 3 *Gwill.* 1051.
(*b*) 4 *Gwill.* 1314.
(*c*) 3 *Gwill.* 902.
(*d*) 2 *Gwill.* 546.
(*e*) 1 *Gwill.* 299.
(*f*) 2 *Inst.* 660.

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1805-6.

KYNASTON v. The EAST INDIA COMPANY.

his house was built on a spot where old houses and warehouses stood which never did pay any tithes. The argument appears to have been much the same as that used in the present case, but the court directed that he should pay in respect of that new house and according to the rent he had stipulated to be paid. There was no occasion to resort to the value in that case, because that happened to be a rent, but it was decreed that it should be paid, and that goes a great way to shew that a new built house should pay according to the value stipulated and agreed between the parties, in the shape of rent. But the case of *Williamson* v. *Gosling* (*a*), goes the whole length of this case: for there the claim of the rector was the same as it is in the present case; the situation of *Sir Francis Gosling*'s two houses was, as the answer stated, that those two houses, of which *Sir Francis Gosling* was the owner, and of one of which he was the occupier, were built upon the sites of four houses, three of which had paid anciently a customary payment: the three houses are distinguished and set forth, and the other house was a public house known by the sign of the *Gentleman* and *Porter*, situate separately and behind the other three houses. The answer of *Sir Francis Gosling* is stated in these words, " that the defendant for two years had occupied the two new houses of about the yearly value of £100, and he let the other to another person for the yearly rent of £70;" then here is a house built, occupied, and owned by *Sir Francis Gosling* upon the sites of old houses, for one of which no rent could be shewn, but for three of which the rents were shewn, and the decree of the court was conformable to this answer, namely, that the value was about £100 a year. The court decreed, that with respect to the houses which stood upon three of the ancient tenements, they had made out their ancient payment, and with respect to the other, the court decreed, " that they should pay 2*s*. 9*d*. in the pound according to the yearly value of the premises stated

(*a*) 3 *Gwill.* 902.

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in his answer, that the value was about £100 a year;" which shews that he was calculating the *value*, not speaking of any fixed rent, for the terms are "about the *yearly value* of £100," and that was decreed accordingly. Now compare that with the present case: here is a warehouse upon ground on which stood houses that never had paid any rent, it is precisely the situation of *Sir Francis Gosling*'s houses. The case seems to run on all fours with that, and therefore whatever the decree in that case was, it must be the same in the present: that upon whatever the annual value is, which is not stated here, the defendants shall pay at the rate of 2*s*. 9*d*. in the pound as in that case. Therefore an account must be decreed at that rate, and an enquiry made of what is the real value, and as this is an entangled question, which in many instances has distressed the court, it seems to be a case in which no costs should be given.

From this decree the *East India Company* appealed to the house of lords, praying that the same might be reversed for the following reasons:—

1st. Because the decree of the court of exchequer has declared that the respondents are entitled to tithes after the rate of 2*s*. 9*d*. in the pound upon the annual value of the premises in the pleadings mentioned, although the said act of parliament made and passed in the 37th year of king *Henry* 8. and the said decree of the 23d day of *February*, 1545, upon which alone the right to tithes of houses in *London* is founded, directs that every owner or inhabitant of any dwelling-house, or houses, warehouses, shops, cellars, or stables, inhabiting or occupying the same himself, should pay after the rate of 2*s*. 9*d*. in the pound according to the quantity of such yearly rent as the same was last letten for, without fraud or covin, and although the appellants are the owners of the premises mentioned in the pleadings, and occupy the same, and although it does not appear that the same have ever been letten.

2d. Because

1806.

KYNASTON v. The EAST INDIA COMPANY.

2d. Because the said act of parliament and decree of the 23d day of *February*, 1545, directed the said tithe to be calculated after the rate aforesaid, upon the yearly rent and not upon the improved value.

3d. Because the case of an owner inhabiting or occupying himself any dwelling-house, or any houses, warehouses, shops, cellars, or stables, which have never been letten, and for which no rents have been reserved or can be ascertained, is omitted out of the said act of parliament.

4th. Because for a great number of years after passing the said act of parliament and making the said decree of the 23d *February*, 1545, rent was considered as the criterion upon which the tithe of 2*s.* 9*d.* in the pound, of houses, warehouses, shops, cellars, and stables within the city of *London* was calculated, and no attempt was made on the part of the clergy to enforce the payment of tithe after the rate aforesaid, upon the value of any houses, warehouses, shops, cellars, or stables, till from lapse of time and inevitable accident, all evidence of the rent for which the same were last letten was lost.

5th. Because the construction put upon the said act of parliament and decree of the 23d *February*, 1545, by the said court of exchequer, is not consistent with the intent and meaning of the legislature, as it would increase the livings in *London* to a rate far beyond what the legislature could have intended to have provided as the stipends for the parochial clergy, and to an amount exceeding the revenues of many of the high dignitaries of the church.

6th. Because the said act of parliament and decree of the 23d *February*, 1545, were intended to quiet the animosities, and settle the disputes which had for several centuries subsisted between the clergy and citizens of *London*, respecting the

the payment of tithes, and as this was the object of the legislature, it is a deviation from the intention of parliament, and is inconsistent with the spirit of the act and decree, to put a construction upon them which will tend to revive the disputes, and introduce the mischiefs, which it was the object of the said act of parliament and decree to prevent.

A. Piggott.
W. Adam.
J. Wyatt.

The respondents submitted that the decree ought to be affirmed, and the appeal dismissed with costs, because according to the clear meaning and construction of the statute, 37 *H.* 8. and the decree of the 23d *February*, 1545, the respondents are entitled to be paid tithes or dues in the nature of tithes, in respect of the premises in question, after the rate and in the manner declared by the decree of the court of exchequer pronounced in this cause.

T. Plumer.
J. Leach.
C. Wetherell.

On the 25th *February*, 1813, the house of lords affirmed the decree of the court of exchequer.

GRAY'S INN HALL.

June 4, 1817.

Before the Lord Chief Baron alone.

Relief given against a bond entered into for the purchase-money of a remainder expectant on an estate tail, and the interest paid on the bond decreed to be re-funded, it appearing that the remainder had without the knowledge of either party, been barred by a common recovery suffered previous to the sale.

HITCHCOCK *v.* GIDDINGS.

THE bill prayed that a bond for £5000 from the plaintiff to the defendant, dated *May* 3d, 1810, might be declared to have been fraudulently obtained, and be delivered up to be cancelled: that the defendant might re-pay to the plaintiff £250, alledged to have been paid by him as interest on the bond, and for an injunction. It appeared that *John* and *Thomas Vowles* became entitled as tenants in common, under the will of *Thomas Millard*, to a remainder in fee-simple in the real estates of the testator, expectant on the life estates of *Elizabeth Millard* and *Anne Wrentmore*, and on an estate tail given by the will to *Anne Wrentmore Colmer*, and subject to an annuity of £10 to *Anne Hawkins* for her life. By two several indentures, both dated *December* 24th, 1805, the before-mentioned remainder was conveyed to the defendant in fee, by *Thomas Vowles*, and by *William Vowles* the heir at law of *John*, who had previously died intestate. In *April* 1810, the defendant agreed to sell one moiety of his reversionary interest to the plaintiff for £5000, to be paid as follows; £2000, with interest on the whole £5000, on the 1st *May* 1812, and the remaining £3000 with interest, on the 1st *May* 1815; the whole to be secured by the bond of the plaintiff. The draft of a conveyance was afterwards, by the plaintiff's direction, prepared by his solicitor, and, together with a copy of the testator's will, and the original conveyances from *William* and *Thomas Vowles*, laid before Mr. *Bridgman* for his perusal and opinion on behalf of the plaintiff. Mr. *Bridgman*, by a written opinion on the draft, stated, that the limitations in the will of *Thomas Millard* placed the estate of the remainder-men *John* and *Thomas Vowles* in a remote point of view, for that it was in the power of the tenants in tail with

the

1817.

HITCHCOCK v. GIDDINGS.

the assistance of the tenants for life, if living, and if they were dead, of their own possession, to suffer a recovery and dock the remainders which the said Messrs. *Vowles* had sold to the defendant. By a subsequent opinion, Mr. *Bridgman*, after alluding to the existing life estates, and to the annuity of £10, observed, that the most formidable obstacle was the power of *Anne Wrentmore Colmer*, to suffer a recovery and bar the remainder of Messrs. *Vowles*, which they had conveyed to the defendant, and he added, that from those and other observations, Mr. *Hitchcock* would perceive that his purchase was somewhat speculative. It appeared in evidence, that after the second opinion was written, the plaintiff and his solicitor had a consultation with Mr. *Bridgman*, who repeated his former opinion as to the effect of suffering a recovery, and recommended a search to be made in order to ascertain whether any had already been suffered, on which the plaintiff declared that he was satisfied with his purchase; that it was worth £10,000, and that he had lately been in *London*, and had made a search, and that no recovery had been suffered. The plaintiff thereupon instructed his solicitor to ingross the conveyance, which was accordingly prepared and executed by the defendant a few days afterwards, the plaintiff at the same time executing a bond to the defendant conditioned for the payment of the £5000 and interest at the times above mentioned, being the bond sought to be set aside by this suit. The conveyance executed by the defendant to the plaintiff, was an indenture, dated the 10th of *May*, 1810, between the defendant of the first part, the plaintiff of the second part, and *Sheppard*, a trustee for the plaintiff, of the third part, whereby, after reciting the will of *Millard*, the conveyance of the remainder to the defendant, and that the plaintiff had contracted with the defendant for the absolute purchase of one moiety of the defendant's reversionary right, title, estate, and interest, so respectively purchased of *Thomas* and *William Vowles* of and in the said estates, &c. for £5000; it was witnessed, that in consideration of £5000 to

1817.

HITCHCOCK v. GIDDINGS.

the defendant paid by the plaintiff, the defendant granted, bargained, sold, &c. to the plaintiff and *Sheppard*, their heirs and assigns, all that one moiety, or equal half part or share of and in all the right, title, remainder, reversion, estate, interest, &c. at law and in equity, of *Thomas Vowles* and *William Vowles*, and of the defendant as a purchaser from them respectively of, in, and to all the estates late of *Millard*; to hold to the plaintiff and *Sheppard*, their heirs and assigns, subject nevertheless to the trusts, powers, charges, declarations, and limitations, mentioned and declared in the will; to the use of the plaintiff and *Sheppard*, their heirs and assigns: In trust, nevertheless, for the plaintiff, his heirs and assigns, with a general warranty of the said messuages, &c. and other the premises thereby granted, against the defendant and his heirs, and all other persons whomsoever. The deed also contained covenants by the defendant, that he had good right to convey the said moiety, and that the premises thereby granted, &c. were free from all former and other gifts, grants, estates, rights, titles, and incumbrances whatsoever, save and except the several estates and interests created by the said testator, and then subsisting thereon in favour of *Elizabeth Millard* and *Anne Wrentmore*, *Anne Hawkins* and *Anne Wrentmore Colmer*, as therein before particularly mentioned and recited. In *June* 1810, (the month immediately following that in which the conveyance and bond were executed) it was discovered by the plaintiff's solicitor, that a recovery had been duly suffered by *Anne Wrentmore Colmer*, the tenant in tail under the will, before the sale to the plaintiff, viz. in *Easter Term*, 48 *Geo.* 3., whereby the remainder was effectually barred; but the defendant by his answer positively denied that he had any knowledge of that fact, or any reason to suspect that it existed, which denial was not effectually contradicted by the evidence in the cause. It appeared by the depositions of the plaintiff's solicitor, that shortly after he ascertained that the recovery had been suffered, he informed the plaintiff, but the exact date of that communication did not

not appear. There was also evidence that the plaintiff had made a payment of interest on the bond in *November* 1810, and had also in *March* 1811 applied to the defendant to postpone the payment of the accruing half year's interest until the following *June*, and had in *March* 1811, expressed himself satisfied with his purchase. It was also proved, that the proposal for the purchase originated with the plaintiff, and that he was desirous to purchase the other moiety, but which the defendant refused to sell.

Fonblanque and *Wingfield* for the plaintiff, admitted, that although the bill charged actual fraud against the defendant, in selling to the plaintiff an interest which he knew had previously been barred, that case was not made out in evidence. But they contended that this transaction was one against which the plaintiff was entitled to be relieved on the ground of mistake. The question is, whether the transaction shall prevail so as to suffer the defendant to enforce payment of the £5000. It will be contended that the bond is to be considered as an actual payment. It cannot be said that this is a contract executed. In most instances, securities are given for the performance of contracts, and yet the court is called on to relieve against the securities. If a security had been payment, there would be no such distinction as that which exists between contracts executory, and contracts executed. In this case there is an implied engagement that no recovery had been suffered. From the answer and the evidence, the defendant's case appears to be, that it was a matter of indifference to the plaintiff, whether any recovery had been suffered or not, but this is contradicted by the fact of his having made a search ; he agreed to be a purchaser, if his solicitor and counsel approved of the title, and his counsel directed a search to be made.

Martin and *Heys* for the defendant.—The plaintiff has proceeded on a case totally different from that which he has

1817.

HITCHCOCK v. GIDDINGS.

stated on the record. The prayer of the bill is, that he may be relieved on the ground of fraud, and that the defendant may pay back the money he has received for interest. There is no doubt that it is more correct to view this case as a transaction, originating in mistake; but if parties speculate, one selling and the other buying a contingent interest, if the contract be executed, the court will not interfere unless fraud should be proved to have intervened. At law, if a party pays money, having a knowledge of facts, but being ignorant of the law, an action of assumpsit does not lie to recover back the money thus paid. If the transaction be actually closed, the court will not interfere. The question is, whether we have not a right to consider the bond as payment. If a party having a right to tax a solicitor's bill, gives a bond, the court considers the transaction as closed; the same principle is applicable in this case. There is nothing moving from the defendant; he does not make the offer; the plaintiff being in *London*, comes to treat with the defendant in the country for an interest which the defendant had recently purchased; the offer proceeds from the plaintiff himself. It is clear that the defendant was drawn into the transaction, and if it is to be impeached on the ground of fraud, (which absolutely fails) that circumstance is material on the question of costs. The defendant never knew of any recovery having been suffered. Mr. *Bridgman* tells the plaintiff, that if a recovery should be suffered, the title would be worth nothing, but still he completes his purchase, then files his bill on the ground of fraud, and at the hearing takes a new ground. The plaintiff so far preferred his own inaccurate search, that he insisted on completing the contract, expressed himself satisfied, and said he should make £10,000. He had been in *London* to see whether the interest had been barred, and believing that no recovery had been suffered, he comes down and enforces the contract. These parties were dealing for that which both must have known might be of no value whatever. If the recovery had been suffered the next morning, the plaintiff would

would have obtained exactly what he has now: he knew that he stood in the situation of an insurer: it was on the plaintiff's part, a gambling speculation. There is no fraud in the defendant; there is folly in the plaintiff, but folly is no ground for relief. On the question of costs, the defendant is clearly entitled to them. 1st. Because his attention was not directed to the case now attempted to be made. 2dly. The plaintiff's original case is disproved. 3dly. The contract proceeded from the plaintiff, who now seeks to be relieved from it. Upon the whole it was submitted for the defendant, that the parties were both dealing in ignorance, and that the bond amounted to an actual payment, that although the bond were given for a nullity, yet that repayment should not be decreed of what had actually been paid under it, and that the defendant was entitled to costs.

Fonblanque, in reply, observed, with regard to the bill being framed differently from the manner in which the case was submitted to the court, that the plaintiff was justified by the circumstances in describing the transaction as in the bill, and afterwards in retracting when he found the evidence not so high as the allegation, and resting the case on the ground of mistake. As to the bond being payment, he denied that the giving a bond was an objection to the taxing of costs. If there is any case in which a bond is not payment, it is where it is given for the performance of a contract; and if it is a payment, the defendant is proceeding at law for that which is already paid. The plaintiff's declaration as to making £10,000 by his bargain, shews he could not have been in a state of mind capable of contracting, and the circumstance of his subsequently paying interest cannot operate as a confirmation.

RICHARDS Ch. B. In this case there is a charge that the defendant not having an interest in the estate, sold as if he had, and prevailed on the plaintiff to give the bond. That

1817.
HITCHCOCK
v.
GIDDINGS.

That is what is called fraud in a court of equity. But it is said, that this was an agreement for the purchase of a contingency. If they held a communication together to this effect, the defendant saying, if a recovery was suffered, I have no title, but if it has not been suffered, I have a title, and they agree that something shall be given for the chance, I apprehend the court would not assist the plaintiff; but that is not the case here. Under the will the defendant had a remainder in fee simple, unless it was barred by a recovery. They acted on the belief that a recovery had not been suffered. The evidence shews that it was the object of the parties that a recovery had not then been suffered, for Mr. *Bridgman*, who appears to have paid a very proper regard to the interest of the plaintiff, in his opinion refers to the power of the tenant in tail to suffer a recovery and defeat the remainder. They were willing to agree, subject to the contingency of a recovery afterwards being suffered, but on the supposition that it had not already been done. When a party offers an estate for sale, he having no interest in it, and takes a security for the purchase money, it amounts to fraud, in the sense in which the word is used in courts of equity. It is not a speculation, according to the way in which the defendant puts it. They contracted under the belief that an interest was sold by the one, and purchased by the other: that was the sole object of the parties. It is not true that fraud is the only ground for setting aside an instrument. No man ought to sell what he does not think he really has. Here the defendant thought he had it, but he had it not. It would be a prodigious nuisance if a court of equity could not interfere. The defendant admits he had not an inch of the ground to sell. Then can I suffer the defendant to recover the £5000 which he admits was the price of an estate in which he had no interest whatever? With respect to the cases referred to on the subject of the taxation of a solicitor's bill, where the giving a bond is held to preclude the party from taxing the bill, it is not because the bond is considered as payment, but because

1817.

HITCHCOCK v. GIDDINGS.

because the parties are understood to have considered the matter maturely: but even in those cases, if the money is not fairly due, the security would be relieved against. In the present case, the bond was for *securing* payment, and of money, for which the defendant admits he gave no consideration, although the parties were under a common mistake. I am therefore clearly of opinion that the plaintiff is entitled to be relieved against this bond, and that the interest being the fruit of the bond, is affected by the same equity as the principal, and must be repaid by the defendant to the plaintiff. If the application for the injunction had been made immediately, no interest would have accrued. As no greater blame is imputable to one party than to the other, I shall give no costs on either side.

The decree directed the bond to be delivered up to be cancelled; an account of interest received by the defendant, and the amount to be repaid to the plaintiff.

HAMILL *v.* STOKES.

EXCHEQUER CHAMBER.

June 10, 1817.

Before the Lord Chief Baron alone.

A. on his own proposal takes B. into partnership for five years, in consideration of 500*l.* paid and 550*l.* secured: soon afterwards A. procures a commission of bankrupt against B. and thereby dissolves the partnership; the security decreed to be delivered up, and the payments refunded, allowing for the time the partnership continued.

THE case, as alledged by the bill, and admitted by the answer, was this:—

In *November* 1807, the defendant *Stokes* proposed to take the plaintiff *Hamill* into partnership in his profession of a solicitor and attorney, and it was thereupon agreed, that *Hamill* should pay to *Stokes*, for his being so admitted, £1050, whereof £500 was to be paid at the execution of the articles

of

1817.
HAMILL
v.
STOKES.

of partnership, and the remaining £550 to be secured to *Stokes* by the joint bond of *Hamill* and of *Roberts*, (another plaintiff in the suit) and to be made payable by yearly instalments of £100 each with interest. On the 26th of *January*, 1808, a bond was accordingly executed to *Stokes*, conditioned to be void on payment of the £550 and interest in manner before mentioned, and also if either *Hamill* or *Stokes* should die before *Hamill* was admitted an attorney: on the same day articles of partnership were executed by *Hamill* and *Stokes*, wherein it was recited that *Stokes* had agreed to take *Hamill* as a co-partner with him in carrying on the profession or business of an attorney and solicitor in manner after mentioned, in consideration of £1050 to be paid as after expressed, and that in pursuance of the agreement, *Hamill* had that day paid to *Stokes* £500, part of the £1050, and that he and *Roberts* had executed the before-mentioned bond: it was witnessed, that in further pursuance and performance of the agreement, and for the considerations before-mentioned, *Stokes* and *Hamill* agreed that they would on the day on which *Hamill* should be admitted an attorney, commence and be co-partners in the profession and business of an attorney and solicitor for the term of five years, to commence from the day on which *Hamill* should be admitted an attorney. *Hamill* was admitted an attorney on the 4th *May*, 1808, from which time the partnership commenced, and was carried on till the time afterwards mentioned; *Hamill* paid *Stokes* the £500, and in *January* 1809, he and *Roberts*, or one of them, paid *Stokes* £100, the first instalment of the £550, with the interest. On the 24th of *June*, 1809, *Stokes* procured a commission of bankrupt to be issued against *Hamill*, who was thereupon duly declared bankrupt, and the plaintiffs *Brown* and *Jane* were chosen his assignees. *Stokes* was himself the petitioning creditor for the commission, in respect of a debt of £188. 6*s*. 7*d*. and he admitted by his answer, "that he did by the means aforesaid dissolve and put an end to the said co-partnership."

co-partnership." The bill filed by *Hamill* and his assignees against *Stokes*, and against *Price*, to whom *Stokes* had assigned the bond as a security for a debt, and against *Biss* and *Longmore*, assignees under a commission of bankrupt against *Stokes*, prayed that the bond might be delivered up to be cancelled, that the defendants might pay back to the plaintiffs respectively, the sums of £500 and £100 paid to the defendant *Stokes*, with interest: that the plaintiffs might be admitted creditors under the commission against *Stokes* for the aforesaid sums, after making such abatement (if any) as ought to be made therefrom, and for an injunction against proceeding at law.

The defendants *Biss* and *Longmore* having been removed from their situation of assignees, pending the suit, by an order of the lord chancellor, *Rossiter* and *Baker*, the assignees chosen in their place, were made parties by supplemental bill.

Dauncey and *Wyatt* for the plaintiffs, contended, that *Hamill* having for only thirteen months had the benefit of that contract which was to have continued for five years, and the contract having been determined by the act of *Stokes* himself in suing out the commission, the consideration for the bond had failed, and that therefore the obligation itself must cease; and they compared it to the cases between master and apprentice, in which, when the apprentice is discharged by his master, the whole, or a proportional part of the apprentice fee is returned, the amount being settled by the *Chamberlain* of *London*, where the indentures have been recorded in his office, and in other cases by the intervention of a court of equity: and they stated the reason of these cases to be, that it is a fraud in the party to break his own contract. Here the contract is for five years, and it is dissolved by *Stokes* himself at the end of thirteen months.

Martin

1817.

HAMILL v. STOKES.

Martin and *Treslove*, for the defendants *Stokes* and the removed assignees; *Beames*, for the present assignees of *Stokes*, and *J. Martin* for the defendant *Price*. The partnership between *Stokes* and *Hamill* could be determined only by an agreement, or by some act amounting to a dissolution. It cannot be contended that *Stokes* acquired the same power over *Hamill* as a master does over his apprentice, or that he could prevent him from doing those acts which might amount to a dissolution; he could not controul his conduct. The failure of the credit of *Hamill*, of necessity involved that of *Stokes*. If it be admitted in a court of equity, that a party has done a particular act, and there are two motives to which that act may be ascribed, the one of which is fraudulent, the court will not assume the act to have been influenced by the fraudulent motive. In this case there is nothing to shew that *Stokes'* motive was fraudulent, and there is something to shew that it was otherwise: for *Hamill* stood in a situation in which he might pledge the credit of *Stokes*. The commission could not have been obtained by *Stokes*, unless by *Hamill's* own act: for before *Stokes* could obtain it, *Hamill* must have been a trader, a debtor to *Stokes*, and must have committed an act of bankruptcy; and if the effect of these acts is to destroy the contract, they are clearly the acts of *Hamill* himself, and not of *Stokes*. The whole equity therefore must rest on the fact that *Stokes* was the petitioning creditor, and the plaintiffs fail, in not shewing that it was done from a fraudulent motive. The cases of master and apprentice have no application, because it is not shewn that *Stokes* broke the contract, for *Hamill's* bankruptcy was the act of himself. Here is a contract with nothing bad on the face of it; one party becomes bankrupt, and the other is the petitioning creditor. That cannot of itself destroy the contract, unless it be shewn by antecedent acts that it was fraudulent. Supposing it notorious that *Hamill* was insolvent; could any man in his senses continue to act with him? Supposing the fact of his insolvency known only to *Stokes*, could any man remain a partner with such

1817.

HAMILL v. STOKES.

such a person, at the risk of involving himself in continual litigation in consequence of his knowledge of that fact? If one partner commits a felony, and the other prosecutes him to conviction, this would be a dissolution of the contract, and yet it could not be maintained that the innocent partner should on that account lose his money, for the dissolution would be produced by the prior act of the guilty partner. If *Stokes*, *bonâ fide*, thought it necessary for the preservation of his property to make *Hamill* a bankrupt, his conduct was not fraudulent, and the plaintiffs are therefore not entitled to relief. Besides, it is not shewn that *Hamill* was solvent or *Stokes* insolvent when the contract was entered into, nor is it pretended that there was no foundation for the commission against *Hamill*. The silence of the other parties on this subject, shews the bankruptcy to have been a fair proceeding on the part of *Stokes*. When an insolvent enters into partnership, and absconds, the partnership is determined by his own act, and it becomes necessary that the other partner should, for the preservation of his own property, dissolve it. If one of these partners had died the day after the partnership commenced, the money would nevertheless have been payable. It is probable that *Hamill*, a falling person, entered into partnership in order to save himself, and he might abscond for the purpose of protecting his surety. The only reported case on the subject of master and apprentice is *Hall* v. *Webb* (*a*), and is in favour of the defendants: it was a bill to recover part of the apprentice fee. The master and his apprentice had disagreed. Lord *Kenyon* said he could see no equity in it. Where the apprentice is discharged for misconduct, he forfeits all right to a return of the premium. Supposing, however, the court to be of opinion that the plaintiffs are entitled to relief, it cannot be to the extent sought by the bill, for *Hamill* had the benefit of the partnership for thirteen months: and the petitioning creditor's debt was £188, the

(a) 2 *Bro. C. C.* 78.

defendants

1817.
HAMILL v. STOKES.

defendants are therefore entitled to an allowance for the time the partnership continued, and to a set off for the debt of £188.

Dauncey, in reply, referred to the answer of *Stokes*, in which he distinctly admitted that he proposed the partnership, and that he *procured* the commission, and did by the means aforesaid, dissolve and put an end to the partnership.

RICHARDS Ch. B. If this were a case merely between *Hamill* and *Stokes*, it would be impossible for any one to entertain a doubt upon it. *Stokes* agrees with a young man to take him into partnership when he should become an attorney, which partnership was to continue for five years. *Hamill* is to pay him £500, and at a future time £550 more. The partnership continues only thirteen months, so that nearly the whole benefit of it is lost to *Hamill*; and if this had happened merely by any accidental termination of the partnership, it could only have been a subject of regret; but when *Stokes* admits that he procured the commission to be issued, and thereby put an end to the partnership, he admits that, which in morality amounts to a grievous offence. There is, however, no imputation on the assignees and creditors of *Stokes*, who are properly desirous to secure what they can out of his estate; but the rule of law is the same with regard to them, as with regard to *Stokes* himself: and *Price*, although a *bonâ fide* holder of the bond, could only take it subject to the same equity as *Stokes*. I am clearly of opinion that a court of equity ought to relieve in such a case. The bond must be delivered up, and there must be an enquiry how much of the money received by *Stokes* ought to be repaid, allowing for the time the partnership actually continued, and an allowance should be made for the debt of £188 due from *Hamill* to *Stokes*. The balance, and the amount of the plaintiff's costs, to be proved under the commission against *Stokes*. And it appearing that the defendants *Biss* and *Longmore*,

Longmore, the removed assignees of *Stokes*, had after their removal been continued as defendants, and brought to a hearing, his lordship ordered that their costs subsequent to their removal, including those of the hearing, should be paid to them by the plaintiffs.

The decree declared that the injunction should be continued: that the defendants *Rossiter* and *Baker*, the assignees of the defendant *Stokes*, should deliver up the bond to the plaintiffs to be cancelled. Refer it to the deputy remembrancer to inquire and state to the court what sums ought to be paid back to the assignees of the plaintiff *Hamill* in respect of the sum of £600 advanced and paid by the plaintiff *Hamill* to *Stokes*, and also what allowance should be made to the defendant *Stokes* in respect of the time during which the partnership was carried on, and such allowance is to be deducted from the sum which the deputy remembrancer shall be of opinion ought to be paid back to the plaintiff *Hamill*'s assignees as aforesaid. The deputy remembrancer to tax the plaintiffs their costs of this suit, and also the costs of the defendants *Longmore* and *Biss* from the time of their removal from being assignees, to the hearing, and let the plaintiffs pay such costs: and the plaintiffs are to stand as creditors on the estate of the defendant *Stokes* for so much money as the deputy remembrancer shall find ought to be paid back to them in respect of the matters aforesaid, and also for the costs of the plaintiffs, and for the costs of the defendants *Longmore* and *Biss* to be paid by the plaintiffs as aforesaid: but the court does not think fit to give any costs to the defendants *Stokes* or *Price*, or to the defendants *Rossiter* and *Baker*, the assignees of *Stokes*.

DORMAN

EXCHEQUER CHAMBER. 1817. *May* 7, 8, 14. *Before the Lord Chief Baron alone.*

DORMAN *v.* CURREY.

Where an endowment gave a vicar all small tithes excepting hay, and also gave him the hay tithes of a particular district called *S*, and the vicar had immemorially received the corn tithes of *S.* without any express endowment, and the rector had in several instances, during the last 80 years received tithes of seeds of clover and artificial grasses out of *S:* held that this was not sufficient to warrant a presumption of an exchange between the rector and vicar, of the corn tithes of *S.* for the tithes of seeds out of *S.*, there being also some evidence of perception of the latter by the vicar.

THIS was a bill filed by the plaintiffs, lessees of the parsonage of *Dartford* in *Kent,* under the bishop of *Rochester,* against the defendant *Currey,* vicar of the parish of *Dartford,* and the other defendants *Sears, Solomon, Saxby, Ward,* and *Sparkes,* occupiers of lands within the parish, praying from the defendants the occupiers, an account and payment of the tithes of green fodder and of clover seeds, alledging a claim of the latter by the defendant *Currey* as vicar. The bill charged that although the vicarage was endowed with the tithes of hay produced on the lands situate in a certain level called *Dartford Salt Marsh,* and not with the tithes of corn produced thereon, yet that nevertheless the tithes of corn produced on *Dartford Salt Marsh,* had for a long series of years been paid to the vicar in exchange for the tithes of clover and artificial grasses and the seeds thereof, produced on the other lands in the parish, exclusive of *Dartford Salt Marsh,* under some ancient agreement between all proper parties for the mutual accommodation of the rectors and vicars long before the memory of man, or at least before the time of queen *Elizabeth,* and that such agreement ought now to be presumed. The plaintiffs also alledged an immemorial perception by the lessees of the rectory under the bishop of *Rochester,* of the tithes of artificial grasses and their seeds, and that the defendant *Currey* had admitted that he was not entitled to the tithes of clover seeds except as to the *Salt Marsh,* and had abandoned such claim, and that he had admitted that the lessee of the bishop of *Rochester* had uniformly received the tithes of clover seed on the lands within the parish.

Where a rector claims in opposition to an express endowment, he must prove his case, the presumption being against him.

Semble, that clover, tares, &c. cut green and given to horses employed in husbandry are not titheable, if there be no fraud on the clergyman.

Semble, a horse employed generally for purposes of husbandry does not lose its exemption by being occasionally used as a riding horse.

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As to the tithes of green fodder, the bill suggested pretences by the defendants the occupiers, that the whole or the greatest part of the lucerne, tares, clover, and other articles cut by them for green meat, were consumed wholly by horses employed in the cultivation of their lands, and that therefore the plaintiffs were not entitled to tithes thereof, and charged that the articles so cut were not wholly consumed by horses employed in the cultivation of their farms, and that quantities of clover, &c. were cut for green meat, more than sufficient for the consumption of their horses in husbandry: and that such parts of the articles cut for green meat as were actually so consumed, were unnecessarily consumed by such horses and with an intent to defraud the plaintiffs of the tithes, the defendants in the same years having a sufficient quantity of fodder for such horses exclusive of the articles cut for green meat, and having sold quantities of hay and fodder which might have been consumed for food by their husbandry horses, and having also applied hay and fodder to other purposes than the support of their husbandry horses: and having also in the same years sufficient pasturage for their husbandry horses on their lands within the parish, but having with the intent of defrauding the plaintiffs of their tithes of green meat, used their pasturage for other purposes than that of depasturing their husbandry horses.

The defendant *Currey* by his answer admitted that it appeared from old tithing-books, that the tithes of corn on *Dartford Salt Marsh* had been paid to the vicar ever since 1660, but denied that it was in consequence of such exchange as supposed by the bill, more especially as none of the seeds mentioned in the bill were then or for a considerable time afterwards grown within the parish: but that if ever any exchange took place between the rector and vicar entitling the vicar to the tithes of corn on *Dartford Salt Marsh*, it was more probable such exchange might have been made not for the tithes of seeds of clover, &c. but for the tithes of hay

1817.
DORMAN
v.
CURREY.

hay upon 21 acres of land, part of a Marsh called *King's Marsh*, which last-mentioned tithes were given to the vicar by an endowment by *Thomas D. Woodham*, who was bishop of *Rochester* from the year 1291 to 1316, but which tithes had nevertheless been received by the lessees for the time being of the rectory. The defendant *Currey* also denied the alledged perception of the tithes of seeds on lands within the parish (save *Dartford Salt Marsh*,) by the lessees of the rectory, except in some few instances when the vicar was not aware of such articles having been produced, the defendant having always considered himself to be entitled under his endowment or otherwise to all small tithes, including clover and other seeds, but excepting hay only: and having generally agreed with the parishioners for a money compensation for all small tithes including clover and other seeds, he had only in a few instances taken or compounded specifically for the tithes of seeds, but whenever he discovered that clover seeds were grown by persons with whom he was not under agreement for a money compensation, he had uniformly obtained payment of the tithes of such seeds: that although the lessees of the rectory might in some instances have received tithe of clover seed, yet they never received it uniformly, but very rarely and without the knowledge of the vicar, and by usurpation on his rights: referring to the agreements and tithe books after-mentioned as given in evidence in the cause. The defendant *Currey* denied his having ever admitted that he was not entitled to the the tithes of seeds, but on the contrary, that whenever he was apprised of their being grown by any person who was not under an agreement for a money compensation, he had applied for and received the tithes, except as to the tithes of clover seeds, which the defendant did not uniformly claim in consequence of that seed having in very few instances been grown within the parish: and he also denied that he had ever abandoned his claim to the tithes of seeds of clover and artificial and other grasses, but admitted, that in 1779, he entered into a composition with *John Dorman*,

man, (the husband of one and father of the two other plaintiffs) to pay the defendant *Currey*, two several sums of £5. and £1. 1*s*. *per annum*, for the vicarial tithes of two farms in the parish, and that on *Dorman*'s death, the defendant agreed with the plaintiffs for 1*s*. for every acre of marsh land and turnips in addition to the former compositions, and for the tithes of woad and of pigs according to their value: that in 1809 the defendant applied to the plaintiffs for payment of vicarial tithes, and among the articles in respect of which he demanded tithes, he included twelve bushels of clover seeds, at £2. 2*s*. as omitted the last year by mistake: and that the plaintiffs objected to the demand, not because the defendant *Currey* was not entitled to receive such tithes or because they belonged to the lessees of the rectory, but because they were included under the money compensation, and therefore the defendant waived that item or demand: and in consequence of such composition and not for any other reason, the defendant believed he might have admitted that he could not insist upon such demand, struck out the item, received the amount demanded by him exclusive of the tithes of clover seed, and gave a receipt for the sum so received, expressing it to be for tithes due from the plaintiffs at *Michaelmas* last.

As to the tithes of green fodder, it appeared by the answers of the defendants from whom those tithes were claimed, that the defendant *Sparkes* had horses which he employed not only on his lands in the parish of *Dartford*, but indiscriminately in 30 acres of land in the adjoining parish of *Wilmington*, which he occupied with his farm in *Dartford*; that he had built a lime-kiln on part of his lands in *Wilmington*, and sold the lime: and that his horses were employed in drawing lime for the kiln, a space of about 100 yards: that all the lime was used by *Sparkes* on his lands in *Dartford*, except four kilns, which he sold to several persons for their accommodation, for which he received in all £22. leaving him

1817.
DORMAN v. CURREY.

a profit of £4: that *Sparkes* had 40 acres of wood-land in *Wilmington*, which he had cut down in four falls of 10 acres each, and the wood was carried by his horses to the lime kilns; that he had employed his husbandry horses in drawing coals for the use of his family and some coals which were used in his hot-house. It also appeared from the answers of the defendants *Sears* and *Solomon*, that they had several husbandry horses, and the former, one riding horse; that in 1807, and the several following years, they had sold quantities of hay, produced on their lands in the parish, and no other hay except that grown in the *Salt Marsh*, to the tithe of which the vicar was entitled, and which was unfit for working horses.

The following evidence was adduced by the plaintiffs in support of their claim to the tithes of seeds: 1st. A receipt, dated *July* 4, 1721, signed by *Henry Tasker*, (admitted to have been then lessee of the rectorial tithes) whereby he acknowledged to have received of Mr. *Dorman*, £5. 2*s*. 6*d*. for the tithes of ten acres of peas and the tithes of *three acres of cinquefoil seed* last year." 2d. A receipt, dated *December* 4, 1734, from *Tasker* to *Dorman*, for 11*s*. 3*d*. for the tithe of fifteen bushels of clover seed, sold Mr. *Allen*; for the tithe of 4½ acres of peas, at 5*s*., £1. 2*s*. 6*d*. and for three ditto, 15*s*.—3d. The following extract from the vicar's books: " 1734 to 1735, Mr. *Vaux*, *Feb*. 21, eight acres of clover fed the first part of the year, and after for seed. *The seed pays tithe to Mr. Tasker*." 4th. A receipt, dated *July* 21, 1770, from *Edmund Williams*, to *John Dorman*, for 14*s*. 6*d*. *in full for tithe of clover seed* for the use of Miss *Francis*, who was admitted to have been then lessee of the rectory. 5th. An agreement, dated *April* 4, 1775, signed by the said *Edmund Williams* and several occupiers of lands in the parish of *Dartford*, whereby *Williams* agreed to let to the other parties to the agreement, their tithes for the farms they respectively had in the parish of *Dartford*, they

they agreeing to pay yearly for the same after the respective rates *per* acre mentioned in the agreement, at the end of which were these words, "*clover seed, cinquefoil seed, turnip seed in kind as usual.*" 6th. An agreement, dated *July* 15, 1776, whereby *John Powell* agreed to pay to *Edmund Williams* for each acre of *Temple Farm*, in the parish of *Dartford*, as follows: peas, 6*s.* an acre; cinquefoil and clover, 5*s.* 6*d.*; *clover seed after thrashing to account for:* and expences allowed for thrashing, carrying and cleaning: turnip seed, or any seed to account for after cleaning and allowing for as clover. 7th. An agreement, dated *January* 1, 1780, between *Basil Francis*, then lessee of the rectory, of the one part, and *John Dorman* of the other part, whereby *Dorman* agreed to pay to *Francis* for seven years from the 25th *December* preceding, several rates or compositions by the year, in lieu of the great tithes which should become payable to *Francis* for the several titheable matters after specified, which specification includes the following item: "For clover seed and turnip seed, one tenth part of the net profit after all charges deducted, and rateably and proportionably for a less quantity, &c." 8th. An account delivered by the defendant *Currey* to the plaintiffs, as occupiers of lands in the parish, containing the following item: "clover seed, twelve bushels omitted last year by mistake:" which item appeared to have been afterwards struck out. 9th. The following extracts from the books of receipts of *John Dorman*, as agent to the then lessee of the great tithes: "1787, *April* 8. To cash of Mr. *Powell* for tithe of his clover seed, £2. 12*s.* 6*d.* 1794, Mr. *Boniface* two acres of trefoil seed, 10*s.*

The documentary evidence on the part of the defendant *Currey*, consisted of, 1. An office copy of the endowment or modification of the endowment of the vicarage of *Dartford*, dated 29th *July*, 1315, reciting a former endowment by *Law-*

1817.
DORMAN v. CURREY.

rence bishop of *Rochester*, whereby he ordained the vicarage of *Dartford*, and endowed it (inter alia) *in minutis decimis excepto fœno*, and also reciting a renewed ordination or endowment executed by *Thomas* bishop of *Rochester*, on the 19th *July*, 1299, and by the prior and convent of *Rochester* on the 23d of the same month, whereby the former endowment was confirmed, and the vicarage declared to consist endowed with the portions, oblations and obventions before-mentioned for ever, and by which endowment of 1299, the bishop granted to the then vicar and his successors, a house in *Dartford*, "*unà cum decimâ fœni viginti & unius acrarum prati vocati* Kynge's Mersh *in parochiâ de* Dertforde *prædictâ*," as an augmentation of the ancient endowment: by the endowment or modification of the 29th *July*, 1315, *Walter*, archbishop of *Canterbury*, ordained, that the vicar and his successors should have "*totam decimam fœni provenientem de magno prato salso*," in further augmentation of the new endowment made by *Thomas* bishop of *Rochester*, which new ordination and endowment in every part thereof, together with the augmentation and regulation made by that of 1315, was by the last-mentioned instrument decreed to be perpetually observed. 2. An agreement, dated *September* 15, 1720, entered in a book of orders relating to the parish of *Dartford*, whereby thirty-one persons who are described as parishioners of *Dartford*, agreed with Mr. *Chambers*, the then vicar, to acquit the vicarial tithes of all taxes, rates, &c. on condition of his accepting the compositions therein specified for the several tithes enumerated, but which enumeration does not include any kind of seeds. Then follows this passage:—"And for all other small and vicarial tithes according to the value thereof." 3. A brief appearing to have been prepared on occasion of an appeal by Mr. *Chambers* the former vicar, against an assessment to the poor's rates, and which brief contained the following statement:—"The vicarage of *Dartford* consists of a vicarage-house, &c. &c. with the tithes of corn and hay in the

the salt marshes only, and of two mills, &c. and likewise of hops, woad, wood *and other small tithes.*" 4. Two cases dated 1721, coming out of the custody of a former lessee of the great tithes, and containing the following statement:—" By the augmentations or endowments in 1299 and 1315, the vicarage of *Dartford* was endowed with *small tithes*, except hay." 5. Several entries in the vicar's books of payments and compositions for the tithes of seeds, of which entries of payments there are three in 1720: in 1725, an agreement for a composition, entered in the same books, between Mr. *Chambers* and his parishioners, which, after specifying many kinds of tithes, proceeds thus: " The tithe of garden and orchard fruits, of *seed* and roots, according to their value or agreement with the vicar:" in 1729 there is one entry of a payment for the tithe of turnip seed; in 1730, four; in 1731, three; and in 1740, one similar entry as to turnip seed; in 1787, one entry of a payment for clover seed and one for turnip seed: in 1788 one for clover seed, and in 1789 one for clover seed. 6. An agreement, dated 1st *November*, 1734, between Mr. *Chambers*, and *John* and *Henry Woodin*, whereby the *Woodins* agreed to pay Mr. *Chambers* £16 *per annum* for the vicarial tithes of *(inter alia)* all manner of garden roots, herbs, plants, fruits and *seeds*, wheresoever they might be growing, in gardens, orchards or fields, within the lands occupied by the *Woodins*. 7. A copy (in the handwriting of Mr. *Chambers)* of a letter, dated 20th *February*, 1735, from Mr. *Chambers* to the Rev. Mr. *Price*, son of the Rev. *Thomas Price*, the immediate predecessor of *Chambers*, and grandson of the Rev. *John Powle*, the predecessor of *Price*, in which letter *Chambers* puts the following question: " Do you know or have you heard that all manner of tithes great and small in *Salt Marsh*, containing 444 acres, are due to the vicar, and all manner of small tithes without exception in every other part of the parish, and that your father and grandfather received the same?" And a letter from Mr. *Price* in answer,

1817.
DORMAN
v.
CURREY.

answer, dated 9th *March*, 1735, as follows: "I have heard that part of that 444 acres do not pay tithe when used by the owner of the land: *I believe that all manner of small tithes in every other part of the parish are due to the vicar*, but I cannot say that either my father or grandfather did receive all their due." It appeared by the depositions of several witnesses examined on behalf of the defendant *Currey*, that there are no lands in *Dartford*, called *King's Marsh*, but that there is a considerable quantity of marsh land in the parish besides the *Salt Marsh*, which other land is *Fresh Marsh*, and part thereof is held with and considered part of an estate called *Dartford Priory*, which is reputed to have been formerly a residence of one of the kings of *England*. Several of the witnesses also deposed generally, that all the small tithes of the parish and all the tithes of the *Salt Marsh* had always been reputed to belong to the vicar, and that the vicar had been in the perception of, or had entered into compositions for all the small tithes within the parish and the tithes of every description in the *Salt Marsh*.

The defendants the occupiers proved by several witnesses that it was usual for farmers to cut clover and other artificial grasses to give to their husbandry horses in the stable in the summer, instead of turning them out to feed: that it is more wholesome for the horses than keeping them on dry meat all the year, and that it is much more beneficial both to the tithe owner and the occupier that such grasses should be cut green and given to the husbandry horses, than eaten and depastured on the land by turning out the horses, as they trample down and destroy much more than they eat: that the defendants *Scars* and *Solomon* had no pasture land except that which lies in *Dartford Marshes*, the produce of which, as well in its green as in its dry state, was proved to be not of a proper quality for the support of working horses; that no farmers ever feed their husbandry horses with it, and that the marshes produce a quantity

a quantity of grass called squirrel-tail, which occasions ulcers in the mouths of horses. There was also the evidence of several witnesses, that during the periods in question in this suit, all the green meat cut by the defendant *Solomon* was given to husbandry horses only and necessarily, and that without it there was not a sufficiency of proper food: that all the green meat cut by the defendant *Sears* was of necessity given to his husbandry horses, there not being sufficient green meat without, except that a small part might have been consumed by his riding horses, which were principally used in his farming business, and by another horse generally used for agricultural purposes, but occasionally driven in his chaise. It was proved that the defendant *Sparkes* had no meadow land on his farm, that he sold no hay, but was obliged to buy corn, straw, hay, and other fodder for his husbandry horses; there was also evidence that the green meat cut by *Sparkes* in the parish of *Dartford*, was consumed by his husbandry horses which were employed promiscuously on his lands in *Dartford* and *Wilmington*, except that the horses were occasionally employed in bringing coals from a wharf at *Erith*, for *Sparkes'* house in *Dartford*, held with his farm, a small part of which coals might be used for his hot-house, and except that in 1812, 1813, and 1814, they were occasionally employed in carrying wood from *Sparkes'* wood-land in the parishes of *Wilmington* and *Dartford* to the towns of *Erith* and *Dartford*: that the green meat given by *Sparkes* to his husbandry horses was necessarily and properly given, as he had not a sufficient quantity of pasturage, hay, fodder, or other food: and that although the horses were employed by *Sparkes* promiscuously on his lands in *Dartford* and *Wilmington*, yet a larger quantity of the crops grown in *Wilmington* was applied to the support of the horses than in proportion to the work done by them in *Wilmington*, and all the crops grown by *Sparkes* in *Wilmington* were brought into the parish of *Dartford*, and all the oats, hay, and fodder arising

1817.

DORMAN v. CURREY.

arising therefrom, were consumed by his husbandry horses in *Dartford*.

Martin and *Roupell* for the plaintiffs.—The production of an endowment is of no avail when opposed by subsequent usage. It is not unusual for a vicar to be in the receipt of tithes of a different description from those mentioned in his endowment, for by usage it may be explained or even contradicted. In *The Countess of Dartmouth* v. *Roberts* (*a*), the plaintiffs claimed the tithe of hay, which was opposed by the production of an endowment, dated in 1253, giving the tithes in question to the vicar of *Batley*, but it appeared in evidence that there had been an uninterrupted perception of the tithes of hay by the plaintiff and her ancestors as far back as living memory could trace, and the court of *King's Bench* were of opinion, that the tithes might be presumed to have come into lay hands before the restraining statutes. In the present case it is shewn that the vicar has not been in the constant habit of receiving the tithes of seeds, but that they have been received by the rector; it cannot indeed be proved by constant and regular receipts, for clover is not a regular production cultivated every year, but it is proved that in 1734, the rector's right to these tithes was acknowledged in the books of the vicar, making an entry against his own interest, and there do not appear more than two or three instances in which the vicar has received the tithes. The fact of the vicar having since the endowment acquired a right to the corn tithes of the *Salt Marsh*, coupled with the perception of tithes of seeds by the vicar, affords satisfactory proof by usage of an exchange between the rector and the vicar. The expression "the seed pays tithe to Mr. *Tasker*," in the receipt of 1721, shews an actual payment to the lessees of the rectory; the farmers have in many instances entered into agreements to compound for this tithe

(*a*) 16 *East*. 334.

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with the lessees of the rectory: and the present vicar in compounding with the plaintiffs for other tithes, accounted to them for clover seeds, striking out the item containing a charge for the tithes of those seeds, not unadvisedly, but because he did not think himself entitled to receive it. [*Richards Ch. B.* observed that this might be a mistake, or the tithes might have been paid, and that he did not feel the weight of the argument.] The words "as usual," in the agreement of 1775, shew what had been the previous custom as to these tithes: there is no sum set opposite these particular articles, they are to pay tithes in kind. As to the tithes of green fodder, if a party claims an exemption from payment of tithes of this description, he must shew that the green fodder was necessary for his horses employed in husbandry, and the reason of the exemption is that the parson derives a benefit from the labour of the horses, and the party setting up the exemption must shew that the parson has the benefit. This has been decided as to horses used in the North of *England* for carrying lead, their food having recently been held not exempt from tithes, and the same rule applies to coach and pleasure horses. If it appears doubtful whether there is sufficient other fodder, the court has declared it matter of enquiry, but if there is, as in the present case, an admission of the sale of hay, that circumstance of itself shews a sufficiency of fodder and entitles the plaintiffs to an account. The case of *Mantell* v. *Paine* (*a*), has settled the law on this subject, and the only question is whether the court is not satisfied at once with the evidence. When a farmer gives green food to his horses and sells hay, it is evidence that he has sufficient fodder, it therefore seems, that in consequence of the admission of the sale of hay, it will not be necessary to make the enquiry made in *Mantell* v. *Paine*, as to there being or not sufficient fodder. In that case the defence was that ten or twelve acres

(*a*) 4 *Gwill.* 1504.

were

1817.

DORMAN v. CURREY.

were cut for the necessary support of the husbandry cattle, and the court said that there must be an enquiry as to that point. In this case one defendant had a riding horse, and another had horses which were used for other purposes than husbandry, as drawing wood, coals, &c. In *Thorpe* v. *Bendlowes* (*a*), agistment tithe was decreed for coach horses, and although in *Underwood* v. *Gibbon* (*b*), it is said that saddle horses shall pay no tithes, the reason is not satisfactory.

Dauncey, *Hall*, and *Abercromby* for the defendants. The vicar's right to small tithes generally, is not disputed by the plaintiffs, and it is also admitted that he is entitled to the great tithes of a particular spot called *Dartford Salt Marsh*. The endowment gives him the tithes of hay in the *Salt Marsh*, and the tithes of hay of 21 acres called *King's Marsh*. The argument for the plaintiffs is, that the plaintiffs' right to the tithes of seeds is in consequence of the vicar having become entitled to the corn tithes of the *Salt Marsh* before the time of legal memory. But if this had taken place before the time of legal memory it would have appeared on the endowment; it could not be by prescription, for artificial grasses are of modern introduction. It is incumbent on the plaintiffs to shew how they became entitled, for although a vicar can claim only by endowment, yet when an endowment is produced, the *onus* is on the rector. The fact of the vicar having the corn tithes of the *Salt Marsh* affords no reason for presuming that he gave up the tithes of seeds to the rector, it is more probable that the vicar's possession of the corn tithes was in consequence of his giving up the hay tithes of *King's Marsh*, a spot which cannot indeed now be traced, but it is proved that there are marsh lands in the parish out of which the description may be satisfied. As to the percep-

(*a*) 3 *Gwill.* 899. 3 *Burn's Eccl. Law.* 446. *S. C.*
(*b*) *Bunb.* 3.

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tion by the rector, it was held in *Clarke* v. *Stapler* (*a*), that where a vicar was endowed with all small tithes, he was entitled to the tithes of seeds of artificial grasses, although it appeared that the impropriator had been in the perception of them from their first introduction into the kingdom. So in *Cartwright* v. *Bailey* (*b*), which was a suit by a vicar for the tithes of clover seed and rye-grass seed which had always theretofore been received by the impropriator, and the vicar proved that he had always received all other small tithes, the court were of opinion that the tithe in question was a small tithe, and that at the time of the appropriation it was impossible for a reservation to be made of this sort of tithe to the rectory, because artificial grass had been but lately introduced into the kingdom, and could not be in contemplation when the appropriation was made. And in *Jeremy* v. *Strangeways* (*c*), an account was decreed to the vicar of the tithes of clover seeds against the impropriator and occupiers, although there was evidence that such tithes had been paid to the impropriator under a mistaken notion that the seed followed the nature of the grass. All these authorities shew that whether there be an endowment or not, if the vicar has the small tithes generally, the perception of the impropriator will not avail, but the tithes, if of new articles, must follow the right, for such articles could not be an object of exception. In *The Vicar of Kellington* v. *Trinity College, Cambridge* (*d*), which was a suit for agistment tithes, it appeared that the tithes in question had been paid to the rector for fifty years last past, but that before that time, viz. sixty years ago, this species of tithe was paid to two vicars, and *Parker* Ch. B. observed, that there had been an usurpation on the vicar for the last fifty years, and the court decreed in favour of the vicar. The evidence in the present case amounts to no more, nor indeed to so much as the evidence in the cases cited.

(*a*) 3 *Gwill.* 926.
(*b*) 3 *Gwill.* 938.
(*c*) 3 *Gwill.* 1173.
(*d*) 1 *Wils.* 170. 2 *Gwill.* 799.

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1817.

DORMAN v. CURREY.

Some of the payments to the rector were made before it was decided that tithe of seeds is a small tithe, which was not settled till the case of *Wallis* v. *Paine* (*a*), determined in 1738. As to the tithes of green fodder, it was contended that this is a claim for an agistment tithe. If the article be cut green it is as much exempted as if taken by the mouth of the animal. There is no doubt that if given to plough cattle it is exempted: this seems to have been one of the points determined in *Collyer* v. *Howse* (*b*). But it is said that here this was not done necessarily, but the defendants have alledged and proved that there was not a sufficiency of wholesome food without it, for the produce of the marshes has been clearly proved to be unwholesome and unfit for agricultural horses, and that it could not with prudence be given to horses so employed. The saddle horse which belonged to one of the defendants was generally used in his farming business, and another horse was occasionally employed in drawing a chaise, but according to *Pothill* v. *May* (*c*), and *Underwood* v. *Gibbon* (*d*), agistment tithe is not due for saddle horses or horses used merely for pleasure. As to the drawing of lime for 100 yards by some of the horses, it is clear that mere occasional acts will not take away the exemption. The true criterion in these cases is whether there is any fraud on the part of the occupier: in the present case it is clearly shewn that the green food was fairly given to horses generally employed for agricultural purposes, and that there was not sufficient food without it.

Martin in reply. It may be admitted that notwithstanding the common law right of a rector, an endowment is *primâ facie* an answer to his claim, but with this qualification, either that usage has gone along with the endowment or that there is an

(*a*) *Comyn's Rep.* 633. 2 *Gwill.* 749.

(*b*) 4 *Wood.* 440. The case is reported as to other points in 3 *Anstr.* 954, and 4 *Gwill.* 1489.

(*c*) 1 *Bulst.* 171. 4 *Gwill.* 1571.

(*d*) *Bunb.* 3. 4 *Gwill.* 1582.

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entire absence of all usage. In the present case it is less extraordinary that the pieces of evidence should be few in number, than that any one receipt should be preserved. Farmers are not in the habit of keeping their receipts, but generally consider them as waste paper, on the other hand the vicar has a direct interest in preserving his books. The evidence for the plaintiffs is stronger than that for the defendants. It is said that the payments of tithes of seeds might have been made before the case of *Wallis* v. *Paine* (*a*), which decided that they are small tithes. But what is the evidence subsequent to that period? In and after 1770 there are receipts for and agreements relative to the tithes in question, and there is a tithe collector; this is done openly, and it shews that the parish understood that the rector had a right to these tithes. The words "clover seed, cinquefoil and turnip seed in kind as *usual*," in the agreement of 1775, shew that the vicar could not have been entitled to these tithes, for if he had, the rector's tithe-gatherer could have no right to deal with them. Although the book of 1725 given in evidence by the vicar, mentions turnip seed, yet nothing appears to have been received on that account. There is no proof of perception of the tithes of seeds generally. The cases of *Clarke* v. *Stapler* (*b*), and *Jeremy* v. *Strangeways* (*c*), do not apply, for the plaintiffs here do not claim it as a rectorial, but as a vicarial tithe. As to the tithes of green fodder, tares are a great tithe, and when cut, are not altered in their nature and will not be made an agistment tithe. Therefore, although it be admitted that husbandry horses are exempt from agistment tithe, it does not follow that green tares will be exempt when given to husbandry horses. Both on authority and principle, horses kept merely for pleasure cannot be exempt. Farming horses are only protected in case the food given to them is necessary for their sustenance and the owner has no other, but the farmer will not be permitted to avail himself of this

(*a*) *Com. Rep.* 633.
(*b*) 3 *Gwill.* 926.
(*c*) 3 *Gwill.* 1173.

privilege

1817.

DORMAN v. CURREY.

privilege so as to defeat the claim to tithes. The real question is, whether the articles given are titheable, and whether the party is within the exemption? that was the view the court took of the subject in *Mantell* v. *Paine* (*a*), and there is every reason to support that case for the prevention of fraud.

May 14.

RICHARDS Ch. B. In questions between rector and vicar, the rector is not entitled to an issue unless the court entertains a doubt. They are usually questions depending on the construction of the endowment. It is clear in the present case, that the vicar has received the tithes of all seeds, but it is insisted on the part of the rector that an exchange has taken place whereby the vicar had something given to him in lieu of the tithes of seeds. But of such an exchange no evidence whatever has been adduced, nor is there any reason for supposing that it ever took place. The rector comes now, admitting that he once granted the tithes to the vicar, and claims them in opposition to his own grant. It is incumbent on him to prove his case. He shews by some evidence that in the year 1721 a receipt was given for the tithe of cinquefoil seed, but in the same receipt there is an acknowledgement that the rector had received the tithes of peas, to which latter it is admitted the vicar is entitled, yet they were then received by the rector, so that the receipt of 1721 proves too much. After 1721 no other receipt occurs till the year 1734, when there is a receipt for the tithes of clover seed as paid to *Tasker*, and in 1770 a similar receipt by *Williams*. In 1775 there is an agreement by *Williams* for the tithes of clover seeds, cinquefoil and turnip seeds, the latter of which are not claimed by the rector: this instrument therefore proves too much. In 1776 there is an agreement whereby *Williams* agrees to accept a composition for clover seed, *turnip seed, or any seed,* which shews that the lessee of the rectory then claimed the tithes of every description of seeds.

(*a*) 4 *Gwill.* 1504.

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This instrument therefore cannot be relied on. In the absence of any explanation of the paper signed by Mr. *Currey* in 1809, in which the item relative to seeds appears to have been struck out, I cannot consider it as proving any thing. It is well known that it was for a considerable time matter of doubt whether the tithe of seeds of clover and other grasses was a great or a small tithe, and there are many cases in which payment of it to the rector has been held not to operate to the prejudice of the rights of the vicar. The evidence adduced by the vicar, that the tithes of all seeds belonged to him, though not very distinctly given, is yet evidence. When the rector has by the endowment clearly given the tithes to the vicar, and now says they have been given back, I expect him to establish his case by very clear and satisfactory evidence. I think he has not made out such a case, and therefore as against the vicar and the defendant *Warde*, (against whom the tithes of seeds only are claimed) the bill must be dismissed with costs.

With respect to the other question, the *Lord Chief Baron* in the course of the argument intimated his opinion that the occasional employment of horses for riding would not take away their exemption as husbandry horses: and on a subsequent day his lordship observed, that on a perusal of the evidence, he did not think it sufficiently strong to warrant a decree for an account of the tithes of green food without further enquiry, but that as the plaintiffs stood in the situation of rector, they might have an issue or an action on this part of the case: and the cause stood over as to this point, that it might be considered by the counsel on both sides what would be the most effectual mode of trying the question.

SANDERS

EXCHEQUER CHAMBER.

SANDERS *v.* LONGDEN.

May 13, 1817.

Before the Lord Chief Baron alone.

On a bill by the rector of *W.* for a moiety of the tithes of lands in another parish, and for a commission to ascertain the lands, the court refused the commission until the rector's title to the portion should be determined on the trial of an issue, although by a decree of this court and a trial at law in 1671, the then rector's right was established: it appearing that subsequent to the decree, the tithes had never been paid in kind, but an annual payment of 40*s.* had uniformly been made.

THE bill stated that the master prior and convent of *Sempringham* in the county of *Lincoln*, being seised in frankalmoign of the manor of *Bramcote* in *Nottinghamshire*, and of divers lands, &c. in *Bramcote*, and of a meadow in *Chilwell*, in the holding of *William Mantell*, otherwise *Martyn*, by indenture of lease dated 2d *April*, 29 *Henry* 8. demised all the said premises to *George Pole*, for 43 years: and that on the dissolution of the monastery of *Sempringham*, the hereditaments comprised in the lease to *Pole*, devolved to King *Henry* 8. from whom they descended to Queen *Elizabeth*, who by letters patent dated the 14th *July* in the sixth year of her reign, granted the same to *Charles Jackson* and *William Mason*, in fee, subject to the lease made to *Pole*. The bill then stated a feoffment in fee of the premises from *Jackson* and *Mason* to *Richard Hanley*, dated 17th *September*, 6 *Eliz.*, and that they descended on the death of *Richard Hanley* to *Henry Hanley*, his only son and heir, and on the death of *Henry*, to *Robert Hardinge*. The bill further stated that the rectors of *Wollaton*, or *Wollaton-cum-Cossal* in *Nottinghamshire*, having been for time out of mind by virtue of some ancient consecration, endowment, prescription, or usage, entitled to a portion, moiety, or half-part of the tithes of corn and hay arising from the lands in *Bramcote* which had formerly belonged to the monastery of *Sempringham*, and were usually called the *Sempringham Lands*, some time in the year 1671 *Samuel Kendal* clerk, the then rector, filed his bill in this court against *Robert Hardinge* the then owner and occupier of the *Sempringham Lands* in *Bramcote*, whereby after stating that *Kendal* and his predecessors rectors of *Wollaton*, for time whereof the memory of man was not to the contrary

1817.

SANDERS v. LONGDEN.

trary, had received, and ought to receive, as a portion of tithes due unto them, to wit, the moiety or one half of the tithes of all corn, grain and hay, and the moiety or one half of all other tithes whatsoever arising within certain lands called *Sempringham Lands*, lying in *Bramcote*, and being without the parish of *Wollaton*, all which tithes had been theretofore duly paid to *Kendall* and his predecessors, by the possessors of the *Sempringham Lands*, which *Sempringham Lands* contained 500 acres or thereabouts, but that *Robert Hardinge* the defendant, had for divers years past been and then was the possessor of all the said *Sempringham Lands*, and had withheld payment of the said tithes; the plaintiff *Kendall* by his bill prayed for an account and payment of the tithes, and that the defendant *Robert Hardinge* might set forth the bounds and limits, situation and quantities of the lands called *Sempringham Lands*. The bill further stated two decrees or orders made in the last-mentioned suit, one dated 21st *November*, 22 *Car.* 2. whereby it was ordered that the plaintiff *Kendall* should bring his action of debt against the defendant *Hardinge* for the tithes of such part of the *Sempringham Lands* as was in the defendant *Hardinge*'s occupation, upon the statute 2 *Ed.* 6; and the other order dated 8th *February*, 24 *Car.* 2. whereby after stating the former proceedings in the suit, and that a trial being had at the last assizes for the county of *Nottingham*, where upon full evidence on both sides a verdict passed for the plaintiff for £5. treble debt for the said moiety of tithe corn and hay of *Sempringham Lands*: it was decreed that the defendant should pay to the plaintiff the value of the tithe corn and hay for the four last years mentioned in the plaintiff's bill, and that a commission should issue to set forth such of the said lands called and known to be *Sempringham Lands* as should be proved in the defendant's occupation for the last four years, and also to ascertain the values of the moiety of tithe corn and hay of the *Sempringham Lands* in the defendant's possession, and that no judgment should be entered for the plaintiff against the defendant upon the said verdict. The bill then stated an

1817.

SANDERS v. LONGDEN.

award, dated 10th *October*, 1672, made by *John White*, *John Hacker* and *John Millington*, whereby after reciting that for several years past there had been divers suits at law and in equity between *Kendall* and *Hardinge* concerning the moiety of the tithes of *Sempringham Lands* in *Bramcote* in *Hardinge*'s possession, and that a commission had issued out of his majesty's court of exchequer directed to *White*, *Hacker* and *Millington*, for the examination of witnesses, and diligent enquiry into the said cause, which commission had lately been executed by *White*, *Hacker* and *Millington*, and after the execution thereof, *Kendall* and *Hardinge* had submitted themselves and all differences between them, touching the premises, unto the award of the said commissioners or any three of them: in pursuance of the submission, *White*, *Hacker* and *Millington*, awarded that *Hardinge* should, on or before the 11th *November* next, pay to *Kendall* £8, in full for all tithes due to *Kendall* out of the *Sempringham Lands* until *Michaelmas* last, and should yearly thereafter as long as *Kendall* should continue rector of *Wollaton*, pay to him 40*s*. in lieu of all tithes to be thenceforth issuing out of all or any of *Hardinge*'s lands either in his own possession or in the possession of any of his tenants in *Bramcote*. The bill further stated the descent of the manor of *Bramcote* and the lands called *Sempringham Lands* in 1675, from *Robert* (then Sir *Robert*) *Hardinge*, to *Robert Hardinge* his son and heir, and from *Robert* the son in 1709 to *John Hardinge*, by whom the same were by lease and release and bargain and sale inrolled, dated the 7th and 8th *July*, 1721, conveyed in fee-simple to *John Sherwin*, on whose death they descended to his son *John Sherwin*, and from the latter to his son *John Sherwin*, who by his will dated 14th *March*, 1800, devised the same to the defendant *Longden*. The bill then stated that the defendant *Longden* occupied part of the *Sempringham Lands* in *Bramcote*, and the other defendant *Marriott* the residue, as tenant to *Longden*, and alledged pretences by the defendants that none of the lands occupied by them

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are the lands called *Sempringham Lands*, or if they are, that they are not liable to pay any tithes to the plaintiff, and that the 40*s*. a year alledged to be paid for a great length of time by the defendant *Longden* and his predecessors to the rectors of *Wollaton*, was some charitable gift or donation by some former owner of the manor of *Bramcote* to the rector of *Wollaton:* the plaintiff charging that the 40*s*. a year was paid to the plaintiff and his predecessors as a temporary composition in lieu of a portion or moiety of the tithes of corn and hay, and that previous to the 10th *October*, 1672, the date of the award, a moiety of the tithes of the lands called *Sempringham Lands*, in the occupation of the defendants, had been for many years paid to the rectors of *Wollaton:* and the bill prayed that the defendants might account with the plaintiff the rector of *Wollaton*, for the said portion of tithes; that the defendant *Longden* might set forth and discover the specific lands called the *Sempringham Lands*, out of which the portion or moiety of the tithes was theretofore taken by the plaintiff's predecessors, and that if it should appear that the defendant *Longden* or his predecessors had suffered the metes and bounds to become so altered and obscured, that the same cannot now be specifically ascertained by him, that the same might be set out under the direction of the court, and that if necessary, a commission might be issued for the purpose of ascertaining and distinguishing the same; and if they could not be distinguished, then of allotting by proper names, metes, &c. such parts of the defendant *Longden*'s lands in *Bramcote* as should be a fair equivalent in point of extent or numbers of oxgangs or acres to the ancient amount or quantity of the *Sempringham Lands* in *Bramcote*, and that the right of the rector of *Wollaton* to receive the portion or moiety of the tithes of corn and hay from such lands so to be set out and allotted, might be established.

The defendant *Longden* by his answer admitted the several alienations and descents of the manor of *Bramcote* stated in the bill, and that he is the owner or proprietor of the manor of

1817.
SANDERS v. LONGDEN.

Bramcote, and of certain lands there which formerly belonged to Sir *Robert Hardinge*, but that he believed Sir *Robert Hardinge* was seised of other lands in *Bramcote* besides those belonging to the defendant, and stated that he and the defendant *Marriott* had refused to comply with the plaintiff's demand of tithes by reason of their being unacquainted with the lands in the bill called *Sempringham Lands*, and with the plaintiff's right to demand the portion of tithes: that the defendant *Longden* did not know whether the 40*s. per annum* mentioned in the bill, and which had been paid by the defendant and his predecessors to the rectors of *Wollaton*, had been paid as a temporary composition in lieu of the portion of tithes, or whether such 40*s. per annum* was ever paid to the rectors previous to the 10th *October*, 1672, or whether previous to that day a moiety of the tithes mentioned in the bill was paid to the rectors, or whether the 40*s. per annum* was payable as a charitable donation, or whether any charitable donation was paid to the rectors before *October* 1672, or when or by what means it commenced.

In the ecclesiastical survey in 1535, the rectory of *Wollaton* is stated to consist (among other things) "*In decimis garbarum unius messuag. in* Brambicote *in tenurâ* Gul. Martyn, 20*s.*" And in the minister's accounts in 32 *Hen.* 8. of the possessions of the priory of *Sempringham*, is the following passage: "*De firmâ maner. de* Bramcote *in* Com. Nott. *cum omnibus messuagiis, terris, &c. nuper in tenurâ* Gul. Martyll *et modo parcell. predict.*"—In a terrier of the possessions of the rectory of *Wollaton*, dated 1661, the rector is stated to be entitled to a portion of the tithes of *Sempringham Lands* in *Bramcote*, and four other terriers, dated respectively 1748, 1764, 1777, and 1781, contain the following entry: "*Bramcote* tithe compounded at 40*s. per annum*, paid by *J. Sherwin*, esq." In a book containing an account of the receipts of the rector of *Wollaton*, is the following entry: *Nov.* 28, 1767. "Received a year's composition for *Bramcote* tithes due *Michaelmas* last, £2." and similar entries for thirty successive years.

Martin

1817.

SANDERS v. LONGDEN.

Martin and *Dowdeswell* for the plaintiff, contended, that the defendants had by their answer clearly precluded themselves from insisting on the 40*s*. a year as a modus, having stated that they did not know whether it had been immemorially paid. They have merely stated that a sum of 40*s*. a year has been paid: there is nothing in the answer to induce the plaintiff to suppose a modus will be relied on. The plaintiff has clearly shewn a time when there was no such payment, for it is inconsistent with the terrier of 1661, which speaks of a portion of tithes. That document standing uncontradicted is evidence that the rector was then entitled to a portion of the tithes of the lands formerly belonging to the abbey. It appears, that at an early period there was a difficulty in ascertaining the lands, but the proceedings in the suit instituted in 1671 are conclusive, and established the right of the rector; an action was brought, there was a verdict for the rector, and no application for a new trial; on the contrary, when the cause came on for further directions, a commission was ordered. The commission book for that year cannot indeed be found, but that circumstance cannot prejudice the case, for it is clear that the right was established at law and confirmed in equity. It was therefore contended that the court should now direct a commission as prayed by the bill.

Clarke, for the defendant *Longden*, observed, that even if it were ascertained what are the lands out of which the portion of tithes issued, the court would not decree an account without first sending the parties to law. The ecclesiastical survey speaks only of the tithes of sheaves, but the plaintiff now claims also the tithes of hay. Exclusive of that document all the evidence is of the plaintiff's own making. The party signing the terrier of 1661, is *Kendall*, the plaintiff in the suit of 1671. All the other terriers follow the first, and none of them state of what the portion consisted. No title or endowment is shewn to it, but the claim rests upon usage. It does

1817.
SANDERS
v.
LONGDEN.

does not appear that after the decree any commission issued, or that any lands were set out, the probability is that nothing was done, for if the lands had been set out the case would now have been capable of the clearest proof: on the contrary there has ever since been a regular payment of 40*s*. If a commission had issued and the party had been entitled, it is highly improbable that all successive rectors would have constantly received the 40*s*.

RICHARDS Ch. B. (stopping further argument for the defendants.) Why should I send a commission but on the supposition that the plaintiff is entitled to an account? I cannot think it so clear a case as to be decided without the intervention of a jury. I agree that there was no effectual quarrelling with the verdict on the former trial, and that the rector was then entitled to the portion of tithes, and to have the lands set out. It is extraordinary that with that decree in their favour, the rectors should have called the payment of 40*s*. a composition. The 40*s*. has been paid ever since the decree, and I am bound to suppose it possible that the owner of the lands has some defence to make. The common law is against the rector, for the lands are not in his parish. Upon the whole I do not feel able to decide the case without referring it to a jury.

An issue was directed to try whether the plaintiff is entitled to any and what tithes of any and what lands in the occupation of the defendants, reserving further directions and costs.

ANDREWS

ANDREWS *v.* MOWBRAY *and* CASTLE.

IN CHANCERY.

Before Sir W. Grant, Master of the Rolls, Aug. 8, 1805, and upon appeal before Lord Chancellor Eldon, Dec. 15, 1807.

A land agent or steward is not incapacitated to purchase of his employer, and the sale, though beneficial to the purchaser, will not be set aside in equity if there was no imposition on the part of the agent, and no concealment of information as to the value. Bill charging such agent, and another defendant the plaintiff's solicitor, with fraudulently combining to procure the estate for the agent at an undervalue, dismissed with costs; the charges of fraud, &c. not being proved.

THIS was a suit instituted for the purpose of setting aside a sale made by the plaintiff *Nesfield* on behalf of himself and the other plaintiffs to the defendant *Mowbray*, of estates at *Shotley* and *Waskerley* in *Northumberland*, by articles dated 10th *May*, 1800, which articles were carried into execution by conveyances in the month of *October* following. The object of the suit and all the facts of the case are fully stated in the judgments delivered by the master of the rolls and the lord chancellor.

The case was argued at the Rolls in *July* 1805, by *Richards*, *Romilly* and *Cullen*, for the plaintiffs, by *Piggott*, *Hart* and *Bell*, for the defendant *Mowbray*, and by *Leach* and *Heald*, for the defendant *Castle*: and on the 8th *August* following, his honour delivered judgment.

Sir W. GRANT, M. R. This is a bill filed for the purpose of setting aside a sale made by the plaintiffs to the defendant *Mowbray* in *May* 1800, and perfected in the *October* following by the execution of a conveyance by all the parties having a beneficial interest in the estate.

The way in which the sale is impeached is this: the plaintiffs state that *Mowbray* was employed by them as their agent or land steward, that in that capacity and by means of that employment, he acquired a complete knowledge of the value of this property; that the plaintiffs having formed a resolution to part with it, and having proposed to sell it by public auction, and *Mowbray* having on his side formed a plan or design to procure it to himself at an undervalue, took means to

1805.
ANDREWS v. MOWBRAY. (*In Chancery.*)

to prevent its being sold at its fair value by public auction, and afterwards contrived to get it to himself by private contract at an undervalue, in consequence of having withheld from the vendors, circumstances in his possession, which if communicated would have apprised them that he was not giving the fair value for the property.

Now the first question that has been made between the parties has been, whether *Mowbray* was or was not to be considered as an agent of the plaintiffs. With regard to that, I think the plaintiffs have proved him an agent for all the purposes necessary to their case; that is, they have shewn that he was in the employment of the plaintiffs; that he undertook a duty relative to the management of the estate, and had an opportunity, from the situation in which he was placed, to acquire full information respecting all the circumstances belonging to the property with regard to its value. Without entering into the disputed points between the parties relative to the extent of this agency and with regard to the mode in which it was executed, I think that a person placed in that situation is to be considered, in bargaining with his employer, in a different light from that in which a mere stranger would be placed, and that he cannot withhold from his employer when he comes to treat with him relative to that property, any circumstance which it may be material for his employer to know, in order to be able to ascertain the real value of the property.

The parties have disputed with each other a great deal with regard to the extent of this agency; it being contended on one side that *Mowbray* was to all intents and purposes a regular land steward; that he approved of all the bills that were brought in to Mr. *Castle*, the general agent; that no bill was paid without his approbation. *Mowbray* on the other hand insists that he acted occasionally only in that capacity; that he did not sign all the bills, but that he was referred

1805.

ANDREWS v. MOWBRAY. (*In Chancery.*)

referred to from time to time whenever any doubt occurred with regard to the propriety of any demand made on account of any repairs on the farms, and that he gave his judgment upon the matter by signing the account if he approved of it. This is perfectly immaterial to my view of the case, because, as I have said, the plaintiffs have done enough when they have fixed him with such a degree and kind of agency, as made it a duty incumbent upon him to disclose to his employers every thing that came to his knowledge in consequence of being placed in that situation. Here the allegation is, that this agent obtained this estate at an undervalue. That it was competent to him to purchase, dealing fairly, I think cannot be disputed: even a trustee employed to sell an estate, may become the purchaser of that estate if he deals fairly with his cestuique trust: state *Mowbray*'s employment as an agent as high as you will, you cannot bring him into a situation of greater incapacity than that under which a trustee labours; and indeed it was not contended in the course of the argument, that there was an absolute incapacity to become the purchaser of this estate, if it had, there would be a short end to the question, for the instant that is made out, it becomes immaterial to consider how he conducted himself in the various parts of the negociation, relative to the purchase. If it was competent to him to become a purchaser, the two parts into which the enquiry resolves itself, must be, whether he has purchased at an undervalue, and if he has, whether he has so done by means of any imposition upon the seller, or by withholding from the seller any information which it was his duty to communicate to him.

I have stated the first enquiry to be, whether the purchase was made at an undervalue, because that is the foundation of the whole demand that is made by this bill: for if no injury has been sustained, it would be unnecessary to enquire by what means it was that the bargain had been brought to a conclusion: if the bargain is in itself a fair one, it is needless to enquire what the

1805.
ANDREWS
v.
MOWBRAY.
(*In Chancery.*)

the circumstances were which led to it, because it is not contended that the fraud consisted in this, in getting a man to sell an estate he did not mean to sell; it is admitted he meant to sell, and the *gravamen* is, that he was prevailed upon to sell at an under price. To shew that the estate was sold for less than its value, the direct evidence is that of only one witness, one *Jopling*, who was the occupier of the principal farm upon the estate, and he states in one part of his deposition, that at the time of the sale the estate in his judgment was worth to be let, £500 a year clear of all deductions: he says the ground upon which he conceives himself competent to form that judgment, is, that he has occupied the principal farm on the estate for four or five years, and thereby become acquainted with the value of the farm and likewise the other farms in that neighbourhood. That is the whole of the direct evidence on the part of the plaintiffs with regard to the value of the estate. Upon a supposition of that being the case, the price paid for it is not adequate. On the part of the defendant this evidence is contradicted, at least contrasted, by that of two witnesses: *George Robinson*, who says he has been acquainted with the estate for forty years, and that he has been twenty years in the habit of valuing estates, and he says he viewed the estate immediately before the sale at the request of Mr. *Clayton*, who had some intention to become the purchaser, and he valued it at £10,670. Another witness, *John Todd*, says he viewed it, and he valued it at £10,000 or 10,000 guineas, that £1000 with regard to the draining would be wanting, that he has been all his life-time a farmer and cultivator, and has purchased several estates. But then the plaintiffs go on to prove the value in another manner, and that is by the rent at which the defendant *Mowbray* let the estate after he had become the purchaser of it: they say that this estate, which was sold for £11,150, was, immediately after the sale, let by *Mowbray*, at rents amounting to £620 a year, from which they conclude that the estate was of much greater value than he had given for it. Now in the

1805.

ANDREWS v. MOWBRAY. (*In Chancery.*)

the first place it is necessary, before that inference can be drawn, to consider what circumstances may have contributed to the augmentation of the rent. The defendant *Mowbray* states that the rent was raised to that amount in consequence in the first place of his granting leases to all the tenants for certain terms of years; in the next place, in consequence of his undertaking to lay out considerable sums of money in draining, and in repairs and improvements upon each of the farms; and in the third place, in consequence of the rise in all the articles of the produce of land about the time he made the new leases: and he says, that taking all those circumstances into consideration, the rise of the rent was not more than he was entitled to, supposing the estate had been fairly paid for by £11,150. Now it is impossible to throw these circumstances entirely out of the case; some allowance must be made for them: they are all of them relevant undoubtedly to the purposes for which they are adduced, that is, to account for an advance of rent. In order, however, to ascertain precisely how much this advance of rent is to be ascribed to this circumstance, and how much to the fair value of the land such as it was, disconnected from all those circumstances, it would be necessary to have an examination made, different from any that is to be found in this evidence. I have no data given me, on which I can determine with any degree of precision, what the sum is that I am to set down as a fair allowance for the circumstances insisted upon by *Mowbray*, for the cause of the rent raising: something I must allow for them; how much then am I to ascribe to the intrinsic value of the land beyond what it was sold for? so that it is impossible for me to say that the plaintiffs have proved satisfactorily in this case, that the land was not sold at its fair value; a great rise of rent succeeding immediately upon the sale, is undoubtedly evidence that the land was underlet previous to the sale, but it is not conclusive, because the rise may be accounted for upon different principles. The defendant has produced a witness, Mr. *Peacock*, who says that he

is

1805.

ANDREWS v. MOWBRAY. (*In Chancery.*)

is employed very much in letting estates, and that he knows, that in the course of that year the rents of estates did very considerably rise in consequence of the increased price of all articles of the produce of lands; he estimates that difference alone at the rate of 20 *per cent.*, and he says that he himself let farms at the end of 1800, to be entered upon in *May* 1801, at £120 which he would have let in the early part of that year for £100. Now, for the purpose of proceeding to the consideration of the other part of the case, I shall however assume that the land was worth more than the price that was paid for it, although, if the case were to turn entirely upon that, I certainly should be under the necessity of putting that question into some different course of examination, as I should be unable to determine it myself upon the data now before me, but when I state as a supposition, that the land would turn out upon such an enquiry to be worth more than the price given for it, it would not necessarily follow, that this cause is to be determined in favour of the plaintiffs, because if it be once admitted that Mr. *Mowbray* might become a purchaser, it cannot be contended in the same breath that he can only become a purchaser upon condition of his making no benefit of his purchase; because that would be to turn him into the situation of a trustee who cannot get a beneficial bargain on his own account; it would be to say that if there be a benefit resulting from the bargain, it is incompetent for him to hold it, that is what is said with regard to trustees who sell to themselves: whatever turns out to be the value of the thing, even supposing it should be an accidental value, it is the property of the cestuique trust, but that cannot be the case with regard to a man who is not incapacitated to purchase. In the case of *Coles* v. *Trecothick* (*a*), the lord chancellor did not at all consider that the circumstance of there being an offer of £5000 in advance upon £20,000 within a very few days after the sale, was enough to deprive the trustee

(*a*) 9 *Ves.* 234.

or

1805.

ANDREWS v. MOWBRAY. (*In Chancery.*)

or the person for whom the trustee purchased as agent, of the benefit of his contract, supposing the contract to have been fairly and unexceptionably made. Then the question comes to be, whether this purchase, supposing it to be made at less than its real value, was obtained from the plaintiffs by any improper conduct on the part of Mr. *Mowbray*; whether he was guilty of any misrepresentation to them; whether he was guilty of a suppression of any fact he was bound to communicate; or whether (which is charged against him) he made use of any undue endeavours to prevent the estate from being sold at its full value by public auction; or to prevent any other persons from contracting for it by private sale. It is alledged that both he and *Castle* had entered into a combination for the purpose either of obtaining this estate for Mr. *Mowbray*, or obtaining it for their joint account. I must in the first place declare that that allegation is altogether unsupported by evidence, or by any circumstance appearing in the cause. *Castle* seems to me to have conducted himself with perfect fairness, without the least design of favouring *Mowbray* in any particular: if he had been in any degree negligent in the duties that belong to his situation as an agent, there is no appearance that that negligence was attributable to any such motive as is imputed to him; indeed, I do not conceive that any negligence or any neglect of duty can fairly be imputed to *Castle*: but if there were, it appears his object was not, and cannot be traced, from any circumstance in the transaction, to have been to throw the estate into the hands of *Mowbray* at an undervalue, or at any price whatever. He appears to have taken due pains to procure purchasers for this estate in the ordinary way which agents, employed to sell estates by auction, have the means of doing, and indeed nothing can be a stronger proof of his being perfectly sincere in his endeavours to get the best price for this estate, than a letter he wrote to Mr. *Clayton*, who is represented to be the person most likely to become the purchaser, it being one of the main grounds of complaint in the bill, that by

1805.

ANDREWS v. MOWBRAY. (*In Chancery.*)

by the conduct of *Castle* and *Mowbray*, a negociation that was going on with *Clayton* was prematurely terminated, without giving him an opportunity of concluding that negociation in which he was engaged. In that letter, *Castle*, after stating the present rental of the estate, and giving the particulars of it, told *Clayton*, by a memorandum made at the foot of the particulars, that the estate was now under-rented, and that if it was not sold, the rents would be increased. Was that the conduct of a man who wished, by suppressing the fair worth of the estate, to throw it into the hands of his friend Mr. *Mowbray* at an undervalue? It may be doubtful whether he was justified in making that representation, because I see nothing in the evidence which would lead me to suppose, that at that time, and without any advance made, or any benefit or advantage given to the tenants, an increase of rent could have been obtained; however so he represented it. With regard to *Mowbray*, he appears a considerable time, before the sale took place, to have had communication with one of the plaintiffs, Mr. *Nesfield*, relative to the sale of this estate, and in the course of those communications, to have signified his own willingness to become a purchaser of it if it could not otherwise be disposed of; it does not appear, nor indeed is it represented by the bill, that any pains were taken by *Mowbray* to prevail on *Nesfield* to part with the estate to him; nothing, I think, is even alledged, excepting an intimation on his part, to give a certain price. No inducements are stated to have been held forth by *Mowbray* to *Nesfield*, to part with the estate at that price: nothing to induce him to give him a preference: nothing to induce him to suppose it would be better to conclude a private contract with him than to take the other mode of sale; on the contrary, the evidence of *Castle* is, that *Mowbray* represented the times to be unfavourable for selling the estate, but if there was a determination to sell, it would be best to sell it by public auction; and at a time shortly before the attempt to sell by auction took place, he renewed his proposition to give a certain sum for the estate in case it should not

not be sold by public auction. Now this was, as far as it goes, correctly performing his duty as an agent, himself conversant with the value of the estate, and therefore, perhaps, having some advantage in a private treaty for the purchase of it. In the case of *Fox* v. *Mackreth* (*a*), it was mainly relied upon as an objection to *Mackreth*'s conduct, that he had not advised a sale by auction, or had not at least published advertisements, because, it was said, that if he had done so, Mr. *Page*, who thought the estate of such value, would have given to Mr. *Fox* the price he afterwards agreed to give. In this case Mr. *Mowbray* avoids that imputation, and advises a sale by auction: and the next question is, whether the imputation be true, that he took means to prevent that sale by auction from taking effect, or from being made in such a manner as was likely to produce an advantageous offer. A great many minute particulars are insisted upon relative to the steps that were taken preparatory to the sale, the mode in which the advertisements were published, the mode in which the particulars and conditions were prepared, the mode in which the estate was to be viewed, the mode in which persons inclined to offer were to obtain information with regard to it; it is said that in all these particulars the sale was not conducted in a manner most favourable for the proprietors; and it is alledged, that there was a particular duty incumbent on Mr. *Mowbray*, as an agent for the conduct of the sale, to have attended to the whole of these circumstances. It might be sufficient in this case to say, that none of these allegations rest in proof: I am desired to say without evidence in the first place, and in the next place against evidence on the part of the defendant, that the proper and usual means were not taken for the purpose of bringing the estate properly to sale. As to Mr. *Mowbray*'s obligation, it appears to me, he had no particular trust thrown upon him with regard to the conduct of the sale; all that was done with regard to him was

(*a*) 2 *Bro. C. C.* 400. 2 *Cox.* 320.

to

1805.

ANDREWS v. MOWBRAY. (*In Chancery.*)

to mention, by his own consent, his name in the advertisement, as a person to be applied to for particulars, and the question is, whether, in that situation, he has in any degree misconducted himself. It does not appear to me, that *Castle* has in any degree misconducted himself; but supposing he ought to have published the advertisements in a different manner, supposing he ought to have published the particulars of sale in a different manner; supposing he ought to have published the conditions of sale before the auction took place; none of these are duties with which *Mowbray* appears to have been charged, or which he had undertaken; the only part which he had undertaken, was that of answering all enquiries that should be made with regard to circumstances falling within his knowledge, and there is no evidence whatever of his having been guilty of any misrepresentation. The first application made to him is by *Clayton* in *London*; and *Mowbray*, I think, very properly, declines entering with him into any particulars, because he had no papers with him, and he had, he says, not had full communication with *Castle*, before he left the country; he might therefore have either misled Mr. *Clayton*, or he might have done some injury to the proprietors of the estate, if he had upon an imperfect recollection ventured to make representations to *Clayton* relative to the estate; he refers him to those on the spot, and it is not alledged that he did say any thing to *Clayton* in order to discourage him from being the purchaser, or to disparage the estate he was selling, but referred him to those who could give him information.

The next situation, in which there is any evidence, of his appearing as taking any part in the conduct of the sale, is at the time of the auction; there the evidence does not impute to him any suppression of information, or any misinformation; the only witnesses who asked him any questions, appear to have been perfectly satisfied with the information, and do not seem, when they gave their evidence, to express the least suspicion, that he either misinformed them, or concealed any information it was in his power to communicate.

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These are the only instances in which there is evidence of applications made to him in consequence of this reference which he permitted to be inserted in the advertisement. It is imputed to *Castle*, that there was no plan of the estate left on the premises in the possession of the bailiff who was to shew the estate. Upon looking at the advertisement, it appears that the bailiff *Beckwith* was not referred to as a person who was to communicate any particulars relative to the sale, but was only to shew the estate, therefore every thing for which he was referred to was done when he had shewn what the estate consisted of, and the particulars were to be learned from Mr. *Castle* and from Mr. *Mowbray*. Then it was said that due pains were not taken to circulate the advertisements in a sufficient number of newspapers. The evidence is that advertisements were published for the usual length of time, and in a greater number of papers than estates in that country are usually advertised in: other observations are made of the same kind, to which the answer is, the sale was conducted in all other respects in the manner sales are commonly conducted, there was no deviation from the ordinary mode; no evidence is given on the other side, to shew there was; all this is gratuitous; all this is entered into by the defendant against the charge, which is not supported by any evidence whatever.

The next head of imputation is with regard to a lease or the promise of a lease to one *Jopling*, which they say was inserted in the particulars for the purpose of deterring purchasers by the apprehension of the estate being incumbered with a lease of a certain duration. The tenants were represented to hold at will, except *Surtees Jopling*, who had the promise of a lease. That, so far from being a misrepresentation unfavourable to the sellers, appears to me to have fallen short of the truth, and the purchaser would have had reason to complain if that representation had not been made

1805.
ANDREWS
v.
MOWBRAY.
(*In Chancery.*)

to him. There is a great deal of confusion in the minds of all the parties and all the witnesses relative both to *Jopling*'s promise, and the promises made to the other tenants, but it is impossible to dispute he had a promise of a lease, it was no misrepresentation to state that he had such promise: it not only cannot be denied, but the evidence upon that subject is perfectly uncontradicted, and Mr. *Nesfield* himself states in his own hand-writing in a case that was prepared, that *Jopling* had the promise of a lease, and a promise from him *Nesfield*. It is not in evidence whether any other representation than this was made, but there is an allusion in *Clayton*'s letter to something said by Mr. *Mowbray* at the sale, that he had an idea that other tenants might be in the same situation. If he did so, he would, in my opinion have stated nothing untrue: he probably had an intimation given by the other tenants, that they had promises of leases; however, *Castle* and *Nesfield* do not conceive themselves to have been under any obligation to state more than they had done with regard to the other tenants, and therefore no communication was made either at that time or at any other, that could leave any body to conceive that a purchaser was to be burthened with any thing but *Jopling*'s lease.

When the auction concluded without any purchase, Mr. *Clayton* entered into a negociation privately for the estate. It does not appear that he made an offer of any sum that he would give, the demand seems to have been at first £12,000; that is the utmost limit of the demand made after the auction was over. He says that the demand was lowered, but how much he does not recollect, but *Castle* recollects it to be lowered to £11,500. Then the next head of imputation on *Mowbray* is that he and *Castle* put a stop to this negociation with Mr. *Clayton*, by which means Mr. *Nesfield* was prevented from getting that price which *Clayton* might probably if the negociation had continued, have been disposed to give. How does that stand? The negociation concludes with a promise

1805.

ANDREWS v. MOWBRAY. (*In Chancery.*)

mise on the part of the vendors that they would communicate to him more distinctly than they at that time felt themselves in a condition to do, whether *Jopling* was or was not, or should be considered as tenant of the estate. More knowledge upon the subject than they had it was not likely they would procure, but the delay was for the purpose of considering whether they should agree to come to some arrangement themselves with *Jopling*, so as to represent to *Clayton* that the estate was free from any demand of his. That, however, does not appear to have been done, and the letter written to *Clayton* informs him that *Jopling* is to be considered as having a promise of the lease, but it goes on to desire that Mr. *Clayton* will make a conditional offer upon the supposition that *Jopling* is to be taken as a tenant, that some arrangement might be made and that his claim to a lease might be put an end to. It appears to me that nothing was better calculated than that letter, to obtain a decisive offer from *Clayton*; for if there was a scheme on the part of *Mowbray* and *Castle* to prevent *Clayton* from getting the estate, nothing could be more likely to prevent it than putting it in a state that deprived *Clayton* of any excuse to giving an answer. *Clayton*, instead of making any offer in the alternative, writes back that he cannot come to a determination within the time, and begs they may not suspend the sale on his account if they have any other disposition of the estate in view. Then the question is, was there a fair motive for prescribing a limited time within which this answer should be given. The motive alledged is that *Mowbray* was bound to take a journey from home, and that he had in view the purchase of another estate in case he did not conclude the bargain with *Nesfield*. Now supposing it had only been that he was going from home, and wished, before he went, to be at a certainty whether this estate was to be his or not, I should have thought it perfectly sufficient for him to say, I beg to have your definitive answer before I go. Was this a pretence? If it was a false pretence for the purpose of

1805.
ANDREWS
v.
MOWBRAY.
(*In Chancery.*)

abridging the period within which the answer should be returned, that might have been shewn on the part of the plaintiffs; it is not contended that it was, it is not alledged that he was not going from home at that time; what was there to prevent him, if he was in a situation to become a purchaser at all, from saying, we have tried to sell this by auction, you have had no offers at the price at which it has been put up, will you close with my proposition, that proposition which was made before the auction; that proposition which I am willing to abide by of £11,000? What was there that made it improper in him to say that? It is not alledged he did more than state that; it is not alledged that he used any arguments to prevail on *Nesfield* to close the agreement, or that he would have added a syllable to induce him to act against the tendency of his own inclination. The bargain being thus concluded, let us see what there was or is alledged to have been in *Mowbray*'s knowledge which he concealed and kept back from *Nesfield* during this treaty. It has been said that this case is not only to be considered as with regard to *Nesfield*, but likewise with regard to the other owners of the estate. How any distinction can be made between them, I do not know, except upon the supposition that *Nesfield* himself was guilty of any collusion with *Mowbray* to sell the estate at an undervalue; if he had, I admit that the other owners of the estate would not have been bound by a fraud practised by one of their agents in concurrence with another; but if *Nesfield* was fairly dealt with, all the parties were fairly dealt with. It would be absurd to say they are entitled to quarrel with the transaction because representations were not made to them, which there was no opportunity to make; all the representations must be made, if made at all, to the person who sold the estate. To say they must have the representations made to them, and that not disclosing circumstances to them will vitiate the transaction, is to say the estate could not be purchased by any body, unless all the parties interested in the sale were on the spot.

With

1805.
ANDREWS v. MOWBRAY. (*In Chancery.*)

With regard to the value, it is said that *Mowbray* knew that this estate was very improveable, and that he ought to have acquainted Mr. *Nesfield* the vendor that it was so. Undoubtedly he ought; for if he got an estate that was improveable, upon the supposition that it was worth only its actual rent, that would have been an imposition on the vendor. But I must look at the answer with regard to the fact of which the plaintiffs can give no evidence. Whether a communication has or has not been made by one man to another, cannot commonly be matter of evidence: the vendors in this case cannot prove a negative, that no information was given to them, but they apply to the conscience of the defendant and they put it to him whether he did make to them the necessary communications. He answers that he did; he admits he did know it was improveable, that he purchased it upon a supposition of its being so, but that he always represented to them that it was so: that does not rest merely on his answer, (which for this purpose would be sufficient) but *Castle* likewise gives evidence of such representation having been made to the plaintiffs, by means of *Nesfield*, the only party with whom there was an opportunity of communicating upon the subject, and to his wife, another of the parties interested in the estate. It was represented that this was an estate, improveable by laying out money on it, and that an outlay of money would be attended with a very considerable profit, a profit of no less than ten per cent. independent of all accidental circumstances which are said to have contributed to the actual rise of the rent. I must take it therefore that the circumstance was not concealed, and that *Nesfield* did not enter into the contract from any ignorance that it was an improveable estate he was selling. Indeed it appears from the evidence in the cause that it was an estate that required money to be laid out upon it, that the houses were out of repair and the lands in want of draining, because the continual allowances made from year to year are sufficient evidence of that, besides the evidence of witnesses who say it required

1805.
ANDREWS
v.
MOWBRAY.
(*In Chancery.*)

required draining, and that the houses were out of repair. That is very natural to have been the idea and opinion of the parties, which is represented by *Mowbray* to have been the answer given by them to this representation:—that circumstanced as this estate was with relation to the ownership of it, it would be inconvenient and improper to lay out money upon it, it was better to sell it and divide the produce among the different proprietors, instead of laying out money on improvements.

Another circumstance of which it is said they were not fully informed, was the value of the wood and the woodlands on this estate. It seems to me, however, that uncommon pains were taken to force upon the view of purchasers the value of the wood; it is the prominent feature in the advertisement, a proportionate degree of importance seems to be attached to the valuable plantation, and it was repeated in the conditions of sale. But then it is said that *Mowbray* had taken pains to inform himself with great accuracy with regard to the value of the wood and woodlands, for that it had been surveyed by one *Surtees* a short time before the sale, and the value of it precisely ascertained. He admits in his answer that he did cause it to be surveyed a short time before the sale with a view to his own information, as there seemed a disposition on the part of *Nesfield* to let him have the estate in case he could not dispose of it in any other way. Then did he secrete the information, which he obtained by means of this survey? If he had, that I think would have been a circumstance of unfairness; but it was not alledged that the plaintiffs were in any state of ignorance with regard to the value of the wood. When I turn to the bill and see the representation on that subject, I find their statement is that the wood was worth £1000, and that at the time of sale the woodlands were assessed to the poor's rate at £40 a year. Now they cannot say that by that statement they mean

to

1805.

ANDREWS v. MOWBRAY. (*In Chancery.*)

to represent that those were circumstances not in their knowledge; an assessment of the poor's rates cannot be a circumstance concealed from them and yet in the private knowledge of *Mowbray; Mowbray* states in his answer that they were mistaken in that supposition, but that is the idea they represent themselves to have had with regard to the value of the wood and woodlands: they do not charge him in the bill with any suppression of his information with regard to the value of this part of the property, but he goes beyond the charge in the bill, and says that this valuation which was made by *Surtees*, although made for *Mowbray*'s own information in the first instance, was communicated to *Nesfield* previous to the auction. And it does not rest here, for I find that he communicates to *Clayton* at the time of the auction, that this valuation had been made by a surveyor, and according to *Clayton*'s recollection he represented the value of the wood and woodlands to be somewhat more than the surveyor had estimated them to be; I think *Clayton* states them to have been represented to be worth upwards of £900, the valuation being only £850. It is impossible to attribute a fraudulent purpose when I see no fraudulent use is made of it, but a use is made of it totally to counteract any design he himself might have by suppressing his knowledge, to obtain a beneficial bargain for himself; he is at pains, according to Dr. *Pemberton*'s evidence, to state the quantity of which the woodlands consist; it was Dr. *Pemberton*'s particular enquiry; he is satisfied with his statement to him, and he puts into Dr. *Pemberton*'s hands a plan of the estate that he may be more fully informed on the subject. It seems to me therefore, that *Mowbray* has communicated, or at least there is nothing in this cause that can entitle me negatively to say he has not communicated to the plaintiffs, all the information he had relative to the value of the estate or any particular parts of it: if so, he has by acting fairly, placed himself in the situation of an ordinary purchaser, because from the moment he has discharged all the obligations

1805.
ANDREWS
v.
MOWBRAY.
(*In Chancery.*)

tions attached to the character of an agent, he stands just in the same situation as any other purchaser, and is intitled to all the advantage that he may eventually derive from the bargain; and the consequence is that he is not to be deprived of the bargain even supposing it to be proved that the estate was worth at that time more than he contracted to give for it, provided the vendor had the fair opportunity of exercising his own judgment upon full information with regard to all the particulars of the estate, and deciding for himself without misrepresentation or suppression, that it was expedient to let the estate go at the price offered for it.

Upon these grounds therefore I think it is absolutely impossible to give this party the relief which he seeks, and that it would have been impossible to give him the relief that he seeks, supposing he had filed his bill on the day after the transaction was completed:—but it does not close there, for the bargain is made in the month of *May*, there is an opportunity given for six months together for the party to consider of the contract he had made, to obtain information with regard to any circumstances which he might have overlooked at the time, to obtain information from all the persons who had any thing to communicate; and then at the end of six months the necessary steps are taken to enable them to make the conveyance, and the conveyance is made; the bill is filed only after the estate has been let at the advanced rent which, it is said, constitutes the evidence of its having been purchased at an undervalue. It does not appear from any circumstance in the case that this suit would have had any existence if these advanced rents had not been obtained:—therefore under the whole of the circumstances of the case I must dismiss the bill: and as it imputes fraud, and fraud of a gross kind, both as to *Castle* and *Mowbray*, of which, in my opinion, no proof has been given, I must dismiss the bill with costs.

From

1807.

ANDREWS v. MOWBRAY. (*In Chancery.*)

From this decree the plaintiffs appealed to the *Lord Chancellor*, and the cause came on to be heard before his lordship in the year 1807: having been again fully argued by *Richards*, Sir *Samuel Romilly* and *Cullen*, for the plaintiffs, by Sir *Arthur Piggott*, *Hart* and *Bell*, for the defendant *Mowbray*, and by *Leach* and *Heald*, for the defendant *Castle*, his lordship on the 15th *December* 1807, delivered judgment to the following effect:—

Lord ELDON C. On hearing this cause the *Master of the Rolls* was pleased to decree the dismissal of the bill with costs. As against Mr. *Castle* the bill prayed nothing but the costs of the suit, and if it was maintainable against him upon any ground it was on this:—that he had been so involved and implicated in the gross frauds which were charged by this bill, and that it was so difficult to detect those frauds, that for the purpose of giving the necessary relief to the plaintiffs by having a discovery and a sufficient production of papers and instruments, it was not unfit that he should be made a party, and that he should contribute to the expence of relieving the plaintiffs from the effect of that gross fraud in which he was involved. In dismissing such a bill, his honour could do no otherwise than dismiss it with costs. If it had been a bill proceeding upon the ground that Mr. *Mowbray* was in some sense to be considered as agent to these parties, which circumstance upon the application of some general principle established and acknowledged in a court of equity would incapacitate him from purchasing under any circumstances, that was a ground simple and intelligible, which might be justly stated as against any defendant whatever who being capable of being so characterized, had made a purchase which upon such general principles this court would cut down: but that is not the case made by this bill. The main object of the bill is to charge the defendant Mr. *Mowbray* with contriving as early as the year 1795, when he first became acquainted with the concerns of this estate,

1807.

ANDREWS v. MOWBRAY. (*In Chancery.*)

estate, finally to make himself the purchaser of it, and with a view to that object, valuing the estate, and concealing its value, contriving, or at least by studied negligence managing, that it should be brought to sale at an auction where it could not be sold, and after all, taking advantage of the circumstances to become himself the owner: and it charges him for this purpose with entering into a combination with Mr. *Castle* to enable him in the character of agent to the estate, with the assistance of Mr. *Castle* the solicitor and man of business of the family, to take from that family for £11,150, an estate represented to be worth from £15,000 to £20,000. Under these circumstances, if his honour had been of opinion that the bill could have been sustained upon the dry principle of the court attaching upon him the character of an agent, he would have thought it his duty, as I should have thought it mine, to dismiss the bill without any costs; he could not well have dismissed it with costs to the defendants if he had so thought; but if he proceeded upon these circumstances of fraud, he ought to have marked it with costs for the sake of the character of the defendants merely, but as he was deciding that this was a case in which the general principle of the court was not violated, and deciding that which was a much more important circumstance in this case to all the parties, that this was not a case in which that gross fraud was in any manner proved, he was bound to dismiss the bill with costs.

It is necessary to state with great particularity the case as it is alledged in the bill on the part of the plaintiffs, and also the answers of the defendants, for I cannot agree with the gentlemen at the bar, (and his honour did not) that in a case of this sort no notice is to be taken of the answers. I do not know what is to become of the rule of this court with respect to the weight of testimony, unless the court is to see how far and to what extent the number as well as credibility

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of the witnesses goes in support of the answer of the defendants: for that purpose, therefore, it is absolutely necessary to look at the answers.

This bill is filed not by Mr. *Nesfield* only, but by the other parties, who with Mr. *Nesfield* are interested, and it will be to be considered how far Mr. *Nesfield* is to be viewed as the agent of the other parties, and how far upon the consideration of a question of this sort his acts ought or ought not to be binding upon them. These ladies became under the will of Mr. *Andrews*, and under another will, beneficially entitled in the year 1792 to this property; they were all at that time unmarried, and most of them were not of age in the year 1793. In that year Mr. *Nesfield* married one of the ladies interested in this estate:—and the bill proceeds to state that after the death of Mr. *Andrews*, the estates of *Shotley* and *Waskerley* being adjoining to each other and having been let together, *Elizabeth Andrews*, *Fawcett*, and *Bright*, who were the trustees under the will, appointed one *Hopper* to be land steward of both the estates: that he continued in such appointment till the middle of the year 1795, when the trustees removed him and directed Mr. *Castle* to apply to Mr. *Mowbray* to undertake the business of land-steward or agent in his room: that Mr. *Mowbray* consented to do this, and took upon himself the employment of land steward or agent: that as such he managed and directed the letting of the several farms upon the estates and the cultivation and repairs from the removal of *Hopper* till the estates were sold to him in the manner afterwards mentioned, and during the whole of that time Mr. *Castle* acted as agent for the plaintiffs in receiving the rent of the estates: that whilst *Hopper* had the management of the estates, the rents amounted to £349 a year; that after Mr. *Mowbray* took the management they were advanced by him to £395, besides wood lands, that £395 being the utmost rent they would bear; it then states that the expences of repairs and other expences

directed

1807.
ANDREWS v. MOWBRAY. (*In Chancery.*)

directed by Mr. *Mowbray* were so much increased, that the clear annual income had been reduced to somewhat below what it had been before Mr. *Mowbray* had the management of the estates: that they had no suspicion though the rents were reduced, of the integrity of Mr. *Mowbray*, but relying upon that and upon his great skill and experience in the management and cultivation of estates, and supposing therefore that the estates would not admit of any further improvement without a great deal of trouble and labour, and would not make any adequate returns for a great length of time, the plaintiffs resolved in the beginning of the year 1800, to bring the estates to sale:—that Mr. *Nesfield* for that purpose consulted Mr. *Mowbray* as the land-steward or agent of the estates respecting the sale: that Mr. *Mowbray* several times assured Mr. *Nesfield* that the estates being let at as high a rent as they could bear, might probably fetch £12,000, which Mr. *Mowbray* said was in his judgment their utmost value, and that he advised Mr. *Nesfield* to have the estates advertised for sale by auction at *Newcastle-upon-Tyne:* that upon this, Mr. *Nesfield* directed Mr. *Castle* and Mr. *Mowbray* to cause the sale of the estates to be advertised; that Mr. *Castle* and Mr. *Mowbray* having concerted and framed the advertisement for that purpose, Mr. *Castle* caused it to be inserted in the *Newcastle* and *York* papers. The bill then states the advertisement, which describes the property as consisting of 800 acres, and represents it in general terms as having a large plantation of valuable timber thereon which having been taken great care of is in a good and thriving condition. An application is then directed to be made for shewing the estate, to a person of the name of *Beckwith*, and with regard to the particulars, persons who wished to be informed are referred to Mr. *Mowbray* or Mr. *Castle*. The bill then alledges that Mr. *Mowbray* and Mr. *Castle* before the auction took place, formed a plan that they or one of them should become the purchasers of these estates, and for that purpose they determined to take means to discourage any

1807.

ANDREWS v. MOWBRAY. (*In Chancery.*)

any person from bidding at the auction, in order that they might afterwards obtain the estate at such price as Mr. *Mowbray*, in whom they knew the plaintiffs placed great confidence, should say it was worth: so that this auction was part of the management alledged, by which the estate was to be procured by these parties or one of them. It then states that on the 5th of *May*, 1800, Mr. *Nesfield* attended the auction, and Mr. *Mowbray* and Mr. *Castle* also attended: Mr. *Mowbray* as the land-steward of the estate and agent for the sale on behalf of the plaintiffs, and Mr. *Castle* as the solicitor and law agent of the plaintiffs: that at this auction a Mr. *Clayton* with several other persons attended for the purpose of bidding, and they desired to be informed among other things, whether the tenants of the estates had any leases or agreements for leases, upon which Mr. *Mowbray*, who well knew that none of the tenants had any such leases or agreements, and particularly that *Surtees Jopling*, who was the principal tenant upon the estate, had not any lease or binding agreement for a lease, yet in pursuance of the design formed by them, declared to Mr. *Clayton* in the hearing of other persons then present, and in which declaration Mr. *Castle* also joined, that the tenants had been promised leases, and expected and were entitled to the same, and particularly that *Surtees Jopling* had been promised or had an agreement for a lease of his farm for nine years; that the conditions of the sale of the estates prepared by Mr. *Mowbray* and Mr. *Castle* or one of them, were shewn to the company at the auction. The conditions of sale are then set forth in the bill, and the large plantation of valuable timber appears again in the conditions of sale, and there is one of these conditions, which I now take notice of, because it was very much observed on in the argument; that the purchaser is to pay down a deposit of 10 per cent. in part of the purchase-money, and sign an agreement for payment of the remainder on or before the 12th *May*, 1801, on having a good title, and that the vendors reserve to themselves three biddings, and the estate is to be put

1807.
ANDREWS
v.
MOWBRAY.
(*In Chancery.*)

put up at the sum of £10,000. The bill then states that in pursuance of their design, *Mowbray* and *Castle* did not cause the conditions of sale to be printed and distributed till the time of the sale. It then alledges that the vendors reserving three biddings to themselves was a very unusual thing, and not only calculated to prevent, but was inserted by Mr. *Mowbray* and Mr. *Castle* in the conditions of sale, for the purpose of preventing or discouraging persons from bidding at the sale: that the estates were put up by auction at £10,000, but no further bidding being made, the auction closed, and after it was closed, Mr. *Clayton* having expressed his desire to Mr. *Mowbray* and Mr. *Castle* to treat for the purchase by private contract, requested to be informed of the nature and terms of the agreement made with the tenants for granting leases, and to be written to on that subject in order to enable him to consider the value and make an offer for the estate: that Mr. *Mowbray* and Mr. *Castle* undertook to send him such information, and Mr. *Castle* promised to write to him for that purpose; that after the auction, Mr. *Mowbray* and Mr. *Castle* informed Mr. *Nesfield* that Mr. *Clayton* had declined all intention of purchasing the estate, and that Mr. *Mowbray* immediately offered to Mr. *Nesfield* to become himself the purchaser at £11,000: that Mr. *Nesfield* declined taking that sum, upon which, Mr. *Mowbray* offered the sum of £11,150 for the purchase of the estates; and Mr. *Nesfield* being informed that that was the utmost that he could or would give for the same, and not knowing that any persons had made enquiry or were desirous of becoming purchasers, understanding also from Mr. *Mowbray* and Mr. *Castle*, that Mr. *Clayton* had given up all idea of purchasing, and therefore despairing of being able to dispose of the estates, he was induced to accept the offer of Mr. *Mowbray*. The case on the part of the plaintiffs then represents that Mr. *Mowbray*, upon that, directed and instructed Mr. *Castle* to prepare the agreement for the same which is stated at length in the bill,

and

1807.
ANDREWS
v.
MOWBRAY.
(*In Chancery.*)

and it contains a clause which it will be necessary for me to take notice of presently, that it shall be lawful to Mr. *Mowbray* to give discharges to the present tenants of the premises to quit possession on the 12th of *May* 1801. The bill then states the circumstance of the conveyance having been prepared and great part of the purchase-money paid at different times; of the conveyance having been finally executed, of a recovery having been suffered in *Michaelmas Term*, in order to make a good title: that Mr. *Nesfield* some time in *August* following put Mr. *Mowbray* in possession of the mansion-house, garden, orchard, and woodlands; and then the bill proceeds to alledge a most material fact, that since the agreement of the 10th of *May*, 1800, and the execution of the conveyance, the plaintiffs have discovered that Mr. *Mowbray* had previous to the sale formed the plan of buying it, and had prevented persons from bidding at the auction, not only in the manner before mentioned, but in the manner afterwards stated. There is then an allegation which brings into controversy a fact on which there has been much argument, that Mr. *Mowbray* asserts that he never acted in the capacity of land-steward or agent for the estates, the plaintiffs on the other hand charging that he did act in that capacity, and that, acting in that capacity, he signed all or almost all the bills of charges for the cultivation and repairs of the estates, and that he did so as an authority to Mr. *Castle* to pay them, and that Mr. *Castle* paid them under the authority of Mr. *Mowbray* as such land-steward or agent, and that Mr. *Castle* had in his possession those bills of charges paid by him under the authority of Mr. *Mowbray* during the time that Mr. *Mowbray* was such land-steward; that when those were produced, it would appear that Mr. *Mowbray* had signed them with his name or initials: that he asserts he never was employed by the plaintiffs nor ever acted as agent or manager for the sale of the estates by public sale or otherwise. This is an allegation

1807.
ANDREWS v. MOWBRAY. (*In Chancery.*)

tion that takes a distinction which is not immaterial, in my apprehension, in a case of this sort; the former is an allegation that he was not the land-steward or agent for the estates originally: this is an allegation that he was not the agent in the sale, attributing to him a character which goes beyond that, with reference to the doctrines and principles of this court as land-steward or agent. There is then a charge that the advertisements were drawn by the direction and advice and with the knowledge and consent of Mr. *Mowbray*, that he acted as the principal agent for the sale of the estates, that he was there applied to by several persons as such agent to give them information respecting the sale, that upon such applications he did not refer them to Mr. *Nesfield*, but immediately answered them himself, and that in other respects he conducted himself ostensibly, and was in truth, the only manager of the sale: that after the auction was closed, *Clayton* having expressed a desire to treat by private contract, he applied to Mr. *Mowbray* for further information, particularly respecting the agreements for leases: that Mr. *Mowbray* undertook to communicate with him upon the subject at a future time: that Mr. *Mowbray* directed Mr. *Castle* to write to Mr. *Clayton* the letter of the 6th of *May*, 1800, and that Mr. *Castle* did write the same with the privity and consent of Mr. *Mowbray*. The bill then goes on to alledge that Mr. *Mowbray* does admit sometimes that he was agent for the estate, or agent for the sale of the estate; but then he says the purchase ought not to be avoided, because it was made fairly and openly, and without any misrepresentation, fraud, or practice, upon the plaintiffs, and for a fair and adequate price: that £11,150 offered by him was the full value of the estate at that time: in answer to this the plaintiffs undertake to make out that soon after he was employed as land steward or agent for the management of the estates, he, well knowing and having been frequently informed by Mr. *Nesfield* and other persons, that the estates were to

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be sold in pursuance of the directions of the will of Mr. *Andrews*, formed the design of procuring the same to be sold to himself at an undervalue; that in pursuance of that design, he did as early as the year 1795, increase the expences of the estates so as to reduce the income arising therefrom in a much greater proportion than he raised the rents, with a view to depreciate the value; and in furtherance of this fraudulent design, and to prevent competition at the auction, upon Mr. *Nesfield*'s suggesting the propriety of advertising the auction in the *London* newspapers, *Mowbray* dissuaded him, and advised that the advertisement should not be inserted in the *London* or any other newspaper but the *Newcastle* and *York* papers, which being only published weekly, had a narrow and limited circulation: that Mr. *Mowbray* wilfully, and with a view of preventing purchasers from bidding, acquainted with the nature and value of the estates, caused the advertisement to be drawn up and published without making any mention therein of the rents of the estates, and that there were no leases thereon, and that there was none but the said verbal agreement with *Surtees Jopling*; and then follows a charge that Mr. *Castle* acted in concert with and by the advice and direction of, and assisted Mr. *Mowbray* in his fraudulent design of obtaining the estate at an undervalue: that it was a part of the same design that no particular description of the estates was drawn up or prepared, that no directions were given to *Beckwith* to shew the estates to any person who might enquire; that they did not deliver to him any plan of the estates, although Mr. *Mowbray* soon after he became land-steward, had caused a full and correct plan and admeasurement to be made of the estates, and although a copy of the plan was at hand previous to the sale of the estates, that many persons applied to see the estates, and that they were disappointed upon those applications because he was not in possession of any plan, and that Mr. *Nesfield* was not informed that those persons who had applied, had made such application. The bill then represents,

1807.

ANDREWS v. MOWBRAY. (*In Chancery.*)

that on the 5th of *May*, 1800, as Mr. *Mowbray* and Mr. *Castle* were going to the auction with the plaintiff Mr. *Nesfield*, Mr. *Mowbray* informed Mr. *Nesfield*, that if there should be no bidders for the estate at the auction, *Mowbray* himself would give £11,000 for the purchase of the estates, by private contract; the offer is stated to have been made as they were going to the auction; that with a view to obstruct the sale of the auction by keeping back as much as in them lay, all the information necessary and proper for persons who intended to bid for the estates, they omitted to print or distribute before the auction, the conditions of sale, that by reason of such omission, several persons who came to the auction and were prepared to make a deposit of such part of the purchase-money as the conditions required, would not bid; that many persons were discouraged from bidding by reason of so large a deposit, and a deposit of such magnitude is also stated as another evidence of designed fraud; that amongst others, a gentleman of the name of *Todd* was influenced by this consideration: that when Mr. *Clayton* was making enquiry respecting the leases, Mr. *Mowbray*, with the view and intention of diverting Mr. *Nesfield* from any intercourse or communication with Mr. *Clayton*, and for the purpose of preventing any competition for the purchase, informed the plaintiff that Mr. *Clayton* made such enquiries purely out of curiosity or ostentation, and that he was sure he did not intend, nor was a likely person to offer to purchase the said estates; that Mr. *Clayton* (and that Mr. *Mowbray* knew it at the time he made this assertion) did intend to make an offer as soon as he should be informed of the state of the leases; that Mr. *Mowbray* knew that Mr. *Clayton* had before the auction been to view the estates and to learn all he could respecting them; and the same observations are made with respect to a gentleman of the name of *Pemberton*. Then there is another charge in the bill that after the auction several persons applied to Mr. *Mowbray* and Mr. *Castle*, for the purpose of treating with them for the estates by private contract, but

but neither Mr. *Mowbray* nor Mr. *Castle* communicated to the plaintiff any such applications, but that they diverted them from their treaty for the purchase of the estate. Then the bill proceeds further to alledge, that since the conveyances have been executed, it has been discovered that Mr. *Mowbray* and Mr. *Castle*, knowing that Mr. *Clayton* was willing to treat for the purchase of the estates, were determined to prevent his treating for them, and for the purpose of making out that allegation, they state the letter of the 6th of *May*, 1800, which was written to Mr. *Clayton*, and the answer to that which was received on the *Friday* or *Saturday* of the week in which that 6th of *May* occurred. Then there is a charge in the bill that it was perfectly well known both to Mr. *Mowbray* and Mr. *Castle* that *Jopling* was not entitled to be considered as a tenant for six years, and that he had no binding agreement for the lease of the farm. The case then represents that with respect to the letter written and sent to Mr. *Clayton* and the answer that was sent by him, Mr. *Nesfield*, who was acting on the part of the plaintiffs, was entirely ignorant, that he knew nothing of the correspondence which those communications related to. Then there is an allegation as to the value:—that the estates were worth if they were fairly and openly sold either by private contract or public auction, the sum of £18,000 and upwards, and the fact is stated that Mr. *Mowbray*, immediately after obtaining possession, raised the rents of the estates to £620 a year: that while he was land-steward, he kept a wood book, containing a full and particular account of all the timber and wood upon the estates, and that it would appear that the wood upon the estates extended to 92 acres, and was at the time of the sale, of the value of £1000, or thereabouts: that the estates were, at the time of the sale, rated to the poor of the parish of *Shotley*, in respect of the wood lands, at £40 a year; that Mr. *Mowbray*, while he was such land-steward, made a valuation of the estates, which this bill represents to be in his possession, and by which it will appear that the estates

1807.
ANDREWS v. MOWBRAY. (*In Chancery.*)

were worth £20,000, or some such large sum of money. It is then alledged that the improvements that have been made will not account for the rise of the rents; that twenty acres having been taken out of the lands of the occupying tenants, the improvements that have been made since are in point of fact, all fraudulent improvements for the purpose of accounting for the rise of the rents: that the terms of the leases are not more beneficial to the tenants than those that they had before, and that this would appear if Mr. *Mowbray* would state the nature and terms of the leases: that in *December* 1800, he secretly cut down a very large quantity of valuable timber and thereby procured the repayment of the purchase-money.

I have stated in this very particular manner the case as made by the bill on the part of the plaintiffs, because there is hardly a topic contained in this bill, which has not in some way been pressed in the argument of the case. I do not recollect that any part of Mr. *Mowbray*'s answer was read, except that which describes him as being in his conception, in the situation of land-agent or steward. I take the answer of Mr. *Mowbray* to be a denial of all these allegations. With respect to the agency, he says he acted as honestly in his own opinion, as a man could do in the management of this estate, such as his management was; he says he had not the least idea in the world in the year 1795 when he made the valuation of the estate, of valuing it with reference to any purchase or sale; that upon that valuation he estimated the property and he declared at the time that he estimated it according to its utmost value, at £414 a year, and he denies all purpose of making a valuation of it with a view to the future purchase of it himself; that in the year 1800, which is a fact beyond controversy, he employed a person to make a valuation of this estate with a view to determine whether he should become an offerer for it, and what terms he should offer; he says he communicated that fact to those persons

sons who were concerned; and he asserts, that Mr. *Nesfield* entered into a conversation with him, in which Mr. *Mowbray* said he would give him £11,000 if he did not get a better price when sold by auction, and he denies any interference to prevent or discourage the sale. His answer certainly cannot be read in any degree as evidence of the truth of what it contains, but I apprehend it is the habit and according to the principles of the court, to look at what the answer is, in order to see how far the testimony in the case will authorize the court in cutting down the transaction that is in controversy between the parties. Before I state the answer of Mr. *Castle*, I must observe that whatever may have been the conduct of Mr. *Castle*, unless Mr. *Mowbray*'s can be mixed with it, you cannot upon the conduct of Mr. *Castle* alone, unless you call in the aid of general principles, cut down this purchase of Mr. *Mowbray*'s. To explain what I mean:—if Mr. *Mowbray* was only such an agent as he describes himself in his answer, if it can be proved by his intercourse and dealings with the estate (independent of what Mr. *Castle* states) that he was only such an agent as he represented himself to be, if it be proved that he had no participation in any fraud upon Mr. *Nesfield*, as acting on the part of these plaintiffs, I am at this moment at a loss, as I have been throughout the whole of the case, to know, even supposing Mr. *Castle*'s conduct to have been improper in the circumstances here stated, how those circumstances of conduct on Mr. *Castle*'s part, if the connection of fraud cannot be made out between him and Mr. *Mowbray*, are to affect this purchase of Mr. *Mowbray*'s. Mr. *Castle*, by his answer represents not Mr. *Mowbray*, but himself as the land-steward or agent; that Mr. *Hopper* was the man who under him had assisted as such land-steward or agent; that Mr. *Hopper* had a salary for his services, and that he was afterwards dismissed: that upon that occasion he himself called in the assistance of Mr. *Mowbray*, first, for the purpose of making the valuation, and secondly, for the purpose of giving him additional aid in determining what further repairs were

1807.

ANDREWS v. MOWBRAY. (*In Chancery.*)

were necessary, what sort of cultivation should be pursued, what sort of management was going on, and in some instances, what bills were fit to be allowed. This is the same representation that Mr. *Mowbray* makes of his agency: and after examining all the evidence in this case as well as I can, my opinion is that Mr. *Mowbray* did not consider himself as the land-agent or steward in the sense in which he is land-agent or steward in other concerns, but that he did act in a variety of instances as land-agent or steward to this family. I do not think him at liberty to say he was in no sense land-agent or steward, but the question here is whether considering the whole of the acts he did, independent of Mr. *Castle*'s evidence, he was more or less the land-agent or steward than he represents himself in his answer to be. I agree that he was the land-agent or steward for all purposes of raising the question of equity in this cause; but whether he had a written or a verbal appointment, or no appointment at all, are questions which have nothing to do with the case, if it be the principle that a man by interfering in my concerns or my property shall not obtain a knowledge which he shall conceal from me if I am treating with him in a bargain about that property, and the knowledge he has got by his agency is that which I have a right to have the benefit of as well as himself. I have no doubt that whatever Mr. *Mowbray*'s idea might be as to the nature or character of his agency, the circumstance of his actually dealing with the estate as the facts prove he did deal with it, placed him in a situation in which, as the *Master of the Rolls* thought, it did fairly raise the question whether because he was agent his purchase was upon that principle to be cut down.

I shall now look at Mr. *Mowbray*'s situation as bringing forward the discussion of the principle of equity in the strongest way in which you can put it. Let us suppose, first, that he is to all intents and purposes the land-steward or agent;—secondly, let us suppose that he is not only the land-

steward

1807.

ANDREWS v. MOWBRAY. (*In Chancery.*)

steward or agent but the agent in the sale:—thirdly, let us inquire what would be the consequence of establishing the fact that he was the land-agent or steward and agent in the sale, regard being had to the circumstance that this contract was finally a contract made by private sale under the circumstances which have been proved in this case. It would have been very fortunate in the case of trustees, agents, and all other confidential persons, if courts of equity had rendered it less difficult to collect what is the practice of the courts with respect to such subjects, and perhaps it would be infinitely better if the rule had been laid down as broadly as this:—that no trustee or land-agent, no land-steward, no agent for a sale, shall under any circumstances make a purchase: I believe that would have been a more convenient rule for mankind than that which does obtain. I am not aware however that any case has been decided which has gone the length of saying this, that a man who has been the land-steward or land-agent of another, shall not purchase of that other an estate of which he was such agent, dealing fairly and acting honestly: on the contrary, one of the first cases that I remember since I have practised, was that of the steward of a family, where Lord *Northington* opened the biddings, upon the ground not that the steward could not buy, but that he bought the estate under circumstances under which it was not fair he should have purchased. It was the same in *Gartside* v. *Isherwood* (*a*), in which I apprehend Lord *Thurlow* did not mean to say that it was necessary that there should be a great difference of value between the worth of the thing that was sold and the price that was given; he did not mean to lay down that if there had been any concealment or any improper conduct on the part of the steward, he would not cut down the bargain merely because the value was enough, but it was an important consideration for him to know what the value was, in order to ascertain by this means,

(*a*) 1 *Bro. C. C.* 558.

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1807.
ANDREWS
v.
MOWBRAY.
(*In Chancery.*)

among others, whether the steward had acted improperly; for in nine cases out of ten, a steward will know the value of an estate better than his master, and therefore the difference of value may make a great difference in the decision of a court of equity. If therefore Mr. *Mowbray* had been the land-steward or agent in the most extensive sense in which he is contended to have been, if he kept himself out of a situation in which he had any other duties than those which resulted merely from that character, it does appear to me that there is not a precedent in this court to induce me to say that for that reason the sale shall not stand. In the case of *Beaumont* v. *Boultbee* (*a*), where the defendant who was the steward of the plaintiff, made an agreement for a lease, nobody doubted that he was the steward, and Lord *Rosslyn* laid down that though he might take that lease if he stood in the character of land-steward or agent, he was bound to take care that his master in dealing with him and granting that lease, had full knowledge of all the circumstances respecting it, and all the information his duty required him to give him: it seems to me he was then at liberty to purchase.

The next question is whether *Mowbray* was more than a land-steward or agent? and this bill contends that he was more than a land-steward or agent, that he was an agent in the sale. With respect to his being an agent in the sale, one can easily see how much greater injury and much more detriment to the principal may arise from it: and there would be much more mischief from considerations of public utility in permitting a man who is actually the agent in the sale, who is actually employed in the sale, to buy for himself, than in permitting a mere land-steward to buy; and yet I cannot find upon active research any case which has gone the length of deciding, though a good deal has been said upon the principle,

(*a*) 5 *Ves.* 485. 7 *Ves.* 599.

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1807.

ANDREWS v. MOWBRAY. (*In Chancery.*)

what would have been the case of an agent in the sale. It is contended that Mr. *Mowbray* was agent in the sale upon the various grounds mentioned in the bill, and with repect to those that have been proved, if I recollect right, they stand thus :—that he was the agent in the sale because he was referred to as to the particulars, because he permitted himself to be referred to for the knowledge of those particulars, that applications were made to him for information, and that in some instances, for example, with respect to Mr. *Clayton*, he declined to give the information that was asked, but still conducted himself as a person from whom the particulars were to be enquired, and because he was a person who stated that he had papers upon the subject. With respect to his being concerned in the advertisements, of his having intimated to Mr. *Nesfield* that the advertisements should not be inserted in the *London* papers, there is no proof. It is not proved that he had any thing to do with the advertisements, with the conditions, with settling the particulars, or with what Mr. *Cullen* says is called in *Scotland* the upset price : it is proved that he offered to give £11,000, and that he was cognizant of the fact that the estate was not to go under £12,000; but that will not make him an agent in the sale : it is proved that he did attend the sale, but not as is alledged as land-steward or agent, or as agent in the sale ; it is according to the bill represented that he went as such, but according to Mr. *Castle*'s evidence it is not so represented ; he says a conversation passed between them about three weeks before this auction, and afterwards Mr. *Castle* communicated to Mr. *Nesfield* the conversation, in which Mr. *Mowbray* told him that he did not intend to go to the auction, but he says that in consequence of that conversation he has an offer made him to be franked in a chaise, and he goes with him to the auction : at the auction he answers enquiries, and enquiries of a very peculiar sort, for according to Mr. *Clayton*'s evidence, Mr. *Clayton* asked whether there had been any valuation of the wood-lands ; that *Mowbray* gave him a very satisfactory

1807.

ANDREWS v. MOWBRAY. (*In Chancery.*)

factory answer to all his enquiries upon that head, and told him that £960 was the valuation that had been made of the wood-lands, and unless my recollection of the evidence deceives me, he told him who had made that valuation, and at what time it had been made. To that extent therefore he mixes himself in the sale, but in my view of this transaction of the auction, whether Mr. *Mowbray* was or not the agent in the sale at that auction, as that auction did not lead to a contract either between these vendors and Mr. *Mowbray*, or these vendors and any other persons, taking him to be agent at the sale, unless the plaintiffs can make out as they endeavour to do that the auction was a part of a system of management, that it was only one transaction in the course of the fraud which began prior to that transaction; that the auction was managed and carried on as the means of leading to something else;—it does not appear to me that it is enough to make out that he was an agent in this sale by auction, unless they make out also that his agency in this sale by auction is the ground and the circumstance upon which rests and upon which alone rests that contract by private sale which afterwards took place:—for if that contract by private sale cannot be touched on the ground of fraud of which the previous auction is alledged to have formed a part, the question comes to this; that the estate is finally bought by private contract, by a person who is not an agent in the sale, but who had the character of land-agent and land-steward. And how does that stand? according to the representation of Mr. *Castle*, and according to the representation of Mr. *Mowbray*, uncontradicted by any one witness, after the sale by auction there is a treaty entered into with Mr. *Clayton*. Now upon the best examination I can give to the correspondence between Mr. *Castle* and Mr. *Clayton*, it seems to me impossible to infer fairly in a court of justice out of that correspondence, that not only this auction but that correspondence was a scheme to get those estates for Mr. *Mowbray*. It is clear beyond all question, that if it was worth £18,000, and if

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Mr. *Mowbray* had it in contemplation that it was worth £620 a year, that if any body at the auction had bid above £11,000, Mr. *Mowbray* would not have had the estate. It is at least clear, that if it had brought £12,000, which Mr. *Nesfield* intended the estate should go for, Mr. *Mowbray* could not have had the estate, and therefore Mr. *Mowbray* rather than give £12,005 would have lost an estate which he knew to be worth £620 a year; the very circumstance of the communication made to Mr. *Clayton* that he might have the estate considering *Jopling* to have a lease, is some sort of evidence that Mr. *Mowbray* would not have had the estate, and Mr. *Clayton*'s answer is an answer which desires that the issue may no longer be suspended. In the conversation on the subject of Mr. *Mowbray*'s becoming the purchaser of the estate, it is said, that his answer must be given in a week, and allusion is made to the circumstance of his having some other estate in view: Mr. *Richards* says truly, he might have proved that he had some other estate in view, but am I as a judge justified in not believing that to be the fact when it is sworn in the answer and no contradiction is given it? the utmost that could be stated would be that it was a ground of suspicion, but I never will say that that can be a ground of judicial decision. Then according to the evidence, how does the transaction proceed after this? It proceeds thus, if I am to believe the evidence, that it was Mr. *Nesfield* who made the offer to Mr. *Mowbray* to sell the estate for £11,000, and it leads to the liquidation of the supposed demand of *Surtees Jopling*'s lease. A great deal has been said upon that subject, and it is not for me to say how any of these parties have treated the tenant, but I am satisfied that at the time that auction was had, there was not one of them who thought it a right thing to bring it forward at that sale that *Jopling* was to have a lease, and yet I am satisfied that when the bargain was finally concluded some compensation was intended. It appears to me that the result of that bargain was this:—that having

1807.
ANDREWS v. MOWBRAY. (*In Chancery.*)

having at the auction stated that *Jopling* was entitled to it, the parties certainly at some time or other thought he was entitled to some compensation: that when Mr. *Mowbray* and Mr. *Nesfield* finally closed upon this, a larger price was given with respect to this lease than Mr. *Mowbray* originally intended to give, and that Mr. *Nesfield* took upon himself to make good to Mr. *Mowbray* the covenant contained in these articles of agreement, that it should be lawful for him effectually to give notice that the tenant should quit at the next *May-day*. That being so, Mr. *Nesfield* on the other hand probably meant no more than this, that it being a questionable matter whether under all the circumstances that had taken place *Surtees Jopling* could or not enforce the agreement for the lease, the discussion and decision of that question with *Surtees Jopling* he would take upon himself, but in case the decision was adverse to Mr. *Mowbray*, he was to have possession at *May-day*, and *Nesfield* would give it effect by that covenant, binding himself to indemnify Mr. *Mowbray*; that is the result of that transaction. This agreement being entered into, they proceed partly to execute it by the payment of a sum of money at different times, and lastly by the execution of the deed. But then it is said, here is such a monstrous rise in these rents from £340 to £620 a year, that of itself, or at least connected with other circumstances of the case is a ground upon which the court would proceed. Now that this circumstance is of itself a ground, if all other matters were clear, I cannot persuade myself. In the first place, if Mr. *Castle*'s evidence be true, this was represented as an improveable estate, it was so represented to Mr. *Clayton*, it was an estate incapable of any improvement but by the expenditure of money, and as far as one can collect the probability of the question of expenditure, it went to four or five year's rent. If that was so, the substance of the thing is this, not that the man pays £11,000 only, but that he pays £11,000 and the rents for

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1807.

ANDREWS v. MOWBRAY. (*In Chancery.*)

so many years to come to get possession of the estate at the end of those years. If there is any truth in the case on the part of the defendant, it is this: that the estate was bought with the view to improve it by the expenditure of money upon it. Then it is said he might have proved that he bought it with an intention to pursue that course, and the leases might have been produced to shew that that course had been pursued. But it is proper to shew that if the leases had been produced, they would not have proved any such fact; because according to Mr. *Mowbray's* answer, notwithstanding the rents were raised, and though the expenditure was made, there was no obligation to allow that expenditure: but it will not turn upon that, but whether the agreement was partly executed and what has stopped the farther execution of it. It is not at all unlikely that this suit should stop the further execution of it: with respect to the expenditure actually made of £1660, *Adamson* goes to that extent, and if you are to add to that, the probable expenditure that might be further incurred, it does seem to me when you recollect that there was no person who viewed this estate but thought that £10,000 was too much to set it up at, that £10,670 was the worth of it, and when you recollect that £11,150 was paid, and that the further expences were to be added as part of the consideration money, I cannot think that the circumstance of the rise of the rents which *Adamson* says ought to be a third, according to the expenditure, is a circumstance sufficient to authorize this court to cut down the transaction. I do agree if it could be made out that Mr. *Mowbray* foreseeing and knowing that he could raise the rents to this particular height, had purchased the estate without meaning to lay out considerable sums, and without meaning to purchase in a rational sense that increase of rent, and that he had concealed that knowledge from his employers, that might have made a mighty difference in the case; and I do agree, that if all the other circumstances in the case were proved as stated in this bill, being connected with the rise of the rents, that

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1807.
ANDREWS v. MOWBRAY. (*In Chancery.*)

connection would have had a very material and important effect upon the judicial decision of this case: but I do not see that from those circumstances alledged, there is sufficient to shew that Mr. *Mowbray* has been systematically acting in fraud with regard to this property. I may also add, that Mr. *Mowbray* was not agent at the time of the final sale.

With respect to the question whether Mr. *Nesfield* is to be considered in any point of view as the agent of the other plaintiffs, I have looked through the record to see what I can make of it, and I do not see that there is any circumstance that would entitle them to relief that would not also entitle Mr. *Nesfield:* that being my opinion upon the whole, I think this decree must be affirmed (*a*).

(*a*) The notes of the foregoing judgments were communicated by one of the gentlemen professionally engaged in the cause.

DAVIES *v.* DODD.

EXCHEQUER CHAMBER.
June 12, 1817.
Before the Lord Chief Baron alone.

A court of equity will decree the payment of a lost bill of exchange on a sufficient indemnity being given, though there may be a remedy at law by action on the bill.

To a suit by the indorsee against the acceptor of a lost bill, accepted for the accommodation of the drawer and without consideration, the drawer need not be a party.

THE bill filed in *Easter Term* 1813, prayed that the defendant might be decreed to pay to the plaintiff £96. 9*s.* the amount of a bill of exchange dated 4th *March* 1812, drawn by one *Allen* on and accepted by the defendant, payable two months after date to the order of *Allen*, and indorsed by him to the plaintiff for a valuable consideration, the plaintiff offering to execute and deliver to the defendant a proper indemnity against any demand which might be made on the defendant in respect of the said bill of exchange. It appeared in evidence that after the bill in question had been indorsed to the plaintiff, it was lost by his agent, and that although it had been frequently advertised in several news-

papers,

papers, and a reward offered for its recovery, it had never afterwards been heard of. It also appeared that the defendant received no consideration for his acceptance, but that he accepted the bill merely for the accommodation of *Allen*. The plaintiff charged that he had offered the defendant a proper indemnity, but the defendant denied by his answer that any other indemnity had been proposed than the bond of the plaintiff which the defendant had declined accepting, as the plaintiff was in insolvent circumstances.

1817.
DAVIES v. DODD.

On the cause being opened, it was objected by *Trollope* for the defendant, that *Allen* the drawer ought to have been a party, in order to prevent multiplicity of suits, as the defendant in the event of this case being decided against him would have a remedy over against *Allen*, the defendant having accepted the bill for *Allen*'s accommodation and without receiving value for it. To which it was answered by *Martin* for the plaintiff, that *Allen* was not a necessary party; that the plaintiff could have prayed no relief nor obtained any decree against him; that the court could have made no decree between *Dodd* and *Allen* if the latter had been made a defendant: besides, the defendant has shewn that he does not think *Allen* interested, for he has examined him as a witness. And the *Chief Baron* was clearly of opinion that *Allen* was not a necessary party.

Martin and *Parker* for the plaintiff, contended, that the loss of the bill being proved, this was clearly such a case of accident as entitled the plaintiff to the assistance of a court of equity.

Trollope for the defendant.—In this case the plaintiff's remedy is at law, for on the same evidence which he has produced in this cause an action at law might have been maintained, and for this he cited *Long* v. *Bailie* (*a*). By the

(*a*) 2 *Campb.* 214.

laches

1817.
DAVIES
v.
DODD.

laches of the plaintiff in not applying sooner for payment, the defendant has been deprived of his remedy over against *Allen*, who is now in insolvent circumstances. But supposing the defendant to be liable at all in equity, he could only be so on the plaintiff's giving him an effectual indemnity against any future demand on the bill, which the plaintiff has never yet offered to do, the only indemnity proposed being the bond of the plaintiff himself which is not sufficient. The plaintiff therefore has shewn no grounds entitling him to the assistance of a court of equity.

RICHARDS Ch. B. It does not become me to decide the question whether the plaintiff has or has not any remedy at law, but I am satisfied that he has a remedy here, and if he had proceeded at law, I am of opinion that he might have been restrained, because a court of law cannot compel him to give security. In cases of lost bonds the parties have always come into equity for an indemnity, and therefore even if there be a remedy at law, this suit is proper, and I do not think any laches has been shewn which can prevent the plaintiff from succeeding. No blame however is imputable to the defendant for not paying the amount of the bill, for he is clearly not bound to accept whatever security the plaintiff might offer. The question now is whether the security the plaintiff offered was such as the defendant ought to have accepted, which question must be referred to the deputy remembrancer, and it must also be referred to him to settle a proper security, reserving further directions and costs (*a*).

(*a*) There is a distinction as to the remedy at law between the *loss* and the *destruction* of a bill, for in *Pierson* v. *Hutchinson*, 2 *Campb.* 211. Lord *Ellenborough* non-suited the plaintiffs who were indorsees of a bill, although they offered evidence of the loss, but his lordship said, that if the bill were proved to be *destroyed*, he would receive evidence of its contents and direct a verdict for the plaintiff. On the subject of lost bills another distinction prevails at law between cases where the bill has been indorsed in blank, and those where it has been indorsed specially: in the former the plaintiff cannot recover: see 6 *Ves.* 812: in the latter he may, *Long* v. *Bailie*, 2 *Campb.* 214.

As to the jurisdiction of the courts of equity in these cases, see *Walmesley* v. *Child*, 1 *Ves.* 341. *Toulmin* v. *Price*, 5 *Ves.* 235. *Ex parte Greenway*, 6 *Ves.* 812. Mr. *Fonblanque's* note to Treat. of Eq. vol. 1. page 15, and Mr. *Maddock's* Treatise on the Principles and Practice of the Court of Chancery, vol. 1. page 22.

GILLIBRAND

GILLIBRAND *v.* SCOTSON.

EXCHEQUER CHAMBER.

June 12, 13, 23, 1817.

Before the Lord Chief Baron alone.

A defendant in his answer to a bill for the tithes of his farm called *A. H. F.* stated that the farm is parcel of the *demesne lands of a mansion called A. H. which demesne lands are usually called A. H. D. and comprise 219 acres, 3 roods and 36 perches;* that 40*s.* a year was immemorially payable to the rector by the proprietor of the *said mansion-house and demesne lands* in lieu of all the tithes arising on *the whole of the said demesne lands*, and the defendant examined a witness who described *A. H. F.* by its abuttals: held that this modus was ill laid, for want of a sufficient description of the lands called *A. H. D.*

THE bill stated, that by act of parliament 33 *Geo.* 3. it was enacted that the township of *Chorley* in *Lancashire* should be separated from the parish of *Croston*, and become a distinct parish, and that the great and small tithes of the township of *Chorley* should be annexed to the parish church of *Chorley*, and be paid to the rector thereof. The bill then stated a lease from the rector of *Chorley* to the plaintiff, of all the tithes arising within the parish; and after stating that the defendant occupied a farm called *Astley Hall Farm*, containing 120 acres, situate within the parish, prayed an account and payment of the tithes of corn taken from the said farm.

The defendant by his answer admitted the occupation, but insisted that the plaintiff was not entitled to the tithes of any of the titheable matters which grew on the farm whilst the same was in the defendant's occupation, or to any satisfaction for the same, save such modus or customary payment as after mentioned, "for this defendant saith that the said farm is parcel of the demesne lands of a certain mansion-house called *Astley Hall*, situate in the said parish of *Chorley*, and which said demesne lands are usually called *Astley Hall Demesne*, and comprise altogether about 219 acres, 3 roods, and 36 perches, and he believes and insists that from time whereof the memory of man is not to the contrary, a certain modus of 40*s.* a year hath been payable to the rector of the parish of *Croston* (of which the parish and township of *Chorley* formed part until divided therefrom by the act of parliament in the bill mentioned) and now is payable yearly and every year at *Easter*

1817.

GILLIBRAND v. SCOTSON.

or as soon after as demanded, by the proprietor of the said mansion-house and demesne lands, for and in lieu and full satisfaction and discharge of all the tithes yearly arising upon the whole of the said demesne lands, and such modus or customary payment hath been constantly and regularly paid as the defendant verily believes from time immemorial down to *Easter* 1812, inclusively, by the proprietors for the time being of the said mansion-house and demesne lands, to the rectors of the said parish of *Croston*, or to some persons lawfully authorised by the said rectors to receive the same, and hath been by them received, taken, and accepted as a modus from time immemorial for and in lieu and in full satisfaction of the tithes of all titheable matters yearly arising upon the said lands: and this defendant humbly insists upon such modus, and craves that he may have the benefit thereof in like manner as if he had pleaded the same in bar to the relief sought by the bill."

Martin and *Roupell* for the plaintiff, contended that this modus was ill laid. The term "demesne lands" does not occur in legal proceedings otherwise than as applied either to the demesnes of the crown, or of a manor. There is no averment in this case that the demesnes have been always known, or that there has been from time immemorial such a mansion, but a modus for a house cannot be supported without averring the house to have existed from time immemorial. This modus is laid as payable not by the occupier but by the proprietor, who may not reside in the parish. It should have been laid as payable in respect of an ancient farm with certain abuttals, immemorially known as such. This certainty has been always required in order that the rector may know where to apply for his modus. The only case in which it has been dispensed with is that of an orchard, but that is an exception to the general rule, and it is clear from *Scott* v. *Allgood* (*a*),

(*a*) 4 *Gwill.* 1369.

and

and other cases, that a modus for a farm must be distinctly pleaded.

Dauncey and *Blake* for the defendant, denied that the modus was incorrectly laid, the lands to be covered by the modus being sufficiently designated by a general name, and by their quantity. Abuttals are only necessary when the lands have not a known name, if they have, it is sufficient to describe them by that name, which is done in this case. The case of the orchard is in point for the defendant. The demesnes of *Astley Hall* will be proved to be well known, and it is no objection that a part only of those demesnes is in the defendant's possession, for the modus covers the whole. As to the modus being laid as payable by the proprietor, it is more favourable for the rector, for the proprietor is in that case answerable for all the persons who may be occupiers. The same objection was made to the modus in *Ord* v. *Clark* (*a*), but was over-ruled by the court. With regard to the certainty required in stating a modus, there is a distinction between a bill and an answer, for in a bill the plaintiff comes in opposition to the common law right of the rector, and is therefore held to greater strictness than in an answer where the defendant comes in opposition to the rector's claim of the extraordinary assistance of a court of equity. This distinction is noticed in *Scott* v. *Allgood* (*b*). And in *Mallock* v. *Browse* (*c*), Sir *Thomas Clarke* said, that if it appears that a pecuniary payment was made for any sort of tithe, the court would help the imperfection in the manner of setting out the modus, and put a sense upon the words. In *Vyse* v. *Duntze* (*d*), it was considered clear that if the number of acres was set out, the modus would be well laid, and the principle of that case is applicable to the present. In *Ord* v. *Clark* a modus was claimed in respect of divers

(*a*) 3 *Anstr.* 638. 4 *Gwill.* 1437. 2 *Anstr.* 397. 4 *Gwill.* 1412.
(*b*) 4 *Gwill.* 1369. And see also as to the distinction here alluded to, *Atkyns* v. *Lord Willoughby de Broke*,
(*c*) *Ambl.* 423. 3 *Gwill.* 905.
(*d*) 3 *Gwill.* 1124.

1817.
GILLIBRAND v. SCOTSON.

pieces of land consisting of about 61 acres, parcel of an ancient estate called *R.* estate, consisting of 1500 acres, covered by the modus, and it was objected that the lands ought to have been set out by metes and bounds, but the court thought the description sufficiently certain. These cases shew the propriety of the manner in which the present modus is laid. And in *Atkins* v. *Hatton* (*a*), one of the defendants, after stating that *Thomas Burgoyne* had been seised of one capital mansion-house, and a specified number of gardens, orchards, acres of meadow and pasture, alledged that *Burgoyne* and all those whose estate he had in the said messuage, &c. had immemorially paid a modus, and an issue was directed to try the validity of the modus although in that case the lands to be covered by it are not described either by name or by metes and bounds.

In consequence of an intimation by the court that the evidence might be material to the question whether the lands were sufficiently described, the defendant's evidence was read, and was in substance as follows:—

Henry Latham deposed that he had known the lands called *Astley Hall Farm* upwards of sixty years: that they were the same occupied by the defendant, and the witness believed the farm had during the whole of that time consisted of the same fields as at present, except one allotment of common which was added about 40 years ago, and since that time had been usually occupied with *Astley Hall Farm*; that he never knew that any tithes in kind or composition or satisfaction for the same were paid for *Astley Hall Farm*, and had always understood that the whole farm was tithe free except *Heald Close*. *Ann Clarkson*, aged 83, deposed, that there had been no addition to or diminution from *Astley Hall Farm* in her recollection, but that she

(*a*) 4 *Wood* 412, 415.

had

had heard that there was one field put to the farm; that she had always heard that the whole of *Astley Hall Farm* except the field so put to it, was tithe free, and did not know that any composition for tithes had ever been paid to the rector of *Chorley*. *Richard Gerrard* deposed that he was the occupier of *Astley Hall Farm* 25 years ago; that it consisted of about 120 acres, *and the witness described its boundaries*; that there is also a close at *Hartwood Green* which was added when the common was taken in, 47 or 48 years ago, which close was sold or exchanged; that there is also one field belonging to the estate, called *Heald Meadow*, on the border of the estate; that except those alterations, the *Astley Hall* estate has always consisted of the same particulars and has been always bounded in the same manner; that no tithe or composition had been paid or demanded for *Astley Hall Farm* whilst the witness occupied it, except the said modus, and tithes in kind for *Heald Meadow* and the new inclosure, which were considered titheable but were never ploughed during the deponent's tenancy; that he purposely avoided ploughing *Heald Meadow* and the inclosure, that he should not have to pay tithe for them; that a year or two before he came to the farm, *Heald Meadow* was let to one *Piper* who ploughed and paid tithes for it. *Edmund Kellet* deposed in substance to the same effect. Evidence was also adduced to shew that the 40*s*. a year had been received as a modus for 70 years, but as the determination proceeded on the manner in which the lands were described, it is unnecessary to state that evidence or the discussion respecting it.

Blake for the defendant, observed that even if the description in the answer was insufficient, it was supplied by the evidence, as the witness *Gerrard* distinctly described the boundaries of the farm.

Martin in reply. If the modus is laid loosely, it is not helped by proof: for it is not proved that there has been immemorially

1817.

GILLIBRAND v. SCOTSON.

immemorially such an estate as *Astley Hall Demesne*, and one particular payment made for the tithes of that estate. The witness *Latham* speaks only of *Astley Hall Farm*, and he mentions an allotment made about 40 years ago. On that shewing the defence is destroyed, for it appears that the 120 acres in the defendant's occupation are certainly not part of *Astley Hall Demesne*. If the farm has been added to, it does not consist of the same lands. The evidence is entirely silent as to *Astley Hall Demesne*. If *Astley Hall Demesne* had existed before the time of legal memory, the witnesses would have known that *Astley Hall Farm* was part of it, and if the 40*s*. a year had covered the whole, they would have so described it. On the contrary, they thought it was tithe free except *Heald Close*. When a party claims an exemption for particular lands in his occupation, and shews that they have not immemorially consisted of the same lands, he must fail. Here the defendant says he occupies *Astley Hall Farm* containing 120 acres, but the witnesses prove that it consists of that including *Heald Meadow* and the allotment; he therefore fails, because he attempts to add lands not covered by the exemption. Whenever the modus is mentioned by the witnesses it is said to be in lieu of the tithes of the *farm*. Is this an answer to be given to the rector's common law right? This is a modus for a district which must have borne the same name and been of the same quantity; to shew a money payment for a part does not support the case. It appears that a part is liable to tithes when ploughed. No witness states in the terms of the answer that there is a district called *Astley Hall Demesne*, in respect of which a modus has invariably been paid. On the contrary, the result is, that there is a payment for *Astley Hall Farm*, and that *Astley Hall Farm* has not consisted of what it does at present. If therefore the modus be well pleaded, it is not well proved. There is no case in which on a money payment being shewn for a district of land different from that on the record, the court has directed an issue. A party claiming

claiming an exemption must prove it as he lays it. It is laid as paid by the *owner* of *Astley Hall Demesne*, but some of the witnesses say it is payable by the *occupier* of *Astley Hall Farm*, and none of them say what quantity is covered by the modus, so that in another suit the party might be let in to prove that another hundred acres, of which the plaintiff knows nothing, are covered by the same modus. The defendant has taken on him the affirmative, and he is bound to shew, 1st. that there is a district of this description; 2dly, that it has invariably been so known and considered, and 3dly, what are the lands to be covered by the modus.

1817.
GILLIBRAND v. SCOTSON.

RICHARDS Ch. B. after taking time to consider, declared his opinion that the lands to be covered by the modus were not sufficiently described. His lordship observed, that if the modus had applied to *Astley Hall Farm* only, the description would have been sufficient, but that it would have been insufficient if this had been a suit for the tithes of the larger portion called *Astley Hall Demesne*, for there must be something distinctly pointing out to the clergyman where he is to get his payment: that in this case it was not sufficiently pointed out, and the defence being therefore not complete, there must be a decree for an account of the tithes, but without costs.

June 23.

ARMSTRONG *v.* HEWITT.

EXCHEQUER CHAMBER.

June 17, 18, 1817.

Before the Lord Chief Baron alone.

THIS was a bill by the plaintiffs as lessees of the vicar of *Stanwix* in *Cumberland*, against the defendants *Armstrong* and *Bishoprigg*, occupiers of parts of certain large tracts of land called *Cringle-Dyke* and *Burnt*

Where a vicar had no endowment, but was stated in the ecclesiastical survey and in several terriers to be entitled to the tithe hay of the parish, and proved a perception of such tithe in the parish generally, and also in the district where the defendant's lands were situate, but it was proved that no tithe hay of those particular lands had ever been paid to any vicar, and that former vicars had declared that they were not entitled to them: the court refused to decree an account, but directed an issue.

Hill,

1817.
ARMSTRONG v. HEWITT.

Hill, within the parish, for the tithes of hay; alledging that the vicar by some ancient endowment, or by prescription or immemorial usage, was entitled to all the vicarial tithes, including those of hay, within the parish, and in particular to those arising within the tracts before mentioned.

The defendants by their answer denied the right of the vicar, and stated that the parish of *Stanwix* is a rectory impropriate and also a vicarage, and is divided into nine districts: —*Stanwix, Richardby, Linstock, Cargo, Stenton, Tarraby, Houghton, Etterby,* and *Cringle-Dyke;* that the bishop of *Carlisle* is owner of the advowson of the vicarage, and as such is also owner of the corn tithes of the districts of *Stanwix, Richardby* and *Linstock;* that the dean and chapter of *Carlisle* are owners of the corn tithes of the districts of *Cargo, Stenton, Tarraby* and *Houghton,* but that the vicar as such is entitled to the tithes of corn in the district called *Etterby,* and as such he is also entitled to certain ancient moduses or prescriptive payments in lieu of the tithe of hay arising within the districts of *Etterby* and *Stenton,* and a small part of the district of *Houghton,* and also entitled to tithe hay in kind for lands within the districts of *Stanwix, Linstock, Tarraby* and *Cargo,* except as to three estates situate within the districts of *Tarraby* and *Linstock,* and except several other lesser estates in the districts of *Stanwix, Linstock, Tarraby* and *Cargo,* which are held by divers persons in fee-simple; but that with respect to the remaining district of *Cringle-Dyke,* the same consists of the two farms occupied by the defendants, and of three other estates comprising in the whole 260 acres or thereabouts. The answer then stated that *Henry Aglionby,* Esq. deceased, was prior to the year 1806, entitled in fee-simple to all the tithes of corn or prescriptive payments in lieu of the tithes issuing out of the lands within *Cringle-Dyke,* and amongst others, out of the lands in the occupation of the defendants, and that Mr. *Aglionby* and his ancestors were so seised or entitled and

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in the actual perception of such last-mentioned tithes, or of such prescriptions, for an uninterrupted period of 200 years or thereabouts; that on his death they descended to his son *Christopher Aglionby*, Esq. who died soon after his father, whereupon his real estates (including the tithes within *Cringle-Dyke*) descended to his four sisters as his co-heirs at law, who made a partition of his real estates, and on such partition all tithes of corn or prescriptive payments in lieu of tithes issuing and payable out of the aforesaid lands in *Cringle-Dyke*, including the estates in the occupation of the defendants, were allotted to *Ann*, the wife of *Samuel Bateman*, one of the four co-heirs: and that by lease and release dated 13th and 14th *March*, 1806, Mr. and Mrs. *Bateman* and the trustee in their marriage settlement, conveyed all the tithes of corn, or prescriptive payments in lieu of tithes out of the aforesaid lands at *Cringle-Dyke*, to *Richard Ferguson* in fee, in trust for himself and the defendant *Hewitt* in fee: that *Ferguson* afterwards duly conveyed to the defendant *Hewitt* the tithes of corn and grain issuing out of the lands now in the defendant *Hewitt*'s occupation; and that *Ferguson* died, having by his will devised the tithes arising from the lands in the defendant *Bishoprigg*'s occupation, to *Robert Ferguson* in fee, who hath ever since been in the enjoyment of the tithes so devised to him.

The answer further stated, that neither the defendants nor any former owners nor occupiers of the lands in their occupations, had ever, to the defendant's belief, made any payment to the present or any former vicar of *Stanwix*, in respect of the tithes of grass or hay produced upon the lands occupied by the defendants or either of them, and that the defendants believed that no tithes of grass or hay arising upon the lands occupied by them or either of them, or upon any other lands within the district of *Cringle-Dyke*, had been within the memory of man received by any vicar of the parish, or any persons claiming under him: and that no payment in respect of the

1817.

ARMSTRONG v. HEWITT.

the tithes of hay or grass arising from any lands within the district, particularly those in the occupation of the defendants, had ever been paid to the plaintiff or to any former vicar of the parish, or any persons claiming under any vicar within the memory of man: and that if any payment ever accrued due in respect of the hay or grass tithes, the same or some prescriptive payments in lieu of such tithes became due not to the vicar, but to such persons as were for the time being entitled to the tithes of corn within the district of *Cringle-Dyke*; and the defendants submitted, that even if it should appear that any former vicar either by endowment or otherwise became entitled to the tithe of hay within that district, yet under the circumstances before stated it ought to be presumed that such right was sometime ago released or given up for some valuable consideration, and does not now exist. The answer further stated the defendants' belief, that in the year 1760, *Richard Ferguson* deceased, father of the first-mentioned *Richard Ferguson*, was seised of the farm occupied by the defendant *Bishoprigg*, consisting of 80 acres of arable land, and during many years kept it in his own possession, and during some of those years the lands were sown with corn, and the tithe of such corn was taken by *Henry Aglionby* or some payment made to him in lieu thereof, but that in the year 1771 *Ferguson* caused the whole of the land (excepting one small field consisting of five acres) to be sown with grass, and that during the year 1771, and for many years subsequent thereto large quantities of grass were grown upon the land and made into hay by the order of *Richard Ferguson* the father, and that he so laid down such parts to grass and mowed the same for the express purpose of depriving the said *Henry Aglionby* of his tithes of corn, and that no tithe was ever paid by *Richard Ferguson* the father to or for the use of any vicar of *Stanwix* in respect of such tithes of hay, nor was any thing demanded in lieu of such tithes, notwithstanding it was notorious to the vicar that *Ferguson* had caused the lands to be converted into grass lands, and had made divers quantities of such grass into hay.

The

1817.

ARMSTRONG v. HEWITT.

The plaintiffs did not produce any endowment, but the ecclesiastical survey 26 *Hen.* 8. stated the vicar to be entitled to the tithes of hay of the parish: and several of the vicar's books of receipts were given in evidence, containing entries of payments of the tithes of hay, and of compositions for such tithes, some for *Cargo* (in which district some of the witnesses stated the lands occupied by the defendants to be situate, though others represented them as forming of themselves a separate district called *Cringle-Dyke*) and others for the tithes of hay of all the parish, but none of them particularizing the lands occupied by the defendants. These entries commenced in 1705, and were continued to the year 1794, there being sometimes an interval of two or three years without any such entries. The plaintiffs also produced in evidence several terriers dated in 1707, 1730, 1749 and 1770, found in the church chest, stating that tithe hay was paid in kind to the vicar, except as to certain persons whose lands were exempted by prescriptive payments specified in the terriers, and which were not contended to be the lands in question in the suit.

It was proved by several witnesses that the vicar received the tithes of hay in the parish generally, and in the district of *Cargo*, but that neither he nor any of his lessees had ever received any such tithes for the lands occupied by either of the defendants; on the contrary there was the evidence of persons who had farmed the tithes of hay of the parish under several former vicars, that the witnesses had never taken or demanded tithes of hay of the lands in question because they did not consider themselves entitled to them: and that the Reverend Mr. *Farrer*, the last vicar, had informed his lessees that the vicar was not entitled to tithes of hay for the lands of *Cringle-Dyke* and *Burnt Hill*. There was also the evidence of one witness that compositions had been paid for these lands to the *Aglionby* family, which covered both the tithes of corn and of hay. For the purpose of accounting for the non-perception of the tithes of hay within the defendants' lands, it was attempted on the part of the plaintiffs, to shew

1817.

ARMSTRONG v. HEWITT.

shew that until a very recent period, the hay grown on the lands occupied by the defendants was so inconsiderable that the tithes were not worth collecting, but on this subject the evidence was contradictory, some of the witnesses stating that the lands were not productive of hay, that the produce was of trifling value, and that the tithe would not have been worth collecting: others, on the contrary, and among them persons who had occupied the defendants' lands many years, stating that the lands produced good crops of hay, and the tithes would have been of considerable value and well worth collecting.

Martin and *Barber* for the plaintiffs, contended that the plaintiffs having shewn something evidencing the existence of an endowment, had imposed on the defendants the necessity of proving either a title to the tithes of hay, or an exemption from payment of that description of tithes. The plaintiffs have produced the ecclesiastical survey, and have corroborated that document by the vicar's books, thus clearly shewing that the vicar is entitled to the tithes of hay in kind except from persons resident in particular places. At the time of the ecclesiastical survey the reputation of the parish was that the vicar was entitled to the tithes of hay, and it is an important fact that it does not appear that the tithes of hay are rendered to any other person. It is shewn that the reputation continued to prevail in and from 1707, for in the terriers the same general right is adverted to and the same exceptions particularized. The plaintiffs have shewn that in 1705 and the following years, the vicar received payments for the tithe of hay, and the ecclesiastical survey shews that he was entitled to it. The plaintiffs have therefore shewn enough to call upon the defendants to prove an exemption, for an endowed vicar is in the same situation as a rector. The case of the defendants is, that *Aglionby* had the tithes of corn, and the defendants claiming under him are therefore entitled to the tithes of hay. But *Aglionby* was not rector, he had a particular portion of tithe, and has conveyed to the defendants,

1817.

ARMSTRONG v. HEWITT.

dants. In order to discharge the lands from tithes of hay, there must be either an exemption, or a title. In this case no exemption is insisted on, and as to the title, *Aglionby* had only the tithes of corn, how therefore can the defendants, who claim under him, be entitled to those of hay? It may be admitted, that if the defendants had shewn that *Aglionby* was entitled to the tithe of hay, it might have passed to the defendants, but the evidence does not prove *Aglionby* to have had the tithes of hay, for the payments made to him were of corn tithes, and the title on the record is to the tithes of corn, which the court is told is a good resistance to a claim of the tithes of hay. The ecclesiastical survey is evidence of the vicar's right at the time when it was made, and throws on the person resisting it as strong a case as if an endowment was produced.

Dauncey and *Phillimore*, *contrà*, insisted that on a bill by a vicar the plaintiff must make out his title, and cannot call on the defendant to shew either title or exemption. In the present case it is clear that the vicar has never received tithes of hay from *Cringle-Dyke* or *Burnt-Hill* farms, for there is no evidence whatever which points out either of them. It is indeed attempted to be shewn that these lands produced no titheable matter worth collecting, and that they were covered with whins or furze, but this is contradicted by other evidence. The vicars have let their tithes with an express declaration that they had no right to tithe hay. The ecclesiastical survey does not support the plaintiffs' case, for it represents the vicar to be entitled to the hay tithes of the whole parish, but it appears by the terriers, part of their own documentary evidence, that there are in several instances compositions for these tithes.

RICHARDS Ch. B. A vicar is undoubtedly bound to shew his title, for the common law gives him none, and the plaintiffs in this case being lessees of the vicar, must stand in the same situation as the vicar himself. The plaintiffs have no endowment to produce, and we must collect from other evidence

1817.
ARMSTRONG v. HEWITT.

dence whether there ever was such endowment. The first evidence is the ecclesiastical survey in 26 *Hen.* 8. which shews that it appeared to the compilers of that document, that the vicar had the tithes of hay. But it is well known that the ecclesiastical survey is not of equal validity with an endowment. The next evidence consists of the vicar's books, from which at one time I had received an impression that they sufficiently shewed the vicar's title, and that they might warrant me in deciding for the plaintiffs, but we must look at the evidence on the other side, and the misfortune is, that in a court of equity every witness whose depositions appear on paper, is entitled to equal credit, and I have no means as a jury has of weighing the credibility of one witness against that of another. The defendants say, not that they themselves are entitled, but that the plaintiffs are not entitled. On the evidence I say the vicar is entitled generally. The vicar's books are strong evidence, and beyond doubt support the ecclesiastical survey, but they do not shew that the vicar is entitled in every acre of the parish. It is admitted that the vicar never received tithes of the lands in question, but to meet the inference from this non-perception, the plaintiffs have endeavoured to prove that no hay had been produced on these estates, but they have failed in proving it. [His lordship here stated and commented on the evidence given on this point, and also that relative to the declarations of the vicar as to his not being entitled.] Several witnesses concur in saying there was little hay, but no witness says there was none. One witness, *Mitchinson,* says he occupied *Burnt Hill,* and never paid tithe to any one, but there were tithes paid to the vicar in other parts of the parish. All this evidence, though it assists the ecclesiastical survey generally, does not carry it through the whole parish, as it has been of necessity pressed for the plaintiffs. One of the witnesses who was lessee of several vicars, says, he never had or demanded tithes of hay of these lands, because the vicar told him that none were due. What am I to say to this? Here is a lessee of all the vicar's

1817.

ARMSTRONG v. HEWITT.

vicar's tithes who does not claim the tithes of hay arising from these lands, because the vicar told him he was not entitled to them: here is not only an actual non-perception, but an intentional non-perception by a person whose interest it was to take the tithes in question. Another lessee speaks to the same effect, and it is not said by either of them to have been because there were no titheable matters, but because the vicar was not entitled. Another witness says it was paid to the *Aglionby* family, which shews it was not paid to the vicar. The conclusion from the whole is, that the vicar is entitled to tithe hay in a considerable part of the parish, but the question is, whether the evidence is not such as to induce me not to decide in his favour in this stage of the cause, as to the lands in question. I have evidence that no tithe hay has ever been paid to the vicar for these lands, and that the vicars have directed their lessees not to take tithe hay of these lands because they were not entitled to it. Under these circumstances I am bound to pay equal attention to the evidence on both sides, and am therefore under the necessity of sending the question to be tried by a jury.

RUMNEY *v.* BEALE.

EXCHEQUER CHAMBER.

June 18, 1817.

Before the Lord Chief Baron alone.

Where there are several defendants, some of whom do not appear when the cause is called, it cannot be heard unless the plaintiff will dismiss the bill as against them: and the defendants who appear are entitled to the costs of the day.

ON this cause being called, *Dauncey* and *Wilbraham* appeared for the plaintiff, and *Shadwell* for two of the defendants, but there were two other defendants who did not appear.

RICHARDS Ch. B. said, that he could not proceed to hear the cause without all the defendants appearing, unless the plaintiff was prepared to dismiss his bill against the two defendants who did not appear, for that otherwise the court might be called on to hear the cause again as to those defendants. His lordship therefore directed the cause to stand over till the next term, and that the defendants who had appeared should have the costs of the day.

LEONARD

EXCHEQUER CHAMBER.

June 18, 23, 1817.

Before the Lord Chief Baron alone.

The abstract of an endowment of the vicarage of *N.* in the diocese of *L.*, contained in an ancient book in the registry of that diocese called Bishop *Wells*'s collection, was received as evidence in a suit by the vicar for small tithes, though the book was without date, and it did not appear by whom or for what purpose it was compiled.

LEONARD *v.* FRANKLIN.

IN this case, which was a bill by the vicar of *Newbottle* in *Lincolnshire*, for small tithes, the plaintiff offered as evidence of the endowment of the vicarage, an ancient book brought from the registry of the diocese of *Lincoln:* the book was without date, but appeared to be of very high antiquity, and was supposed to have been compiled by *Hugo Wells*, who was bishop of *Lincoln* from about the year 1209 to the year 1234: it contained a collection of ordinations, institutions, and other ecclesiastical matters, and among others, an abstract of an endowment of the vicarage of *Newbottle*.

Martin and *Temple* for the defendant, objected that this book was not receivable in evidence, and on its being stated by *Dauncey* and *Hall* for the plaintiff that there were cases in which it had been received, the *Lord Chief Baron* permitted the cause to stand over that those cases might be produced: on a subsequent day the plaintiff's counsel referred his lordship to the decrees of this court in *Halse* v. *Eyston* (*a*), *Hebden* v. *Freeman* (*b*), and *Harman* v. —— (*c*), in all which the same book had been received, and *Dauncey* mentioned a case on the *Oxford* circuit where it had been received at *nisi prius*.

Martin and *Temple* for the defendant, contended that the book was inadmissible, as it did not contain any instrument purporting to be an endowment or even a copy of an endowment, but was merely a compilation of notes without any thing to shew either the time at which, or the person by whom it was made. It is not an episcopal act, it might be

(*a*) In 1809. (*b*) *Nov.* 22, 1810. (*c*) *Nov.* 26, 1810.

compiled

compiled by an individual, and lodged as a matter of curiosity: and it does not seem confined to the diocese of *Lincoln*, but appears to be a history of ecclesiastical matters generally; it comes indeed from the proper custody, but it wants every other requisite for authenticity. It does not appear that in any of the cases which have been produced the attention of the court has been called to this document.

RICHARDS Ch. B. observed, that he felt all the weight of the arguments urged against the admissibility of the book, but seeing that it had been received in this and other courts, he was under the necessity of yielding to the authorities: whereupon the book was received in evidence, and the plaintiff had a decree for an account with costs.

JACKSON *v.* RADFORD.

EXCHEQUER CHAMBER.

June 19, 1817.

Before the Lord Chief Baron alone.

Where a bill by the executors of a creditor against executors and devisees of a debtor prayed the specific performance of an agreement by the defendants' testator, for a mortgage of part of his real estate for securing the debt, and also prayed the usual accounts of his personal estate, and a sale of the other parts of his real estate; held that these parts of the prayer were inconsistent, and the plaintiffs were compelled to elect to confine themselves either to the mortgage or to the account.

In a suit by creditors against devisees and the heir at law, if a sale may be necessary, the court never dismisses the bill against the heir though he admit the will.

THIS was a bill by the executors of *George Jackson* deceased, against the executors, devisees in trust, and heir at law of *Samuel Brundrett*, and against *Jones, Fox*, and Co. bankers, praying an account of what was due from the estate of *Brundrett* to the plaintiffs and to his other creditors, and the usual accounts of his personal estate and payment of his debts; and that by virtue of an agreement alledged to have been made between *Brundrett* and the testator *Jackson* for a mortgage for securing the amount of the debt due to the latter from the former, the plaintiffs might be considered as specialty creditors of *Brundrett*, and that the defendants the devisees in trust of

1817.

JACKSON v. RADFORD.

Brundrett might be decreed specifically to perform on their parts the said agreement for a mortgage, and to make and execute to the plaintiffs a mortgage of certain messuages late belonging to *Brundrett* pursuant to the said agreement; and that if *Brundrett's* personal estate, together with the mortgage, should not be sufficient to satisfy or secure the amount of the plaintiff's demand, then that the remainder of his real estates might be decreed to be liable to the payment of his debts, and might be sold for that purpose: and that the defendants *Jones, Fox,* and Co. might execute to the plaintiffs an assignment of a bond dated 20th *September,* 1809, from one *Jeremiah Royle* and *Brundrett* jointly and severally, to *Jones, Fox,* and Co.: the money secured by the bond being alledged by the bill to have been paid by the testator *Jackson* to *Jones, Fox,* and Co. at the request of *Brundrett*: and that the plaintiffs might be at liberty to make use of the names of *Jones, Fox,* and Co. for the purpose of any proceedings at law on the bond.

Dauncey and *Roots* for the plaintiffs were proceeding to read evidence in support of the allegations in the bill that there had been an agreement on the part of *Brundrett* to execute a mortgage to *Jackson*: but

RICHARDS Ch. B. observed, that there was an inconsistency between that part of the prayer of the bill which sought an account and a sale, and that which prayed the specific performance of the agreement for a mortgage: and that the plaintiffs must elect whether they would confine themselves to the mortgage or to the account, for supposing them to establish an agreement for a mortgage, that mortgage would give them the estate in point of law, and their debt would be included in the mortgage, for the mortgage claimed is for the whole of the debt. If they were creditors and claimed a mortgage for their debt, the court could only give them a mortgage and not an account; for if they had an account, they

they would give up their specific lien on the estate and come in with the other creditors.

In consequence of this intimation, the counsel for the plaintiffs abandoned their claim to a mortgage. It was then objected for the defendants that the plaintiffs were not entitled to be considered as specialty creditors; but the *Lord Chief Baron* said, that as some debt appeared to be proved, it was a sufficient authority for the court to send it to the deputy remembrancer, and that the most convenient way for all parties would be to refer it to the deputy remembrancer to enquire whether any and what part of the plaintiffs' debt was a specialty debt, and as the other creditors were interested in that question they would have an opportunity of being heard upon exceptions to the report: that an assignment from *Jones, Fox,* and Co. to the plaintiffs of the bond would be of no value, but that on the defendants *Jones, Fox,* and Co. undertaking to let their names be used in any action the court might direct on the bond, the bill should be dismissed against them with their costs.

Wilson and *Symons* for the heir at law, applied for the dismissal of the bill against him.

RICHARDS Ch. B. It is the practice of courts of equity to keep the heir at law before the court whenever a sale may be necessary, although he has admitted the will: for when the estate is sold in court, it is usually expected that the heir at law should be a party, though it certainly is not necessary. I am not aware of any instance of the dismissal of such a bill against an heir at law.

Martin, Agar, Wilson, Duckworth, and *Symons* for different defendants.

The minutes of the decree were to the following effect:—"The defendants *Jones, Fox,* and Co. by their counsel consenting

1817.
JACKSON
v.
RADFORD.

that their names as obligees in the bond in the pleadings mentioned, shall be used by or for the benefit of the plaintiffs with respect to such bond, in such manner as the court shall direct, let the bill be dismissed as against those defendants with costs to be paid by the plaintiffs, but without prejudice to the question out of what fund such costs shall ultimately be borne and paid: the deputy remembrancer to tax such costs. Refer it to the deputy remembrancer to take an account of the testator *Brundrett*'s personal estate possessed by his executrix, or by her order, &c. and of the application thereof, and an account of the testator's funeral expences, and of what is due to the plaintiffs and other the creditors of *Brundrett*, who remain unsatisfied, who shall come in and contribute to the expence of this suit. The deputy remembrancer to advertise for creditors. And let the deputy remembrancer enquire whether the testator *George Jackson* did in fact pay to the defendants *Jones*, *Fox*, and Co. the principal and interest due to them on the bond in the pleadings mentioned, for or on behalf of the testator *Brundrett*, and is entitled to stand in the place of the last named defendants as bond creditors of *Brundrett*. An account of the real estate of which the testator *Brundrett* died seised, and of the rents and profits thereof received by the defendants his devisees in trust, or for their use, and of their payments in respect of such real estates. Reserve further directions and costs."

COCKSHUTT *v.* POLLARD.

EXCHEQUER CHAMBER.
June 19, 1817.
Before the Lord Chief Baron alone.

THIS was a bill by the plaintiffs on behalf of themselves and all other the creditors of *Benjamin Micklethwaite*, who died intestate, against *Pollard* and *Faber* the executors

An administrator cannot resist a creditor's bill for an account, on the ground of length of time, without either pleading or claiming the benefit of the statute of limitations.

of

1817.

COCKSHUTT v. POLLARD.

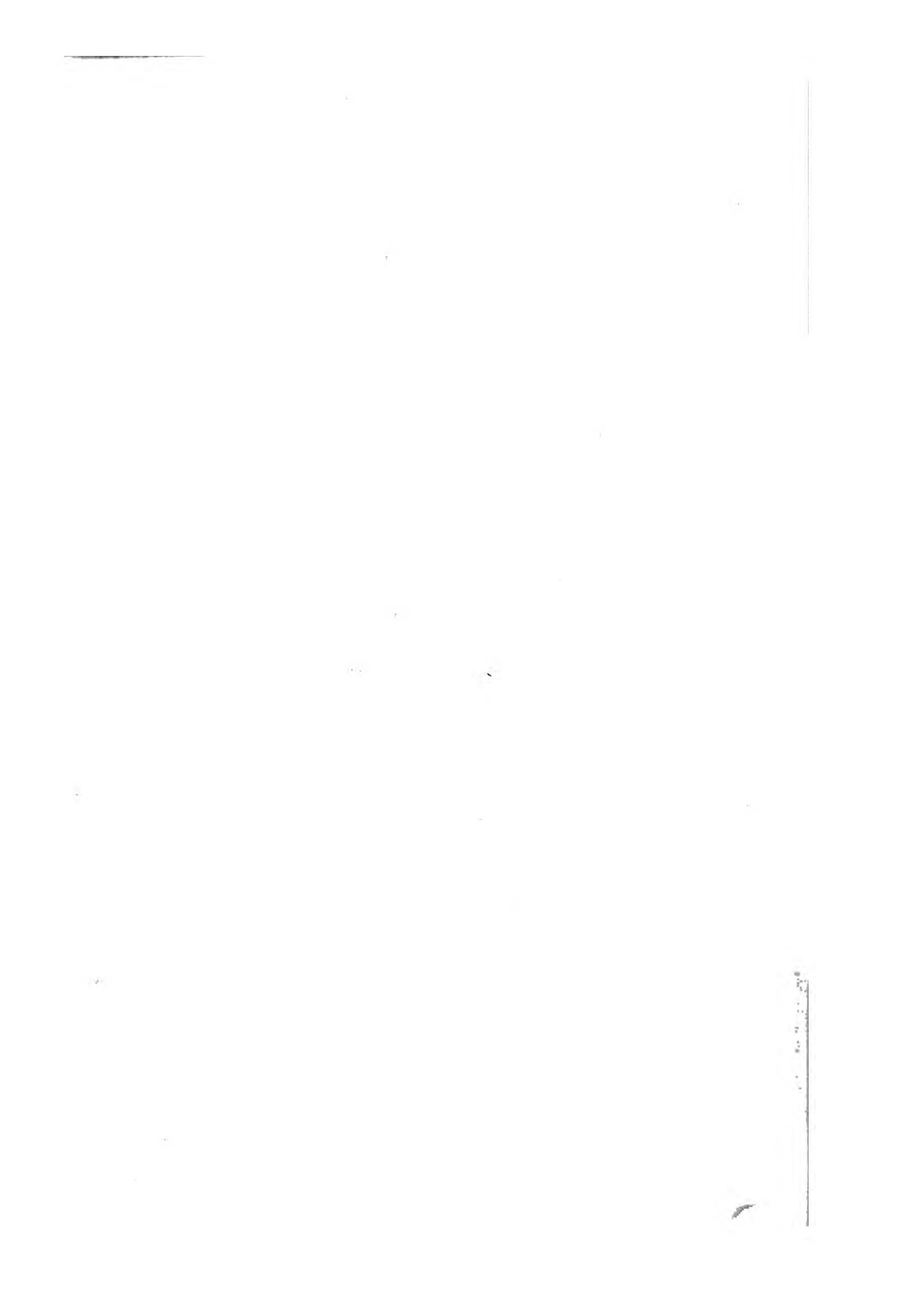
of *Richard Micklethwaite* who was the administrator of *Benjamin*, and against *Mayor* the administrator *de bonis non* of *Benjamin Micklethwaite*, praying the usual accounts of the personal estate of *Benjamin Micklethwaite*, and that the same might be applied in payment of his debts.

It appeared that *Benjamin Micklethwaite* died in the year 1798: that *Richard* his administrator died in 1800, and that the present bill was filed in *Hilary* term 1813, but the defendants did not plead or claim the benefit of the statute of limitations. It was objected on the part of the defendants, that the court would not decree an account after so long a time had elapsed since the death of the intestate and of the administrator: but the *Lord Chief Baron* was of opinion that as the defendants had not pleaded or claimed the benefit of the statute of limitations, they could not avail themselves of the length of time as an answer to the plaintiffs' demand (*a*).

Wingfield for the plaintiffs, *Parker* and *Barber* for the defendants.

(*a*) See acc. *Prince* v. *Heylin*, 1 *Atk.* 493. and *Mitf.* 221.

Memorandum.

In the vacation after *Trinity* Term 1817, WILLIAM COURTENAY, Esq. was appointed one of the Masters of the High Court of Chancery, on the death of ROBERT STEELE, Esq.

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