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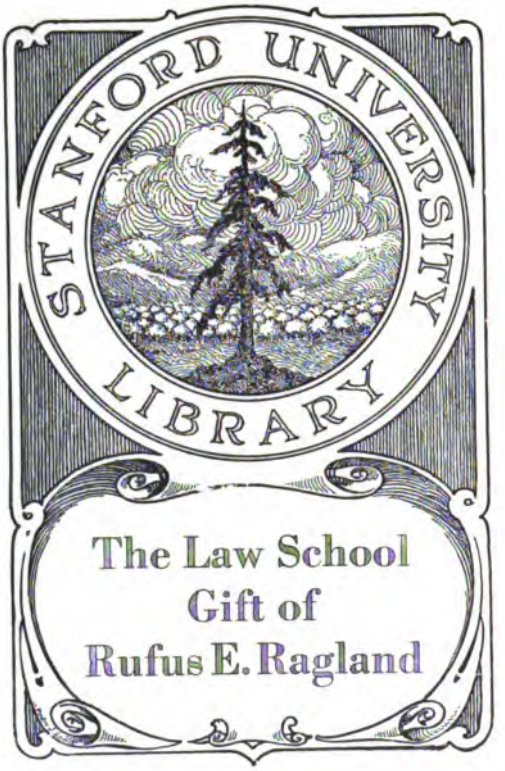

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

English Courts of Chancery,

WITH

NOTES AND REFERENCES

TO ENGLISH AND AMERICAN DECISIONS.

BY E. FITCH SMITH,
COUNSELLOR AT LAW.

VOL. XXVII.

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REPORTS OF CASES

ADJUDGED IN THE

HIGH COURT OF CHANCERY,

BEFORE THE

RIGHT HON. SIR JAMES WIGRAM, KNT.

VICE-CHANCELLOR.

By THOMAS HARE,
OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

WITH NOTES AND REFERENCES

TO ENGLISH AND AMERICAN DECISIONS.

By E. FITCH SMITH,
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VOL. VII.

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REPORTS OF CASES

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HIGH COURT OF CHANCERY,

BEFORE

THE RIGHT HON. SIR JAMES WIGRAM, KNT.,

VICE-CHANCELLOR.

COMMENCING IN THE

SITTINGS AFTER HILARY TERM 11 VICT. 1848.

TOFT *v.* STEPHENSON.

1848: March 2nd, 3rd, 4th, 6th, 7th and 20th.

A contract for the sale of an estate was made in March, 1811; the agreement being, that the purchase-money should be paid on the 13th of May following; and the purchaser was let into possession immediately on the execution of the contract. The purchase-money was not paid; but the purchaser and persons claiming under him continued in possession. In 1844, the assignees of the vendor filed their bill, claiming a lien on the estate for the purchase-money and interest from the day fixed for the completion of the contract:—*Held*, that the right of the vendor to recover the purchase-money, as a lien or charge upon the land, was barred by the 40th section of the statute 3 & 4 Will. 4, c. 27.

That under a contract for the sale of land, the equitable title of the vendor, and those representing him, to recover from the vendee, and the obligation of the vendee to pay—the purchase-money, in the sense in which it is described as a trust, is not an express trust, within the 25th sect. of the stat. 3 & 4 Will. 4, c. 27; and, therefore, that the right of the vendor, as such *cestui que trust*, to a lien or charge upon the land for the amount of the purchase-money, is not kept on foot, under the provision contained in that section.

That the right of the vendor to recover the purchase-money, as a lien or charge upon the land, is not preserved by the existence of a suit by the creditors of the devisor of the estate, under whose will the sale took place, for the administration of his

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estate; nor by suits by the residuary devisees and legatees of the purchaser for the administration of his estate.

Whether, from the relation existing between the vendor and purchaser of land, constituting the purchaser a trustee of the purchase-money for the vendor, there arises any other than a constructive trust, as to which the relief in equity, by analogy to the Statute of Limitation, will be barred by long acquiescence—*quære*.

JOSEPH MARRIS, who died in 1808, by his will devised [*2] his real estates, (including certain lands in the *parish of Owston, in the county of Lincoln) charged with the payment of his debts and legacies, in aid of his personal estate, to Thomas Marris and his heirs, and appointed Thomas Marris his executor. Thomas Marris proved the will; and by an agreement in writing, dated the 4th of March, 1811, in consideration of 6300*l.*, to be paid to him by John Stephenson, on the 13th of May then next, agreed to sell and convey, surrender and assure, on the same day, unto and to the use of the said John Stephenson and his heirs, the copyhold lands in Owston, described in the agreement as containing by admeasurement 151a. 2r. 28p., exclusive of the warping drain and lands belonging to the said Thomas Marris, which premises were then in the occupation of J. Renshaw, and part thereof being in a state of warping. The agreement provided, that the conveyance was to be prepared at the purchaser's expense, by certain solicitors therein named, the vendor making out the title; and it contained the provisions which follow:—"The said John Stephenson to have the use of the said Thomas Marris's warping drain, to warp said land so purchased as aforesaid, every third year during the term of twelve years, without paying any consideration for the same, but giving such security in case of any overflowing or damage done the country in the course of warping as is usually done previous to warping; and also to have a right, with said Thomas Marris, to warp from the snow sewer; the said Thomas Marris to make and maintain the fences on the south and west side of land being east of Stockworth road; the said Thomas Marris to be at no further expense from this day, with respect to that part of the purchased premises now in a course or state of warping; and said John

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Stephenson to make the usual allowances to the tenant on his quitting the premises, for management and usual allowances: Provided always, and if any error *should have [*3] arisen in the quantities of land so sold, an allowance of forty guineas per acre, and so in proportion for a greater or less quantity, shall be made to either party, the price being forty guineas per acre, and fifty given again upon the whole purchase-money." The agreement was signed by both parties. John Stephenson the purchaser was immediately let into possession of the premises. The purchase-money was not paid.

Thomas Marris, the vendor, was a partner in trade with one Nicholson; and on the 13th of January, 1812, Marris and Nicholson were declared bankrupts, and assignees were chosen.

In Hilary Term, 1812, an administration suit (*Bower* v. *Marris*) was filed by the creditors of the testator, Joseph Marris, against Thomas Marris, the executor and devisee, and the assignees in the bankruptcy of Marris and Nicholson.

On the 6th of October, 1812, John Stephenson, the purchaser, contracted to sell about 63a. 3r. 13p., part of the Owston estate, to Cornelius Sandars, for 4500*l.*, with lawful interest from the 6th of April following: and Cornelius Sandars was forthwith let into possession; but the purchase-money was not paid.

The decree for the accounts in the creditor's suit, (*Bower* v. *Marris*) was made on the 16th of May, 1816.

John Stephenson, the purchaser, died in July, 1827, having by his will, dated in 1817, devised and bequeathed his real and personal estate to trustees for sale, and given the residue (after payment of his debts *and applying the interest of [*4] 1000*l.*, for Elizabeth, his wife) to his eight children. The executors and trustees named in his will refused to accept the trusts, and Elizabeth, the widow, obtained letters of administration, and with her seven younger children filed a bill (*Stephenson* v. *Stephenson*) against Joseph, the heir-at-law of John Stephenson, for the appointment of trustees; in which suit the said Joseph Stephenson and one W. Read were appointed trustees.

On the 13th of June, 1828, by an order made in *Bower* v. *Marris*, it was referred to the Master to inquire whether any and what

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contract had been entered into by Thomas Marris, previously to his bankruptcy with John Stephenson, for the sale to him of any and what part of the real or leasehold estates of the testator, Joseph Marris, and whether it was for the benefit of the parties interested in the said estates, that such contract should be carried into execution. The Master's report under this reference, dated the 31st of March, 1837, reported that certain surveyors, jointly appointed by the assignees of Thomas Marris and the trustees of the estate of John Stephenson, had found that the total quantity of land to be paid for under the contract was 155a. 3r. 22p., at 42*l.* per acre, or 155a. 0r. 15p., at 42*l.* per acre, and 1a. 2r. 24p., at 21*l.* per acre, deducting 50*l.* to be retained on the total amount; and the Master found it would be for the benefit of the parties interested in the estate, that the contract should be carried into execution. This report was confirmed by an order of the 14th of July, 1837, made upon the petition of the assignees of Thomas Marris, and it was ordered that the contract should be carried into execution, and that all proper conveyances should be made to the trustees of the estate of John Stephenson, and the deeds and assurances delivered to them, upon payment by them [*5] of the *purchase-money, 6499*l.* 18*s.*, and interest at 4*l.* per cent. per annum, from the 13th of May, 1811, to the accountant in bankruptcy, in trust in the bankruptcy of Marris and Nicholson, to an account to be intituled "The separate estate of Thomas Marris."

Cornelius Sandars died in 1831, intestate.

In Michaelmas term, 1835, Feary and Manning, claiming to be purchasers of a share of John Stephenson's estate from one of his daughters and her husband, filed their bill against his widow, the trustees of his estate, and the other children of Stephenson, praying, amongst other things, that the real and personal estate of John Stephenson might be administered under the direction of the court. Feary took the benefit of the insolvent act before the hearing, and his assignees were made parties by supplemental bill. The trustees and the other defendants admitted and set forth, in their joint answer, the contract of the 4th of March, 1811.

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In January, 1838, Stephenson and Read, the trustees of John Stephenson's estate, presented their petition, intituled both in the causes of *Bower* v. *Marris* and *Feary* v. *Stephenson*, stating the contract and sub-contract, and the other circumstances, including the proceedings in the causes, and stating that the petitioners had not the means, by or out of the personal or real estates of the testator John Stephenson, of paying or raising the purchase-money of 6499*l.* 18*s.* and interest, unless the agreement of the 6th of October, 1812, should be carried into effect, the moneys due from the estate of Sandars paid, and the residue of the real estate of John Stephenson sold; and praying, that the co-heiresses and administrators of Cornelius Sandars might be ordered to pay into court the purchase-money of 4500*l.* and interest; *and that thereupon the estate might be conveyed to them; and that the residue of the estate of John Stephenson might be sold, and the purchase-money also paid into court in all the causes, with liberty to all parties to apply. This petition was not signed by the petitioners. The assignees of Marris & Nicholson, having by their solicitors accepted service, appeared upon it, and on the 27th of March, 1838, it was heard and refused, with costs. [*6]

The cause of *Feary* v. *Stephenson* was heard on the 23d of November, 1838, when the usual decree in an administration suit for an account of the personal estate, debts, funeral expenses and legacies, was made; and it was referred to the Master to ascertain what freehold and copyhold estates the testator John Stephenson was entitled to at the respective times of making his will and of his death; and whether the same, or any and what part thereof, were or was subject to any and what mortgage or incumbrance; with liberty to state special circumstances; and the freehold and copyhold estates of the testator, which passed by his will, were directed to be sold and the purchase-money paid into court, to the credit of the cause.

It did not appear that any further proceedings had been taken in either of the causes.

The bill was filed on the 29th of January, 1844, by the assignees of Marris & Nicholson, against Stephenson and Read, (the

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trustees of the estate of John Stephenson) and his widow and younger children, Manning, and the assignee of Feary, (the plaintiffs in the suit of *Feary* v. *Stephenson*) and the co-heiresses and administrators of Cornelius Sandars, stating the contracts and proceedings, and stating that the plaintiffs were advised [*7] *that they were entitled to a lien on the estate comprised in the contract of the 4th of March, 1811, for the amount of the said purchase-money and interest thereon, after the rate of 4*l.* per cent. per annum, from the 13th of May, 1811; and praying a declaration that the plaintiffs had such lien accordingly, and that the administratrix and trustees of John Stephenson, or the co-heiresses and administrators of Cornelius Sandars, or some or one of them, might be ordered to pay the same to the plaintiffs, or that the same might be raised by sale or mortgage of the estate.

The defendants Stephenson and Read by their answers admitted the contract, the possession of the estate, and the fact that the purchase-money was unpaid, and submitted to the Court, whether the right and title of the plaintiffs to the relief sought by the bill were not barred by their laches, and by the statutes for the limitation of actions and suits; and as trustees they claimed the protection of the Court. The widow, and some of the children of John Stephenson, also admitted the material facts, and insisted upon the statute, and the principles adopted by the Court in analogy thereto. Others of the children of John Stephenson denied all knowledge of the facts stated in the bill, relating to the estate in question. The heir-at-law of Manning, who had died intestate, was an infant, and submitted his rights to the Court.

The co-heiresses and administrators of Cornelius Sandars by their answers admitted the contract of 1811, and the sub-contract by Cornelius Sandars in October, 1812, and stated, that, immediately upon the execution of that agreement, Cornelius Sandars was let into possession of the lands comprised therein, and expended 325*l.* in warping the same; they admitted that [*8] Cornelius *Sandars, and those claiming under him, had ever since been in possession or receipt of the rents and

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profits of the said lands, and that the purchase-money had never been paid; they said they had always been, and still were ready and willing, to complete the purchase of the estate comprised in the contract with Cornelius Sandars, as soon as a good title should be deduced thereto; they admitted that the possession of John Stephenson and Cornelius Sandars, and those claiming under him, had not been in any way adverse to the plaintiffs, and submitted to the court, whether the plaintiffs were entitled to a lien on the premises for the purchase-money, but said it was incumbent upon those who represented John Stephenson to complete his agreement with Marris before they were in a position to enforce the performance of the sub-contract against the representatives of Sandars; they submitted that there was no privity between them and the plaintiffs, but said, that, however that might be, as their purchase-money had for a long time been lying idle, they ought not to be required to pay more than 4*l.* per cent. interest thereon.

Mr. *Romilly*, Mr. *Lee*, and Mr. *Glasse*, for the plaintiffs.

First,—The defendants claiming under John Stephenson, the purchaser, are trustees of the purchase-money: they are trustees in the first place, by the effect of the will of Joseph Marris, the devisor, and the suit of *Bower* v. *Marris*, instituted by his creditors; and they are trustees, in the second place, for the plaintiffs, on the principle laid down by Lord Hardwicke, "that the vendor of the estate is, from the time of his contract, considered as a trustee for the purchaser, and the vendee, as to the money, a trustee for the vendor:" *Green* v. **Smith.* (*a*) Lord Lough- [*9] borough, citing the words of Lord Camden, says the vendor has "a natural equity," and he adds, "It struck me always, that there was such a lien, and that it was so from the foundation of the court. A bargain and sale must be for money paid, otherwise it is in trust for the bargainor. If an estate is sold, and no part of the money paid, the vendee is a trustee:" *Blackburn* v. *Gregson*,(*b*) *Mestaer* v. *Gillespie*.(*c*) The judgment of Baron Alderson, in *Cator* v. *Croydon Canal Company*,(*d*) and the case of

(*a*) 1 Atk. 572. (*b*) 1 Bro. C. C. 420, 424. (*c*) 11 Ves. 625.
(*d*) 4 Y. & C. 405, 420.

Phillipo v. *Munnings*,(a) are of the same effect. The terms of the trust are specified in the contract, and the case must therefore be treated as one of express trust, within the stat. 3 & 4 Will. 4 c. 27, s. 25. The co-heiresses of Sandars, the purchaser, who, treating the case as an express trust, could alone claim to be considered as against the plaintiffs, as purchasers for valuable consideration, submit to perform the contract as to their portion of the estate, and do not claim the benefit of the statute: *Harrison* v. *Browell*,(b) *Cummings* v. *Adams*(c.) Secondly, if the case be not a case of express trust, within the statute, it is not within the operation of the statute. It is a suit to recover purchase-money, of which the vendee is a trustee. It is not, primarily, within the meaning of the 40th section of the statute, secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of the land." The lien is but an incident to the right of recovering the money, not the foundation of the right, as in the case which the statute contemplates. So, in *Du Vigier* v. *Lee*,(d) where notwithstanding the words of the 42d section, which restrict mortgagees to six years' arrears of interest; yet the statute was held not [*10] *to prevent a mortgagee with a bond or covenant from recovering twenty years' interest. So, again, the 40th section of the statute has been held not to apply to cases where the suit if brought to recover money charged upon land, however distant the time at which the right accrued, if there has not been a person by whom the charge was presently payable, who was competent to acknowledge its continuance as a debt, or who, by the delay, would be induced to suppose that it was abandoned: *Burrell* v. *The Earl of Egremont*.(e) So, also, notwithstanding the words of the act, that no person shall make a distress to recover any rent, but within twenty years next after the time at which the right to make such distress first accrued;(f) yet it was held, in replevin, that distress might be made for rent reserved on a demise, although there had been no payment or receipt of such rents for twenty-five years: *Grant* v. *Ellis*.(g) Thirdly,

(a) 2 My. & Cr. 309.
(b) 10 Sim. 382.
(c) 2 Ir. Eq. Rep. 393.
(d) 2 Hare, 326.
(e) 7 Beav. 205. See *Wynne* v. *Styan*, 2 Ph. 303.
(f) Sect. 2.
(g) 9 M. & W. 113.

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supposing the statute to apply, still the right of the plaintiffs is saved by the 15th section. The possession by the vendees and those claiming under them has never been adverse to the vendors; for the possession was consistent with, in pursuance of, and in fact strictly according to the terms of the contract: *Hall* v. *Doe* d. *Surtees*,(a) *Taylor* d. *Atkyns* v. *Horde*,(b) *Doe* d. *Corbyn* v. *Branston*,(c) *Doe* d. *Jones* v. *Williams*,(d) *Doe* d. *Thompson* v. *Thompson*,(e) *Doe* d. *Counsell* v. *Caperton*.(f) The possession not being adverse, the 15th section gives the plaintiffs five years from the passing of the act, which brings down the period of its operation to July, 1838. Before this time had elapsed, *the order of July, 1837, in the suit of *Bower* v. *Marris*, had been made. This order was followed by the petition of Stephenson and Read, in January, 1838, and the decree in *Feary* v. *Stephenson*, in November, 1838. These proceedings—which bring the whole subject within the jurisdiction of the court, direct the contract to be carried into execution, and the purchase-money to be brought into court—relieve the case from any difficulty with respect to the statute: *Ravenscroft* v. *Frisby*,(g) *Wrixon* v. *Vize*,(h) *Sterndale* v. *Hankinson*.(i) The answers in the cause of *Feary* v. *Stephenson* amount to acknowledgments of the plaintiff's right: *Lord St. John* v. *Boughton*.(k) Fourthly, the amount of the purchase-money was not in fact ascertained by the contract itself. It was to be determined by a subsequent survey or measurement; and it does not appear when a conclusive settlement of the price was made, or whether it has in fact been yet made: *Hanson* v. *Meyer*.(l) [*11]

The case of *Doe* d. *Milburn* v. *Edgar*,(m) and *Coore* v. *Lowndes*,(n) were also mentioned.

(a) 5 B. & A. 687.
(b) 1 Burr. 60; Smith's Leading Cases, 324. See p. 398, n.
(c) 3 Ad. & E. 63, 67.
(d) 5 Id. 291.
(e) 6 Id. 721.
(f) 9 C. & P. 117.
(g) 1 Coll. C. C. 16, 23.
(h) 3 D. & W. 104.
(i) 1 Sim. 393.
(k) 9 Id. 219.
(l) 6 East, 614.
(m) 2 Bing. N. C. 391.
(n) Before the Lord Chancellor at Westminster, 26th January, 1848.

Mr. *Teed*, Mr. *Kenyon Parker*, Mr. *Bacon*, Mr. *Willcock*, Mr. *Roders*, Mr. *Goodeve*, Mr. *Faber*, Mr. *Smythe*, Mr. *Follett* and Mr. *Lean*, appeared for ths several defendants.

For the defendants it was contended, that, under the statute, the only question was, when the right accrued? the doctrine as to adverse possession had no application: *Nepean* v. *Doe* d. *Knight.*(*a*) The right in this case had *accrued in 1811, and was clearly barred, unless it could be brought within some saving provision. It was not an express trust within the act: *Doe* d. *Stanway* v. *Rock.*(*b*) Nor was the situation of the vendee strictly or properly that of a trustee. It was, at the most, the case of trustee *sub modo* only, not even amounting to a constructive trust: *Wall* v. *Bright.*(*c*) Even taking it as a constructive trust, and assuming that the statute did not apply, the court would not now interfere: *Beckford* v. *Wade.*(*d*) The admission, that the money mentioned in the contract as the consideration had not been paid, was immaterial in such a case: *Christopher* v. *Sparke.*(*e*) The proceedings in the two suits did not constitute any acknowledgment or other ground for preventing the operation of the statute: *Lucas* v. *Dennison*,(*f*) *Berrington* v. *Evans.*(*g*)

[*12]

Drant v. *Vause*,(*h*) *Searle* v. *Colt*,(*i*) *Batchelor* v. *Middleton*,(*k*) *Towler* v. *Chatterton*,(*l*) *Doe* d. *Jukes* v. *Sumner*,(*m*) were also cited.

VICE-CHANCELLOR:—The plaintiffs by their bill claim a lien on the estate contracted to be sold, for the amount of the purchase-money and interest. The bill asserts no other equity. That is material, for it brings the case under the statute 3 & 4 Will. 4, c. 27, "for the limitation of actions and suits relating to real property."

[*13]

*No question arises with respect to the purchase by Sandars, as between those claiming under him, and the

(*a*) 2 M. & W. 894.
(*b*) 4 M. & Gr. 30.
(*c*) 1 J. & W. 494, 501.
(*d*) 17 Ves. 87, 97.
(*e*) 2 J. & W. 223.
(*f*) 13 Sim. 584.
(*g*) 1 Y. & C. 434.
(*h*) 1 Y. & C. C. C. 580.
(*i*) Id. 36.
(*k*) 6 Hare, 75.
(*l*) 6 Bing. 258.
(*m*) 14 M. & W. 39.

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plaintiffs in this case. The plaintiffs confirm the contract with Sandars: those who represent him have their purchase-money ready; and the court has simply to decide between the plaintiffs and those who claim that purchase-money.

Of the parties claiming under John Stephenson, the purchaser, some admit the contract, and that the purchase-money is unpaid, but claim the benefit of the statute; others make the same admissions, but do not claim the benefit of the statute; and others ignore the circumstances of the transaction altogether. In explaining my views of the case, I shall begin by supposing all the defendants to have claimed the benefit of the statute.

The first point I shall refer to is this:—It was said that the agreement did not ascertain, but in terms left the amount of the purchase-money to be ascertained; and that, until this amount was ascertained, time would not run against the vendor. To this argument I cannot accede. The price of the land is mentioned in the agreement. The day for payment, the 13th of May, 1811, is fixed by the agreement; and the only thing in the agreement upon which to found the suggestion that the price is not fixed, is the proviso as to an allowance for forty guineas per acre in case there should be any error in the stated quantity of land. Now, unless it can be maintained, that by reason of this proviso the vendor could not have maintained an action for his purchase-money, I cannot give to it the effect contended for. In the case of *Hanson* v. *Meyer*,(a) cited in the argument *on this point, goods were sold so much per hundred-weight, to be weighed before delivery. The warehousemen weighed and delivered part, and that was held not to be a delivery in law of the part unweighed. The application of that case to the present case I must say I have not been able to discover; but this, at all events, is clear, that if the plaintiffs meant to make this part of their case, they should have averred by their bill that the price was not correctly stated in the agreement, and that the proviso had been operative. The only ground for the suggestion is, that, in the Master's report of the 31st March, 1837, made in pursuance of the reference of the 3d of June, 1846, in the case of *Bower*

[*14]

(a) 6 East, 614.

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v. *Marris* (to which the defendants in this cause were not parties) the Master incidentally notices the finding of certain surveyors, as to the measure and value of the land; a fact which appears in the bill only in the form of a recital in an order. I cannot admit this as a ground for taking the case out of the Statute of Limitations in a suit so framed.

The second point was much labored at the bar. It was contended, that the relation of vendor and purchaser, before the payment of the purchase-money, was that of trustee and cestui que trust, and that the case was therefore within the 25th section of the statute.(*a*) I do not mean to question the doctrine stated by Lord Hardwicke in *Green* v. *Smith*:(*b*) but I am under no apprehension of being thought to have done so by saying that the trust existing between vendor and purchaser is not an express trust, within the 25th section of this statute. The observations of Sir William Grant, in *Beckford* v. *Wade*,(*c*) with which every one is familiar, upon the distinction of trusts which are [*15] actual and express, as between the *cestui que trusts and trustee properly so called, on the one hand, and constructive trusts on the other, are conclusive upon this point. "If," (as that learned judge observed) "every constructive trust is to be dealt with as an actual and express trust, within the Statute of Limitations, I hardly know how any suit in equity could be barred by the statute. Upon what grounds is a court of equity ever called upon to direct one man to convey a real estate to another, except upon the ground of a trust, either actual or constructive?"(*d*) A trust by which a person undertakes to hold and apply property for the benefit of another, is widely different from the case of ownership, subject to the claim of another, if he thinks proper to enforce it. But, leaving this general reasoning, how is it possible to hold, that the common lien of the vendor can be an express trust, within the 25th section, to which, in the absence of special circumstances, no length of time is a bar, where the 40th section of the act makes twenty years a bar to every lien upon land?

(*a*) 3 & 4 Will. 4, c. 27. (*b*) 1 Atk. 572. (*c*) 17 Ves. 87. (*d*) See 17 Ves. 95.

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The third point made by the plaintiffs was, that, at the time the act came into operation (July, 1833) the possession of the purchaser was not adverse. Assuming this to have been so, the vendor would have five years from that time within which to prosecute his claim, and the argument was, that the claim had been prosecuted within the five years, so as to save the plaintiffs' rights. I shall assume, for the present, that the possession was not adverse in July, 1833, and consider the effect of the proceedings upon which the plaintiffs have relied for taking the case out of the statute. These are the proceedings to which I have referred as having taken place in the cause of *Bower* v. *Marris*, (to which cause, as already has been observed, the de- [*16] *fendants here were not parties;) the answer in *Feary* v. *Stephenson;* and the petition of Stephenson and Read in the two causes of *Bower* v. *Marris* and *Feary* v. *Stephenson.*

With respect to the above proceedings, there are two aspects under which they might from their nature, have been available to the plaintiffs; first, as acknowledgments taking the case out of the statute; and, secondly, as a judicial determination establishing the right which the plaintiffs claim in this suit. As to the former, although it was prominently put forward at first, it was at last but faintly insisted that the plaintiffs could in those proceedings find such an acknowledgment as the statute requires. I am clear they are not acknowledgments within the statute. I am satisfied it cannot be made out, that in any of these proceedings there is an acknowledgment by the party to be charged to the party who is entitled to receive the money. *Lord St. John* v. *Boughton*(*a*) was the case of a trust to pay debts, and the Vice-Chancellor of England held, that, the trustee having signed an acknowledgment admitting a party to be a creditor, that would take the case out of the operation of the statute. That case does not help the plaintiffs.

It must be on the ground that the proceedings in this court were equivalent to a judicial determination, if those proceedings were to avail the plaintiffs in this suit. The order of the 14th of July, 1837, in *Bower* v. *Marris*, is the proceeding which is relied

(*a*) 9 Sim. 219.

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upon for this purpose. This, it was said, judicially decided the right of the plaintiffs to that which they claim in the present suit. A question here suggests itself,—why, if an order of the court already exists, which gives the plaintiffs what they ask,
[*17] *should this suit be necessary to enforce it? And to that question I have certainly heard no sufficient answer; even admitting, for the purposes of the argument, that the plaintiffs are entitled to have this suit treated as a suit to enforce the order obtained by the creditors of Joseph Marris on the 14th of July, 1837. The plaintiffs, in this view of the case, are pressed with two difficulties: first, that the order is not imperative upon Stephenson and Read to pay the purchase-money; and, secondly, if it were imperative upon them, still, it might not be binding upon the beneficial or real owners of the estate, the cestui que trusts.

As to the first of these points, I find the order imperative upon the vendors to convey and deliver up the deeds upon receiving the purchase-money; but I find no order, which, either in terms or by any necessary implication, directs Stephenson and Read to pay the money. Stephenson and Read were not parties to the suit. They were mere trustees of the real estate of John Stephenson, and had not, so far as it appears, any money in hand to enable them to pay the purchase-money. It is not probable, that, in a case so circumstanced, it could have been intended to bind Stephenson and Read, by an adverse order to pay the purchase-money. It would not be compatible with the practice of the Court to make the order in such a case, unless upon the consent, undertaking, or submission of the parties by whom the payment was to be made; and I find no such consent, undertaking, or submission on their part mentioned in the order. I do not, however, by what I now say, mean to question the right of the vendors to any benefit which they may be advised the order of the 14th of July, 1837, gave them against Stephenson and Read. They may enforce the order if they can; but, for that purpose only, I think this suit is unnecessary.

[*18] *The second question is, whether the order of the 14th of July, 1837, binds the cestui que trusts claiming under John Stephenson's will, and under Cornelius Sandars? I am

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clear it does not. The cestui que trust of a real estate is a necessary party to a suit in this Court affecting that estate. The case is not within the 30th Order of August, 1841, which enables the Court to deal with real estate, under certain circumstances, in the absence of the persons beneficially interested.

In what I have said, I do not express any opinion as to the right of the plaintiffs to claim as general creditors against the estate of the debtor. My observations are confined to their right to a specific charge upon this particular property.

I have read the note of the judgment in the case of *Coore* v. *Lowndes*,(a) and the circumstances, as they appear to me, do not touch this case.

I have assumed, throughout these observations, that the possession of the parties was not adverse to the rights of the vendor at the time the statute 3 & 4 Will. 4, c. 27, came into operation. Now, if the plaintiffs can at law recover from the trustees possession of the property, this Court would not, at the instance of the cestui que trust, admitting the purchase-money has not been paid, restrain the vendor from proceeding to enforce his legal remedy. I shall give the plaintiffs leave to proceed in ejectment for the recovery of the property. I do this without expressing any opinion on the legal question. In a case where the purchasers are here, admitting that they have an estate for which they *have not paid, this Court will deprive the plaintiffs of no [*19] possible chance of recovering the property.

The only other point is, that some of the parties have not taken the benefit of the statute. I can make no decree against them in the present state of the case. If the plaintiffs should hereafter seek to take advantage of the submission of those parties—the right of the plaintiffs being entirely a legal right,—if they should have tried the action at law, it may be a question whether the court can do otherwise than govern itself by the result of the legal proceedings. For this reason, amongst others, I abstain from giving any opinion on that part of the case.

(a) Not reported.

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BARKER *v.* ROGERS.

ROGERS *v.* ROGERS.

1848: January 14th. 1849: February 9th and 10th.

Persons who claim specific portions of property in the possession of another at the time of his death, are not necessary parties to a suit for administration of the estate of the deceased person.

A submission by the defendant "to the judgment of the Court, whether" certain persons "ought to be made parties to the suit," may be properly set down as an objection for want of parties, under the 39th Order of August, 1841.

In a suit for administering the estate of one who had been the personal representative of another, the party entitled to a share of the residuary estate of such other person carried in a claim for such share, as a debt, before the Master; but the Master disallowed the claim, on the ground that such residuary share could not be allowed as a debt, unless it appeared that the clear residue, after payment of debts, &c., had been ascertained—*Held*, that, in such a case, the claimant ought to have forthwith applied to the Court for a direction to the Master to receive the claim, or to be examined *pro interesse suo*, or for leave to file a bill for the administration of the estate in question, or take some such proceeding, and to stay the distribution of the estate of the representative in the meantime; and that he ought not to have delayed his claim until after the Master's report, and the order on further directions.

That where, after such delay, the claimant of the residuary share filed his bill against the parties in the administration suit, the Court, though it stayed the general distribution of the fund, would not stay the payment of the costs under the order on further directions.

THE suit of *Barker* v. *Rogers* was instituted by the resi-
[*20] duary legatees under the will of Ann Rogers against *her executors, for the administration of her estate. The executors by their answer stated, that they had paid to the plaintiffs their share of such property as was clearly the personal estate of the testatrix: that the furniture, plate, and other articles in the house of the testatrix at the time of her decease were in her possession as the administratrix of John Rogers her late husband, who had died intestate; and that a promissory note for 10*l.* payable to her said late husband, and a sum of 492*l.* cash, had been found in a drawer in the house, a moiety of which was claimed by the next of kin of the said intestate; and they submitted "to the judgment of the Court, whether or not the said next of kin

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who had made the claim thereinbefore set forth ought to be made parties to the suit."

The plaintiffs set down the cause as upon an objection for want of parties.

Mr. *Wood* and Mr. *Josiah W. Smith*, for the defendants.

First—the submission in the answer does not amount to an objection for want of parties; it is only the suggestion of trustees made in performance of their duty, in order that the Court may be informed of the different claimants of the trust-fund. Secondly, the whole of the estate of the testatrix having been administered, with the exception of the specific property in dispute, the question of right in respect to such property ought not to be determined in the absence of one of the classes of claimants of that property,—the next of kin of the husband,—and such next of kin are, therefore, necessary parties.

*Mr. *W. Morris*, for the plaintiffs. [*21]

The VICE-CHANCELLOR held; that the cause was properly set down on the question of parties; and said, that the court could not require a person to be made a party to an administration suit, merely because he had made a claim to property which was in the hands of the testatrix, as being property which did not belong to her, but which she had held as the administratrix of another.

The usual decree was afterwards made, and the accounts were taken before the Master. One of the next of kin of the husband, the intestate, having obtained administration *de bonis non* of his estate, carried in a claim as a creditor against the estate of Ann Rogers, the administratrix, in respect of the estate of the intestate remaining in her possession at her decease. The Master disallowed the claim. The report was made and confirmed; and on the 16th of December, 1848, the cause was heard for further directions, and a decree made for the taxation of the costs and the distribution of the fund.

On the 11th of January, 1849, the next of kin of John Rogers,

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the husband, filed their bill against the executors of Ann Rogers, and the plaintiffs in the suit of *Barker* v. *Rogers*, claiming their distributive shares of the estate of John, the husband, alleged to have been possessed by the wife as his administratrix, and immediately applied for an injunction to restrain all proceedings by the defendants or any of them, for obtaining or recover-
[*22] *ing the monies therein mentioned, standing to the credit of the cause *Barker* v. *Rogers*, until the further order of the Court.

Mr. *Malins* for the motion.—

The claim of the plaintiffs in *Rogers* v. *Rogers*, was rejected by the Master, in *Barker* v. *Rogers*, not on the ground of defective evidence, but because the Master was of opinion that it could not be allowed as a debt, and that it must be established by a suit. The plaintiffs do not question the propriety of that decision; and they therefore did not complain of the report. The course which they have taken was therefore the proper and only course open to them.

The *Solicitor-General* and Mr. *W. Morris* opposed the motion.—

This was an irregular attempt to reverse the decision of the Master, without excepting to his report. Any proper claim which the plaintiffs in *Rogers* v. *Rogers* had, might have been substantiated in *Barker* v. *Rogers*. After the order on further directions in that cause, and the taxation of the costs under that order, the Court would not stay the proceedings, or re-open the accounts of the testatrix's estate.

VICE-CHANCELLOR:—In the cause of *Barker* v. *Rogers*, the usual decree was made for an account of the estate of the testatrix
[*23] in *the cause. The testatrix Ann Rogers, had been the personal representative of John Rogers, her husband. The administrator *de bonis non* of John, made a claim in the Master's office for a specific sum, as a debt due to the estate of John. The claim was founded upon the allegation, that a specified sum of money was discovered in the house after the death of John, the

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husband, which formed part of his estate, and was afterwards laid out in 3*l.* per cent. stock. The Master rejected the claim; and he rejected it, as he informs me, both upon the ground, that he could not allow, as a debt, the claim of the representative of John to a specific sum of money, which had been laid out upon, and still stood in, a particular investment; and also because he could not charge the estate of the testatrix with a debt claimed to be due as part of the residuary estate of John, which would not in fact be due, unless it appeared that such sum remained after the debts of John were paid. The Master accordingly disallowed the claim, observing that it could only be allowed, if at all, in a suit instituted for that purpose; and he made his report, stating the claim, and the fact of its having been disallowed. The report was confirmed, and the decree upon further directions was made in December, 1848. Under this decree the costs have been taxed; but the decree has not been otherwise carried into effect. In January, 1849, the present bill was filed to litigate the claim of the husband's estate, in respect of the property alleged to belong to that estate; and all the parties to the suit of *Barker* v. *Rogers* are made defendants, for the purpose of staying the distribution of the fund until the rights are determined in this cause. The parties have not taken the proper course. The plaintiffs must have been aware, when their claim was made before the Master, that the fund would be distributed in this suit, unless they succeeded in intercepting the order for that purpose.

When, *therefore, the claim was rejected, instead of de- [*24]
laying their application until the cause had been heard for further directions, they should have immediately come to the Court by petition, for a direction to the Master to receive their claim as a debt or liability of the estate of the testatrix, or for liberty to go in before the Master *pro interesse suo*, or, if necessary, for leave to file a bill, or have taken some such proceedings; and the Court, in dealing with that application, would have accompanied any order which it made, with a direction for suspending the final order in the other suit. It would be going too far, however, to hold that the negligence or delay of the plaintiffs should operate as a forfeiture of their right, if they are as they allege,

entitled to this property. I think the proper course will be, to allow the decree in *Barker* v. *Rogers*, so far as it directs the payment of the costs, to be carried into execution, and stay the distribution of the residue of the fund until the further order of the Court.

PETRE *v.* DUNCOMBE.

1848: 17th and 18th March.

To a bill by the covenantee for specific performance of a covenant entered into by a tenant in tail in remainder, to disentail the estate after the decease of the tenant for life, judgment creditors of the tenant in tail, whose debts have been made charges on his estate, under the statute 1 & 2 Vict. c. 110, are not necessary parties.

THE bill stated, that, by an indenture of the 3rd of February, 1823, the plaintiff became a surety for the payment of an annuity granted by the defendant to one Downes; and that, by an indenture dated the 28th of February, 1823, duly registered at Wakefield, made between the defendant and the plaintiff,—reciting the will of Henry Duncombe, dated in 1799, whereby he devised his estates at Burton Leonard and elsewhere in the county of York, to his nephew Thomas Duncombe, for life, with remain-
[*25] der to trustees to preserve contingent *remainders, remainder to the use of the first son of the body of the said Thomas Duncombe, with divers remainders over; reciting also, that the testator died in April, 1818; and that the defendant was the first son of Thomas Duncombe,—the defendant, in order to indemnify the plaintiff against his liabilities under the deed of the 3rd of February, 1823, granted and demised the said estates unto the plaintiff, his executors, administrators, and assigns, for the term of 500 years, to commence and be computed from the decease of Thomas Duncombe, without impeachment of waste, upon trust, by selling, mortgaging, or otherwise disposing of the premises, or by means of the rents and profits thereof, to indemnify the plaintiff, his heirs, &c., from all costs and damages by reason of the plaintiff having become surety for the payment of

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the annuity: and the defendant thereby, for himself, his heirs, executors and administrators, covenanted, promised, and agreed with the plaintiff, his heirs, executors, administrators and assigns respectively, that the defendant would, at his costs and charges, as soon as conveniently might be after the decease of Thomas Duncombe, suffer and execute such common recovery or recoveries, or other assurances in the law, as by the plaintiff, his heirs, executors, &c., should be reasonably required for more effectually conveying and assuring the said estates to the plaintiff, his executors, &c., for the said term.

The bill stated, that, the defendant having made default in payment of the annuity, the plaintiff had been required to pay various sums in respect of the same; and that Thomas Duncombe died on the 7th of December, 1847, whereupon the defendant became tenant in tail male in possession of the said estates.

The bill prayed that the defendant might, in perform- *ance of his said covenant, be decreed, at his own expense, [*26] to execute forthwith, and afterwards duly enrol and perfect such a disposition, under the provisions of the statute for the abolition of Fines and Recoveries,(a) as would be effectual for the purpose of barring and defeating his estate in tail male of and in the said estates, and all remainders, reversions, estates, rights, titles, interests, and powers, to take effect after the determination or in defeasance of such estate in tail male, and for effectually conveying and assuring the same estates to the uses of the plaintiff, for the residue of the said term of 500 years, upon the trusts of the said indenture.

The defendant by his answer said, that, both previously and subsequently to the date and execution of the deed of February, 1823, he (the defendant) had executed for valuable consideration several other deeds which he was advised might contain covenants on his part to execute a disentailing deed of the said estates in favor of the parties to such deeds. The defendant also stated, that various judgments were recovered against him, which had been and were duly registered in the West Riding, and with the senior Master of the Court of Common Pleas at Westminster,

(a) 3 & 4 Will 4, c. 74.

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and were still unpaid and unsatisfied; and the defendant was advised, that he could not execute a disentailing deed without materially affecting the rights of the said several incumbrancers. The defendant also stated, that other parties, therein named, had filed a bill in this Court against him, praying that he might be decreed to execute a proper disentailing deed, in pursuance of a covenant contained in a certain deed of May, 1829. The defendant submitted, that all or some of such incumbrancers were necessary parties to the suit.

[*27] *The cause was set down upon the objection for want of parties.

Mr. *Wood* and Mr. *Southgate*, for the defendant, argued, that, under the stat. 1 & 2 Vict. c. 110, s. 18, the judgment-creditors of the defendant had acquired specific charges upon the estates in question; and that the legal estate ought not to be transferred to the plaintiff or any other party by a decree of the Court in their absence. The cases of *Roe* d. *Crow* v. *Baldwere*,(a) and *Martin* v. *Strachan*,(b) were referred to with reference to the operation of a fine or recovery, and the possibility that other conflicting incumbrances might thereby be introduced.

Mr. *Rolt* and Mr. *Messiter*, for the plaintiff.—

The parties to the contract are the only necessary parties to a suit for specific performance: *Humphreys* v. *Hollis*,(c) *Wood* v. *White*,(d) *Nelthorpe* v. *Holgate*.(e) The disentailing of the estate will not prejudice the judgment-creditors; but, on the contrary, will be a step for their benefit: —— v. *Walford*.(f)

VICE-CHANCELLOR:—The effect of the objection is, that the absent parties, whether they claim under Mr. Duncombe,

[*28] *or by force of the act of Parliament, are mere incumbrancers upon the estate.

Now this is a bill for specific performance; and nothing can

(a) 5 T. R. 104. (b) Id. 107, n. (c) Jac. 75.
(d) 4 My. & Cr. 460. (e) 1 Coll. 203. (f) 4 Russ. 372.

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be more clear as a general rule, than that, in such a suit, no persons are necessary parties, except the parties to the contract.

If, as it was suggested, any of the incumbrancers referred to have priority over the plaintiff, the decree for specific performance of the covenant in this suit will not affect them. Incumbrancers so circumstanced are never made parties to a suit for specific performance. If it be doubtful whether the incumbrancers have priority over the plaintiff I cannot compel him to make them parties, though he might perhaps have elected to make them so. Their absence may, by possibility, embarrass the plaintiff at the hearing of the cause. But I cannot in this stage of the cause decide that the plaintiff shall not enforce the contract against the defendant only—wholly, if he can do so,—partially, if the defendant shall have put it out of his own power, or it shall otherwise have become impossible for the plaintiff to get complete relief against the defendant.

The objection goes to the plaintiff's right to relief, and not to the question of parties.

[*29] *FUSSELL *v.* ELWIN.

1849: April, 19th, 20th, and 21st.

If a suit be instituted against defendants jointly and severally liable within the meaning of the 32nd Order of August, 1841, the plaintiff cannot, after the cause stands for hearing, dismiss his bill, or waive the relief, as to some or one of such defendants, and prosecute the cause against the others only under that order; and, therefore, where one of such defendants became bankrupt during the progress of the cause: at the hearing, the assignees in the bankruptcy were held to be necessary parties.

If, at the hearing of the cause, it be stated and admitted, that a defendant on the record has become bankrupt since the institution of the suit, the plaintiff is not (in ordinary cases) at liberty to disregard the bankruptcy, and take a decree against the defendant, as if no bankruptcy had occurred; but the cause will be ordered to stand over, that the assignees may be made parties.

Costs of the day are not given, where a cause is ordered to stand over at the hearing, owing to an abatement or imperfection of the suit, which happened after the cause was at issue.

THE bill was filed against four trustees of an ascertained and appropriated residue, by the cestui que trust, to recover the fund which three of the trustees had permitted to be misapplied and lost by the default of the fourth. The trustee by whose acts the loss arose died after the institution of the suit, and his representatives were brought before the Court. Afterwards, one of the surviving trustees became bankrupt. In this state of things the suit was brought to a hearing.

The *Solicitor-General* and Mr. *Batten*, for the plaintiffs, proposed to take the decree against the two surviving trustees, and the representatives of the deceased trustee, omitting the trustee who had become bankrupt. They suggested, that the plaintiff was entitled, under the 32nd Order of August, 1841, to sue one or more of the trustees at his discretion: *Perry* v. *Knott*,(*a*) the authority of which is not affected, as to this point, by the case of *Lenaghan* v. *Smith*,(*b*) *Ling* v. *Colman*.(*c*)

Mr. *Wood* and Mr. *Gordon*, for the defendants, submitted that the assignees of the bankrupt trustee were necessary par-

(*a*) 5 Beav. 293. (*b*) 2 Ph. 301. (*c*) 10 Beav. 370.

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ties to the suit. It was a question of *circumstances whether the Court would allow one trustee to be sued in respect of an alleged breach of trust without his co-trustee. It could not be done in the case of an administration suit: *Biggs* v. *Penn*,(a) *Hall* v. *Austin*.(b) Nor could it be done where the absent trustee was the principal defaulter, or retained in his hands the very fund in dispute: *Shipton* v. *Rawlins*.(c) And in a case like the present the Court would not permit a plaintiff to commence and for a time prosecute his suit with a certain aspect, as against all the parties who might be charged, and after the defence had been adapted to the frame of the suit, then to change its form, drop some of the defendants, and proceed against the others alone. Every defendant was entitled to know, at the outset of the suit, whether he was to be jointly or severally charged. It was not an answer to this argument to say, that if the plaintiff obtained a decree against all, he might proceed to execution against any: the defence was framed with reference to the question of what decree the Court ought to make, and not to the question how the plaintiff might think proper to deal with it when made. The defendant might also be materially prejudiced with respect to his remedy over, or to contribution, by the circumstance of other persons liable not being parties to the suit.(d) [*30]

The *Solicitor-General*, in reply.—

The objection in this case can only occasion expense and delay. Any benefit that the defendants can hope to obtain from bringing the assignees before the Court can be had without that form. If the decree be made against the defendants in *this suit, they would be allowed to prove under the bankruptcy for such amount of contribution as they might be entitled to; or the plaintiffs may prove in the bankruptcy, as they have in fact applied to do. The bankrupt was not himself the party who possessed the trust-funds, and the case of *Shipton* v. *Rawlins* does not therefore apply. The circumstance that a trustee was made a party in the first instance, cannot exclude the [*31]

(a) 4 Hare, 469. (b) 2 Coll. 570. (c) 4 Hare, 619.
(d) See *Morse* v. *Tucker*, 5 Hare 79.

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plaintiff from the benefit of the 32nd Order, if he afterwards thinks proper to dismiss his bill as to such trustee. It is perhaps impossible to suggest any variation in the defence which such a course would render necessary. None has in fact been suggested. If such a difficulty arose, it might be met by giving the defendant liberty to file a supplemental answer, or in some other effectual manner. The difficulty is, in fact, only imaginary. In this case, however, the suit comes to a hearing in a perfect form. There is no evidence of any bankruptcy: that is only stated at the bar. All that the Court knows by the facts before it is, that one defendant does not appear; and there is nothing to prevent the plaintiffs from taking the decree against him, upon affidavit of service.

VICE-CHANCELLOR:—I assume, for the purpose of my present decision on the question of parties, that this case is one in which the plaintiffs are not under the necessity of proceeding by an administration suit; that the executors have committed a breach of trust for which they are jointly and severally liable; and that the 32nd Order of August, 1841, had, in that state of circumstances, given the cestuis que trust who have been injured by the breach of trust, an option to proceed, either against all the trustees, or against some or one of them. The plaintiffs [*32] *having, as I assume, that option, have exercised it by filing a bill against all. If at the hearing in such a case the plaintiffs had desired arbitrarily to dismiss their bill as against some or one of the defendants, and to have a decree made against the others, such an application would have been refused. The Court would have said, that if the plaintiffs had originally elected to file their bill against some or one only, those against whom the bill was filed might have proved such a case as would have shown that they ought not to be so dealt with. It would not be difficult to suggest many cases admitting of such a defence.

In the principal case the suit came before the Court for hearing, and, for anything that appeared upon the proceedings, there was no reason why a decree against all the defendants should not be made. It was said, however, by counsel, and admitted on all

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sides, that one of the parties had become bankrupt. That being the case, the common course was, to let the case stand over for the purpose of bringing the assignees before the Court by supplemental bill. The plaintiff, however, resisted the adoption of this course, and insisted, that, inasmuch as the bill might have been filed originally against some only of the defendants, he was certainly entitled to a decree against the persons named as defendants other than the bankrupt; or if not, that he was at liberty to disregard, and to require the Court to disregard, the fact of the bankruptcy, and take a decree against all the defendants on the record, as if the bankruptcy had not taken place. I think that neither of those courses is open to the plaintiff; but that the cause must be dealt with in the usual way, by directing it to stand over, giving the plaintiffs liberty to make the assignees of the bankrupt parties by supplemental bill.

*Mr. *Wood*, for the defendants, asked for the costs of [*33] the day. But

The VICE-CHANCELLOR said, it was not the practice in such a case to give costs.

PHILLIPS *v.* SARJENT.

1848: July 11th and 13th.

Where a term of years is bequeathed to a legatee for life, with remainder over, and the legatee for life, having joined with the executors in selling and assigning the term to a purchaser for a sum of stock, survives the duration of the term, the legatee for life, and not the legatee in remainder, is entitled to the stock, although the latter was not a party to the sale.

If the legatee in remainder (not being a party to the conversion) sues for a portion of the purchase-money in the lifetime of the tenant for life, whether the Court will do more than secure the fund, or whether it will apportion the fund according to the value of the respective interests—*quære*.

SIR BENJAMIN TEBBS, by his will, dated in 1769, bequeathed as follows:—

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"I leave to my daughter Jane, by my first wife, the Swan Alehouse, at Charing Cross, to commence immediately after my death; but if she should die unmarried, or married and having no children, then to my daughter Elizabeth Hodgson, and after her death then to Louisa Hodgson, her daughter."

The testator died in 1796. The house which was the subject of the legacy was leasehold, for the residue of a term of sixty-four years, expiring at Michaelmas, 1830. In December, 1805, Messrs. Drummond purchased the house for the sum of 2333*l.* 6*s.* 8*d.*, 3*l.* per cent. Reduced Annuities, which was transferred by them to Collick and Carpenter, the executors of the testator, and George Hodgson the husband of Elizabeth Hodgson, and Jane Tebbs, all of whom executed the assignment of the residue of the term to Messrs. Drummond. Collick, Carpenter, and George Hodgson, and also Elizabeth, his wife, all died in the lifetime of Jane Tebbs.

[*34] In April, 1836, Jane Tebbs transferred 2300*l.* of the said stock into the *joint names of herself, George Tebbs, and S. P. Mann, and sold the remaining 33*l.* 6*s.* 8*d.* On the 28th of April, 1842, Jane Tebbs and S. P. Mann, then the surviving trustees, transferred the 2300*l.* into the joint names of themselves and the plaintiffs, who executed a declaration of trust of the fund of that date, which declared the same to be for Jane Tebbs and her assigns, for her life, and after her decease to pay and apply the dividends during the life of Louisa Sarjent (formerly Louisa Hodgson) for her separate use, without power of anticipation; and after her decease, upon trust, as to 800*l.* of such stock, for Louisa Jane Mann, for her separate use for her life, and after her decease, for such persons as she should by deed or will appoint; and in default of appointment, for her executors, &c.; and as to 450*l.* thereof, upon trust for Frances Ann Toppitt, her executors, &c.; and as to the remaining 1050*l.* upon trust for Delia Mann, Susan Barnes, Caroline Mann, Ellen Marriott, Rose Mann, and Catharine Mann, as tenants in common.

Jane Tebbs died in January, 1845, having received the dividends of the 2300*l.* stock during her life.

The bill was filed by the surviving trustees of the fund, to obtain the directions of the Court.

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Mr. *Kenyon Parker* and Mr. *Hingeston*, for the trustees.

Mr. *Walker* and Mr. *Prior*, for the husband of Louisa Sarjent, claimed the 2300*l.* stock, from the decease of Jane Tebbs, (Elizabeth Hodgson having died in her lifetime) as his absolute property in right of his wife. The sale of the house to Messrs. Drummond was a conversion *by the executors. As against Louisa, the legatee, that conversion was a breach of trust, and therefore a wrongful act. It was not wrongful as against Jane Tebbs, under whose appointment or declaration of trust the other defendants claim; nor was it wrongful against Elizabeth Hodgson,—for both Jane Tebbs and Elizabeth Hodgson concurred in the sale; but being wrongful against Louisa, it was at her option, either to repudiate the transaction and insist upon the preservation of the house in specie, or to adopt it and take the benefit of it. Louisa may be taken, by her acquiescence, to have adopted the conversion, and to have accepted the stock as representing the house,—to have taken a property of an enduring nature, in the place of property held for a certain term. The greater permanency of the interest is the only consideration which it can be suggested that Louisa received for her acquiescence in, or adoption of, the conversion of the property; and if it be held, that the first tenant for life, by having lived until after the expiration of the term for which the house was held, acquired the absolute disposal of the fund, Louisa, the legatee in remainder, will have suffered the risk arising from the conversion of the property into money, but will be deprived of the only advantage which she could derive from that conversion. [*35]

Mr. *Wood* and Mr. *Rogers*, for the other defendants.

Vice-Chancellor:—The rights of the parties must be determined by considering the case as between Louisa, on the one side, and all the persons who were parties to the sale to the Drummonds, on the other. Louisa may possibly have *a right to say she will consider the sale as a breach of trust and a wrong; or to adopt it, and consider and treat it as a lawful [*36]

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act. Louisa cannot, however, have the right to consider and treat the sale as a breach of trust and a wrong, so far (if at all) as it may be for her benefit to do so, and estop the other parties, or any of them, from claiming the benefit of the same view of the case. She cannot have a right to say, the sale was wrong, so far only as it may appear for her benefit to consider it wrong, and to consider it as right, so far only as it may appear for her benefit to consider it right.

There are two theories according to which the sale may be considered with regard to Louisa. First, Louisa might reject the transaction altogether; and secondly, she might adopt it altogether, and treat the act as lawful; saying to the executors, "you have irregularly sold the property, but I claim the application of the purchase-money, as representing the property, in conformity with the trusts of the will."

The first of these theories does not arise in this case. If the second be adopted, the case is the same as if Louisa had joined in the sale. The principle may be considered, by supposing that Elizabeth Hodgson, who did so, had immediately afterwards filed a bill to have a part of the trust funds awarded her in possession; would the Court, in that case, have implied an agreement between Jane Tebbs and Elizabeth Hodgson that the fund was to be so divided? I think not. No intention to alter the rights of the parties appears, or is to be implied from the transaction itself; and there was no necessity for any such alteration, unless there had been an impossibility of protecting her interests in any other way; but I can see no such impossibility. The rights [*37] of both parties might have been effectually *secured without it, by treating the money as representing the term, in this way—that if Jane Tebbs survived the term she would take the whole fund, as she would have had the whole leasehold interest; if she did not, Elizabeth Hodgson would have had a claim upon the fund for the value of the remainder of the lease. If Elizabeth Hodgson survived the term, she (as in the case of Jane Tebbs) would have taken all: if she did not survive the term, Louisa would have a claim upon the fund for the value of what remained of the lease.

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If a bill had been filed by Louisa, the reasoning would have been substantially the same as in the second case. The fund would have been substituted for the term; and the Court would probably have done no more than impound the whole fund for her protection.

There does not appear to have been any intention that the sale of the term and the conversion of the property into stock should do more than substitute the stock for the term, subject to the same rights, as to all the parties, as the term was subject to.

DECLARE, that Jane Tebbs, having survived the term, was absolutely entitled to the whole fund, and that the same was subject to the trusts of the indenture of April, 1842.

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*In re MARGERY GROOM. [*38]

1848: August 1st and 3d.

It is not necessary to name a next friend of the petitioner, on the petition of a married woman, under the stat. 2 & 3 Vict. c. 54, for access to infants in the custody of the father.

THIS was a petition under the stat. 2 & 3 Vict. c. 54, by a mother, for access to her children in the custody of the father.

Mr. *C. Hall* objected that some person should be named as the next friend of the petitioner, who might be answerable for costs, if the application should appear to be made without any just grounds.

Mr. *Rolt* appeared for the petition.

The VICE-CHANCELLOR held, that, in such a case, a next friend was not required.

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WILLETTS *v.* WILLETTS.

1848: July 7th and 8th.

Where a testator,—after giving legacies to his daughters for their respective lives, with remainder to their respective issue, and in default of issue, the share of the daughter so dying to the survivors,—directed, that in case any or either of his daughters should happen to die before such legacy or bequest should have become vested in her, leaving issue, then such legacy or bequest should descend to, or become the property of, such issue: it was *held*, that the word "survivor" must be taken in its strict sense; but that, under the clause of substitution, a survivor's share of a legacy to a daughter who died without leaving issue (such survivor's shares being necessarily contingent upon survivorship) passed to the children of a daughter of the testator who died in his lifetime, leaving issue that survived him.

THE will of J. Willetts contained, with other legacies, a bequest of 800*l.* to trustees, upon trust, to invest and pay the interest unto and amongst his daughters, Alice, Mary, Sarah and Mar-
[*39] tha, equally, share and share *alike, during the term of their respective lives, their respective receipts alone, notwithstanding coverture, to be the only sufficient discharge for the same; and in case of the decease of any or either of them leaving issue of her or their body or bodies lawfully begotten, the testator gave and bequeathed one fourth part of the said principal sum of 800*l.* to be equally divided amongst such issue, and if but one, to such one only; and in default of issue, then the part or share of her or them so dying, he gave and bequeathed unto the survivors of them, share and share alike, and if but one, to such one only. After some other bequests in the same will came the following clause:—"And I hereby will and direct, that, in case any or either of my children to whom or to whose benefit any legacy or bequest is hereinbefore given, shall happen to depart this life before such legacy or bequest shall have become vested in him, her, or them, leaving lawful issue of his, her, or their body or bodies lawfully begotten, then such legacy or bequest shall descend to and become the property of such issue, if more than one, to be equally divided between them, share and share alike; and if but one, then the whole to such one only."

Sarah, one of the four daughters of the testator, died in his life-

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time, leaving children, and the other three daughters survived him. The sum applicable to the payment of the legacy was divided into four parts, and carried over to the separate accounts of the respective families. Mary, another daughter, then died, without having had any issue.

The question was, to whom the fourth share, which stood to the account of "Mary and her children, if any," now belonged.

*Mr. *De Gex*, for the children of Sarah, claimed one- [*40] third of the share of Mary, arguing, first, that "survivors" should be read "others": *Wilmot* v. *Wilmot*,(a) *Aiton* v. *Brooks*,(b) *Doe* v. *Wainwright*,(c) *Cursham* v. *Newland*;(d) and, secondly, that the last clause, which substituted the children of a legatee for the parent, where the parent should die before legacy became vested, amounted to a gift of Sarah's share of Mary's legacy to the children of Sarah, in the events which happened: *Bouverie* v. *Bouverie*.(e)

Mr. *Craig*, for Martha and her children; and

Mr. *Metcalf*, for Alice and her children, contended, that the word "survivors" must be taken in its strict and natural sense: *Milsom* v. *Awdry*,(f) *Davidson* v. *Dallas*,(g) *Crowder* v. *Stone*,(h) *Slade* v. *Parr*,(i) *Taylor* v. *Beverly*,(k) *Leeming* v. *Sherratt*.(l) The clause referred to was intended by the testator to apply to a legatee, who, by surviving him, acquired the capacity of taking a vested interest in the legacy, and cannot be properly construed as giving to children, by substitution, what the parent was not capable of taking at any time after the will came into operation.

VICE-CHANCELLOR:—I retain the opinion which I have expressed in other cases,(m) as to the construction of the word "survi-

(a) 8 Ves. 10. (b) 3 Russ. 217. (c) 5 T. R. 427.
(d) 2 Beav. 149. (e) 2 Ph. 349. (f) 5 Ves. 465.
(g) 14 Ves. 578. (h) 3 Russ. 217. (i) 1 Y. & C. C. C. 568.
(k) 1 Coll. C. C. 113. (l) 2 Hare, 14.
(m) See *Leeming* v. *Sherratt*, 2 Hare, 14.

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[*41] vors," *and the circumstances in which the Court has read that word as "others." I think that the strict sense of the word must prevail, unless there is anything in the context of the instrument which requires a different sense.[1] There is, however, in this will a subsequent clause, disposing of the legacy in the event of either of the children dying before it came vested, the terms of which appear to me sufficient to carry this fund to the children of the testator's daughter Sarah. The interest given to Sarah was contingent upon certain events. If Sarah died before her sisters, no interest in their shares could vest in her. That event, in fact happened. Sarah was living at the date of the will; she had children, and died in the lifetime of the testator. The clause which I have referred to then came into operation. The interest which would have become vested in the mother if she had survived is given to the children. I think there are authorities for adopting this construction of the will: *Willing* v. *Baine*,(a) *Walker* v. *Main*,(b) *Humberstone* v. *Stanton*.(c) Although it is probable that the event which has happened was not contemplated by the testator, yet it is within the strict language of the bequest.

(a) 2 P. Wms. 113. (b) 1 J. & W. 1. (c) 1 V. & B. 385.

[1] See note (1) to the case of *Leeming* v. *Sherratt*, 2 Hare, page 25.

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*Sheffield *v.* Von Donop. [*42]

1848: July 17th and 22nd.

Two funds were settled for the benefit of a husband and wife for their respective lives, with remainder to their children, as to one fund, as the parents should appoint, and as to the other fund, in equal shares. The husband and wife resided abroad, and received the dividends through Coutts & Co., and, previously to the marriage of one of their sons, they signed a document, expressing, that they thereby disposed of a certain sum "standing in the English bank of Coutts & Co." in favor of such son and his wife, and the children of the intended marriage:—*Held*, that the settled funds were sufficiently referred to by the instrument of disposition; that it did not refer exclusively to the fund subject to the power of appointment; that the son was entitled to his share of the other fund, and to have the sum mentioned in the instrument of disposition made up out of the fund subject to the appointment.

Where an appointment of a trust fund reserved a power of revocation, but did not reserve a power of new appointment, it was held, that, upon the exercise of the power of revocation, a new appointment might be made.

By a settlement made in February, 1805, on the marriage of George Wilhelm Baron Von Donop and Charlotte Augusta his wife, 5000*l.* Consols, the property of the wife was vested in trustees, upon trust for the husband for his life, and after his decease, upon trust for the wife for her life; and after the decease of the survivor of them, (the husband and wife) upon trust for all or such one or more, exclusively of the other or others of the children or child of the said marriage, or the issue of such children or child born in the lifetime of the said husband and wife, or of the survivor of them, in such parts, shares and proportions, at such time or times, and in such manner and form as the husband and wife, or the survivor of them, from time to time, or at any time or times, by a deed or deeds, writing or writings, with or without power of revocation, sealed and delivered and attested by two witnesses, or by his or her last will and testament, attested by the like number of witnesses, should direct, limit and appoint; and in default of such appointment, or in case of an incomplete appointment, the said trust monies, or the unappointed parts thereof, should be in trust for all and every the children or child of the said marriage, who, being sons, should attain twenty-one, or die under that age leaving issue; or, being

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daughters, should attain that age or be married, to be equally divided among them: and it was thereby declared, that no
[*43] child taking any part or share *of the said trust monies under or by virtue of any direction or appointment to be made by the husband and wife, or the survivor of them, should have or be entitled to any further or other share of the unappointed part of the said trust monies, without bringing such his or her appointed part or share into hotchpot.

There was issue of the marriage, six sons and one daughter. One son and the daughter died under twenty-one, and married.

By a deed-poll, dated in July, 1830, Baron and Baroness Von Donop appointed the trust fund amongst their sons equally, reserving a power of revocation. By a deed dated in November, 1834, Baron and Baroness Von Donop revoked the appointment of 1830, and appointed 2465*l.* 3*s.* 7*d.*, part of the said trust funds, subject to their life interests, to Wilhelm, their eldest son, absolutely; and that 2531*l.* 16*s.* 5*d.*, the residue, should, upon determination of their life interests, be in trust for the then five younger sons of the Baron and Baroness Von Donop in equal shares. A power of revocation of these appointments was also thereby reserved to the Baron and Baroness Von Donop.

By an indenture, dated the 15th of June, 1820, sums of 1295*l.* 13*s.* 8*d.* Consols, and 800*l.* Reduced Annuities were settled upon trust for Baroness Von Donop for her life, and after her decease, upon trust for all her children, in equal shares as tenants in common, the shares of the sons to vest at twenty-one, and those of the daughters at twenty-one or marriage, with benefit of survivorship between such children, as to the original and accruing shares, in case of any of them dying before such periods of vesting. Of these sums the plaintiff Grant was the surviving trustee.

[*44] *The trustees of the three sums of stock empowered Messrs. Coutts & Co. to receive the dividends, and place them to the account of Baroness Von Donop, and they were for many years received and disposed of by them according to her directions. In contemplation of the marriage of their second son, August Werner Frederick, Baron and Baroness Von Donop

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executed an instrument in the German language, unattested, of which the following is a translation:—"We, the undersigned at the foot hereof, dispose hereby in favor of our son August Werner Frederick Von Donop, lieutenant in the service of the Prince of Lippe, that he shall receive from the survivor of us a capital property of 7000 dollars,(a) Prussian currency, which stands in the English bank of the late — Coutts, Esq. & Co. in London. Further, that, until our death he shall receive from us a yearly allowance of 300 dollars in Prussian currency. We hereby further give him liberty and power to dispose, even during our lifetime, of the above mentioned 7000 dollars currency for the benefit of his intended wife, Miss Augusta Elizabeth Charlotte Lorenz; and in case of children of the future marriage, then in their favor. Detmold, the 23rd August, 1839."

Prior to the marriage of their fifth son, Leopold Robert Sheffield, Baron and Baroness Von Donop signed and gave to him a writing, unattested, of which the following is a translation:—"We, the undersigned, grant to our fifth son, Leopold Robert Von Donop, lieutenant in the 28th royal regiment of infantry, full permission to contract matrimony with Miss Mathilde Lorenz, daughter of the late captain Lorenz, of Detmold. We, however, promise to pay, and to cause to be delivered well and truly, in ready money every year, to our son aforesaid, *in order to his [*45] further advancement, the annual sum of 150 dollars for his maintenance, and also a like sum for his wife—that is to say, 300 dollars in all for both parties. With regard to the pecuniary circumstances of our son Leopold, after our decease, they are the same as those which have been stipulated in reference to our son August on the occasion of his marriage with Augusta Lorenz. Nevertheless, before the marriage takes place, we, the two undersigned parties, are willing to ratify the above by a judicial act. Wobbel, 27th April, 1843."

Baron and Baroness Von Donop had not, in 1839, or subequently, in the bank of Messrs Coutts & Co. any capital monies or securities, or any other monies, except the dividends of the trust funds, and a sum of 128*l.* 2*s.* paid in by the plaintiff Grant, in

(a) Stated by the report to be equal to £1000.

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July, 1839, to the account of Baroness Von Donop, in respect of monies received from the French government. At the date of the instrument of August, 1839, there was a balance of 14*l.* 8*s.* 7*d.*, and at that of April, 1843, there was a balance of 11*l.* 8*s.* 8*d.* at the bank, to the account of Baron and Baroness Von Donop. No notice of either instrument was given to the trustees of the fund, until after the death of the Baron and Baroness Von Donop. They died, leaving the said three sons, and two others, Edward and Frederick, surviving.

The bill was filed, in May, 1847, by the surviving trustees of the settlement of February, 1805, one of whom was also the trustee of the settlement of June, 1820, against the personal representative and children of August Werner Von Donop, who was then dead, Leopold Robert Sheffield and his wife and two daughters, and Edward and Frederick, the two other sons; and it prayed, that the rights and interests of the said several
[*46] *defendants in and to the said sum of 2534*l.* 16*s.* 5*d.* Consols, the residue of the trust fund of 5000*l.* might be declared, and that the plaintiffs might be at liberty to divide, transfer, and pay the same, and the dividends accrued thereon, to such parties respectively as this Court should direct.

Mr. *Follett*, for the trustees.

Mr. *Shapter*, for the defendants Edward and Frederick Von Donop, two of the sons of Baron and Baroness Von Donop, argued that the power of appointment was exhausted by its exercise, either in July, 1830, or in November, 1834; and that it was not kept on foot by the power of revocation reserved in those instruments, the same having been accompanied by any reservation of a power to appoint new uses: *Ward* v. *Lenthall*;(*a*) 1 Sudg. Pow. 458, 7th ed. All the sons were, therefore, entitled to participate equally in the fund comprised in the settlement of 1805. But, if it had been competent to the donees of the power to re-appoint the fund after the appointments of 1830 or 1834, still they did not, in fact, do so. The instruments of 1839 and

(*a*) Sid. 343. See 16 Vin. Abr. 498, Powers, I.

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1843 cannot be treated as appointments; they neither describe the fund nor refer to the power: *Hughes* v. *Turner*,(a) *Denn* v. *Roake*,(b) 1 Sugd. on Powers, p. 420, 7th ed. Even if the instruments of 1839 and 1843 were treated as appointments made in pursuance of the power, the hotchpot clause would then come into operation as to those portions of the trust fund not thereby appointed: *Wilson* v. *Piggott*,(c)

Mr *Lloyd*, for the representatives and children of *August Von Donop, and Leopold Robert Sheffield Von Donop, and his wife and children, contended, that the instruments of 1839, and 1843 operated as appointments of so much of the residue of the 5000*l.* Consols: *Walker* v. *Mackie*,(d) *Mackinley* v. *Sison*,(e) and that it had no operation or effect with reference to the fund comprised in the settlement of 1820. The case of *Ward* v. *Lenthall* was determined on grounds exclusively applicable to real estate, and to the doctrine as to the seisin necessary to feed the new uses. There was no room for the operation of the hotchpot clause in a case where, as in this case, the whole trust fund is appointed. *Lushington* v. *Sewell*(f) was also cited. [*47]

The Vice-Chancellor, at the conclusion of the argument, expressed his opinion to be, that the power of appointment had continued, notwithstanding the absence of any express reservation of such power accompanying the power of revocation. He was also of opinion that the reference to funds "standing in the English bank of the late — Coutts, Esq. & Co., of London," sufficiently pointed to the funds comprised in the settlement of 1805, and also to those in the settlement of 1820. The question was, whether, in the case of so general and inaccurate a description, the language should be strictly confined to the single fund with which the parties had power to deal, or whether their intention would not be carried out by adopting the literal sense of the expression as referring to all the funds, the dividends of which were paid through the banking-house of Coutts?

(a) 3 My. & K. 666. (b) 5 B. & C. 720. (c) 2 Ves. jun. 351, 356.
(d) 4 Russ. 76. (e) 8 Sim. 561, 569. (f) 1 Russ. & My. 169.

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VICE-CHANCELLOR:—The first question is upon the [*48] effect of the settlement *of the 23rd of August, 1839, on the marriage of August Werner Frederick Von Donop. I continue of opinion, that the residue of the stock originally comprised in the settlement of February, 1805, and the residue of the stock originally comprised in the settlement of June, 1820, or either of those funds, are and is sufficiently indicated by the words "which stand in the English bank, &c."

Another question has been raised. The former of the above funds was subject to the joint appointment of Baron and Baroness Von Donop. The latter stood limited absolutely to Baroness Von Donop for life for her separate use, without power of anticipation, with remainder to the children equally. One-fourth or one-fifth of this fund therefore belonged to Augustus Werner Frederick Von Donop, and over this, Baron and Baroness Von Donop had no power; and the question raised is, whether the 7000 dollars, in the settlement of the 23rd of August, 1839, is to come wholly out of the former fund, or whether an apportioned part only is to come out of that fund?

First, is the language of the settlement to be read as applying in terms to the former fund only, or as applying to both? I think, in construction, to both. In many cases it would be right to hold, that the words should be restrained so as to confine them to the property subject to the power, upon the presumption that the parties intended only what they lawfully could do, although their language may, in fact, express something more. But in a case circumstanced as this is—a case in which the language of the parties is so inaccurate as well as general—it is difficult to found such a presumption, and, in such a case, it is safer to abide by the words of the parties. In point of construction, therefore, [*49] I think the words *must be read as giving the 7000 dollars out of the two funds.

Another and an important point, however, remains. Baron and Baroness Von Donop had not, as I have already observed, power to charge the latter fund: must not the 7000 dollars be thrown upon the former, over which they had power? If the latter fund belonged wholly to a stranger, that point might per-

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haps be successfully made. But one-fourth or one-fifth belonged to August Werner Frederick Von Donop, and the appointment (as I now assume) applies to the latter fund as well as to the former. Now the words of the instrument are not, "we give him 7000 dollars," but, "we dispose that he shall receive from the survivor of us" 7000 dollars; and this is satisfied by giving him, out of the former fund, over which the power existed, so much as, with the fifth of the fund in the settlement of 1820, would make up the 7000 dollars which the instrument was designed to secure to him. The settlement of 1843, made on the marriage of Leopold, will have the like operation and effect. It is a case in which the safest and best rule of construction is to give to every word a literal interpretation.

The appointment of November, 1834, extended to the whole fund, and that appointment remains in force, except as to the difference between the shares which August and Leopold take out of the funds in the settlement of 1820, and the sums of 7000 dollars given to them by the instruments of 1839 and 1843; and, after setting apart sufficient to make up these sums, the residue of the 2534*l.* 16*s.* 5*d.* will be divided amongst the four younger sons. The operation of the hotchpot clause is excluded by the appointment of the whole fund.

*Holland *v.* Teed. [*50]

1848: November 3rd, 4th and 7th.

Under a guarantee given to a banking-house, consisting of several partners, for the repayment of such bills, drawn upon them by one of their customers, as the Bank might honor *and* any advances they might make to the same customer, within a a certain time: it was *held*—

That the guarantee ceased upon the death of one of the partners in the Bank, before the expiration of the time to which the guarantee was expressed to extend.

That bills accepted before the death of the partner and payable afterwards, were within the guarantee.

That the amount guaranteed could not be increased by any act of the continuing firm and the customer, after the death of the partner, although such amount might be diminished by such act.

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That, in the particular form of the guarantee, the amount guaranteed in respect of the bills honored by the Bank, who was not to be reduced by the amount of a balance owing from the Bank to the customer when the guarantee ceased, such balance having been afterwards paid in the course of business between the continuing firm and the customer.

A SUIT on behalf of the creditors of Thomas Teed, Ladbroke, Kingscote & Co., bankers, claimed to be creditors in respect of guarantees given to the testator, the first which was as follows:—

"*London*, *June* 29, 1839.

"Gentlemen,—I hereby agree to guarantee to you the repayment of any bills you may honor, to be drawn upon your house by the firm of Carruthers & Co., of Manchester, distillers, and any advances you may make for the said firm of Carruthers & Co. from time to time, not exceeding the sum of 8000*l.* This guarantee to extend to any current amount or ultimate balance, not exceeding the sum of 8000*l.* and interest; and to continue in force for one year from the date hereof.

"I am, &c., "THOMAS TEED."

The second guarantee was given on the occasion of one of the firm of Carruthers & Co. retiring from business: it was as follows:—

"*London*, 27*th January*, 1840.

"Gentlemen,—Notwithstanding Mr. John Carruthers has retired from the partnership of Carruthers & Co., of Manchester, distillers, and which business is now carried on by Mr. Frederick F. Carruthers, under the said firm, on his own account, I do hereby agree, in consideration of your giving credit to and honoring the drafts of the said firm of Carruthers & Co., to [*51] continue the guarantee *given by me to your house for the sum of 8000*l.* for and on behalf of the said F. F. Carruthers alone, upon the same terms, condition, and period as expressed in the guarantee given by me to your house when the said John Carruthers was a partner in the said business. This guarantee for the said F. F. Caruthers to extend to any current amount or ultimate balance, not exceeding, as to my liability, the sum of 8000*l.* and interest, and only to continue in force for the same period as mentioned in my former guarantee.

"I remain, &c., "THOMAS TEED."

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During the year to which the guarantee was limited, divers payments were made by Ladbroke, Kingscote & Co. to Carruthers & Co., and divers remittances were made by the latter to the former, and four bills of exchange, of different dates, amounting together to 1975*l.* were drawn by Carruthers & Co., payable at the house of Ladbroke, Kingscote & Co., and accepted by the latter. On the 14th of March, 1840, after the acceptance of the four bills, and before any of them became due, Felix Calvert Ladbroke, one of the partners in the firm of Ladbroke, Kingscote & Co. died. On the day of his death a balance of 124*l.* 10*s.* 7*d.* was due from the bank to Carruthers & Co. on the several accounts, exclusive of the four bills. The four bills were paid by Ladbroke, Kingscote & Co. within the year mentioned in the guarantee.

After the death of Felix Calvert Ladbroke, the course of business was continued between the continuing firms of Carruthers & Co. and Ladbroke, Kingscote & Co., and divers payments and remittances were made by and to these firms respectively, and other bills were accepted and paid by the bank. On the 15th of June, 1840, the *testator gave Ladbroke, Kingscote & Co. notice that he withdrew his guarantee. On the 14th of July, 1840, Carruthers & Co. became bankrupt. [*52]

Ladbroke, Kingscote & Co. brought their action against the testator on the guarantees, and a verdict was entered for the plaintiffs, subject to a special case; but the action abated by the death of the testator.

Ladbroke, Kingscote & Co. having carried in their claim as creditors in this suit, the Master was of opinion that the guarantees ceased at the death of Felix Calvert Ladbroke, and that all remittances made by Carruthers & Co. to Ladbroke, Kingscote & Co., subsequent to that event, upon the general account of Carruthers & Co., were applicable to the discharge of any balance that might be due in respect of the four bills accepted by the banking-house before, and paid by the surviving partners after, the death of Felix Calvert Ladbroke, in preference to the discharge of any bills which had been both accepted and paid by the surviving partners after his death; and the finding of the

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Master was in conformity with this opinion. Ladbroke, Kingscote & Co. excepted to the report.

The *Solicitor-General* and Mr. *Roundell Palmer* in support of the exceptions.—First, the guarantee was not to the members of the firm by their individual names, but by the name of the firm, and it is expressed to extend to all bills drawn upon their "house." *Barclay* v. *Lucas* (*a*) is an authority which, though to some extent shaken by subsequent decisions, may still be relied [*53] on, as showing that a guarantee may continue so *long as the purpose continues for which it was given. There was no special confidence reposed in any particular member of the firm. Secondly, even if the guarantee ceased at the death of Felix Calvert Ladbroke, the bankers were not bound to appropriate, and had not appropriated, the payments or remittances made to them by Carruthers & Co. after the death of Felix Calvert Ladbroke, in the first place, in discharge of the balance due in respect of the four bills, but might apply all such subsequent payments and remittances to the new account between Carruthers & Co. and the surviving partners in the bank: *Clayton's case*(*b*) and *Jones* v. *Maund*.(*c*) A surety has no right to require the creditor to make any specific appropriation of his receipts or payments: *Williams* v. *Rawlinson*,(*d*) *Kirby* v. *Duke of Marlborough*;(*e*) nor has he any right to require that the appropriation shall be made in the manner most beneficial to him. Thirdly, the balance of 124*l.* 10*s.* 7*d.* was paid by the surviving partners to Carruthers & Co., and forms no part of the account in respect of the bills which had been accepted on the faith of the guarantee.

Mr. *Rolt*, Mr. *Willock* and Mr. *Taylor*, for the executors and the plaintiff, contended that the grantee ceased at the death of the partner in the house to which it was given: *Dry* v. *Davy*;(*f*) *Strange* v. *Lee*;(*g*) *University of Cambridge* v. *Baldwin*;(*h*) *Myers* v. *Edge*;(*i*) that the subsequent remittances ought to be applied,

(*a*) 1 T. R. 291. (*b*) 1 Mer. 572. (*c*) 3 Y. & C. 347.
(*d*) 3 Bing. 71. (*e*) 2 M. & S. 18. (*f*) 10 Ad. & El. 30.
(*g*) 3 East, 484. (*h*) 5 M. & W. 580. (*i*) 7 T. R. 254.

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in the first place, to the reduction of the liabilities of the testator under the guarantee, especially as the surviving partners of the old firm had continued the old account, and had *not [*54] opened a new account: *Bodenham* v. *Purchas*;(a) *Pemberton* v. *Oakes*;(b) *Sterndale* v. *Hankinson*;(c) that, with regard to the extent of such liabilities, the circumstance that bills were accepted before the death of Felix Calvert Ladbroke was not conclusive that they were, therefore, within the guarantee, for the guarantee was not general, but was limited in point of time.

[VICE-CHANCELLOR.—I have not to decide what the effect would be in the case of a guarantee expiring at the end of the year, if the bankers had, on the last day of the year, accepted a bill payable at a future time.]

The amount of the bills for which the surety was liable, ought certainly to be reduced by the sum of 124*l.* 10*s.* 7*d.*, the balance owing to Carruthers & Co. by the bank on the day that Felix Calvert Ladbroke died.

[It was, before the conclusion of the argument, conceded, that, upon the later authorities, the guarantee must be taken to have ceased at the death of Felix Calvert Ladbroke.]

VICE-CHANCELLOR:—On the 14th of March, 1840, the day on which Felix Calvert Ladbroke died, the state of the account between the firm of Ladbroke, Kingscote & Co. and Carruthers & Co., was as follows:—A cash balance of 124*l.* 10*s.* 7*d.* was owing from Ladbroke, Kingscote & Co. to Carruthers & Co., and four bills of exchange, amounting together to 1975*l.*, drawn by Carruthers & Co. upon, and accepted by, the bankers, Ladbroke, Kingscote & Co., were *running. The guarantee [*55] given by Teed to the bankers covered this account.

After the death of Felix Calvert Ladbroke, the surviving partners of Ladbroke, Kingscote, & Co. carried on their banking transactions with Carruthers & Co., in the ordinary way between bankers and a customer, by applying to those transactions the

(a) 2 B. & A. 39. (b) 4 Russ. 154. (c) 1 Sim. 393.

ordinary rules governing the appropriation of payments in account. The 124*l.* 10*s.* 7*d.* was paid before any of the four bills became due. Afterwards the bills became due, and were paid by the bankers. The bankers claim to be paid the amount of those bills out of the estate of Teed, the surety. The executors of Teed resist the claim altogether; but contend that, if the estate of Teed were liable under the guarantee, for the amount of the bills, credit must at all events be given for the 124*l.* 10*s.* 7*d.* due from the bankers to Carruthers & Co., when Felix Calvert Ladbroke died.

Upon the principal point,—the liability of Teed's estate under the guarantee,—I decided in favor of the bankers, but reserved my opinion upon the other point relating to the 124*l.* 10*s.* 7*d.*

In considering this point, the case will be simplified by supposing Carruthers & Co., after the 14th March, 1840, and before any of the bills became due, to have drawn a cheque upon the bankers for the exact balance of 124*l.* 10*s.* 7*d.*, and that such cheque had been paid, and no other transaction had taken place between the bankers and Carruthers & Co. after the 14th of March, 1840,—would Teed's estate, in that simple case, have been entitled to a credit for the 124*l.* 10*s.* 7*d.* when sued upon the bills?

I put the case in this way, in order that it may be seen
[*56] that I do not (as was *suggested at the bar) question the fact, that the 124*l.* 10*s.* 7*d.* was paid in account by the bankers to Carruthers & Co.

The exact extent of Teed's liabilities, under the guarantee, on the 14th of March, 1840, is shown by the state of the account between the bankers and Carruthers & Co. on that day; those liabilities might be diminished and finally extinguished by acts done after that day; for the ultimate claims of the bankers against Carruthers & Co. might be wholly satisfied; but the surviving partners of Ladbroke, Kingscote & Co. could not charge Teed's estate with any advances made by them to Carruthers & Co. after the 14th of March, 1840. Now, the cheque for 124*l.* 10*s.* 7*d.*, I have supposed to have been drawn upon and paid by the bankers, was an advance to Carruthers & Co.; and, as the effect of that was ultimately to make Teed's estate liable for the full amount of the bills, by an act done after the 14th of March,

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1840, I thought it deserved consideration, whether, in ascertaining the amount for which Teed's estate was liable under the guarantee, that estate was not entitled to credit for the 124*l.* 10*s.* 7*d.*

I think, however, that the language of the guarantee disposes of the question. The guarantee applies, in terms separately from the advances and ultimate balance, to all bills drawn upon and honored by the bankers. Now it is true, that the surviving partners of Ladbroke, Kingscote & Co. could not, after the 14th of March, 1840, accept new bills or make new advances in respect of which Teed would be liable under the guarantee. But they might wind up all which were covered by guarantee transactions, on the 14th of March, 1840, in the regular course of business. Unless, therefore, it can be said that the payment of the 124*l.* 10*s.* 7*d.*, whilst the bills were running, leaving the bills, in case *they should be called upon to pay [*57] them, to be protected by the guarantee, was not in the regular course of business, I think the surety cannot complain; and if that would be so, in case of a payment by hand or by a remittance, the payment by a cheque cannot alter the case.

East and West India Dock Company *v.* Littledale.

1848: July 18th and 25th; August 1st, 3rd and 4th; November 15th; December 2nd, 5th, 16th, 19th and 22nd.

The right of the plaintiff in interpleader, is to be protected not merely from double vexation; and he is not therefore bound to show the existence of an apparent title in each of the defendants who are claimants of the property in dispute.

The stakeholder is entitled to relief by suit of interpleader, and is not bound to accept an indemnity from either of the claimants, although the claimant offering such indemnity shews an apparant title to the property in dispute.

A defendant in interpleader cannot generally be ordered to interplead, by bringing or defending a suit in respect of the property in question, until he has put in his answer, or the bill is taken *pro confesso* against him; but where the defendant seeks, as an indulgence, time to answer beyond that which the general rule allows, he must satisfy the Court that the case cannot with justice be put in a course

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for determination without further delay; and, in this case, the further time was granted only upon the defendant forthwith proceeding to try his legal right by defending the action which had been brought by the other defendant, against the stakeholder.

The plaintiff in interpleader undertakes by his suit to use all proper diligence to get in the answer of, or take the bill *pro confesso* against, each of the defendants; and if any delay should occur in such proceedings, any defendant may apply as against the plaintiff, for a dissolution of the injunction, or for the delivery up of the subject of interpleader, as the case may be.

In December, 1847, the ship "Coromandel," with a cargo consisting partly of 639 bales and 10 half bales of cotton, consigned to the order of Syers, Livingstone & Co., of Bombay, entered the plaintiff's docks, and on the 7th of January, 1848, the bills of lading of the cotton, indorsed to Littledale & Co., were lodged at the dock office. On the 9th of January, 1848, the Dock Company received notice from the solicitors of certain Parsee merchants of Bombay, named Dadabboy Pestonjee and Mancherjee Pestonjee, not to deliver any part of the cotton by the "Coromandel," without their consent or that of their agents, Forbes & Co.,—the house of Syers, *Livingstone & Co., the purchasers, having become insolvent, and the said Parsee house claming, as unpaid vendors, to stop the cotton *in transitu*. In consequence of this notice the Dock Company refused to deliver the cotton to Littledale & Co., notwithstanding that firm offered to indemnify the Company. On the 31st of January, Littledale & Co. brought trover for the cotton against the Dock Company. The company on the 17th of February, took out an interpleader summons under the statute, calling upon Littledale & Co., and the Parsee merchants, to show cause why they should not appear and state the nature and particulars of their respective claims to the subject-matter of the action, and maintain or relinquish the same, and abide by such order as might be made thereon; and why in the meantime all further proceedings should not be stayed. The summons was served upon Littledale & Co., and upon Forbes & Co., as the agents of the Parsee house, and was heard before Baron Parke. Forbes & Co., appeared, and objected to the jurisdiction of any judge in this country over the Parsee merchants, natives of, and residing at,

[*58]

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Bombay. The matter was from time to time adjourned, but no order was made, the learned judge having (as the bill stated) been of opinion that the questions between the parties could only be satisfactorily disposed of in the Court of Chancery.

On the 15th of April, the plaintiffs filed their bill of interpleader against Littledale & Co., and Dadabboy Pestonjee, and Mancherjee Pestonjee, and obtained the usual injunction to restrain proceedings in the action.

Littledale & Co., by their answer stated, that they were the holders of the bills of lading of the cotton, for value, long before the arrival of the "Coromandel" in this country; they insisted that there was no ground *for requiring them to [*59] interplead, and claimed from the plaintiffs the amount of the loss which they had suffered by the depreciation of the market price of the goods. The other defendants had not answered.

The *Solicitor-General* and Mr. *Follett*, for the defendants Littledale & Co., moved to dissolve the injunction.—They submitted, that the bill did not state a case throwing the least doubt upon their title to the cotton. The Parsee merchants having sold the cotton to Syers, Livingstone & Co., had entirely parted with it, and had clearly no right to stop it *in transitu* between Syers, Livingstone & Co., and a subsequent purchaser: *Lickbarrow* v. *Mason*.(*a*) The bill was without any reasonable pretence; and unless there be some reasonable ground for the adverse claim, this Court will not restrain the proceedings of the party in whom the right is apparently vested. Lord Eldon, in the case of *Martinius* v. *Helmuth*(*b*) said, "The course is, the instant explanation is obtained here, to put the cause in a train for procuring a more speedy determination than by bringing it to a hearing. The

(*a*) 6 East, 21, n.

(*b*) Reported (in some copies only) as an appendix to the case of *Stevenson* v. *Anderson*, 2 V. & B. 407. It would seem by the observations of Lord Eldon, in *Martinius* v. *Helmuth*, that, where an action has actually been brought by one party who has a legal right, not controlled by any adverse equity, and the other claimant is out of the reach of process, and cannot be brought within the jurisdiction of the court, the stakeholder may be in a situation in which the costs of the protection which he seeks must be borne by himself.

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mere circumstance, that a verdict might have been obtained, does not decide the question of interpleader,—the ground of relief being, that the plaintiff at law may recover, and that there is another person who may recover, either at law or in equity,
[*60] *against the plaintiff seeking relief here, desiring this Court therefore, to bring the claimants here, to discuss their rights, and then direct some proceeding that may determine to whom the stake in his possession belongs. Messrs. Littledale had, moreover, offered to indemnify the plaintiffs against any claim to the cotton by other parties, which indemnity they ought, in such a case, to have accepted.

Mr. *Wood* and Mr. *Prior*, for the plaintiffs, submitted that they were in a position which rendered a bill of interpleader proper; and that the action of trover ought not to be allowed to proceed against them: *Stephenson* v. *Anderson*;(a) unless the other claimants of the goods should undertake to defend the action and indemnify the plaintiffs.

The VICE-CHANCELLOR said, that the right to sustain a suit of interpleader was founded, not upon the consideration that the plaintiff might be subjected to a double liability, but on his being threatened with double vexation; and he ordered the motion to stand over, with leave for the defendants, Littledale & Co., to serve the other defendants, the Parsee merchants, with notice of the motion.

When the motion was again made,

Mr. *Lewis*, for the defendants D. & M. Pestonjee, said, that the instructions received from Bombay had not been sufficient to frame their answer to the bill; that, until their answer was on the file, their case was not properly before the Court: *Hyde* v. *Warren*;(b) and, until that time, the Court could not re-
[*61] quire the *defendants actively to interplead, either by defending the action or otherwise.

(a) 2 V. & B. 407. (b) 19 Ves. 322.

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The *Solicitor-General* adverted to the hardship on the defendants, Littledale & Co., if the injunction should be continued. The defendants were entitled to recover, in trover against the Company, damages calculated according to the value of the cotton at the time the sale was interrupted.

The VICE-CHANCELLOR said, that the Court only required to know judicially the case on which the defendants in interpleader relied, or the question in dispute, to put it in a course of trial. There was no absolute and inflexible rule that the case should be brought forward by answer; it might be stated at the bar. If there were really a question, it must be the interest of all parties acting *bona fide*, that the question should be determined without more delay or expense than was unavoidable. Still, if a defendant, for purposes which it was difficult to understand, should insist upon his right of putting in an answer, and refuse to disclose his case in any other form, it might be necessary to proceed with the cause to that stage. The Court could not judicially know what the case of the party was until it was made known by the defendant, by his answer, or by some other sufficient statement.

November 25th; December 2nd.—The motion to dissolve the injunction was again brought forward. The answer of the Parsee merchants was not filed, but an offer on their behalf had been made to the plaintiffs, to put in the answer immediately, if they would accept it without oath or signature. This offer had been referred by the plaintiffs to the defendants, Littledale & Co. who had refused to interfere *in the conduct of the cause, [*62] and had left the plaintiffs to act on their own responsibility.

The *Solicitor-General*, for the defendants Littledale & Co., pressed the motion for the dissolution of the injunction.

Mr. *Wood*, for the plaintiffs, resisted it: and stated that the plaintiffs intended to proceed forthwith to take the bill *pro confesso*.

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Mr. *Lewis*, for the defendants the Parsee merchants, declined to argue the question with respect to the injunction, and asked for their costs of the motion.

VICE-CHANCELLOR:—It has never (according to my reccollection) occurred to me to have to consider what is the strict practice in cases of interpleader, raising the question which arises here. The course of proceeding in practice, as far as my experience goes, he has always been for the parties, defendants in interpleader, to come in upon motion and state their respective cases, (with or without affidavits, according to circumstances,) and to obtain the opinion of the Court, in that early stage of the cause, as to the proper mode of trying the question between them; and from the cases in the Reports of Vesey & Beames,(*a*) it appears that Lord Eldon's experience did not furnish him with a single instance of a bill of interpleader being brought to a hear-
[*63] ing. In this case, *however, one set of defendants, the Parsee merchants, insist upon their right to file the answer, and to have the cause prosecuted against them in a regular way. The question is, what order am I to make? I assume, for the present purpose, that the plaintiffs are entitled to have this case considered *prima facie* as an interpleader suit. That privilege imposes on them the obligation (for this, says Lord Eldon, the plaintiffs undertake) to prosecute the suit with diligence against both defendants. I cannot say they have in this case forfeited their privilege by want of diligence. Messrs. Littledale & Co. retain the power of urging on the other defendants, by acting against the plaintiffs if they do not proceed.

The strictly regular course is, I apprehend, by answer. If any injury shall arise to Littledale & Co. in consequence of the plaintiffs being supposed to do their duty, it is an evil incident to the plaintiffs' privilege in interpleader, to be protected against double vexation, and I cannot avoid it.

I observe, however, that no inconvenience can arise in this case, beyond what has already occurred; for, the answer being

(*a*) *Stevenson* v. *Anderson*, 2 V. & B. 407; *Martinius* v. *Helmuth*, Id.

due, the bill will be taken *pro confesso*, unless the defendants, the Parsee merchants, obtain further time to file their answer, or other indulgence; and, upon an application for that purpose, they will have to satisfy me that the question between themselves and Littledale & Co. cannot with justice to them be put into an immediate train of investigation.

December 16th.—The *Solicitor-General*, for the defendants Littledale & Co., again moved to dissolve the injunction; Mr. *Wood*, for the plaintiffs, moved, under the general order, to *take the bill *pro confesso* against the Parsee merchants; [*64] and Mr. *Lewis*, for the latter defendants, moved for four months' time to answer.

VICE-CHANCELLOR:—This case, after repeated adjournments, is now before me upon three motions. First, a motion by Messrs. Littledale & Co. to dissolve an injunction obtained by the plaintiffs, restraining proceedings in an action brought by Messrs. Littledale & Co. against the plaintiffs. Secondly, a motion by the plaintiffs to take the bill *pro confesso* against the defendants, the Parsee merchants, who, since the middle of October, have been in default for want of an answer. Thirdly, a motion by the Parsee merchants, for four months' further time to answer.

The case, as regards the proceedings in the suit on the part of the Parsee merchants, is this: they caused an appearance to be entered in the suit on the 17th of July, 1848: they obtained from the Master three months' further time to answer. This time was allowed to run out without any application being made to enlarge the time for filing the answer. On the 30th of October an application was made to the Master for further time, which was refused on the ground that the Master's jurisdiction was gone; and no application for time was made to the court, until the 16th of this month. Before this, the plaintiffs, who are bound to prosecute the suit to a hearing with due diligence, and who have been pressed on by the motion of Messrs. Littledale & Co. to dissolve the injunction, gave their notice of motion to take the bill *pro confesso*,—a motion regularly made, and which I con-

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sider myself bound to grant, unless the Parsee merchants
[*65] can entitle themselves upon their motion to *the further time they now ask for filing their answer. The grounds upon which they ask it are—that, since January, 1847, when Littledale & Co. made their claim, they have, in consequence of the imperfect instructions sent from India, been compelled repeatedly to seek further instructions for the answer of the Parsee merchants, and that they did not obtain such instructions as enabled them finally to prepare their answer, until the last week in November, 1847. They say that the answer is now complete, and that they require time only for the purpose of sending it to India to be sworn. In the meantime, they have offered to file it without oath or signature. This departure from regular practice the plaintiffs decline to accede to, without the consent of Littledale & Co., and Littledale & Co. refuse to relieve the plaintiffs from the responsibility of conducting the suit in such a manner as the regular practice of the Court requires,—they seek, in effect, by all lawful means to get rid of the injunction, and are ready to take any advantage which a departure from practice may give them. I do not make this observation disparagingly to them.

Now, as I said on a former day, it is strictly the right of the Parsee merchants, within the limits of the time allowed by the practice of the Court, to insist that they shall not be called upon to interplead before they have answered; and where a defendant resides at a distance, which makes it impossible that he should file his answer within the time allowed to parties residing within the jurisdiction, I cannot but think he must be entitled to such extended time for filing his answer as the circumstances of the case may require. But he is bound to satisfy the Court, not only that the extended time he asks is necessary at the time he makes his application, but that he could not (using due diligence from the beginning) have avoided the necessity of making it.
[*66] In *this case the language of the affidavit in support of the application of the Parsee merchants is so general as to render it impossible for me to form any opinion whether they have used due diligence or not; and I must, therefore, consider them as asking an indulgence which they must purchase at a

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sacrifice of mere form, not trenching upon their own rights in the case.

I should observe, that I consider Littledale & Co. as justified in not agreeing to dispense with the oath of the Parsee merchants; for, without that sanction, a fictitious case might be suggested upon the record.

With respect to the order now to be made—I have asked to be informed as to the contents of the answer of the Parsee merchants. Their case is founded on the right of stoppage *in transitu*, as against the plaintiffs; and further they say, that if Littledale & Co. have any interest in the cottons in question in the cause, they have also other securities, which they are bound in equity to apply in the first instance, so as to leave the cotton, as far as may be, untouched for the use of the Parsee merchants. The answer does not suggest that these securities are sufficient to cover the amount of Littledale's demand. I do not understand how this second point can arise, but I will assume that it does or may arise. This, however, clearly remains—that the primary claims of the co-defendants to the cotton, as against the plaintiffs, are strictly legal questions, and I can do the Parsee merchants no possible injustice by treating their answer as true. What, therefore, I shall do is (the Littledales asking this)—dissolve the injunction so far as relates to the trial, but with a stay of execution—the Parsee merchants to defend in the name of plaintiffs, indemnifying them—and give the defendants, the Parsee merchants, the time they ask to file their answer, in order *that they may have an opportunity, if so advised, of [*67] putting their equitable case upon the record. If the answer now produced were on the file, I should certainly direct the trial of the legal question in the first instance.

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INGRAM *v.* THORP.

1847: January 19th and 20th. 1848: March 19th, 20th and 22d.

A. having accepted bills for the accommodation of B. who was unable to take them up, entered into an agreement to provide for payment of half of the amount of the outstanding bills as they became due,—a third person, party to the agreement, charging certain property to the extent of 1500*l.* for the benefit of A. by way of security, which property such third person alleged to be his own, and a security amply sufficient in value above incumbrances. More than half of the amount of the bills was afterwards paid by A., but the property of the third party charged as a security proved to be heavily incumbered, and insufficient:—*Held*, in a suit by A. against the executors and devisees of the third party, that the misrepresentation as to the surplus value being proved, A. was entitled to have so much of the sum of 1500*l.* and interest as the specific property was insufficient to pay, raised and paid out of the general estate of the testator.

HENRY and Thomas Wilson, who had been partners, as drapers and warehousemen, at Liverpool, dissolved their partnership in October, 1835, and thenceforward the business was carried on by Thomas Wilson and William, his son, under the name of Wilson & Son. The plaintiff, Ingram, a woollen-worsted manufacturer at Halifax, had supplied Henry and Thomas Wilson, and afterwards Wilson & Son, with worsted goods, and he also drew, accepted, or indorsed several bills of exchange for the accommodation of the latter firm. In July, 1839, Wilson & Son having omitted to provide for some of the bills when they became due, Ingram made inquiries of Henry Wilson as to the solvency of the firm of Wilson & Son; and Henry Wilson assured him that the firm was solvent. Others of the bills, to the amount of 800*l.*, having been dishonored in August, 1839, the plaintiff again informed Henry Wilson of the fact, who repeated his assurance of the solvency of Wilson & Son, and advanced the 800*l.* to take up the bills. A few *days after this, on the 23rd of August, 1839, Ingram, Henry Wilson, and Thomas Wilson, met by appointment at Henry Wilson's house. At this meeting, in order to provide for the bills, upon which Ingram was still liable, amounting to 3500*l.*, Henry Wilson, Thomas Wilson, and Ingram, entered into an agreement, that Ingram and

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Thomas Wilson should each deposit half that sum in the hands of a third person, and that Ingram should be indemnified from loss, to the extent of 1500*l.*, by Henry Wilson, who should give Thomas Wilson an authority to sell certain property in Duke-street, Liverpool, belonging to Henry Wilson, and pay that sum to Ingram out of the proceeds of such sale. Henry Wilson stated to Ingram, at this interview, that the property referred to was his own, and amply sufficient to secure the 1500*l.*, or, (as the witnesses said,) three or four times, or several times over that amount, and was entirely unincumbered, or, if not, that it was only charged with the payment of a small annuity. The statement was alleged to have been made in the presence of Thomas Wilson. Henry Wilson, at the same time, gave Thomas Wilson a written authority to sell the premises before the 1st of November then following, and to pay out of the proceeds a sum not exceeding 1500*l.* to Ingram, provided he should have advanced his share of the monies required to meet the bills; and this letter Thomas Wilson, in pursuance of the same arrangement, delivered to Ingram, inclosed in another addressed to him, in which Thomas Wilson stated, that, by the authority thereby given, he was enabled to sell the Duke-street property, and pay Ingram 1500*l.* out of the proceeds, if he should be called upon to provide for the bills then running. Ingram was accompanied, on this occasion, by two sons. One of Ingram's sons, who was a solicitor, remarked, that a more formal security should be given than that which was created by the letters *from Henry to Thomas Wil- [*69] son, and from Thomas Wilson to Ingram; whereupon Henry Wilson observed, that he and Ingram were old friends, and men of honor, and it was useless to allow their arrangements to be disturbed by young attornies, as his word was as good as his bond; to which Ingram assented. At the same meeting, Henry Wilson repeated his assurances to Ingram, that the firm of Wilson & Son was perfectly solvent, and able to pay all the claims against them in full, if their affairs were then wound up.

The firm of Wilson & Son provided 500*l.* only to meet the outstanding bills, and Ingram was compelled to take up the remainder when they became due.

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On the 2d of December, 1839, Wilson & Son became bankrupt. Ingram proved against their estate in respect of the bills, and obtained a dividend of 1*s.* 1-2*d.* in the pound.

It subsequently appeared that the Duke-street property was charged with an annuity of 150*l.* for the life of the grantee of the annuity, and also with a second incumbrance for 2500*l.* and interest, and that it fell far short of a sufficient security for the 1500*l.*

Henry Wilson died in 1840, having devised his real estate to trustees for sale, and charged the same, together with his personal estate, with the payment of his debts.

A creditors' bill was filed on the 22nd of August, 1845, by Ingram, against the executors and devisees of Henry Wilson, charging that Ingram had entered into the agreement of the 23rd of August, 1839, upon the faith of the assurances of
[*70] Henry Wilson as to the *solvency of Wilson & Son, and of the sufficiency of the Duke-street property as a security for the 1500*l.*; that Henry Wilson knew of the insolvency of Wilson & Son, who were, in August, 1839, indebted to him in upwards of 4000*l.*; that he also knew that the Duke-street premises were mortgaged very nearly to their full value; and that such representations were made by Henry Wilson, to prevent the plaintiff from taking legal measures against Wilson & Son.

The assignees of Wilson & Son were made parties, upon a suggestion that they claimed some interest in the Duke-street property.

The bill prayed that an account might be taken of what was due to the plaintiff in respect of the 1500*l.*, and that the leasehold premises in Duke-street might be sold, and the proceeds applied, so far as they would extend, in payment of the plaintiff's said demand, and that the deficiency might be paid by the executors and devisees of Henry Wilson, out of his other personal and real estate. The bill also asked for the usual account of debts, and for the application of the estate of the testator in a due course of administration.

The representatives of Henry Wilson, by their answer, said they did not doubt, that, in August, 1839, Henry Wilson, as well as all other persons acquainted with the Duke-street property,

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believed it to be an ample security for the 1500*l.*, but that, by reason of a subsequent diminution in value, it had become scarcely sufficient to discharge the prior incumbrances thereon. The assignees of Wilson & Son disclaimed.

The allegations of the plaintiff as to the representations made by Henry Wilson, at the meeting of the *23rd of [*71] August, 1839, were substantially proved by the depositions of the two sons of the plaintiff, who were present.

Thomas Wilson was examined as a witness for the defendants, and stated that no representation was made in his presence or to his knowledge, by Henry Wilson, that the Duke-street property was unincumbered, or only charged with a small annuity. He stated that the property had cost 5200*l.*; that Henry Wilson had always considered it to be worth that sum; that, about a month after August, 1839, it had been valued by surveyors at 4800*l.*; and that, since that time, the premises had fallen very greatly in value.

Mr. *Romilly* and Mr. *Elmsley*, for the plaintiff, relied upon the proofs of the fact that the false representation had been made by the testator; that he must have known the representation was false, or, if not, that he made himself answerable for its truth;(*a*) and that the plaintiff, having taken up the bills upon the faith of the representation, had received damage thereby: *Pasley* v. *Freeman*,(*b*) *Burrowes* v. *Lock*,(*c*) *Dobell* v. *Stevens*,(*d*) *Partridge* v. *Usborne*.(*e*)

Mr. *Bacon* and Mr. *Lloyd*, for the defendants, the representatives of Henry Wilson.—As to the alleged representation of the solvency of the firm of Wilson & Son, there is no evidence that it was not perfectly true. The fact that the house was hurried to a bankruptcy, and that the *assets failed to [*72] realize but a small dividend, does not negative the fact of the solvency of the house at the time the representation was

(*a*) *Schneider* v. *Heath*, 3 Camp. 506, per Mansfield, C. J.
(*b*) 3 T. R. 51. See Smith's Leading Cases, p. 55, 2d edit.
(*c*) 10 Ves. 470. (*d*) 3 B. & C. 623. (*e*) 5 Russ. 192, 215.

made. The other representation imputed to the testator rests upon slight evidence—the recollection of conversations many years before, by parties under, at least, a bias to attribute to them the effect which the bill alleges. The testator, appears, moreover, to have had reasonable grounds for believing that the property was not then an insufficient security for the 1500*l.*; and, whether it was sufficient or not, there is no proof of any damage to the plaintiff. He was liable to pay the bills before the security was given; he did not incur any new liability in reliance upon the charge, but merely fulfilled a prior obligation. The security was in fact perfectly gratuitous on the part of the testator, and, as it would seem, was given in consideration only of the friendship and connection in business which had long subsisted between the plaintiff and the testator, and perhaps also from the consideration that it was through the testator that the plaintiff had become acquainted with the firm.

VICE-CHANCELLOR:—According to the agreement between the parties, I have no doubt that the plaintiff is entitled to have the property sold to pay him the 1500*l.*, if he has advanced it; and that he has in fact advanced it does not appear to be a question. No inquiry is asked by Mr. Bacon upon that point. It will be in the common course to decree the sale of the property, subject to the incumbrances, if the incumbrancers will not join, and free from the incumbrances, if they do.

It is then insisted, that if the property should be insuf-
[*73] ficient to realize the 1500*l.*, the plaintiff is entitled *to proceed for the remainder against the general estate of the surety, on the ground of the fraud complained of by the bill. This does not necessarily follow. The question is, not what the property will realize now, but what it was worth at the time the representation was made.

The representations which constitute the alleged fraud relate to two distinct facts: first, as to the solvency of the firm of Wilson & Son; and, secondly, as to the value of the property offered for the mortgage.—There is no question that Wilson & Son was an embarrassed firm, for it was their embarrassment that led to

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this arrangement. If the representation amounted to no more than this, that, looking to the accounts of the firm, the firm was solvent, I must take the meaning of that representation to have been, that, although the firm was so embarrassed that they could not then meet their engagements, yet if they could realize their assets, and time was given them for that purpose, the amount of the assets would be found to exceed the amount of liabilities. Now I have no evidence before me of the state of the firm at the time of the alleged representation, nor of what it might have been if given, or other possible circumstances had occurred. I cannot, therefore, decide that there was any misrepresentation as to the solvency of the firm.

The misrepresentation with respect to the property the subject of the mortgage, as alleged by the bill, is, that there was no incumbrance upon it except an annuity, and that the property was more than sufficient in value to pay the debt. The sufficiency may or may not be matter of opinion; but I do not concur in the observation, that, because value is matter of opinion, therefore a man who says his property is sufficient to pay a debt may not be shown to have made a fraudulent representation. It may be so plainly deficient as to *make it impossible [*74] for the party to have believed what he stated. It appears that the property was about this time valued at 4800*l.*, and that it had cost the owner 5200*l.*; and if there were no incumbrances upon it, the representation of its value to a person about to advance upon it no more than 1500*l.* might have been perfectly honest. The only misrepresentation which can be imputed, was that regarding the existence of the incumbrances. The allegation in the bill is, that the property was subject to no incumbrances except an annuity of 150*l.*, when in point of fact there was at that time, and of course within the knowledge of the party who made the representation, if he did make it, not only the annuity, but a mortgage of 2500*l.*—a charge which would render the security insufficient for payment of the debt. It appears to me that the plaintiff must be entitled to say to the owner of the property, if I pay 1500*l.* upon a representation falsely made by you, that the estate you gave as a security for it is worth 2500*l.*

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more than it was in truth worth, you shall make good your representation out of the property, so far as it will extend; and if it shall be insufficient, then out of your other assets. This appears to me to be a clear head of equity. [His Honor then examined the weight and effect of the evidence in the cause, as to the conversation at the meeting of the 23rd of August.]

I have no distinct evidence as to the value of the property at the time, but some evidence is given that the property has fallen in value since this transaction took place. I cannot, in this state of the case, make an absolute decree in the plaintiff's favor. It is equally clear, upon the evidence before me, that I cannot say the plaintiff has not made out a case for relief.

Let there be a decree for a sale of the property, and [*75] *the Master to ascertain the value of the surplus after paying the incumbrances. If the property be not sufficient to pay the plaintiff's debt, the Master must ascertain what, at the time of the agreement in August, 1839, was the value of the property, and what was the amount of the incumbrances upon it. I direct the inquiry without prejudice, and the Master must be at liberty to state special circumstances.

When the cause comes back, if I am not able satisfactorily to weigh the credit due to Thomas Wilson on the one side, and the two sons of the plaintiff on the other, I must do that which this Court is sometimes obliged to do,—direct the parties to be examined before a jury. I hope that I may be able to escape from that necessity.

1848: *March* 19*th*.—The cause was heard upon further directions. The substance of the Master's report is stated in the judgment.

Mr. *Romilly* and Mr. *Elmsley*, for the plaintiff.

Mr. *Bacon* and Mr. *Lloyd*, for the defendants.

VICE-CHANCELLOR:—The two letters of the 23rd of August, 1839, would clearly give the plaintiff a lien on the Duke-street

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property to the extent of 1500*l.*, bills to that amount being paid by plaintiff at maturity. The agreement contained in the two letters of the 23rd of August, 1839, is the only agreement this Court can enforce. But if the plaintiff was induced to enter into that contract by a collateral representation which was false, and known by Henry *Wilson to be false, (as, if it [*76] were false, it must have been,) I cannot entertain a doubt that Henry Wilson thereby became liable to the plaintiff for any damages he might sustain by that representation: *Lysney* v. *Selby*,(a) *Dorell* v. *Stevens*,(b) *Evans* v. *Bicknell*,(c) *Burrowes* v. *Lock*,(d) *Partridge* v. *Usborne*,(e) and the cases cited in *Blair* v. *Bromley*.(f) If the damages thus sustained were unliquidated in amount, a jury might possibly be necessary to ascertain the amount: but here the amount is ascertained, or capable of being easily ascertained, if the equity be made out.

The circumstance that, before the 23rd of August 1839, the plaintiff had become liable upon the bills against which the security was intended to protect him, may be material in considering whether the alleged representations were made or not,—for an actual creditor may be glad to get what security he can. The creditor who is about to advance his monies will naturally look with greater caution to the security he takes. But if the misrepresentations (as facts) are proved, no question can arise as to the sufficiency of the consideration to support the mortgage. The creditor who is secured rests upon his security, and foregoes those extreme remedies against his debtor to which, without security, the due protection of his own interests might drive him; and if the misrepresentations are established, they will give the plaintiff the same equity against the party who made them, as if the advance was made at the time.

I have briefly noticed the foregoing points, because they were much commented upon at the bar; but in *truth [*77] these points were all disposed of by the judgment I pronounced at the hearing of the cause in January, 1847. I then decided, that the plaintiff was entitled to relief under two condi-

(a) 2 Ld. Raym. 1118. (b) 3 B. & C. 623. (c) 6 Ves. 173.
(d) 10 Ves. 470. (e) 5 Russ. 195. (f) 5 Hare, 542.

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tions:—First, that the misrepresentations were established; and, secondly, that damage and injury had resulted from them to the plaintiff. I reserved to myself the question, whether I should send the case to a jury; but in other respects I decided the whole case, so far as the expression of my opinion could do so.

The decree directs a sale, and that the incumbrances shall be ascertained; and if the surplus proceeds, after payment of the prior incumbrances, shall not amount to 1500*l.*, then the Master is to make inquiries as to the state of the incumbrances on the 23rd August, 1839. If (as the defendants have argued) the plaintiff took the security for what it was worth, these latter inquiries would have been nugatory. But, by the terms of the decree, the inquiries were to be without prejudice, and I could not, therefore, refuse to hear the argument for the defendant repeated.

I directed the inquiries contained in the decree, in order that I might be informed what were the incumbrances and their amount for that would go directly to the question of misrepresentation. I desired also to know the value of the property in August, 1839; because, as I before observed, although value might in some sense be a matter of opinion, yet the disproportion between the alleged and actual value might be such as to make fraudulent a merely general representation as to the sufficiency of the proposed security.

The Master has made his report, and the short result of that report may be stated in a few words. Assuming the [*78] annual value to have been 300*l.*, (in fact the *property was let at a much less sum,) the gross value was 4800*l.* The incumbrances were,—the annuity of 150*l.*, or 1740*l.*, and the mortgage for 2500*l.*, making together 4240*l.* This would leave a value of 560*l.* beyond the incumbrances. If the rental were less it would of course be reduced in proportion. In no view of the case could it be an adequate security for 1500*l.*, subject to existing incumbrances, and much less could it be worth three or four times the amount of the sum to be secured in favor of the plaintiff. If Henry Wilson said it was unincumbered, except the annuity, that was a fraud; and if he did not say that, but said only that it was a sufficient security, or that it was worth three

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or four times as much as the 1500*l.* as a security, it is difficult to say that such a representation could have been other than fraudulent.

[His Honor then went through the pleadings and evidence, and concluded that the case made by the bill, of misrepresentation concerning the value of the property, was proved.]

Some observations were made on the delay in filing the bill, as a circumstance that discredited the plaintiff's case. I cannot so consider it. If the mortgage itself were in question, or if the state of the property, with reference to the incumbrances, was known in the lifetime of Henry Wilson, and unnoticed by the plaintiff, the observations upon the time between 1839 and 1845, when the bill was filed, might be material. But, the mortgage, not being in dispute, there is nothing in that part of the case to excite suspicion. Henry Wilson died in 1840, and there is no ground for imputing to the plaintiff any knowledge of the state of the title until after his death.

DECREE for payment of 1500*l.*, with interest and costs, not including the costs of the assignees of Wilson & Son.

*CHANT *v.* BROWN. [*79]

1849: January 12th, 13th and 15th.

Confidential communications made by a party to his attorney or counsel do not cease to be privileged by the fact that the attorney or counsel afterwards becomes interested as devisee of the property, to the title of which such communications related.

Upon exceptions for insufficiency to the answer of a party who had been the attorney in the transactions impeached, and who refused discovery, on the ground of privilege, the Court cannot regard the subsequent consent of the client to the disclosure of the matters inquired after, for the question of sufficiency must be determined as of a time anterior to the exceptions.

EXCEPTIONS to the sufficiency of the answers of Augustus Pulsford Brown and George Brown, had been allowed by the Master, and were now argued upon exceptions to his report. The

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question was, whether the professional relation in which the defendants had stood, as attorney and counsel to a party in the transaction impeached by the bill, protected from discovery the matters in question, notwithstanding the circumstances that had subsequently taken place, and which had given the defendants, the Browns, or one of them, a beneficial interest in the property in dispute.

By a settlement made in 1805, upon the marriage of Edward Melton and Mary his wife, the husband was (subject to the life estates of himself and his wife) donee of a power of appointment of an estate at Westhill in the county of Devon, amongst the children, or such one or more of the children of the marriage as he should think fit, with remainder, in default of appointment, amongst the children equally. There were five children of the marriage, Richard, Mary, Jane, Elizabeth, and Margaretta. Margaretta married the plaintiff, Robert Chant.

Edward Melton, the husband, died in 1834, and Mary the wife in 1847.

The bill was filed by Robert Chant and Margaretta his wife, alleging that Mary, one of the daughters, attained her age of twenty-one on the 21st of May, 1828; that, shortly afterwards, Edward Melton, by some deed, duly executed and attested in the manner required by the power in the settlement of 1805, [*80] appointed the Westhill estate to Mary, the *daughter, absolutely; and that, by indentures of lease and release of the 12th and 13th of September, 1828, made between Edward Melton and Mary his wife, of the first part, Mary, the daughter, of the second part, John Timewell of the third part, and the defendant, Augustus Pulsford Brown, of the fourth part, and by a fine, the Westhill estate was conveyed to John Timewell in fee, by way of mortgage for securing to him 4600*l.* The bill alleged that the deeds and fine were executed in pursuance of a scheme of Edward Melton, the donee of the power, to raise money for his own use; and that Timewell was a party to such scheme, or had notice of the intended application of the 4600*l.*; and that the whole of such sum was accordingly paid to Edward Melton, and applied for his own purposes.

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It appeared by the bill and answers, that John Timewell died in March, 1836, having by his will devised his real and residuary personal estate to the defendant George Brown and Francis Timewell, upon trust for the separate use of Mary, the wife of the defendant, Augustus Pulsford Brown, for life, remainder to Augustus Pulsford Brown for life, determinable on his bankruptcy, and otherwise as therein mentioned, remainder to the children of Augustus Pulsford Brown and Mary his wife; and the testator appointed the said Mary Brown, George Brown, and Francis Timewell his executors. There were children of Augustus Pulsford Brown and Mary his wife, but none of such children were parties to the suit; nor was the personal representative of Edward Melton a party.

The bill charged that Timewell, the testator and mortgagee, had notice, before the advance of his money, of a fraudulent exercise of the power of appointment, as thereby alleged; and, as evidence of such notice, the *bill charged that [*81] the defendant, Augustus Pulsford Brown, acted as the solicitor of Timewell, and of Edward Melton, in the treaty for and preparation of the deeds of appointment and mortgage, and in the execution and completion thereof respectively, and thereby acquired a knowledge of the nature of the transaction; and that the same also appeared by an account current between Edward Melton and Augustus Pulsford Brown, in the possession of the latter.

The bill sought to set aside the deed of appointment of May, 1828, and the mortgage-deed of September following, and the effect of the fine in favor of the parties who would, under the settlement of 1805, in default of appointment, be entitled to the Westhill estate.

The defendants, Augustus Pulsford Brown and George Brown, filed separate answers. Augustus Pulsford Brown said that he was, and continued to be, an attorney and solicitor, and that he acted as the solicitor of Edward Melton in the treaty for and preparation of said deed of appointment; and that George Brown, a barrister-at-law, acted as the counsel of Edward Melton in settling the draft of said deed of appointment. The defendant said, that

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he, (Augustus Pulsford Brown,) did not act as the solicitor of John Timewell in the treaty for a preparation of said deed of appointment; and that George Brown did not act as the counsel of John Timewell in settling the said draft; and that, to the knowledge or belief of the defendant, John Timewell was not party or privy to the treaty for, or preparation, or making or executing of said deed of appointment, and did not know, and was not in any way informed, that the same had been, or was about to be made or executed, or that there was or had been any treaty for the same. The defendant, Augustus Pulsford Brown,

[*82] *further said, that he acted as the solicitor of Edward Melton and John Timewell, in the treaty for and preparation of the said indentures of the 12th and 13th of September, 1828, and the mortgage thereby made, and that George Brown acted as counsel of Edward Melton and John Timewell in settling the draft of the said indenture of the 13th of September, 1828; but the defendant said, that he, the defendant, was not consulted by, and did not act as the solicitor of Edward Melton and John Timewell, or either of them, in or about the treaty for or preparation of said indentures of the 12th and 13th of September, 1828, or the mortgage thereby made; nor did George Brown act as the counsel of Edward Melton and John Timewell, or either of them, in settling the draft of the said indenture, until some months after the making and executing of said deed of appointment; and that the treaty for, and preparation and making and executing of the said deed of appointment, formed an entirely separate and distinct transaction from the treaty for, and preparation and making and executing of the said indentures of the 12th and 13th of September, 1828; and that the treaty for, and preparation or executing of the said deed of appointment had not any connection with the treaty for or preparation or making or executing of the said indentures; and the defendant said, that all the knowledge and information which he possessed of the purport or effect or contents of the said deed of appointment, or the circumstances under which, or the purposes for which, or by virtue of what power or authority, or under what agreement, or with what view the same was made and executed, or the form or mode

of the execution or attestation thereof, or any other matter or thing in any way relating to the said deed of appointment, were acquired by him, the defendant, in the course and by means of his said professional employment as the solicitor of Edward Melton, and not *otherwise; and that all the know- [*83] ledge and information which he, the defendant, possessed of the purport or effect or contents of the said indentures of the 12th and 13th of September, 1828, or the circumstances under which, or the purposes for which, or under what agreements or agreement, or with what view the same was made and executed, or by whom the money secured thereby was advanced or paid, or how the same was applied, or any other matter or thing in any way relating to the said indentures, were acquired by him, the defendant, in the course and by means of his said professional employment as the solicitor of Edward Melton and John Timewell respectively, and not otherwise; and the defendant submitted he was not bound to set forth, and he refused to set forth the particulars inquired after by the interrogatories with regard to the purposes for, and the manner in which the appointment of May, 1828, was made to Mary, the daughter. These inquiries formed the subject of ten exceptions.

Mr. *Wood* and Mr. *Bird*, for the defendants, in support of the exceptions to the report.

The privilege extended to professional confidence was not taken away by any subsequent events. It was emphatically stated by Mr. Justice Buller, in *Wilson* v. *Rastall*,(a) not to cease "at any period of time. In such a case, it is not sufficient to say the cause is at an end; the mouth of such a person is shut forever": *Carpmael* v. *Powis*,(b) *Jones* v. *Pugh*.(c) The fact that the party was dead to whom were imputed the acts complained of, did not, therefore, alter the case, or destroy *the privilege [*84] which originally existed; nor was it affected by the circumstance that the solicitor had acquired a partial interest in the property to which the dispute related.

(a) 4 T. R. 759. (b) 9 Beav. 16; S. C. 1 Ph. 687. (c) 1 Ph. 96.

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The *Solicitor-General* and Mr. *Dickinson*, for the plaintiffs, *contra*.

The true question is, whether Timewell, the testator, if he had been himself a defendant to the bill, would have been bound to answer. The charge against Melton and Timewell is that of contriving and carrying into effect a scheme, whereby Melton was enabled to possess himself of money which belonged to his children; thereby committing a fraud on the settlement. It is clear that Timewell could not have avoided discovery of the fact or the extent of his participation in the alleged fraud. Then, the privilege of the attorney being not for his own benefit, but for that of his client, was only co-extensive with the privilege of the client. The difficulty, if any had existed, was moreover entirely removed by the fact that the interest of Timewell had become vested in the defendants, the Browns, whereby the several characters of solicitor and client were, as it might be said, merged: *Tugwell* v. *Hooper*,(*a*) *Guppy* v. *Few*.(*b*) In so far as the interest of Mary Melton, the appointee, was concerned, the privilege was in this suit, and the solicitor would not be permitted to insist upon it, where the client expressly required the discovery to be made: *Blenkinsop* v. *Blenkinsop*.(*c*)

Mr. *Wood*, in reply, denied the proposition, that the [*85] *privilege, which could be or ought to be claimed by the solicitor and by the client, was the same: *Greenough* v. *Gaskell*,(*d*) *Desborough* v. *Rawlins*.(*e*) [On this point, the case of *Preston* v. *Carr*(*f*) was also cited.]

VICE-CHANCELLOR:—It is, I understand, admitted that the answers of the defendants do not satisfy the interrogatories in the bill to which the exceptions apply. The two defendants, the Browns, insist they are not bound to answer the questions, for reasons assigned in their respective answers. The Master thought the reasons insufficient in law, and allowed the exceptions, and

(*a*) 10 Beav. 348. (*b*) Hare on Discovery, 168.
(*c*) Lord Chancellor, May 4th, 1848. Reported, 17 L. J., Chanc. 343.
(*d*) 1 My. & K. 98. (*e*) 3 My. & Cr. 515. (*f*) 1 Y. & J. 175.

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they came before me upon exceptions to the Master's report, finding the answers insufficient.

It will simplify the case if I confine my observations to the answer of Augustus Pulsford Brown; for it was admitted (after I had intimated my opinion, that, if the case of Augustus Pulsford Brown, solicitor and attorney, was within the privilege insisted upon, that of George Brown, the counsel, must be within the privilege also) that the same judgment must apply to both answers.

It may be convenient to observe, as narrowing the argument, that there is no exception applicable to the account current, which is mentioned in the bill as a ground for affecting Timewell with notice of the plaintiffs' case; and with respect to the terms in which the privilege is claimed, (being not less strong than those in *Jones* v. *Pugh*,)(*a*) it was not argued that they did not describe a case of privilege, if the position of the parties
*were such as to entitle them to claim it. I may observe [*86]
also, that the Browns are not charged with any fraud.

Now, if Edward Melton and John Timewell were living, and the question arose between the plaintiffs on one side and them on the other, I may perhaps say there are interrogatories not answered which they could not have refused to answer. A party liable to give discovery at the suit of another cannot, by communicating the matter of such discovery to his solicitor, for the purpose of getting advice, on the ground of that communication only excuse himself from giving the discovery which otherwise he would have been bound to give. I had occasion fully to consider the distinction between the client and the attorney, in that respect, in *Lord Walshingham* v. *Goodrich*.(*b*) Here the question is, whether the attorney is bound to give the discovery.

The law upon this point is given with clearness in Mr. Phillips' Treatise on Evidence. The mouth of the attorney, with respect to privileged communications, is closed forever, unless he has the permission of his client (whose privilege it is) to speak;

(*a*) 1 Ph. 96. (*b*) 3 Hare, 123.[1]

[1] See note by American Editor, 3 Hare, 122.

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and it is immaterial whether the client be a party in the suit or not. Lord Brougham examines the principle of the rule in *Greenough* v. *Gaskell*.(a) It is a rule founded upon something like necessity. Without it no one would dare ask professional advice; and it is not, perhaps, too much to say of the rule, that, unless the client waives the benefit of it, Courts of justice are bound to consider confidential communications (falling within the rule) as if they never had been made.

But it was argued, that, in this case, the parties upon [*87] whom the benefit of the privilege had devolved upon *the death of Edward Melton, appeared and waived the privilege. I cannot understand how that argument can apply upon exceptions to the answer. The questions upon the exceptions is not whether the client, after answer, consents to waive his privilege, but whether the answer was sufficient at the time it was filed. Upon a motion for the production of documents scheduled to the answer, an opportunity (of which the Lord Chancellor availed himself in *Blenkinsop* v. *Blenkinsop*) is presented of getting the waiver of the client. But that is inapplicable to an answer, the sufficiency of which must be determined as of a time anterior to the exceptions. I have not now to consider whether the plaintiffs might avail themselves of it by amending their bill.

If, however, the waiver were applicable to the case, I should be of opinion that there was no such consent in this case as would justify the attorney in disclosing what was originally confidential. The parties upon whom the benefit of the privilege devolved, upon the death of Edward Melton, would, in the first instance, be Mary, the appointee, and those who claim derivatively under the appointment to her, namely, the Timewells, and perhaps the personal representatives of Edward Melton,—for I am not prepared to admit, without more information than I now possess, that Edward Melton, as donee of the power which he exercised in favor of Mary, may not have an interest in upholding the appointment, even against the wills of Mary and Timewell. The right of Mary now to give up the benefit of the ex-

(a) 1 My. & K. 98.

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clusive appointment to her brother and sisters is not the question. Admitting that Mary might waive the privilege, in respect of her own interest, she cannot, after the mortgage of September, 1828, deprive Timewell, and those who claim under him, of the benefit of the privilege.

*But it was said, that Augustus Pulsford Brown having, under Timewell's will, acquired a property in the mortgage, must, upon these exceptions, be considered as owner of the property, and that, as such owner, he could not refuse to answer interrogatories which Timewell himself would have been compellable to answer. I cannot bring myself to think that reasoning sound, even if Augustus Pulsford Brown were absolute owner, which he is not. If Timewell had left his property by will to a stranger, the mouth of Augustus Pulsford Brown would have been forever closed in respect of the privileged communications. Could it then be argued with success, that if that stranger had by will given the property to Augustus Pulsford Brown, or that Augustus Pulsford Brown had purchased it of him, he would have become bound to disclose that which, by the supposition, came to his knowledge under circumstances which made it confidential, and which, but for his own acquisition, he never could have disclosed? I cannot come to that conclusion. The claim of privilege in this case deprives the plaintiffs of no evidence or right they originally had to a discovery from Augustus Pulsford Brown; and if that can be made out, why should the subsequent accident of the property coming to him make him liable to give discovery of matter which came to his knowledge under a privilege, which, in favor of third persons, would be conclusive? But, in this case, Augustus Pulsford Brown is not absolute owner; why, then, is his limited ownership to deprive the owner of the *corpus* of the estate of the privilege? [*88]

It was ingeniously argued, that those who claim under Timewell could not object to discover that which related to the appointment only; for that the answer stated, that Augustus Pulsford Brown was solicitor for Edward Melton, only in the matter of the appointment. *There are two answers to that argument; first, that the plaintiff's case upon his [*89]

bill—and without proving which, he can get no relief, and for the purpose of proving which, he wants discovery from Augustus Pulsford Brown—is, that the appointment and mortgage were one transaction; and, secondly, that the mortgage of September, 1828, gives Timewell, and those who are entitled through him, an interest in the appointment, and makes their consent as necessary to the disclosure of the confidential communication, as that of Mary, the appointee.

Exceptions to the report allowed.

CASTELLI *v.* COOK.

1849: February 8th and 9th.

If relief which is a proper subject of the jurisdiction of another Court, be dependent upon relief to be given in this Court, or if the relief which is a properly a subject for this Court, cannot be given except that which belongs to another jurisdiction be also given,—this Court, to prevent multiplicity of suits, may give both kinds of relief; but if the relief which is sought in a suit be of different kinds, within the jurisdiction of different Courts, and independent of each other, although relating to the same transaction,—the right in this Court to one kind of relief, will not necessarily draw along with it the right to the other; and therefore, where the bill by a part owner of a ship, against the master and other part owners, prayed an account of the past earnings of the ship, to which the plaintiff was entitled, his right to that relief afforded no reason for going on to restrain the sailing of the ship until security, according to the practice of the Admiralty Court, was given for the plaintiff's shares.

The Court of Chancery will not (in a case within its jurisdiction) interfere beyond, or otherwise than, the Court of Admiralty would interfere at the suit of some part owners to control the management or restrain the sailing of a ship,—there being no question as to the ownership, and the only dispute being as to the powers of the owners *inter se*.—*Semble*.

Whether the Court of Chancery has a concurrent jurisdiction with the Court of Admiralty, to restrain the sailing of a ship at the suit of the minority, or some of the part owners, until security for its return shall be given by the majority, or others; or whether it is necessary that other circumstances should exist,—as questions of property or otherwise, to draw the subject within the jurisdiction of the Court of Chancery,—*Quære*.

Objections to relief, on the ground that, although part that is asked is, yet the other part is not, within the jurisdiction of the Court, are not analogous to objections

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for multifariousness, where unconnected subjects of equitable jurisdiction are united in the same suit.

Where an injunction is applied for upon a distinct ground, which fails, it will not, in general be granted upon another ground which has not been put forward, but which, it appears, might have been put forward in the circumstances of the case.

A MOTION to dissolve an injunction restraining the defendant Robert William Cook, his servants and agents, *from sailing the ship Alligator, or causing or procuring [*90] her to sail from the port of London, until the said defendant should fully answer the bill, or the Court make other order.

The plaintiffs were the owners of 12-64ths shares of the ship, the defendant Cook of 24-64ths, the defendant Woods of 12-64ths, and the defendant Siddle of 16-64ths, which he had sold but not transferred to the defendant Patey. The bill and affidavits stated, that the Alligator sailed from London in June, 1841, for Singapore, under the command of the defendant Cook, and that she arrived in the port of London in November, 1848, having in the interval been employed in different voyages in the eastern seas; and that the plaintiffs believed that the gross earnings of the ship during that period had not been less than 25,000*l.*, all of which had been received by the defendant Cook. The several voyages referred to were set forth as showing the grounds of this belief; and the bill and affidavits stated, that the defendant Cook had not rendered to the plaintiffs any accounts of the employment or earnings of the vessel, nor had such accounts been rendered to other co-owners; and that such accounts were open and unsettled; and that the defendant had paid to the plaintiffs only the sum of 337*l.* on account of the earnings of the ship. The plaintiffs set forth a correspondence which had taken place since the return of the ship, by which it appeared that the defendant had refused to deliver the log-book or the bills of lading to the plaintiffs. It appeared, also, that the plaintiffs had been forcibly prevented from keeping a man on board the ship to retain possession; and that the ship had been removed to Rotherhithe, and extensively repaired. The bill and affidavit alleged, that the ship was advertized to sail on the 20th of January, for Shanghae, under

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[*91] the command of one John Dunn, *who was unknown to the plaintiffs; and that the plaintiffs believed the defendant Cook was still, in fact, the acting master. The bill and affidavits averred, that, the accounts of the employment and earnings of the ship being justly taken, it would appear (as the plaintiffs verily believe) that a balance, amounting to 3000*l.* at least, was justly due and owing to the plaintiffs in respect of their said 12-64ths shares. The bill prayed an account of the earnings of the ship, and payment of what might be found due to the plaintiffs on such account; a writ of *ne exeat regno* against the defendant Cook, until he should have made satisfaction to the plaintiffs in the said matters; and an injunction to restrain Cook from causing the ship to sail from London without the plaintiffs' consent, or unless upon the terms of giving security to the plaintiffs for the value of their shares; and a reference to the Master to settle such value and security.

The *ne exeat* and injunction was applied for *ex parte* on the 9th of January, when the injunction was granted, the plaintiffs undertaking to appear, upon one day's notice of motion to dissolve. The defendants Cook and Woods answered together on the 6th of February, and thereupon Cook gave the present notice of motion to dissolve the injunction. The defendants Siddle and Patey had also answered.

The answer of Cook denied any intention on his part to make another voyage with the ship, and denied any refusal to account, or that any balance whatever would be found due to the plaintiffs on taking the accounts.

Mr. *Wood* and Mr. *Tripp*, for the motion, insisted.—[*92] First, that the injunction had been obtained upon a *partial statement of the facts, and that material circumstances had been suppressed; and they argued, secondly, that there was no principle of law which would entitle the plaintiffs to the injunction to restrain the sailing of the ship. There was no dispute or question respecting the property in the ship, as occurred in *Haly* v. *Goodson*,(a) and in those cases in which the

(a) 2 Mer. 77.

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Admiralty Court has declined to act—the *Guardian*(a) and the *Aurora*.(b) If the sailing of the ship could be restrained, the jurisdiction was not in this Court, but in the Court of Admiralty. The injunction was refused in *Christie* v. *Craig*,(c) upon another sufficient ground, but nothing was said by the Lord Chancellor in that case, affirming the jurisdiction of this Court. The powers of the Court of Admiralty have been materially increased by the stat. 3 & 4 Vict. c. 65. Here, moreover, the allegation that the defendant was about to sail with the ship was denied by the answer, and the ground for an injunction, if such a jurisdiction existed, was altogether displaced. The circumstance that there were unsettled accounts between the parties, was no ground for the interference of the Court, prospectively, with the future employment of the ship.

The *Solicitor-General* and Mr. *Campbell*, in support of the injunction.

This Court has concurrent jurisdiction with the Court of Admiralty: *Haly* v. *Goodson*,(d) and there are many cases in which the Court of Admiralty has jurisdiction, but in which the jurisdiction of this Court is more effectual than that of the Court of Admiralty: *Duncan* v. *M'Calmont*.(e) The relief which that Court gives *falls short of that which a part owner [*93] is entitled to in equity. The dissentient minority can only require a bond to be given in an amount equal to twice the value of their shares, to secure, not the amount of their payments in repairs or outfit, nor their proportion of the profits which the ship may make, but merely the return of the ship within the jurisdiction. This measure of relief is obviously insufficient, and does not meet the case of a majority of part owners, who, whilst the accounts of former voyages are still unsettled, and the plaintiffs have been practically excluded from the management and profits of the ship, are again about to take the ship out of the jurisdiction of the Court, and continue the same system of exclu-

(a) 3 Rob. 93. (b) Id. 133. (c) 2 Mer. 137.
(d) Ubi supra. (e) 3 Beav. 409.

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sion: *Davis* v. *Johnston*.(a) The other part owners may go on trading with the ship until she is only fit to be broken up, and the Court of Admiralty is unable to provide for any account or division of the profits in the meantime. There was no principle which excluded the part owner of a ship from a right to partition, in common with the owner of any other kind of property. Even supposing that the same or similar relief would be given by the Admiralty Court, still the account of the past earnings of the ship was a proper subject of equity, and the account being taken here, the Court would not refuse the relief by injunction, and thereby compel the plaintiffs to institute a second suit for that purpose in the Court of Admiralty: *Pearce* v. *Creswick*.(b) If the injunction already obtained were other or more extensive than the circumstances now appearing would sustain, the Court would modify it in such a manner as to do justice to the parties, and afford security to the interests of the plaintiffs, but would not, in the circumstances of the case, leave them wholly unprotected.

[*94] *VICE-CHANCELLOR:—The rule, as I understand it, is this:—that a plaintiff applying *ex parte* comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go. But if the case has been properly brought forward, and there has been no concealment, the Court, if any considerations affecting the question have been overlooked will say it has itself to blame for not having looked more carefully into the case; and the Court then hears the motion, and deals with it according to the merits. There is nothing in this case that I am disposed to treat as an improper concealment on the part of the plaintiffs.

The plaintiffs are owners of 12-64ths of the ship Alligator.

(a) 4 Sim. 539. (b) 2 Hare, 286.

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The defendant Cook is at present entitled to 24-64ths, Woods to 12-64ths, and Siddle to the remaining 16-64ths. Siddle has entered into a contract for transferring his shares to Patey, but there has been no transfer of these shares yet made upon the register; and therefore I shall treat Siddle as the owner of the property. These are the rights of the parties at the present time. In the year 1841, Cook had not such an extensive interest as he has now; he was at that time the owner of 12-64ths.

In the year 1841, the ship sailed to China,—as I must take it, with the consent of the plaintiffs,—and from that time until her return to this country in the latter part of 1848, the ship continued trading in the China *seas. The defendant [*95] Cook went out as master of the ship, as well as part owner, and the ship has been trading under his directions. The plaintiffs allege that Cook has made large profits by such trading with the ship, that he has never accounted for them to the plaintiffs or any one else, and that he is largely indebted to the plaintiffs. The plaintiffs moreover allege that the ship is about to sail under the command of Cook, and they have therefore filed their bill, praying that Cook may be restrained from so sailing in the ship, or allowing the ship to sail, until he shall give security for the value of the plaintiffs' shares of the ship; the bill also prays, that accounts of the past earnings of the ship may be taken, and that the writ of *ne exeat regno* may be issued against Cook.

I am perfectly satisfied that the accounts which are asked are totally disconnected with the question as to the sailing of the ship. The plaintiffs have a right to have the accounts taken. There being no evidence of a debt due, on a balance of account or otherwise, from Cook, I refused that part of the motion which asked for the *ne exeat*, but I granted the part which related to the sailing of the ship. I shall, in the first instance, exclude the question of account from the consideration of that part of the case. It is, however, clear that the bill was filed on the principle that the state of the unsettled account affected the rights of the parties with reference to the disposition of the ship, and that the question of account was intended to influence the judgment

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of the Court as to the injunction to restrain the sailing of the ship.

In determining whether the plaintiffs are entitled to restrain the sailing of the ship or not, I shall, as I have said in the first place, in order to try the principle, consider the case pre-
[*96] cisely in the same way that I should *have done if the bill had stated nothing whatever as to the account, but had simply alleged that Cook was about improperly to carry the ship, in which the plaintiffs had an interest, away from this country. Now there is no doubt, that, if Cook was about to do what, upon this argument, is alleged, there being no dispute as to the number of shares belonging to each of the parties, the Court of Admiralty has a jurisdiction, and, I believe, a very effective jurisdiction, to prevent one part owner from so improperly dealing with the property of another.

It is said, however, that this Court has a concurrent jurisdiction with the Court of Admiralty in such a case; and, in considering that point, with reference to the case before me, it is extremely important to consider the meaning of the word "concurrent;" for if this Court has a concurrent jurisdiction, and nothing more, it is foreign to the question whether the relief afforded by the Court of Admiralty is or is not perfectly co-extensive with what the abstract justice of the particular case may require, or whether the protection which that Court gives is or is not insufficient. If the jurisdiction of this Court be merely concurrent, it follows that the measure of relief in the Court of Admiralty must be the measure of relief here, and that the only difference is in the form of proceeding.

If, however, I am to take into account the insufficiency of the relief which it is said the Court of Admiralty gives, and am on that account to entertain jurisdiction, the principle of my interference will be, not that this Court has a concurrent jurisdiction, which would only entitle me to do the identical thing which the Court of Admiralty might itself do, but that the Court of Admiralty does not do enough, and that the plaintiffs have a right to ask me to do more than the Court of Admiralty would
[*97] *do, it was for this reason, that, when I was pressed,

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during the argument, with the insufficiency, or ineffectual character of the relief which is given (as it was said) by the Court of Admiralty, I asked whether I could possibly do more than that Court could do? Where was the equity? I have not been answered by having a single authority adduced, showing that this Court would do more. It is clear, in the case of *Haly* v. *Goodson*,(a) Lord Eldon did nothing more than give the parties the same relief which the Court of Admiralty would have given; but he entertained the jurisdiction, because the Court of Admiralty was defective in power for the purpose of ascertaining what the shares of the parties were. The argument for the plaintiffs is founded upon the jurisdiction being supposed to be concurrent; and, in the absence of any authority, to show that this Court could go farther, I must take it, that the plaintiffs ask me to do for them, with reference to the sailing of the ship, that only which the Court of Admiralty would do.

Looking at the case in this point of view, my impression throughout the whole of the argument was, that the plaintiffs, by the frame of their bill, are placed in a situation of insuperable difficulty. If their application were made to the Court of Admiralty, they might have asked that Court to compel those parties who are about to take the ship away from this country, to give security for the return of the ship; but the bill does not proceed on the ground that the defendant Cook, and the other shareholders, who, by adding their shares to those of the defendant Cook, make a majority which may deprive the plaintiffs of the control of the ship, ought to give security; the bill alleges, that the other shareholders, whom the plaintiffs necessarily make defendants, concur with them in the view which they take *against Cook, and it prays no relief against the other [*98] shareholders. No relief being prayed against the shareholders other than Cook, it is impossible I could, at the hearing of the cause, or that I can now, upon motion, give any relief against them. What, therefore, I am asked to do is this,—I am asked to compel Cook to do that which, according to the case

(a) 2 Mer. 77.

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shown by the plaintiffs, and according to the case as it now appears in evidence before me, Cook is not bound to do. In fact, Cook entirely displaces the case which the plaintiffs have made, even if that case had been one upon which this Court could have acted in their favor. Cook says, "I am not about to sail with the ship. I am one among many part owners, who concur in thinking that the ship should go abroad; and I submit to the ordinary terms of giving security, if I am taken before a court which has jurisdiction to give the relief asked." But the way in which the plaintiffs have framed their case compels me either to refuse the motion or to restrain the defendant Cook from taking the ship away or allowing the ship to sail, until he has done that which he is not liable in law to do.

This, however, is a much narrower ground than I think I am bound to put the case upon. I have said I feel myself bound to exclude all question about the account, but I am perfectly satisfied that it is not the view with which the bill was framed. The bill seeks relief against Cook, on the ground of misconduct; and the relief prayed against him is not relief confined to this point,—that, as a partial shareholder, he can have no right to take away the ship without giving security; but the relief is founded on the allegation that Cook is a large debtor to the plaintiffs, and that, until he has rendered an account, he ought not to be allowed to go out of the jurisdiction and take the ship with him.

[*99] *That is the case put forward by the bill. Lord Cottenham, in *Whitworth* v. *Gaugain*,(a) said, that when a party comes on motion to restrain another from doing an act, he is bound to tell the Court what the case is on which he relies; and that, when he brings forward prominently, and relies upon a given case, the Court will not allow him, if he should fail in that case, to spell out another, and say he might have framed his case so as to show a title to the relief asked. That was a much more favorable case than this for permitting such a change of ground for there everything which the plaintiffs asked might have been granted them on the facts as they were stated on the bill. Here, it appears to me, the case is otherwise; for the plaintiffs are ask-

(a) Cr. & Ph. 325.

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ing, against Cook exclusively, relief to which, as against him alone, they are not entitled on the frame of the bill. I think, therefore, on that ground, if I assume that the Court has jurisdiction, I am bound to dissolve the injunction, without prejudice to the parties moving for another, if they can alter their case.

I do not wish to give any encouragement to the idea that this Court has jurisdiction between the part owners of a ship, when no point is in question, but whether one part owner can take the ship away. It is not necessary that I should express any opinion on the question, whether this Court has jurisdiction to restrain the sailing of the ship, where there is nothing to draw the subject within the jurisdiction, more than the simple case which I have supposed; and I certainly do not wish to encourage the supposition, that an injunction could be maintained in the circumstances of this case.

The only other point was that which arose out of the *question of account. It was suggested, and it occurred [*100] to me during the argument, that the Court, having necessarily jurisdiction in the matter of the account, might entertain jurisdiction on the other parts of the case. This, I am satisfied, is a proposition which cannot be maintained in the circumstances of this case. If that which the Court is asked to do with regard to the ship depended on the result of the account or if the Court were unable to give the plaintiff relief after the ship should have been taken out of the jurisdiction, there might be a reason why the Court should interfere to prevent its departure; but there is no ground for interference in this case. That part of the transaction which affects the sailing of the ship, and that which affects the account, are as independent of each other as any two questions can be. I cannot, I think, upon this motion treat the case as one of multifariousness, or, if I must so treat it, I must I think, overcome the objection of multifariousness. In this case the plaintiffs are asking certain relief to which they are entitled, and which would oblige the defendant to answer all the charges in the bill; and the plaintiff is at the same time going on to ask that which, as I view it, I think the Court has no jurisdiction to grant. [Injunction dissolved, with costs.]

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[*101] *In the Matter of the Act 10 & 11 Vict. c. 96 and In the Matter of Gaffee's Settlement.

1849: January 15th and 19th.

By a post-nuptial settlement a sum of money, the property of the wife, was vested in trustees, upon trust to pay the income as the wife should from time to time appoint, not by way of anticipation; and in default of appointment, to the wife for her separate use, independent of G., her husband; and from and after her death, to G., the husband for life; and from and after the death of the survivor, to the children of the marriage, as therein mentioned; and if there should be no children and the wife should survive G., the husband, the whole trust property to be paid to her, and if G., the husband, should survive the wife, then, at his death, as the wife should appoint, or, if no appointment, to her next of kin.

Held, that,—there being no definite term during which the trustees were directed to pay the income as the wife should appoint, or for her separate use, and the direction to pay to herself being made with reference only to the marital rights of G., the then existing husband, and there being no protection, by the express words of the settlement, afforded against a future marriage of the wife—the provision for the separate use and the clause against anticipation had no force after the death of G., the husband, and during a second coverture of the wife; and that, therefore, the second husband had power to assign the interest of the wife in the trust property.

The petition of Hannah, the wife of Adam Browne, for the payment to her of the dividends arising from a sum of 1283*l.* 6*s.* 8*d.* which had been paid into court under the Trustee Relief Act, by the trustees of the settlement made during the lifetime of her first husband, Benjamin Gaffee. The petition was opposed by persons who claimed the dividends of the trust funds by virtue of assignments thereof made by Adam Browne and Hannah his wife to secure the payment of certain annuities. The question was, whether, under the terms of the settlement, the provision for the separate use of the wife, and the restraint of anticipation, prevailed during the second coverture. The settlement is stated in the judgment, together with the other material facts that appeared in the affidavit upon which the fund was paid into court, and upon the affidavits in support of the petition.

Mr. *Wood* and Mr. *Parsons*, for the petitioner.

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The *Solicitor-General* and Mr. *Bacon*, for the Respondents, claimed the benefit of the assignment of the income of the trust fund, to secure the annuities.

*The cases of *Knight* v. *Knight*,(a) *Benson* v. *Benson*,(b) and *Bradley* v. *Hughes*,(c) were cited, which, it was contended, on one side, were untouched by the decision in *Tullett* v. *Armstrong*(d) and *Scarborough* v. *Borman*,(e) and on the other, were the result of that view of the law which formerly existed with regard to the general cessation of the fetter against alienation upon the termination of the coverture, and which was displaced by the latter authorities. [*102]

Mr. *Walker* and Mr. *Blundell*, for the trustees.

VICE-CHANCELLOR:—Hannah Poole, one of the three daughters of Thomas Poole, married Benjamin Gaffee. At the time of the marriage Hannah was a minor, and was entitled under her father's will to property of considerable value; but no settlement, or agreement for a settlement, was made upon her marriage. After the marriage, it was proposed and agreed that a part of Hannah's fortune should be paid to her husband, and that the residue should be settled. In pursuance of this agreement, the sum of 1283*l.* 6*s.* 8*d.* was paid to Benjamin Gaffee, and a settlement of the residue was executed. The settlement was dated the 29th of May, 1811, and was made between Benjamin Gaffee and Hannah his wife of the one part, and trustees of the other part; and, according to its provisions, the trustees were to pay the income of the trust property to such persons as Hannah should from time to time appoint, but not so as to dispose of the same by way of anticipation; and, in default of appointment, to pay it to Hannah for her separate use, notwithstanding her coverture, independently of Benjamin Gaffee, who was not to intermeddle with the same, nor was the same *to be subject to his debts or engagements; and from and after her death, to Benjamin Gaffee [*103]

(a) 6 Sim 121. (b) Id. 126. (c) 8 Sim. 149.
(d) 4 My. & Cr. 390. (e) Id. 377.

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for life; and from and after the death of the survivor, to the children of the marriage, according to the appointment of the parents as therein mentioned; and if no appointment, to vest in the sons at twenty-one, and in the daughters at twenty-one or marriage, but not to be payable until the death of the survivor of the parents. If there should be no children of the marriage, and Hannah should survive Benjamin, the whole trust property was to be paid to her; if Benjamin survived Hannah, then, at his death, subject to her appointment, the whole was to go to her next of kin, according to the Statute of Distributions.

Benjamin Gaffee died, and there are several children of the marriage. Hannah has since married Adam Browne, her present husband.

Since the second marriage, Adam Browne and Hannah his wife have charged her interest in the trust property with several annuities; and a question having been raised as to the validity of the charge, the trustees have sought the directions of the Court.

The law, as laid down in *Tullett* v. *Armstrong*,(*a*) and in *Scarborough* v. *Borman*,(*b*) is not in dispute. The only question is, whether the trust for the separate use of Hannah, with the proviso against anticipation, is, upon the true construction of the settlement of May, 1811, confined to the then existing coverture, or is general, extending to any marriage she may contract during her life.

The settlement is very inartificially worded. The [*104] *first direction is to pay the income to such person as Hannah shall from time to time appoint, which, coupled with the direction against anticipation, means, from time to time appoint after it has become due. But no definite time, as the life of Hannah, or the continuance of the existing coverture, is mentioned during which the direction is to be observed.

Then follows, secondly, the direction, that, in default of appointment, the trustees are to pay the income to the separate use of Hannah, "notwithstanding her coverture:" stopping there, the question would be, whether the words "notwithstanding her

(*a*) 4 My. & Cr. 390. (*b*) Id. 377.

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coverture," used by parties actually married, do not, in point of construction, mean the then present coverture. If that be doubtful, the next question will be, whether that meaning of the words is not fixed by the reference which is made to the debts and engagements of Benjamin Gaffee only?

Assuming, for the purposes of the argument, that the direction to pay to the separate use of Hannah is confined in construction to the then existing coverture, will not that necessarily, or at least by reasonable construction, shew that the clause against anticipation (unlimited in terms) is also to be restrained to the existing coverture? It is merely part of the machinery by means of which the gift to the separate use of the married woman is made effectual; and no conveyancer, in the simple case, contemplates the one being more extensive than the other.

It may be observed further, that, after the provisions for giving the separate use to Hannah, the settlement proceeds, "from and after her death," &c., supposing her to die in the lifetime of her husband; and the settlement is defective in not containing any direction to *pay to her during her life, except what may be found in the first direction to pay to her indefinitely. [*105]

Another observation, tending in some degree to confirm the construction which would confine the separate estate and clause against anticipation to the existing coverture, is, that, in the event of Hannah surviving Benjamin, and the failure of children of the marriage, she is to take the whole absolutely, by the express words of the settlement; and thus no protection is afforded against a future marriage. I do not, however, think that this observation has much force.

It was said, that, if the clause against anticipation, and the separate use clause, are co-extensive, and confined to the existing coverture, (and I think certainly they are co-extensive,) there is no express gift to the wife for her life if she survived her husband. This, I think, is a just observation. But the implication (if implication be necessary where the property belonged to the wife, and she survived her husband,) is so plain, and the inaccu-

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racies in penning the settlement so manifest, that, if in other respects the separate use and claim against anticipation be limited in construction to the first marriage, I am clear the omission to give the express estate for life is not a reason for altering it. At all events, the gift of a life estate to the wife would not weaken the observations in favor of the limited construction.

The result may, I think, be fairly stated to be, that, except the general power to appoint from time to time, which (standing alone) is indefinite, the language of the settlement points throughout at a provision for the existing marriage.

Without saying that I have a very positive opinion [*106] *that the limited is the necessary construction, I find three cases decided by the Vice-Chancellor of England, *Knight* v. *Knight*,(a) *Benson* v. *Benson*(b) and *Bradley* v. *Hughes*,(c) which I must overrule if I hold that the alienation of the income of the fund by Hannah was restrained after the death of Benjamin Gaffee.

MIDDLETON *v.* REAY.

1849: February 13th.

Upon a reference to the Master to appoint new trustees, in a case where the power of appointments is vested by the author of the trust in a party to the cause, the Master will have regard to such power in selecting the trustees from the persons proposed by that party and by others, but the Master is not bound to approve of the persons nominated by such party in preference to other persons whom he may consider more eligible; and his decision is not open to exception merely because he has not chosen the persons nominated by the party to whom the power was given.

Where parties in a cause have a power of appointing new trustees, and it is proper for the appointment to be made in the cause, there should be special directions to the Master to approve of proper persons to be nominated by the parties having the power, if it be intended to preserve their right of nomination.—*Semble.*

EXCEPTIONS to the Master's report, approving of two persons as new trustees of the estate of B. Middleton, the testator, in the

(a) 6 Sim. 121. (b) Id. 126. (c) 8 Sim. 149.

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place of one trustee who was dead, and of another who declined to act.

The defendant, the widow of the testator, who, under his will, was entitled to a life interest in the estate, and was also the surviving and continuing trustee, had married the defendant Reay. The plaintiffs were the parties interested in remainder. The will provided, that, in case any of his trustees thereby nominated and appointed, or any future trustee or trustees to be nominated in the place or stead of them or either of them, as thereinafter mentioned, should happen to die, or desire to be discharged from or decline or become incapable to act in the trusts thereby in them respectively reposed as aforesaid, before the trusts should be fully executed, *then, and so often as the same [*107] should happen, it should and might be lawful to and for the surviving or continuing trustees or trustee, by any deed or deeds, &c., from time to time to nominate, constitute, and appoint any other person or persons to be a trustee or trustees, in the place of the trustee or trustees so dying or desiring to be discharged, or refusing or declining or becoming incapable to act, as aforesaid.

Mr. *Kenyon Parker* and Mr. *Shebbeare* argued, that the existence of the suit did not put an end to or suspend the operation of the will, or take away the powers conferred by the testator. The suit only rendered it necessary that those powers should be exercised under the control of the Court. In this case, the Master was bound to select the persons nominated in pursuance of the power,—they being proper persons; and therefore, the Master ought to have selected the persons proposed by Mrs. Reay: *Webb* v. *Lord Shaftesbury*,(a) *Attorney-General* v. *Clack*,(b) *Cafe* v. *Bent*.(c)

The *Solicitor-General*, in support of the report.

The trustee had an opportunity of appointing new trustees before the bill was filed; but, not having done so, the appoint-

(a) 7 Ves. 480. (b) 1 Beav. 467. (c) 3 Hare, 245.

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ment was in the Master, by force of the decree. It was not a matter in which any party could be supposed to have an interest other than in obtaining the appointment of fit persons; and the decision of the Master could not now be displaced, except by shewing that the persons he had selected were not fit for the office.

The VICE-CHANCELLOR, after communicating with the Master, said that the surviving trustee might have acted [*108] *under the power given by the will, and appointed new trustees before the commencement of the suit; but, instead of doing this, it appeared that several years,—from 1842 to 1846,—had been allowed to elapse without any such appointment. In the simple case of a power of appointing trustees, confided to a particular person, the Court, on referring it to the Master, in a suit for the appointment of new trustees, would probably give a special direction to the Master to approve of fit persons to be nominated by the donee of the power. Such special directions had, however, not been asked for, or had not been made in this case. The cause had been referred to the Master in the usual way. Under such a decree, the power of appointment given by the will to the defendant was, no doubt, a circumstance to be regarded; but it was only one circumstance. It gave the defendant no right to require the appointment of her nominees. The Master, taking that as well as other circumstances into his consideration, had thought proper to approve of the trustees nominated by the other parties. The defendant did not object to the fitness of the trustees so chosen. He could not allow the exception without holding, as an abstract proposition, that under a decree in the common form, directing the Master to approve of trustees, he is not at liberty, in his discretion, to select persons other than those proposed by the party to whom the power of appointment was given. He saw no ground for differing with the Master in the conclusion to which he had come. The Master had given some reasons for his decision, which deserved attention; but the judgment of the Court was formed independently of those reasons. [Exception overruled.]

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*Robertson *v.* Southgate. [*109]

Harmer *v.* Southgate.

1849: June 8th and 9th.

Motion by the executor of a defendant, as against whom a bill was dismissed, with costs, since the stat. 1 & 2 Vict. c. 110, the defendant having died before taxation of his costs, that the Master might proceed with such taxation,—the suit not having been revived,—refused, with costs.

At the hearing of the original and supplemental suits, the bills were ordered to be dismissed, with costs, to be taxed for the defendants, James Webb Southgate and William Turquand, and it was ordered, that such costs, when taxed, should be paid by the plaintiffs, James Harmer and Zaccheus Woodman, to the defendants James Webb Southgate and William Turquand.(*a*) The decree was pronounced, and dated the 12th of January, 1848. The defendant, James Webb Southgate, died on the 30th of January, 1848, before the decree was drawn up. This fact was stated to the Registrar by the solicitor for the plaintiffs in the supplemental suit, but the Registrar nevertheless passed the decree. The death of James Webb Southgate was afterwards stated to the Taxing Master, and not denied by the solicitor for the executrix of James Webb Southgate, and the Master refused to tax the costs ordered by the decree to be taxed and paid to James Webb Southgate.

Mrs. Southgate, the widow and executrix of James Webb Southgate, by leave of the Court gave notice of motion intituled in both causes, that the Taxing Master to whom the taxation was referred might proceed with the taxation of the costs of the defendant James Webb Southgate, notwithstanding his decease.

The *Solicitor-General* and Mr. *Hallett*, for the motion.

The Taxing Master ought to have obeyed the decree, *unless some subsequent order of the Court had been [*110]

(*a*) 6 Hare, 536.

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made to stay its prosecution. His duties were in this respect ministerial only. He had no jurisdiction to inquire into the existence of new facts affecting the interests of parties under the decree. The circumstance, that there was no dispute as to the death of the defendant, was immaterial. A rule of practice must be applicable to all cases, whether there be a question of fact or not; and if the fact were in question, it was clear the Master had no jurisdiction to examine witnesses on the point.

The rule, that there cannot be a bill of revivor for costs only, if untaxed, had been deplored as unjust and arbitrary, by the most eminent judges: *Kemp* v. *Mackrell*,(a) *Bowyer* v. *Beamish*,(b) *Barry* v. *Stawell*,(c) *Hall* v. *Smith*,(d) and the Court would not sanction the continuance of the practice of staying the taxation of costs payable to the estate of a deceased party, now that the statute 1 & 2 Vict. c. 110 had in substance and effect identified decrees in equity with judgments at law, and the persons entitled to costs in equity with judgment creditors at law, and had assimilated the powers of and remedies in the two courts: *Carlon* v. *Farlar*,(e) *Blake* v. *White*,(f) *Taylor* v. *Jardine*.(g) The practice of suspending the taxation was founded upon the absence of the right to revive; but the statute enabled the person interested in the taxation to proceed without revivor. It had the effect of a written agreement to charge the lands of the party liable to pay the costs under the decree, operating on the day the decree was pronounced. In order to obtain the benefit of this [*111] *statutory agreement it was necessary that the amount of the costs should be registered with the senior Master of the Common Pleas; and the taxation was therefore necessary, not for the purpose of revivor, which the statute did not assist: *Andrews* v. *Lockwood*,(h) but for the purpose of giving effect to the provisions which the statute contained, and the right which it conferred. According to the forms of writs of execution framed by the judges in equity, in pursuance of the statute, the interest

(a) 3 Atk. 812. (b) 2 J. & L. 228.
(c) Flan. & Kel. 1; *S. C.*, 3 Ir. Eq. Rep. 18, 146. (d) 1 Bro. C. C. 488.
(e) 8 Beav. 525. (f) 3 Y. & C. 434. (g) 1 Hare, 316,
(h) 15 Sim. 153; *S. C.*, 2 Ph. 398.

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commenced only from the date of the Master's certificate of taxation;(a) which constituted a further reason for proceeding with the taxation without delay, inasmuch as the party entitled to receive the costs was absolutely deprived of the interest on the amount of his claim so long as the delay should continue. The cases at law showed that the charge upon the land is completed by the order, although the taxation has not taken place, and the amount is unascertained: *Hodgson* v. *Patterson*,(b) and where the charge was, from any circumstances, necessarily incomplete, the Court would, after the taxation, take the necessary steps for establishing it: *Doe* v. *Amey*,(c) *Neale* v. *Postlethwaite*.(d) In those cases no question arose affecting the representatives of deceased parties; but that distinction was not material with reference to the effect of the statute, for it was not execution which was now sought. The Court was only asked to direct that the order which had been already pronounced should be carried into effect, so far as related to the duties which it imposed upon the officers of the Court. With regard to execution, the parties would of course be entitled to no more than *their legal remedies, and be subject to no more than their legal liabilities. [*112]

Mr. *Kenyon Parker* and Mr. *Greene* opposed the motion.

With reference to a suggestion founded upon *Morgan* v. *Scudamore*,(e) of a distinction between the case of the death of the party to receive, and that of the party to pay costs, they referred to *Jupp* v. *Geering*,(f) where any such distinction was denied. There could be no step in the cause affecting a party or his estate, without revivor. Process could not issue unless the cause were revived: *Averall* v. *Wade*.(g) Even where costs were ordered to be paid out of a particular fund, and abatement happened, there must be revivor. The statute made no alteration in this respect, and the present motion was therefore wholly irregular.

(a) See General Order, 10th May, 1839; Forms V. & VII. Beav. Crd. Can. 145.
(b) 5 Scott N. R. 76.
(c) 8 M. & W. 565.
(d) 1 Q. B. 243; *S. C.*, 4 P. & D. 623.
(e) 2 Ves. jun. 313; *S. C.*, 3 Ves. 195.
(f) 5 Madd. 377.
(g) 1 Moll. 571.

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June 9th.—VICE-CHANCELLOR:—The party entitled to receive costs, under the decree in these causes, died before the taxation of the bill of costs carried in by his solicitor, and, the fact of his death being made known to the Taxing Master, he refused to proceed with the taxation. The present application, which is made without a revivor of the suit, is for an order that the Master shall proceed with the taxation. If the case had occurred before the statute 1 & 2 Vict. c. 110, or if that act had not been passed, the weight of authority would, I think, be against the right of the party to revive the suit, or to require the Master to go on with the taxation; and the costs would in that case have been lost to the estate of the party. It has been argued, [*113] that, since that statute, the costs directed to be *paid to a party who happens to die before their taxation, are not lost, but that a statutory right to recover such costs is given to his representatives. It is not necessary that I should give any opinion upon that point. For the present purpose I may assume that there is such a right. I have made inquiries with respect to the practice, and the result is, that I cannot direct the taxation of the costs in these causes to proceed, without the revivor of the suit. The proceedings are stayed by the abatement; and if the parties would go on, they must revive the suit, if they are in a situation which entitles them to revive it. I must refuse the motion, with costs.

The *Solicitor-General* asked that the costs of the plaintiffs of their motion might be set off against the costs payable by the plaintiffs to James Webb Southgate.

VICE-CHANCELLOR.—As the case now stands, I cannot tell who is entitled to receive the costs ordered to be paid to James Webb Southgate.

See *Dundas* v. *Dutens*, 2 Cox, 241.

*Bagshaw *v.* The Eastern Union Railway Company. [*114]

1849: March 5th, 6th and 28th.

The Eastern Union Railway Company was authorized by several acts of parliament to make railways from Colchester to Ipswich, Ipswich to Bury St. Edmonds and Norwich, and from Ipswich to Harwich, and, for those purposes, to raise moneys by shares and loans, not exceeding certain sums in the whole. The same company was also, by a distinct act, authorized to purchase and complete the Hadleigh Junction Railway, and for that purpose, by shares or loan, to raise a sum not exceeding 100,000*l.* In a suit brought by the proprietor of a scrip certificate for stock, forming part of the capital raised in pursuance of the acts authorizing the company to purchase the Hadleigh Junction Railway, and make the Harwich line,—charging, that the company was about to misapply the 100,000*l.* raised under the Hadleigh act in the construction of the Norwich line, and seeking to restrain such misapplication,—the demurrers of the company and the directors, for want of equity, were overruled.

Where a company is authorized by act of parliament to raise moneys for a specific purpose only, it is not competent to any majority of the shareholders of the company to divert such moneys to another purpose against the will of a single shareholder; nor could unanimity amongst the shareholders make such a diversion lawful.

Whether a company, having powers to construct several branch and extension railways, and to raise certain distinct sums of money for such respective works,—such moneys being declared to be part of the general capital of the company,—may or may not lawfully apply moneys in the execution of one undertaking, which they were empowered to raise for another—*quære.*

The company, in its corporate character, was properly made a defendant to such a suit by some of the members.

The proprietor of a scrip certificate, whether registered or not, (such proprietor not being in default,) may sue on behalf of himself and all other proprietors of like certificates, and of the stock which they represent, or into which they are convertible, where the proprietors of certificates and stock are very numerous; there being no incompatibility in the interest of the registered and unregistered proprietors to preclude the plaintiff from representing both classes of persons.

The original subscriber of the sum represented by the scrip certificate, and vendor of the same to the plaintiff, is not a necessary party to the suit, inasmuch as the contract between such original subscriber and the company gave the former the right to assign his interest and be discharged, and such interest was duly assigned by him to the plaintiff, and the plaintiff was accepted by the company in his stead.

Demurrers by the Eastern Union Railway Company, in their corporate character, and by George Alexander and seventeen

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other persons, directors of the same Company, to the bill of John Bagshaw, on behalf of himself and all other the proprietors of scrip certificates for perpetual six per cent. stock, 1849, in the Eastern Union Railway Company, who should come in and seek relief under, and contribute to the expenses of the suit, other than and except the eighteen defendants, praying a declaration that a certain resolution of the half-yearly general meeting of the Company, held on the 21st of August, 1847, was
[*115] valid and binding on the Company *and the directors thereof, as a contract between them and the proprietors of the said scrip certificates and six per cent. perpetual stock, as to the application of such new capital; and that an account might be taken of the moneys received by the defendants under the powers of the Eastern Union and Harwich Railway and Pier Act, 1847, and the Eastern Union and Hadleigh Junction Railway Sale Act, 1847, or either of them, and of the application of such moneys; und if it should appear that the directors had applied any portion of the said moneys to any other purpose than the purposes specified in the said respective acts, then that it might be declared that they had committed a breach of trust in so doing, and that they might be decreed personally to replace to the credit of the Company the sums which should appear to have been so misapplied; and praying a declaration that it would be a breach of trust on the part of the directors to apply any portion of the moneys received or to be received under the powers of the said two acts, or either of them, to any other purpose than the purposes specified in the said acts respectively; and that the directors might be restrained by injunction from applying any portion of such moneys to any purpose other than the purposes so specified.

The Company demurred for want of equity, and for defect of parties; and the directors, in their individual character, put in a similar demurrer. The grounds assigned upon the demurrers, and insisted upon in argument, were, first, that the matters which were the subject of complaint concerned the internal management of the business of the corporation, of which the plaintiff was a member, and that it did not appear that the corporation had not

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or might not confirm what had been and was proposed to be done; secondly, that the interests of the registered shareholders of the Company in *the 6*l.* per cent. per- [*116] petual stock, and the interests of the proprietors of scrip certificates of the same stock, were conflicting, with respect to the question in the cause; and that therefore the plaintiff, who stood in both situations, could not, in this suit, represent both classes of proprietors, without misjoinder; and, lastly, on the objection as to parties, that the original subscribers, from whom the plaintiff purchased the scrip certificates in respect of which he sued, ought to be parties to the suit. The facts stated by the bill, material to these points, were as follows:—

The Eastern Union Railway Company was empowered by several acts of Parliament to raise and apply money in the construction of certain railways and works. The first or original act, (19th of July, 1844,) being the act of incorporation, empowered the Company to make a railway from Colchester to Ipswich. The capital for this undertaking was 200,000*l.*; and the Company was empowered to borrow, on mortgage or bond, or by the creation of new shares, a further sum of 16,666*l.* And all the money raised by the Company, whether by subscriptions of the shareholders, or by loan or otherwise, was to be applied, *first*, in paying the costs and expenses incurred in obtaining the act, and all expenses preparatory or relating thereto; and, *secondly*, in carrying the purposes of the Company into execution. By another act, (22nd of July, 1845,) the Eastern Union Railway Company was empowered from time to time to raise, by creating new shares, any sum of money not exceeding 50,000*l.*, in addition to the money authorized to be raised by the former act; and (sect. 3) the capital so to be raised was to be considered as part of the general capital of the Eastern Union Railway Company, as if it had been part of the original capital, except as to the amount of the shares, and the times of making calls thereon, and the amount of such calls, which the directors *of the Company were to fix as they thought fit, and [*117] except as to any special advantages in favor of, or other regulations in relation to such shares, which might be resolved

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on by any general or special meeting of the Company, according to the provisions of the first act or of this act. The Company was also empowered to raise a further sum, by mortgage or bond, not exceeding 16,666*l.*, with power to convert the loan into capital.

By a third act, intituled, "An Act to amalgamate the Eastern Union and Ipswich and Bury St. Edmunds Railway Company," (9th July, 1847,) reciting the two above-mentioned acts, and the act empowering the Eastern Union Railway Company to complete the railway from Hadleigh to Colchester, and that the Eastern Union Railway from Colchester to Ipswich had been made, completed, and opened to the public; and reciting another act of Parliament, called the Ipswich and Bury St. Edmunds Railway Act, (1845,) and another act, intituled "An Act to amend the Ipswich and Bury St. Edmunds Railway Act, and for making a railway from the said Ipswich and Bury St. Edmunds Railway to Norwich, with a branch therefrom;" and reciting, that the said Ipswich and Bury St. Edmunds Railway, as authorized by the said two last recited acts, had been completed from Ipswich to Bury St. Edmunds, and the remainder was then in course of construction; and reciting, that the undertakings authorized by the several recited acts might be advantageously worked under one management, and that the Eastern Union Railway Company and Ipswich and Bury St. Edmunds Railway Company were desirous of being united and incorporated into one Company; it was enacted, that immediately after granting the certificate therein mentioned, the two Companies should be dissolved; and [*118] (sect. 3,) *that the persons and corporations, who were proprietors of shares in either of those Companies, should be united into one Company, for the purpose of completing the works authorized to be made by either of the dissolved Companies, and should be incorporated by the name of "The Eastern Union Railway Company." The amount of the capital, (sect. 26,) and the distribution of the shares amongst the persons who, at the time of granting the certificate, were shareholders in the dissolved Companies respectively, and (sect. 34) the division of profits, were fixed. Power (sect. 41) was given to the new Company

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to borrow, on mortgage or bond, to the extent therein mentioned, not exceeding in the whole one-third of the capital of the Company. The certificate required by the last-mentioned act was granted, and the two last-mentioned Companies were amalgamated.

Two other acts, the Eastern Union and Hadleigh Junction Railway Sale Act, 1847, and the Eastern Union and Harwich Railway and Pier Act, 1847, above referred to, were subsequently obtained. By the first of these, intituled "An Act for authorizing the Sale of the Eastern Union and Hadleigh Junction Railway to the Eastern Union Railway Company, (8th June, 1847,") power was given to the Eastern Union and Hadleigh Junction Railway Company to sell, and the Eastern Union Railway Company to purchase, the undertaking authorized by the Eastern Union and Hadleigh Junction Railway Act of 1846; and on the execution (sect. 4) of the conveyance, the powers of the Eastern Union and Hadleigh Junction Railway Company over the railway were to cease; and (sect. 7) it was enacted, that, for the purpose of the purchase and execution of the Eastern Union and Hadleigh Junction Railway, it should be lawful for the Eastern Union *Company to create additional shares [*119] and borrow money, as might be necessary, for completing the purchase or constructing and working the undertaking, not exceeding 100,000*l*. By sect. 14, this act was to be called "The Eastern Union and Hadleigh Junction Sale Act (1847.") The second act, "An Act to empower the Eastern Union Railway Company to make a Railway from the Eastern Union Railway at Manningtree to Harwich, with branches thereout, and for other purposes, (22nd July, 1847,") recited, that it would be attended with much public advantage if a railway were made from the line of the Eastern Union Railway, in the parish of Lawford, to Harwich, with two small branches therefrom, and also, if a pier or jetty were made at the latter place in connexion with the proposed railway, and that the Eastern Union Company were willing to carry those objects into effect; and enacted, that it should be lawful for the Company to raise, for the purposes of that act, in addition to the capital they were empowered to raise

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under other acts, a sum of money not exceeding 200,000*l.* This sum (sect. 4) was to be divided into shares, and was to be considered as part of the general capital of the Company, and the Company was empowered to borrow, on mortgage or bond, any additional sum of money, not exceeding 66,666*l.*; and the Company was further empowered to make a line of railway from Lawford to Harwich, and also two small branches therefrom, and also to construct a pier at Harwich, in connexion with the railway. Three years from the passing of the act were allowed for the compulsory purchase of lands and completing the railway, and seven years from the passing of the act were allowed for the completion of the pier.

A half-yearly meeting of the Eastern Union Railway Company was holden on the 21st of August, 1847, and, [*120] *at such meeting the directors of the Company submitted to the shareholders a general report in writing strongly recommending the completion of the Harwich branch; and the directors, at the same meeting, submitted to the shareholders a report in writing, dated the 19th of the same month of August, also recommending the completion of the Harwich branch; and John Chevalier Cobbold, the chairman of the directors (one of the defendants) proposed the following resolution, which was carried unanimously:—"That, for the purpose of constructing the branch line from Manningtree to Harwich, and for purchasing the Hadleigh railway, under the two acts passed in the last session of Parliament, the directors be authorized to raise, between the date hereof and the 1st of January, 1849, the sum of 200,000*l.* and 100,000*l.*, and to grant scrip receipts for such amount as may from time to time be paid up in respect of such sums, until each subscriber of 20*l.* and upwards shall have paid the amount he may subscribe in full; and such scrip receipts shall entitle the holder thereof, on the 1st of January, 1849, to become a registered shareholder in a new Eastern Union Stock for the amount he has subscribed and paid up, upon which he shall receive a guaranteed dividend of 6*l.* per cent. per annum in perpetuity, and have the option, at the end of any six months within five years, of converting his guaranteed stock into the

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general stock of the Company; that, to comply with the fourth article of the terms of amalgamation between the Eastern Union and Ipswich and Bury Companies, the directors shall, by means of a circular to be addressed to the original shareholders of the guaranteed 5*l.* per cent. and general extension scrip of the Ipswich and Bury Companies, offer, until the 31st of October next, to receive such sums exclusively from the present holders (as they can be ascertained) of the above extension scrip shares; and that each holder of an extension scrip share *of 5*l.*, on which 2*l.* 10*s.* has been already paid, shall [*121] be entitled to 20*l.* of such guaranteed stock, on making application to that effect, with an undertaking to pay the remaining 17*l.* 10*s.* before the 1st day of January, 1849, at such stated periods as shall be satisfactory to the directors; and that, on all prepayments discount be allowed to the 1st of January, 1849, at the same rate of interest as is allowed in perpetuity on the new stock. That, in case any holder or proprietor of such Ipswich and Bury extension scrip shall refuse or neglect, before the 31st of October, 1847, to accept stock in accordance with the terms of the offer, or, having accepted the same, shall fail to pay up the sum of 17*l.* 10*s.* in respect of every 20*l.* thereof, on or before the 1st of January, 1849, the same shall be allotted by the directors to such persons and in such manner as they may think fit, and with or without the like advantages as to interest, by way of discount and dividend, as above provided."

In pursuance of the above resolution, the whole of the 300,000*l.* was subscribed for, and all the calls thereon had been paid previously to the 2nd of June, 1848, except 85,500*l.*, which would fall due and ought to be paid on or before the 30th of December, 1848. The plaintiff had purchased and was the holder of two scrip certificates of the extension stock, numbered respectively 982 and 983. Such certificates were in the following words:—"Scrip for Eastern Union; perpetual 6*l.* per Cent. Stock, 1849, with the instalments in course of payment; Eastern Union Acts; Eastern Union and Harwich Railway and Pier Act; Eastern Union and Hadleigh Junction Railway Act, 1844, 1845, 1846, and 1847; Stock, 500*l.*—The holder of this certificate having

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paid 250*l.* to the Eastern Union Railway Company, and having engaged to make further payment of 250*l.* on the 31st
[*122] of December, 1848, under allowance of discount *from day of payment to 1st of January, 1849, at the rate of 6*l.* per cent. per annum, to any of the bankers hereinafter mentioned, viz. Messrs. Glynn & Co. and others, will be entitled to 500*l.* stock of the said Company, and to be registered as proprietor thereof; on fulfilment of such obligations, such stock to bear interest at the rate of 6*l.* per cent. per annum in perpetuity, from the 1st of January, 1844, with an option to the proprietor, at any time during five years from that day, to surrender such guaranteed stock of the amalgamated Eastern Union and Ipswich and Bury Company, and such dividends as such general stock may be entitled to thereafter, as the above payments are equally binding upon the present holder and his assignees, if parted with. A condition hereof is, that, in case of failure of any one of the above payments for thirty days after the same is payable, the holder shall forfeit his right to a guaranteed interest, and be entitled to participate only in dividends upon such money as he shall have paid up, at such rate as shall be declared subsequent to the 1st of January, 1849, upon the general stock of the Company."

The secretary of the Company, in a letter to the plaintiff, dated the 1st of January, 1848, recognized the plaintiff as a proprietor of scrip in the Harwich branch line; and the plaintiff paid all the calls which, at the time of filing the bill, had become due in respect of his certificates, and had observed the conditions attached thereto, and had paid and advanced the last call which was to be paid upon one of his certificates, and had become entitled to have the shares represented thereby duly registered in his name. On the 27th of December, 1848, the plaintiff delivered that certificate to the secretary of the Company, and requested that the shares represented thereby might be immedi-
[*123] ately registered in his *name, which the secretary promised to do, giving the plaintiff a receipt for his certificate in the following words:—

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"Eastern Union Railway,
"No. 10, Craig's-court, 27th December, 1848.

"Dear Sir,—I have received scrip certificate of twenty-five shares, 6*l.* per cent., to be registered in the name of John Bagshaw, Esq., M. P., of Dovercourt, Essex, and for which purpose a new certificate shall be forwarded to your address.

"I am, &c.,
"JAS. F. SAUNDERS, *Secretary.*

"To John Bagshaw, Esq., M. P."

These twenty-five shares were afterwards registered in the plaintiff's name, or, but for the default of the Company and the directors, ought to be so registered.

The bill stated, that the plaintiff had, until within a few days, believed that the Company intended to proceed with the construction of the railway from Manningtree to Harwich; but he had since been informed that all negotiations for land on that line had been postponed indefinitely, and that the directors had resolved not to proceed with the said railway; that a further delay in the commencement of the works thereon would occasion irreparable loss to the plaintiff and the other persons desirous of having the same completed, inasmuch as the unexpired time during which the powers of the Company would continue, was not more than sufficient for such completion. The bill alleged, that a majority of the directors of the Company had a strong personal interest distinct from the interest of the Company, in completing the Eastern Union Railway to Norwich, and were totally indifferent about the completion of the line to Harwich; and finding themselves unable to raise sufficient capital for both purposes *they had determined to misapply, and had already to [*124] a great extent misapplied, the money raised under the said Eastern Union and Harwich Railway and Pier Act, and Eastern Union and Hadleigh Junction Railway Act, by employing the same in constructing an extension line to Norwich, and for other purposes not authorized by the said acts or either of them; that such application of the said moneys was also contrary to the resolutions of the 21st of August, 1847, and was not within the powers of the Company, that, unless restrained by injunction

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the directors would in like manner misapply the 85,500*l.*, to be received on the 30th of December, 1848; that, under the Companies Clauses Consolidation Act, the plaintiff was disabled from calling a meeting of the Company without giving thirty-five days' notice thereof.

The bill charged, that the proposed extension to Norwich would be an unremunerative application of the moneys of the Company and that the same was determined upon for the personal convenience of the holders of stock in the Company (other than of the 6*l.* per cent. stock,) who were desirous of having the line to Norwich, in preference to the line to Harwich. The bill charged, that the interest of such last-mentioned shareholders were properly represented by the defendants Samuel Bignold and three others, who resided at Norwich; that the other proprietors of the scrip certificates and of such perpetual stock exceeded 600 in number, and the other shareholders in the Company were still more numerous, and had all a common interest in the matters in question, and that it would be impracticable to make them all parties to the suit.

Mr. *Wood* and Mr. *Daniel*, for the defendants, in sup-
[*125] port *of the demurrers, argued that the Company had power to apply any part of their capital to the execution of any of the works which the acts of Parliament enabled them to execute. The powers to raise distinct sums for particular works were introduced by the Legislature, not for the purpose of binding the Company to apply the specific moneys to the specific undertaking, but for the purpose of thus fixing the aggregate amount of the capital which the Company should be permitted to raise. The Legislature retained its control over the Company, however the funds were ultimately apportioned; for it was obvious that, if the Company expended a larger amount in one undertaking than Parliament had enabled them to raise for that particular work, the Company would be obliged to come to Parliament for further powers, or leave some other work uncompleted. It was for the Legislature to grant the Company such powers as it might think proper, and for the company to deter-

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mine whether, or when, or how they should be exercised: *Ware* v. *The Grand Junction Water Works Company*,(a) *Maudsley and Cunliff* v. *Manchester and Bolton Canal Company*.(b) The Company alone could decide on the order or priority in which the several railways should be made; and the directors were intrusted by the general body of shareholders with the conduct of their affairs, and the care of their interests. The Court would not interfere, at the instigation of one or more persons claiming to be members of the corporation, to inquire whether the governing body had acted prudently, or more or less for the interests of the shareholders. That question would be decided in a general meeting of the Company, not in a Court of equity: *Mozely* v. *Alston*,(c) *Foss* v. *Harbottle*,(d) *Yetts* v. *Norfolk Railway* **Company*.(e) Supposing the suggested application of [*126] the funds to be, in fact, unlawful, the Company alone was the party whose right and duty it was to sue: *Attorney-General* v. *Wilson*.(f) The directors were, according to the statements of the bill, the persons who wer ethe wrong-doers, and they alone were responsible. It did not appear that the Company, in its corporate character, had done anything which was unlawful, even according to the plaintiff's view of the law. In the case of *Preston* v. *The Grand Collier Dock Company*,(g) the Company was a party to the act in question. In this case, no general meeting had sanctioned any misapplication of the funds of the corporation and the directors could not be made the agents of the corporation for any other than lawful purposes: they could not make the Company answerable for their unlawful acts. But whether the application of the moneys referred to in the bill was or was not proper, the plaintiff had no right to complain: the Company had accepted his loan, but had made no contract with him as to the application of the money. He was in a position analogous to that of the creditors in *Garrard* v. *Lord Lauderdale*.(h)

On the question of misjoinder, owing to the suggested conflict

(a) 2 Russ & My. 470. (b) Id. 480, n. (c) 1 Ph. 790.
(d) 2 Hare, 461. (e) Before Vice-Chancellor Knight Bruce, 15th Jan. 1849.
(f) Cr. & Ph. 1. (g) 11 Sim. 327. (h) 3 Sim. 1.

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of interests between the persons whom the plaintiff affected to represent, and on the question of defect of parties in omitting the original scripholders, from whom the plaintiff had purchased his certificates, they cited the cases of *Taylor* v. *Salmon*,(a) and *Walburn* v. *Ingilby*.(b) The case of *Smith* v. *Goldsworthy*(c) was also referred to in the course of the argument.

[*127] The *Solicitor-General* and Mr. *Grove*, for the bill, argued *that the diversion of the funds raised for the construction of the Harwich and Hadleigh lines, to the making of the line to Norwich, was illegal, and therefore not capable of confirmation by any act of the majority: *Tyrrell* v. *Woolley*,(d) *Colman* v. *The Eastern Counties Railway Company*,(e) *Chappell* v. *Cadell*,(f) *The Queen* v. *The Eastern Counties Railway Company*,(g) *Blakemore* v. *Glamorganshire Canal Company*,(h) *Gray* v. *Chaplin*,(i) *Natusch* v. *Irving*.(k) On the questions of parties, they cited *Midland Great Western Railway Company* v. *Gordon*,(l) and *Knight* v. *Barber*.(m)

The VICE-CHANCELLOR, after stating the several acts under which the Eastern Union Company derived their powers before the passing of the act which authorized the sale of the Eastern Union and Hadleigh Junction Railway to the Eastern Union Railway Company, and observing, that, upon the passing of the act of amalgamation, of the 9th July, 1847, it appeared that the Eastern Union Railway Company became charged, *inter alia*, with the completion of the railway from Ipswich and Bury St. Edmunds to Norwich; and that the said acts, and the two other acts of 1847, (8th of June and 22nd of July,) exhibited the existing position of the Eastern Union Railway Company, except so far as it had already executed the works empowered to be done by them, under such acts; and that, assuming that the line to Norwich was incomplete, and that none of the works authorized to be done by the two last-mentioned acts had been completed,

(a) 4 My & Cr. 134. (b) 1 My. & K. 61. (c) 4 Q. B. 430.
(d) 1 M. & G. 809. (e) 10 Beav. 1. (f) Jac. 537.
(g) 10 A. & E. 531. (h) 1 My. & K. 154. (i) 2 S. & S. 267.
(k) Gow on Partn. Ap. 398. (l) 5 Railw. Cas. 75. (m) 4 Id. 674.

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the Eastern Union Railway Company at the present time stood charged with the *completion of the Norwich line, [*128] Hadleigh junction line, (if the contract had been completed) and the Harwich line and pier; and that, upon the demurrer, this must be taken to be in substance the state of the case, proceeded as follows:—

The bill contains allegations, which, as I read them, do not amount to this—that the Company have finally abandoned the intention of making the Harwich branch but that they have postponed the same indefinitely, with a view to the more speedy completion of the Norwich line. I cannot, I think, upon demurrer, read the bill more favorably for the plaintiff. The bill then charges, that the directors, finding themselves unable to raise sufficient capital for the purpose of completing both the Norwich line and the Harwich branch, have determined to misapply, and have already, to a great extent, misapplied the money raised under the Eastern Union and Harwich Railway and Pier Act, 1847, and under the Eastern Union and Hadleigh Junction Railway Sale Act, 1847,—by employing the same in constructing the Norwich line, and for other unauthorized purposes. Charges to this effect are repeated in different parts of the bill; and there is also a charge, that the directors intend, in like manner, to misapply the 85,500*l.*, which is payable on the 30th of December instant, that is, immediately after the filing of the bill. This the bill charges is illegal, and relief is prayed accordingly.

Now, before noticing some objections which have been taken to the frame of the bill, I shall consider the general point of law which the demurrer raises. I give no opinion upon the right of the company to apply any portion of their general assets, including as part of such general assets the money raised under the powers of *the Harwich Act, to the construction of [*129] the Norwich line. Those moneys are declared to be part of the general assets of the Company, and the works to be done under the Harwich Act are part of the general undertaking of the Eastern Union Railway Company; and the Legislature may have thought it right that the application of the general capital on the one side, and the construction of their general works on

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the other side, should be left to the unfettered discretion of the Company, leaving it to the directors, in the first instance, and to a general meeting of the shareholders, in the second, to determine in what manner and order the works should be done and the general capital applied, as in the case of a private partnership. But the Legislature may also have thought it right to provide, that the capital raised for a specific purpose, should not be applied for any other purpose. And if such a state of things exists, as to any of the capital to be raised under any of the acts I have mentioned, the application of capital so appropriated to any other than the specified purpose must be unlawful.[1] Now this ap-

[1] The right and power of directors and managing officers of railroad corporations to embark in speculations foreign to the legitimate purposes of their charter, or to appropriate the capital to any other than the purposes therein specified, and of the power and duty of courts of equity to interfere by way of injunction, are questions which have received repeated consideration in England, and have been, and are beginning to be raised in our American courts. In the present somewhat extended note will be collated the adjudications upon these questions. A case has recently arisen and been decided in Vermont, by Chancellor Bennett. As the case has not yet been formally reported, copious extracts will be made from the able and learned opinion of that distinguished jurist. The case is that of *Byron Stevens* v. *The Rutland and Burlington Railroad Company*. An application was made for an injunction on a bill filed by a stockholder in the company to restrain them from applying the funds of the corporation or pledging its credit for the purpose of constructing a railroad from Burlington, in the county of Chittenden, to Swanton, in the county of Franklin.

It appeared that the legislature of that state, at their session in 1843, granted a charter of incorporation to divers individuals, and to their successors, for the purpose of building a railroad from some point in Burlington, through the counties of Addison, Rutland and Windsor or Windham, to some point on the west bank of the Connecticut River, under the name of the Champlain and Connecticut River Railroad Company. This name was subsequently changed by the legislature, to the Rutland and Burlington Railroad Company. The charter, among other things, provided that the capital stock of the company should be one million of dollars, with the right in the corporation to increase it to an amount sufficient to complete said road, and furnish all necessary apparatus for conveyance. The company, after having procured some minor amendments to the charter, which it is not necessary to notice, caused the books to be opened, the stock to be taken, and organized in due time, under the law, and had caused the road to be constructed, and it had for some time been in successful operation. The plaintiff, upon opening the books, subscribed for five shares of the capital stock, had regularly paid his subscription, each share being one hundred dollars; and he had ever since been the owner of said shares. After this

pears to me to be very clearly the case with respect to the 100,000*l.* raised under the Hadleigh Act, as the Hadleigh branch

road was constructed, and while in operation, the legislature of that state passed an additional act to authorize this corporation to extend their railroad, at any time within three years, from Burlington to Swanton, in the county of Franklin, it being a distance of about thirty miles. This additional act also provided that the corporation, in the construction of this extension, should have all the rights and privileges, and be subject to all the liabilities contained in the original charter, and the previous supplementary acts. The plaintiff then proceeded to allege, that the directors, who were made parties to the bill, and without authority from the board of directors or from the corporation, and without any previous notice, and in bad faith, and for the purpose of prejudicing the interests of the shareholders, had procured the legislature to pass this additional act of 1850, and had caused it to be accepted by the board of directors; and that the directors had caused a meeting of the stockholders to be called, to see if they would accept of the act, as an amendment of their charter; and that they threatened, if the act should be accepted by a majority of the corporation, that they would proceed immediately in the construction of the extension, and for that purpose would apply the funds and pecuniary resources of the corporation, and pledge its credit, to whatever extent they should find it necessary, to effect the object; and this, too, without the consent and against the will of the minority of the stockholders, and particularly of the plaintiff who alleged that he had not and would not consent to accept of said act of 1850, and construct said extension, and that he had ever since the passage of the act, requested the defendants to desist from the same.

The question was, could the plaintiff, upon such a state of facts, claim at the hands of the chancellor, his injunction? The chancellor held that it was an admitted principle, that in partnerships and joint stock associations, they could not by a vote of the majority change or alter their fundamental articles of copartnership or association, against the will of the minority, however small, unless there was an express or implied provision in the articles themselves that they might do it. It was equally well settled, that a court of chancery would, upon the application of an individual member of a partnership or joint stock association, restrain, by injunction, the majority from using the funds or pledging the credit of the partnership or association in a business not warranted, and not within the scope of their fundamental articles of agreement. That courts of equity treated such proceedings by a majority, as a fraud upon the other members, which they would neither sanction or permit. To prevent the commission of fraud, by injunction, had been one of the earliest and most appropriate heads of equity jurisdiction, as well as to relieve against it when committed.

He said it was well conceded, in the argument on the defence, that if the corporation had been about to proceed to a construction of the contemplated extension without the act of 1850, it would have been a proper case for an injunction. The only question which can be open to debate is, as to what shall be the effect of the act of 1850, and a subsequent adoption of the act by the corporation, upon the indi-

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was purchased by the Company; and, as it is sufficient, upon general demurrer, for the plaintiff to show that his complaint is,

vidual rights of a shareholder who does not assent to its adoption? If bound by it, there is no equity in this bill. It is, and must be admitted, that the legislature have no constitutional power, unless it be reserved in the grant, to change or alter an act of incorporation without consent, and thereby cast upon the company new and additional obligations, or take from them rights guaranteed under the original charter. And, indeed, this the legislature have not attempted to do. It is also equally true, that it is a part of the law of corporations, that they act according to the voice of the majority. But it is to be remembered that this is not a suit in which the plaintiff seeks to protect himself in any *corporate* right, but in his own *individual* right, growing out of the fact of his having become a corporator, by his subscription, and its payment, to the capital stock of the company. One of an aggregate corporation may contract with the company, as well as a third person; and the rights of the individual so contracting are no more distinct and independent, in the one case, than in the other. The plaintiff, by his subscription, assumed to pay to the corporation, and only for the purpose specified in the charter, its amount, according to the assessments; and there was at the same time a trust created, and an implied assumption on the part of the corporation, to apply it to that object, and none other. The corporation also assumed upon themselves to account to this corporator for his share of the dividends, when this road should be completed and put in operation; and for his share of capital stock, though not *in numero*. The charter, in this case, gives to the state the right to purchase out the road of the corporation, after a given number of years, upon certain terms therein specified. The relation between each original shareholder and the corporation is the same. The obligation of the contract between the legislature and the corporation, after an acceptance of the charter, is no more sacred than that which is created between the corporation and the individual corporator. Does any one suppose the legislature could, without the consent of parties, absolve a corporator from liability on his subscription to the corporation, or modify it? and can they do the reverse of it? It is conceded that there is a class of alterations in a charter which the corporation may obtain and adopt, that would not so essentially change the contract as to absolve the corporator from his subscription, or give him a right to complain in a court of justice, in case he had previously paid it.

Where the object of the modification or alteration of the charter is *auxiliary* to the original object of it, and designed to enable the corporation to carry into execution the very purpose of the original grant, with more facility and more beneficially than they otherwise could, the individual corporator cannot explain; and I should apprehend it would make no difference with the rights of a corporation in such a case, though he could show that the charter, as amended, was less beneficial to the corporators than the original one would have been. The ground upon which such amendments bind the corporator I deem to be his own consent. When he becomes a corporator by his signing for a portion of the capital stock, he in effect agrees to the by-laws, rules and votes of the company, and there is an *implied* assent on his part, with the corporation, that they may apply for and adopt such amendments as

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to any extent, right, I think the plaintiff in this case has shown that the directors have misapplied, and are about to misapply,

are within the scope, and designed to promote the execution of the original purpose; and he signs, and the corporation receive his subscription, subject to such implied contingency: and if we regard it in the nature of a *license* only, it would not alter the principle. Both parties having acted upon it, it would not be countermandable.

But suppose the object of the alteration is a *fundamental* change in the original purpose, and designed to superadd to it something which is beyond and aside of it; does the same principle apply?

After citing several cases for the purpose of showing that corporations can exercise no power over the corporators beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent, he adds, "This is a sound proposition. The consent or assent may, however, be *implied* in a class of cases, as has already been stated, where the amendment is not regarded as *fundamental*, and can be brought within the scope of the original purpose of the association; and this is going to the very verge of the powers of the corporation. It is difficult, and would be unwise, to attempt to lay down any general rules to determine in what precise cases the assent of the corporator should be implied, and in what not. It is sufficient for the present purpose to say, that his assent cannot be implied, in a case like the present, from a majority vote. Courts may differ, and doubtless will, in regard to what alterations shall be sufficient to constitute a fundamental change. But in the present case, I think on this point there can be but one opinion. The *termini* of the road, as fixed by the charter, are Burlington, and some point on the west bank of Connecticut River, in the county of Windsor or Windham. The capital stock is one million of dollars, with a right in the corporation to increase it to an amount sufficient to complete said road, and furnish the necessary apparatus for conveyance. The supplementary act of 1850 purports to authorize the corporation, within three years, to construct and extend their railroad from the terminus in Burlington to some point in Swanton, in the country of Franklin, a distance of about thirty miles; and the act provides that in the construction of the road, they shall have all the rights and privileges, and be subject to all the liabilities contained in their original charter, and the acts in addition to it.

"The franchise granted to this company was territorial, and an extension of the *termini* necessarily is an extension of the franchise. It cannot remain the same thing in substance, until it can be established, that a part is equal to the whole. Besides, the company may increase the capital stock, to such additional sum as shall be necessary to construct the extension.

"The statute of 1850 is little less in effect, if anything, than an attempt to create, in a summary manner, and by way of reference, a new corporation, and to transfer all the old corporators to it. If all the corporators had assented to this transfer, it was well enough. The change in the purpose was not more fundamental in the case from the 5th of Hill, than in this. It is not necessary that the business should be changed in kind, to change the original purpose. If this is not a change in purpose, it would not be to extend the road in one direction to Canada line, and in the

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the 100,000*l.* I have adverted to,—that is, the 100,000*l.* raised under the Hadleigh Act. No majority of the shareholders, how-

other to Massachusetts line; and there would be no limits to the control which the corporation might acquire over the individual corporators, and this, too, without their consent, except what arises from the confines of legislative authority.

"The change, then, in the charter being *fundamental*, and the corporation not being able to bind the plaintiff by a majority vote, what must be the result? If he had been sued for an assessment upon his stock, he might have claimed that he was absolved from all liability upon the acceptance of the amendment. And is not this reasonable? Shall it be said that the legislature and the corporation have power to embark this corporator in a speculation to which he has never consented? If it can be done in one case, it can in another. But having paid his funds into the corporation, he has a right in chancery to compel a faithful performance of the *trust* by the corporation, in conformity to the original charter, and to keep them within its purview. No one can suppose that upon the payment of his subscription, the personal identity of the plaintiff was merged in the corporation, or that he ceased to have distinct and independent rights. * * *

"In the case before us, it must follow if the plaintiff is not bound by the conjoined effect of the act of 1850, and a majority vote of the corporation, the defendants can stand on no better ground than a voluntary association, who are about to go *beyond* and *aside* of their original articles, against the will of a minority. This, in effect, was conceded in the argument. There was nothing improper in the passage of the act of 1850, though upon the application of a portion of the directors of the company, as stated in the bill. No attempt is made by the legislature to impair the obligation of any contract between themselves and the corporation, or to cast upon the company any new and additional burthens without their consent. There was no attempt to impair any contract arising under the prior charter, between the corporation and the corporator as an individual, or disturb any vested right in either. The act is not *mandatory*, and there is, in fact, an implied condition annexed to it, that it is to be accepted by all whose individual and corporate interests are to affected by it, before it shall become operative. But suppose this act had been *mandatory* upon the corporation and the several stockholders, to build this extension in the road within three years; would not all cry out against its palpable injustice? Suppose, instead of this, the legislature had left it optional with the corporation to accept or reject the act of 1850, and had provided, that in case of the acceptance of the amendment by the corporation, it should bind the corporators who dissented from it, or did not assent to it, and this too in their individual rights; would there not be the same reason to cry out against it? Would it not, by its carrying a stockholder into an enterprise which he had never consented to, and changing the principles of liability between the corporation and the individual corporator, from what they were under the original compact, impair and disturb vested rights under it? I have no hesitation in saying that, in my opinion, it would be beyond the pale of the constitutional authority of the legislature.

"The Rutland and Burlington Railroad Company is but a private corporation, so

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ever large, could sanction the misapplication of this portion of the capital. A single dissenting voice would frustrate the wishes

far as the stockholders are concerned, though as it regards the powers of the legislature to authorize the taking of private property for public use, it may be said to be a *qua* public corporation. The stock is owned by individuals who compose the corporation, and from which they design to derive a profit; and they manage the business in view to their own interest; and it does not become a public corporation, because the public interests may be incidentally promoted by it. In principle, it is like a turnpike, a canal or bridge charter. I think it is obvious beyond a reasonable doubt, upon principle and authority, that the plaintiff is not bound in his individual rights as a corporator, by force of the act of 1850 and the majority vote of the corporation, without his individual assent. In the case of public corporations, as in towns, counties, &c., a different rule may obtain. The distinction between private and public associations and corporations has been well settled since the days of Lord Coke.

"In case of public associations and corporations, the *public good* requires that the voice of the majority should govern; and hence the power is more favorably expounded than when created for private purposes; and it would seem that *public convenience* required the adoption of such a rule. But in case of private associations and corporations, it is not the doctrine that a majority can bind the minority in a matter *beyond* and *aside* of their original articles of association, or charter of incorporation, unless it be by special agreement giving such power, which must be a part of the original association.

"If, in a case like the present, the majority cannot bind the minority, it is plain that there is an equity in this bill, and that the defendants can stand in no better situation than if they had by a vote of the company proceeded to build the extension, and to apply the funds and credit of the corporation to that purpose, without any additional act of the legislature.

"Where it is clearly shown that a corporation is about to exceed its powers, and to apply their funds or credit to some object beyond their authority, it would, if the purpose of the corporation was carried out, constitute a breach of trust; and a court of equity cannot refuse to give relief by injunction.

"The injunction must therefore be allowed, but only so far as to restrain the defendants, until the further order of the chancellor, from applying the present funds of the corporation, or their income from their present road, either directly or indirectly to the purpose of building said extension in said road, or to pay land damages and other expenses which may be contingent upon the building of it; and also from using or pledging, directly or indirectly, the credit of the corporation in effecting the object of the extension; and at the same time the company will be left at liberty to build the extension with any new funds which they may see fit to obtain for that specific object."

Lord Eldon, upon the application of an individual member of a company which had been organized for the purpose of carrying on a fire and life insurance business, restrained the company from embarking also in the marine insurance business, al-

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of the majority. Indeed, in strictness, even unanimity would not make the act lawful. This appears to me to take it out of

though the applicant had paid into the fund of the company only £150 as a deposit upon fifteen shares, and the company gotten up by the Rothschild of England, and was composed of six or seven hundred individuals, with a capital of £5,000,000 sterling. *Natusch* v. *Irving et al.* Gow on Partnership, Appendix, p. 566, No. II.

Lord Cottenham, in the case of *Bagshaw* v. *The Eastern Union Railway Company*, on appeal, held, that where a company is authorized by an act of parliament to raise moneys for a specific purpose only, it was not competent for any majority of the shareholders of the company to divert such moneys to any other purpose against the will of a single shareholder, nor could unanimity amongst the shareholders make such a diversion lawful. *Bagshaw* v. *The Eastern Union Railway Company*, 2 Hall & Twells, 201; see same case before V. C. 7 Hare, 114.

Where the directors of a railway company, for the purpose of increasing the traffic, proposed to guarantee certain profits, and secure the capital of an intended steam packet company, who were to act in connection with the railway, Lord Langdale held that such a transaction was not within their powers, and they were restrained by injunction from so doing. He placed his decision upon the grounds that such companies have such large funds, and such extensive powers as to materially affect the rights and interest of other persons, and the rights which the public had been accustomed to enjoy. That to look upon them in the light of a common partnership, and as subject to no greater vigilance than common partnership, would be to mistake the functions which they perform and the powers which they exercise of interference not only with the public but with the private rights of individuals.

He laid down the following general propositions:—

1st. That the powers given to them by parliament extend no farther than is expressly stated in the act, or is necessarily or properly required for carrying into effect the undertaking, and most of which the act expressly sanctioned.

2d. That they had no right to enter into new trades or business not pointed out by these acts; nor had they any right to pledge without limits the funds of the company for the encouragement of other transactions, with a view thereby to increase the profits of the shareholders.

3d. That the power to construct, maintain, regulate the traffic, and do all that was necessary for the purpose of carrying on and making the railroad did not imply that the directors were to be at liberty to pledge the funds of the company for a completely different transaction, in the hope that it might turn out a profitable act.

4. That a pledge of the funds of the company for the purpose of supporting another company engaged in a hazardous speculation, was a thing they had no right to do. *Coleman* v. *The Eastern Counties Railway Company*, 10 Beav. 1.

Where a railway company became lawfully possessed of shares in another independent railway company, Lord Langdale, Master of the Rolls, held that the company having no authority to do so by their act of parliament, they could not legally, as against one of the dissentient shareholders, increase the number of such shares, nor could they lawfully apply their funds for the support of the second company.

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the case of *Foss* v. *Harbottle*,(*a*) to which I *was referred. That case does not, I apprehend, upon this point, [*130]

(*a*) 2 Hare, 461.

That a railway company was bound to apply all its money and property for the purposes directed and provided for by the act of parliament, and not for any other purposes whatsoever. Any application of, dealing with the capital, funds or money in any manner not distinctly authorized by the act was illegal. And where directors, for purposes not authorized by the act, were proceeding upon illegal principles, to involve the company or shareholders in liabilities to which they never consented, relief might, and ought to be given by the court. That the mere circumstance that it had lawfully obtained a certain number of shares in another company, was not a reason why they should be enabled or permitted to purchase more shares, and thereby increase the risk to which parliament allowed the shareholders to be exposed, by the shares which might have become vested in them by an amalgamation act, or why the directors should be permitted to divert so much of the funds of the company as they thought proper, for the support of another company, having distinct objects, and meant to be applied to purposes different from those in consideration of which alone their powers were granted to them.

He overruled a demurrer for want of equity, but allowed a demurrer for multifariousness, with leave to amend. *Salomons* v *Laing*, 12 Beav. 339.

Lord Langdale also held, in another suit, that where the directors of one incorporated railway company paid over its funds to another railway company for purposes wholly unauthorized, and the latter received it with knowledge of the breach of trust, the latter might be made parties to a bill seeking to have the funds restored. *Salomons* v. *Laing*, 12 Beav. 377.

An attempt was before Lord Cottenham to interfere by injunction to restrain a company from constructing a small portion of their works, with a view of abandoning the remainder. Lord Cottenham held that a court would interfere by injunction in proper cases to restrain a company from so doing, but declined to do so in that case, on the ground, as such intention had been known to the shareholders, or they had an opportunity of knowing it many months before the filing of the bill to prevent such proceedings, and had made no application to the court. That this amounted to such an acquiescence on the part of the shareholders as under the circumstances of that case to create a counter equity. In regard to the general right of the shareholders to restrain the company from using the fund raised for one purpose for another purpose, the lord chancellor said, "Parties who have subscribed their money for one purpose are not to be told that the directors, or a majority of the company, are of opinion that it would be very advantageous to employ it for another." *Graham* v. *The Birkenhead, Lancashire and Cheshire Junction Railway Company*, 2 Hall & Twells, 450.

Where a railway company, authorized to make a line of fifty-six miles, resolved on making only four miles, and to abandon the rest, a bill was filed by a shareholder in behalf of himself and others, in which he alleged that it was the duty of the defend-

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go further than this: that if the act, though it be the act of the directors only, be one which a general meeting of the Company

ants to construct the whole railway, in consideration of which the act was passed, and its powers given, and that to apply the funds of the corporation for the construction of only a part was illegal, and prayed a declaration, that it was not within the power of the company to make the proposed four miles only, and that the fund of the company could not be lawfully applied for that purpose, and prayed for an injunction, Lord Langdale held that such a resolution was illegal both as against the land-owners on the line and the shareholders in the company. That the powers contained in the act were given only in contemplation of the supposed public good, by the completion of the whole work, and that the court would interfere when it saw that the whole undertaking could not be completed. He said, "I apprehend it to be perfectly clear, that the powers given by these acts are given only in contemplation of the supposed public good, and to be obtained from the completion of the whole work authorized; and that it never is, or can be deemed to be intended, that the powers would have been given on any less consideration, or any less obligation upon the parties to whom the powers are given."

In answer to the position that no such protection ought to be afforded to the shareholders who were bound by the acts of the company, of which they were members, he said, "a shareholder is a person who has subscribed and paid his money, no doubt, on the faith of an undertaking sanctioned by parliament, on the ground of its being expected and intended to produce a public benefit by its completion; and his object may be his own particular benefit or profit; but his advances are made on a scheme, the whole of which must be considered, as to that which alone has been approved and authorized by parliament, which is to be conducted and managed in the way approved by parliament, for the end proposed by parliament, and for no other end; and the governing body must be considered to have entered into the obligation to complete the work authorized. It is on these expectations that the shareholders became members." He held that the company was not like a partnership for general trading purposes, in which one part might be encouraged and and another discouraged or abandoned, according to the contingencies of trade, and a general authority to use the capital to the best advantage; but it was a partnership for a public purpose, for effecting a work which it was a duty to complete, and for which alone the capital was advanced in shares. The obligation to complete the work appeared to be co-extensive with the authority to make it. The act contained no authority to substitute a less work, or a part of the whole for the whole; and if the governors or directors of the company took upon themselves to determine that they would not perform the whole work, but apply the capital, collected on the faith of the whole work being completed, in completing only a part of it, that such a determination was without authority, and contrary to the provisions of the act of parliament. *Cohen* v. *Wilkinson*, 12 Be. 125. In a subsequent case an act of parliament had been passed in 1837, authorizing the making of a railway from Chester to Birkenhead. A second act was passed in 1846, authorizing another company to construct a junction railway uniting with the Birmingham and Manchester Railway. A third

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could sanction, a bill by some of the shareholders on behalf of themselves and others, to impeach that act, cannot be sustained,

act, passed in 1847, amalgamated the companies, and converted the shares in the new or amalgamated company into three classes. A bill was filed by an owner of shares in the third class, on behalf of himself and other shareholders or proprietors, in the amalgamated company except the defendants, against that company and the directors thereof, alleging in substance, that the directors being unable, for want of funds, and by reason of the expiration of their compulsory powers to complete the junction line, had resolved and determined to abandon the whole forty-six miles of it, except only seventeen miles. The bill prayed a declaration that it was not within the power of the defendants to make a portion of the railway only, otherwise than for the purpose of completing the whole, and prayed that the directors might be decreed to indemnify and save harmless the company and the funds thereof, and from all the consequences of the illegality, and for an injunction. On demurrer, the Master of the Rolls again held, that the demurrer must be overruled, and that he should adhere to the rule which had been adopted in regard to both companies. That they obtained their vast powers from parliament for the completion of certain specified works, and were not to be allowed to apply the moneys which they had raised, or the powers which had been given them for those purposes, for any other than that for which they were originally granted. *Dumville* v. *The Birkenhead, Lancashire and Cheshire Junction Railway Company*, 12 Beavan, 444. It has been absolutely, and now unalterably decided in the court of chancery, that companies who are possessed of funds for objects which are distinctly defined by an act of parliament, cannot be allowed to apply them to any other purpose whatever, however advantageous that purpose may appear to the company, or to the individual members of it. *Mant* v. *The Shrewsbury and Chester Railway Company*, 13 Beavan, 1. See also *Logan* v. *The Earl of Courtown*, 13 Beavan, 22.

Where the shareholders in a railway company consisted of two classes, viz. the proprietors of whole shares, and the proprietors of half or guaranteed shares, the directors introduced two bills into parliament to vary the rights and privileges of the two classes, and application was made for an injunction to restrain the directors from paying the costs of the application and incident to said bill, &c. An injunction in this respect was refused, but an injunction was granted to restrain the application of the funds of the company in prosecuting the bill in parliament so far as it proposed to affect the privileges attached to the half shares. *Stevens* v. *The South Devon Railway Company*, 15 Jurist, 235; 2 Eng. Law and Equity Rep. 138.

Lord Chancellor Brougham retained so much of an injunction granted by the Vice-Chancellor as restrained a corporation from doing acts which they were not empowered to do by an act of parliament. But held that a court of equity would not, at the instance of a shareholder, enforce a joint stock company, incorporated by an act of parliament which prescribed its constitution and objects, from applying in its corporate capacity to parliament, and from using its corporate seal and resources to obtain the sanction of parliament to the remodeling of its constitution, or to a material alteration and extension of its objects and powers. *Ware* v. *The Grand Junction*

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because a general meeting of the Company might immediately confirm and give validity to the act of which the bill complains.

Water Works Company, 2 Russell & Mylne, 470. Chancellor Bennett, in the case of *Stevens* v. *The Rutland and Burlington Railroad Company*, commenting upon this decision of Lord Brougham, says: "He evidently goes upon the ground, that parliament is the proper place to meet the question; and that if parliament decide to make the alteration proposed, it is binding upon all the corporators. I apprehend that the views expressed by the lord chancellor in that case, if sound, must rest upon one of two grounds: either that the change asked for in the charter was not a fundamental one, or else upon the ground of the transcendent powers of a British parliament. It is said by Lord Coke, 'that the power and jurisdiction of parliament is so transcendental and absolute, that it cannot be controlled or confined, either for causes or persons within any bounds;' and in Steph. Elec. Law, (vol. 1, p. 11) the doctrine is maintained that the statutes of the realm are binding upon all the subjects, unless they are repugnant to the laws of God; and that they can only be dispensed with by the same authority of parliament with which they were made. Other writers, however, have maintained the ground that there are certain boundaries set to the exercise of even the supreme powers of a British parliament. It is evident that Lord Brougham, in the case of *Ware* v. *The Grand Junction W. W. Com'y*, grounds himself upon the sovereign and uncontrollable powers of parliament. The change in the charter, asked for in that case would, under most, if not all, the decisions in this country, be regarded as a fundamental one. The argument of Lord Brougham, at least in one particular, does not seem very sound. He says: 'The company ought to have the power of obtaining an alteration in their constitution, or that the plaintiff ought to have come in as a member of it, under certain conditions and limitations.' But would the conditions and limitations be more sacred than the constitution itself? and if parliament might change the constitution, might they not dispense with the conditions and limitations. See Amer. Law Mag. vol. 6, p. 93. But, with us, no legislature can transcend the bounds of the constitution. It is not a constitutional tribunal to hear and settle the rights of the parties, as Lord Brougham seems to consider the British parliament. I apprehend that in this State, no court of chancery would restrain a corporation from applying to the legislature for a fundamental change in their charter; and a sufficient reason would be, that if the additional power and authority changed the charter of the original contract, and defeated the vested rights of the stockholders, the act would bind such of the stockholders only as consented to the alteration."

Where an act of parliament, which authorized the transfer of a particular portion of a projected railway company to another, enacted that if that portion of the railway was not completed within three years from the transfer, it should not be lawful for the railway company to pay any dividends until the whole should be completed. That portion was not completed within the three years. On a bill filed by one shareholder, in behalf of himself and other shareholders, to restrain the payment of any future dividends, and that notwithstanding such shareholder had received interest on his shares since the expiration of the three years,—he being ignorant of the

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Upon the merits, therefore, I think the demurrers in this case must be overruled.

Some objections were, however, taken to the frame of the bill, which require much consideration. It was not, I think, argued by the defendants, that the proprietors and holders of scrip certificates in the perpetual stock had not such an interest in the application of the capital of the Company as was necessary to enable them to maintain a bill properly framed, to prevent a misapplication of the capital of the Company. It clearly could

enactment in question,—Lord Cottenham held that the company were prohibited from paying any dividend on any of their shares, and not merely upon the capital embarked in that particular portion of their undertaking. But that the plaintiff, being the holder of some shares of a particular class which were not entitled to participate in any dividend, was not entitled on a bill so framed, to an injunction to restrain the payment of dividends already declared, the other shareholders who were interested in the dividends not being parties or represented upon the record. *Carlisle* v. *The South Eastern Railway Company*, 2 Hall & Twells, 366. The case last cited was one of a statutory prohibition against making dividends if the work was not completed within a given time. But it cannot be said that in no case whatever a joint-stock company ought not to, or will in all cases be restrained from dividing profits until all their work has been completed. The jurisdiction of the court has in several cases been usefully applied in preventing or checking the erroneous conduct of corporations created by an act of parliament for public purposes; but it is not settled to what extent, or subject to what particular limitations, the jurisdiction ought to be exercised. The class of cases in which the court has often been called upon to interfere are those which arise out of a combination of (1) acts in themselves illegal, considered as breaches of contract with the public; (2) acts which are breaches of contract, express or implied, with the subscribers to the undertaking; and (3) acts erroneous, or breaches of contract, incapable of being rectified by the shareholders themselves in the exercise of their own powers. The directors or governing body are under a concurrent yet two-fold duty: the one, their duty to the public; the other, their duty to the shareholders. The remedy for the breach of their duty to each of these classes is by no means the same. Although their violation of their duty to the public might be such as would show great injury to the public yet, this must be regarded as a public wrong, and for this violation of their duty to the public a court of equity has not jurisdiction to interfere. In regard to the duties which they owe to their constituent shareholders, even in that case a court of equity will not in all cases attempt to direct the performance of all such duties; but, on the contrary, will leave the companies themselves to the enforcement of all the duties arising out of matters which are the subject of internal regulations. See *Brown, &c.* v. *The Monmouthshire Railway and Canal Company*, 13 Beav. 32.

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not be so argued; for there was an inchoate right in such parties to become general shareholders in the Company. Nor was it argued that proprietors of registered certificates had not a similar interest; but it was said that the interests of the proprietors and holders of scrip certificates, and the interest of the proprietors of registered certificates conflicted with each other; and that as the plaintiff must sue on behalf of both classes, the bill could not be sustained. I cannot take that view of the case. The holder of the scrip has an inchoate right to become a registered holder of the perpetual stock, and it is the interest of both classes in that stock which entitles him to sue; and if the scripholder has performed his conditions up to the time of filing the bill, there is no such conflict as the argument suggests.

[*131] Assuming this to be the case, and that the charges *in the bill are true with reference to the number of persons who are proprietors or holders of scrip, and who are proprietors of registered certificates, and that one at least of the acts complained of is altogether illegal. I think the case is one in which one person interested in the perpetual 6*l.* per cent. stock may sue on behalf of himself and others by a bill properly framed for the purpose.

Another objection taken on the part of the Company was, that the Company ought not to be a party to the suit. That applies to the demurrer by the Company. This objection I have no hesitation in overruling. The acts of the directors of which the bill complains were the acts of the directors as the representatives of the Company, and, as such, were the acts of the Company itself. The object of the suit, among other things, is to restrain the Company from doing the acts complained of; and the Company would not be bound in this suit, unless it were a party in its corporate character. This frame of suit is admitted by the Court as the only means of binding the Company, in a case in which the question arises between some of its own members, whether that which the Company is about to do, or has done, is a lawful act. In truth the only regular way of suing the Company is as a corporation; but in a case where a dispute arises between the members of the Company as to the legality of the acts done or intended to be

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done by the managing body of the Company, and a suit becomes necessary, the Court, as the only means of trying the question, allows some of its members to sue the others; but still, it is the Company against whom the question is raised. I do not think there is any question or doubt upon that in any of the cases.

The last objection I need notice is, that the vendors of the plaintiff's unregistered shares in the perpetual *stock [*132] of the Company (the plaintiff being a purchaser, and not an original subscriber for such scrip,) ought to be, and are not, parties to the suit. To this objection I was at one time disposed to yield; but, looking at the language of the resolution of the 21st of August, 1847, the form of the certificate entitling the original holder of the scrip and his assignee to the benefit of the rights the certificates conferred, and looking also to the recognition of the plaintiff's rights by the Company, and the payment and acceptance of his calls, I think the plaintiff can sustain this bill without making the vendors of the scrip parties to the suit. It is true, as it was argued, that the contract was, in the first instance, between the Company and the original subscriber; but that contract gave the original subscriber a right to be discharged, by transferring his scrip with its liabilities to another. The plaintiff became the purchaser, and is now, on the allegations of the bill, the lawful holder of the scrip; and he therefore became entitled, on the 1st of January, 1849, on performing the conditions of the certificate, to be admitted a registered shareholder. The Company, in conformity with the original contract with the scrip-holder, discharges him from his liability, and accepts the plaintiff as his assignee, and has thereby given him a right to sue as between himself and the Company. It will be remembered, that, in all these cases, it is much too broad a proposition to say, that a debt cannot be transferred at law. A debt or liability may be transferred, in point of fact, where there are three persons dealing as these parties in this case dealt. If A. be indebted to B. in a sum of money, and B. to C., and C. to A., those three persons may agree to a settlement of accounts as between each other, and that the one who owes most shall pay the difference to the one who is entitled to receive it. A payment in pursuance of such

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an agreement would in law discharge the party making it, and in that manner there may be a *transfer of the debt. [*133] This is nothing more than a contract made between a Company and the original scripholder, the latter agreeing to transfer his liability, and the Company to accept the transferee. The new holder or transferee of the scrip goes to the Company, and the Company acknowledges his right to it, accepts his payment of the calls, and promises to register his shares, or at least undertakes to do so by treating him as a scripholder. The proposition is much too broad, that, in none of these cases can you avoid the necessity of making the original holder a party. *Walburn* v. *Ingilby*,(a) has no application to this case.

The demurrers must be overruled.

PENNY *v.* BEAVAN.

1848: November 10th and 11th.

Upon a motion by the defendant to dismiss the bill, upon payment of satisfaction to the plaintiff of the debt or claim made by the suit, and certain costs of the suit, the court will, in some circumstances, determine the question of costs to be paid by the defendant, as where such question is purely collateral to the subject of the suit.

The costs of the plaintiff in a creditors' suit, in opposing a motion to dismiss for want of prosecution by a party named executor, who had renounced probate and disclaimed, was refused to a creditor whose bill was dismissed upon payment of his claim by the acting executor.

The mere offer from a defendant to pay a claim and costs (without motion) held not to disentitle the plaintiff to his costs of the subsequent proceedings in the suit.

MOTION by the executrix, defendant in a creditors' suit, that, upon payment to the plaintiff of the debt and costs of the suit, as against the executrix, up to the filing of her answer, the bill might be dismissed. It appeared that one Gardiner had been named a co-executor of the will, and had been made a defendant

(a) 1 My. & K. 61.

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to the suit. Gardiner renounced probate, and put in an answer and disclaimer, and afterwards moved to dismiss the bill for want of prosecution,—a motion *which the plaintiff [*134] unsuccessfully opposed. The executrix had afterwards, before answering, offered to pay the debt and costs, except the costs of Gardiner's motion; but the plaintiff declined to accept such payment, and enforced the answer.

Mr. *Drewry*, for the motion, submitted that, in such a case, the Court would make the order asked, limiting the costs to be paid by the executrix by excluding Gardiner's motion, and the costs incurred after her offer of payment;—the first, because Gardiner, if a proper party to be retained, was dismissed owing to the plaintiff's laches; and, if not a proper party to be retained, the plaintiff ought to have dismissed him without an adverse motion; and the second, because, although it was true the plaintiff might insist on his legal right to prosecute his suit, until stayed by the order of the Court, yet if he proceeded after all that was justly due to him was tendered, he would not be allowed subsequent costs: *Millington* v. *Fox*.(*a*)

Mr. *W. W. Cooper*, for the plaintiff, opposed the dismissal of the bill, except upon payment by the executrix of the whole costs of the plaintiff of the suit, as well as the debt. The Court would not, on an interlocutory application of this kind, enter into the question of parties, or other considerations proper to be entertained at the hearing of the cause.

The VICE-CHANCELLOR decided in favor of the executrix, on the first point made by her counsel, and against her upon the second. He said, that the general *rule was, that [*135] a defendant coming to stay a suit before the hearing, must give the plaintiff all that he claimed by the suit. The claim for costs might be purely collateral to the question in the cause, and cases would occur in which the Court might, on such

(*a*) 3 My. & Cr. 338.

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a motion, properly consider the question of costs. If he refused now to decide the point, the decision would in effect be, that the defendant must submit to pay the costs demanded, or carry the cause to a hearing; when, after much expense, precisely the same question would have to be decided, with no better or other materials than the Court had now before it. Although, therefore, he at first had doubted whether he ought now to decide the point, he thought it a case in which it would be proper to do so. The plaintiff ought, on the coming in of Gardiner's disclaimer, to have himself dismissed the bill, and not to have occasioned an increase of costs, by opposing Gardiner's motion to dismiss. On that part of the case, therefore, the proper order would be, that the bill should be dismissed, on payment of the plaintiff's debt, and interest, and the costs of the suit, including the costs of the motion to dismiss the bill for want of prosecution; with a special direction to the Master, that, in taxing the costs, he was not to allow any costs occasioned by the opposition of the plaintiff to Gardiner's motion. With regard to the offer of the executrix on the 20th of October, after an attachment had issued for want of answer, to pay the debt and costs, (even if she had offered to pay all that she ought to pay,—of which his Honor was not satisfied,) that offer could not deprive the plaintiff of the subsequent costs, or of the costs of this application. The defendant might have moved at an earlier stage of the cause.

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*Nixon *v.* The Taff Vale Railway Company. [*136]

1848: Nov. 8th, 9th and 14th. 1849: Jan. 11th.

By a contract for the execution of railway works, after specifying certain works to be done for a gross sum, it was provided, that extra works, which the company or their engineer should, by any writing under his hand, require to be executed, should be deemed to be included in the contract, and should be paid for at a certain rate; and that the contractor should not be entitled to make any claim for any alteration or addition which he might make without such written and signed instructions.

Held, by the Vice-Chancellor of England, (affirmed on appeal by the House of Lords) that a suit for an account of the moneys due to the contractor, in respect of the works done under the contract, was a proper subject of jurisdiction in equity.

Held, by the Vice-Chancellor Wigram, (upon exceptions) that a direction for an account of extra works done by the plaintiff under and by virtue of the contract, did not authorize any account to be taken of works (other than the specified works) done by the contractor, with the privity of the company, without written instructions; but that the court would give the plaintiff liberty to bring his action at law against the company, in respect of works done without such instructions,—not, however, relieving him against the legal effect of the lapse of time during the proceedings in equity.

Whether, if the contractor could not, in covenant, recover for extra works done for the company without written instructions, he might not recover in assumpsit—*quære*.[1]

Exceptions to the Master's report, in a suit by William Nixon, a contractor for executing works on the Taff Vale Railway, against the Railway Company, under a certain contract called Contract No. 10, for an account of what was due to the plaintiff, and for payment of the balance; and to restrain the Company from paying any moneys to the assignees of David Storm, a party who, with the privity of the Company, had subsequently become interested with the plaintiff in the contract.

By the decree in the cause made by the Vice-Chancellor of England on the 15th of November, 1845, after stating that, by the admission of the Company, all the specified works were finally completed in the month of January, 1841, pursuant to the contract and specifications, except that the same were incomplete

[1] See *The East Lancashire Railway Co.* v. *Hutlenly*, 8 Hare, 92.

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in respect of 2771 yards of fencing; it was ordered that the Master should inquire, and state to the Court whether the fencing was or was not completed by the plaintiff. And the Court directed the Master to take an account of all extra works done and performed by the plaintiff for the Company, under and by virtue of the Contract No. 10; and it was ordered that the Master should take an account of all sums of money paid by
[*137] the Company to the *plaintiff and to David Storm, or to either of them, for or on account of such extra works under the said contract; and it was ordered that the Master should state whether anything, and what, then remained due from the Company in respect of such extra works, having regard to the payments made by the Company to the plaintiff, or to David Storm, or either of them, in respect of such extra works, under the Contract No. 10; and it was ordered that the Master should state when such extra works were completed. And it was ordered that the Master should also take an account of all sums of money paid and advanced by David Storm to or on account of the plaintiff, to carry on the works comprised in the Contract No. 10, as well extra as specified works or otherwise, expended by David Storm in carrying on the works comprised in such contract, as well extra as specified works; and also an account of the corn, hay, and all and every other material supplied by David Storm to or on account of the plaintiff, in carrying on such specified and extra works; and also an account of all sums of money paid and advanced by the Company to David Storm, for or on account of Contract No. 10. And it was ordered, that the Master should inquire and state whether any and what sum of money then remained due from the plaintiff to the defendants, the assignees of David Storm, in respect of such advances, and supplies of hay, corn, and other materials made by David Storm, as aforesaid, to or on account of the plaintiff, and in respect of interest on such advances and the moneys chargeable for such supplies, such interest to be computed at 5*l.* per cent. per annum from the date of such advances and supplies respectively. The usual directions were given for taking the accounts, &c. with lib-

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erty to state special circumstances; and the Court reserved the further directions and the costs of the suit.

*The Taff Vale Railway Company appealed from this decree to the House of Lords, and their Lordships affirmed the decree.(a) [*138]

The amount in dispute between the plaintiff and the Company was very large. The contract price of the specified works was 7395*l.* 15*s.* The Company had paid 9207*l.* 12*s.* 6*d.* and insisted that nothing more was due; and the plaintiff claimed a further sum of 7300*l.* and upwards. The works which became the subject of discussion before the Master, and with regard to which the several questions between the parties arose, may be arranged in five classes: 1st, The specified works performed by the plaintiff, for the gross sum of 7395*l.* 15*s.* 2ndly, Works alleged by the Company to be part of such specified works, but charged by the plaintiff as extra works. These works formed the larger part of the subject in dispute before the Master; and it was against the Master's finding, with reference to the character of these works, whether specified or extra, that the greater part of the exceptions to the Master's report were ultimately directed. 3rdly, Extra works done in pursuance of the contract. These, (or such of them as were undisputed,) may be taken as represented by the sum which the Company had paid the plaintiff beyond the 7395*l.* 15*s.* 4thly, Extra works done by the plaintiff with the privity of, and adopted by the Company, but not executed with the formalities required by the terms of the contract. The sum of 1710*l.* 14*s.* 6*d.* was determined by the Master to be the price of this portion of the works, if they had been done "under and by virtue of" the contract. 5thly, Extra works executed by the plaintiff, with the privity of the Company, but which works *were excluded from the contract. The ballasting and laying the permanent rails, for which the plaintiff claimed 1243*l.* 18*s.*, fell under this head. [*139]

The Master, by his report, found that certain works were done

(a) See the report of the case, and their Lordships' judgment on appeal, 13 C. & F. 111.

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and performed by the plaintiff for the Company, upon the line mentioned in and forming the subject of the Contract No. 10, other than and besides the said works, for which the sum of 7395*l.* 15*s.* was to be paid; and, in the schedule to his report, he set forth the particulars of all such works, and the sums which he had considered proper to be allowed for the same works, if they had been done under and by virtue of the contract, amounting in the whole to the sum of 1710*l.* 14*s.* 6*d.* And the report then proceeded thus:—"And I find, that by the terms of the Contract No. 10, written orders were required to be given by the Company, or their engineers or agents, for all extra works to be done by the plaintiff, whereas no written orders were given for the said extra works, or for any part thereof; and I find, that by the custom of the said Railway Company such written orders were not usually given, although required by the contracts; and I find that all the works which were done by the plaintiff for the Company, as well the specified works as also such other works as aforesaid, were done with the privity and knowledge of the Company and their engineers; but, under the circumstances aforesaid, I am of opinion that the work so done by the plaintiff for the Company, other than the said specified works, cannot be considered as having been done under and by virtue of the Contract No. 10; and therefore, I have not allowed the said sum of 1710*l.* 14*s.* 6*d.*, nor any other sum for the same. And I find, that all the said works, as well specified as other works, were completed in the month of January, 1841." The Master, by his report, also found that the plaintiff had [*140] *performed certain ballasting, and had laid the permanent rails on the said portion of the line of railway which formed Contract No. 10, for which he had charged 1243*l.* 18*s.*; and that such work was performed by the plaintiff for the Company, with the privity of the Company and their engineers, and that the price charged for the same had been admitted before him to be fair and reasonable; but, inasmuch as the ballasting and laying the permanent rails were expressly excepted by the terms of the Contract No. 10, he had disallowed the same. The Master also found, that the plaintiff had claimed several other

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sums for works alleged by him to be extra works done by him for the said Company, which he had disallowed, being of opinion that the same were within the terms of the said Contract No. 10, and could not be considered as extra works.

The plaintiff took several exceptions to this report. The first exception related to the 1710*l.* 14*s.* 6*d.*, which the Master had found to be the price of the extra works performed, but which he had disallowed, as having been for works done, not under the contract. This was the only exception which was argued,—the other exceptions standing over, by consent of both parties, inasmuch as the success of the plaintiff, on the remaining exceptions, would be of no avail if the principle of the first exception should be decided against him; and his failure with respect to the latter exceptions would, in the same event, be of no importance to the Company.

The *Solicitor-General*, Mr. *Wood*, and Mr. *Stinton*, in support of the exceptions, argued that the finding of the Master, whereby he had in effect disallowed all the charges for extra works, was in substance a reversal of the decree of the Vice-Chancellor and the House of *Lords, which, by directing an [*141] account of extra works, had assumed that such works had been done. There was, in truth, no question that they had been done; the only question was, whether by omitting the formality of requiring the written orders for the execution of such works, the plaintiff had lost the entire benefit of his contract, and not only the benefit of his contract, but even a fair remuneration for the work which he had done. The engineers of the Company, by whose parol directions, and under whose authority the work had been done, were the agents of the Company appointed and intrusted in that business, and the Company were bound by their acts in respect of the works done. The engineers of the Company had not only directed the extra works to be done, but had afterwards adopted them, and signed certificates of their performance. The Company had not repudiated the works, but had, on the contrary, accepted them. This was equivalent to an original and formal authority. The maxim

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omnis ratihabitio retrotrahitur et mandato æquiparatur applied: *Maclean* v. *Dunn.*(*a*) If the Company had intended to deny that any extra works had been done, in conformity with the contract, that defence should have been raised upon the pleadings, and the question which was now argued would have been determined at the hearing of the cause.

Mr. *Rolt* and Mr. *W. M. James*, for the Company, contended that there had been no adoption of works by the Company, other than specified works, or the works for which the plaintiff had been paid. The certificates of the engineers were given for the quantities of work done, without reference to the fact, whether it was specified or extra work; but even if the certificates distinguished the works as extra, that did not bring [*142] *them necessarily within the contract. The Company bound themselves to pay for works which their engineer ordered to be done, not for what he might say he had ordered. A surety might bind himself to pay for goods which the principal should buy, but that would not make him liable for everything which the principal might afterwards say he had bought. It was impossible to say that, under the contract, the plaintiff was entitled to be paid for the works referred to in this exception. They cited *Kirk* v. *The Guardians of the Poor of the Bromley Union.*(*b*)

1849: *Jan.* 11*th.*—VICE-CHANCELLOR:—By a deed, of the 6th of April, 1838, made between the Taff Vale Railway Company of the first part, and the plaintiff, William Nixon, of the second part, the plaintiff contracted to do certain works connected with the railway for the Company, upon terms mentioned in the agreement. The works thus agreed to be done, may, for the present purpose, be conveniently divided into two heads. First, certain works, particularly described in a specification annexed to the deed, and which portion of the works I shall hereafter call the specified works; and, secondly, extra works, under which head

(*a*) 4 Bing. 722. (*b*) 2 Ph. 640.

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I mean to include works described as extra works in the specification; as also any alterations, additions, or omissions, to or in the specified works or extra works. By the terms of the deed the plaintiff was to be paid 7395*l.* 15*s.*, subject to increase or diminution in case of any alterations, additions, or omissions therein, in manner pointed out by the deed, and was to be paid for the extra works after a rate pointed out by the *deed. In the deed is contained a clause relating to the extra works in the words following:— [*143]

"Provided always, and it is hereby declared and agreed by and between the said parties, that all such works as in the said specification are described or referred to as extra works, which the said Company or their principal engineer, or assistant resident engineer for the time being, shall, by any writing under their or his hand, require to be made and executed, shall be and the same are deemed and considered as included in the covenants and agreements hereinbefore expressed and contained on the part of the said William Nixon, and that such extra works shall be paid for by the said Company, at the time, after the rate, and in the manner hereinafter mentioned; and that, if the said Company shall think proper, at any time or times, to make any alterations, additions, or omissions, to or in the said several works, including such extra works as aforesaid, or any of them, whether in respect of the form, character, dimensions, or mode of executing the same, or in any other respects, they, the said Company, shall be at liberty to do so, upon giving to the said William Nixon, or to his foreman, to be appointed as hereinbefore mentioned, written instructions for such alterations, additions, or omissions, signed by two of the directors of the said Company, or by their principal or assistant resident engineer for the time being; but the said William Nixon shall not be considered as having authority for any alteration, addition, or omission, nor as entitled to make any claim for the value or in respect of such alteration or addition, without such written instructions signed as aforesaid, although such alteration or addition may have been actually executed by the said William Nixon." The due execution of the works was

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to be certified by the principal engineer of the Company
[*144] before *the plaintiff was to be entitled to claim payment for his works. The contract embodied in this suit is called Contract No. 10.

The plaintiff afterwards filed his bill against the Taff Vale Railway Company, and other defendants, stating, amongst other things, that, after the execution of the deed, in 1838, the plaintiff commenced the works thereby agreed to be done, and finally completed all the specified works and the extra works which he was required to do. And that the specified works amounted to 7395*l.* 15*s.*, and the extra works to 9133*l.* 2*s.* 1*d.*; and that payments on account of the specified and extra works, to the amount of 9207*l.* 12*s.* 6*d.*, had been made by the defendants, leaving a balance due from them to the plaintiff; and the bill sought to have an account taken of what was due from the Company in respect of the plaintiff's work. Part of the prayer is in the following words:—"but if it shall appear that the said contract has not been duly performed, or that the said sums of 7395*l.* 15*s.* and 9133*l.* 2*s.* 1*d.*, were not due on the contract, then that an account may be taken of the works done under the said contract by the said plaintiff, or on his behalf, pursuant thereto, and such other accounts taken and balance struck under the said contract."

By the bill and proceedings in the cause, it appears that the plaintiff, with the privity of the Company, had assigned the benefit of the deed of April, 1838, to one David Storm, by way of mortgage; and that Storm had afterwards become bankrupt, and that his assignees in bankruptcy were parties to the bill; and one point in the cause was as to the rights of the assignees of Storm; but, for the present purpose, that point in the cause may
[*145] be wholly excluded from consideration, and the *case may be considered as if David Storm had not intervened, and as if this had been a bill of the plaintiff against the Taff Vale Railway Company for payment to the plaintiff of what was due to him under the deed of April, 1848: that is, as a bill in equity to enforce a purely legal demand.

The defendants answered the bill, in which they appear generally to have made no substantive defence, except as to the

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amount of what was due under the deed of April, 1838. The cause was afterwards heard by the Vice-Chancellor of England, and a decree or decretal order was made, dated the 15th of November, 1845.

[His Honor stated the terms of the decree]:—

This decree, as between the defendants and the plaintiff, was (as I understand) objected to, upon the ground, that the plaintiff's demand did not constitute a case for an account in this Court. And the Company appealed to the House of Lords, where the decree of the Vice-Chancellor was affirmed upon the express ground, that the case was the proper subject of an account in equity.(*a*) The case of *Kirk* v. *The Guardians of the Poor of the Bromley Union*,(*b*) appears scarcely to recognize the same principle.

The Master has made his separate report, which is in a very special form. He finds, that the fencing mentioned in the decree was not defective or incomplete in respect of the 2771 yards or any part of it, but that the whole of such fencing was completed by the plaintiff.

I may usefully pause here for the purpose of observing, that this finding clears the case of all question as *to [*146] the specified works, and narrows the question between the plaintiff and defendant to what, if anything, is due from the Company to the plaintiff for extra works done and performed by the plaintiff for the Company, under and by virtue of the Contract No. 10.

The substance of the Master's report is, that the plaintiff has done extra works with the privity and knowledge of the Company and their engineers; and that the same would be recoverable under Contract No 10, if written orders had been given for the same by the principal engineers of the Company, before they were executed; but that the plaintiff is precluded from recovering the same, by reason that the Contract No. 10 requires that such written order should have been given before the works were

(*a*) 13 Cl. & Fin. 111. (*b*) 2 Ph. 640.

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done by the plaintiff. The defendants, the Company, are satisfied with this report; at least, they have taken no exceptions to it. The plaintiff, however, has filed eighteen exceptions, the first of which raises the question, whether the Master is right in the principle upon which his report has proceeded; and, as my adoption or rejection of that principle would or might dispose of other exceptions, the argument of counsel upon the exceptions was confined to that question.

The view which the Master took of the case was this: that he was to ascertain what the plaintiff was entitled to under the covenants in the deed of April, 1838,—that he was, in fact, to try an action of covenant, the damages of which were to be measured by the stipulations in the Contract No. 10. In this principle, as the basis of his report, it is with regret that I feel myself compelled to agree with the Master. Nothing has drawn this case into equity but the better remedy which, in a case of account, this Court affords for a legal demand; but it is *still the legal demand, and that alone, which the Court is to ascertain by an account of what is due under and by virtue of the Contract No. 10. The words of the decree must, in such circumstances, mean what is due at law, under Contract No. 10. The pleadings, which I have read, make no other case, and the words already quoted from the prayer of the bill, namely, "that an account may be taken of the works done under the said contract by the plaintiff, or on his behalf, pursuant thereto," follow the same course. In a note of the Vice-Chancellor's judgment, which is printed in the Appendix to the Respondent's case before the House of Lords, his honor put the plaintiff's right to a decree entirely on the account. He says, "I do not see it is possible to resist the account;" and upon that view of the case, the counsel on both sides appeared to consider that the only decree to be taken, was a decree for an account according to the prayer of the bill. I mention this in order to show that, in the construction which the Master has put on the decree, he is consistent with the scope and prayer of the bill, and with the understanding of the Court and counsel at the time the decree was made.

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It was said, however, that the Master is wrong in the construc-

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tion he has put upon Contract No. 10. This depends upon the clause of the Contract No. 10, which I have quoted. That clause is certainly somewhat inaccurate in language; but I shall for the present, assume that the Master has correctly understood it and the decree; and that throughout the contract, where provision is made for payment of extra works, it must be understood as meaning extra works required in writing. I thought at one time, that the provision requiring the previous writing might be read as provision for the protection and benefit of the plaintiff alone; in which case it might have been argued that he was at *liberty to waive a clause in the contract, [*148] made for his own benefit only. But that construction of the contract cannot, I think, be maintained.

It was further argued, that, as the plaintiff had obtained the certificates of the principal engineer of the Company, that the were properly done, according to the contract, those certificates superseded the necessity of proving the precedent authority in writing; but that position, I shall also for the present assume, cannot be maintained. The principal engineer was the agent of of the Company for the purpose of determining what extra works should be done, and also for determining whether they were properly done; but not for the purpose of dispensing with a provision in the deed, which might be of vital importance to the interests of the Company.

The last argument I shall notice is, that the plaintiff contended that, as the point taken before the Master was not taken upon the pleadings, it was too late to take it in the Master's office. I wish I could agree with that argument; but I think the decree has clearly left open every legal defence of which the Company might have availed themselves in an action on the covenant. I greatly regret this conclusion, because it is manifest that the plaintiff is placed in his present difficulty by a mere oversight; for if, instead of confining his demands to his rights under the contract, he had proceeded (as it were) in assumpsit, I cannot but think that he would at law have been entitled to recover for the work of which the Company have taken, and had and now have, the benefit; and that, in the circumstances of this

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case, the measure of damages to which he would have been entitled would have been the same as under the contract, if
[*149] the precedent authority in writing had been *obtained; and that the mere remedy of this Court would have been open to him, as in the case of his suing under the contract. His difficulty is merely technical; it arises from the decree giving him his rights under the covenant only.

In what I have said I have abstained from giving any opinion on the construction of the contract. From what I have been informed of the course taken at law in these cases, it is this:—If, in an action by a contractor, it appears that the Company have the benefit of the work done with their knowledge, the Court of law does not allow the Company to take the benefit of that work without paying for it, although in covenant the contractor cannot recover. If the plaintiff should desire to have an opportunity of trying the question upon the construction of the contract, I will certainly give it him. The difficulty which has deterred me in taking that course, unless the plaintiff shall ask it, is this:—He has sued in covenant. If he can sue in covenant he is in time; but if not, he may have a difficulty on the Statute of Limitations. In the case of *Knight* v. *Marquis of Waterford*,(a) where the remedy was barred, or supposed to be barred, by the statute, by reason of the time that elapsed during the proceedings in equity, the parties applied to the House of Lords to make an order, which should prevent the statute from barring them, and the House of Lords refused to do it. The plaintiff, therefore, can have no relief on account of the time which has passed while these proceedings have been going on.

18*th Jan.*—The exceptions were ordered to stand over, with liberty to the plaintiff to bring such action as he might be advised.

(a) 11 Cl. & Fin. 653.

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*WINTHROP *v.* MURRAY. [*150]

1848: Dec. 9th, 12th and 15. 1849: August 4th.

Where the same solicitor appeared for two defendants, one of whom had, and the other had not, filed his answer so long a time previously, as to entitle him to move to dismiss the bill for want of prosecution, the court refused such a motion by the former defendant, with costs.

Where a plaintiff has obtained an order of course to amend his bill, after one or more answers has been filed, he can obtain no further order of course to amend, although he has called for and obtained an answer to the amended bill from the defendants or defendant, who had answered the original bill, and although other defendants may not have answered the original bill.

If the right of the plaintiff to an order of course to amend be barred as against one defendant, it is barred against all.

One of several plaintiffs having concurred in authorizing a suit to be instituted, and after its institution instructing the solicitor for the plaintiffs not to take any further proceedings in the cause, is not, upon further proceedings being taken, entitled to an order that the solicitor shall indemnify him in respect of the subsequent costs of the suit.

MR. GLASSE, for the defendant Murray, moved to dismiss the bill for want of prosecution.

Mr. *Elderton*, for the plaintiff, opposed the motion.

It appeared, or was admitted, that although the answer of the defendant Murray had been put in so long before, that with reference to time alone he was entitled to make the present motion, yet the answer of another defendant had been filed so recently, that the time for obtaining the common order to amend (Order LXVI. May, 1845) had not expired; and it was admitted, also, that the two defendants appeared by the same solicitor, who could not, therefore, have been ignorant of the state of the cause. (See Order CXVIII. of May, 1845.)

The VICE-CHANCELLOR, on the latter ground, refused the motion, with costs.

The defendant Murray had answered the original bill in Feb-

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ruary, 1848. In April, 1848, the plaintiff obtained an order of course to amend his bill, and the defendant Murray answered the amended bill on the 10th of June, 1848. Other defendants filed their respective answers in the months of August, October, and November following. One defendant had not yet an-
[*151] swered, *and one was out of the jurisdiction. In this state of the cause, the plaintiff applied for a second order of course to amend his bill, which the Registrar did not consider him entitled to, and declined to draw up.

12*th Dec.*—Mr. *Elderton* moved, *ex parte* for a direction to the Registrar to draw up the order, giving the plaintiff leave to amend. He referred to *Dalton* v. *Hayter*,(*a*) and submitted, that the construction in the latter case, of the 33rd clause of Order XVI of May, 1845, had not been disturbed by the decision of the Lord Chancellor, in *Arnold* v. *Arnold*.(*b*) He distinguished this case from that of *Duncombe* v. *Lewis*,(*c*) by the circumstance, that, after the Order of April, 1848, had been obtained, and the bill amended, requiring a further answer from Murray, the bill should be considered as in substance a new bill against him: *Wharton* v. *Swann*.(*d*) In *Duncombe* v. *Lewis*, the defendant who objected to the second order, had not been required to answer the amended bill.

15*th Dec.*—VICE-CHANCELLOR:—I think the plaintiff is not entitled to an order to amend his bill as of course.

The first question is, whether the plaintiff is so entitled against the defendant Murray. If not so entitled against him, there is an end of the question; for an amendment is an amendment against all; and if the plaintiff be barred as against one, he is thereby barred against all.

[*152] The case of *Duncombe* v. *Lewis*,(*e*) in principle decides the case. I consider, that if there had been any doubt upon the point before, that case puts an end to it. In order to

(*a*) 7 Beav. 586, 589. (*b*) 1 Ph. 805. (*c*) 10 Beav. 273.
(*d*) 2 My. & K. 362. (*e*) 10 Beav. 273.

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avoid the effect of that decision, the plaintiff insists that the bill, as amended under the first order of course, of the 20th April, 1848, is to be considered as a new bill,—that is, an original bill; and that he starts from that point with the same right to one order of course to amend his amended bill, as he would have had upon an original bill; and in support of this argument, *Wharton* v. *Swann*,(a) was referred to. That case was decided upon the orders of 1831, and not upon the orders of 1845. Whatever might be thought of that case originally, it does not now apply, having been superseded by the latter orders.

If the plaintiff's argument were admitted, the power of a plaintiff to amend his bill by orders of course would be unlimited, which it has been the object of the modern orders to prevent.

Not only is there the authority of *Duncombe* v. *Lewis*, but upon reference to the 66th Order of May, 1845, it will be seen that it expressly provides that "no further order of course for leave to amend a bill is to be granted after an answer has been filed," unless as in the Order LXV.

1849: *Aug. 4th.*—The *Solicitor-General* and Mr. *Hetherington* moved, on behalf of Wyche, one of the plaintiffs in this suit, that Mr. Elderton, the solicitor for the plaintiffs in the *cause might be ordered to indemnify Wyche in respect [*153] of such costs as had been incurred in the suit since the 13th of March, 1848, and for the costs which might hereafter be incurred. The application was made on the ground, that, although Mr. Wyche had originally consented to be named as the plaintiff in the cause, he had on the 13th of March 1848, requested that no further proceedings should be taken, and other proceedings had since been had. They referred to *Dundas* v. *Dutens*,(b) and *Tarbuck* v. *Woodcock*.(c) If the solicitor were instructed to proceed by any other plaintiff, he might apply to strike out the name of the dissenting plaintiff, and make him a defendant if he

(a) 2 My. & K. 362. (b) 2 Cox, 240; 1 Ves. jun. 200; 1 J. & W. 459, n.
(c) 6 Beav. 581.

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were a necessary party, either by amendment or supplemental bill: *Langdale* v. *Langdale*.(a)

[The VICE-CHANCELLOR:—That case has not been followed. I remember it was cited in *Holkirk* v. *Holkirk*,(b) before Sir John Leach, who, nevertheless, held, that a plaintiff cannot be permitted to withdraw, if, by so doing, the remaining plaintiffs are injured. How does it appear in this case that the solicitor has the power of removing the name of this plaintiff from the record, or to stay the proceedings?]

The Court allows an infant, on coming of age, to repudiate a suit commenced in his name; and if he does so, the Court finds means to relieve him from the suit without injury to the other parties. The same, or a similar course, might be taken where one of several plaintiffs, admitting his liability to costs up to a certain period, is desirous of being relieved from future responsibility.

[*154] Mr. *Bacon*, Mr. *Alderton*, and Mr. *W. W. Cooper*, appeared for the solicitor and parties in the cause. But, without hearing them,

The VICE-CHANCELLOR refused the motion with costs.

GAUNT *v.* JOHNSON.

1848: Dec. 6th.

In a suit by cestui que trusts against the trustees of a settlement for an account, and execution of the trust, the suggestion by the defendant, of a doubt whether some part of the property of which they have possessed themselves as trustees, may not belong to the estate of the settlor, does not render the representative of the settlor a necessary party.

AN objection, at the hearing of the cause, that the personal representative of the author of the settlement, the trusts of which

(a) 13 Ves. 167. (b) 4 Madd. 50.

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it was the object of the bill to enforce, was a necessary party to the suit, and that it was not a case in which such personal representative was properly made a party by being served with a copy of the bill.

By the trust deeds, which were dated in December, 1834, J. R. Gaunt conveyed and assigned to trustees, certain estates vested in him by way of mortgage, and also certain leasehold premises, and moneys owing to him, the household goods and furniture mentioned in the schedule, and the crops of corn, peas, tares, grass, hay, seeds, and other articles then standing and growing, or being upon the farms occupied by him, upon trust to get in the said moneys, and at their discretion to sell the said estates and other property, and invest the proceeds, and pay the dividends to the plaintiff, Jane, for her life, who was to maintain thereout the other plaintiffs, her five children, and after her decease, upon trust for the said five children as therein mentioned.

The surviving trustee by his answer stated, that the ex- [*155] istence of the indentures was not made known to the trustees until October, 1835, and that the trustees executed the same at the request of J. R. Gaunt, but that J. R. Gaunt retained the trust deeds in his possession until his death in May, 1838; that the property and effects, except so far as J. R. Gaunt sold or disposed of them in his lifetime, remained in his possession until his death; that, at the death of the said J. R. Gaunt, the defendant and his deceased co-trustee had conceived themselves to be entitled, as such trustees, to the whole of the live and dead stock and crops then being upon the farm, lands, and premises in the occupation of the said settlor, at the time of his death, although the defendant had since been advised that it was at least very doubtful whether, under the provisions of the said trust deed, the said trustees were entitled to the whole of such stock and crops; and he submitted the same to the judgment of the Court; and he also submitted, whether the rights of the parties to the said stock and crops, and the produce thereof, could properly be decided in the absence of the personal representative of J. R. Gaunt. The defendant also submitted to the Court, whether certain other sums, which had been received by them in respect of debts owing

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to J. R. Gaunt, at his death for corn which he had sold shortly before, formed part of the trust property.

The plaintiffs, by amendment, made the personal representative of J. R. Gaunt a party, serving him with a copy of the bill, under the 23rd Order of August, 1841. At the hearing,

The *Solicitor-General* and Mr. *Freeling*, for the defendant, argued that the personal representative of J. R. Gaunt was a necessary party to the bill, and that he was not properly made a party by service of the copy: **Barkley* v. *Lord Reay*,(a) *Marke* v. *Locke*,(b) *Powell* v. *Cockerell*.(c)

[*156]

Mr. *Wood* and Mr. *Southgate*, for the bill, referred to *Lloyd* v. *Lloyd*,(d) and *Duncombe* v. *Levy*.(e)

The VICE-CHANCELLOR said, that if the settlor, who ought to have delivered the deed to the trustees, and enabled them to secure the trust property, had kept the deed of trust in his possession, and mixed up the property which he had made the subject of the settlement with his other property, so that the trustees could not distinguish it, the trustees might have insisted that the representative of the settlor was a necessary party, and that the account ought not to be taken in his absence. So, if the plaintiffs by the bill had claimed property, of which the trustees had not been able to possess themselves under the deed. Neither of these cases was made. The answer suggested, that the trustees might possibly have taken possession of some other property, in addition to the trust property; but this did not render it necessary to make the owner of such other property a party to a bill for the administration of the trust.

(a) 2 Hare 306. (b) 2 Y. & C. C. C. 500. (c) 4 Hare, 557.
(d) 1 Y. & C. C. C. 181. (e) 5 Hare, 232.

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Earl Granville *v.* M'Neile.

1849: March 9th, 10th and 13th.

A power contained in a settlement of real estate on trust for sale, enabled one of the parties, his executors, administrators and assigns, on a vacancy to appoint a new trustee. The party so empowered died, having by his will named three executors, one of whom renounced probate; and the vacancy in the trust having occurred, it was held, that the two acting executors had power to appoint the new trustee.

A BILL by the parties beneficially interested under a settlement of real estate, on trust for sale and other purposes, together with parties who had been subsequently *nomi- [*157] nated to be new trustees, in the place of deceased trustees, of the same settlement, for a conveyance of the trust property to the new trustees by the defendants, the devisees of the last survivor of the original trustees; or if the Court should be of opinion, that one of the persons so named as a new trustee had not been properly appointed, then that it might be referred to the Master to appoint a trustee.

The question was, whether a power of appointment given to a deceased person, "his executors, administrators, or assigns," was well executed by the two acting executors appointed by the will of such deceased person, where three executors had been named in his will, and one of them had declined to act.

Mr. *F. Currey*, for the plaintiffs.

Mr. *Cairns*, for the two acting executors of the deceased donee of the power.

Mr. *Stevens*, for the devisees of the last survivor of the original trustees, in whom the legal estate was vested.

The authorities cited were,—Case in the Year Book, 15 Hen. 7, fol. 11. b.; *S. C.*, Appendix No. 1 to Sugden on Powers;

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Yates v. *Compton*,(a) *Keates* v. *Burton*;(b) *Adams* v. *Taunton*,(c) *Eaton* v. *Smith*,(d) 2 Sugden on Powers, 138, 139.

VICE-CHANCELLOR:—In this case, by a settlement of the 11th of June, 1833, a power was reserved to George Alexander Fullerton, his executors, administrators, or assigns, in events which afterwards happened, to appoint a new trustee in [*158] *the place of Stone, an original trustee of the 11th of June, 1833. Stone died in 1844, having devised the trust estates, and the same are now vested in the devisees in trust under Stone's will. George Alexander Fullerton is since dead, having made a will and appointed three persons executors. One of those persons has renounced, and the will has been proved by the remaining two. The two acting executors under Fullerton's will have appointed a trustee in the place of Stone. The trustee so appointed, together with the other trustees of the settlement of the 11th of June, 1833, have called upon the devisees in trust under Stone's will, to convey the property to them; and the question is, whether the appointment of trustee by the acting executors of Stone is a good appointment. I have referred to Sir Edward Sugden's Book on Powers, but find nothing there to make me doubt the sufficiency of the appointment. The question in all such cases is, whether the confidence is reposed in the individuals named or in the persons who *de facto* fill the given office.

In this case, the power to appoint the trustee is not derived under the will of Fullerton, but under the settlement of June, 1833; and I cannot, in such circumstances, hesitate in coming to the conclusion, that the intention of the parties was, that those whom Fullerton trusted to administer his property should also be trusted to exercise the power given to Fullerton in the settlement of June, 1833. Those whom Fullerton trusted were the persons who acted, and not those only whom he named.

DECLARE the trustee appointed by the acting executors of the will of George

(a) 2 P. Wms. 308. (b) 14 Ves. 434. (c) 5 Madd. 435. (d) 2 Beav. 236.

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Alexander Fullerton to be well appointed, and direct the devisees of George Stone to convey the trust premises to the new trustees. Costs of all parties, as between solicitor and client, to be paid by the new trustees, and retained by them out of the trust funds.

*Webster v. Bray. [*159]

1848: December 11th and 12th. 1849: Feb. 9th.

Two sets of parties having projected a railway on a similar line, agreed to consolidate the project, and appointed as solicitors of the proposed company, the plaintiff and defendant, whom they had respectively consulted prior to the consolidation. The two solicitors accepted the appointment without making any definite arrangement as to the division of the business, or of the emoluments of the office, and a much larger portion of the work was done by the defendant than by the plaintiff. In a conversation between them about six months after the appointment, and before the principal part of the business was transacted, the plaintiff stated, as the result of his inquiries into the practice in like cases, that the allowance for office expenses and personal trouble in such limited partnerships between solicitors, was made by each party retaining, besides his expenses and disbursements, from ten to twenty-five per cent. on the amount of the net charges for the business done, and which principle he considered satisfactory; and the defendant, in reply, observed, that there could be no misunderstanding about it between honorable men. Upon a bill by the plaintiff, claiming an account and division of the profits of the business done by the company, upon the footing of an equal copartnership, and offering to allow twenty-five per cent. upon the work done separately, to the partner who did it,—the court, in the circumstances, made a decree accordingly.

In April, 1845, some of the directors of the Preston and Wyre Railway Company projected a new line, to connect that railway with the manufacturing towns of the West Riding of Yorkshire; and, about the same time, a similar project for connecting the town of Preston with the West Riding was set on foot by some of the directors of the Preston and Longridge Railway Company. The plaintiff, who was a solicitor residing at Manchester, was professionally employed or consulted as solicitor by the Preston and Wyre directors, at Manchester; and the defendant, a solicitor residing at Preston, was in like manner employed or consulted by the Preston and Longridge directors, who chiefly

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resided in his neighborhood. The two parties of projectors entered into communication, and agreed to associate themselves together, and apply to Parliament for powers to carry into effect their common object, under the name of the "Fleetwood, Preston and West Riding Junction Railway Company." They accordingly formed a provisional committee, and held their first formal meeting on the 8th of May, 1845, at which a resolution was passed, "That the solicitors be Joseph Bray, Esq., Preston, John Webster, Esq., Manchester."

A form of appointment was subsequently prepared
[*160] *for registration, under the stat. 7 & 8 Vict. c. 110, which was as follows:—

"We, promoters of the Fleetwood, Preston and West Riding Junction Railway Company, do hereby appoint Joseph Bray of Preston in the county of Lancaster, gentleman, and John Webster of Manchester in the same county, gentleman, attorneys of her Majesty's Court of Queen's Bench, to be solicitors for the promoters of the said Company, for the purposes specified in the 6th section of the Act for the Registration, Incorporation, and Regulation of Joint-stock Companies. Signed, on behalf of the promoters of the said Company: T. B. Addison, Clement Royds, John Laidlay, Promoters of the said Company. Dated this 11th day of October, 1845."

To this was subjoined the acceptance of the plaintiff and defendant, in these words:—

"We, the undersigned, do hereby accept the office of solicitors for the promoters of the Fleetwood, Preston and West Riding Junction Railway Company, for the purposes specified in the 6th section of the Act for the Registration, Incorporation, and Regulation of Joint-stock Companies.

"Dated, this 11th day of October 1845.

"JOSEPH BRAY.
"JOHN WEBSTER."

The parliamentary agents returned the document, with an intimation that the Registrar refused to enter both names, and that the acceptance of the appointment must therefore be signed by

one only. Another form of appointment was thereupon signed by the promoters, and the plaintiff, in forwarding it to the defendant, said that he would "defer to him the honor" of signing the acceptance, and the same was signed by the defendant only.

*The professional business of the Company was [*161] transacted by the plaintiff and defendant as such solicitors; but the quantity of such business done for the Company by the defendant was much greater than that done by the plaintiff. After the passing of the act, the directors of the "Fleetwood, Preston and West Riding Junction Railway Company" removed their offices to Preston. The plaintiff, by a letter dated the 22nd day of August, 1846, resigned his office as a solicitor to the Company; and on the 31st of August, 1846, the defendant was appointed their sole solicitor.

In March, 1847, the plaintiff filed his bill against the defendant, which, after setting forth the circumstances alleged by the plaintiff to have taken place with reference to the appointment, the communication between the plaintiff and the defendant, and the manner in which the duties of the office of solicitor to the Company had been divided or performed, stated that the defendant had, without the knowledge or assent of the plaintiff, made out and delivered bills of costs, and received from the Company moneys to a large amount. The bill charged, that, by the effect of the joint appointment of the plaintiff and defendant, as solicitors of the Company, and their acceptance thereof, and acting under the same, or otherwise, under the circumstances of the case, a partnership or joint interest was constituted betweon the plaintiff and defendant in the business of solicitors for the Company, during the subsistence of the appointment, for their mutual and equal profit and loss, subject to all just allowances between them, and prayed a declaration of the Court to that effect. The bill also prayed, that an account of the partnership business might be taken, and the defendant be ordered to pay the plaintiff what, if anything, should, upon such account, appear to be due from him, the plaintiff being ready and *willing, [*162] and thereby offering, to pay to the defendant, what, if

anything, should appear to be due to him thereupon; and that, in taking such account, the defendant might be charged with interest at the rate of 5*l.* per cent. per annum, or at such other rate as to the Court should seem proper, upon the balance found owing from him to the plaintiff, for the period since the settlement which had been come to between the defendant and the Company, and until the actual payment of such balance; or that the defendant might otherwise be charged with interest upon the balance or sum coming from him to the plaintiff for the period during which such balance had been and should be retained; and that the account prayed might either be taken upon the footing of including an allowance to the plaintiff and the defendant respectively, for office expenses and personal trouble in respect of so much of the partnership or joint business as was personally superintended and managed by them individually, or exclusively of any such allowance, as to the Court should seem proper; and if exclusively of such an allowance, then that such an allowance might be calculated by way of a per-centage deduction, if any amount not exceeding 25*l.* per cent., from the total amount of the net charges for the business personally superintended and managed by each partner; or otherwise, that such other allowance might be made as to the Court should seem meet; and if necessary, that it might be referred to the Master to inquire and ascertain what would be a proper allowance to be made to the plaintiff and the defendant respectively, for office expenses and personal trouble; and for a receiver and injunction.

The defendant by his answer denied that there was any joint appointment, or that any partnership was constituted between him and the plaintiff, as solicitors of the Company, or [*163] that the proceedings were taken in *their joint names, or upon their joint responsibility, or their joint account; and, on the contrary, he insisted that such of the proceedings as were taken by himself, were taken on his own responsibility and account, and such of them as were taken by the plaintiff, were taken upon the plaintiff's responsibility and account, although, in some of the printed papers, the names of both were inserted. The defendant admitted that he had delivered his bill of costs for

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business done for the Company, amounting to 4038*l.* 11*s.* 6*d.*, and that he had received 450*l.* in respect of business done by the plaintiff, having indemnified the Company against any demand which the plaintiff might have; that he (the defendant) had also received 769*l.* 16*s.* 4*d.* in respect of the bill of the parliamentary agents, and 4669*l.* 8*s.* 2*d.* on account of his own disbursements. He said that the plaintiff had refused to come to any account except upon the footing of the alleged partnership, although no such partnership ever existed; and the defendant said, that he had frequently offered to pay the said sum of 450*l.* to the plaintiff, or to pay to the plaintiff whatever he was justly entitled to.

Evidence was entered into; and, among the rest, some witnesses were examined upon the custom or practice amongst solicitors as to the allowances made for personal labor in cases of joint business. The evidence, so far as it was considered material, is adverted to in the judgment.

Mr. *Rolt* and Mr. *Little*, for the plaintiff.

The *Solicitor-General* and Mr. *Selwyn*, for the defendant.

*The case of *M'Gregor* v. *Bainbrigge*,(*a*) lately before [*164]

(*a*) M'Gregor *v.* Bainbrigge.

1848: May 9th, 10th and 29th.

Issues directed on the questions, whether the solicitors of a railway company were partners in the business done by them for the company; and, if partners, whether in equal shares.

The projectors of a railway from Kidderminster to Hereford agreed to combine their project with that of the Derbyshire, Staffordshire and Worcestershire Junction Railway Company. The plaintiff was the solicitor of the former parties, and the defendant of the latter. Under one of the clauses in the agreement for amalgamation, the plaintiff and defendant were appointed joint solicitors to the company. The plaintiff and defendant transacted the professional business of the company, (how far separately or jointly was disputed) but the larger part of such business was done by the defendant. The company failed in obtaining parliamentary powers. The bill alleged, that it was agreed between the plaintiff and defendant, with the sanction of the directors of the amalgamated company, that the business thereof should be jointly carried on by the plaintiff and defendant, and that they should be interested in all the gains and profits thence arising, in equal shares; and prayed

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this branch of the Court, was referred to; the points argued will sufficiently appear in the judgment.

an account of such joint business, and payment to the plaintiff of what should be found due to him, after making to the defendant all just allowances.

The defendant denied the alleged agreement, and said, that the understanding between the plaintiff and himself was that each should be paid for the professional work and labor actually done and performed by each.

The *Solicitor-General* and Mr. *Leach*, for the plaintiff.

Mr. *Wood* and Mr. *Piggott*, for the defendant.

The authorities cited were:—*Farrar* v. *Beswick*,(*a*) *Reid* v. *Hollingshead*,(*b*) *Thompson* v. *Williamson*,(*c*) *Brock* v. *Brown*,(*d*) *Willett* v. *Blanford*,(*e*) *Peacock* v. *Peacock*,(*f*) *Blair* v. *Bromley*,(*g*) *Coope* v. *Eyre*,(*h*) *Finckle* v. *Stacy*,(*i*) and Collyer on Partnership.(*k*)

The VICE-CHANCELLOR directed two issues to be tried: first, whether, at the time of the amalgamation of the two companies, or at any other time, it was agreed between the plaintiff and defendant, that the business of the amalgamated company should be carried on by them jointly, as copartners; secondly, if the jury should find that there was such partnership, whether it was agreed between the said parties that they should be interested in the gains and profits thereof, in equal shares. And it was ordered, that the plaintiff in equity should be the plaintiff at law; and if the jury should find any special matter, the same was to be indorsed on the postea.(*l*)

The jury having found a verdict for the plaintiff upon both issues,

1849: *Feb.* 28*th*; *March* 1*st and* 3*d*.—Mr *Wood*, Mr. *Piggott* and Mr. *Cowling*, for the defendant, moved for a new trial, on three grounds: first, misdirection; secondly, that the verdict was against evidence; and thirdly, that it was obtained by calling a witness named English, who had not been previously heard of, and whose production was a surprise upon the defendant.

The *Solicitor-General* and Mr. *Bramwell*, for the plaintiff, opposed the motion.

The alleged misdirection was, that the learned judge had told the jury, that the

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(*a*) 1 Moo. & Rob. 527. (*b*) 4 B. & C. 867. (*c*) 7 Bligh, N. S. 432.
(*d*) Cited Id. 436. (*e*) 1 Hare, 253.
(*f*) 16 Ves. 56.; *S. C.*, 2 Camp. 35. (*g*) 5 Hare, 542; *S. C.*, 2 Ph. 354.
(*h*) 1 H. Bl. 37. (*i*) Sel. Ch. Ca. 9. (*k*) Page 105, *et seq.* 2d edit.
(*l*) See 6 Hare, 624, n. (*a*.)

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VICE-CHANCELLOR, after stating the appointment of the plaintiff and defendant to be solicitors of the Company, and their acceptance of the appointment—

*In the interval between the appointment of the plaintiff and defendant to be joint solicitors, on the 8th of May, 1845, down to the resignation of the plaintiff on the 22nd of August, 1846, the legal business of the *Company was transacted by the plaintiff and defendant; that is, all was transacted by them or one of them, or their or one of [*165] [*166]

joint employment of the plaintiff and defendant, as the solicitors of the company, and their acceptance of the appointment in the terms on which it was conferred, was *prima facie* evidence that the business was to be done by them for the joint and equal benefit of both.

VICE-CHANCELLOR:—The order which I made on the hearing of this cause, directing the issues, was, I believe, the best order I could have made, attending to the mixed questions of law and of fact, upon which the rights of the parties do or may depend; and to this also, that these rights cannot be made the subject of any action. If I had been prepared to decide (upon my own judgment) that the retainer of two persons by a third to be his solicitors, and the acceptance of that retainer by the two, raised a presumption (in the first instance) that the two were partners *inter se* in the business, done under the retainer, I could not have decided this case against the defendant, without giving him an opportunity of showing that the retainer in this particular case did not raise, or that it excluded the presumption I have adverted to, or that the circumstances of the case, in other respects, negatived that presumption. And certainly I could not have decided that there was an actual agreement for a partnership between the plaintiff and defendant, without sending the case to a jury. The jury have found for the plaintiff upon both the issues, and the learned judge is satisfied with the verdict.

In support of the motion for a new trial, three points have been made: first, misdirection; secondly, that the verdict is against evidence; and, thirdly, surprise. Upon the first point I think there is no ground for a new trial; upon the second, (standing alone) I am also of opinion that no ground for a new trial has been shown; but, attending to the important evidence given by the witness English, and to the circumstances under which that evidence was given, I think the third point is a ground for new trial. The verdict, whilst it stands, concludes the defendant, whatever the law of the case may be.

I beg, however, to be distinctly understood as not dissenting from any of the remarks of the learned judge, nor expressing any opinion that the jury did wrong in giving credit to the evidence of English. My only reason is, that I ought not to bind the defendant by this verdict.

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their agents. The question in this case is, upon what
[*167] principle, or in what proportions, the *profits of that business should be divided between the plaintiff and defendant.

The plaintiff insists, that by the effect of the joint appointment of the plaintiff and defendant to be solicitors, and their acceptance of such joint appointment, and their acting under the same, a partnership was constituted between themselves in the business of solicitors to the Company, for their mutual and equal profit and loss during the subsistence of the appointment, subject to all just allowances between them; and the bill prays relief upon this principle, suggesting various modes by way of alternatives, upon which just allowances may be computed, if the Court should be of opinion that any of such modes are proper under the circumstances of the case.

In order to explain, in a general way, upon what the contract between the parties turns, it will be sufficient to say, that, according to the allegations in the bill, (which, for the present purpose, may be considered as admissions,) the work actually done by each party was, as between themselves, divided merely according to the convenience of the case; and the meaning of this expression, "convenience of the case," is thus explained in the bill:—

"That the more influential and active of the provisional committee of the intended Company, including the chairman and deputy chairman of such committee, were resident in or near Manchester, where the Company's offices were also situate, and where the secretary of the Company resided, and where the committee meetings were held, but that the line of the proposed rail-
way, as before stated, commenced at Preston, and thence
[*168] passed in an easterly direction in its route *towards Yorkshire; and that, from the local circumstances above mentioned, and from the obvious convenience of the case, it happened that the greater part of the legal business arising out of attendances upon the provisional committee, and the obtaining and registering the signatures of members and their consents to act and to take shares, and other forms for registration, the preparation of the parliamentary contract, and the subscribers' agreement,

and the procuring of the signatures thereto, the getting of the same contract and signatures printed, and the preparation of the notice of application for an Act, and of the draft bill for Parliament, were principally, but not exclusively, superintended and managed by the plaintiff, as the active party; and the greater part of the legal business arising out of the preparation of the books of reference, and the service of the notices upon the owners, lessees, and occupiers of lands, and the forwarding of the bill through its several stages in Parliament, were principally, but not exclusively, superintended and managed by the defendant as the active party; however, in all the aforesaid particulars, the plaintiff and defendant acted in communication and co-operation with one another, and in fact the defendant frequently interposed in those departments of the business which were in general under the more immediate superintendence and management of the plaintiff, and the plaintiff in like manner frequently interposed in those departments of the business which were in general under the more immediate superintendence and management of the defendant."

The actual result appears to have been, that the proportion of work done by the parties was by no means equal. Indeed, according to the defendant's allegation, the amount of charge for work done by the plaintiff was not more than one-twentieth of the entire work *done for the Company. The [*169] amount of charge for work done by the defendant exceeded (as he alleges) 9000*l.*, whereas that done by the plaintiff (as the defendant alleges) did not exceed, or did not greatly exceed 450*l.*

The defendant's case is this;—He says, that, after the association of the two classes of projectors, meetings were held with a view to transact the business of the intended company: and that at one of such meetings, the appointment of officers was the subject of consideration; and that his (the defendant's) claims to be solicitor to the Company were fully admitted by all parties present. But that two persons present who acted on behalf of the parties resident at Manchester, forming part of the intended Company, stated, that it was desirable that a solicitor residing in the town

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of Manchester should also be appointed, whom the persons residing in Manchester could conveniently consult, without the necessity of going to Preston for the purpose. That, therefore, the plaintiff was named as a proper person to be appointed for that purpose. That, on the 8th day of May, 1845, the first regular meeting of the provisional committee of the intended Company was holden at Manchester, and that defendant was proposed as solicitor; that after some discussion, and Mr. Birley stating it was advisable to have an organ at Manchester with whom the directors resident there might advise, although the legal proceedings and all other steps necessary for the purpose of bringing the intended Company before parliament must be transacted by a solicitor residing in the town of Preston, the resolution appointing the plaintiff and defendant as solicitors was made. The answer sets out the different parts of the business done by the plaintiff and defendant respectively, and the manner in which they [*170] respectively acted after the above appointment. The *defendant denies that the plaintiff and defendant were joint solicitors of the Company. He always speaks of the appointment of the 8th of May, 1845, as an appointment "in the bill improperly called a joint appointment," and denies that plaintiff and defendant were jointly responsible to the Company for the acts of each other, and insists that each was answerable for his own separate acts only. He denies that there existed any partnership or joint interest in the profits or emoluments of the work done. He says that he has always been ready and willing to pay to the plaintiff such a sum of money as, upon a fair investigation of his bill, should appear to be justly due and owing to him; but that the plaintiff has always insisted upon a right to receive some profit or emolument in respect of business transacted by the defendant alone, and in which the plaintiff took no part; and that the plaintiff has always refused to come to any account with the defendant, except upon the principle of being allowed some such profit or emolument. In another part of the answer the defendant says, that the only obstacle to the settlement and payment of the sum due to the plaintiff has been created by the plaintiff himself, by his claim to be entitled to a share of the business

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transacted by the defendant, and by his assertion of the existence of a partnership between the plaintiff and the defendant, although no such partnership ever did exist. The same is repeated in substance in the answer to the amended bill.

The result is, that the defendant, admitting the joint appointment, in form, of himself and the plaintiff, as solicitors to the Company, denies that they were so in fact, or that the appointment had any such effect as the plaintiff would ascribe to it: he insists that each was responsible to the Company for his own acts only; that *there was no common interest between [*171] the plaintiff and defendant as partners, or otherwise, in work done for the Company; and that each is entitled to be paid for such work as he did, and for no other; and these are the questions I have to try.

Now, without saying what are the consequences of it, my opinion is, that, upon the pleadings and evidence in this cause, it must be taken that the plaintiff and defendant, as between themselves on the one hand, and the Company on the other, were the joint solicitors of the Company. The manner in which the plaintiff and defendant might distribute the work to be done for the Company, or divide the emoluments between them, may have been a matter of indifference to the Company; but the Company clearly intended to have one agency only, though consisting of two persons, upon whom an undivided responsibility should attach, and to whom the Company should be under a single liability for the expenses to be incurred; and I am equally clear that such, at the outset, was the mutual understanding of the plaintiff and the defendant, although at that time neither probably anticipated the turn which affairs afterwards took. The proposition that such was the position of the plaintiff and defendant, as between themselves on one side, and the Company on the other, is so prominent throughout the transactions from the time of the joint appointment in May, 1845, to the resignation of the plaintiff in August, 1846, that I cannot think it would be a useful employment of time to attempt a summary of the evidence which proves it. It is prominent in the original resolution of the 8th of May, 1845, and the subsequent written appoint-

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ment in October, 1845, and in the acceptance of it; in the joint reports of the plaintiff and defendant to the Company, [*172] founded on those *reports; in those particular letters between the plaintiff and defendant, in which their joint responsibility is mentioned in terms, and in the London agencies; in the defendant's bill against the Company; and I may add generally, in the correspondence, and other documentary evidence, the important parts of which are stated in the amended bill; the parol evidence confirms it; and, wherever there is a a departure, or apparent departure, from this state of things, it is explained by attendant circumstances, which clearly show that the departure, or apparent departure, was irrespective of, and not intended to alter the position of the plaintiff and defendant, as between themselves on the one side, and the Company on the other. This, however, is not the question I have to decide; and the point is material only as it bears upon the real question before me, namely, the rights and liabilities of the plaintiff and defendant as between each other.

Upon this point, an argument was much pressed upon me by the defendant's counsel, which, if it should prevail, would at once terminate the suit. It was said that there could be no partnership without contract, and that, in this case, there was not only an absence of allegation in the bill, that a contract for a partnership had been come to between the plaintiff and the defendant, but that the bill contained allegations which shewed that no such partnership had been agreed to. The allegations which are said to negative the partnership are those relating to the conversations which took place between the plaintiff and the defendant on the 19th of November, 1845, and other allegations relating to the same subject as that conversation. The form of the argument was this: that the bill, after stating the joint appointment of the plaintiff and defendant as solicitors to the Com- [*173] pany, their acceptance of that appointment, *and their acting under it, concluded that those circumstances alone constituted a partnership, without alleging any agreement for a partnership between the two, but alleging (as was said) that no agreement had ever been come to between them for sharing the

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profits as a subject of joint interest. I should greatly regret the necessity of deciding this case upon a ground so narrow and unsatisfactory as this. If the bill had alleged a partnership, and relied upon the joint appointment, the acceptance of, and the acts done under it as evidence of the alleged partnership, there could be no doubt that the plaintiff's case, in point of pleading merely would have been sufficient. The only question would be, whether the joint appointment and acceptance of, and acts done under it, and other evidence in the cause, proved the alleged partnership. I am satisfied that the argument proceeds upon a refinement which the rules of pleading in this court do not oblige me to act upon, and that I am justified in reading this bill as if it had been in the form which I have supposed, that is, as having alleged a partnership, or agreement for a partnership, and relied upon the evidence in the cause, as proving the allegation; and I have considered the position of the parties upon that assumption.

In doing this, I have not been much impressed with the difficulties which it was said by each party would result from adopting the extreme propositions put forward by the other. If two solicitors, situated as the plaintiff and defendant in this cause were in May, 1845, had mutual confidence in each other's skill and integrity, I see nothing irrational in an agreement which supposes each to become responsible to the Company for the skill and integrity of the other; although, as between each other, they may agree that each shall be paid for the work actually done by him, and nothing *more; nor do I see anything [*174] irrational in an agreement which supposes, that, as between the plaintiff and defendant, each was to have an interest in the emoluments of, as well as be subject to a responsibility for, the work done by the other. All that appears to me to be necessary to make either agreement rational is, that the parties shall have mutually understood each other at the outset, so that neither may have a motive during the progress of the work, of avoiding or engrossing any part of it, with a view to his personal advantage, at the expense of the other. I proceed, therefore, to consider the case without prejudice from any such consideration, and

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under a conviction that I shall best consult the interests of the parties by deciding the case with as much strictness as I can. For this purpose I should have been glad to have availed myself of the course pursued by Lord Eldon, in *Peacock* v. *Peacock*,(*a*) and have ascertained, by means of issues properly framed, whether, as between each other, the plaintiff and defendant were partners in the emoluments of each part of the work done between May, 1845, and August, 1846, and, if so, in what proportions, or upon what terms. Both parties, however, have declined asking for an issue, and have requested me to decide the point; and as my decision will not in such circumstances preclude an appeal, I will state what my conclusion is.

There are certainly grounds for contending that where A. and B., jointly as between themselves on one side, and a third party on the other, contract with that third party to do work for him, there is an implied contract between the two for a joint interest in the profit of the work, as well as in its responsibility: [*175] *Peacock* v. *Peacock*.(*b*) And if the work should *afterwards be done jointly, or nothing afterwards occurs to raise an opposite inference, I cannot but think a court of justice would infer a contract between the two for a joint interest, notwithstanding there might be inequality in the labor bestowed by each, or in the advances come under by them for the purposes of the work.

In this case it seems undisputed that each has done work, in the labor of which the other did not participate, and that some work (though not to a great extent) has been done jointly. The question upon the whole is, if the joint appointment and joint acceptance (which made the plaintiff and defendant partners, as between them and the Company) do not prima facie afford evidence of a partnership as between themselves, whether, if such be the case, the other evidence in the cause, coupled with that, do not prove it.

The plaintiff in this contest has an advantage over the defendant in point of evidence. The fact that each acted separately in

(*a*) 16 Ves. 53. (*b*) Id. 49.

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some matters furnishes no conclusion that the separate acts were not done on the joint account. The same occurs in every partnership, but as the contract between the two (be that contract what it may) is entire, every joint act of the two, not imperatively called for by the relation in which they stood to the Company, (as for example, their joint reports to the Company) is legitimate evidence in the plaintiff's favor of some joint interest in all the work as between the plaintiff and defendant, and the letters, in which the joint responsibility of the plaintiff and defendant to the Company is spoken of, are evidence to the same effect. The evidence of this nature in the present case (excluding that which I am about to mention) is not perhaps such as would satisfy me that I have come to the conclusion *which [*176] the moral justice of the case requires, however it might justify me, in connection with the joint appointment and joint acceptance, in holding that the plaintiff was, in law at least, entitled to participate in the emoluments of that part of the work, the labor of which was performed by the defendant separately. But the evidence I have just excluded is very material. It is the conversation which took place between the plaintiff and the defendant on the 19th of November, 1845: it is contained in the following charges in the bill, which are admitted by the answer, without any qualification by which its effect is impaired.

The bill charges, "that from the period of the appointment it was contemplated by the plaintiff and defendant, that the business which might be superintended and managed by one of them, might prove more onerous than the business which would be superintended and managed by the other of them, and that consequently, shortly after the said joint appointment of solicitors, an understanding was come to, as the result of discussion between the plaintiff and the defendant, on the subject, that, before the division of the profits should be made, each party should be entitled, after deducting actual expenses and disbursements, to an allowance for office expenses and personal trouble in respect of so much of the business as should have been personally superintended and managed by him individually, as is usual in limited partnerships of the like nature between solicitors jointly concerned

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in the procuring of acts of Parliament for public companies, but no final agreement was ever come to between the plaintiff and the defendant as to the rate of such allowance; but upon the occasion of the subject being mentioned between the plaintiff and defendant at the interview which the plaintiff had with
[*177] the defendant at Preston, on or *about the 19th of November, 1845, the plaintiff stated, as the result of his inquiry into the practice in similar cases, that the allowance for office expenses and personal trouble in this description of limited partnerships between solicitors was made by each party deducting and retaining to himself, besides expenses and disbursements, a per-centage of from 10*l.* to 25*l.* per cent., on and from the total amount of the net charges, for the business transacted and managed in his office, which would be a satisfactory principle or rate of allowance for the plaintiff; and the defendant did not then object to such principle or rate of allowance, but observed, that there could be no misunderstanding about it between honorable men; however, the conversation having been diverted to some other topic, the rate of the allowance was never actually fixed by express agreement, unless the aforesaid conversation, the full benefit and effect of which plaintiff claims and insists on, shall be deemed to have operated to fix the same."

Now, I take that conversation as evidence of the terms (whether or not sufficiently definite for the Court to act upon) on which the parties had acted from the beginning, and, for the purpose of determining what those terms were, I use the evidence in the same way as I should have done if the conversation had taken place on the 8th of May, instead of the 19th of November, 1845. Now, if the conversation had taken place on the 8th of May, 1845, and the defendant had then told the plaintiff, as he now tells him, that he knew of no joint appointment, or joint acceptance, or joint responsibility, and that he (the defendant) should insist upon retaining the profits of all the work he should himself do, must I not assume that the plaintiff, in that case, would or might have insisted upon a division of the business
[*178] different from that which has actually taken *place? And, if that might have been the case, can I allow the

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defendant to say that he will have all the profit of the work he did? Does not the conversation on the plaintiff's part, amount, in unequivocal terms, to a claim of right to participate in the profits of all the work? And is not the conversation on the part of the defendant, an unequivocal submission to that claim? The defendant may, indeed, say that no honorable man would consider the plaintiff entitled to be paid for work he had not done; but it is impossible to put such a construction upon what the defendant said: it would make his answer to the plaintiff's claim a denial of, and not an assent to it, a construction which the answer does not contend for, nor admits of; and what of unfairness is there in the plaintiff now putting forward his present claim? He might have insisted on taking part in all the work, and sharing the emoluments, or he might fairly leave part of the work to the defendant, and take part upon himself, making just allowances on each side. I see no unfairness in this. This evidence confirms the impression made upon my mind by the other evidence I have referred to, that a conclusion in favor of some joint interest between the plaintiff and the defendant in the work done for the Company, between May, 1845, and August, 1846, is that, to which the evidence in the cause requires that I should come.

But here a serious difficulty arises, namely, how I am to make that certain which the parties have left in uncertainty. I am clear that there is no evidence before me which establishes a practice in such cases, or furnishes a rule, upon which I can judicially rely for supplying that which the parties have omitted. The conclusion to which the evidence would probably have led me, is that to which I should perhaps have come, as a conclusion of law, without the evidence, namely, that *in the absence of previous arrangement between the parties, the remuneration to be paid to either for personal labor exceeding that contributed by the other, must be left to the honor of the other; that where that principle was wanting, a court of justice could not supply it, and that equality in the division of the profits, would be the rule. In support of this, some observations may be found in the judgment of Lord Eldon in *Peacock* v. *Peacock*. No conclusion, however, could, morally [*179]

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speaking, be more unjust than that which would give the plaintiff a moiety of the profits in this case, without allowing the defendant a per-centage upon the work done by him exclusively. The case upon the bill throughout is, that inequality of labor was contemplated from the beginning, and that it was understood between the plaintiff and the defendant, that, for this inequality, the defendant should be compensated by a per-centage upon the work he did. It is due to the plaintiff, however, to say, that he did not claim at the bar, an equality of profits, otherwise than subject to just allowances, and that, under the head of such just allowances, he submitted to be charged in the defendant's favor, upon the work done by the defendant on the joint account.

The only remaining questions then are, whether I can judicially fix the amount of that per-centage, without, or by means of, an inquiry; and if not, what the conclusion must be.

The conclusion to which (though certainly not without hesitation) I have come is this, that, in the circumstances of this case, if the per-centage cannot be ascertained by inquiry, the inconvenience must fall upon the defendant, who cannot, regard being had to what passed *on the 19th of November, 1845, after the work has been done and the emoluments realized, insist upon excluding the plaintiff from a participation in the profits of any part of the work done by either party between May, 1845, and August, 1846. On the other hand, I consider the plaintiff as having, on the 19th of November, 1845, assented to the allowance of a per-centage of not less than twenty-five per cent.; and I understand him as having submitted at the hearing of the cause, to allow that per-centage for the purposes of the present suit. I might perhaps consider the transaction of the 19th of November, 1845, as evidence that each party assented to a per-centage within the limits mentioned in their conversation. If, however, the defendant thinks he can, by inquiry before the Master, establish a right to a higher per-centage, with reference to that practice which the plaintiff says exists in like cases, and desires such an inquiry, I will give it him.

[*180]

Neither party asking the court to direct any issue in the case:—This court doth

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declare, that the plaintiff and defendant are jointly and equally interested in the profits and loss of the business transacted by or on account of them, or either of them, as solicitors to "The Fleetwood, Preston and West Riding Junction Railway Company," in &c., or to the provisional committee, or directors thereof, between and inclusive of the 8th day of May, 1845, and the 22d day of August, 1846, subject to all just allowances between them; and neither party asking the court to direct any inquiry as to the amount of per-centage proper to be allowed to each party, as against the other, for work which might have been done by such party separately; and the plaintiff, by his counsel, submitting, that 25*l.* per cent. shall be allowed upon each portion of the work done by either party separately, in favor of the party doing such work:—It is ordered, that it be referred to the master of this court in rotation, to inquire and state to the court what work was done by the plaintiff and defendant jointly, or by either of them separately, or on their or either of their account, for the *company, or the provisional committee, or directors thereof, [*181] between and inclusive of the 8th day of May, 1845, and the 22d day of August, 1846, and by whom, or on account of which such parties respectively, the work was done jointly or separately as aforesaid; and also the amount paid and payable by the company, or the provisional committee, or directors thereof, in respect of such work. And it is ordered, that the said Master do take an account of the receipts and payments of the plaintiff and defendant respectively in respect of the transaction of the aforesaid business of solicitors to the said company, or to the provisional committee, or directors thereof, between the periods aforesaid, and of the profits made thereby. It is ordered that the Master do ascertain what balance is due from either of the said parties to the other of them, on the footing of the aforesaid declaration, and of the inquiries and account herein directed; and when such balance became due; and in taking the aforesaid account, and in ascertaining the aforesaid balances, the Master is to make unto the parties respectively all just allowances, and under the head of such just allowances he is to allow to each party for work and labor 25*l.* per cent. upon the charge made against the company, or the provisional committee, or directors thereof, for each portion of the work which the Master shall find to have been done by or on the account of each party separately, exclusively of the disbursements in relation to such work; and for the better taking of the said account, and discovery of the matters aforesaid, the parties were to produce &c. Liberty to state special circumstances. The 450*l.* to be paid into court, and invested &c. Further directions and costs reserved. Liberty to apply.

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[*182] *MOODY *v.* HEBBARD.

1848: June 2d, 3d and 12th.

It is sufficient that the memorial of an annuity, inrolled pursuant to the act 53 Geo. 3, c. 141, should, under the head "Consideration, and how paid," state the amount of the consideration, and whether paid in money, notes or bills, as the case may be; without stating to whom the same was paid, or the fact that part of such consideration was paid to a third person in redemption of a prior incumbrance on the property.

THE plaintiff,—who was the lessee of certain messuages in Tothill-fields, which he had mortgaged to T. and J. Mitchell, to secure the repayment to them of 226*l.*, and also charged with an annuity of 32*l.* in favor of one Dean,—executed an indenture, dated in October, 1827, whereby, in consideration of a sum of 800*l.*, he granted the defendant an annuity of 64*l.*, charged upon the same premises; and the Mitchells and Dean, who were parties to the indenture, upon having their respective charges paid off, released and assigned the premises to one Cates, as a trustee, to secure payment of the annuity of 64*l.* to the defendant, and subject thereto, upon trust for the plaintiff.

The 800*l.* consideration for the annuity was paid by the defendant to Cates, the trustee, in sovereigns and Bank of England notes. Cates applied 642*l.*, part of the 800*l.*, in payment of what was due to the Mitchells and Dean in respect of their prior incumbrances on the property, and handed over the remaining 158*l.* to the plaintiff. The defendant then delivered to Cates his bill of costs, which Cates gave to the plaintiff. This bill amounted to 76*l.* 16*s.* 6*d.*, but the defendant agreed to accept 70*l.*, and that sum the plaintiff paid, by a note for 100*l.*, receiving from the defendant a cheque for 30*l.*, which was duly paid to the plaintiff by the defendant's bankers.

The memorial of the annuity, which was inrolled pur-
[*183] suant to the Annuity Act,(*a*) contained, under the *head "Consideration, and how paid," these words,—"30*l.* paid in money, 770*l.* paid in notes of the Governor and Company of

(*a*) 53 Geo. 3, c. 141.

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the Bank of England, expressed to be payable to bearer on demand, making together 800*l.*"

The bill charged, that the indenture of October, 1827, and the annuity thereby granted, were void, by reason that the consideration was not truly set forth in the memorial, and prayed that the same might be declared to be void accordingly, and that the indenture might be delivered up to be cancelled.

Mr. *Wood* and Mr. *S. S. Bell*, for the plaintiff, cited *Duke of Bolton* v. *Williams*,(*a*) *Wasburn* v. *Birch*,(*b*) *Watts* v. *Millard*,(*c*) *Ex parte Ansell*,(*d*) *Byne* v. *Potter*,(*e*) and *Finley* v. *Gardner*.(*f*)

Mr. *W. Rudall*, for the defendant, cited *Morris* v. *Jones*,(*g*) *Cane* v. *Lovelace*,(*h*) and the observations, 3 Sug. V. & P., App. xiv., 10th ed.

VICE-CHANCELLOR:—The statute requires a memorial of the annuity to be inrolled, containing a statement of certain particulars of the transaction, among which is the pecuniary consideration for the grant. The memorial is divided into columns, of which one is intitled "Consideration, and *how paid." [*184] The memorial in this case correctly states what was paid, but it does not state the fact that the consideration-money was applied partly in redeeming an old annuity, and paying off an existing charge. This fact, it was said, ought to have been introduced into the memorial. This is the only objection. In the absence of authority, I cannot take that view of the statement. The body of the act requires, that the pecuniary consideration paid by the grantee, shall be stated in the memorial. The schedule or example given in the act, was not intended to enlarge the provision in the body of the act, but to explain what was meant. What then is to be understood by the word "how"? The column explains it by mentioning money, notes, or bills of

(*a*) 2 Ves. jun. 138: *S. C.* 4 Bro. C. C. 297. (*b*) 5 T. R. 472.
(*c*) Id. 598. (*d*) 1 B. & P. N. R. 62. (*e*) 5 Ves. 609.
(*f*) 6 B. & C. 165. (*g*) 2 B. & C. 232. (*h*) 2 B. & Ad. 767.

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exchange, as the case may be; but it is obvious that the form pointed out for the memorial does not enlarge the language of the act in the way contended for by the plaintiff. This is Sir Edward Sugden's opinion,(*a*) and is mine also.

The cases under the old Annuity Act, except the *Duke of Bolton* v. *Williams*, do not conflict with this view of the case, and the latter cases cited by Mr. Rudall, tend to shew that in the act of the 53rd Geo. 3, the word "consideration" is not to be extended beyond its natural meaning. The Court, in its judgment in *Duke of Bolton* v. *Williams*,(*b*) supposes the old act to require, that the memorial shall state "to whom" the consideration is paid, and, from the language of the judgment, it would appear that the Court considered the application of the consideration to be inseparably involved in the consideration itself. But that was a case under the old Annuity Act, and (as Sir Edward [*185] Sugden observes) to put that construction *upon the new act (notwithstanding the form of the memorial) would be to perpetuate the inconveniences the new act was intended to remove.(*c*)

Bill dismissed, the plaintiff suing in forma pauperis, without costs.

(*a*) V. & P. Vol. 3, App. xiv. p. 24, 10th ed.
(*b*) 2 Ves. jun. 138; *S. C.*, 4 Bro. C. C. 297.
(*c*) Ubi supra.

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SMITH *v.* CAPRON.

1849: February 12th and 13th; Nov. 23d, 24th and 26th.

The vendor's bill, in a suit for specific performance of an agreement to take an assignment of a lease, stated a covenant in the lease not to assign without the license of the lessor, but did not aver that the plaintiff had or could obtain such a license:—*Held*, upon demurrer, that the court, at the hearing of the cause, upon such facts, would not dismiss the bill, but would refer it to the Master, to inquire whether the vendor could make a good title; and that the demurrer must, therefore, be overruled.

During a treaty for an assignment of a lease, the plaintiff produced the lease of the defendant, and the defendant looked at the lease and the indorsement by which the original lessee had assigned the lease to the plaintiff, and in which it was stated, that the assignment was made with the license of the lessor. The defendant afterwards requested the plaintiff to cause the proposed assignment to be indorsed on the lease *totidem verbis* with the assignment thereon to himself. Upon a bill for specific performance, the defendant denied, by his answer, that he had seen the covenant against assignment without license; but the court concluded, upon the circumstances, that the defendant had notice of that covenant.

An agreement, signed by A. and B., for the sale by A. and purchase by B. of the fixtures in a lease at a certain price, and that A. shall execute an assignment of his interest in the house to B., to bear date on a certain day—*Held* to be a contract by B. to take such assignment when executed; and B. having inspected the lease, and the assignment to A., and subsequently directed A. to cause an assignment to him, B., to be indorsed *totidem verbis*, it was *held* that B. was precluded from calling for the lessor's title.

DEMURRER, for want of equity to a vendor's bill for specific performance.

The bill stated, that, by an indenture of lease of the 17th of March, 1845, Lord Monteagle and Lady Lucy Standish demised a messuage, numbered 51, in Great Ormond-street, to Thomas Wakefield, his executors, administrators, and assigns, to hold the same unto the said Thomas Wakefield, his executors and administrators, for the term of fourteen years, from Midsummer then next, subject to the payment of the rents and the performance of the covenants therein reserved and contained; one of which covenants was, that the said Thomas Wakefield, his executors or administrators, should not at any time, during the continuance of the said term, assign or underlet the same premises without the license of the lessors in writing first had and obtained for that purpose; and it was agreed, that such license, if ob-

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tained, should not extend to any future assignment or demise of the said premises, or be construed as a waiver of the said covenant for restraining or disposing of the said premises, but should, from time to time, as and when the same
[*186] should be given, be limited and *confined to the particular person or persons in such license named; that, by an indenture of the 25th of January, 1847, indorsed on the lease, Wakefield, with the consent of Lord Monteagle, who had survived Lady Lucy Standish, assigned the messuage for the residue of the term to the plaintiff, his executors, administrators, and assigns, subject to the rent and covenants. And that a memorandum, dated the 29th of November, 1848, was written upon an inventory of fixtures by the defendant, and signed by both parties; and was as follows:—

"*November 29th*, 1848.—Memorandum, that it is agreed between Edwin Smith and Thomas William Capron, that the said Edwin Smith hereby agrees to sell, and the said Thomas William Capron hereby agrees to purchase, at and for the price of 200*l.*, the several articles and things described in the above-written inventory as fixtures or otherwise, and now being in or about the house 51, Great Ormond-street, in the occupation of the said Edwin Smith, (with the exception of the mahogany porch and screen in the front or entrance hall, which the said Edwin Smith is to be at liberty to remove at his own expense, making good any damage to the doors and walls occasioned thereby;) and the said Edwin Smith also agrees to execute an assignment of his interest in the said premises to the said Thomas William Capron, such assignment to bear date the 25th day of December next, on which day possession is to be delivered to the said Thomas William Capron; and the said Edwin Smith hereby agrees to pay and discharge the rent, together with all taxes, rates, water-rates gas-rates, and all other charges whatsoever, which may be or accrue due for the said premises to such 25th day of December."

The bill averred, that the plaintiff was ready and
[*187] *willing to perform his part of the agreement, and that the defendant had accepted the plaintiff's title, and was

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precluded from investigating the same; and it prayed a decree for the specific performance of the agreement.

Mr. *Schomberg*, for the defendant, in support of the demurrer, argued, that, inasmuch as the bill stated that the plaintiff could only assign with the license of the lessors, and did not state any such license, it shewed that the plaintiff had no power, or, at least, did not show that he had power to perform the contract; and that, therefore, he could not sustain the bill. The covenant in this case would run with the land. The title must be shown upon a bill with the same certainty as upon a declaration at law: *Lord Uxbridge* v. *Staveland*,(*a*) *Balls* v. *Margrave*.(*b*)

Mr. *Wood* and Mr. *Southgate*, for the plaintiff, contended, first, that, notwithstanding the special terms of the covenant, the assignment having once been made, the assignee was in of the whole term, and was subject to the covenant against the assignment made by the original lessee, *Dumpor's case*,(*c*) that the covenant might remain binding as against the lessee, *Paul* v. *Nurse*;(*d*) but with that the assignee had nothing to do. It was not necessary to state expressly that a license to assign could be procured; but that fact was substantially involved in the averment that the plaintiff was ready to perform his part of the contract. Even supposing the license necessary, in order to give the defendant a title, still the plaintiff might procure it at *any [*188] time before the Master made his report, and he would be entitled to the decree: *Noel* v. *Hoy*.(*e*)

VICE-CHANCELLOR:—The only question is, whether, if the cause were now at the hearing, and nothing more was stated, admitted, or proved, than what appears on the bill, I should be of opinion, that the plaintiff had not asserted a title to the premises comprised in the contract, and that the defendant was entitled to

(*a*) Per Lord Hardwicke, 1 Ves. 56.
(*b*) 3 Beav. 284.
(*c*) 4 Rep. 119.
(*d*) 2 Man. & Ry. 525.
(*e*) Vice-Chancellor, 23d Feb. 1820, 2 Sug. V. & P. 32, 10th ed.

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a decree dismissing the bill, without directing a reference to the Master. The objection raised by the demurrer is one of very strict pleading. There is the absence of an affirmative averment, which, it is contended, is a ground for allowing the demurrer. The bill states a covenant not to assign without license, and if it had appeared that there was a proviso for re-entry on breach of the covenant, the plaintiff, omitting to state that he had or could procure a license to assign, might not have shown a title. But the bill does not state any proviso for re-entry on breach of the covenant. According to what appears upon the bill, the plaintiff may be able to give the defendant a title which would be good at law, although the covenantor may still be liable for a breach of covenant. I do not give any opinion as to what might have been the effect of the absence of the averment as to the license, if there had been a proviso for re-entry; but, I think, I should be bound, if the cause were at the hearing, upon these facts to give the plaintiff the benefit of a reference to the Master to inquire whether a good title could be made.

Demurrer overruled.

[*189] *By the answer of the defendant it was admitted, that on or about the 21st of November, 1848, the plaintiff informed the defendant of the nature of his interest in the leasehold premises, as to the term of years and amount of rent, that the plaintiff produced for his inspection the lease and assignment, and that the defendant looked at the same to ascertain the number of years for which the premises were holden, and the rent; but the defendant said, that he did not observe or know of the covenant against assignment, and, if he had been aware of that covenant, he would not have entered into the treaty. The defendant admitted, that, on the 30th of November, 1848, he wrote to the plaintiff a letter, excusing himself from accommodating the plaintiff with a part of the purchase-money immediately, as the latter had requested, and saying that he might depend upon his being prepared at the time mentioned, cautioning the plaintiff at the same time to direct that care should be taken to avoid injury to the walls in removing the furniture, adding in

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a postscript,—"As the assignment to me can, of course, be by indorsement and in *totidem verbis*, as that to yourself, perhaps you would let your clerk engross it on the deed with a 35*s.* stamp, and for which I can repay you." The defendant said he believed that the solicitor of the lessor had stated to the plaintiff, that a license to assign to the defendant or any responsible tenant would be granted as a matter of course.

At the hearing,—

Mr. *Wood* and Mr. *Southgate*, for the plaintiff, contended, that the defendant had accepted the title. In *Burroughs* v. *Oakley*,(*a*) Sir Thomas Plumer, M. R., said, that the preparation of the conveyance was an important *fact, as showing, "that [*190] the parties had arrived at a stage of proceeding subsequent to the question of title." The defendant certainly could not now insist upon the production of the landlord's title: *Clive* v. *Beaumont*.(*b*)

The *Solicitor-General* and Mr. *Schomberg*, for the defendant.

There is no contract on the part of the defendant to take an assignment of the lease. The agreement is for the purchase of the specified articles in the house, and the term as to the assignment is introduced for the defendant's benefit, if he should require it. But if there be a contract to take the assignment, it was the duty of the plaintiff, in order to entitle himself to the decree, to prove that he can obtain a license to assign, and that he has in fact obtained it: *Mason* v. *Corder*,(*c*) *Lloyd* v. *Crispe*.(*d*) The defendant has done nothing to deprive him of the benefit of the common inquiry as to title. Even if objections had been distinctly waived, and it should be afterwards shown that there is some defect in the title unknown to the purchaser, the Court will not decree specific performance: *Warren* v. *Richardson*.(*e*) In this case the covenant against assignment without license is in a very special form, and was wholly unknown to the defendant,

(*a*) 3 Swanst. 159. (*b*) 1 De G. & S. 397. (*c*) 7 Taunt. 9.
(*d*) 5 Taunt. 249. (*e*) Younge, 1.

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until after the institution of the suit. Not only is such a covenant unusual, but in this case the form of the covenant is uncommon; and the defendant may never be able to get rid of the property; this is an objection to enforcing specific performance.

[*191] *The VICE-CHANCELLOR held, that the terms of the memorandum amounted to a contract to take an assignment of the lease, and that, under that agreement, the defendant having previously inspected the lease, and become acquainted with its terms and of the plaintiff's interest in the premises, as stated in the answer, could not insist upon proof of the lessor's title.

Mr. *Wood*, in reply, upon the point as to the covenant against assignment without license, cited *Cosser* v. *Collinge*,(a) *Freme* v. *Wright*,(b) *Pope* v. *Garland*,(c) and submitted that the Court could not consider the defendant as having been ignorant of the existence of the covenant, when he entered into the contract.

VICE-CHANCELLOR:—This is a bill by the assignee of a lease against a person who is alleged by the plaintiff to have entered into a contract to take an assignment of the lease. The original lease contains a covenant not to assign without the license of the landlord; and Thomas Wakefield, the original lessee, obtained a license enabling him to assign the lease to the plaintiff. The assignment, expressed to be made with the consent of the landlord, was indorsed on the lease. The defendant contends, first, that there is no contract; secondly, if there be a contract, that the plaintiff cannot make a good title; and lastly, that the covenant against assignment is a surprise upon him: that he had no notice of it, until the bill was filed, and therefore, that he did not purchase in fact what he supposed himself to be buying.

[*192] *The two former points I disposed of at the conclusion of the argument for the defendant.

On the 21st of November, during the treaty between the

(a) 3 My. & K. 283. (b) 4 Madd. 364. (c) 4 Y. & C. 394.

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parties, the plaintiff gave the defendant the original lease, with the assignment indorsed upon it, for his inspection. The defendant then looked at the body of the lease and indorsement. On the 29th of November, an agreement for the sale of the fixtures and assignment of the plaintiff's interest in the premises is prepared and signed by the defendant. The plaintiff had desired that some part of the purchase-money might be at once paid, but this the defendant by a letter of the 30th of November declined, but added, "Of course you may depend upon my being prepared at the time mentioned." In a postscript to the same letter, the defendant said, that the terms of the assignment to Smith would be sufficient for that to himself, and requested the plaintiff to have his assignment indorsed *totidem verbis*. After this, the dispute arose, which had no connection with the defence now raised at the bar.

If this case had come before the learned judge who decided *Cosser* v. *Collerige*, there is no doubt of what his decision would have been. There might be hardship, if a case were to be determined upon constructive notice. But in this case Mr. Capron saw the indorsement on the lease, and by that indorsement it appeared, that the licence to assign was necessary. It is also admitted that he looked into the body of the lease, and therefore, he had actual notice of its contents, or such part of the contents as he thought it useful or material to read. The presumption would therefore be, that he had made himself acquainted with the whole of the instrument. I do not think that I ought to allow this presumption to be rebutted by the averment of the defendant, that *he looked into the other [*193] parts of the lease, and did not observe the covenant upon which his objection is founded. I may also observe, that this covenant, if not strictly an usual covenant, is at least so common that there can be no hardship in regarding it as no surprise upon the defendant.

DECLARES the plaintiff entitled to the specific performance of the agreement. Refer it to the Master to inquire whether he can make a good title, and, on such inquiry, the Master is to consider and treat the title of the lessor as a good title.

PIMM *v.* INSALL.

1848: May 11th, 29th and 30th; June 16th.

A., being indebted to a larger amount than his personal estate was sufficient to pay, died intestate as to his real estate, which descended upon his daughter and heiress at law, a minor. The daughter married during her minority, having entered into articles to settle the estates, upon her attaining her majority, for the benefit of the parties to and the issue of the marriage, with power to vary the settlement within six months after she attained her age of twenty-one years. After the said six months had expired, the estates were settled, with power of revocation; and, by a subsequent deed, the uses were revoked, and the same estates were appointed to trustees for sale, and payment of the debts of A., and, subject to such trusts, for the benefit of the husband and wife, and issue of the marriage. After the death of the wife, the deeds of settlement and appointment were set aside at the suit of one of the children of the marriage, and the estates to be decreed to be reconveyed to the uses expressed in the articles:—*Held*, subsequently, in a suit by a creditor of A., that the real estate was subject to the payment of such parts of A.'s debts as his personal estate was insufficient to pay.

Articles made upon the marriage of a minor, covenanting to settle her real estate on attaining her majority, for the benefit of herself and her husband and the issue of her marriage, preclude the husband, during the coverture, from doing or concurring in any act inconsistent with the articles, but are not binding upon the wife.

A SUIT by a simple contract creditor of Thomas Stanley Hill, who died on the 11th of March, 1837, intestate as to his real estate, and leaving only one child, Mary Ann, his infant daughter and heiress-at law.

By certain articles, dated the 24th of August, 1837, made prior to their marriage, Mary Ann the daughter, and the defendant Insall, covenanted to settle the estates which had descended upon Mary Ann, as heiress-at-law, to the use of Mary Ann for life, remainder to the defendant Insall, the husband for life, remainder to such of the children of the marriage as the husband and wife should appoint, and in default of such

[*194] *appointment to the said children as tenants in common; if there should be no issue of the marriage, then to such uses as the wife should by deed or will appoint, and in default of such appointment, to the use of the wife, her heirs and assigns. The articles provided that the trustees of the settlement should have power to sell the settled estates during the joint

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lives of the husband and wife and the life of the survivor, and to pay one-third of the moneys so produced to the husband, and re-invest the other two-thirds in other lands, to the uses before declared. And it was thereby provided that it should be lawful for the husband and wife, and the trustees thereby named, or the major part of such parties, in case of any difference between them at any time within six months after the wife should have attained the age of twenty-one years, and before or at the time of the execution of the settlement, to add to or otherwise vary or alter all or any of the said limitations, subject only and without prejudice to the provision agreed to be made for the wife; and also to insert in the settlement a power of revocation and new appointment. Mary Ann was a minor at the date of the articles, and at the time of the marriage.

The original bill was filed in November, 1888, against the husband and wife and the trustees named in the articles, alleging that the husband and wife had possessed themselves of personal estate of the testator more than sufficient for the payment of his debts, and praying payment thereout, or if the same should be insufficient, that the deficiency might be made good by the sale or mortgage of the real estate descended, and that the articles might be declared to be void.

Mary Ann, the wife, attained her age of twenty-one, on the 14th of January, 1839.

*On the 2nd of May, 1840, indentures of settlement, [*195] purporting to be made in pursuance of and in conformity with the articles of August, 1837, were executed by the husband and wife, reserving a power of revocation and new appointment; which power was exercised by an indenture dated the 4th of May following, whereby the real estate was appointed to certain trustees and their heirs, upon trusts for sale and for the payment of the debts of the intestate Thomas Stanley Hill out of the proceeds of such sales, and the payment of the surplus of such proceeds to the trustees of the marriage settlement, upon the trusts thereof.

Mary Ann the wife died in September, 1840, leaving two infant children.

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In July, 1844, a bill was filed in the name of one of the children of the marriage, against the surviving parties to the deeds of May, 1840, and the other child of the marriage, who was the heir-at-law of his mother, to obtain the opinion of the Court on the validity of those deeds, praying that the settlement might be reformed, if not in conformity with the articles, and that the subsequent appointment in trust for sale might be set aside, or otherwise, that the trusts of the latter deed might be performed. Upon the hearing of this cause the Court by its decree, dated the 27th of July, 1844, declared that the trustees for sale under the deed of the 4th of May, 1844, were trustees of the legal estate in the premises, upon the trusts declared thereof by the articles of the 24th of August, 1837, and directed a re-conveyance of the estate to the trustees named in the articles.

The executors of the plaintiff in the original suit filed their bill of revivor and supplement in December, 1844, against [*196] the husband, the children of the marriage, one of *whom was the heir-at-law of the deceased wife, the trustees named in the articles of 1837, the trustees of the deed of the 4th of May, 1840, and the executor of Thomas Stanley Hill. A decree was made in 1845 in the original and supplemental suit. The Master reported that debts had been proved before him to the amount of 17,327*l.*, and that the real estate was subject to mortgages amounting to the further sum of 19,450*l.*, and that the personal estate of the testator had been wholly exhausted by the payments made by the defendants, the husband and executor, which he had allowed to them in account, and that balances amounting to 3035*l.* were due to the said executors in respect of such payments.

At the hearing for further directions,

The *Solicitor-General* and Mr. *De Gex* for the plaintiff.

The settlement by the articles of August, 1837, was not binding upon Mrs. Insall: *Simson* v. *Jones*,(*a*) *Hastings* v. *Orde*,(*b*)

(*a*) 2 Russ. & My. 365. (*b*) 11 Sim. 205.

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Godsal v. *Webb.*(a) It was not, therefore, an alienation of the estate, having the effect of taking it out of the reach of creditors. It is not because a contract may be beneficial to an infant that the infant can be bound in equity: *Flight* v. *Bolland.*(b) Before the infant came of age, the original suit was instituted, and therefore any confirmation of the articles must have been made with notice of the claim of the creditors, which would have rendered the settlement fraudulent and void under the stat. 13 Eliz. c. 5: *Gooch's case,*(c) *Apharry* v. *Bodingham.*(d) The authority of these cases was admitted in *Richardson* v. *Horton.*(e) A *purchaser for value during the pendency of a suit is [*197] bound by it: *Daly* v. *Kelly.*(f) The estates were held discharged of the debts of the intestate in the cases of *Spackman* v. *Timbrell,*(g) and *Mathews* v. *Jones,*(h) because there had been an effectual conveyance of the estates by the heir or devisee. In this case the heiress-at-law, and the other parties to the articles, so far from confirming the settlement, or attempting to perfect it, actually set it aside by the deed executed when she attained her majority. The deeds of May, 1840, cannot be regarded as an adoption of the articles, and the estates are therefore left, as they previously were, liable in equity to the debts of the intestate.

Mr. *Wood* and Mr. *Malins*, for the infant children of Mr. and Mrs. Insall.

The question is not affected by the existence of the original suit; no personal representative of the intestate was a party to the suit, and if there had been, a purchaser is not bound to take notice of a bill for payment of debts generally out of the estate: *Walker* v. *Flamstead,*(i) Persons within the marriage contract are always treated as purchasers for value. In the case of *Richardson* v. *Horton* there was a distinct recital that the personal estate was insufficient for the payment of the debts. In this case, the original bill stated that the defendants had possessed personal

(a) 2 Keen, 99. (b) 4 Russ. 298. (c) 5 Rep. 60 a.
(d) Cro. Eliz. 350. (e) 7 Beav. 112 (f) 4 Dow, 435, per Lord Eldon.
(g) 8 Sim. 253. (h) 2 Anst. 506. (i) 3 Ld. Ken. Rep. 57.

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estate of the testator more than sufficient for the payment of his debts; and it may be questioned whether the different statements by the supplemental bill does not render the suit ineffectual: *Blackburn* v. *Staniland*.(a) The settlement made by
[*198] *the articles was not void, but was, at the utmost, only voidable by the infant, on attaining her majority: *Zouch* v. *Parsons*,(b) *Durnford* v. *Lane*.(c) It was not like a case of an instrument void from the beginning: *Doe* v. *Butcher*,(d) *Machil* v. *Clark*.(e) Nor was it a voluntary settlement, so as to be within the stat. 13 Eliz. c. 5. The articles have, in fact, been confirmed by the decree of the Court in the suit of *Insall* v. *Insall*,(f) as well as by the act of the wife, who had settled the estates in pursuance of the articles, attempting at the same time to add other provisions which were invalid: *Countess of Coventry* v. *Earl of Coventry*.(g) Supposing the infant not to be bound by the articles, and that nothing had been done to confirm them, she could not, during the coverture, do any act to defeat the settlement thereby agreed to be made: *Milner* v. *Lord Harewood*,(h) and the husband was undoubtedly bound, and prevented from doing or concurring in any act in derogation of the settlement.

Mr. *Campbell*, for the defendant Insall, the husband.

Mr. *Metcalfe*, for the personal representative of Thomas Stanley Hill.

Mr. *Heathfield*, for the trustees named in the articles, and the trustees appointed by the deeds of 1840.

VICE-CHANCELLOR:—In March, 1837, Thomas Stanley Hill died intestate as to his real estate, leaving an only child,
[*199] a daughter, *Mary Ann, then an infant, who afterwards married. Thomas Stanley Hill, at the time of his death, was indebted to an amount exceeding his personal estate, by

(a) 15 Sim. 64.
(b) Burr. 1794, 1808.
(c) 1 Bro. C. C. 106.
(d) 1 Doug. 50,
(e) 2 Salk. 619.
(f) Supra, p. 195.
(g) 2 P. Wms. 222.
(h) 18 Ves. 275.

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37,000*l.* It is not in dispute that the real estate, descended upon the heir of Thomas Stanley Hill, was at the time of his death subject to the payment of his debts. The only question is, whether since his death anything has taken place by which his creditors have become deprived of the right which they then had to the application of his estate in payment of his debts. The only acts which have been done since the death of Thomas Stanley Hill, affecting his real estates, are in substance two:—one consisting of certain articles, dated the 24th of August, 1837, made on the marriage of Mary Ann his heiress-at-law, and the defendant Insall; and the other of certain deeds executed by Mary Ann in May, 1840, after the marriage, and after she had attained the age of twenty-one.

As to the articles of August, 1837, it was objected, that, at the time of the marriage, Mary Ann Hill, afterwards Mrs. Insall, was a minor. The limitations were for the benefit of the parties to the marriage and their issue, and they contained a covenant by the husband and wife to settle the estates descended, when the wife attained her majority. She attained that age on the 14th of January, 1839. On the 14th of June, 1839, the six months, within which the parties to the articles had power to alter them, expired. Notwithstanding this, on the 2nd of May, 1840, being nearly a year afterwards, a settlement purporting to be made in pursuance of and in execution of the power contained in the articles of August, 1837, was executed, in which there was reserved a power of revoking the uses thereof. On the 4th of May following, another deed was executed, by which the power of revocation was exercised, and trusts were *created to pay the creditors of Thomas Stanley Hill. Supposing, therefore, the deed to have stood, little difficulty in the case would probably have arisen. But this took place afterwards,—Mary Ann Insall died in September, 1840, leaving the defendant Insall, her husband, and two children surviving. In 1844 a bill was filed by one of the children to set aside the transaction of May, 1840. The cause was heard on the 27th of July, 1844, before the Vice-Chancellor of England, who made, a decree which set

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aside the transaction of May, 1840, and in effect therefore annulling its terms.

This is the whole case which is made against the claim of the creditors. The reasoning upon it appears to be more simple than the argument at the bar. Supposing nothing to have been done in pursuance of the articles, and that the case depended upon the articles alone, the plaintiffs would be entitled to a decree for payment of the debts of Thomas Stanley Hill out of the real estate descended to his heiress-at-law.

The effect of the articles of the 24th of August, 1837, was this:—They precluded the husband, during the coverture, from doing anything himself, or concurring in any act of his wife inconsistent with the articles. But upon the wife they were not binding. Had she survived her husband, without having done any act by which to confirm the articles, she would not have been bound by them; and if she died without having done any act by which to confirm the articles, the estates would have descended upon her heir, discharged from the articles, and would, in the hands of such heir, have been subject to their original liability to pay the debts of Thomas Stanley Hill. The death of the wife in the lifetime of the husband, without having done any [*201] act *confirmatory of the articles, (which is the hypothesis upon which I now reason,) must have the same effect.

The next question arises as to the effect of the transaction of May, 1840. If those deeds are valid, the creditors of Thomas Stanley Hill will have a right to be paid out of the real estates, not (properly speaking) as cestui que trusts under the deeds of May, 1840, for they are strangers to the deed, but in this way,—the estates were assets originally liable, and if those estates were brought into the articles in August, 1837, they have been discharged from the trust thereof by the deeds of May, 1840.

It appears, then, that the creditors would have a right to be paid out of the assets, not under the deed, but by virtue of their original right, which right would be preserved by the assets being distributed according to the deeds. But the Vice-Chancellor of England has set aside the deeds of May, 1840, and that decree,

supposing it to stand; has restored the creditors to their original right under the articles. In either view of the case, therefore, the plaintiff will be entitled to be paid his debt out of the real assets of Thomas Stanley Hill.

Affirmed by the Lord Chancellor, 20th November, 1849.

*CUDDON *v.* MORLEY. [*202]

1848: March 22d and 23d; April 13th.

Suit by a lord of the manor against a tenant of lands within the manor, to restrain the defendant from taking stone from lands in his occupation. The defendant by his answer alleged, that it was and had been a common practice in the manor, to remove the stone which laid immediately under the surface, for the benefit of cultivation. At the hearing, the court made a decree for a perpetual injunction,—the defendant declining to try his right to take the stone in an action at law, to be brought against him by the plaintiff.

THE plaintiff, the lord of the manor of Cockfield Hall, in Suffolk, filed his bill in August, 1846, to restrain the defendant Morley, the occupying tenant of a farm within the manor, from working, hewing, digging, or otherwise raising stone from the quarries or beds of stone on, in, or under the copyhold lands or soil thereof; and from opening or working any new or other quarry, or mine of stone, or other mineral therein; and for an account of the stone already worked by the defendant, and of the profits made thereby; and for payment thereof to the plaintiff.

The defendant by his answer said, that, if the lord of the manor was entitled to the beds of stone under the soil, such right had never been exercised or claimed until the institution of this suit, for a great number of years, during which the defendant had been a tenant of land within the manor, and he believed that no such right existed. The defendant said, that the soil of his farm being very thin, he had, with the consent of his landlord, caused the soil in some places to be thrown back, and the stones lying under the surface removed, to the depth of twelve or eighteen inches,

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and that being done, had caused the soil to be replaced. The defendant said, that the tenants of lands in the manor had been accustomed to do the same, where the nature of the soil was thought to render it advisable, and that he had done so, not for the sake of the value of the stone, but merely for the improvement of the soil. He said, that there were no quarries of stone, in the proper meaning of the term, on the estate occupied by him, and no claim had ever been made by the lord of the [*203] *manor to the stone raised in such process of cultivation; and he submitted, that his landlord, the owner of the copyhold estate, was entitled to the stone thereon. The defendant set forth an account of the moneys received by him for the sale of the stone, which, in 1844, amounted to 12*l.* 15*s.* 5*d.*, and in 1845, to 10*l.* 7*s.* 9*d.*, making in the whole, 23*l.* 3*s.* 2*d.*

The plaintiff amended his bill, after the answer, by adding, as defendants, the owners of the copyhold farm occupied by the defendant Morley. One of such owners appeared at the hearing, and did not dispute the title of the lord to the stone; and the others were proved to be out of the jurisdiction.

The steward of the manor by his evidence said, he believed there was no custom for the tenants to take stone. Several witnesses were examined on the part of the defendants, who proved that stone had commonly been taken in the process of cultivation as in the defendant's case; and that, in such cases, part of the stone had been sometimes used to repair walls and buildings upon the estate, or to repair the roads, and some part had been sold to defray the expenses of raising the same; and the witnesses, who had long known the land, had never heard of the stone having been claimed by the lord.

The *Solicitor-General* and Mr. *Bichner*, for the plaintiff.

The decree for an injunction is of course. The defendant does not plead a custom: it is true he alleges that the wrong, of which the plaintiff complains, has been frequently committed, but that is not a defence which the plaintiff could put in issue at [*204] law. No *legal right was set up. The case is, therefore, one in which the lord has no alternative, but to

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proceed with the suit. They cited *Dearden* v. *Evans*,(a) and Gilb. Ten. Wat. p. 425.

Mr. *Rolt* and Mr. *Terrell*, for the defendant Morley.

The suit is unnecessary and oppressive, and will not be sustained by this Court. The plaintiff asserts a legal right, and he might have brought his action at law in the first instance, and obtained a speedy and comparatively inexpensive decision; or he might have moved for the injunction, when the Court would have sent the case for the decision of a court of law, and the expense of going into evidence in this court would have been avoided. It is a case which ought not to have been brought to a hearing: *Bacon* v. *Jones*.(b) The right of the plaintiff being denied, he ought, before any decree is made, to establish his right at law; and the utmost which the Court can now do, is to retain the bill, giving him liberty to bring his action.

Mr. *Archibald Smith*, for the owner of the copyhold estate, not claiming any title to the stone, asked for his costs.

VICE-CHANCELLOR:—The plaintiff is lord of the manor, and the defendants, except Morley, are copyholders of the manor. Morley is the yearly tenant of the copyholders of a tenement with about twenty-eight acres of land. Morley on two occasions, once in the end of 1843 or the beginning of 1844 and once in December, 1845, removed the top soil from a small quantity of the land in his occupation, *and dug and got from it the [*205] stone, lying at about twelve or eighteen inches below the surface, and sold the stone for his own benefit; and this being done, the top soil was replaced. The profit made by Morley, in the first transaction, was 12*l.* 15*s.* 5*d.*, and by the second, 10*l.* 7*s.* 9*d.* The stone does not appear in itself to have been of any value, qua stone,—merely the sub-soil, gravel, or whatever it was; and Morley says he did the acts solely with a view to the better cultivation of the land. He says, that all persons occupy-

(a) 5 M. & W. 11. (b) 4 My. & Cr. 433.

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ing lands in the manor have been accustomed to do the same thing for the same purpose; and that, until the bill in this cause was filed, the lord of the manor had never objected to the same, or claimed a right to the stone gotten. He says, that he had the express authority of his co-defendants, the copyholders, to do the act above mentioned; and that the stone belongs to them, if not to himself. He adds, that he intends and insists upon his right to do the like, if occasion should require. In August, 1846, the bill was filed against Morley, only complaining of the above acts, and praying an account and an injunction. Morley answered and stated his case in substance, as I have above given it; and by his answer he insisted, that his now co-defendants, the copyholders, were necessary parties to the bill. The bill was amended accordingly, and the copyholders made parties. They do not by their answer support the case which Morley makes under them. Morley's evidence in the cause shews a very extensive practice, at least amongst agricultural occupiers of lands in the manor, to remove the substratum of stone, as a means of better cultivation; but Morley has not supported by any evidence the case of authority from the copyholders, which he insists upon by his answer.

[*206] *It cannot be disputed, that the injury complained of in this case is of a nature which this Court will prevent by an injunction, provided that injury, as distinguished from damage, be established. At the same time, I cannot but regret that the plaintiff should have been advised to resort to a court of equity in a case like this.

The first act complained of must have taken place in the very beginning of the year 1844, if not in the end of the year 1843. The second I will suppose to have taken place at the end of the year 1845. No repetition of the alleged injury was actually threatened; but in August, 1846, apparently because Morley in terms said he had a right to get the stone, if occasion should require, the bill was filed praying an injunction. No injunction, however, was moved for, and the defendant has done nothing since, but awaited the trial of the cause.

I cannot understand why, in such a case, a bill in equity was

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preferred to an action at law,—a dilatory and expensive proceeding to one which was prompt, and comparatively inexpensive. No judge has more strenuously asserted the jurisdiction of the Court of Chancery that the Lord Chancellor, but no one has more deprecated the practice of seeking its extraordinary aid in cases in which the rights are purely legal, and in which they might be as effectually protected by proceedings at law, as by a bill in equity. It would be idle to say, that there is anything in this case which made preventive justice,—the *festinum remedium* of an interlocutory injunction,—necessary to protect the plaintiff's rights.

These remarks do not at all go to the jurisdiction of the Court. With regard to the case made by the defendant, the practice of taking the stone, the evidence goes a great way to shew that it has always been done *in the manor as a means [*207] of cultivation. If the defendant Morley should think it worth while to try the case at law, I shall put him to admit the title of the lord of the manor, and that he, Morley, is merely tenant from year to year under the copyholder, and I will retain the bill.

It is quite clear the plaintiff must pay the copyholders their costs, and have them over against Morley. There is no pretence in this case for saying that they authorized him to do the acts complained of; and the answer does not support him in saying that they claimed the right.

THE defendant Ephraim Morley, by his counsel declining to try his right to take the stone in question in this suit, by an action to be brought by the plaintiff, in which the said defendant is to admit the title of the plaintiff as lord of the manor of Cockfield Hall, in the county of Suffolk, in the pleadings mentioned, and that the lands in question are within the boundaries of the said manor,—This court doth order and decree, that a perpetual injunction be awarded to restrain the defendant Ephraim Morley, his servants, laborers, workmen and agents, from working, hewing or digging, raising or obtaining, and from permitting to be worked or hewed, or dug or raised, or obtained, any stone from the quarries or quarry, or beds or bed of stone, or in or under the copyhold lands in &c., or any part thereof, or from such copyhold lands or the soil thereof; and from opening or working any new or other quarries or mines, or quarry or mine of stone or other minerals, in or under the said copyhold lands; and from permitting the same to be opened; and from selling and removing, or causing to be sold or removed, such part of said stone which has been hewed or dug, or raised or obtained, as in &c., as now remains on the said

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copyhold lands. And it is ordered, that the defendant Ephraim Morley do, within three weeks after service of this decree, pay to the said plaintiff James Cuddon a sum of 23*l.* 3*s.* 2*d.* Bill to be dismissed against the copyholders, whose costs are to be taxed and paid by the plaintiff, who is to add them to his own. Costs of plaintiff to be taxed and paid by defendant Morley. Liberty to apply.

Affirmed by the Lord Chancellor, 24th November, 1849.

[*208] *BEECH *v.* FORD.

1848: June 2d, 27th and 30th.

The payee of two promissory notes being about to sue the maker, the brother of the maker agreed to pay 200*l.* to the payee, in trust for E., or 6*l.* 10*s.* per quarter, so long as the 200*l.* should be unpaid, so that the notes should be suspended and rendered inoperative so long as the brother continued to pay the 6*l.* 10*s.* a quarter to the payee; and on payment of the 200*l.* all claim on the notes to cease, and the same to be given up. The brother not having paid the 6*l.* 10*s.* to the payee, for two quarters, but having paid these sums to E., the *cestui que trust*, (as the latter admitted) the payee brought his action upon the notes against the maker:—

Held, in error, reversing the judgment of the Queen's Bench, that the agreement could not be pleaded in bar to the action upon the notes, but might be the subject of a cross action.

Held, in equity, that the agreement must be construed as a contract by the brother, to provide for E. the annuity of 25*l.*, or the gross sum of 200*l.*, as a substitute for the two notes, and by the payee that the two notes should thenceforth be only a security for the performance of such contract; and not as an agreement, under which the original right of the payee against the maker would revive on any failure of the quarterly payments by the brother.

That the brother was entitled to the specific performance of the agreement in equity, not on the ground of the circuity of cross actions which the rule of law occasioned, but on the ground that this court, by modifying its decree, could give to all parties the benefit of the agreement, whilst a court of law, being unable so to modify its judgment, could not give to one party the benefit of the agreement without depriving another party altogether of such benefit.

THE plaintiff, William Beech, was the maker of two promissory notes, one for 140*l.*, and the other for 200*l.*, both dated the 28th of May, 1829, of which the defendant, John Ford, was the payee and holder. John Ford having threatened to sue William Beech upon the notes, Alfred Beech, his brother, interposed, and

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an agreement was entered into, which was in the following terms:—

"I hereby consent to pay Mr. John Ford, in trust for my sister Elizabeth Beech, the sum of 200*l.*, for her sole use and benefit, or the sum of 25*l.* per annum, so long as the 200*l.* shall remain unpaid. This sum of 25*l.* yearly is to be paid every quarter, and should two quarters remain in arrear, such arrears will be considered as a violation of the agreement; and this I promise to do as a consideration for money advanced to my brother William Beech on two bills of his acceptance, bearing date May 28th, 1839, to John Ford, so that the bills and interest on them be suspended and rendered inoperative, so long as I continue to pay the said sum of 6*l.* 5*s.* sterling every quarter to Mr. John Ford; but, on the payment of 200*l.* to Mr. Ford at any one time, all further claim pertaining to the said bills on my brother William Beech is to cease, and the said bills are to *be given up by Mr. Ford. Should my sister Elizabeth Beech decease, such sum of 6*l.* 5*s.* per quarter to be still paid to Mr. Ford, to be at his disposal to allow to any member of my family whom he may think proper. The payments to commence from the 25th of December, 1843. [*209]

"Alfred Beech.

"January 31st, 1844.

"To this agreement I am a consenting party.

"J. Ford."

William Beech was privy to this agreement.

Disputes afterwards arose between William and Alfred Beech, and Ford, and on the 19th of August, 1844, Ford commenced an action in the Queen's Bench against William Beech, to recover the sum of 44*0l.*

The 44*0l.* was made up of principal and interest on the two notes for 140*l.* and 200*l.*, and of a sum of 15*l.* claimed to be due to Ford on another transaction.

The bill was filed in December, 1844, by William and Alfred Beech, against John Ford and Elizabeth Beech, alleging the performance of the agreement on the part of the plaintiff Alfred;

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and, in particular, that it was arranged between the plaintiffs and Ford, that the sum of 6*l.* 5*s.* per quarter, mentioned in the agreement, should be paid by Alfred Beech to Elizabeth Beech herself, instead of being paid to Ford for her use; and that, between the date of the agreement and the 25th of June, 1844, when the second quarterly sum became payable, Alfred Beech had, in pursuance of the agreement, paid or caused to be paid to Elizabeth Beech divers sums of money, amounting in the whole to more than the 12*l.* 10*s.* The bill prayed a decree for the specific performance of the agreement of the 31st of January, 1844,

[*210] *and that the sum of money to be paid by Alfred Beech might be secured for the benefit of the defendant Elizabeth Beech; that, if necessary, a trustee might be appointed in the room of Ford; that Ford might be restrained by injunction from proceeding with his action upon the two promissory notes; and that the notes might be delivered up to be cancelled.

The defendant Ford, by his answer, denied that any arrangement had been made between himself and Alfred Beech for the payment of the quarterly sum by the latter to his sister Elizabeth; and on the contrary, the defendant Ford said that he had always stipulated that such payments, which were his bounty to Elizabeth Beech, should be received by himself, and administered or paid to her by himself.

The cause came on for hearing in June, 1847; when it appeared that William Beech, the defendant at law, had obtained a verdict in the action, upon which judgment had been given by the Court of Queen's Bench in his favor; it appeared also, that the defendant Ford had brought his error to reverse the judgment, on the ground that, *non obstante veredicto*, upon the matters in the plea, judgment should have been given for the plaintiff in the action. The cause was directed to stand over, until the decision of the question at law should be known, the plaintiff Alfred Beech to be in the meantime at liberty to pay the defendant Elizabeth Beach 6*l.* 5*s.* quarterly, in part satisfaction of the agreement, without prejudice to any question between the parties.

The judgment of the Court of Queen's Bench was afterwards

reversed in the Exchequer Chamber. The Court of error held that the agreement of the 31st of January, 1844, could not be pleaded in bar to the action *upon the notes; [*211] that the right to bring a personal action once existing, and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive; and that the construction of the agreement, from the apparent intention of the parties, was not to suspend the right of Ford to recover on the notes, but to entitle Beach to bring a cross action against Ford, in case of the breach of the agreement by the latter.(a)

The cause was again brought on to be heard in June, 1848, after the reversal of the judgment in *Ford* v. *Beech*.

Mr. *Rolt* and Mr. *Amphlett*, for the plaintiffs, insisted that the plaintiffs were entitled to the specific performance of the agreement in equity, as involving a trust for the benefit of the defendant Elizabeth Beech. They cited *Gregory* v. *Williams*,(b) and *Tomlinson* v. *Gill*.(c)

Mr. *Wilcock*, for the defendant Ford.

First, The plaintiffs have no common case, entitling them to a specific performance of the contract. William Beech is not a party to the agreement, and is not bound by it; and Alfred has no interest in restraining the action against William. The parties to the agreement only are entitled to sue: *Tasker* v. *Small*.(d) Secondly, A suit for this purpose could only be sustained by Elizabeth, the *cestui que trust*, and then only could it be sustained against the trustee, if there be any breach of trust on his part, or in case he neglected to enforce the agreement for her benefit; but the trustee is, in fact, adopting the only legal means which he has for enforcing the *agreement; he is using [*212] the notes as a security for the benefit of the *cestui que trust*, the conditions for the withdrawal of the notes having been broken. Thirdly, Before the plaintiffs could raise any question

(a) See the case, *Ford* v. *Beech*, in the Queen's Bench Reports, for November, 1847, and February, 1848; and the authorities cited in the judgment of Wilde, C. J.

(b) 3 Mer. 582. (c) Amb. 330. (d) 3 My. & Cr. 63.

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of trust, the 200*l.*, the subject of the trust, must be paid. Until Alfred Beech has paid that sum, there is nothing upon which the trust can operate. Fourthly, As the case at present stands not only without any trust fund provided, but without any suit in which a trust can be administered, the case is entirely at law. The agreement raised a right to a cross action, in case the defendant should commit any breach of the agreement; but the notes are to be inoperative no longer than Alfred Beech shall pay to Ford 6*l.* 5*s.* a quarter: whether that has been done will be determined by a cross action on the agreement. In *Gregory* v. *Williams*, the relief was given by Sir William Grant, only on the consideration that the remedy at law was very doubtful.(*a*) In this case, the judgment of the Court of error amounts to a decision that a cross action can be brought. Fifthly, The Court will not now stay execution in the action; or, if the execution be restrained, it will only be on the terms of the plaintiffs, or one of them, paying into court the 200*l.*, with the arrears of the quarterly payments, and paying the costs.

VICE-CHANCELLOR:—The defendant, John Ford, was the payee and holder of two promissory notes, one for 140*l.*, and the other for 200*l.*, both dated the 28th of May, 1829, made and signed by the plaintiff William Beech, and by him delivered to John Ford.

[*213] From the circumstances attending the making of those notes, as well as from the terms of the *agreement of the 31st of January, 1844, it appears that John Ford was a person who took great interest in the welfare of the family of the Beeches, and more especially of the defendant Elizabeth Beech. But as these circumstances, (although they explain the relative position of the parties,) have not appeared to me have any legitimate bearing upon the law of this case, I abstain from noticing them in detail. The plaintiff Alfred Beech is a brother, and the defendant Elizabeth Beech is a sister of plaintiff William Beech.

[His Honor stated the agreement of the 31st of January, 1844, the action, and the suit.]

(*a*) See 3 Mer. 589.

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When the cause first came on for hearing before me, the plaintiffs in equity had obtained a verdict at law, which they considered equivalent to a decision in their favor; the defendant in equity had carried the case to the Court of error, and the question before that Court was then pending. It appeared to me, with reference to the state of the proceedings at law, that the whole question might possibly be determined at law, and I directed the cause to stand over. The proceedings at law have since terminated by a judgment of the Court of error in favor of the plaintiff at law, reversing the judgment of the Court below. The effect of that judgment, as I understand it, has been to determine that the performance by the plaintiff Alfred Beech of the agreement of the 31st of January, 1844, cannot at law be pleaded in bar to an action by Ford upon the notes, and that Alfred Beech, if damnified by such action, must seek compensation by a cross action. I am now, therefore, to consider the effect of the agreement of the 31st of January, 1844, in this Court.

In stating my view of this case, I am anxious to guard against being supposed to decide, that the mere circuity *of cross actions is sufficient to give an equity. But I [*214] apprehend, that where an agreement is made, the direct substance of which can be had in this Court, it is not necessarily an answer to a bill for the performance of such an agreement, to say that the parties may have compensation in damages, equivalent in value to what this Court can give by its decree. A court of law, in this case, cannot give the parties the direct benefit of the agreement, because it cannot give Ford the benefit of his claim against William Beech, without depriving him of it altogether. But if this Court can preserve to all the parties the benefit of the agreement, the case may be proper for its interposition.

The question upon the agreement, (whatever difficulty there may be in answering it,) may, I apprehend, be thus stated:—Is it to be considered as a new agreement between Alfred Beech and Ford, the substance of which was, that Alfred should, at the instance of Ford, provide for his sister Elizabeth the annuity or gross sum mentioned in the agreement; that such provision should

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be a substitute for the two notes owing from William Beech to Ford; and that the notes should thenceforth be a security only for the performance of that agreement? or, was the substance of the agreement this,—that if it was not performed by Alfred, with legal exactness—*i. e.* the very day—Ford's original right against William would revive, notwithstanding any number of payments regularly made by Alfred, under the agreement of January, 1844?

It appears to me, that the former is the correct view of the case. The substance of that for which Ford contracted was a benefit to Elizabeth Beech, in consideration of his relinquishing his claim against William. The substance of that for which Alfred Beech contracted, was the relief of William from his liability [*215] upon the *notes. This being the substance of the agreement of January, 1844,—by treating the notes as a security thereafter forthe performance of it, I secure to Ford all he contracted for; I relieve Alfred from no liability but that which might attach upon a neglect to make a money payment on the very day on which, by law, it was due;(*a*) and the agreement is complied with in all respects, by giving to Ford a revival of his rights against William, for the purpose of enforcing the performance by Alfred of his part of the agreement. This a Court of law cannot do, as it cannot modify its judgment, as this Court may do. If the notes had been given at the time the agreement was entered into, I cannot doubt that such would have been the construction of the agreement. As the agreement was altogether new, on the part of Alfred, I cannot think that the circumstance of the notes having existed before the agreement, alters the case.

What I take to be the effect of the agreement, by no means proves that Ford was wrong in bringing his action upon the notes. It is obvious, with reference to the effect given to that agreement in the Court of error, that, in order to secure to Ford the benefit of the agreement given as a security, it might be necessary for him to proceed to judgment upon the notes, though

(*a*) See *Bowser* v. *Colby*, 1 Hare, 109, and cases there cited.

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not to execution, except to the extent necessary for enforcing the security, as I have mentioned.

It was objected, that there was a want of consideration for the agreement; and that William was not a party to it, and, therefore was not entitled to sue. I cannot give any weight to these objections. I have not any doubt of the sufficiency of the consideration; and *although William was not a party [*216] to the agreement, it is admitted that it was made with his privity and he has a distinct interest in seeking that it may be enforced. Alfred might certainly have sustained the bill alone; but it is not necessary now to express any opinion what the result of the objection might have been, if the question of misjoinder had been raised by demurrer. At the hearing of the cause, the court is not bound to allow the objection, that a party has been made a plaintiff, if there be no difficulty in making a final decree, notwithstanding the misjoinder.

The costs of the proceedings at law must follow the event. In this court the defendant Ford has been unsuccessful in the case which he attempted to set up. The defendant did not say that he intended to sue only for the benefit of Elizabeth Beech. He insisted upon his right to sue on the notes, not merely to the extent of enforcing the security, but absolutely, and of being the administrator of his own bounty, so far as he had contracted for a bounty to Elizabeth. In this contention he has failed; and, according to the rule strictly followed by the Lord Chancellor, he must pay the costs.

THE defendant Elizabeth Beech, by her counsel admitting payment of the annuity or annual sum of 25*l.*, in the agreement, &c., up to this date, this court doth order, that the sum of 200*l.*, in the said agreement mentioned, be paid to the said defendant Elizabeth Ann Beech, by the plaintiff Alfred Beech, on or before the 10th day of August next; and thereupon it is ordered, that satisfaction of the judgment in the action at law in the pleadings mentioned, brought by the defendant John Ford against the defendant William Beech, upon or in respect of the two promissory notes in question in this cause, be entered up. And it is ordered, that the defendant John Ford do deliver up the two promissory notes to the plaintiff William Beech to be cancelled. Order for taxation of the costs of the plaintiff of this suit, and setting off *the same against the sum of 50*l.* 15*s.*, the taxed costs of [*217]

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the defendant Ford in the action at law, and for payment of the balance. Liberty to apply.

Affirmed by the Lord Chancellor.

DAVENPORT *v.* DAVENPORT.

1849: March 3d.

To the bill of plaintiff, alleging that, under a settlement thereby stated, he was entitled to an estate, of which the defendant was in possession, and had been so for nineteen years; the plaintiff had not discovered his title until a very recent period; and that he had since brought an ejectment against the defendant, to recover the premises, which action stood for trial at the next Assizes; and praying an injunction to restrain the defendant from cutting down and selling ornamental and other timber of great value, and thereby occasioning irreparable injury to the estate, which the bill charged that the defendant threatened and intended to do—a demurrer for want of equity, was allowed.

THE bill stated a deed dated the 30th of December, 1656, whereby certain estates in the county of Chester were limited to the use of Peter Davenport the settlor, for life, with remainder to his first, second, third, and fourth sons successively in tail male, with remainder to the right heirs of the settlor; and, after averring the death of the settlor, leaving five sons the possession of the estates in conformity with the limitations in tail, the death of the four elder sons, and the extinction of their male issue upon the decease of one William Davenport without issue, who died in possession of the estates in April, 1829, and that none of the tenants in tail had ever done any act to destroy the estates tail, or defeat the remainders expectant thereon—alleged that the plaintiff was descended from the fifth son of the settlor, and upon the death of William Davenport became entitled to the estates under the ultimate limitation to the right heirs.

The bill alleged, that upon the death of William Davenport, Sir Salisbury Pryce Humphreys Davenport, by virtue of some pretended title unknown to the plaintiff, entered into possession of the estates, and continued in such possession until his death,

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in 1845; that, upon his death, the defendant Dame Maria Davenport, his widow, by virtue of some pretended title unknown to the plaintiff, entered into possession of the estates, and had ever since continued in such possession.

*The bill stated, that the plaintiff had not discovered [*218] his title to the said estates until within a very recent period; that, as soon as he discovered the same, he demanded possession, which the defendant had refused to deliver to him; and that, on the 10th of January, 1849, which was as soon as his circumstances would allow, he commenced an action of ejectment in the Queen's Bench, and caused a declaration in ejectment to be served upon the defendant to recover possession of the said estates, which action of ejectment stood for trial at the next Chester Assizes.

The bill alleged that the defendant threatened and intended to cut down and fell the timber and other trees standing on the said lands, and to sell the same and apply the proceeds of such sale to her own use; and that she had caused timber and other trees to be lotted and marked, and had advertised their sale by auction at Stockport, on the 14th of February, 1850. The bill alleged that such timber and other trees were of the value of 2000*l.* and upwards; that the same were very ornamental; and that irreparable injury would be done to the estates by their removal.

The bill prayed an injunction to restrain the defendant from cutting down or felling or otherwise injuring any of the timber or other trees then standing on the said estates, and from selling or otherwise disposing of the same; and that the defendant might be directed to keep an account of all monies received by her for or on account of any timber which she might have felled or sold or otherwise disposed of.

The defendant demurred.

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*The *Solicitor-General* and Mr. *Hare*, for the demurrer. [*219]

This is the case of an adverse possession of real estate, the defendant and her late husband having been in possession ever since the title of the plaintiff is alleged to have accrued, and

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the plaintiff not having established his title at law. In such a case there is no instance of the interference of the Court by injunction to restrain the acts of the party in possession; and such an interposition has been distinctly refused: *Pillsworth* v. *Hopton*,(a) *Jones* v. *Jones*,(b) *Armitage* v. *Wadsworth*,(c) *Smith* v. *Collyer*.(d) The injunction has been granted in modern times in cases of trespass: *Flamang's case*,(e) and *Robinson* v. *Lord Byron*;(f) but the cases in which the Court has interfered, have been cases in which there was a privity between the [*220] parties, as in the case of *landlord and tenant; or the possession has been acquired by some breach of duty;(g) or under a contract, as in *Crockford* v. *Alexander*;(h) or by means of an office or trust, as in *Mortimer* v. *Cottrell*;(i) or the case of the lord and tenant of a manor: *Grey* v. *Duke of Northumberland*;(k) or in which the land whereupon the act complained of was about to be committed, was in the possession, or at least the undisputed property, of the plaintiff. Such have been cases of mines, in which the owner of a mine has worked into the land of a neigh-

(a) 6 Ves. 51.

(b) 3 Mer. 161, 173. The record in *Jones* v. *Jones* was referred to on the point, (which is omitted in the report) of waste or destruction having been committed or threatened. The allegation in the bill is as follows:—"And your orator further showeth, that the said Thomas Jones, the said residuary legatee named in the said pretended will, with the privity and consent of the said executors and trustees, soon after the death of the said William Jones, committed several acts of waste and destruction in and upon the several parts of the said real property, and particularly, that the said Thomas Jones has caused to be pulled down a large dwelling-house, at Sudbury aforesaid, late in the occupation of the widow Ruffles, and has sold the materials thereof, and applied the moneys arising therefrom to his own use and benefit; and the said Thomas Jones has also caused to be pulled down the dwelling-house and premises in which the said W. Jones resided at the time of his death, and also a cottage and farm called Highlander's Farm, situate at ———; and that he and the said other trustees and executors threaten and intend to commit several other acts of destruction and waste in and upon the building and other parts of the said real estate and premises."

(c) 1 Madd. 189. (d) 8 Ves. 89. (e) Cited by Lord Eldon, 7 Ves. 308.

(f) 1 Bro. C. C. 588; 2 Cox, 4. (g) Per Lord Eldon: see 19 Ves. 154.

(h) 15 Ves. 138; see also 16 Ves. 132. (i) 2 Cox, 205.

(k) 17 Ves. 281; see also *Kinder* v. *Jones*, 17 Ves. 110, which perhaps is within another class.

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boring proprietor: *Mitchell* v. *Dors*;(a) or where the use of a stream of water has been intercepted, as in *Robinson* v. *Lord Byron*; or works have been executed, by which water has been thrown on the land of another, as in *Dawson* v. *Paver*,(b) *Duke of Beaufort* v. *Morris*;(c) or where the act itself would amount to a destruction, not of things of mere ornament or convenience, but of the inheritance itself: *Thomas* v. *Oakley*,(d) *Haigh* v. *Jaggar*.(e) It was a much wider extension of the jurisdiction, to apply it in favor of a party who had never obtained possession, against a possession which had endured for nearly twenty years. In the case of *Vice* v. *Thomas*,(f) in the Court of the Stannaries, one of the latest decisions on a question of this nature, it was laid down, that, there was "strong authority for holding, that, in the particular case of a party out of possession of an estate claiming equitable relief, the right to which depends upon the right of possession, the Court requires that the party so circumstanced *should recover the possession at law before he [*221] files his bill, for the consequential equitable relief."(g)

Mr. *Bacon* and Mr. *Bagshaw*, for the bill.

The cases, in which the Court has refused to interfere by injunction to restrain irreparable waste, have all been cases in which the title of the plaintiff has been denied. Lord Eldon in *Norway* v. *Rowe*,(h) observes, that he does not recollect that the injunction has been extended to trespass, "where the fact of the plaintiff's title to the property on which it was committed was disputed by the answer." But these authorities have no application to a case like the present, in which the title of the plaintiff is admitted, as it must be taken to be upon demurrer. The case presented to the Court is that of a plaintiff having a legal title to the estate, to recover which he has brought ejectment, and of a defendant availing himself of the time which must elapse before the action can be tried, to cut down and sell the timber upon the estate. It

(a) 6 Ves. 147. (b) 5 Hare, 415. (c) 6 Id. 340.
(d) 18 Ves. 184. (e) 2 Coll. 231. (f) 4 Y. & C. 538.
(g) 4 Y. & C. 560. (h) 19 Ves. 147.

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is doubted by the Vice-Chancellor Knight Bruce, in the case of *Haigh* v. *Jaggar*, whether the Court is of necessity at this day prevented from interfering in favor of a party out of possession, to restrain a party in possession from stripping the estate of its timber, even where the latter swears that his title is just and valid, or that that of his adversary is unjust and invalid; and, if the Court can interfere in such a case, it certainly is not precluded; by the want of possession by the plaintiff, from interfering where there is no denial of his title.

[They also commented on the other authorities which had been cited on behalf of the plaintiff, and distinguished them from the present case.]

[*222] *VICE-CHANCELLOR:—If this question were new, I should have no hesitation in holding, that, upon the facts stated upon the bill, the plaintiff would be entitled to the injunction. In the absence of authority my mind, in cases of actual destruction of property, would be little prepared to admit the distinction between waste and trespass in cases like the present. But the question is, whether the cases of trespass against a party in possession are not cases of a class in which the Court refuses to act, until the right is established at law.[1]

[1] Where the right of a party is doubtful, the court will not grant an injunction to prevent an illegal interference with the same until the right is established at law. *Hart* v. *Mayor of Albany*, 3 Paige's Ch. Rep. 213; *Nevitt* v. *Gillespie*, 1 Howard, 108; *Partridge* v. *Menck*, 2 Barb. Ch. Rep. 101; *Attorney-General* v. *Hunter*, 1 Dev. Eq. Rep. 12; *Van Bergen* v. *Van Bergen*, 3 John. Ch. Rep. 282; *Dana* v. *Valentine*, 5 Metcalf's Rep. 8; *Bonaparte* v. *The Camden and Amboy Railroad Co.*, 1 Baldwin's Rep. 205. An injunction should never be granted to stay waste when it appears that the defendant is in possession claiming and holding adversely. Even in the case of a trespasser, the court will require the production of unquestioned evidence of title before granting an injunction, and the court will never interfere to restrain an apprehended trespass, except in extreme cases, where the threatened injury would be irreparable, and the title to the land is unquestioned. *Nevitt* v. *Gillespie*, 1 How. R. 108; *Amelung* v. *Seekamp*, 9 Gill & John. 468. It is a general rule, that a party seeking to be protected by injunction in the possession and enjoyment of real property must show a right, and such a right as the court will feel bound, upon his own showing, to protect against the act of the defendant. *Oucalt* v. *Disborough*, 2

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The jurisdiction of the Court in cases of injunction, originally, no doubt, arose in cases of waste, where there was privity between the parties. All the earlier cases are of that description. The Court began afterwards to interfere in cases of trespass; but I believe it will be found that the cases, in which the jurisdiction was exercised in restraining trespass, have been cases of this peculiar description,—the party complaining has been in possession of property, and has complained that his possession was wrongfully invaded by some alleged trespasser. The alleged trespasser, on the other hand, has not admitted the possession of the plaintiff, nor claimed a right to invade such possession as he had, nor intended to do so,—as in the case of the underground workings of adjoining mines,—and the Court has distinguished these cases from ordinary cases of trespass by saying the alleged wrong-doer claimed under color of title. The cases of railway companies taking lands, under the compulsory powers given them by Parliament, are of the same class. Neither party disputes the abstract right of the other to that which he claims. The dispute is, as to the practical application of the law to the facts of the case. It has always appeared to me, the Court was *trying to get out of a technical rule, with a view to [*223] the better protection of property.

I remember a case concerning the property of Lady Bastard, in the west of England, in which some observations on this point were made by the Lord Chancellor in the course of the argument. Persons working mines insisted that, within a particular district, there was a right common to all miners to make drifts through private closes, for the purpose of draining the mines. This right they were about to assert by cutting a trench through some property of Lady Bastard. In that case the Lord Chancellor grant-

Green's Ch. Rep. 214. In an application to stay waste even the rule is strict. In such cases as the parties usually claim under adverse rights, and unless the complainant will show a sufficient title in himself, the court will not interpose, but leave him to his legal remedy. Ib. 214. In cases of an application for an injunction to restrain the commission of trespass, the mere allegation of a complainant that irremediable damage or irreparable mischief will ensue, is not sufficient; but to entitle a party to an injunction, the facts must be stated to show that the apprehension of injury is well founded. *Ameking* v. *Seekamp*, 9 Gill & John. 468.

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ed the injuuction. But whether these are or are not refinements as to the claim being made under a color of right, I think no case can be found, in which,—the party out of possession coming to this Court complaining that another party in possession, and insisting upon a title to that possession, is cutting down timber or doing any other act of destruction,—the Court has ever granted an injunction, until the right has been established at law.

The present case, however, would not be determined, if the case rested there; for the bill states, and the demurrer therefore admits, that the plaintiff is the party entitled, and that the defendant, having been in possession for nearly twenty years, claims under a pretended title. I do not, however, understand that the bill asserts that the defendant does not claim a right to the possession. Whether the defendant may or may not be eventually successful in defending the possession, I should have thought that, if such a case could exist, this ought to be one for granting an injunction, inasmuch as there is, for the present purpose, an admission upon the record that the title, whatever the [*224] result of the trial may be, is in some *sense a pretended title. But I have the case of *Jones* v. *Jones* before me, where the question arose upon demurrer, and my difficulty is, that I cannot, in the face of that decision of Sir William Grant, take upon myself to say that I am not to apply the rule there laid down to this demurrer. I quite agree with Sir William Grant's observations, and with those of the Vice-Chancellor Knight Bruce. I cannot, however, do otherwise than say, that, if the cases are to be overruled, it must be by the Lord Chancellor.

In the case before Sir William Grant, the plaintiff alleged, that the testator died intestate,—that the plaintiff was his heir-at-law, and as such had become entitled to the estate, and that certain other persons had some paper, which they called a will, not attested so as to pass the real estate. Sir William Grant said, the Court never had done what was there asked; but he adds, that, at least, the party ought to state that he had used due diligence, whereas it appeared that he had waited two years. How long the plaintiff in this case has waited I do not know. He says he

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had not discovered his title until very recently. What "very recently" may mean, as against a party who has been in possession for nearly twenty years, I do not know.

I cannot help expressing my surprise that the law should be in this state, but I am compelled to allow the demurrer. I must refer the plaintiff to a higher tribunal, if he thinks he can sustain the bill.

*SMITH *v.* PALMER. [*225]

1848: Dec. 14th and 15th. 1849: Jan. 12th.

The testator, after directing his personal estate to be invested, gave the income of the same and of his real estate to his wife for her life, and directed that after her death his trustees should sell his real estate, "and pay, distribute and divide" the money thence arising, and the money at interest, and he thereby gave and bequeathed one-third thereof unto his cousin, J. S., "if he should be then living, but if he should be then dead, unto his legal representative or representatives, if more than one, share and share alike." J. S. died in the lifetime of the testator's widow, leaving a widow and children:—*Held*, that, upon the death of J. S., his widow and children, as the persons who would, in case of intestacy, be entitled to his personal estate, according to the Statute of Distributions, took vested interests in the third of the residue in equal shares, as tenants in common.

WILLIAM FINDLAY, by his will, dated in 1807, devised and bequeathed his real and personal estate to trustees, upon trust to invest the personal estate, and pay the interest thereof, and the rents and profits of his real estate, to his wife for her life, who was to pay thereout an annuity for the lives of two legatees therein named; and upon the death of his wife, he directed his trustees to sell his real estate, subject to the said annuity, continuing as follows:—"And the money from thence arising, and also the money at interest, shall and do pay, distribute, and divide, and I do hereby give and bequeath the same in manner following; (that is to say,) one-third part or share thereof unto my cousin James Strachan, if he shall be then living, but if he shall be then dead, unto his legal representative or representatives, if more than one, share and share alike; one other third

part or share thereof unto my cousin William Shanks, if he shall be then living, but if he shall be then dead, unto his legal representative or representatives, if more than one, share and share alike; and the remaining third part or share thereof unto my cousin Charles Smith, if he shall be then living, but if he shall be then dead, unto his legal representative or representatives, if more than one, share and share alike." And the testator appointed his wife sole executrix of his will.

The testator died in 1808, leaving Nancy his widow, and the said James Strachan, William Shanks, and Charles Smith surviving. James Strachan died intestate in 1810, leav-
[*226] ing Mary his widow, and several children *surviving. William Shanks died in 1825, leaving Jane his widow, and several children surviving. Nancy, the widow of the testator, (who had afterwards married Thomas Palmer,) died in May, 1838, leaving Charles Smith surviving.

On the construction of the will, three principal questions arose:—First, whether the respective administrators of James Strachan and William Shanks took for their own benefit, as the persons described by the words "legal representative or representatives," the shares given to James Strachan and William Shanks respectively.

Secondly, if such respective shares were bequeathed to the next of kin of James Strachan and William Shanks respectively, did the expression mean next of kin, according to the Statute of Distributions, or the nearest of kin in point of consanguinity; And thirdly, whether the words "legal representative or representatives," meant persons living at the death of James Strachan and William Shanks respectively, or persons living at the death of the tenant for life.

The *Solicitor-General* and Mr. *Phillips* for the plaintiff; and Mr. *Blundell*, Mr. *Dickinson*, Mr. *Walters*, and Mr. *Elderton*, for the several defendants.

In addition to the cases referred to in the judgment, the cases

of *Taylor* v. *Beverley*,(a) *Long* v. *Blackall*,(b) *Nickolson* v. *Wilson*,(c) *Corbyn* v. *French*,(d) *Tidwell* v. *Ariel*,(e) *Thomas* v. *Hole*,(f) *Phillips* v. *Garth*,(g) *Richardson* v. *Richardson*,(h) *Godkin* v. *Murphy*,(i) *Hames* v. *Hames*,(k) and *Meryon* v. *Collett*,(l) were referred to. [*227]

VICE-CHANCELLOR:—I stated my opinion at the close of the argument to be, and I have no doubt, that the expression "legal representatives," in this will, means next of kin.

I think also that it means next of kin according to the Statute of Distributions. *Elmsley* v. *Young*,(m) the words were "*next* of kin," and not as here, "legal representative or representatives:" *Rowland* v. *Gorsuch*,(n) *Cotton* v. *Cotton*,(o) *Booth* v. *Vicars*,(p) and the cases collected 2 Jarman, p. 39; and *Walker* v. *Lord Camden*.(q)

The question, whether next of kin is to be read as next of kin living at the death of the respective legatees, or at the death of the widow, is a question of more difficulty, and I have thought it right carefully to explain the grounds of my judgment upon it.

First, let it be supposed that the gift had been to James Strachan, simpliciter, without the words "if then living," and without any substitutionary gift, would James Strachan in that case have taken a vested or contingent interest? My opinion clearly is, a vested interest. The whole estate in that case would have been disposed of by way of present gift and simple remainder, and the interest of James Strachan would have been postponed for the convenience of the estate only, (that is to say,) for the sake of those who were to take before him. The only question could have been, whether it was made contingent by the word "then," (referring to the [*228]

(a) 1 Coll. 108.
(b) 3 Ves. 486.
(c) 14 Sim. 549.
(d) 4 Ves. 418.
(e) 3 Mad. 403.
(f) Ca. t. Talb. 251.
(g) 3 Bro. C. C. 64.
(h) 14 Sim. 526.
(i) 2 Y. & C. 351.
(k) 2 Kee. 646.
(l) 8 Beav. 386.
(m) 2 M. & K. 780.
(n) 2 Cox, 187.
(o) 2 Beav. 67.
(p) 1 Coll. 6.
(q) 16 Sim. 329.

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death of the widow,) or by the circumstance that the gift to James Strachan was in fact expressed by the words "pay, distribute, and divide." But I think, in such a case, the interest would have vested in James Strachan, at the death of the testator. The word "then" is satisfied by referring it to the time when James Strachan is to become entitled in possession, without supposing that the vesting was intended to be postponed, and where the same subject (in substance) is the subject of successive limitations. I consider it immaterial whether the testator uses the words of remainder, or whether the future gift is expressed in a direction to pay and distribute, as is explained in *Leeming* v. *Sherratt*,(a) *Holloway* v. *Clarkson*,(b) and *Packham* v. *Gregory*.(c) *Batsford* v. *Kebbell*(d) is sometimes cited, to shew that a future gift, expressed in the terms "pay and distribute," is contingent by force of the expressions only. That is not so; the judgment preceeded emphatically upon the ground that the subject of the future gift was not the same as, but different from, the previous gift for life. The case of *Vawdry* v. *Geddes*(e) is also distinguishable for similar reasons. Mr. Jarman's observations upon those cases deserve attention; and the inconvenience of not holding such gifts vested, in case a legatee might die leaving a family unprovided for, is so great, that in late years they have been rarely held to be contingent.

[*229] *However, the will before me (if that be necessary) contains words of present gift. The words of the will are, not only that the trustees shall "pay, distribute, and divide," but the testator adds, "and I hereby give and bequeath the same in manner following." If a substitutionary gift to B. be added, in the words of this will, it may be admitted that the interest of B. would be contingent during the joint lives of James Strachan and the widow of the testator. But if James Strachan died leaving the widow surviving, the gift would become vested, as in the case I first supposed, of a simple gift to James Strachan. In like manner, if, instead of supposing the substituted legatee to be a single individual, several legatees be substituted as tenants

(a) 2 Hare, 14. (b) Id. 521. (c) 4 Id. 396.
(d) 3 Ves. 362. (e) 1 Russ. & My. 203.

in common, they would all take vested interests upon the death of James Strachan, in the lifetime of the widow.

But it was argued, that, in the case of the gift to a class, the rule is otherwise: and that the court will read the gift to the class (where the gift is substitutionary) as a contingent gift to such of the class as are living at the period of distribution, namely, the death of the widow. It cannot, I think, be denied, that such a rule of construction would be, in some sense, arbitrary in this case, as not being authorized by the language of the will; still, if the rule exists, I am bound to follow it. It has been said,(a) that this construction is hardly reconcilable with analogous cases, and that it must be treated as peculiar to clauses of substitution in favor of children. Upon this, the only cases cited are *Eyre* v. *Marsden*,(b) and *Crowder* v. *Stone*.(c) If *Eyre* v. *Marsden* be referred to, it will be found that the gift to the children contained a reference to the anterior gift to the parent, which might justify the Court in the conclusion it came *to, supposing it to be a construction the Court felt itself bound to favor. *Crowder* v. *Stone*,(d) raised a different question; but the judgment appears to have proceeded upon what Lord Lyndhurst considered the true construction of the will. I was, however, referred to the later cases of *Bennett* v. *Merriman*,(e) *Booth* v. *Vicars*,(f) and *M'Gregor* v. *M'Gregor*,(g) all cases of "children" substituted for parents, to which special cases it has been considered that the rule is confined. But I cannot think that either of the learned Judges, by whom those cases were decided, recognized any such abstract rule. In *Bennett* v. *Merriman*, Lord Langdale said, "With regard to the general rule as to gifts in remainder, there is no doubt. The question is, whether the peculiar wording of this will does not lead to a different construction;" and in the other two cases, the Vice-Chancellor proceeds entirely upon the wording of the will. Having formed a strong opinion, that if the individuals named had been the substituted legatees, [*230]

(a) Jarman on Wills, Vol. 2, p. 105. (b) 2 Kee. 564.
(c) 3 Russ. 217. (d) 3 Russ. 217. (e) 6 Beav. 360.
(f) 1 Coll. 6. (g) 3 Coll. 193.

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under the words "I give and bequeath," and not meaning to express any opinion upon the rule which has been stated as to children, I think the interest of the next of kin vested at the death of James Strachan, and that I should be introducing an arbitrary rule of construction if I held otherwise.

The declaration will be, that, upon the death of James Strachan, the persons who, according to the Statute of Distributions, would be entitled to his personal estate, took vested interests as tenants in common, but in equal shares, in the third of the residue bequeathed to James Strachan and his legal representatives; and the form of the declaration will be similar as to the other third of the residue bequeathed to William Shanks and his legal representatives.

[*231] *HARVEY *v.* TOWELL.(*a*)

1847: Dec. 10th, 11th and 17th.

Gift of stock in the public funds, upon trust to pay the dividends to the four brothers and two sisters of the testator, in equal shares, for their respective lives, and after their respective deceases, to pay the dividends unto and amongst the eldest sons or son of his said brothers, and the survivors and survivor of them, for their lives or life, in equal shares and proportions, upon their attaining twenty-one, with a provision for maintenance in the meantime; and after the decease of such eldest sons or son, to pay the said dividends unto and amongst the eldest male issue only for the time being of their bodies, *ad infinitum*, forever:—*Held*, that the bequests to the brothers and sisters of the testator were valid.

That the bequests in remainder to the four eldest sons of the four brothers, each of whom had a son living at the death of the testator, were valid; but that such eldest sons took absolute interests in their several shares of such stock.

SAMUEL TOWELL, by his will, dated in 1812, after giving certain annuities and pecuniary legacies, proceeded:—"And as to all the rest, residue, and remainder of my estate and effects whatsoever, whether real or personal, which I shall die possessed of and interested in, I give and bequeath the same, and every part thereof, unto my brother Richard Towell: to hold to the said Richard

(*a*) See Vol. 6, p. 12, n.

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Towell, his heirs, executors, and administrators, forever, according to the nature and quality thereof respectively; upon the special trust, nevertheless, to pay and apply the interest, dividends, and annual proceeds of the sum of 1200*l.* 4*l.* per cent. Bank Annuities, and 4000*l.* 3*l.* per cent. Consols, now standing in my name, subject to the payment of the aforesaid annuities unto and amongst him, the said Richard Towell, and my other brothers, John, George, and William, and my sisters, Susan Wade, widow, and Mary Keeling, in equal shares and proportions, for and during the term of their several and respective natural lives; and from and immediately after their several and respective deceases, then upon trust to pay the same interest, dividends, and annual produce of the said stock unto and amongst the present or any future eldest sons or son only, for the time being, of my said brothers, Richard, John, George, and William, born or to be born, and the survivors *or survivor of them, for and [*232] during the term of their natural lives or life, in equal shares and proportions, upon their attaining their age of twenty-one years, such respective shares to be applied, in the meantime, towards their or his maintenance and education; and if but one son only of my said brothers shall be living at the time of my decease, then the whole to such only son, during his natural life, as aforesaid; and from and immediately after the decease of such eldest sons or son, for the time being, and the survivors and survivor of them, as the case may be, then, upon further trust, to pay and apply the interest, dividends, and annual produce of the said stock, unto and amongst the eldest male issue only, for the time being, of their and each and every of their bodies or body, *ad infinitum*, forever, without, in any manner or on any account whatsoever, reducing or disposing of any part or parts of the said capital sums of 1200*l.* and 4000*l.* so by me invested, and now standing in my name, as aforesaid, and to and for no other use, trust, intent, or purpose whatsoever."

Richard Towell, the brother, was the executor and trustee appointed by the will.

By the Master's report it appeared, that the testator died in September, 1812, leaving his said four brothers and two sisters

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surviving, and that the testator's brothers respectively had eldest or only sons living at the date of the will, and of the death of the testator.

The bill was filed, after the death of all the testator's brothers and sisters, by an incumbrancer on the share of Henry Towell, who was the eldest son of William, one of the brothers of the testator named in the will.

[*233] *The case was argued on the construction of the will, and its effect on the events which had happened, by

Mr. *Kenyon Parker*, Mr. *Romilly*, Mr. *Rolt*, Mr. *Chandless*, Mr. *Elderton*, Mr. *Rogers*, Mr. *Craig*, Mr. *Headlam*, Mr. *F. J. Wood*, and Mr. *Pownall*, for the different parties in the cause. The following cases were cited:—*King* v. *Melling*,(a) *Roe* d. *Dodson* v. *Grew*,(b) *Knight* v. *Ellis*,(c) *The Earl of Chatham* v. *Tothill*,(d) *S. C.*, *Tothill* v. *Pitt*,(e) *Lyon* v. *Mitchell*,(f) *Skey* v. *Barnes*,(g) *Stonor* v. *Curwen*,(h) *Attorney-General* v. *Bright*,(i) *Thomason* v. *Moses*,(j) *Curtis* v. *Lukin*,(k) *Templeman* v. *Warrington*,(l) *Jordan* v. *Lowe*,(m) *Evans* v. *Jones*.(n)

VICE-CHANCELLOR:—At the conclusion of the argument in this case, I stated my opinion to be, that the estates to the brothers and sisters of the testator were good, and that the estates in remainder, limited to the eldest sons of the four brothers (each of whom had a son living at the death of the testator,) were good also. The question upon which I reserved my judgment was, whether the sons of the testator's brothers,—the testator's nephews,—took life estates only, or absolute interests in the stock in question. If the property, which was the subject of the testamentary gift, had been real estate, no serious question would have arisen; for, if the nephews of the testator did not

(a) 1 Vent. 231. (b) 2 Serj. Wills. 322. (c) 2 Bro. C. C. 570.
(d) 7 Bro. C. C. 570, Toml. ed., 453. (e) 1 Madd. 488.
(f) Id. 467. (g) 3 Mer. 335. (h) 5 Sim. 264.
(i) 2 Kee. 57. (j) 5 Beav. 77. (k) Id. 147.
(l) 13 Sim. 267. (m) 6 Beav. 350. (n) 2 Coll. C. C. 516.

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*take estates tail by force of the rule in *Shelly's case*, it [*284] is clear that they could have taken such estates by force of the *cy pres* doctrine. The result, therefore, if the subject of the gift had been real estate, would have been the same, though it might have depended upon the application of different principles. But the subject of the bequest being personal estate, it became necessary to decide upon which of the two principles above referred to, the decision in the case of real estate would have depended. If upon the rule in *Shelley's case*, the nephews of the testator would have had the benefit of the argument, that the same words of limitation which in the case of real estate, would give an estate tail, will in the case of a bequest of personal estate, give an absolute interest. But if the bequest to the issue male of the nephews, in this case, is not to be construed as a limitation to the nephews themselves, the right of the nephews to a larger estate than for their lives, would have depended upon the *cy pres* doctrine; and that doctrine being inapplicable to personal estate, the life estate of the nephews would not be enlarged.

The counsel for the nephews argued, that the limitations to their issue male were clearly used by the testator himself, as words of limitation,—an argument which (he will pardon me for saying) created the first serious difficulty in my mind upon the case; and, if my decision is to depend upon the correctness of that argument, I have no hesitation in saying, my decision must be against the nephews taking more than a life estate. To say that the limitation to the issue male of the nephew, was used by the testator as words of limitation, is equivalent to saying that it was used by the testator for the purpose of describing the quantity of interest he intended the nephews to take. The effect of such a construction of the testator's words would be to make *it simply impossible that his will could take effect [*285] in favor of the issue of the nephews, in a single instance, differing, in this respect, from the descent of real estate. In the latter case, the decision of the court gives the issue a chance; in the former it would destroy it. Moreover, the language of the will is directly opposed to the same construction, for the testator gives an estate to the nephews for their lives only, and in the

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most express terms gives it to the issue of the nephews, as purchasers. I have, since the argument, read Mr. Jarman's observations,(*a*) and (with great advantage) those of Mr. Prior also,(*b*) on the case to which I was referred, but without being able to come to a conclusion satisfactory to my mind. The argument which has made me conclude in favor of the claim of the nephews to an absolute interest in the personalty, is, the elaborate argument of Mr. Fearne,(*c*) in which he considers the cases to which, in principle, the rule in *Shelley's case* is applicable, and those to which it is not. Lord Thurlow's statement of the rule is this,—that the testator does intend the heirs male to take as purchasers; but he intends, also, that all heirs male should take, and that they should take because they were heirs male, and in that character. I think this case is within the principle deduced by Mr. Fearne.

The costs of the suit must come out of the estate.

[*236] *CULSHA *v.* CHEESE.

1849: Feb. 22d; March 2d, 6th, 7th and 24th; April 4th.

Upon the marriage of the testator and the testatrix, certain estates were settled to the use of the husband for life, remainder to the wife for life, remainder to the children of the marriage, and, in default of issue of the marriage, to the use of the survivor of the husband and wife, and his or her heirs and assigns. The testator, by his will, made during the coverture (having other estates not in settlement) devised all his real estates to the testatrix for her life, and, upon her decease, to the use of A. B., and C., in trust for sale, and out of the proceeds of such sale, and the residue of his personal estate, to pay certain legacies, and subject thereto to stand possessed of one-fourth part of the said trust-moneys, for such purposes as the testatrix should appoint, and, in default of appointment, for her next of kin; and to pay and dispose of the other three-fourths equally amongst A. B., and C., their executors, administrators and assigns. The testator died in the lifetime of the testatrix, leaving no child of the marriage. The testatrix, by her will, made in

(*a*) Treatise on Wills, 1844.

(*b*) Treatise on the Construction of Limitations in which the words "issue" and "child" occur, &c. 1839.

(*c*) Fearne's Conting. Rem. 7th edit. 190.

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1849.—Culsha v. Cheese.

1839, after the death of A., B. and C., reciting, that she believed it was the testator's wish that the settled estates should pass by his will, and she was desirous of fulfilling his wishes, devised the settled estates to the uses by the testator's will declared concerning the same, and in exercise of the power of appointment given to her by the testator of the fourth of his estate, appointed the same to her trustees, upon the trusts which she declared of her own residuary estate, and directed her real estate to be sold and fall into such residue, which she bequeathed to several legatees.

Held, that there being, in the events which happened, no uses declared of the settled estates by the will of the testator, the specific devise of such settled estates by the will of the testatrix was void, or incapable of taking effect.

That the heir-at-law of the testatrix did not take the settled estates as the subject of a void or ineffectual devise; but that, under the Wills Act (7 Will. 4 & 1 Vict. c. 26,) the setted estates passed by the residuary devise in the will of the testatrix, for the benefit of her residuary legatees,—the case not being one in which a contrary intention appeared, within the meaning of that statute.

Costs, where two estates, those of the testator and the executor, are administered in the same suit.

By a settlement, made upon the marriage of John Woodhouse and Mary his wife certain estates, in the county of Hereford were settled to the use of John Woodhouse and his assigns, during his life, with remainder to the use of Mary the wife, for her life, for her jointure and in bar of dower, and after the several deceases of John Woodhouse and Mary his wife, and the decease of the survivor of them, then to the use of the children of the said marriage, as John Woodhouse and Mary his wife should jointly by deed, or the survivor of them should by deed or will appoint, and in default of such appointment to the use of the said children, and, in case there should be no issue of the marriage, or if all such issue should die in the lifetime of the survivor of the husband and wife, then to the use of such survivor, his or her heirs or assigns forever.

*John Woodhouse, the husband, died in January, 1820, [*237] without issue, having by his will, dated in 1816, directed that, after the payment of his debts and certain legacies, the residue of his personal estate should be invested, and the annual produce thereof paid to Mary his wife, for her life; and that, from and after her decease, the same should be held upon the same trusts as were thereinafter declared of the moneys to arise by the sale of his real

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estates. And the testator thereby bequeathed legacies to children of Thomas and Althea Jeffries, and children of John and Barbara Fletcher, and to several other persons; and he directed that all such last-mentioned legacies should be paid by his trustees out of the moneys thereinafter provided for that purpose, at the end of twelve months next after the decease of his wife. And after devising the estates vested in him by way of trust or mortgage, the testator devised all other his manors, messuages, or tenements, farms, lands, hereditaments and premises, and real estate whatsoever and wheresoever, to the use of the said Mary his wife and her assigns, for her life, subject to an annuity to his mother for life, and from and immediately after the decease of his said wife, unto and to the use of John Cheese, Thomas Jeffries, and John Fletcher, their heirs and assigns forever, upon trust to sell the said real estate, and out of the moneys to arise from such sale and the residue of his personal estate, to set apart so much as should be sufficient to produce certain annuities, which he thereby directed to be paid to his mother and his brother Richard, for their lives, and in the next place to pay the legacies thereinbefore bequeathed by his will, and directed to be paid at the end of twelve months after the decease of his wife. And after the payment of such annuities and legacies he directed his trustees to stand possessed of the said moneys, upon trust to pay, apply, or dispose of one-
[*238] fourth part *thereof unto such person or persons, in such manner, and for such intents and purposes in all respects, as his wife should by deed or will appoint, give, or bequeath; and in default of such direction, limitation, or appointment, gift or bequest, and as to so much thereof to which no such direction, limitation, or appointment, gift or bequest, should extend, upon trust to pay, apply, and dispose of the same unto and amongst the next of kin of his wife, according to the Statute of Distribution; and upon further trust to pay, apply, and dispose of and retain the residue of the said moneys, stocks, funds, and securities unto and equally amongst themselves, the said John Cheese, Thomas Jeffries, and John Fletcher, their respective executors, administrators, and assigns.

The testator, at the time of making his will and of his death,

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was seised of real estate not comprised in the settlement of 1790.

Mary the widow, and John Cheese, Thomas Jeffries, and John Fletcher, survived the testator John Woodhouse. The three last persons, the devisees in trust, all died in the lifetime of the widow. Thomas Jeffries survived his co-trustees, and after his death his heir-at-law executed a conveyance for the purpose of vesting the real estates of the testator in himself and the defendant John Cheese, as a new trustee, upon the trusts of the testator's will.

Mary the widow died in April, 1842, having by her will, dated in December, 1839, recited and devised as follows:—"Whereas my husband by his last will and testament devised (after various devises and bequests) all other his manors, messuages, or tenements, farms, lands, hereditaments, and premises, and real estate *whatsoever and wheresoever, to the use of [*239] myself for life, (subject to certain charges,) and after my decease to the use of John Cheese, Thomas Jeffries, and John Fletcher, their heirs and assigns, upon certain trusts in the said will declared. And whereas part of the manors, messuages, lands, and hereditaments, which my said late husband was possessed of, were settled in such manner that the same devolved to me as having survived him. And whereas I believe it was his wish that the said settled manors, messuages, lands, and hereditaments should pass by his will to the uses and upon the trusts thereby declared, and I am desirous of fulfilling his wishes: Now I do hereby give and devise all and singular the said manors, messuages, lands, hereditaments, and premises, and real estate whatsoever and wheresoever, to, for, and upon such uses, trusts, ends, intents, and purposes, and under and subject to such charges, powers, provisoes, and agreements as are in and by the said will of my late husband expressed, declared, and contained of and concerning the same; and except, I charge all the said premises with the sum of 500*l.*, to be paid to Catherine the daughter of my sister Barbara Fletcher, my said husband having by mistake omitted her name in his said will. And whereas I have, since the decease of my said husband, purchased or become otherwise possessed of considerable real property: Now, therefore, I give and devise to John Cheese and Thomas Jeffries all and singular

my real estate whatsoever and wheresoever, upon and for the trusts, &c." And the testatrix then declared the trusts of such last-mentioned devise to be, that her said trustees should sell her said real estate, and that the proceeds of such sale should fall into and be considered as part of her residuary personal estate. The testatrix, then expressing her desire to execute the power
[*240] of appointment given *to her by the will of her husband, of the fourth part of his residuary real and personal estate, appointed the same to the trustees of her will, upon the trusts to which she had given her own residuary estate. The testatrix then bequeathed several legacies; and as to the residue of the said trust-moneys, she directed her trustees to divide the same into eight equal parts, seven of which she gave to her sister Althea Jeffries, and her nephew and niece Thomas and Althea Jeffries, and her nieces Barbara, Althea, Eliza, and Catherine Fletcher, and the remaining eighth share to trustees, upon trust for Mary Culsha, for her separate use, with remainder to her children.

The bill was filed by several of the residuary legatees under the will of the testatrix, who were also legatees, whose legacies were payable after her death, under the will of the husband, for the execution of the trusts of both wills. The heir-at-law of the testatrix, who was the eldest son of her eldest brother, the heir-at-law of the testator, and the new trustees and devisees in trust, the personal representatives of the testator and the testatrix, and the other parties interested in common with the plaintiffs, were defendants.

The cause came on upon further directions.

The principal question related to the effect of the will of the testatrix, with reference to the settled estates. The bill charged, that, in regard to the settled estates and hereditaments specifically devised by her will, the said John Cheese, Thomas Jeffries, and John Fletcher, the devisees in trust, and the three residuary legatees named in the will of the testator, were all dead at the time of the decease of the testatrix; and that, to such extent
[*241] as the devise in the will of the testatrix, of *the said settled estates and hereditaments to the uses declared by the will of the testator, failed or became incapable of taking effect,

the settled estates and hereditaments formed part of the residuary estate of the testatrix, devised by her said will.

Mr. *Kenyon Parker* and Mr. *J. T. Humphrey*, for the plaintiffs.

Mr. *Selwyn*, for the other residuary legatees under the will of the testatrix; and Mr. *Smale* for other parties.

No effect can be given to the language used by the testatrix in her will, with regard to the settled estates, for no uses of those estates were declared by the will of the husband. The husband's will operated upon his own estates, and not upon those of his wife. The will of the testatrix, so far as it professes to dispose of the settled estates to non-existing uses, is necessarily void: *Youde* v. *Jones*.(a) There is no doubt of the intention; but the question, in cases of construction, as expressed by Baron Parke in that case, is "not what the parties intended to have done by the instrument executed by them, but what the meaning of the words of the instrument is."(b) The devisees under the husband's will were, moreover, dead at the death of the testatrix; and the limitation in the husband's will to their executors, administrators, and assigns, would not prevent the gift by the will of the testatrix from lapsing: *Maybank* v. *Brookes*.(c) The settled estates, therefore, pass by the general devise to the residuary legatees, under the 25th *and 27th sections of [*242] the Wills Act.(d) [They also cited *Easum* v. *Appleford*.(e)]

Mr. *Hodgson*, for the defendant John Cheese.

The gift of the settled estates of the testatrix will take effect, as if the husband had in fact devised them by the words of his will. The death of the devisees before the testatrix does not affect the case; for it is not a devise to persons, but to uses. It

(a) 14 Sim. 131, 149; *S. C.* 13 M. & W. 534.
(b) 13 M. & W. 546.
(c) 1 Bro. C. C. 84.
(d) 7 Will. 4 & 1 Vict. c. 26.
(e) 10 Sim. 274; *S. C.* 5 My. & Cr. 56.

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substitutes the uses for the persons, which is in substance the same as naming other legatees: *Sibley* v. *Cook*.(a) There is no doubt of the intention of the testator to include the settled estates. The will was made some years before his death, the words of the will are sufficient to embrace the settled estates, and, if he had survived his wife, they would have passed by his will. The testatrix, then reciting the event by which the estates became hers, expresses her desire to fulfil her husband's wishes, and goes on to fulfil them, by making the objects of his bounty the objects of her own also. The testator brings the intention, and the testatrix the power. The effect of her expressions is to give a reflex operation to the testator's will, and to render it operative upon the three-fourths of the settled estates of which the testator intended to dispose. The meaning of the words of the devise in the will of the testatrix clearly is, that the settled estates shall go in conformity with her husband's intention, and that intention there is no difficulty in discovering, or in giving effect to.

Mr. *Lee* and Mr. *Lloyd*, for the heir-at-law of the testatrix.

[*243] —*The Court will not give an operation to the will which shall exclude the heir-at-law, without clear expressions or necessary implication to that effect. But these are not to be found in this case. The argument in favor of the devise of the settled estates to the uses of the husband's will fails, unless it can be shown that there is a cestui que use capable of taking under the gift. It is not enough to say there is a use. The claim of the residuary legatees is founded on the 25th section of the Wills Act; but that section enacts, that lapsed and void devises shall be included, "unless a contrary intention shall appear by the will." Here the contrary intention clearly appears, for the testatrix has expressly declared her intention to be, that three-fourths of the settled estates shall not, and one-fourth shall be taken by her residuary legatees.

[VICE-CHANCELLOR.—According to that argument, in no case

(a) 3 Atk. 572.

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of a void devise would the subject be included in the residuary devise, for in every such case a contrary intention would appear.]

The next of kin of the testatrix ought to be brought before the Court; for they are materially interested in this question. With regard to the one-fourth of the settled estates, the testatrix has not professed to execute her power. The Court will not infer that she had any intention to confirm the husband's will as to that fourth, the effect of which would be to make herself tenant for life, and her own next of kin purchasers. Whatever may be the decision with regard to the other three-fourths, the proceeds of the one-fourth of the settled estates are not disposed of, and are not comprised in the residuary devise: *Fitch* v. *Weber*,(a) *Amphlett* v. *Parke*,(b) *Humble* v. *Shore*,(c) in which *Cresswell* v. *Cheslyn*(d) was cited. [*244]

The VICE-CHANCELLOR, at the conclusion of the argument, suggested that a case should be prepared for the opinion of a Court of law. The counsel for the heir-at-law declined to ask for a case, and the counsel for the other parties desired to have the judgment of this Court.

VICE-CHANCELLOR:—I was desirous in this case that all the questions at law should be decided at law. But the parties have desired me to give my opinion.

The testatrix, having survived her husband the testator, gave certain of her estates "to, for, and upon such uses, trusts, ends, intents, and purposes, and under and subject to such charges, powers, provisoes, and agreements, as were in and by" the will of her husband "expressed, declared, and contained of and concerning the same." It was admitted in argument at the bar, that the husband's will contained no devise of the wife's estate, and in strictness, therefore, upon that assumption there was no

(a) 6 Hare, 145. (b) 2 Russ. & My. 221. (c) Infra, p. 247.
(d) 2 Eden, 123.

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declaration of uses, trusts, or purposes, to which the devise of the wife's estate by her will could be referred. Besides this, divers of the devisees of the estates devised by the will of the husband died before the wife: some of those were beneficial devisees, and others devisees in trust.

The question before me arose upon claims made by parties claiming the wife's estate under the uses, trusts, and pur-
[*245] poses declared in the husband's will of his own *estate.

The claims of these parties were rested upon the proposition, that the plain intention of the wife required that her will should be read as if she had devised her property to the uses, trusts, ends, intents, and purposes declared by the husband's will of his own property; and, if the intention of the wife were enough for me to act upon, I should probably have adopted that proposition, with its consequences. But the case of *Youde* v. *Jones*(*a*) too nearly resembles this case to justify me in doing so, without sending the case to law; and this the parties interested have declined asking me to do.

I agree with the argument, that the death of the trustees could not deprive the cestui que trusts of any interest they would have taken under the wife's will, if the trustees had survived her. But *Youde* v. *Jones*, if it governs this case, displaces the rights of those cestui que trusts upon a ground unconnected with the time when the trustees died.

The claims of the beneficial devisees represented by Mr. Hodgson, who died before the wife, would fail upon the same ground; and it was therefore gratuitously, though not extrajudicially, that in the course of the argument I said, that the wife's will must speak from her own death, and that no person who did not survive her could take under her will, even if the trusts of her will could be found in that of her husband.

After the argument of the case, it occurred to me that the import of the will of the husband might possibly be affected, and a meaning thereby given to the devise of the wife, by the principle affirmed in the case of *Jones* v. *Roe*.(*b*) I called the atten-

(*a*) 14 Sim. 131. (*b*) 3 T. R. 88.

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tion of counsel to that case, and although I do not, upon consideration, think that it affords any ground for [*246] altering my decision in this case, I will add, that my decision does not proceed upon any doubt in my mind as to the correctness of the decision in the case of *Jones* v. *Roe*. I may also observe, that the will of the husband, in this case, was made before the late statute.

The only question which remains, is that of costs. If the bill had been filed by the wife or her representative, to have an account taken of the estate of her husband, the costs of that suit would have come out of his estate, except the costs occasioned by the wife having improperly blended her husband's assets with her own, which the master by his report in this cause finds she did; and those costs would properly have been payable by the wife, or out of her estate.

The costs of a suit to administer the wife's estate would of course, come out of her own estate. In this case both estates have come to be administered in one suit, and the persons interested in the husband's estate have had the benefit of that administration; and it was said, that they ought, therefore, to bear a portion of the costs of the suit. To this it was answered, that the suit was rendered necessary by the will of the wife, and that, if she had not improperly blended the two estates, no account would have been necessary of the husband's estate. It is difficult, if not impossible, for the Court to do exact justice in such a case; for, in some degree, it is matter of speculation what would or might have been necessary in respect of the husband's estate, if no dispute had arisen respecting the wife's estate, and if the wife had not blended her husband's assets with her own. The wife's estate must clearly bear those costs which it would have had to bear, if the suit had not embraced *the husband's assets, and also the costs occasioned by blending the two together; and I believe I shall best consult the justice of the case by dealing with the costs as in a case in which the object of the suit is substantially to administer the wife's estate, of which the husband's estate is part, and in which the costs in the Master's office have been occasioned by a breach of duty [*247]

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on the part of the wife, and by charging the husband's estate with no costs, except the costs on further directions.

DECLARE, that the estates comprised in the indentures of the 15th and 16th April, 1790, and 2d and 3d August, 1797, and of which, under the uses of those settlements, Mary Woodhouse, the testatrix, having survived her husband, died seised, were not well devised by her to the uses of her husband's will, but that they formed part of her residuary estate devised by her will.

HUMBLE *v.* SHORE.

1847: March 12th, 13th and 16th.

A gift by a will, of one-sixth of the testatrix's residuary estate to S. W., revoked by a codicil, and the same sixth given to S. W. for life, with a direction, after her decease, to pay a legacy thereout, and that the remainder of such sixth should sink into the residue of her (the testatrix's) personal estate, and be disposed of accordingly:—

Held, that the remainder of the sixth share of the residue was not thereby given to the other residuary legatees, but was undisposed of.

THE testatrix, Lydia Shore, by her will, dated in 1835, devised and bequeathed her residuary real and personal estate in trust for sale, and directed her trustees to stand possessed of one sixth part of the moneys, in trust for her cousin Sarah Whittaker, widow, her executors, administrators, and assigns. By a codicil dated in February 1837, the testatrix directed that her trustees should stand possessed of one sixth part or share of the residue of the net moneys to arise and be produced as aforesaid, by her will given and bequeathed unto and in trust for her cousin [*248] Sarah Whittaker, her *executors, administrators, and assigns upon the trusts thereinafter mentioned; namely, upon trust to pay the interest, dividends, and annual proceeds thereof unto the said Sarah Whittaker during her life, as a separate and inalienable provision; and, after her decease, the testatrix directed that her trustees should stand and be possessed of, and interested in, the sum of 2000*l.*; part of the principal or capital of the same one sixth part or share, in trust for the Re-

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verend William Whittaker, the son and only surviving child of of the said Sarah Whittaker, his executors, administrators, and assigns; and the testatrix directed, that, notwithstanding the postponement of the payment of the aforesaid legacy, the same should be a vested interest in the said William Whittaker, immediately upon her decease; and also, that the remainder of the said one sixth part of the same trust money and premises should sink into the residue of her personal estate, and be disposed of accordingly. The testatrix made other codicils, the last of which was dated in July, 1838. She died in May, 1839. Sarah Whittaker died in the lifetime of the testatrix. The question was, whether the sixth share referred to, was by this form of expression given to the other residuary legatees, or whether it lapsed.

Mr. *Temple*, Mr. *Romilly*, Mr. *Hodgson*, Mr. *Wood*, Mr. *Lee*, Mr. *Rolt*, Mr. *Pole*, Mr. *Willcock*, Mr. *Bigg*, Mr. *Heathfield*, Mr. *Daniell*, Mr. *Freeling*, Mr. *Phillips*, Mr. *Robson*, and Mr. *Maule*, appeared for the different parties.

The cases cited on the argument were *Cresswell* v. *Cheslyn*,(a) and the recognition of its authority by the Lord Chancellor of Ireland (Sir Edward Sugden) in *Shaw* v. *M'Mahon*,(b) and by the Vice-Chancellor Knight *Bruce in *Harris* v. *Davis*,(c) and *Skrymsher* v. *Northcote*,(d) and *Evans* v. *Field*,(e) as opposed to the other cases. On the point of republication, *Guest* v. *Willasey*,(f) was also referred to. [*249]

The VICE-CHANCELLOR held, that the sixth share given by the will to Sarah Whittaker absolutely, and revoked by the codicil, except as to a life interest, was undisposed of, and that, so far as the same consisted of personal estate, it went to the next of kin, and, so far as it was real estate, to the heir-at-law.

Affirmed by the Lord Chancellor.

(a) 2 Eden, 123. (b) 4 D. & W. 438. (c) 1 Coll. 416.
(d) 1 Swanst. 566.
(e) Vice-Chancellor of England, May 3, 1839, 8 Law J. (N. S.) Chanc. 264.
(f) 2 Bing. 429; S. C., 4 Id. 614.

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DAVENPORT *v.* JAMES.

1847: Nov. 18th.

Where a mortgage is made to two for a sum of money, of which each had lent a portion, one of the mortgagees may file a bill of foreclosure, making the other mortgagee a defendant, and the plaintiff in such a suit is entitled to the usual decree of foreclosure, on default of payment of the whole mortgage debt, in the proportions due to the plaintiff and defendant respectively, together with their respective costs.

A MORTGAGE for a term of years was made to two persons as joint tenants, to secure 2500*l.*, of which it was alleged, and not denied, that 1500*l.* had been advanced by one, and 1000*l.* by the other of the mortgagees. The plaintiff Davenport, the mortgagee for 1500*l.*, filed his bill of foreclosure against the mortgagors, or parties entitled to the equity of redemption, making Clare, his co-mortgagee, a defendant, on the allegation that he refused to concur in the suit.

[*250] *Mr. *Romilly* and Mr. *W. M. James*, for the plaintiff.

Mr. *Wood*, for the defendant the co-mortgagee.

Mr. *Shapter*, for the defendants entitled to the equity of redemption, submitted, that the mortgagees ought to have concurred in the suit, or were, if they thought proper to divide, only entitled to one set of costs.

It was admitted, that both the mortgagees were necessary parties: *Lowe* v. *Morgan*,(*a*) *Montgomerie* v. *Marquis of Bath*,(*b*) *Palmer* v. *Earl of Carlisle*.(*c*) The cases of *Titley* v. *Davies*(*d*) and *Right* v. *Cuthell*(*e*) were also mentioned.

(*a*) 1 Bro. C. C. 368. (*b*) 3 Ves. 560. (*c*) 1 S. & S. 423.
(*d*) 2 Y. & C. C. C. 399; Vin. Abr. "Mort." F. pl. 19, 20; 2 Eq. Ca. Abr. 604; 2 Atk. 348.
(*e*) 5 East, 391.

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The VICE-CHANCELLOR held, that the mortgagees were not bound to join as plaintiffs in the foreclosure suit, and that the usual decree of foreclosure must be made on default of payment of the principal, interest, and costs of both mortgagees.

IT is ordered, that the Master do take an account of what is due to the plaintiff for principal, interest and costs, in respect of the sum of 1500*l.*, part of the sum of 2500*l.* on the mortgage security in the pleadings mentioned; and it is ordered &c., do take an account of what is due to the defendant David Clare for principal, interest and his costs of the suit, in respect of the sum of 1000*l.*, the remaining part of the said 2500*l.*, on the mortgage, &c., and &c. do tax the plaintiff and defendant David Clare their costs of this suit; and it is ordered, that the costs which the plaintiff shall pay to W. Llewellyn and D. J. Edwardes be added to his costs, and the Master to certify the amount; and, upon defendants D. H. James, W. Simons and *W. B. Cooper, they or any of them, &c., paying what shall be reported [*251] due to him for principal, interest and costs, and also the costs which the plaintiff shall so pay to the defendants W. Llewellyn and D. J. Edwardes as aforesaid, and to the said defendant David Clare what shall be reported due to him for principal, interest and costs, within six months after the Master shall have made his report, at such time &c., the plaintiff and David Clare to reconvey &c. But, in default of the said defendants, or any of them, paying unto plaintiff what &c., and to the defendant Clare what &c., by the time &c., the defendants to be foreclosed &c. —Reg. Lib., 1847.

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STAMPS *v.* THE BIRMINGHAM, WOLVERHAMPTON, AND STOUR VALLEY RAILWAY COMPANY.

1848: June 27th, 29th and 30th; July 3d, 4th and 8th.

A railway company, empowered to take lands for the purposes of the undertaking, is not restricted by the Lands Clauses Consolidation Act to one notice, but may, after a notice for taking certain lands, give a further notice for taking other lands within the prescribed limits,—such additional lands being necessary for the works.

On interlocutory applications, which are necessarily heard upon affidavits, the court does not dispense with the rule, that, on disputed points, the best evidence in the power of the parties must be given; and therefore, it is not sufficient for a party to state, upon affidavit, the purport and effect of a document which he has the means of producing.

The proceedings under the 85th section of the Lands Clauses Consolidation Act are not necessarily invalid because the award was signed on a day subsequent to the day on which the money was paid into court, and the bond given.

A defendant may state in his answer, and take issue upon, matters which happened after the bill was filed; but the court will not deal with the subject of the suit by interlocutory order founded upon matters which occur after the answer has been filed, and are not brought forward by amendment, by supplemental bill, or by supplemental answer.

THE railway which the Act empowered the Company to construct, was designed to pass by a tunnel under some houses belonging to the plaintiff; and after giving the proper notice for that purpose, the Company had taken and paid for the land required for the tunnel. The works were carried on by blasting, the effect of which was alleged to be injurious and dangerous to the houses of the plaintiff above the tunnel; and the plaintiff filed his bill to restrain the Company from proceeding with the construction of the tunnel so as to destroy, damage, weaken, or interfere with the plaintiff's houses, or their foundation; praying, also, that an account might be taken of the damage and injury which had been already sustained.

The bill was filed and the injunction granted in October, 1847. In February, 1848, the Company filed an answer, in which they stated their intention, by the exercise of their com-
[*252] pulsory powers, to become the purchasers of *the houses to which the injunction related. Notices were given in

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pursuance of this intention, and in May, 1848, valuers were appointed, the amount of the valuation paid into court, and a bond given under the 85th section of the Lands Clauses Consolidation Act.(*a*)

The Company, having thus taken steps to acquire the legal possession of the houses, moved to dissolve the injunction, and stay all further proceedings in the cause.

The *Solicitor-General*, and Mr. *Speed*, for the Company.

Mr. *Rolt*, and Mr. *Terrell*, for the plaintiff.

The motion was opposed on several grounds, one of which was, that the Company were not empowered, after having exercised their powers by taking the land necessary for the tunnel, to proceed a second time to take the surface of the same land; that it was against the spirit, and not according to the letter of the Lands Clauses Consolidation Act,(*b*) to take lands piecemeal: and that such a course would be prejudicial to the owner, and might be made the means of unfairly depreciating the value of his property. The Vice-Chancellor of England held, in *Simpson* v. *The Lancaster and Carlisle Railway Company*,(*c*) that the Companies "are required at once to state what land they want." The same construction was given to the compulsory powers by the House of Lords, in *Maule* v. *Moncrieffe*.(*d*)

Another objection was, that there was no sufficient *evidence of the valuation of the property having been [*253] made, in pursuance of the 59th, 60th, 61st, and 85th sections. The alleged purport and effect of the documents were stated upon the affidavits, but the valuation signed by the surveyor was not produced.

On these points the following is the judgment of the

VICE-CHANCELLOR:—I have felt no difficulty as to the right

(*a*) 8 Vict. c. 18. (*b*) 8 Vict. c. 18,. s 18. (*c*) 4 Railw. Cas. 633.
(*d*) 5 Bell, App. Cas. 351.

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of the Company, acting *bona fide*, to come a second time for more land than they demanded at first; but it must not be done capriciously. It has been said, that the Vice-Chancellor of England lays down generally, in the case of *The Lancaster and Carlisle Railway Company*,(*a*) that, giving a notice for land once, for ever exhausts the legal power which the Act of Parliament gives to the Company. The language of the judgment perhaps admits of another construction. *Maule* v. *Lord Moncrieffe*(*b*) does not apply. There was, in that case, power to make a certain dock, and to deviate to the extent of one hundred yards,—that is to say, to make a given dock at point A., or point B. They made their dock at point A., and they wanted to enlarge it by taking a part within the limits of deviation; and all that the House of Lords decided was, that, having once made their dock in the way they required, on one part of the land, they could not, upon the ground that they originally had a right to deviate, abandon what they had done, and say they would take that which was allowed for deviation, and add it to that which they had pre-
[*254] viously *taken. The Company know that the railway at the bottom of the cutting will be of a given width, that the banks must slope, and therefore that land of a certain width at the top must be taken; but after they have entered and made some progress with the cutting, it turns out that the soil is of a nature different from what they expected, and that, from some cause or other, they cannot make the cutting secure without inclining the banks more than they had contemplated. The Company are then obliged to come for a greater width of top, in order to make the slope greater. If the opinion said to be expressed by the Vice-Chancellor of England, in the Lancaster and Carlisle case, is to be taken as law, the power of the Company in such a case is exhausted, and the construction of the railway will be stopped, because the Company had not taken enough land at first. I was not surprised to find a case in which the point had arisen—the case of *Webb* v. *The Manchester and Leeds Railway Company*.(*c*) The Lord Chancellor there expressed no doubt

(*a*) 4 Railw. Cas. 625. (*b*) 5 Bell, App. Ca. 333. (*c*) 4 My. & Cr. 116.

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that they might come a second time. In the Lancaster and Carlisle case, the first notice was given for the purpose of the line, and the second for the purpose of the station; but I do not find anything to distinguish the two cases, if the second portion of land be necessary in order to make the railway. The parties must apply to the Lord Chancellor to alter my judgment upon that point, if it be wrong. The Company have a right to take the most beneficial mode of making their railway: they cannot make it without blasting. The plaintiff says, if you make it under my land, you will destroy my property. The Company assent to this, and say, "We will buy the property of you." This, I am clear, they have a right to do.

*As to the question of the production of the documents, the case is this: the plaintiff was entitled to the injunction at first, but the Company say, that by their subsequent acts they have removed the objection to their proceedings, and, having legally removed it, they now come to have the injunction dissolved. It is contended, that, without the production of the documents, the evidence of what has been done is insufficient. The question is one of great importance: I will inquire whether there has been, as it has been argued, any difference of practice. The view I have always taken is this—to see what, at the hearing of the cause, you will be required to prove regularly. The only difference on the interlocutory application is, that you cannot compel witnesses to attend, but must take the evidence by affidavit. The party is permitted to prove by affidavit what otherwise he must prove by interrogatories. Still, upon matters which are in contest, the best evidence must be given. The production of the document is better evidence than swearing to its effect. It is clear that the Court does not dispense with that which may be as well had by means of an affidavit as by interrogatories. That is the rule I have always acted upon. It may be open to a question, whether the Act of Parliament has not given a locality to the document, so that each party may go and get a verified copy, and so that it is not the document of one party more than of the other. [*255]

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On a subsequent day the Vice-Chancellor said, the document must be produced by the defendants. He could not find that there had been any contrary decision or practice.

Upon the production of the valuation of the surveyor, it appeared to be dated on the 12th of June, the money
[*256] having been paid into Court, and the bond given on the 10th of June. It was argued for the plaintiff, that a payment could not be so made within the 85th section of the Act, and that the proceedings were, therefore, nugatory.

VICE-CHANCELLOR:—It was contended, on the part of the plaintiff, that the award and payment in this case could not possibly be the course mentioned in the Act; and, I confess, I was inclined to take that view of it. But, if I determined that in no possible case can it be good, I might be going to this extreme length,—I might decide that it was not good in a case where the valuation is made, and the award is drawn up and ready to be signed, and the party comes from Birmingham to London to pay the money into court, but, by some accident, the award happens not to be signed till the day after the money has been paid in. I cannot find any words in the Act so stringent as to oblige me to decide, in that case, that the Court would be bound to hold the money was not properly paid in. If such a payment may possibly be good, I think I shall not do wrong in giving the parties leave to explain the dates, and show me, if they can, that the amount had been fairly and properly determined, and that it was by some accident the award was not signed till after the money was paid in. If I refuse to do so, they will take the money out of Court, and pay it in again under the award, and then will be in a position to state the circumstances.

The case was argued upon further affidavits, and also with reference to the answer of the Company.

[*257] *VICE-CHANCELLOR:—I regret very much that I am obliged to dispose of the motion upon a technical

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ground. I will not say that I should not, as the case is now before me, have been fully prepared to dissolve the injunction, if I had felt myself at liberty to grant the second part of the motion, and stay all proceedings. The question is, whether I have a right to do so now, and, if I cannot, whether I can properly grant the first part of the motion. Now, I will first suppose that I cannot stay the proceedings; and, if that be so, is it proper, in this stage of the cause, to dissolve the injunction upon this application?

If the answer had not been filed, I should have had no doubt whatever that the motion to dissolve the injunction was proper upon the merits, and would succeed in this stage of the cause. I take it to be clearly settled, that, where an answer is filed, the defendant may state the facts as they stand at the time of the answer. Take, for example, the case of a person against whom a bill is filed, and who, before he files his answer, obtains a release from the plaintiff: there is no doubt in that case that he may in his answer state the fact of the release which existed, although, at the time the bill was filed, the plaintiff might have had a good claim. In *Knight* v. *Matthews*,(*a*) Sir Thomas Plumer decided, that a plaintiff might introduce, by amendment, into the original bill matter that occurred after the bill was filed, and an answer had been put in, so as to state the case as it then stood. The difficulty I feel in the present case is, that the answer has been filed, and the matter, upon *which the [*258] defendants seek to have the injunction dissolved, is matter which has happened since the answer. Now, if I can stay the proceedings in the suit, no issue will be joined, and there will be no trial to be had; but if, as I now suppose, I cannot stay the proceedings in the suit, the consequence will be, that the defendants are in this position,—having filed their answer, they cannot in the original suit have the question tried on which their right to dissolve the injunction depends. If the defendants should obtain from the Court, by indulgence, leave to file a supplemental answer, or if, as Lord Redesdale suggests,

(*a*) 1 Madd. 567.

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the Court may deal with the matter occurring after answer, and in discharge of the right of suit if such matter be brought forward by supplemental bill,—issue may be joined upon the point. But, if such a new issue be not raised, and I should dissolve the injunction on the grounds that have happened since the answer was filed, and do not stay the proceedings, the plaintiff, as far as I see, may go on with the cause as it now stands, and bring it to a hearing upon the matters disclosed in the pleadings as they stand. I do not, therefore, see how I can make the order for dissolving the injunction in this suit, upon a ground which is not in issue, and which, unless by special favor of the Court in this suit, or in some suit not yet in existence, can never be put in issue. The injunction, it is true, is granted until cause is shown or until further order. The meaning of that is, until cause is shown upon a day named, or until further order of the Court to be made before that day. It appears to me that I cannot get over the technical difficulty, unless I am in a condition to grant the second part of the motion, which is, to stay all proceedings in the cause.

The question then is, whether I am in a condition to stay the proceedings. It appears to me I am not. The [*259] *Court, in modern times, has been very much inclined, and usefully so, to stay proceedings wherever the defendant offers to give the plaintiff all he asks by the suit, that is, all matters in issue in the suit. The defendants here do not offer to give the plaintiff what he asks, which is, to have the property valued,—not under the Act of Parliament, but in a different way. If the defendants, instead of meeting the plaintiff upon these terms, rely on what has been done under the compulsory powers of the Act, the plaintiff has a right to say he will have the validity of those proceedings, as a defence to his suit, tried in the cause.

I must refuse the motion.

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1849.—Hutton v. The London and South Western Railway Co.

HUTTON *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

1849: April 18th and 28th.

In the case of damage to a party whose lands are not entered upon, but are injuriously affected by the exercise of the powers of a railway company upon their own lands, or upon the lands of another party, and for which damage compensation is required to be made by section 6 of the Railway Clauses Consolidation Act, (8 Vict. c. 20,) it is not unlawful for the company to execute the works which occasion the damage, before the amount of compensation for the same is ascertained, paid or deposited.

THE plaintiff was the lessee for years and occupier of a corn-mill, and of a mill-dam and reservoir at Battersea, supplied by the tidal waters of the river Thames. On the 5th of August, 1837, by an agreement of that date, the London and South Western Railway Company contracted with the plaintiff for the purchase of part of the land forming the mill-dam or reservoir, consisting of about two roods, for the purpose of carrying the railway over the same by a bridge. The price agreed upon was 950*l.*, which sum was to include the loss of land and water, the increased expense of clearing the mill-dam, general injury by severance, and all consequential damages, except certain matters thereinafter specified. The agreement contained a proviso, to the effect that *nothing in the agreement contained should [*260] give to the Company any right to stop up the mill-dam, or to impede the flowing of the water into the same, other than for the purpose of erecting the intended bridge, and maintaining and repairing the same; but that the mill-dam, and the use and occupation thereof, was to be retained by the plaintiff, and to be preserved to him by the Company, in such and the same manner as it would have been held by him under the lease thereof, if the same had not been taken by the Company, except as respected the building or repairing the bridge; nor was anything therein contained to prevent the plaintiff from having the free use and right of way along and over, as well the then present banks of

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the mill-dam to be taken by the Company, as of the then intended new bank then to be made by them.

The 950*l.* was paid. The land purchased by the Company was conveyed to them, and the railroad-bridge was completed over the reservoir.

In 1847, the Company obtained a further Act,(*a*) enabling them to widen and improve part of the railway, including the part carried over the reservoir. The Company, in pursuance of the latter Act, proceeded to widen the bridge. The plaintiff thereupon filed his bill, alleging that the effect of the alteration would be, to cause a further accumulation of mud, and a great loss of water, and to impede the flow of the tide into the mill-dam, thereby occasioning inconvenience to the plaintiff in the use and occupation of the mill. The bill alleged, that the Company had never paid or compensated the plaintiff for the loss of any land [*261] or water, other than *that caused by the erection of the first bridge. The bill prayed that the Company might be restrained by injunction from widening or enlarging the bridge, or the piers or abutments, or from interfering with the flow of the tide into the mill-dam, or with the plaintiff's right of way and access along the banks of the dam and reservoir, until the purchase-money or compensation to be paid to the plaintiff in respect of the diminution of water, and the loss and damage the plaintiff would sustain by the works, had been ascertained and paid, according to the provisions of the Lands Clauses Consolidation Act, 1845,(*b*) and the Company's special Act of 1847, or as the Court should direct.

The plaintiff having moved for the injunction, the defendants desired time to answer the affidavits, and the motion stood over, upon their undertaking to stay the works. Before the motion was brought on again, the Company proceeded under the 85th section of the Lands Clauses Consolidation Act, by procuring the appointment of a surveyor, who certified the damage at 42*l.*, which the Company paid into Court, giving the bond required by

(*a*) The London and South Western Railway Company's Widening and York Road Station Enlargement Act, 1847.

(*b*) 8 Vict. c. 18.

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the Act. The damages were afterwards assessed by a jury at 200*l.* The only remaining question was the costs of the suit, which depended upon the question of the right of the plaintiff to the injunction when the bill was filed. This question was by consent argued upon the facts appearing by the affidavits.

The *Solicitor-General* and Mr. *J. H. Law*, for the plaintiff, argued, that the course which the Company had taken, after the motion was made, in proceeding under the 85th section of the Lands Clauses Consolidation *Act, was an admission that the previous proceedings had been unlawful. [*262] They argued also, that the 84th section was explicit on the point.

Mr. *Wood* and Mr. *Wickens*, for the Company, contended that the distinction was between the cases where lands were taken by the Railway Company, and where they were not taken, but injuriously affected by works done by the Company upon their own land: *Thicknesse* v. *The Lancaster Canal Company*,(*a*) *Lister* v. *Lobley*.(*b*) In the case where the damages are the consequence of works done on the land of the Company, there is indeed an obligation to compensate, but not to pay the compensation before the works are done. Not only may the damage be unexpected, but it may arise from necessary variations in the works, in the progress of their execution.

VICE-CHANCELLOR:—The plaintiff does not, by his bill in this case, dispute the right of the Company to widen the bridge in the way proposed, nor does he suggest that the manner in which the Company had proceeded to exercise the powers of the Act is in itself an excess of those powers; but the plaintiff insists that the Company had no right to do this, until they had paid the purchase-money or compensation agreed or awarded to be paid for his interest in the property injuriously affected by the execution of the works.

I will first consider the case independently of the proviso

(*a*) 4 M. & W. 472. (*b*) 7 A. & E. 124.

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[*263] in the agreement of the 5th of August, 1837, and *independently of everything which has taken place since the bill was filed, and confine myself to the inquiry, whether the plaintiff is right in contending that the Company could not lawfully proceed with their works for widening the bridge, until they had paid to the plaintiff, or ascertained and deposited, in the manner required by the Act,(a) the amount of compensation payable in respect of the damage from the execution of the works.

In answering this inquiry, I take it for granted, (for it is sworn by the defendants, and not denied,) that the works they proposed to do, in widening the bridge, and all they had done preparatory to it at the time the bill was filed, was upon the land which they purchased and paid for, under the agreement of the 5th of August, 1837, and which was afterwards conveyed to them; and they have not entered upon, and do not purpose entering upon, any part of the plaintiff's land. The case, therefore, is not one of the Company taking possession of the plaintiff's land before it is paid for, but of the Company doing work upon land already purchased and paid for in 1837, that is, upon land of their own, which works might injuriously affect the plaintiff's interests in the mill and reservoir; and the question I have to answer is, whether it was unlawful in the Company to commence their works before they took steps to ascertain and pay the amount of damage to the mill-dam and reservoir. The question must be answered by the statutes of the 8 Vict. c. 18, and the 8 Vict. c. 20.

In the case of purchasing land, the first Act is explicit. By section 84 of the 8 Vict. c. 18, the price is to be paid be-
[*264] fore entry except entries for certain preliminary *purposes, and in certain special cases provided by the Act; and damages directly consequent upon the purchase, and which the Act says are to be ascertained at the same time, may stand in the same position; but the case of damage to one person, consequential upon the exercise of the powers of the Company upon their own land or upon the land of other persons not complaining, may stand differently. Such damages are given, by the 8

(a) 8 Vict. c. 18, s. 85.

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Vict. c. 20. By that Act(a) the Company is to make to the owners, occupiers, and other parties interested in any lands injuriously affected by the construction of the railway, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise of their powers as regards such lands; and the amount of such compensation, except where otherwise provided by that Act, or the special Act of the Company, is to be ascertained and determined in the manner provided by the Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; but nothing is said as to the time when such compensation is to be paid. Upon this question, the right of the plaintiff to the injunction sought by his bill must have depended, and the question must be determined by the construction of the Act.

In *Lister* v. *Lobley*,(b) a similar question came before the Court of Queen's Bench. Lord Denman pressed the parties to take the opinion of the Court upon a case. The parties, however, could not agree upon a case. The unanimous opinion of the Court was, that it was not unlawful for the trustees of the road to commence works within their powers, which might be attended *with damage to others, before making compensation [*265] for such expected damage. That case is an authority in point; and the result of much inquiry has not led me to think the decision unsound. The ground upon which the Court went in that case, was the impracticability, in many cases, of knowing whether damage will be sustained or not, and of measuring it if it were certain. If the 8 & 9 Vict. c. 20, be carefully examined, it will be found, that there are many cases of damage contemplated, to which the observations of the Court of Queen's Bench apply with great force. I do not, however, mean to say more in the present case than this,—that, upon the authority of the case cited, I think the acts done by the Company at the time the bill was

(a) Sect. 6. (b) 7 Ad. & E. 124.

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filed were not unlawful; and, assuming that, there was no ground for the interference of this Court.

It was said, however, that the proviso in the lease altered the case. I cannot accede to that argument.

Assuming that the distinction is well founded, between an entry by the Company upon the lands of a stranger, and damage to the property of a stranger, consequential upon the lawful acts of the Company upon their own land,—assuming this, the plaintiff's argument must be, that the Company is to be considered and treated, for the present purpose, as entering *de novo* upon the plaintiff's land. I cannot apprehend the ground of such an argument. The object of the provision is plain. The possession and ownership of the land purchased by the Company, in August 1837, might possibly have given them the right or power to interfere with the mill-dam and water for other purposes than those of erecting, repairing, and maintaining the bridge. The agreement might also have interfered with the plaintiff's use [*266] and occupation of the mill-dam, and his right *of way over and along the banks of the reservoir; and therefore, the proviso that the agreement should not give the Company any right to stop up the mill-dam or impede the flowing of the water, other than for the purposes therein mentioned, and that the plaintiff should have the right of way over the then existing banks and the new bank, might well have been intended to guard against such consequences. But the right which the Company claims to widen the bridge is not in any respect derived from the agreement of August, 1837: it is derived from the Act of Parliament, of 1847. The Railway Clauses Act entitles the plaintiiff to compensation for damages sustained by him, by reason of the exercise of the Company's powers; but in estimating those damages, the Company must be considered and and treated as owners in possession of the land they purchased of the plaintiff in 1837. There is nothing in the proviso inconsistent with that. The plaintiff's argument, if carried out, would require the Company to pay a second time for the land purchased in August, 1837.

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*JONES *v.* HOW. [*267]

1848: March 21st and 22d; Dec. 16th, 13th and 22d. 1849: Jan. 11th. 1850: Feb. 13th and 16th.

A father, upon the marriage of his daughter, covenanted with the husband, his executors, &c., by deed or will to give, leave and bequeath unto his (the covenantor's) daughter an equal share with his other children of all the real and personal estate of which he should die seised or possessed. The daughter died in the lifetime of the father, and the father, having made some disposition of property in favor of a son in his lifetime, by his will devised and bequeathed his real and personal estate for the benefit of his widow and surviving daughters:—*Held*, by the Court of Common Pleas, and by this court concurring in the certificate,—that the husband and covenantee had not, under the circumstances, any good cause of action against the executor of the father; and that, if the father had died possessed of no personal estate, the husband could not have recovered any substantial damages in such action.

In a suit by the administratrix of a deceased child, claiming, under a covenant by the father, an equal share with his other children of his real and personal estate, against his devisees and executors, and, for that purpose, praying that his residuary estate might be ascertained, the suit not being framed as a creditor's suit,—the residuary legatees under the will of the father are necessary parties.

Where the suit involves the administration of the estate, and distribution of the residue the devisees in trust do not, under the 30th order of August, 1841, sufficiently represent the persons beneficially interested in the estate.

BY an indenture of settlement, dated the 8th of April, 1826, made previous to the marriage of the plaintiff and Mary his wife, the testator, William Way, the father of Mary, the wife, entered into a covenant, in the following words: "And this indenture lastly witnesseth, that, in consideration of the said intended marriage, and also in consideration of the settlement hereby made by the said Frederick Jones, he the said William Way, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, grant, and agree, with and to the said Frederick Jones, his executors, administrators, and assigns, that he the said William Way shall and will, by deed or writing, or by his last will and testament, give, leave, and bequeath unto the said Mary Way, one full equal eighth part or share, or such other part as shall be an equal share, with all and each of his children

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and child, of all estates, moneys, real and personal estate, of which the said William Way shall die seised or possessed."

William Way had eight children at the date of the settlement. Two of such children died without issue, in the lifetime of Mary the wife of the plaintiff; leaving her one of the six surviving children.

In December, 1837, William Way, the testator, en-
[*268] tered *into an agreement with his son W. W. Way, whereby the stock in trade, fixtures, and utensils of the business of maltsters, theretofore carried on in the names of the father and son, were delivered up to the latter, he giving his note of hand for 2000*l.*, the value of the same, bearing interest at 5*l.* per cent. during the life of the father; and it was agreed that the executors of the father were not to claim the amount of the note, but the same was to be accepted by the son as a gift.

Mary, the wife of the plaintiff, died in February, 1843.

William Way died in July, 1846, leaving one son and four daughters, and having by his will, dated in April, 1843, and by a codicil, dated in November, 1844, devised and bequeathed his real and personal estate to the defendants Thomas How and Alfred Mew, upon trusts for sale of such parts thereof as did not consist of moneys, and for the application of the same for the benefit of his widow and daughters.

The plaintiff, alleging that Mary his late wife had devised and bequeathed to him all her right, title, and interest under the covenant, and that he had obtained letters of administration of her estate with the will annexed, filed his bill against the executors and devisees in trust, praying an account of the real and personal estate of which the testator was seised or possessed at his death, and of the reversionary shares, settlements, and post obit bonds and obligations given by the testator to any of his children in his lifetime; that the share and interest of the plaintiff under the covenant might be ascertained and conveyed, paid or transferred to him; or, if the same had been converted, that the defendants might be decreed to pay him the
[*269] *value thereof; and that an account might be taken of

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the real and personal estate of the testator, and the residue thereof ascertained, and the same, or a sufficient part thereof, secured to answer the claims of the plaintiff under the covenant.

The defendants by their answer admitted, that William Way did not by any deed or writing, in his lifetime, perform his said covenant, and that he had not given to Mary, the deceased wife of the plaintiff, or to the plaintiff, any part or share of or in his (William Way's) real or personal estate. The defendants submitted, that the gift and bequest covenanted to be made, were only to take effect in the event of Mary, the daughter, being alive at the time of the decease of the testator, and that Mary was entitled to no more than a life estate or interest in the property referred to; that, even if the covenant did not fail of effect by the death of Mary in the lifetime of the testator, still the plaintiff was not interested in the real estate of the testator, inasmuch as any share or interest of Mary therein, upon her death, intestate as to the same, became vested in William Way, the testator, her heir-at-law and customary heir, and the same passed to the defendants by his will, upon the trusts thereof; and, with regard to the personal estate of the testator, the defendants said that the same was insufficient for the payment of his debts.

The defendants also submitted, by their answer, that the four daughters, the residuary legatees of the testator, were necessary parties to the suit. Upon this objection the cause was set down, under the 39th Order of August, 1841.

Mr. *Haig*, for the bill, argued, that, as to the personal estate, the executors were the only necessary parties *to a suit for the recovery of moneys payable thereout: [*270] *Brown* v. *Dowthwaite*;(a) and, with regard to the real estate, the defendants were the devisees with immediate power of sale: *Savory* v. *Barber*.(b) In *Cox* v. *Barnard*,(c) the only ground for holding the case not to be within the 30th Order of

(a) 1 Madd. 446. (b) 4 Hare, 125. (c) 5 Id. 253.

August, 1841, was, that the power of sale did not come into operation until the death of the tenant for life.

[The VICE-CHANCELLOR.—In that case my attention could not have been called to the fact that the suit was for the distribution of the estate.]

This is not in fact a suit for the administration of the estate; it is a suit for the specific performance of the covenant, to which the account, if necessary, is only incidental.

Mr. *Haldane*, for the defendants, contended, that, the suit, being brought to recover an aliquot share of the real and personal estate of the testator, necessarily involved the administration of that estate, and was not a suit for a debt or damages: *Wilton* v. *Jones*,(a) *Barkley* v. *Lord Reay*.(b) The case of *Ward* v. *Bassett*,(c) and *Miller* v. *Huddlestone*,(d) there cited, were also mentioned.

The VICE-CHANCELLOR said, that he had no doubt the residuary legatees under the will were necessary parties. The testator had covenanted to leave or give to the plaintiff's late wife an equal share with his other children of all the real and [*271] personal estate of which he *should die possessed. The plaintiff claiming under the covenant might have brought his action at law for such rights as the covenant gave him; but he had filed his bill for an account, and a declaration that he was entitled to a conveyance and assignment of an aliquot share of the real and personal estate of the testator, or of the value thereof if converted. In a suit framed as this is, it is impossible to dispense with the presence of the other parties interested in the distribution of the residuary estate.

The bill was amended and framed as a creditors' suit. The amended bill prayed a declaration that the plaintiff was entitled

(a) 2 Y. & C. C. C. 244 (b) 2 Hare, 306. (c) 5 Id. 179.
(d) 13 Sim. 467.

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to stand as a creditor on the estate of the testator under the covenant for the amount of the largest share of his said children in his real and personal estate; and that, to ascertain what was due to the plaintiff under the said covenant, an account might be taken of the shares of the children of the testator in the real and personal estate of which the testator died seised and possessed whether derived under the will, or by means of any reversionary settlements, or post obit or other obligations dependent on the life estate or other interest of the testator, or payable after his decease, and whether given to one or more of his said children; and that if the defendants should not admit assets to pay what was due to the plaintiff under the covenant, the usual accounts might be taken of the real and personal estate of the testator come to their hands, and of their application thereof; and that the same might be applied to answer the plaintiff's claim and interest in a course of administration.

Mr. *Wood* and Mr. *Haig*, for the plaintiff. [*272]

First, the covenant is plainly broken; the testator did not do that which he had, by the covenant, bound himself to do: Secondly, Mary Way could not have recovered any specific property under the covenant. *Eaton* v. *Butter*,(a) *Naylor* v. *Wetherell*.(b) It sounds in damages only, and such damages the husband is entitled to as administrator: *Fremoult* v. *Dedire*,(c) *Wade* v. *Paget*.(d) Thirdly, the provision that the share to be given to Mary shall be equal to that of "each" of his other children, entitles her to be placed on a footing of equality with the most favored child; or, if this be not so, she was, at least, entitled to the value of one sixth of the estate. Lastly, in the computation of the amount of the estate, property, which the testator parted with in his lifetime, reserving to himself a life interest, must be treated as part of his estate at his death: *Turner* v. *Jennings*,(e) *Jones* v. *Martin*,(f) *Logan* v. *Weinholt*,(g) *Fortescue* v. *Hennah*,(h) *Tompkyns* v. *Ladbroke*.(i)

(a) Palmer, 552. (b) 4 Sim. 114. (c) 1 P. Wms. 428.
(d) 1 Bro. C. C. C. 363. (e) 2 Vern. 612.
(f) Note to *Randal* v. *Willis*, 5 Ves. 266; *S. C.*, 3 Anst. 882.
(g) 7 Bligh, 1. (h) 19 Ves. 67. (i) 2 Ves. 591.

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The *Solicitor-General* and Mr. *Haldane*, for the defendants.

The suit which is now framed as a creditors' suit, (not on behalf of the plaintiff and all other creditors, but for his own debt,) is in substance open to the same difficulties as before; for it is clear that the surviving daughters of the testator are materially interested in protecting their shares in the residuary estate from being applied in satisfaction of the claim made on behalf of the estate of their deceased sister. The suit is for a [*278] *legal demand, and therefore cannot be established without a trial at law. There is not, however, sufficient ground for directing a trial at law. It is not in dispute that the personal estate was insufficient for the payment of the debts of the testator, and this would be the case, even if the alleged advancement to the son was brought into the account; and the plaintiff has no beneficial interest in the performance of the covenant. The testator, William Way, was himself the heir-at-law of Mary Way, and her real estate is vested in the defendants, his devisees.

The VICE-CHANCELLOR directed a case for the opinion of the Court of Common Pleas on the following questions:

First, whether Frederick Jones has, under the circumstances, any good cause of action against the executors of Willaim Way; and, if so, secondly, whether, if William Way had died possessed of no personal estate, and seised only of the copyhold estate above mentioned, Frederick Jones could have recovered any substantial damages in such action.

The certificate of the Court of Common Pleas was—

First that Frederick Jones has not any good cause of action. Secondly, that, in the event supposed, Frederick Jones could not have recovered any substantial damages in such action.

On the equity reserved,

Mr. *Wood*, and Mr. *Haig*, for the plaintiff, said, that the

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Court of law had proceeded upon *Laughter's case*,(a) *and [*274] that great stress had been laid in the argument upon the fact that the words of the covenant were "give, leave, and bequeath," and not "or;" that *Laughter's case* was decided on the ground that the condition had become impossible; and that, in the subsequent case of *Studholme* v. *Mandell*,(b) the rule laid down in *Laughter's case* was said to be incorrectly reported. Under such circumstances, and as the Court of Common Pleas had given no reasons for their certificate, the plaintiff asked that a case might be sent for the opinion of another Court of law.

The *Solicitor-General* and Mr. *Haldane*, for the defendants.

VICE-CHANCELLOR:—In this cause I directed a case for the opinion of the Court of Common Pleas, upon the construction of a covenant which had become the subject of litigation between the parties. By this covenant (I will assume this construction, as being most favorable to the covenantee) the covenantor bound himself, by some act *inter vivos*, or by will, to leave his daughter the wife of the covenantee a certain provision. No act *inter vivos* was done by the covenantor, nor did his will contain any provision for her. The lady died in the lifetime of the covenantor. The circumstance that the covenantor had made no provision for the lady by his will was, I understand, considered immaterial, upon the ground that any provision by will would have lapsed, by the death of the lady in the lifetime of the covenantor.

The case has been argued before three of the judges, *who have certified that there had been no breach of [*275] covenant by the covenantor entitling the covenantee to recover damages against his estate. The question before me is, whether I should confirm that certificate, or send a case for the opinion of another Court. The practice of this Court in such cases, I understand to be, to adopt the certificate, unless the Court itself is dissatisfied with the conclusion involved in the certificate. In this case I am not assisted by knowing the reasons of the

(a) 5 Rep. 21. (b) 1 Ld. Raym. 289.

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judges of the Court of Common Pleas; but I understand from counsel that they considered the case by analogy to the reasoning of the Court in *Laughter's case.*(a) The covenantor in this case has reserved to himself the privilege of not making the stipulated provision during his life, and the provision by will it is said, has failed, not by his act or omission, but by the default of the legatee in his lifetime.

There cannot, I think, be any doubt that the intention of the parties is disappointed by this decision; where a parent, on the marriage of a child, covenants to make for that child a provision, by deed or will, it cannot be doubted that the provision is intended to be absolute, and that the mode of making it alone is intended to be left to the discretion of the covenantor. And a doubt crossed my mind of this nature:—If the will of the covenantor had contained a provision in favor of the lady, and she had left issue living at her death, the new Will Act would have prevented a lapse; and a doubt occurred to me whether the covenantor might not have made a will so as to have preserved to the lady the benefit of the covenant, notwithstanding her death in his lifetime—whether, in fact, he might not, by will, have done for her (dying without issue) that which the Will Act would [*276] have done for her if she had *left issue living at her death. I do not know whether this point was suggested in argument before the Court of Common Pleas; but I do not feel such confidence in the point as to make it proper to send the case a second time to law. I shall confirm the certificate.

Bill dismissed, with costs.

(a) 5 Rep. 21.

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WHITE *v.* PEARCE.

1849: July 14th.

The solicitor of the plaintiff in a foreclosure suit, in which a decree for sale before the Master was made by consent, prosecuted the suit to the settlement of the particulars and conditions, and appointment of the day of sale, when the plaintiff and the defendant, (by his solicitor) having notice of the claim of the plaintiff's solicitor for the costs of the suit, compromised the suit on the terms of paying the plaintiff a certain sum in discharge of the debt and costs, part of which sum was immediately paid to the plaintiff. Upon the petition of the plaintiff's solicitor, the court ordered the costs of the plaintiff's solicitor in the suit to be taxed, and paid by the plaintiff and defendant, or one of them.

AT the hearing of a foreclosure suit, a decree was made for payment by the defendant to the plaintiff of the principal, interest, and costs, within six months after the Master's report; and by consent, in default of such payment, that the mortgaged estate should be sold with the approbation of the Master, and the purchase-money paid into court. The Master reported the amount of the debt and interest to be 243*l.* 10*s.* 4*d.*, and the costs 117*l.* 15*s.* 11*d.* Default was made, and the particulars and conditions of sale were carried in and approved by the Master, and the sale appointed and advertised to take place on the 2nd of June, 1849. The solicitor of the plaintiff having reason to suppose that an intention to compromise the suit was entertained by the plaintiff and defendant, gave notice to the defendant, and also to his solicitors, of his claim (as solicitor of the plaintiff in the cause) for the costs of the suit. The plaintiff and the solicitors of the defendant, acting on the behalf of the latter, afterwards agreed to settle the mortgage debt and the suit for a sum of 300*l.*, to be paid by the defendant to the plaintiff; 200*l.* of which was then paid, and 100*l.* retained in the hands of the defendant's solicitors, and the sale was countermanded.

*The solicitor of the plaintiff, by petition prayed that [*277] the plaintiff or the defendant might be ordered to pay the petitioner his costs out of any moneys paid, or to be paid, to the plaintiff in respect of the debt, or debt and costs, the subject of the suit; and if it should appear that the defendant's solicitors

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had received from or on behalf of the defendant, any moneys in respect of the amount of the debt and costs, for the purpose of settling the plaintiff's claim, that the defendant's solicitors might be ordered to pay the petitioners their costs thereout, so far as such moneys should extend.

The *Solicitor-General* and Mr. *Hare*, for the petition, cited *Ex parte Bryant*,(*a*) *Welsh* v. *Hole*,(*b*) and *Read* v. *Dupper*.(*c*)

Mr. *J. H. Palmer*, for the defendant and his solicitors, opposed the petition, and contended, that having compromised the suit, as they were entitled to do, without any collusion with the plaintiff, or without any purpose of defrauding the petitioner, they were under no liability to the latter. In an *Anonymous* case,(*d*) Lord Hardwicke, on a similar claim by a clerk in court, said, that the lien "does not extend to that degree as to prevent the client fairly and honestly from making an end with his adversary;" and he gave effect to the lien in that case, solely on the ground that the release was voluntary, without anything being paid.

The plaintiff did not appear.

[*278] *VICE-CHANCELLOR:—The petitioner has undoubtedly a lien for his costs upon whatever has been received or paid for compromising the suit. The Court does not, however, allow the lien to stand in the way of an amicable arrangement. There is nothing improper in the compromise; but, if the defendant, not being under any pressure, except that which was the consequence of the decree, pays the debt of the plaintiff, with notice of his solicitor's lien, the question then is, whether the payment is or not made by the defendant in his own wrong. In *Welsh* v. *Hole*, Lord Mansfield puts the case of the assignment of a chose in action, which, in legal strictness, is not effectual, but still he says, as against the right of the assignee, the debtor,

(*a*) 1 Madd. 49. (*b*) Dougl. 238. (*c*) 6 T. R. 361. (*d*) 2 Ves. 25.

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after notice, could not in equity discharge himself by a payment to the principal.[1] The present is certainly not a weaker case. The defendant was asked to pay the money to the petitioner, and notice was given to him of the petitioner's lien for the costs of the suit. The estate would have been sold, and the money paid into Court, if it had not been for this agreement between the plaintiff and defendant. The agreement come to appears to be a very proper one, and I have no doubt that it was made *bona fide;* but I think the defendant, in the circumstances of the case, has paid the money in his own wrong, and that the petitioner has a right to proceed either against the plaintiff or defendant.

The petitioner did not press for the order against the defendant's solicitors, and the order referred it to the Master to tax the costs of the plaintiff, not already taxed, and the costs of the petitioners of the petition, (the first-mentioned costs to be taxed as between solicitor and client) and directed the plaintiff and defendant, or one of them, to pay the petitioner the amount of *such costs when taxed, and also the 117*l.* 15*s.* 11*d.*, [*279] the costs of the plaintiff already taxed, (not exceeding in the whole the sum of 300*l.*, paid, or agreed to be paid to the plaintiff by the defendant or his solicitors, in respect of the matter in this suit) within fourteen days from the service of the order as to the costs taxed, and within the same time from service of the certificate of taxation as to the costs then directed to be taxed.

[1] The court will protect the attorney's lien for costs to the same intent as they would the rights of an assignee. *Bradt* v. *Koon*, 4 Cow. Rep. 416. That an attorney has a lien on a judgment recovered by his client for his costs, and if the defendant, after notice from the attorney, pay the amount of the judgment to the plaintiff without satisfying the attorney's costs, it is in his own wrong, and he is liable to the attorney for the amount of his bill. *Pinder* v. *Morris*, 3 Caines' Rep. 165; *Ten Broeck* v. *De Witt*, 10 Wend. Rep. 617; *Martin* v. *Hawks*, 15 Johns. Rep. 405; *Power* v. *Kent*, 1 Cow. Rep. 172; *The People* v. *New York Common Pleas*, 13 Wend. 649; *Wilkins* v. *Batterman*, 4 Barb. S. C. Rep. 47; *Talcott* v. *Bronson*, 4 Paige's Ch. Rep. 501.

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GREEN *v.* BRIGGS.

1849: July 14th.

The costs of more than two counsel disallowed in taxation between party and party, notwithstanding the third counsel was retained after the counsel by whom the pleadings had been drawn had been called within the bar.

In taxation between party and party, it is not the practice to allow the common retaining fee to counsel.

Before the 120th order of May, 1845, the expense of attending the Master by counsel was not allowed between party and party, except on references for scandal.

THE Taxing Master having disallowed the plaintiff certain fees of counsel in this cause, (reported at the hearing and on further directions in a former volume,)(*a*) the question was raised upon petition for a review of the certificate, whether the plaintiff was entitled, on the taxation of his costs under the decree, as against the defendants, to be allowed the costs of three counsel, either on the ground of the peculiar difficulty and importance of the case and the bulk of the pleadings and evidence, or of the fact, that the counsel who originally settled the pleadings was called within the bar before the cause was at issue: *Carter* v. *Barnard*,(*b*) *Wastell* v. *Leslie*,(*c*) *Attorney-General* v. *Munroe*,(*d*) and the other cases cited.

The VICE-CHANCELLOR held, that on neither ground was the the plaintiff entitled to be allowed the fees of more than two counsel.

[*280] *Upon other objections to the certificate, the Taxing Masters were requested to certify their practice.(*e*)

The petition was refused with costs.

(*a*) Ante, Vol. 6, pp. 295, 632. (*b*) 16 Sim. 157. (*c*) 14 Sim. 84.
(*d*) 1 Mac. & G. 213; *S. C.* 1 Hall & T. 457.
(*e*) The questions and certificate were as follows:—

"*To the Right Honorable the Vice-Chancellor* WIGRAM.

"Your Honor having desired answers from the Taxing Masters of the Court, on the following questions—

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*Hunter v. Daniel. [*281]

1850: Feb. 27th.

The survivors of several defendants, against whom a bill has been dismissed with costs, to be taxed, and paid by the plaintiff, are entitled to proceed with the taxation of their costs, notwithstanding the death of one of such defendants, without a revivor of the suit, and although the surviving defendants and the deceased, in his lifetime, had carried in a joint bill of costs for taxation.

Mr. Elmsley moved, on behalf of six surviving defendants, that the Taxing Master might, notwithstanding the death of the defendant M. P. Daniel, be directed to proceed with the taxation of the costs, and issue his certificate, pursuant to the decree.

At the hearing of the cause(a) the bill was ordered to be dismissed, with costs, to be taxed, &c., such costs, when taxed, to be

"First, Whether, on the taxation of costs between party and party, the practice on taxation is to exclude the common retaining fee of one guinea to counsel, unless otherwise ordered by the Court:

"Second, Whether, on the taxation of costs between party and party, the practice on taxation, before the 120th order of May, 1845, was to exclude the fees to counsel for attending before the Master of the Court:

"We, the undersigned, beg respectfully to certify—

"First, That it is the practice, on taxation of costs between party and party, to exclude the expense of retaining counsel, the 120th order of May, 1845, not authorizing any alteration in the ancient practice of the Court in that respect.

"Secondly, That, before the order of May, 1845, the expense of attending the Master's office by counsel was never allowed in costs between party and party, except in cases of reference for scandal in pleadings.

"Taxing Master's Office,
"12th July, 1849.

"Robt. W. Follett,
"Richard Mills,
"H. R. Baines,
"Philip Martineau,
"John Wainewright,
"Joseph Parkes."

(a) Reported on the demurrer, 4 Hare, 420. The cause was afterwards heard, and the bill dismissed, on the ground of laches.

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paid by the plaintiff John Hunter to the defendants (naming them.) Before the taxation was completed, M. P. Daniel, one of the defendants to whom costs were so ordered to be paid, died; and an objection to proceed with the taxation was taken by the plaintiff, and yielded to by the Taxing Master.

In support of the application it was said, that the right to the costs under the decree must be either joint or several,—if joint, it survived; if several, the surviving defendants were entitled to proceed with the taxation. The case was wholly different from that of *Robertson* v. *Southgate*,(*a*) where the application was made by the personal representative of the deceased defendant. *Meredyth* v. *Hughes*,(*b*) was analogous to the present case; there it was held, that the death of one of several parties ordered to pay costs did not exonerate the others from the obligation. It was now an established principle, that the same rule was applicable with regard to revivor, whether the abatement was caused by the death of the party to receive, or the party to pay costs, and the [*282] case *cited was therefore an authority upon the point. *Ex parte Bishop*(*c*) was to the same effect.

Mr. *Southgate*, for the plaintiff, opposed the motion.

First, there is no precedent of such an application, although the circumstance of the death of one defendant before taxation must have happened in a multitude of cases. The cases cited in 2 Dan. Ch. Pr. 1325, are, where one of the persons to pay had died. The death of a person to receive is different. An order to pay two persons is not satisfied by a payment to one. Secondly, in this case the deceased defendant was not jointly interested in the subject of the suit with the other defendants. The contract was for the sale of their several interests for several sums. Thirdly, the application is unnecessary and oppressive in this case, as the cause was in the Lord Chancellor's paper for rehearing, and struck out on the ground of the abatement by the death of this defendant, and the suit will be revived by the plaintiff, immediately that an administrator can be made a party, and the Taxing Master

(*a*) 7 Hare, 109. (*b*) 3 Y. & J. 188. (*c*) 3 Ves. 333.

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will then proceed as of course. Fourthly, the bill of costs carried in for taxation is the bill of the seven, and the notice of motion is on behalf of the six survivors, that the Master may proceed with the taxation of that bill, which cannot be their right. The representative of the deceased will not be bound by a taxation in his absence.

The VICE-CHANCELLOR said, the fact that the defendants had separate interests in the subject in question in the cause was not material on the present point. He was *rather [*283] surprised at the difficulty felt by the Master in this case. The order was to tax the costs of the seven defendants. If the costs of two or three defendants, who were executors or trustees, were ordered to be taxed, and one of them died, there could be no doubt that the taxation would proceed notwithstanding. It certainly might deserve consideration what the effect of the taxation of the costs of the seven defendants might be, if the plaintiff, in order to proceed with the appeal, should procure administration *ad litem* to the estate of the deceased defendant. If the defendants were content with an order that the Master should proceed with the taxation of the costs of the surviving defendants, pursuant to the decree, there would be no difficulty in making it to that extent.

Mr. *Elmsley* said the order suggested by the Court was sufficient, and it was made accordingly.

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DEERE *v.* ROBINSON.

1849: June 9th; July 6th.

The solicitor of a defendant in the cause, and who is himself a defendant in the same cause, and appears by a second solicitor, cannot be allowed more than one bill of costs, if it appears that the second solicitor has, either before or after his retainer, agreed to allow his client, the first solicitor, a portion of the profits of his costs in the cause.

If, in the judgment of the Taxing Master, there be ground to suspect that an arrangement has been made between solicitors in the cause, by which a portion of the profits of the bill of costs of one is to be paid to another, it is in the discretion of the Taxing Master to require affidavits from the solicitors as evidence of the facts, and, if such an arrangement should appear, the bills of costs ought to be taxed as in case of agency.

A., B., and C. were defendants in the cause, against whom the bill was dismissed, with costs. B. and C. acted as the solicitors of A., and appointed D. to act as their own solicitor in the same cause. After the retainer, an agreement was entered into between B. and D., whereby D. agreed to allow B. and C. a portion of the profits of his bill of costs:—*Held*, that the agreement constituted D., in substance, an agent for B. and C., and that the separate bills of costs of B., and of C. and D., were properly taxed as a joint bill, and that all such costs as would not have been allowed in a case of agency, were properly disallowed.

THE first petition was by two of the defendants in the cause, who were the solicitors of Laura Elizabeth Hall,
[*284] *another defendant; and the second petition was by Laura Elizabeth Hall—praying that the Taxing Master might be ordered to review his taxation of their several bills of costs. The interests of the defendants were considered to be distinct; and the two petitioners in the first petition had appeared, and defended the suit on the behalf of Laura Elizabeth Hall, and instructed another solicitor to appear for themselves. The subject in dispute was settled by the principal parties to the cause, and an order was made to dismiss the bill against Laura Elizabeth Hall and the two petitioners, with costs, to be taxed and paid to the said defendants out of the residuary estate of the testator in the cause. Under this order, the two petitioners carried in the bill of costs of Laura Elizabeth Hall, and the other solicitor carried in the bill of costs of the two petitioners. Upon the objec-

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tion of the solicitor representing the residuary estate, the Taxing Master required the two petitioners and their said solicitor in the cause to state, upon affidavit, whether any agency existed between them as to the costs of the suit; and upon their refusing to make such an affidavit, the Taxing Master declined to certify the costs either of Laura Elizabeth Hall or of the other two petitioners. The two petitioners then applied to the Court for an order that the Taxing Master might complete the taxation of the costs; and a similar application was made by Laura Elizabeth Hall. Both petitions were ordered to stand over; and it was ordered, that the Taxing Master should make such certificate as he should think fit, under the original order directing the taxation of the defendant's costs, without prejudice to the right of either party to adduce such evidence, if any, before the Taxing Master, as he might have done under such original order.

Upon the matter coming again before the Master, affidavits *were made by the solicitor who appeared for the [*285] two petitioners; by which it appeared, that, after his retainer by them, an arrangement was come to between the petitioners and their said solicitor, whereby he consented to pay or allow them a portion of the profits of his bill of costs in the cause, when the same should be taxed and paid.

Upon this evidence the Taxing Master made one certificate, in which, referring to the affidavits, he stated, that he had taxed the costs of Laura Elizabeth Hall and the two petitioners at 324*l.* 8*s.* 11*d.* This was the certificate of which the two petitioners complained.

Mr. *Wood* and Mr. *Leach*, for the first; and

Mr. *Bacon* and Mr. *Bird*, for the second petition.

The *Solicitor-General* and Mr. *A. Smith*, for the respondents.

VICE-CHANCELLOR:—I assume in this case that the interests of the petitioners were so distinct, as to justify them in having a separate solicitor. This has not been controverted. It appears,

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that separate bills of costs were carried in for taxation,—one by the solicitor who appeared for the two petitioners in the first petition, and the other by those two petitioners for Laura Elizabeth Hall. The solicitor for the parties interested in the estate of the testator in the cause suggested, that the first bill of costs ought not to be allowed in full, unless the three solicitors would satisfy the Master by affidavit, that the solicitor who [*286] carried in the first bill of costs was not, in *fact, the agent of the other two, or that no agency existed between them as to the costs of the suit. The Master, influenced, as it is said, by the circumstance that he found precisely the same observations annexed to the briefs furnished to the counsel for Laura Elizabeth Hall, and to the counsel for the other two petitioners, her solicitors yielded to the suggestion. Upon the matter coming before me on the former petitions, I directed the Taxing Master to proceed under the order for taxation, and make such certificate as he should think fit. The only observation I trusted myself to make upon that occasion was, that the two petitioners and their solicitor must obviously have it in their power to set the matter at rest, if they thought proper so to do.

The Master, in making his certificate, has considered and treated the solicitor of the two petitioners, who were the solicitors of Laura Elizabeth Hall, as their agent, and has allowed to the two petitioners such costs only as would have been allowed to them, if such agency had been admitted or proved. Of this the two petitioners and Laura Elizabeth Hall complain,—the former, because the Master has not allowed their full costs, as if the solicitor who appeared for them had been actually their solicitor, and not their agent,—the latter, because the Master has blended the two bills of costs into one, instead of taxing her costs separately.

With respect to the complaint of Laura Elizabeth Hall, the result of the inquiries I have made is, that the certificate is right, provided the Master is right in treating the solicitor who appeared for the other two petitioners as their agent, and not their solicitor. This is a rule of practice, and not to be doubted.

One solicitor is never allowed to bring in more than one bill. *And upon the complaint of the two petitioners, [*287] the solicitors of Laura Elizabeth Hall, I think the Master is also right.

If it were necessary for the petitioners to adduce any evidence in support of their claim before the Master, it was certainly necessary that the evidence should have gone further than the two affidavits which were laid before the Master. One of the affidavits states, that it was after the retainer of the third solicitor that an arrangement was come to between him and one of the two petitioners, whereby he consented to pay or allow to them a portion of the profits of his bill of costs in the causes; and it was said, that if his retainer was in the first instance a *bona fide* retainer, a voluntary agreement on his part, for giving up a portion of his profits to the petitioners, could not be objected to. I am not prepared to deny, as an abstract proposition, that such an arrangement might be valid; but let it be supposed that the arrangement in the present case was come to before any work had been done by that solicitor under his retainer, and that the proportion of profits, which the petitioners were to receive, was that which they would have received if a case of agency had been admitted, could it be said that the Master, upon such facts, was wrong in the conclusion he has come to? I confess, I think not. If, by thus altering the form of the transaction between a solicitor and his agent, the rule of the Court applicable to cases of agency could be evaded, it is obvious that the rule would become a nullity. Who can doubt that, if the solicitor who represented the petitioners had not come to the arrangement supposed, that his retainer would not have been withdrawn, and the business transferred to some other solicitor? In making these observations, however, I do not impeach the truth of the statement. I have *no doubt that the affidavit [*288] represents the facts as the petitioners' solicitor understands them. I think that his mistake has been in supposing that the Court would deal with those facts as he understood them.

The only question then is, whether the Master was right in

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requiring the affidavits, and whether, having had the affidavits before him, I ought now to deal with the case as if the affidavits had not been filed. I think the Master was justified in requiring the affidavits. A discretion must in these cases be allowed to the Taxing Master, and if I differed with the Master upon that point, I think the affidavits having been filed justify the conclusion to which the Master has come.

BINNS *v.* PARR.

1850: Feb. 21st.

It is not the practice to order the payment of money into Court upon motion made after the decree in a cause and before the hearing for further directions, founded merely on admissions in the answer.

THE *Solicitor-General* and Mr. *Speed* moved for the payment into Court of a sum of money admitted by the answer of the defendant to be in his hands.

Mr. *Wood* and Mr. *Goodeve*, for the defendant, objected that the motion was irregular, inasmuch as the decree in the cause had been made. In *Hatch* v. ——,(*a*) Lord Eldon said, that, according to the old practice, the application was not made for payment into Court between the original decree and the hearing for further directions, but that it had since been settled that the application might be made upon the examination before the Master. The plaintiff, in this case, might have moved upon the answer of the defendant at the hearing of the cause, or [*289] he might hereafter move upon the *examination of the defendant, when that should be put in before the Master; but the decree was always considered as determining everything against the defendant of an antecedent nature, not made a subject of direction or not reserved by the decree, and, therefore,

(*a*) 19 Ves. 117.

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the plaintiff was precluded in this stage of the cause from moving upon the answer. It was, in substance, an attempt to vary the decree.

The *Solicitor-General*, in reply.

The case cited rather showed that the motion might be properly made, for the examination was there treated as a proceeding supplemental to the answer, resorted to as a means of procuring further admissions, and, if the practice admitted the supplemental examination as a ground for the motion, it would be unreasonable to exclude the answer, which was the original examination. Lord Eldon said, it had been long settled that the application might be made between the hearing and further directions, and he did not limit the power to do so by reference to the sort of evidence by which the motion was to be supported, so that, if the admission was made in one form, it might be received, and, if in another form, rejected. There was no principle in such a restriction of the rule. In this case, moreover, the defendant had applied to the Master to extend the time for putting in his examination, on the ground of illness.

The VICE-CHANCELLOR said, he saw no reason in principle why the motion might not be made after the hearing. The Court did not order the payment of money into Court, upon admissions in the answer without motion for, until the accounts were taken, it gave the defendant the opportunity of discharging himself by *affidavit, if the facts enabled him to do so. It [*290] was not open to the objection which was suggested, that the order would vary the decree. The payment of the money into court, upon admissions in the answer, was not the subject of the decree, for whenever it took place it must be the subject of an interlocutory application. He was not aware of any authority in practice against the application.

The case of *Burn* v. *Bowes*(*a*) was afterwards mentioned.

(*k*) M. R., 21st July, 1837, 6 Law Journ., (N. S.) Chanc. 275.

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The VICE-CHANCELLOR said, he should, on a point of practice, follow the case cited, and refused the motion.

FORSYTH *v.* ELLICE.

1850: Feb. 26th; March 5th.

The evidence of a witness taken *de bene esse* before a cause is at issue, and not published before the hearing, may be published after the hearing, for the purpose of being used on a question referred to the Master, if the witness cannot then be examined.

A MOTION was made on the part of the plaintiffs that the evidence of Charles Tait, taken *de bene esse* before Commissioners in Canada, on the 23rd of November, 1842, pursuant to an order of this Court, dated the 9th of May, 1842, might be published, and might be read before the Master, to whom the cause was referred.

The order was made upon affidavits by the plaintiffs that Charles Tait, of Montreal, was a material witness on their behalf, and that they could not safely proceed to a hearing without his evidence, and that he was the only witness to some of the facts and circumstances connected with the matters in question in the cause, and which, they were advised, were necessary to be proved therein; and upon an affidavit of the plaintiffs' solicitor

[*291] *that the suit was instituted to recover the plaintiffs' share of the property and effects of the late partnership of Sir Alexander M'Kenzie & Co., of Canada, and that he had been informed and believed that the entries in the books of the partnership touching the transactions mentioned or referred to in the pleadings, or many of them, were made by Charles Tait, and various accounts touching such transactions, (which accounts were also mentioned or referred to in the pleadings,) were made out by him; and the deponent had been informed and believed that Charles Tait was the only witness who could prove the correctness of the said entries, and the books and accounts so made out by him.

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The replication in the cause was filed on the 16th of April, 1844, and witnesses were examined in July following. The affidavit of the plaintiffs' solicitor stated, that, when the causes were at issue, he was advised that it was not necessary or proper then to enter into evidence relating to contested items of account between the plaintiffs and defendants, and that evidence as to items of account should not be entered into unless such evidence should be required in taking the accounts before the Master. The decree in the cause was made on the 11th of July, 1845, and certain accounts were thereby directed to be taken. The affidavit stated, that evidence of the contested items of account was now required to be used before the Master, and that the deponent believed that Charles Tait was and had been for some years of unsound mind, and that he was the only person who was (but for that circumstance) able to give such evidence.

The other evidence of the state of the witness was an affidavit of a surgeon, made in December, 1846, stating that he had had an interview with Charles Tait in *December, [*292] 1846, in the district of Montreal, where he resided, and that his memory and judgment were so much impaired as to disqualify and render him incompetent to give legal evidence in any court of justice, and that such such state and condition of Charles Tait had been for some time past a matter of general rumor.

Mr. *Roundell Palmer* and Mr. *Dickinson*, for the motion.

In *Smith* v. *Althus*,(a) it was held, that evidence not read at the hearing might be read before the Master. The evidence in this case being on the items of the account, could not be used at the hearing, if it had been published: *Law* v. *Hunter*,(b) The rule of the Court, from the necessity of the case permits the publication of depositions taken *de bene esse*, when the witness cannot from any cause be examined in the ordinary way: *Gason* v. *Wordsworth*.(c) The fact of publishing the examination *de bene esse* before the hearing, when it could not have been used, would

(a) 11 Ves. 564. (b) 1 Russ. 100. See *Tomlin* v. *Tomlin*, 1 Hare, 241.
(c) 2 Ves. 336.

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have prevented the examination of the witness in chief on the questions before the Master, if he had afterwards recovered and become capable of giving evidence.

The *Solicitor-General* and Mr. *Brett* opposed the motion: first, as contrary to the practice of the Court; and secondly, as unsupported by the necessary evidence of the impossibility of now examining the witness, although he might have been incapable of giving his testimony in 1846.

[*293] *VICE-CHANCELLOR:—This was a motion by the plaintiff, that the depositions of a witness who was examined *de bene esse* before decree might be published. The bill was for an account, and the decree directs certain accounts to be taken. The witness was not examined before decree in the usual way, nor does it appear whether he was in a state of mind to be examined before publication in the cause. It appears that the plaintiff was advised, that, as the evidence of this witness related only to the items of the account, and the right of the plaintiff to such account, or the principle upon which it was to be directed, it was not necessary or proper that the witness should be examined in the ordinary manner before decree, and accordingly he was not examined before decree. The parties have proceeded in the Master's office under the decree, and the plaintiff now requires evidence as to items in the accounts of which the witness has knowledge, and in this state of things the present application is made.

Two objections have been taken to the motion. First, that it is against practice that the depositions of a witness examined *de bene esse* before decree should be published after decree, and that the plaintiff ought to have examined the witness before the hearing, or have caused the depositions to be published before the hearing. Secondly, that the evidence does not show that the witness is not now in a state to be examined in the usual way.

Upon the second point, I agree with the defendants; but the case is one in which it would clearly be proper to allow the

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plaintiff to supply the defect in his evidence, if it can be done. I have thought it right, *however, to express [*294] my opinion on the first point also, because, (the witness being in Canada,) the plaintiff ought not to be put to the trouble and expense of obtaining further evidence, if the practice of the Court be as the argument for the defendants supposes. I think the practice of the Court cannot be such as that argument supposes; but I give this opinion upon general reasoning, as I cannot find that the point has ever been discussed before.

I cannot doubt that a witness might be examined *de bene esse* after decree, in aid of inquiries referred to the Master, if from age, illness, or other cause, there was danger of his evidence being lost before he could be examined as a witness in the usual way. The objection, therefore, raised by the defendants is one of strict practice, and nothing else.

First, suppose the question not to be affected by the affidavit upon which the order to examine the witness was obtained. Upon that supposition I cannot see why the evidence should not be read for any of the purposes of the cause, if, at the time when it is proper to go into evidence for any of such purposes, the evidence of the witness cannot be obtained under the usual sanctions. It is certain that the plaintiff was rightly advised as to the practice of the Court in not giving evidence as to the items of an account before the hearing. But I cannot think it possible that the practice of the Court should not provide a party with the means of preserving evidence as to the items of the account, which it is the object of the suit to obtain. Without such evidence it is manifest that the plaintiff may not be able safely or usefully to proceed to the hearing of the cause. The only plausible answer to this appears to me to be that which I suggested when the case was opened, namely, *that the [*295] witness might have been examined before decree, and his evidence read after decree, although not entered in the decree. But I cannot, however, think that the practice of the Court can require that a witness should be examined until the parties know what the points at issue between them are. Indeed, until the time arrives when it is *necessary* that the witness should

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be examined, it could scarcely be proper to publish depositions taken *de bene esse*, for there is no *constat* until that time arrives that the witness may not be in a state to be examined in the usual way.

With respect to the affidavit:—in terms it appears to point at the hearing of the cause. But I do not think that can affect the present question. For the affidavit is true, whether the evidence of the witness was wanted for the purpose of establishing the plaintiff's right to a decree, or the principle of the decree, or the items included in the account directed by it.

If I am wrong upon the point of practice, I am wrong also in permitting the plaintiff to adduce further evidence in support of his motion; and the motion ought to be refused. If the defendants will appeal from my order in not dismissing the motion, I will order it to stand over, with liberty to the plaintiff to give further evidence in support of it. If the defendants will not appeal, I will give the plaintiff the option of taking the above order or having his motion dismissed. In which case he may obtain the opinion of the Lord Chancellor before he incurs the trouble and expense of sending to Canada.

[*296] *DOBSON *v.* LAND.

1849: March 20th, 22d and 28th.

Upon the motion by a defendant to suppress depositions supported by the affidavit of a witness, that the evidence which she gave before the commissioner, was not truly represented in the depositions, and that she had mistaken the meaning of a technical expression used in the interrogatories, the court refused to suppress the depositions, but gave the parties liberty to re-examine and cross-examine the witness *viva voce* before the Master, (the commission being issued after decree) upon the disputed parts of the depositions; and also gave the plaintiff liberty in the same manner to examine, and the defendant to cross-examine, the commissioner and his clerk.

MOTION to suppress depositions taken on behalf of the plaintiffs, under a commission issued after decree. Affidavits in

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support of the motion, by two of the persons who had been examined as witnesses on behalf of the plaintiffs, alleged that there were certain passages attributed to them in the depositions which did not correspond with what they respectively said; and one of the witnesses also stated, that, on her saying to the commissioner, in answer to a question put to her, "that she did not know," he said that the fact had been sworn to by other witnesses, naming one in particular. She also stated that she thought the words "owners of the equity of redemption," used in the interrogatories, meant "mortgagees." It was argued that the Court would, from the facts stated upon the affidavits, infer partiality on the part of the commissioner, and suppress the whole of the depositions.

The plaintiffs objected that the commissioner whose conduct was impeached ought to be served with the notice of motion as the person who ought to pay the costs, if the allegations were established. The objection (if any) was obviated by the defendants waiving any claim to costs they might have against the commissioner.

The *Solicitor-General* and Mr. *Batten*, for the defendants, in support of the motion.

Mr. *Kenyon Parker* and Mr. *Shee*, contra.

The cases cited were *Cooke* v. *Wilson*,(a) and *Lord* [*297] *Mostyn* v. *Spencer*,(b) on the small degree of suspicion or irregularity, which was a sufficient ground to suppress depositions, or deprive any party of an advantage gained by the misconduct of the commissioner: *Cooth* v. *Jackson*.(c) On the effect of the mistake of a witness, *Richardson* v. *Fisher*;(d) and on the question of the course which should be taken, without suppressing the depositions, to give the defendants the benefit of their objection, *Campbell* v. *Scougal*,(e) and *Earl Nelson* v. *Lord*

(a) 4 Madd. 380. (b) 6 Beav. 135. (c) 6 Ves. 31.
(d) 1 Bing 145. (e) 19 Ves. 552.

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Bridport.(a) As authorities for wholly refusing the motion, *Wood* v. *Freeman*,(b) and *Whitelock* v. *Baker*,(c) were relied upon.

Upon the affidavits filed on both sides, and the affidavit of the commissioner and clerk, the

VICE-CHANCELLOR held, that he could not infer anything unfavorable to the impartiality of the commissioner, and proceeded as follows:—

If I am to order the re-examination, it will be material to know whether the present depositions are as they were given at the time of the examination. The affidavit of the commissioner asserts that they are, and the circumstances which he states are confirmed by his clerk, and are not denied. If there be a re-examination, it may be right to consider whether the plaintiffs are not entitled to the benefit of the fact (if it be a fact) that both of the witnesses did depose what the depositions repre-
[*298] sent, or whether the plaintiffs are not entitled to *show that the witnesses did on the former occasion give different evidence from what they now give.

If the parties will consent that these affidavits shall go before the Master as evidence, it will obviate any difficulty; if this be not consented to, I must give the parties liberty to examine and cross-examine *viva voce* before the Master the two witnesses upon the disputed parts of the depositions. I do not think I can avoid, at the same time, giving the plaintiffs leave to examine the commissioner and his clerk, without prejudice to the right of cross-examination.

The parties did not consent to the reception of the interrogatories as evidence, and the order was made for examination and cross-examination of the witnesses as above, the plaintiffs not asking for leave to examine the commissioner or clerk.

Costs reserved.

(a) 7 Beav. 195. (b) 4 Hare, 552. (c) 13 Ves. 511.

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*Griffith *v.* Ricketts. [*299]

Griffith *v.* Lunell.

1849. November 14th, 16th and 22d; December 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 20th.

Conveyance of the equity of redemption of real estate to trustees, for sale, for the benefit of the creditors of the author of the deed, and upon trust, if there should be any surplus, to pay the same to him, his executors, administrators and assigns, to and for his and their own absolute use and benefit:—*Held* to be a conversion of the real estate into personalty, as between the real and personal representatives of the author.

Held, also, that the ultimate surplus of the proceeds of the real estate being reserved to the author of the deed, and the deed not being revoked, and no attempt having been made to revoke it, it was not material as between the real and personal representatives of the author, whether the deed was or was not revocable.

That the question whether the surplus proceeds of the trust property belonged to the real or personal representative, was not affected by the state,—whether of realty or personalty,—in which such surplus was found, although the state of the property might affect the character in which such surplus would go to the one or the other of such representatives.

If the author of a deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate, from the delivery of the deed, and is equivalent to a gift of the expectancy of his heir-at-law to his personal estate.

The principle is the same in the case of a deed as in the case of a will; but in the former case the conversion takes place in the lifetime of the party making it,—in the latter, not until his death,—and the rights of the real and personal representatives, in each case, are governed by the simple effect of the instrument.

The onus of proving the re-conversion is on the plaintiff, who claims under the heir-at-law of the author of the deed.

A person served with a *subpœna duces tecum*, under the General Order XXIV., of May, 1845, to produce a document at the hearing of the cause, may, at such hearing, be called upon his subpœna, and asked whether he produces the document, and if he declines to produce it, why he so declines, or other like questions confined to the mere purpose of production.

The amendment of the bill, by adding the personal representative as a party, and by introducing the disclaimer of such personal representative upon the record, will not sustain the suit of the heir-at-law.

A conveyance for the benefit of creditors held not to be revocable by the author, as against any creditors with whom such communications had taken place, as would give them an interest under the deed, but, at the utmost, to be revocable only as

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to the surplus proceeds of the estate, after satisfying such creditors; and, whether the deed was revocable at the option of the author, as to such surplus,—*quære*.

A SUIT by the devisee of the heir-at-law of Edmund Griffith, claiming the equity of redemption of an estate mortgaged by Edmund Griffith to Richard Ricketts, in the year 1800. The defendants in possession insisted that they were purchasers without notice of any subsisting mortgage, and they resisted the alleged title of the plaintiff to redeem.

Several questions arose, and were argued in the cause. The decision ultimately turned upon the effect of a deed of 1810, whereby Edmund Griffith, the mortgagor, conveyed and assigned his real and personal estate to trustees, upon trust for sale, for the payment of his debts, and in case there should be any surplus of the trust moneys, to pay the same to the said Edmund Griffith, his executors, administrators and assigns, to and for his and their own absolute use and benefit. The question was, whether the deed of 1810 operated as a conversion, so that, upon the death of the mortgagor intestate, his personal representative
[*300] became entitled *to the property comprised in the mortgage, to the exclusion of his heir-at-law.

The *Solicitor-General* and Mr. *Pirie*, for the plaintiff.

Mr. *Bethell*, Mr. *Walker*, Mr. *Kenyon Parker*, Mr. *Wood*, Mr. *Bacon*, Mr. *Piggott*, Mr. *Bird*, Mr. *Osborne*, Mr. *Chapman*, and Mr. *Selwyn*, for the several defendants.

The deed of 1800, by which the mortgage was originally constituted, was not admitted by the defendants. A Mr. Hinton, who had been the solicitor of parties deriving their title from Ricketts the mortgagee, but was not the solicitor of any one of the defendants in the cause, was served with the *subpœna duces tecum*, in the form prescribed by the General Orders of December,

1833, and XXIV of the 8th of May, 1845,(a) to produce the mortgage deed of 1800.

At the hearing, the counsel for the plaintiff, in tendering his evidence, requested that Mr. Hinton might be called upon his subpœna.

The proposed course was objected to by the counsel for the several defendants as novel, and contrary to the practice of the Court.

On behalf of the plaintiff the cases of *Davis* v. *Dale*,(b) and *Summers* v. *Mosely*,(c) were cited, as showing that a party served with a *subpœna duces tecum* might be *called to [*301] produce the document without being sworn, and made a witness for the party calling him; that the claim of lien by the solicitor or party in possession of the document, was not an objection to its production: *Thompson* v. *Mosely*,(d) or if it were such an objection, it enabled the plaintiff to give secondary evidence of the deed: *Doe* d. *Gilbert* v. *Ross*,(e) and if such secondary evidence could not be otherwise given, the Court would in such a case give the plaintiff an opportunity of exhibiting interrogatories before the examiner: *Maber* v. *Hobbs*.(f)

December 4th.—VICE-CHANCELLOR:—The plaintiff in this case claims to be mortgagor of lands, which are in the possession of the principal defendant in the cause; which lands he seeks by his bill to redeem.

From the nature of the defence made by the defendants, it has been deemed necessary by the plaintiff to prove the original mortgage deed dated some time in the year 1800. And in order to do this, he has served a gentleman named Hinton with a *subpœna duces tecum*, to produce at the hearing of the cause a deed described in the subpœna. Of Mr. Hinton the Court knows nothing. He has not been examined upon interrogatories before

(a) See Beav. Ord. Can. pp. 62, 293, 339. (b) 4 C. & P. 335.
(c) 2 Cr. & Mee. 477. (d) 5 C. & P. 501. (e) 7 M. & W. 102.
(f) 1 Y. & C. 585.

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the examiner, to prove that he has in his possession the deed described in the subpœna; nor (if the deed be in his possession) to prove from whom he got it, nor in what character, nor any thing else relating to himself or the deed. Of the deed
[*302] itself *I know nothing, except by the description of it in the subpœna.

At the hearing of the cause on a former day, the counsel for the plaintiff called Mr. Hinton upon the subpœna, and was proceeding to ask him questions (I do not say to examine him as a witness) touching the deed. This was objected to on the part of the defendants, as being a course unknown in the practice of this Court. And as I had not myself, and also ascertained that the Registrar then present had not, any recollection of a like question having arisen, and as the result of the cause might mainly be affected by my decision, I desired the cause to stand over to give me an opportunity of making an inquiry.

I will now state the conclusion to which I have come, as to the course to be pursued,—a conclusion which the parties may correct by appeal, if it be erroneous.

I have not been able to find any one who recollects the point having arisen before. Two propositions may, however, I think, be safely stated—one is, that the subpœna lies. The form of it is given at the end of Orders of May, 1845. The second proposition is, that the plaintiff cannot, by means of the subpœna, obtain more than the mere production of some paper or parchment by the witness. The witness has not been sworn, and cannot, according to the practice of the Court, be sworn or examined as a witness, at the hearing of the cause; and the production of the paper or parchment by the witness, will put the plaintiff in no other position than he would have been in if he had obtained the possession of the instrument out of Court, and produced it at the hearing, except that it comes out of the possession of a Mr. Hinton, of whom the Court knows nothing.

[*303] *The question, then, is reduced to this: whether the plaintiff, for the mere purpose of obtaining the production of the instrument, has not a right to ask the witness in this

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Court the same questions as he might have asked an unsworn witness in a Court of law, in precisely the same circumstances.

My opinion is, that the plaintiff's counsel has a right, first, to call the witness upon his subpœna; secondly, to ask him whether he produces the deed described in the subpœna; and thirdly, if he do not produce it, to ask him why he does not produce it; or other like questions confined to the mere purpose of production. Beyond this I am not called upon to express any opinion at the present moment.

If the witness, admitting the possession of the document, shall refuse to produce it, the plaintiff's counsel must determine whether he will try to enforce the production, or tender secondary evidence of the deed, which, according to a late case, he may possibly have a right to do. But upon this point I at present give no opinion.

Mr. Hinton, appearing in obedience to the subpœna, was then asked by the plaintiff's counsel whether the deed of 1800, mentioned in the subpœna, was in his possession. Mr. Hinton said it was. He was then asked to produce it, and declined to do so, alleging that he had a lien upon the deed, as against the estate of Caroline Rosina Frost, deceased.

The VICE-CHANCELLOR refused to make an order that Mr. Hinton should produce the deed, observing, that *such an order would not be made as against a mortgagee, and the case of a lien was in substance the same. [*304]

Secondary evidence of the deed of 1800 was then tendered, the Court reserving the question of its admissibility, and also the question whether, if such secondary evidence should be inadmissible, the plaintiff was entitled, in the circumstances of the case, to any further opportunity of proving the deed. These questions it became unnecessary to determine, the Court holding that the title of the plaintiff was displaced by the subsequent deed of 1810. The arguments on the latter point, together with

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such of the other facts as were adverted to on that part of the case, appear in the judgment.

VICE-CHANCELLOR:—The plaintiff in this case claims under the will of Edmund Griffith the younger, who was the heir-at-law of Edmund Griffith, to be entitled to the equity of redemption of freehold lands of inheritance comprised in a mortgage alleged to have been made of the same lands by Edmund Griffith to Richard Ricketts, in the month of December, 1800. The defendants in the cause, between whom and the plaintiff the contest in the cause has arisen, claim under Ricketts, the mortgagee; amongst other defences they have insisted, that the plaintiff is not entitled to the equity of redemption of the mortgage in question. They insist that the equity of redemption was so dealt with by Edmund Griffith, that at his death his personal representative, and not his heir-at-law, was the party entitled to the equity of redemption. The personal representative of Edmund Griffith is not a party in the cause; and it was admitted by the plaintiff's counsel, at the hearing of the [*305] cause, *that, if I should be of opinion that the defence above-mentioned was well founded, the defect in the constitution of the suit could not be remedied by amending the bill, and making the personal representative of Edmund Griffith a co-plaintiff in the cause. But it was suggested, that, if the personal representative were made a defendant, and disclaimed, that would enable the Court to make a decree in the plaintiff's favor, whatever the original rights might have been. To that argument I cannot accede. The question is, whether the plaintiff, at the time of filing the bill, was entitled to or interested in the equity of redemption which he claims; if that question be answered in the negative, the disclaimer of the party entitled to it will not enable the plaintiff to sustain his suit. I had occasion to consider this point very early in my judicial life, and I found the authorities very clear upon it.(a)

(a) See *Mounsey* v. *Burnham*, 1 Hare, 15, and *Major* v. *Aukland*, 3 Hare, 77, approved by the Lord Chancellor, in *Heath* v. *Chadwick*, 2 Ph. 652.

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An objection for want of parties was founded upon the same theory as to the state of the property at the death of Edmund Griffith; it was said, that at all events the case was not so clear that I could properly decide it against the personal representative of Edmund Griffith, in his absence from the record; and a like objection for want of parties was said to arise in respect of the trustees and creditors of Edmund Griffith, interested under a deed of trust, upon the construction and effect of which the defence above-mentioned depends.

I proceed, in the first instance, to consider this ground of defence.

The mortgage, as already observed, was made in the month of December, 1800. In 1805 or 1810, (but I *think I must say in 1805,) the mortgagee entered into [*306] possession, and the possession has ever since been and now is in the mortgagee or persons claiming under him. The mortgagor has been out of possession ever since possession was taken by the mortgagee.

In 1810 Edmund Griffith executed a deed, by which the equity of redemption, and other property real and personal, was transferred to trustees, upon trust to pay the debts of Edmund Griffith. This deed was of two parts, and made between Edmund Griffith of the first part, and the trustees Harford and Winpenny of the second part. The deed recited, that a sum of 563*l.* had been advanced by Isaac Cooke to Edmund Griffith, and that Edmund Griffith was indebted to several other persons, and that he had agreed to convey and assign all his real and personal estate unto and to the use of Harford and Winpenny, their heirs, executors, administrators, and assigns, (subject, nevertheless, to such mortgages or other charges and incumbrances as affected the same,) in trust for the benefit of all his creditors; and it was witnessed, that, in pursuance and part performance of such agreement, and in order to raise a fund for the payment of his debts, the said Edmund Griffith released and confirmed all his real estates, with the appurtenances, (subject as aforesaid,) unto and to the use of Harford and Winpenny, their heirs and assigns, in trust nevertheless, with all convenient speed to sell

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and dispose of the same, either by public auction or private contract, with power to give receipts for the purchase-money, and so stand possessed of, and interested in, the moneys which should arise from such sale or sales, and also of the rents, issues, profits, produce, and proceeds thereof; in the meantime, in trust, in the first place, to pay the said sum of 563*l.* to Isaac Cooke, and then to retain and reimburse themselves their costs and ex-
[*307] penses in *the execution of the said trusts. And upon further trust, by and out of the trust moneys to pay and discharge all other the debts due from Edmund Griffith to any other persons, so far as the trust moneys would extend; and, in case there should be any surplus of the trust moneys, in trust to pay the same unto Edmund Griffith, his executors, administrators, and assigns, to and for his and their own absolute use and benefit. Edmund Griffith thereby covenanted not to revoke the powers given to the trustees, nor interfere in any way to prevent the trusts from being carried into effect,—that he would aid in the execution of the trusts, and, if necessary, join and concur in the sales of the estate and property; and the deed contained a covenant for further assurance. Upon the effect to be given to this deed, and certain acts of the parties, the validity of the defence I am now considering depends.

One question much argued at the bar was, whether the deed was revocable by the mere act of Edmund Griffith. That it was not absolutely revocable by the mere act of Edmund Griffith is too clear for argument. Clearly it was not revocable as against Cooke, nor against Harford, if it be true, as the evidence states, that he was a creditor of Edmund Griffith for 1300*l.*; nor could the deed be revocable against the creditors of Edmund Griffith, if any, between whom and the trustees such communications had taken place as would give them an interest under the deed.(*a*) The question of revocation must at least be confined to the surplus proceeds of the estate comprised in the deeds, which would remain after satisfying the claims of Cooke, Harford, and such other creditors, if any, as had acquired an interest under

(*a*) See *Acton* v. *Woodgate*, 2 My. & K. 452.

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the deed. If it were necessary, as I think it is *not, to [*308] decide whether the deed was revocable at the mere option of Edmund Griffith as to the surplus proceeds just mentioned, I am not, as at present advised, prepared to decide in the affirmative. A voluntary conveyance of property upon trust to pay creditors not parties to the transaction has been very reasonably held to create a trust for the author of the deed, and not for his creditors. The transaction is assimilated to the case of a debtor putting money into the hands of his own agent to pay his debts, in which simple case it is clear that the debtor may countermand the authority, unless the agent has acted upon it, so as to give the creditors an interest in the money in his hands: *Bill* v. *Cureton*,(*a*) *Wilding* v. *Richards*.(*b*)[1] On the other hand, it is equally

(*a*) 2 My. & K. 503. (*b*) 1 Coll. 656.

[1] This class of cases raise the question as to whether there is an equitable assignment.

In order to constitute an equitable assignment by a debtor to his creditor, of a sum due to the debtor from a third person, there must not only be an *agreement* to pay the creditor out of the particular fund, but *an appropriation* of the fund, either by giving an order upon it, or by transferring it in such a manner that the holder would be authorized to pay it to the creditor directly without the further intervention of the debtor. *Hoyt* v. *Story*, 3 Barb. S. C. Rep. 262. Where a debtor gave a draft on defendant to pay certain sums out of funds received of one Griffin for the debtor, which draft was accepted, payable when in funds under the contract, held an equitable assignment of specific funds. *Vreeland* v. *Blunt*, 6 Barb. S. C. Rep. 183.

Where a debtor gave a creditor security on a schooner, and the debtor agreed to procure insurance on the vessel, pay premium, assign and send policy, the debtor wrote the creditor, "I keep schooner insured for your protection and mine;" subsequently insurance was obtained, loss payable to one Gale; the debtor wrote the creditor, "I have got the schooner insured &c. for $3500, by Gale; he is to hold the amount subject to your order in case of loss." The holder of the policy was advised of that fact by the creditor, and requested him to hold it for his benefit. The debtor told another person that he had directed Gale to pay the proceeds of the policy to the creditor, but there was no evidence he had so directed G. Held this not amount to an equitable assignment, but merely showed an intention on the part of the debtor to appropriate the avails to the creditor's benefit, and did not give specific lien. *Dickinson* v. *Philips*, 1 Barb. S. C. Rep. 454.

In the case last cited, Harris, J. lays down the rule, that no particular form of words is necessary to constitute an equitable assignment. But there must at least be evidence of an intention to appropriate the fund.

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clear that a voluntary conveyance of property to trustees upon trust for a third party, may create an indefeasible trust in favor

The distinction between those cases in which the transaction has been held to constitute an equitable assignment of a fund, and those in which it has been held not to constitute such an assignment, depends upon the question whether the party having the control of the fund intended, in fact, to make an absolute appropriation of it, or whether he himself intended to retain the control of it.

In order to constitute a specific appropriation of a particular fund for the payment of a specific debt, an intention to surrender to the creditor all control over the fund is necessary.

Where a debtor gives to his creditor an order upon one indebted to him, requesting him to pay to the creditor the amount of his debt, such order will be construed as an equitable assignment of the debt, even though the drawee had never assented thereto.

In *Clayton* v. *Fawcet*, (2 Leigh, 19,) the debtor placed a bond for collection in the hands of an agent, then gave to his creditor a letter addressed to the debtor's agent, directing him to pay the money to the creditor when collected, if he should not be present. The debtor died, and the question arose between the creditor and representatives of debtor, whether this letter amounted to an equitable assignment of the money. The chancellor held it did not, and his decision was affirmed by the Court of Appeals. The decision was based upon the ground that the letter was but a bare authority to the agent to pay to the creditor, and not being accompanied by an assignment, and not having been executed before the death of the debtor, his death operated as a revocation of the authority.

In *Bradley* v. *Root*, (5 Paige, 632,) where the holder of a mail contract assigned the same to the complainant, who agreed to carry the mail during contract, and was to receive therefor all moneys which should become payable under it, it was held to be an equitable assignment.

The chancellor held, an order to pay a debt out of a particular fund belonging to the debtor, was an equitable assignment *pro tanto*, and gave the creditor who received the order a specific lien upon such fund. *Ib.*

Where a landlord for value gave an order on his tenant, to pay W. the rents accruing during a certain time, which the tenant, on the order being presented, said he would do so, and subsequently the landlord notified the tenant not to do so, but the tenant disregarded the notice. It was held he did right; that this was an equitable assignment of the rent. Cowen, J. so held; and as the order was given with notice to the tenant, he was bound to pay it, whether accepted or not. *Morton* v. *Naylor*, 1 Hill, 583.

Where H., residing at Providence, was indebted to M., of New York, M. applied to H. for payment, who informed him that he had ordered the balance of his funds from the West Indies to be forwarded to M., and directed him to place the funds to his credit when received. The funds were consigned to M. H. had previously failed and made an assignment. Held M. obtained specific lien for his debt. The chancellor said, by the letter of the 17th of June, H. had given M. notice of his in-

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of that party: *Ellison* v. *Ellison*,(a) *Ex parte Pye* and *Ex parte Dubost*,(b) *Pulvertoft* v. *Pulvertoft*.(c)[2] The difference in principle

(a) 6 Ves. 656. (b) 18 Ves. 140. (c) 18 Ves. 84.

tention to make consignment for the purpose of paying balance; as that letter was in answer to an application for payment, it may be fairly presumed M. acted upon the faith of it, and neglected to press his demand to the extent he otherwise would have done. *Clark* v. *Mauran*, 3 Paige's Ch. Rep. 373.

Where a Calcutta firm, writing to their agents and consignees in London, directed them, if in funds, to hold £10,625 at the disposal of M., a creditor of the Calcutta firm, promising if the funds were not sufficient, to make a further remittance upon general account; and by a letter of the same date, the Calcutta firm advised M. of the directions given to the London firm. The London firm received this letter on the 12th day of March, 1841, and immediately advised M. thereof, stating that they were then in cash advances to the firm to a greater amount than the expected remittances were likely to cover, and concluded, "We have, however, registered the above, and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." In 1842, the Calcutta firm revoked their order in favor of M., upon a bill by M., against the London firm and others. The vice-chancellor held that the effect of the correspondence entitled M. to an account, as against the London firm, for the balance in their hands on the 12th day of March, 1841, on their general account with the Calcutta firm, and of the consignments and remittances of the Calcutta firm to the London firm, up to the revocation of the order, the London firm to have credited in such account for all dependences existing between them and the Calcutta firm, on the 12th day of March, 1841. Upon appeal, Lord Chancellor Cottenham held, that the correspondence did not establish a case of equitable assignment, and that the only question was, whether it established a contract binding upon the defendants, and that was a question of law; and in that case, although he thought it was competent for a court of equity to construe the correspondence, the language of it was such that it might have some peculiar sense, according to commercial usage, and therefore ought to be submitted to a special jury of merchants; and that if they found there was no contract at law, there was no equity. In an action brought to try that question, the Court of Exchequer decided, that there was no contract arising out of the cor-

[2] That where a trust is created for the benefit of a third person, though without his knowledge, he may afterwards affirm it, and enforce the execution of it. See *Cumberland* v. *Codrington*, 3 John. Ch. Rep. 261; *Shepherd* v. *McEvers*, 4 John. Ch. Rep. 136; *Nicholl* v. *Mumford*, 4 John. Ch. Rep. 529; *Moses* v. *Morgatroyd*, 1 John. Ch. Rep. 119. Where a trustee has accepted the trust, and entered upon its execution, he cannot afterwards, without the consent of the *cestui que trust* or the direction of the court, surrender or discharge himself of the trust. *Shepherd* v. *McEvers*, 4 John. Ch. Rep. 139; *Cruger* v. *Halliday*, 11 Paige's Ch. Rep. 314.

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between the two classes of cases is marked and obvious; but to decide to which of the two classes a given trust deed belongs is often a task of difficulty; it depends upon the intention of the author of the deed, to be collected from the deed itself, and such surrounding circumstances as may be admissible in aid of the interpretation of the deed. The present case is not one of simple conveyance to trustees upon trust to pay the debts of Edmund Griffith. The deed contains a covenant on the part of Edmund Griffith not to revoke the deed, and also a covenant on his part

respondence. Lord Chancellor Truro, on the case coming before him, concurred in the opinion expressed by Lord Cottenham, that the correspondence raised an equitable assignment. See the cases between same parties, reported 3 Hare, 46; 6 Hare, 570.

Vice-Chancellor Wigram, in *Malcolm* v. *Scott*, (3 Hare, 46,) says, "Nothing I can conceive, can be more clear than that instructions communicated by a principal to his own agent, to apply the property of the principal in payment of a particular creditor, do not *per se* give that creditor any lien upon the property in the hands of the agent. *Scott* v. *Porcher*, 3 Mer. 652. I think it equally clear, that the mere announcement by the principal, even to his creditors, that such an assignment had been made by himself for the payment of the creditor's debt, would not alter the case or give the creditor a lien; for this, authority can scarcely be wanting, but if it were, the case of *Ex parte Haywood*, (2 Rose, 355,) a case in bankruptcy, and one, therefore, which involved the equity as well as the law of the case; the principle of the decision in *Garrard* v. *Lord Lauderdale*, (3 Sim. 1; 2 R. & M. 451,) and the explanation which is given by Lord Cottenham in *Bill* v. *Cureton*, (2 Myl. & Keen, 510, 511,) of that and other cases of the same class, would remove all difficulty upon the subject. It is clear, notwithstanding such direction or communication, the property may remain under the dominion of the debtor.

In this case, after reviewing some of the correspondence, he assumes that if the debtor countermands direction to the agent, although he admits indebtedness, that the correspondence (no other communication being made to the plaintiff by the agent) was nothing more than a direction to his own agent, "and so far as the direction of the application of the proceeds was countermanded before communication had been made by the agent to the creditor, under which a lien, not given by the direction to the agent alone, could have been acquired by the creditor."

He assumes that an offer of security of a specific fund, when duly made upon enquiry as to payment, without a request for security for payment of the debt out of a specific fund, amounts to no more than a request by the creditor to be informed where he might look for payment. That such a communication, if nothing more passed, would not give the creditor a right to have the fund in the hands of the agent.

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to do all acts necessary on his part to effectuate the purposes for which the deed was made.

It was said, in argument for the plaintiff, that as the *deed without the covenants by Edmund Griffith would [*309] make the trustees, trustees or agents for Edmund Griffith the covenants in question were in substance covenants by Edmund Griffith with himself, and, therefore, binding upon himself only so far as he might think fit. It cannot, I think, have been expected by the counsel, who urged this argument, that it would prevail with me. The covenants in question are part of the deed, and the character of the deed must be determined from a view of all its provisions, including those covenants, whereas the argument fixes the character of the deed without reference to the covenants, which are as important as any other parts of the deed in fixing its character. To show this, it is only necessary to put hypothetically the case which actually existed. Edmund Griffith was in prison for debt; and in order to release him, it was necessary to raise money. Money was accordingly raised for the purpose; and it was to provide for the repayment of the money so raised, as well as to pay the other debts of Edmund Griffith, that the deed of 1810 was made. It is not too much to assume in such a case, that Cooke and the trustees should require a deed irrevocable by Edmund Griffith, for the purpose of securing the payment of Edmund Griffith's debts; but, as I have already observed, I think it immaterial for the purposes of this suit, whether the deed was revocable by Edmund Griffith or not. It appears to me sufficient, for the purposes of the plaintiff in this suit, that the ultimate surplus of the property comprised in the deed was reserved to Edmund Griffith. The value of this ultimate surplus might be materially affected by the revocable or irrevocable character of the deed; but the only question with which the plaintiff in this cause has to do is not the value of the equity of redemption which he claims, but who are the persons entitled to that equity of redemption. If Edmund Griffith did nothing *to revoke the deed, the case will be the same [*310] whether it was revocable or not. If he attempted to re-

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voke the deed, the same being irrevocable, I should apply that attempt to the ultimate surplus, after paying all his debts, precisely in the same manner as I should apply it to the surplus remaining after paying Cooke's debts and any other debts which the trustees had become bound to pay. In other words, for the mere purpose of determining the questions of conversion and reconversion, the same reasoning will apply to so much of the property comprised in the deed, whether that were the ultimate surplus after paying all his debts, or any larger part of the property.

Two questions then present themselves for consideration: first, what is the effect of the deed as between the real and personal representatives of Edmund Griffith? and, secondly, is the effect of the deed altered by anything which has since taken place?

In considering the former of these questions, I shall assume that the latter is to be answered in the negative, and shall also suppose Edmund Griffith to have died not later than the year 1820, that being (as I understand) a period down to which the trustees under the deed of 1810 certainly continued to act in execution of the trusts.

The question to be answered, it must always be remembered, is not, whether the surplus proceeds of the trust estates are real or personal estate, but to which of the testator's representatives those proceeds, whether real or personal estate, belong.

If the question arose under the will of Edmund Griffith, and not under his deed, I should perhaps have little [*311] *difficulty in answering the question; I should follow my own decision in *Fitch* v. *Weber*,(a) which was founded upon the authority of a case before Lord Thurlow.(b) The will speaks from the death of the testator, and whatever is deemed real estate at the time of his death *prima facie* belongs to his heir. A contemporaneous declaration that his real estate shall be turned into personalty may alter the character of the property which the heir-at-law takes, but unless it be given away from the heir, there is no reason why he should not take it, although the trusts of the

(a) 6 Hare, 145. (b) *Robinson* v. *Taylor*, 2 Bro. C. C. 589.

will may oblige him to take it as personal estate and not as real estate.

If the question in this cause had arisen under the will of Edmund Griffith the question would be, whether the limitation of the surplus to the executors of Edmund Griffith (who could not take beneficially) was a gift of the surplus to the next of kin, and the decision between the two classes of representatives would be governed by the answer to that question.

But a deed differs from a will in this material respect. The will speaks from the death, the deed from delivery. If, then, the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate from the delivery of the deed, and consequently at the time of his death. The deed thus altering the actual character of the property, is, so to speak, equivalent to a gift of the expectancy of the heir-at-law to the personal estate of the author of the deed. The principle is the same in the case of a deed as in the case of a will; but the appli-

[1] For cases upon the question of equitable conversion, see *Craig* v. *Leslie*, 3 Wheat. Rep. 563; *Fletcher* v. *Ashburner*, 1 Bro. Ch. Rep. 497; *Doughty* v. *Bull*, 2 P. Wms. 320; *Yates* v. *Compton*, 2 P. Wms. 308; *Rose* v. *Cunyngham*, 11 Ves. 554; *Kirkman* v. *Miles*, 13 Ves. 338; *Earl of Pembroke* v. *Beighden*, 3 Ch. Rep. 115; *Sweetapple* v. *Bindon*, 2 Vern. 536; *Greenhill* v. *Greenhill*, 2 Vern. Rep. 679; *Lingen* v. *Savray*, 1 P. Wms. 172; *Guidott* v. *Guidott*, 2 Atk. Rep. 254; *Bashley* v. *Masters*, 1 Ves. jr., 204; *Sitwell* v. *Bernard*, 6 Ves. 520; *Elwin* v. *Elwin*, 8 Ves. 547; *Best* v. *Stanford*, 1 Salk. 154; *Pulteney* v. *Darlington*, 1 Bro. Ch. Rep. 237; *Beverly* v. *Peters*, 10 Peters' Rep. 532. For American cases on this subject, see also *Smith* v. *McCrary*, 3 Iredell's Eq. Rep. 204, 207; *The Commonwealth* v. *Martin's ex'rs.*, 5 Munf. 117; *Tazewell et al.* v. *Smith's adm'r.*, 1 Rand. 313; *Hurt* v. *Fisher*, 1 Harr. & Gill, 88; *Gott* v. *Cooke*, 7 Paige's Ch. Rep. 523; *Leadenham* v. *Nicholson*, 8 Harr. & Gill, 267; *Allison, ex'r.* v. *Wilson's ex'r.*, 13 Serg. & Rawle, 330; *Morrow* v. *Brenizer*, 2 Rawle, 185; *Burr* v. *Sim*, 1 Whart. 252; *Welling* v. *Peters*, 7 Barn. 287; *Lorrillard* v. *Coster*, 5 Paige's Ch. Rep. 173; *Van Vechten* v. *Van Vechten*, 8 Paige's Ch. Rep. 106; *Ferguson and wife* v. *Stuart*, 14 Ohio Rep. 140; *Marsh* v. *Wheeler*, 2 Edw. Ch. Rep. 157; *Fairly* v. *Kline*, Pennington, 754; *Renehart and wife* v. *Harrison*, 1 Baldwin, 177; *Burrill* v. *Sheil*, 2 Barb. S. C. Rep. 459; *Hawley* v. *James*, 5 Paige's Ch. Rep. 323; *Drenkle's estate*, 3 Barn. 377; *Martin* v. *Sherman*, 2 Sandf. Ch. Rep. 341; *Stagg* v. *Jackson*, 1 Comstock's Rep. 206.

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cation is different, by reason that the deed converts the
[*312] property in the lifetime of *the author of the deed, whereas, in the case of a will, the conversion does not take place until the death of the testator, and there is no principle on which the Court, as between the real and personal representatives, (between whom there is confessedly no equity) should not be governed by the simple effect of the deed in deciding to which of the two claimants the surplus belongs. It was in this view of the case that I observed during the argument, that the *status* in which the property was found could not, as it appeared to me, affect the question to whom it belongs. In this view of the question I find myself confirmed by the language of Sir. W. Grant, in *Thornton* v. *Hawley*,(a) In that case the question was, whether money, the subject of a marriage settlement, was absolutely required to be laid out in land, or conditionally only. Sir W. Grant decided, that the requisition was absolute, and said, "There is no weight in the circumstance that the property is found in the shape of money or land, for the character is to be found in the deed; and in *Wheldale* v. *Partridge* the Lord Chancellor lays down, in which I perfectly concur, that it is a circumstance that goes no way, except when the fund gets into the possession of a party who would have it in either way."(b) Then, after observing that the money in that case never came into the hands of any one who could determine whether it should be money or land, he adds, "We must go back to the deed upon which the true construction is, that it must be considered land."(c)

There can be no doubt as to the mere construction of the deed in the present case; the deed gives the surplus to Edmund Griffith,
his executors, administrators, and assigns. I need not
[*313] inquire how the case would *be if Edmund Griffith had received the money, and dealt with it as his own estate. The first question is, how the case would be if the trustees had sold the land in the lifetime of Edmund Griffith, and had the money in their hands. In that case it would, I apprehend, clearly belong to the personal representative of Edmund Griffith. The

(a) 10 Ves. 129. (b) Id. 138. (c) Id. 139.

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words of the deed require this, and the case of *Van* v. *Barnett*,(*a*) as explained by the plaintiff's counsel,(*b*) supports the conclusion; some of the observations *of Lord Thurlow, [*314] in the case of *Robinson* v. *Taylor*,(*c*) above referred to, throw light upon this subject.

The question however, remains as to the surplus property sold after the death of Edmund Griffith, or not required to be sold to pay his debts; the answer to this question must be found in the deed. I can understand the argument which alters the nature of the property, according as it is actually sold or not sold; but I cannot understand the reasoning which, in the case of a deed, would give the surplus to a different person, according only to the time when the trustees may happen to execute the trust for sale. In the absence of authority, therefore, I should conclude

(*a*) 19 Ves. 102.

(*b*) The argument of the plaintiff's counsel in the principal case, was to show that the bill of Van was filed, not to revoke the deed of trust, but in fact to have the trust for sale carried out under the direction of the court. It appeared from the statements of the bill, that the defendant Barnett had sold considerable portions of the estate, and received the purchase-moneys, and had in 1785 contracted with Brown for the sale of the whole of the residue. The reporter has been favored by Mr. Pirie with the following note of the substance of the prayer in *Van* v. *Barnett*, extracted from R. Lib. 1787, fo. 713:—

"That the defendant Barnett may be decreed to pay to the plaintiff what is due to him on account of the annuity of 300*l*., reserved by deed of trust for the plaintiff's support, and may account with the plaintiff for all sums of money received by him for the plaintiff's use since 1781, and deliver accounts &c. And that the annuity of 300*l*., granted to Barnett, may be held to have ceased from the time defendant received enough to redeem the same; and that the stated account of 1784 may be again entered into; and that it may be referred to the Master to see whether anything, and what, is due to the defendant Barnett on the balance of such account. And that the defendant, on payment thereof, may re-convey the plaintiff's estate as the plaintiff shall direct; and that the defendant Barnett may be enjoined from proceeding with the sale of the estates, or management thereof, or in anything anywise relating thereto, or to the said trust. And that a receiver may be appointed, and the rents and profits applied according to the true intent and meaning of the said deed of trust; and that the agreement of the 10th March, 1785, between Barnett and Brown, for the sale of the plaintiff's estates, may be no longer binding on the plaintiff; and that the plaintiff may be at liberty to re-sell the said estates, freed from the contract with Brown."

(*c*) 2 Bro. C. C. 589.

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that the personal representative of Edmund Griffith, and not his heir, is the party entitled to the surplus of the property comprised in the deed of 1810.

With respect to authority, the late case of *Biggs* v. *Andrews*,(a) is a direct authority in point. It is true, indeed, that the language of the deed in that case does in a popular sense express more clearly than the language in the present case, the intention of the author of the deed, that the surplus property should become personal estate; but the limitation of the surplus to Edmund Griffith, his executors, administrators, and assigns, expresses in technical language all that is expressed in popular language in the case of *Biggs* v. *Andrews;* and I am not at liberty to suppose that Edmund Griffith, using technical language, did not understand its effect.

The case of *Van* v. *Barnett* appears to me to be an au-
[*315] thority in support of the same proposition. In that *case, Van conveyed his property to trustees, upon trust to sell and pay his debts, and to pay the ultimate surplus to Van, his executors, administrators, and assigns. It appears, by searching the Registrar's book, that Van filed his bill, complaining of the conduct of his trustees. He did not, however, seek to revoke the deed, but prayed, in effect, that the trusts of it might be executed by the Court. In the suit, as I understand it, real estate was sold in the lifetime of Van, and the proceeds came to be administered by the Court according to the trusts of the deed. Van died, and the question arose between his real and personal representative, as to the surplus proceeds not required to pay Van's debts. Lord Eldon decided in favor of the personal representative, but gave no opinion as to the real property, if any, remaining unsold. Whether there were any such, does not, I think, appear. That case decides, that the trusts of the deed deprived the heir-at-law of his expectancy, so far, at least, as related to real estate converted before the death of Van. But if it be once admitted that that is the effect of the deed as to part of the property, I cannot follow the reasoning which would ascribe any other

(a) 5 Sim. 424.

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effect to the deed in its application to other parts of the property. The sale or non-sale of the trust property may affect the character in which any surplus may go to the party to whom the deed gives it, but cannot determine, or assist in determining the person to whom it is given. Such an intention cannot be ascribed to Edmund Griffith without express words, or the clearest implication, of which I find none in the present case. I think, therefore, both upon principle and authority, the personal representative of Edmund Griffith, and not his heir-at-law, is the party entitled to the surplus of the property comprised in the deed of 1810.

Many dicta may be found in apparent conflict with what I have decided; but the dicta will, I believe, be *recon- [*316] ciled with the present decision, by adverting to this—that those dicta are applied to wills, and not to deeds, or to deeds in which there has been no disposition of the ultimate surplus, or none inconsistent with the claim of the heir.

I have referred to the Treatise on Conversion, by Leigh and Dalzell, but do not find anything in it which conflicts with the above conclusion. The distinction is that which I have noticed above.

The remaining question then is, "is the effect of the deed altered by anything which has since taken place?" This must be answered by inquiring whether Edmund Griffith did anything in his lifetime indicating an intention to alter the state of the property, as it was fixed by the deed of 1810. Two points were relied upon in argument by the plaintiff's counsel—First, the length of time that had elapsed since anything was done by the trustee; and secondly, the suit of Edmund Griffith in 1827.(a) With respect to the former point, it is not the mere lapse of time, but the acts of parties during that time, that must be looked at, the evidence shows that the debts of Edmund Griffith, provided for by the deed, have not been satisfied. If, indeed, I am to give full effect to what the witnesses say, Cooke's debt, which is specified in the deed, and a debt of 1300*l.* owing to Harford one of the trustees, and the debts of any other creditor between whom

(a) See *Griffith* v. *Ricketts*, 3 Hare, 476, where the substance of the bill is stated.

and the trustees communications may have been made, are still unpaid; and the trustees only ceased to act in paying the debts, when they were unable to realize assets for the purpose. In the meantime, the property which is the subject of this suit
[*317] has been since 1805 in the possession of mortgagees, *and Edmund Griffith has neither enjoyed it nor asserted a title to it adverse to the trustees, unless the suit of 1827 be an act of that description. I may observe however, that in strictness, it is not necessary that I should insist upon this evidence, for the onus is on the plaintiffs to prove the re-conversion, and it is sufficient that they have not so done.

With respect to the suit of 1827, the trustees were not parties to it. The suit does not seek to displace them, and the attempt of Edmund Griffith to redeem the property in that suit is not only consistent with the deed of 1810, but in strictness must be intended as the act of Edmund Griffith in furtherance of his covenants in the deed of 1810. The circumstance that that suit was not prosecuted with effect may well be taken to explain why the trustees have been hitherto unable completely to carry out the trusts of the deed. So long as Cooke's debt or any part of it, or the debt of Harford or of any other creditor between whom and the trustees communications may have been made,—so long as any of such debts remain unpaid, I cannot assume that the trust deed has been abandoned by the parties interested in it.

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*Douglas *v.* Willes. [*318]

1849: Feb. 20th and 21st; May 22d.

By a settlement of trust funds for the benefit of a husband and wife for their lives, with remainder to the children of the marriage equally, it was provided, that if the husband should, during his life, advance or pay any moneys for or on account of the advancement or preferment in life of any child of the marriage, or in case any lands or tenements, moneys, goods or chattels, should descend or come by or from him unto or for the benefit of any such child, then such moneys, goods and chattels, and the value of such lands or tenements, should be accounted as part or in full of the portion provided by the settlement, unless the husband should by writing declare the contrary.

Held, that the advances and payments referred to in the first part of the provision should be construed advances and payments made *inter vivos*, perfected in the lifetime of the husband; and that the lands, tenements, goods or chattels, in the second part of the clause, should be confined to matters not perfected, or not having effect until after his death.

That property which, during the coverture, accrued to the husband and wife, in right of the wife, and by a settlement, to which the husband and wife were parties, was settled upon them for their lives, with remainder to their children, as they or the survivor of them should appoint, (but which was not otherwise received or reduced into possession by the husband) was not property to be accounted for, as part of their portion, by the children to whom the husband and wife, or the survivor of them, afterwards appointed it.

That the value of a leasehold house, assigned by the husband in his lifetime to one of the children of the marriage, for his more comfortable maintenance and support, did not affect the share of such child of the trust fund.

That an advance by the husband in his lifetime to one of his daughters, of a sum of money, for the purpose of apprenticing her son,—the share of such daughter of the trust fund having been settled upon herself and her husband, with remainder to her children,—did not affect the share of such daughter of the trust fund.

Payments or advances to children out of an estate, other than that from which they derive portions, are not to be taken as made in or towards satisfaction of such portions.

The suit was brought to execute the trusts of an indenture of settlement, dated the 20th of April, 1790, made subsequent to the marriage of Charles Johnson and Mary his wife, in pursuance of an agreement entered into before the marriage, whereby a sum of 10,000*l.*, vested in trustees, parties to the deed, was settled upon trust for Charles Johnson for life, remainder upon trust to pay Mary Johnson an annuity of 200*l.* for her life, and

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subject to such trusts, for all and every the children and child of the marriage, equally, to be assigned and transferred to them: as to sons, at their ages of twenty-one years, and as to daughters, at that age or marriage. The deed contained a clause of survivorship between the children in case of the death of a daughter under twenty-one or marriage, or of a son under twenty-one. And the deed contained the following proviso: "Provided also, that if the said Charles Johnson shall, at any time or times during his life, advance or pay any sum or sums of money for or on account of the advancement or preferment in life of any or either of the child or children of the said marriage,

[*319] *or in case any lands or tenements, moneys, goods, or chattels, shall descend or come by or from him the said Charles Johnson, unto or for the benefit of any or either of the said child or children, then and in such case, such sum and sums of money, goods, and chattels, and the value of such lands or tenements, shall be accounted as part, if less in value than the portion or portions last hereinbefore provided or intended for the same child or children; but if as much or more in value, then in full of the same portion, unless he the said Charles Johnson shall, by writing under his hand, or by his last will and testament in writing as aforesaid, declare the contrary."

Of the trust fund, 8000*l.* was paid or provided by John Johnson, the father of Charles, and 2000*l.* by William Willes, the father of Mary; and it was provided, that if there were no children of the marriage, or all the daughters should die before twenty-one or marriage, and sons before twenty-one, the trustees should stand possessed of the 8000*l.* as Charles Johnson should appoint; and if no appointment by Charles, then for John Johnson, his executors, &c., and of the 2000*l.* as Mary should appoint; and if no appointment, for William Willes.

Nine children of the marriage attained twenty-one years of age, and became objects of the power. Three of them, Charlotte, Lucy, and Felicia, were not advanced or preferred in any manner by Charles Johnson in his lifetime. The other six children, Mary, John, Francis, Edward, Harriet, and William, derived

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property from or through Charles Johnson, in his lifetime, in several forms:—

1. By a deed of settlement of the 31st of August, 1815, to which Charles Johnson and Mary his wife were parties, after reciting that the said Charles Johnson *and Mary his wife were entitled to one-sixth part of the residuary estate of Archdeacon Willes, just then deceased, and that they had determined to assign the same upon trusts, the same was so assigned to trustees, upon trust for Charles Johnson for life, remainder to Mary his wife for life, remainder to the children of Charles and Mary, born and to be born, as Charles and Mary, and the survivors of them, should, in manner therein mentioned, appoint; and in default of such appointment, to their children, born and to be born, as therein mentioned. In exercise of this power, Charles Johnson and Mary his wife, by a deed poll of the 29th of January, 1821, appointed 2000*l.* to Charles, 2000*l.* to Edward, and 1000*l.* to Harriet, subject to the life interest of Charles and Mary in the residuary estate of Archdeacon Willes. By another deed poll of January, 1826, Charles and Mary appointed 832*l.* 19*s.* 6*d.* of the same fund to William, subject to their life interest, and by a subsequent deed poll Charles and Mary appointed 438*l.* 18*s.* 2*d.* to William the same son, subject to their life estate. [*320]

The Master found that the one-sixth of the residue of the estate of Archdeacon Willes—the property settled by the indenture of the 31st of August, 1815—consisted of the sums of 5000*l.* and 3000*l.* respectively, secured by mortgage, making together the sum of 8000*l.*, and of the sum of 1271*l.* 17*s.* 8*d.* consols, and which said respective sums were the absolute property of the said Charles Johnson by virtue of his marital right, and consequently the portions thereof so appointed were his absolute property in such right.

2. By an indenture of the 10th of December, 1819, Charles Johnson, in consideration of the love and affection he bore to his son John, and in order to provide for his more comfortable maintenance and support, assigned *to him, for the residue of ninety-nine years, commencing in 1788, a [*321]

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leasehold house in High-street, Mary-le-bone. John obtained the benefit of this assignment in the year 1829; and the value of the interest so assigned to him was then 1587*l.*

3. By an indenture of the 21st of June, 1838, Charles, in consideration of his love and affection for his wife Mary, and for his son Francis, assigned to Francis, his executors, administrators, and assigns, a dwelling-house and close of meadow land in the county of Somerset, for the residue of a term of 1000 years, upon trust for his wife Mary for life, with remainder to Francis absolutely. The value of this house and acre of land at the death of Mary was 390*l.*

And, 4. The Master found that the testator, Charles Johnson, previous to his decease, agreed with his said daughter, the plaintiff Mary Douglas, to advance her a sum of 525*l.*, in order to enable her to apprentice one of her children to a surgeon; and he, previously to his decease, advanced her the sum of 367*l.* 10*s.*, and after his decease, his executor advanced her the remaining sum of 157*l.* 10*s.*, making together the entire sum of 525*l.*

Edward died in the lifetime of his father. Under the will of Charles Johnson, and the sole appointment of Mary his wife, who survived him, Mary, John, Francis, Harriet, and William, who had previously received the benefits above stated, and Charlotte, Lucy, and Felicia, who had not before received anything in the nature of advancement or preferment, took interests. Charles Johnson, by his will, dated in November, 1834, gave all his real estate to trustees, upon trust to sell and to add the net proceeds to his personal estate; and he gave those proceeds and his personal estate to trustees, upon trust for his wife, for life,
[*322] and after her death *for his eight children then living: the shares of his daughters to be for their separate use, during their then present coverture, and in case they should survive their husbands, to them absolutely; but as to the shares of such of them as should die in the lifetime of their husbands, upon trust for their children, as therein mentioned. The Master found that a sum of 1756*l.* 3*s.* 9*d.* had been divided in respect of the residuary estate of Charles Johnson, being 219*l.* 10*s.* 5 1-2*d.* for each of the eight shares; and that a sum of 281*l.* 13*s.* 9*d.* was

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then divisible, yielding 28*l.* 19*s.* 2*d.* for each eighth share. By a deed poll of the 18th of August, 1848, Mary Douglas, in exercise of the power given to her by the indenture of the 31st of August, 1815, appointed a sum of 3000*l.*, and all other unappointed moneys, subject to the trusts of the said indenture of August, 1815, in ten equal shares; as to one of such shares in trust for her eldest son John, his executors, administrators, and assigns absolutely, and as to one other of such shares, in trust for her second son Francis, his executors, administrators, and assigns absolutely, in addition to the sums then already appointed to him; as to two other of such shares, in trust for her younger son William, his executors, administrators, and assigns absolutely, in addition to the sums then already appointed to him; as to one other of such shares, in trust for her daughter, the said plaintiff Mary Douglas, her executors, administrators, and assigns, for her own sole and separate use and benefit; as to one other of such shares, in trust for her daughter Charlotte, the wife of C. C. Eyre, her executors, administrators, and assigns, for her and their own use and benefit; and as to one other of such shares, in trust for her daughter Harriet, her executors, administrators, and assigns, to and for her own sole use and benefit and disposal, in addition to the sum then already appointed to her; as to one other of such shares, in trust for her daughter *Felicia, her [*323] executors, administrators, and assigns absolutely, and to be paid into her own hands for her own use, without being subject or in any manner liable to the trusts of her marriage settlement or any other trust whatsoever; and as to the remaining two of such ten shares, in trust for her youngest daughter Lucy, her executors, administrators, and assigns, for her own sole and separate use and benefit, without being liable or subject to the trusts of her marriage settlement. The Master found that these ten shares consisted of 800*l.* each.

Charles Johnson did not, by any writing under his hand, or by his will, declare that any such sum or sums of money, goods, and chattels, or the value of any lands or tenements, should not be accounted as part of the portion or portions provided by the indenture of April, 1790.

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It appeared also by the report, that one of the children had aliened his share of the property comprised in the settlement of April, 1790; that the shares of several others had been settled upon their respective marriages, for the benefit of the respective settlors and their issue; among others, the share of the plaintiff Mary was, by articles dated in May, 1815, made upon her marriage with Richard Douglas, so settled, that the same, in the events which had happened, belonged to the plaintiff Mary Douglas, for her separate use for life, and after her death, as to one moiety of the annual produce thereof, to the assignees in bankruptcy of her husband during his life, and subject thereto to the children of the marriage, (three of whom were living and were defendants,) as the plaintiff Mary, in manner therein mentioned, should appoint; and in default of appointment, unto [*324] and amongst all the children of the *marriage, or such of them as, being a son, should attain twenty-one, or being a daughter, should attain that age or marry, share and share alike; and if no children, then as the plaintiff Mary should, in manner therein mentioned, appoint; and in default of such appointment, then to the plaintiff Mary absolutely.

The cause was heard on further directions.

The *Solicitor-General*, Sir *F. Simpkinson*, Mr. *Temple*, Mr. *Swanston*, Mr. *Teed*, Mr. *Cooper*, Mr. *K. Parker*, Mr. *Walker*, Mr. *Wood*, Mr. *R. Palmer*, Mr. *Piggott*, Mr. *Stinton*, Mr. *Messiter*, Mr. *Chichester*, Mr. *Toller*, Mr. *Follett*, Mr. *Grenside*, Mr. *Giffard*, Mr. *S. James*, and Mr. *W. P. Murray*, appeared for the different parties.

The questions argued were as to the effect of the benefits which the six children had respectively received from or by means of their father, upon their respective shares, under the settlement of April, 1790; and whether, if those benefits, or any of them, were to be treated as conferred by way of advancement towards or in satisfaction of the portions or portion, the result was to increase the settlement fund for the benefit of the unadvanced children, the objects of that fund, or to constitute the father the

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purchaser of the portions of the children so advanced or benefited.

The following authorities were referred to in the argument:—*Weyland* v. *Weyland*,(a) *Watson* v. *Earl of Lincoln*,(b) *Noel* v. *Lord Walsingham*,(c) *Duke of Bridgwater* v. *Egerton*,(d) *Roberts* v. *Dixall*,(e) *Bray* v. *Bree*,(f) **Trimmer* v. *Bayne*,(g) [*325] *Robinson* v. *Whitley*,(h) *Bell* v. *Coleman*,(i) *Kirk* v. *Eddowes*,(k) *Folkes* v. *Western*,(l) *Pitt* v. *Jackson*, *S. C.* nom. *Smith* v. *Lord Camelford*,(m) *Brownlow* v. *Earl of Meath*.(n)

VICE-CHANCELLOR:—For the purpose of deciding the effect to be given to the acts referred to in the Master's report, upon the interests of the children of Charles Johnson and Mary his wife, under the settlement of April, 1790, it will be convenient, in the first place, to put a construction upon the clause in the settlement, with reference to which the inquiries were directed.

It would be difficult to put any construction upon that clause which should not be open to verbal criticism, or be attended with some anomalous results, unless Charles Johnson took the precaution fully to explain the views with which his acts were done. But I believe the true construction of the settlement requires that the first member of the clause should be read as applicable to acts or matters *inter vivos*, perfected in the lifetime of Charles, and the second member of the clause be confined to matters not perfected or not having effect until the death of Charles: this ascribes to the parties a probable intention, at the time of making the settlement. That Charles would, during his life, advance or pay money

(a) 2 Atk. 632. (b) Amb. 325. (c) 2 S. & S. 99.
(d) 2 Ves. 121. (e) 2 Eq. Ca. Ab. 668, pl. 19.
(f) 2 C. & F. 453; 8 Bligh, N. S. 568. (g) 7 Ves. 508.
(h) 9 Ves. 577. (i) 5 Mad. 22. (k) 3 Hare 509.
(l) 9 Ves. 456.
(m) 2 Bro. C. C. 51; 2 Ves. jun. 692; and observations, 2 Sugd. Pow. 210, 7th edit.
(n) 2 D. & Walsh, 674.

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for or on account of the children of the marriage, for
[*326] the mere purpose of support and maintenance, *and not of advancement or preferment, was certain. It was therefore provided that those advances or payments only which were made by Charles during his life, for or on account of the advancement or preferment in life of any of the children of the marriage, should be accounted as part or in full of their portions, under the settlement of April, 1790. But with respect to property of any kind coming to the children after his death, by devise, descent, intestacy, or otherwise, it was reasonable to consider and treat such property as, in whole or in part of, the provision intended by Charles for the child to whom it might be given, that is, for the same purpose as the settlement,—leaving it to him, if his intention were otherwise, to make that apparent by contemporaneous explanation. Applying this principle of construction to the facts found by the Master, I must hold that the assignment of the leasehold to John by the indenture of the 10th of December, 1819, is not to be accounted for by him in part or in full of his share of the property comprised in the settlement of April, 1790. It is not so within the words of the clause; and the only question is, whether it can be held a satisfaction of a right under the settlement of April, 1790, by any general rule of law irrespective of the settlement; for this no argument or authority was offered. It is not a benefit or provision *ejusdem generis*. John will, therefore, take his share of the settled property, unaffected by the assignment of the leasehold premises.

The like observations apply to the leasehold property assigned to Francis by the indenture of the 21st of June, 1838.

With respect to the 500 guineas agreed by Charles Johnson to
[*327] be advanced to the plaintiff Mary Douglas, in order to enable her to apprentice one of her children to a surgeon, as found by the Master, there are strong grounds for contending that that was money advanced or paid to Mary Douglas on account of her share of the property comprised in the settlement of April, 1790, if not (in terms) for her advancement and preferment; and if Mary Douglas, at the time of that agreement, and the subsequent advances in pursuance of it, had remained

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absolute owner of her share of the property comprised in the settlement of 1790, it would, perhaps, have been right to have accounted that 500 guineas as part of her share of the settled property. But, before the agreement in pursuance of which the 500 guineas was advanced, Mary Douglas had parted with her interest in her share of the settled property; and I cannot, as against the parties claiming under her, hold that any payment made to her is a satisfaction of their derivative claims under her, to the property comprised in the settlement of April, 1790. I give no opinion as to her liabilities to the estate of Charles in any other proceeding. All that I am required, or at liberty to do in this suit is, to determine to whom, and in what proportions, the property comprised in the settlement of 1790 now belongs.

With respect to the property constituting one-sixth part of the residuary estate of Archdeacon Willes, and comprised in the settlement of the 31st of August, 1815, that property does not appear to me to be within the scope of the clause in the settlement of April, 1790, so as to affect the rights of the parties under that settlement. The finding of the Master in respect of that property I am bound to regard as a conclusion of law founded upon premises apparent in his report, and not the finding of a dry matter of fact. The property would have been the absolute property of Charles, if he had called it in, in which case it would have been part of his general estate, and subject to the clause in the settlement *of April, 1790; but unless and until he [*328] did so, it was not part of his estate, and would have survived to his wife, if he had died without reducing it into possession. In that state of the property, an arrangement, to which Charles was a party, appears to have been come to, in pursuance of which the settlement of August, 1815, was executed, by which the one-sixth of Archdeacon Willes's estate was intercepted. The property comprised in that settlement, therefore, never constituted part of the general estate of Charles; and, without any information, except that which is furnished by the settlement of August, 1815, I think I must deal with the property comprised in it as if it had been put into the state in which I find it by the will of Archdeacon Willes, or any indifferent person. Charles, who

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might have made it all his own, waived that right; and I do not see how the circumstance, that his consent was necessary to the arrangement, would justify me now in considering the property comprised in it as part of his estate, or as falling under the description of moneys, goods, or chattels, descending or coming by or from him, within the terms of the settlement of April, 1790; unless it would have been so, if placed in that position by the will of Archdeacon Willes, or any other person.

If the question were, whether, independently of the clause in the settlement of April, 1790, the appointments made in pursuance of the powers given to Charles and Mary jointly, and to the survivor of them, under the settlement of August, 1815, were to be deemed satisfactions of portions given under the settlement of April, 1790, the proper answer would, in my view of the case, be in the negative, upon the ground that the provisions in the two cases were not derived from the same estate: *Roberts* v. *Dixall*,(a) *Walpole* v. *Conway*,(b) and *Sir W. Davies*, [*329] *case*, 5 Vin. Abr. 282, pl. 38; and I cannot think, that, in the settlement executed upon the marriage of the father in April, 1790, anything more was intended; certainly nothing more is necessarily expressed than to make provision for advances to come out of his own estate. It may be said, perhaps, that this construction makes the clause say no more than the law would have said without it. But so it is, as to the first member of the clause, at all events. I cannot say the point is free from doubt; but the conclusion I have come to appears to me to be right. My conclusion is, that neither the joint appointments of the husband and wife in January, 1821, nor the separate appointment of Mary in August, 1843, under the powers reserved by the settlement of August, 1815, have disturbed the rights of the parties under the settlement of April, 1790.

The only remaining question relates to the property given by the will of Charles,—and here I am placed in considerable difficulty. The Master has found the will of Charles, but has not answered the inquiry which would have informed me what

(a) 2 Eq. Ca. Ab. 668. pl. 19. (b) Barnard. Ch. R. 156, 157.

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amount of property came under his will to his eight surviving children; and I am not, therefore, in a condition to deal with this part of the case, unless I were prepared to hold that the property which came under the will of Charles is not within the scope of the settlement of April, 1790, or that I may safely disregard the case of *Folkes* v. *Western*;(a) but to neither of these conclusions, in the abstract, am I prepared to come. The clause in the settlement of April, 1790, contemplates in terms Charles making a will; and I cannot narrow the word "come" in the settlement of April, 1790, so as to exclude from its operation property given by his will; but, in the application *of the clause to the facts found by the Master, it appears [*330] to me that questions admitting of argument may possibly arise. With respect to the case of *Folkes* v. *Western*, I certainly doubt whether, if it were *res integra*, the case would be decided at the present day as it was decided by Sir William Grant in 1804, when the case of *Pitt* v. *Jackson* was not referred to;(b) but it is now forty-five years since that case was decided, and many titles may now depend upon it; and if the present case were exactly similar to *Folkes* v. *Western*, I should feel bound to regard it as a case which ought not to be disturbed, unless by higher authority than mine. The present case is obviously less favorable than was the case of *Folkes* v. *Western* to the conclusion that Charles making an advancement to any of the children, thereby became a purchaser of such child's share, under the settlement of April, 1790. I make these remarks, however, only that the parties interested may not prosecute needless inquiries before the Master as to the estate of Charles.

The reference was not required by any of the parties, and the decree declared that the nine children who survived Charles, or those claiming under them, were entitled to one-ninth each of the trust fund comprised in the settlement of April, 1790.

(a) 9 Ves. 456. (b) 2 Bro. C. C. 51.

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[*331] *DIXON *v.* PYNER.

1850: March 7th, 8th and 11th.

Under a decree, directing the sale of an estate, but not directing by whom the sale shall be conducted, the Master is not bound to give the conduct of the sale to the plaintiff, but may, in his discretion, if he considers it more beneficial to the estate, give the conduct of the sale to other parties.

Grounds on which the conduct of a sale, under the decree of the court, may properly be given to parties other than the plaintiff.

THE decree directed the sale of certain estates which had been vested in the defendants, the trustees, by trust deeds made in 1839. Under these deeds the plaintiff was entitled to a portion of the proceeds of the sale, and the defendant Dixon to another portion. The decree for sale gave the plaintiff, and the defendants beneficially interested, liberty to bid; but such liberty, as to the plaintiff, was stated at the bar to have been added to the decree by inadvertence, the plaintiff not requiring, and offering to waive it.

In carrying out the decree in the Master's office the Master gave the defendants, the trustees, the conduct of the sale, on the ground that, in his opinion, they were in a situation to conduct it more beneficially than the plaintiff, but without having that part of the decree which gave the plaintiff liberty to bid brought to his attention. The plaintiff objected to the course taken by the Master as to the sale, and moved that the conduct of the sale might be given to himself.

Mr. *Lloyd* and Mr. *Shebbeare*, in support of the motion, said, that it was the common practice, where it was not otherwise directed by the decree, that sales before the Master should be conducted by the plaintiff in the cause; and that there was no sufficient reason shown in this case for departing from the rule.

Mr. *Wood* and Mr. *Elmsley*, for the defendant Dixon, and Mr. *Hetherington*, for incumbrancers, opposed the application.

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*Independently of the objection that the plaintiff had [*332] liberty to bid, the sale would be more beneficially conducted by the trustees, whose solicitor had prepared abstracts of the various parcels in the course of the attempts which had already been made to sell the property, and the expense would be greatly increased if the sale were now placed in other hands.

The *Solicitor-General* and Mr. *Hislop Clarke*, for the trustees.

The General Orders L. and LI. of April, 1828, and *Dalby* v. *Pullen*(*a*) were referred to.

VICE-CHANCELLOR:—It was in this case argued, that the Master had no power to take the conduct of the sale from the plaintiff, in the absence of any direction by the Court on the subject, or, at least, unless the plaintiff had been shown to be more or less in default, which, it is said, was not the case. I should have thought that the plaintiff had waived his right to conduct the sale, by obtaining liberty to bid under the decree, and that in this case the trustees, and not parties having liberty to bid, should have the conduct of the sale. Although that point was not made before the Master, the Master has, in this case, given the conduct of the sale to the trustees. The sale of an estate is distinguishable from the common case entitling a plaintiff to the carriage of a decree which he has himself obtained. The question is, whether, the plaintiff not being in default, the Master had a discretion to give the conduct of the sale to any other party. Upon this point I have communicated with several of *the Masters, who are all [*333] clearly of opinion that they have such a discretion. They inform me, that, on being applied to for the purpose, they are in the habit of giving the conduct of sales, directed by the decrees of the Court, to parties other than the plaintiff, when that course is shown to be beneficial to the parties interested in the property. I shall not, therefore, alter what the Master has done

(*a*) 1 Russ. & My. 296.

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in this case, on the ground of any want of jurisdiction to adopt the course which has been taken.

I have no doubt that the Master has in this case proceeded upon safe grounds. The general rule of the Court, where a receiver has been appointed by the Master, and there is no question of property to be decided, but merely a question of discretion, is, not to interfere or disturb the Master's appointment, unless it can be shown that there has been an injurious exercise of such discretion. A like rule should apply to a case like the present. In the present case there were sufficient reasons for giving the trustees the conduct of the sale. It appears that ten years have elapsed since the trusts for sale were created, and in the course of that time several attempts have been made to sell the property. Abstracts have been prepared by the solicitors of the trustees, and from the nature of the property a great number of such abstracts has been required to show the state of the title. The trustees or their solicitor, having prepared these abstracts, and having the necessary knowledge of the state of the title, are in a condition, without further expense and delay, to lay it properly before the Master. The expense and delay which must result from adopting a different course would alone be a sufficient reason for not disturbing the decision of the Master.

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*Bromley *v.* Wright. [*334]

1849: March 14th, 15th and 17th.

Real and personal estate given to trustees, upon trust to pay the income to the testator's wife for her life, and within or at the expiration of ten years from the death of the survivor of himself and his wife, to sell and convert the same into money, and out of the income to pay annuities to several persons and classes of persons for the said term of ten years, with pecuniary legacies to the same persons and classes, and also to other persons, at the expiration of that time, and annuities to other persons for the lives of the annuitants, and specific legacies to others. The residue was then given to all and every the several legatees before named, (with exceptions) rateably and in proportion to the amount of their respective legacies. The wife survived the testator:—*Held*, that the "legatees before named" should be construed to be the legatees taking benefits out of the fund which fell in at the wife's death, and the "legacies" such legacies as remained to be satisfied at the expiration of the ten years.

That annuitants for life, not having other legacies, were legatees of shares in the residue.

That the specific legatees, including one taking a bequest of a watch, chain and seal, were entitled to share in the residue according to the value of their respective legacies.

That annuitants, who survived the testator and died before the expiration of the ten years, when their pecuniary legacies were payable, took vested interests in such annuities and legacies.

That a class described as "the children" of B., but not otherwise named, came within the description of "legatees before named."

That the widow of the testator did not take under the residuary gift.

That the annuities which ceased at the expiration of the ten years, were not legacies in respect of which the annuitants took any share in the residue.

The questions arose upon the will of Thomas Bromley, dated the 10th of February, 1825. The testator gave to his wife Rose Mary 500*l.*, to be paid to her by his trustees within two months after his death. He gave her his household goods, and other effects particularized in the will, which should be in his dwelling-house at Southampton at the time of his death; and also such part of his household goods and furniture and other effects in the parsonage at Bighton, as she might wish to select for her own comfort and convenience. And he gave to his trustees all his real and personal estate, upon trust to pay the income to his

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wife for life; and from and immediately after the decease of his wife, upon trust, within the space or at the expiration of ten years from the decease of his wife, or otherwise from his own decease, in the event of his surviving his wife, as the trustees in their discretion should think best, to sell and convert into money all such part of his real and personal estate as should not then consist of ready money and money in the funds, and invest the proceeds in Government or real securities at interest. And he declared his will to be, that the income of the fund [*335] arising *from such conversion, and the rents, issues, and profits of his real and personal estate, until the conversion, should be held by his trustees, for the purpose of answering and satisfying the several annuities and legacies thereinafter bequeathed. The legacies after mentioned in the will were, amongst others, the following:—

1. To Mary Bromley, the widow of his brother Robert, an annuity or yearly sum of 100*l.*, for the term of ten years from the decease of the survivor of himself and his wife, for the joint use of herself and her daughter Agnes. And, in case of the death of either of them before the expiration of the ten years, then to the sole use of the survivor, her executors, administrators, and assigns. And at the expiration of the term of ten years he gave to Mary, if then living, the legacy or sum of 2000*l.*, but, if she should be then dead, he gave the legacy of 2000*l.* to Agnes, absolutely.

2. To Louisa Worthington Bromley, her executors, administrators, or assigns, an annuity of 50*l.*, for the same term of ten years; and at the expiration of that term, he gave her 1000*l.*, absolutely.

3. To his sister Elizabeth Bromley he gave an annuity or yearly rent-charge of 50*l.*, during the term of her natural life.

4. To his brother Henry he gave an annuity of 50*l.*, for the same term of ten years; and at the expiration of that term he gave him a legacy of 1000*l.*, absolutely.

5. To Margaret and Mary Cowley and the survivor of them he gave an annuity or yearly rent-charge of 50*l.*, for the same term of ten years, if they or either of them should so long live;

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and at the expiration of the ten years, if either of the Cowleys should be living, the trustees were to lay out 500*l.*, in the purchase of an annuity for their lives and the life of the survivor.

6. And he directed his trustees for the time being to *pay an annuity or yearly sum of 100*l.* to the person or [*336] persons having the care and protection of the four children of the late Major Bromley, for the same term of ten years; and immediately after the expiration of the ten years he directed the trustees to pay to such of the four children as should then be living, the sum of 2000*l.* equally between them on their attaining twenty-one, with maintenance in the meantime.

7. To Stretch Cowley Bromley he gave his gold watch, seals, and chain, with an annuity of 200*l.* for the said term of ten years, and a legacy of 3000*l.* at the end of that time.

8. To his old servant, Mrs. Kennel, an annuity of 10*l.* for her natural life.

9. A legacy of 300*l.* to John Heath, one of his trustees, payable at the expiration of the above-mentioned term of ten years.

The will then proceeded as follows:—"And as to all the rest, residue, and remainder of the several trust-moneys and premises which shall remain in the hands of my said trustees or the survivors or survivor of them, under the devises and bequests aforesaid, after duly satisfying and paying the several annuities and legacies hereinbefore bequeathed, I give, devise, and bequeath the same and every part thereof unto and between all and every the several legatees hereinbefore named, (except Elizabeth Ashley Bailey and her family, Mrs. Sly and her daughters, and Mrs. Kennel,) and that the same shall be divided and paid by my said trustees or the survivor of them to the several legatees, rateably and in proportion to the amount of the respective legacies bequeathed to them in and by this my will."

Henry Bromley died in the testator's lifetime. The testator died leaving his widow surviving. The *widow afterwards died; Mary and Agnes outlived the [*337] testator, and both died before the expiration of the ten years. At the expiration of the ten years two only out of the four children of Major Bromley were living.

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On further directions the *Solicitor-General*, Mr. *Teed*, Mr. *Temple*, Mr. *Wood*, Mr. *Blunt*, Mr. *Anderson*, Mr. *T. Parker*, Mr. *Follett*, Mr. *Leach*, Mr. *Dickinson*, and Mr. *Giffard*, appeared for the different parties.

The authorities cited were,—on the claim of the annuitants to participate in the residue, *Sibley* v. *Perry*,(a) *Nannock* v. *Horton*,(b) and *Cornfield* v. *Wyndham*;(c) on that of the specific legatee, *Nannock* v. *Horton*;(d) on the claim of the legatees who died before the expiration of the ten years, *Dawson* v. *Killet*(e) and *Batsford* v. *Kebbell*;(f) and on the effect of the conversion or direction to sell the real estate, *Jessopp* v. *Watson*,(g) *Wright* v. *Wright*,(h) *Pearce* v. *Loman*,(i) *Phillips* v. *Phillips*,(k) *Green* v. *Jackson*,(l) and *Ward* v. *Arch*.(m)

VICE-CHANCELLOR:—The points which it is necessary to consider in this case are:

1. Of what does the residue consist? that is, does it include the real as well as the personal estate, and have the legacies of Mary and Agnes fallen into it or not? 2. Who are the [*338] residuary legatees under the will? 3. By *reference to which of the legacies given by the will, are the proportions in which the residue is to be divided amongst the residuary legatees to be ascertained, there being annuities and pecuniary and specific legacies? 4. Is any part of the residuary estate undisposed of, in the events which have happened? and, 5. To whom does the residue undisposed of (if any) belong?

It would be difficult, if not impossible, to put a construction upon the entire will, for which a complete justification could be found in the very words of the testator. The case is one in which the construction of the will must be aided by reason and probability. Words admitting (possibly) of two constructions, must be read in that sense which is reasonable and probable,

(a) 7 Ves. 522. (b) Id. 391. (c) 2 Coll. 184.
(d) Ubi supra. (e) 1 Bro. C. C. 119. (f) 3 Ves. 363.
(g) 1 My. & K. 665. (h) 16 Ves. 188. (i) 3 Ves. 135.
(h) 1 My. & K. 649. (l) 2 Russ. & My. 238. (m) 15 Sim. 389.

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rather than in that which is unreasonable and improbable. But I believe the key to the interpretation of the will is to be found in this hypothesis:—That the testator, in directing his residuary estate to be divided amongst the "legatees before named," refers to those legatees only to whom benefits are given out of the fund which fell in at his wife's death; and that, by the word "legacies" he means such benefits under his will as existed and remained to be satisfied at or after the expiration of the ten years. This construction, if not imperatively called for by the words of the will, (which perhaps it is) is strictly consistent with them. It ascribes to the testator a reasonable and probable intention; it avoids the improbabilities which a different construction must ascribe to him; and it is, in my opinion, the sound construction of the language he has used. This construction will give to the legatees, to whom he gives legacies or sums of money at the end of the ten years, shares of the residue in proportion to the amount of their respective legacies, (properly so called,) excluding their annuities, which determined at the end of ten *years when those legacies became payable. It [*339] will entitle Elizabeth Bromley to a share of the residue, in proportion to the value of her life annuity at the expiration of the ten years; and it will exclude the widow of the testator from all share in the residue. The other points in the case will have to be decided upon different considerations.

Upon the first point I am clearly of opinion, that the proceeds of the real estate pass by the residuary devise. With respect to the legacies of Mary and Agnes Bromley, who survived the testator, and died before the expiration of the ten years, I think (though not without hesitation) that their legacies were vested, and not contingent upon their outliving the term of ten years. The annuity is absolute for ten years, whether they live for that time or not, and the gift of the legacy takes effect when that annuity ceases. The words of contingency are obviously introduced with a view to provide for a case between Mary and Agnes, and not between them and the estate. The postponement of the legacy is for the convenience or supposed convenience of the

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estate, and is not personal to the legatees, and the gift of the shares of Mary and Agnes of the residue is vested. *Batsford* v. *Kebbell*,(a) is plainly distinguishable; there the gift of the dividends was determinable if the legatee died under thirty-two: here the annuity continues until the legacy is payable; and it is a circumstance not undeserving of attention, that the annuity is the exact amount of the interest of the legacy at 5*l.* per cent. I think that their legacies are given by way of substitution for the annuity, and have not fallen into the residue.

There is no question that the residue will be increased by the lapse of Henry's legacy, as he died in the lifetime of the testator.

[*340] *Secondly, one set of legatees sought to be excluded are the children of Major Bromley. The argument was, that the residue was given to the legatees "named" in the will, and it was said that the children of Major Bromley were described and not named. To that argument I cannot accede. The legatees named means the persons to whom the legacies are given. I cannot adopt a distinction so refined as that.

The next case is that of the annuitant for life, Elizabeth Bromley. That the testator intended her to share in the residue is in the highest degree improbable. Throughout his will he speaks both of legacies and annuities. The legacies he calls "legacies or sums of money;" the annuities he calls "annuities or yearly sums." In the case of the Cowleys, he substitutes a legacy of 500*l.* for their annuities. In the case of Elizabeth, he makes no substitution, but leaves her in possession of an annuity for life. And he uses the word "amount," by which to measure the proportion of the residue which his residuary legatees are to take, —a term not applicable to an annuity. But against this I must set the established proposition, that, in a case of this description, annuities are legacies unless the context of the will shows that such was not the intention of the testator: *Nannock* v. *Horton*,(b) and *Sibley* v. *Perry*,(c) But the exception in the residuary clause of Mrs. Kennel from the legatees enforces by the very words of

(a) 3 Ves. 363. (b) 7 Ves. 391. (c) Id. 522.

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the testator the sufficiency of the word "legacy" to include the annuity. By excepting an annuity for life from the legatees, to whom he gives the residue, he declared that an annuity for life is in his vocabulary a legatee of a share of the residue; and I cannot think that the word "amount," though in strictness inapplicable to annities, is of such unbending force as [*341] to justify me in excluding from a share of the residue an annuitant who would otherwise be entitled to share in it: *Norton* v. *Hannock*,(a) This annuity, it will be observed, is a life annuity, and existed at and after the expiration of the term of ten years, and had to be satisfied out of the estate from the expiration of the term to the death of Elizabeth.

The specific legacy which is given to Stretch Cowley Bromley in the residuary clause must be governed by the same consideration.

The next question is, whether the wife is to share in the residue. That such was the intention of the testator cannot be imagined. His estate is not to be converted for the purpose of division as residue, until, possibly, ten years after his wife's death. In making the disposition of the residue he contemplates the event of her dying before himself, but makes no disposition of any share of residue supposed to be given to her. In the event of her surviving him, he gives her a life interest in the whole of the property, which at her death constitutes or (more correctly) includes that which is directed to be divided as residue. These observations I admit are not absolutely conclusive. If the widow survived the testator, she was no doubt capable of taking an interest in the residue, though not payable until ten years after she was dead, and the circumstance that she took a life interest in the residue is not absolutely sufficient to exclude her from taking a share of the fund in which she is tenant for life. But the improbability that such can have been the intention, and the circumstance that her legacy of 500*l.* was plainly given as income to [*342] meet the exigencies of the first months of widowhood, raises a question whether, according to a sound construction of

(a) Ubi supra.

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the will, the legacies referred to in the residuary clause as measures of shares of residue are not those legacies only which the testator gives after his wife's death. I put this as a question of construction—can a testator who uses such language, in such circumstances, be understood to include his wife (the tenant for life) as a residuary legatee? I think not. But I think further, that the legatees named in the residuary clause are plainly exclusive of the wife. "The legatees hereinbefore named" are the same as those to whom, in the preceding line, he refers as persons to whom "the several" annuities and legacies thereinbefore bequeathed were given. But these are the same whose annuities and legacies were to be paid out of a particular fund; and that particular fund was the fund with which the testator deals after his wife's death, and that fund was exclusive of his wife's legacy.

The case of Louisa Worthington Bromley raises the third question. She is one of a comparatively numerous class, to whom annuities are given for the term of ten years, and, at the expiration of that time, a gross sum of money, *i. e.*, a legacy, properly so called, is substituted for it. The legacy follows the annuity, They have no concurrent existence. And it is observable, that, in the greater number of cases, (not in all) the annuity is the exact amount of the interest at 5*l.* per cent. of the sum which is substituted at the expiration of the ten years. The postponement of the division of the residue for a term of ten years is for the convenience or supposed convenience of the estate, and when the division takes place the annuity ceases. Can it, in such case, be understood, without the most direct words, that a testator who, for the convenience of his *estate, postpones the division of his residuary estate, and gives an annuity during the postponement, and, the period of division arrived. substitutes a legacy for the annuity, refers to anything but the substituted legacy, where he uses the words of this will? Can it be that his words refer to an interest past and determined, where he actually provides a substitute for it, to which the words of the will naturally apply? Apply this question to the case of the widow, and suppose her legacy of 500*l.* to entitle her to a share of the residue,—can it be supposed that the testator intended

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that, in computing her share of the residue, the value of her life interest in the residuary estate (which, by the supposition, had determined for ten years) should be taken into account? Yet to this length the argument must go. I confess, I have so much difficulty in believing that the testator who does, in a sense, continue the annuities by giving the value of them in a substitution of a gross sum, could have contemplated a retrospective valuation of the expired annuities as the measure of the interest of his legatees in his residuary estate,—and the opposite construction ascribes to him so natural and probable an intention,—that I cannot hesitate to say that such, in my judgment, is the sound construction of the word "legacy" in the residuary clause. If it were not for Elizabeth Bromley's legacy, this point in the case could scarcely admit of an argument. The difference, however, between her case and that of Louisa Worthington Bromley is this,—that in Elizabeth's case (the Court being forced to treat the annuity as a legacy) there is nothing but the annuity to refer to by which the words of the will can be satisfied, and her legacy has continued after the ten years. In the case of Louisa Worthington Broomley a legacy properly so-called has been substituted for it, and the annuity has ceased. I think, by excluding the annuity, I am construing the *words of the will in their natural and proper sense, although, possibly, they may admit of a different construction. [*344]

The fourth question applies only to Henry Bromley's legacy. Henry was a legatee of residue in proportion to the amount of his legacy, which lapsed by his death in the lifetime of the testator. The question is, in what way is his contemplated share in the residue to be dealt with? The argument on one side was, that his share of the residue is undisposed of, according to the common rule in the case of a tenancy in common of residue. The argument on the other side was, that the legatees to whom the residue was given were those who survived the testator. No case was cited.(a) I think the former is the sounder argument, and that the share is undisposed of. The will speaks from the

(a) See *Humble* v. *Shore*, supra, p. 247.

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death of the testator; and if the testator chooses to give the share of his residue to a dead man, that share is undisposed of. If the gift had been to A., B., and C. equally, and A. had died in the lifetime of the testator, there would be no question. Why should the decision in this respect be altered, because, in order to favor one party more than another, he gives them legacies of different amounts, and directs the residue to be divided amongst them in proportion to those legacies?

Upon the fifth point I must adhere to what I said in *Fitch* v. *Weber*.(b) It is no new opinion which I then expressed, and the parties appear to have been satisfied with the decision.

THIS Court doth declare, that, Elizabeth Bromley having died within the [*345] period of ten years from the decease of Rose Mary *Bromley, the widow of the testator, the said Elizabeth Bromley, or those in her right, is not and are not entitled to any share of the said testator's real and personal estate, by reason of the annuity of 50*l.* given to her by the will of the said testator. And this Court doth declare, that the said Rose Mary Bromley, the widow of the said testator, or those in her right, is not and are not entitled to share in the said testator's residuary real and personal estate, by reason of the legacy of 500*l.*, or any of the other provisions made for the said Rose Mary Bromley by the said will. And this court doth declare, that, according to the true construction of the said will of the said testator, the parties to whom or for whose benefit pecuniary or specific legacies are given at the expiration of ten years from the decease of his widow, the said Rose Mary Bromley, upon the expiration of such ten years, became and are entitled to the residuary real and personal estate of the said testator, disposed of by his will, in proportion to the amount of their respective pecuniary legacies and the value of the specific legacies; and that the persons who are entitled to such residuary real and personal estate are the persons following, that is to say [administrator of Agnes Bromley, by reason of the pecuniary legacy of 2000*l.*; Louisa Worthington Bromley, in her own right, by reason of the pecuniary legacy of 1000*l.*; the defendants Margaret and Maria Cowley, and the survivor of them, by reason of the sum of 500*l.* directed to be laid out in the purchase of an annuity to them and the survivor; the respective trustees of settlements made by the two surviving children of Major Bromley, by reason of their respective moieties of the pecuniary legacy of 2000*l.* given to the children of Major Bromley; and the plaintiff Mary Ann Bromley as the administratrix of the said Henry Thomas Bromley, by reason of the pecuniary legacy of 3000*l.*, to which the said Henry Thomas Bromley became entitled as the only son of Stretch Cowley Bromley, and by reason of the value of the specific legacy of the gold watch, chain and seals given to the said Stretch Cowley Bromley by the said will; and the defendant Cranstown George Ridout, as in right of Louisia his wife,

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(a) 6 Hare, 145.

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by reason of the pecuniary legacy of 500*l.* given to her by the said will; and the defendant Robert Wright, by reason of the pecuniary legacy of 300*l.* given to him by the said will.] And this Court doth declare, that the said testator died intestate as to the share of his said residuary real and personal estate, which Henry Bromley, in the said will named, would have been entitled to if he had survived the said testator, by reason of the pecuniary legacy of 1000*l.* bequeathed to the said Henry Bromley by the said will; and this court doth declare, that the said share, to which the said Henry Bromley would have been so entitled, and undisposed of by the will of the said testator, so far as it consisted of real estate, devolved to the said Stretch Cowley Bromley, as heir-at-law of the said testator, *in the quality [*346] of personal estate; and that the said plaintiff, Mary Ann Bromley, is now entitled to such share, so far as it consisted of real estate, as the administratrix *de bonis non* of the said Stretch Cowley Bromley; and that the said share, so undisposed of as aforesaid, so far as it consisted of personal estate, belongs to the next of kin of the said testator living at his decease, and is now payable to such next of kin, and the legal personal representatives of such of them as have since died, that is to say, the said Louisia Worthington Bromley in her own right, and as representative of the said Elizabeth Bromley, deceased; the said plaintiff, Mary Ann Bromley, as the legal personal representative of the said Stretch Cowley Bromley, deceased, and the said Frances Diana Burrows, as the legal personal representative of the said Agnes Bromley, deceased, and the said Robert Wright, as the legal personal representative of Rose Mary Bromley, deceased, in the pleadings named. And it is ordered, that it be referred to the said Master to ascertain the value of the specific legacy of the gold watch, chain and seals bequeathed by the said testator's will to the said Stretch Cowley Bromley. And this Court doth declare, that the debts, funeral and testamentary expenses of the said testator are principally payable out of, and that the amount thereof forms a deduction from, the personal estate of the said testator. And it is ordered, that it be referred to the said Master to inquire and state to the court what was the amount of so much of the undisposed of part of the said testator's residuary estate as the said Henry Bromley would have been entitled to in respect of his said legacy of 1000*l.*, if he had survived the said testator; and to state what was the value of so much thereof as consisted of real estate, and what was the value of so much thereof as consisted of personal estate. And it is ordered, that it be referred to the Master to apportion the said residuary real and personal estate of the said testator, disposed of by his said will, amongst the said several pecuniary legatees and specific legatee, or the persons in their right as aforesaid, including the persons entitled to the share or residue to which the said Henry Bromley would have been entitled as aforesaid, if he had survived the said testator, in proportion to the amount of the said pecuniary legacies, and the value of the said specific legacy, by the said will given to such pecuniary legatees and specific legatee respectively. Further directions and subsequent costs reserved. Liberty to apply.

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[*347] *KIRWAN *v.* DANIEL.

1849: March 22d and 23d; April 24th.

The Court may proceed with a cause so far as a final order can be made, notwithstanding the absence of an interested party who is out of the jurisdiction; but where the suit was brought to enforce a charge upon the produce of the estate of an absent party, in the hands of his agents and consignees, in performance of an agreement to which the consignees were parties, the Court refused to direct an account to be taken of the amount of such produce received by the consignees; for, as the absent party would neither be bound by the account of what was due to the plaintiff in respect of the charge on the estate, nor be compelled by the decree for payment of what was found due, to allow in the accounts of his consignees the payments to be made by them in pursuance of such decree, the accounts of the receipts of the produce of the estate by the consignees could not be taken for any final purpose.

It is not an objection to a decree for one purpose, that it may involve the necessity of taking an account, which account it may possibly be necessary to take in another suit for another purpose.

THIS case is reported on the demurrer of Messrs. Daniel & Co., Vol. V., p. 493. The bill was afterwards amended, by making Messrs. N. & H. Mayo defendants, and by adding the alternative prayer, that, in case the Court should be of opinion that the said defendants Daniel & Co. were not liable in all events to the payment of the said annuity during such time as they had been or should be in the receipt of the said consignments, but only to the extent of any surplus of the produce of the said consignments remaining after payment of the expense of the proper cultivation and maintenance of the said estates, or other payments, then that the amount of such surplus might be ascertained under the direction of the Court, and that all proper accounts might be taken for that purpose; and that, in taking such accounts, the said defendants Daniel & Co. might be disallowed all sums claimed by them to be allowed in priority to the said annuity which should not appear to have been paid for or towards the proper cultivation and maintenance of the estates.

The *Solicitor-General* and Mr. *Hetherington*, for the plaintiff.

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Mr. *Rolt* and Mr. *Dickinson*, for the defendants Daniel & Co.

Mr. *Stinton*, for the defendants N. & H. Mayo.

*VICE-CHANCELLOR:—In this case the bill is filed by [*348] Mr. Matthew Kirwan to recover the arrears of an annuity which are charged upon an estate in Montserrat, of which estate the Daniels are consignees. The owner of the estate is John Francis Kirwan, and the plaintiff's claim to have his annuity paid by the Daniels arises out of an agreement made between John Francis Kirwan and the Daniels, under which the Daniels were to be consignees of the whole produce of the estate, and were to accept bills, and send out supplies, and, amongst other things, also to pay the plaintiff's annuity. I was of opinion, and still am, that the plaintiff, by the communications between the different parties, had acquired a right to enforce in his own favor that provision which originally could only be enforced by John Francis Kirwan. However, one objection taken to the relief prayed was, that John Francis Kirwan, to whom the plantation belongs, was stated and proved to be out of the jurisdiction, and consequently that the Court could not make a decree in the plaintiff's favor in the present state of the record. I would not trust myself to decide that question until I had actually written my judgment upon the merits of the case. If, when I have stated what I have to say upon the question of parties, counsel desire to know my view of the case upon its merits, which, as I have had occasion twice to consider the case, I am not very likely to change, I will read it. But I am sorry to say I have come to the conclusion, that, in point of form, I cannot resist the objection for want of parties, which arises from John Francis Kirwan being out of the jurisdiction.

With respect to the objection for want of parties, Lord Redesdale says, that "the Court will proceed without *him" [that is, without an absent party] "against the [*349]

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other parties as far as circumstances will permit;"(a) and adds, "If a person so out of the power of the Court, is required to be an active party in the execution of its decree, as where a conveyance by him is necessary, or if the decree ought to be pursued against him, as the foreclosure of a mortgage against the original mortgagor or his representative or assign, the proceedings will unavoidably be, to this extent, defective."(b) In *Browne* v. *Blount*(c) a judgment creditor of Sir Charles Blount sought to enforce his rights against the property of Sir Charles Blount in the hands of trustees. Sir Charles Blount was out of the jurisdiction of the Court. Sir John Leach said, that, Sir Charles Blount being the person whose interests were sought to be affected by the decree, the suit could not proceed in his absence. The rule of the Court then appears to stand thus: The Court in general requires that all persons interested should be parties to the suit. But where a sufficient reason is alleged and proved for proceeding in the absence of an interested party, the Court will proceed in his absence as far as it can make a final order, attending to this, that he will not be bound by proceedings had in his absence. If the legal estate be in the absent party, and a conveyance of the legal estate is necessary, a decree in his absence cannot be made.[1] If a foreclosure be the object of the suit, the suit cannot proceed to a decree in the absence of the mortgagor, for such a decree, in his absence, would be merely nugatory. In *Browne* v. *Blount*, Sir John Leach thought, that, as the object of the suit was to affect the interest of Sir Charles Blount, the suit could not proceed in his absence. If, in this case, the

(a) Lord Redesdale, Tr. Pl. 164. (b) Id. 165. See also Id. 32.
(c) 2 Russ. & My. 83.

[1] Parties cannot be dispensed with, where the right of persons not before the court are so indispensably connected with the claims of the parties litigant, that no decree can be so made without impairing the rights of the absent parties. *Hallett* v. *Hallett*, 5 Paige's Ch. Rep. 315; *Bailey* v. *Ingles*, 2 Paige's Rep. 278; *Johnson* v. *Rankin*, 2 Bibb, 184; *Mallow* v. *Hinde*, 12 Wheat. 193; *Joy* v. *Wyatt*, 1 Wash. C. C. Rep. 517; *Hallock* v. *Smith*, 4 John. Ch. Rep. 649; *Coe* v. *Whitbeck*, 11 Paige's Ch. Rep. 42; *Boynton* v. *Jackaway*, 10 Paige's Ch. Rep. 307; *Lotory* v. *Morrison*, 11 Paige's Ch. Rep. 327; *Mickles* v. *The Rochester City Bank*, 11 Paige's Ch. Rep. 118, *McCalmont* v. *Rankin*, 8 Hare's Rep. 14.

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only objection were founded upon the consignees' accounts, and there were any purpose for which those accounts *could finally be taken in this suit in the present state [*350] of the record, I should not hesitate to proceed in the absence of John Francis Kirwan. The objection (as expressed in terms) was, that an account of the consignments taken in his absence will not bind him, and that an account of the same consignments may have to be taken a second time against the Daniels at this suit. The objection, as expressed, alone, would not, I think, be a sufficient reason why the account should not be taken in his absence, if I could decree payment in his absence. The single object of this suit is to enforce payment of the arrears of the plaintiff's annuity. Another suit for a different purpose,—that of taking a general account of the consignments,—may perhaps be necessary, and may involve a repetition of the accounts taken in this suit. But I cannot consider that it is an objection to a suit for one purpose, that it may require an account to be taken which may also be necessary in another suit for another purpose.

But my difficulty is this: whatever claim for the arrears of the annuity the plaintiff may establish in this suit, the Daniels must (ex debito justitiæ) be allowed the same in the consignees' accounts against John Francis Kirwan; but if John Francis Kirwan is not a party, he will not be bound by the account taken of the arrears of the annuity, and may possibly resist the payment of the annuity in his account with the Daniels. To that extent, therefore, the proceedings in the absence of John Francis Kirwan would not be to any extent final. If I cannot go on to direct the payment of the annuity,—if I cannot take the account of the arrears due in the absence of John Francis Kirwan so as to bind him,—the accounts would be taken for no useful purpose.

The cause must stand over, with liberty to make John Francis Kirwan a party.

*I may observe, that, since the case of *Browne* v. [*351] *Blount* was decided, the General Orders of the Court have

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enabled plaintiffs in this Court to serve defendants with the subpœna, although they are out of the jurisdiction.(a)

On the question of costs, it was said for the plaintiff, that the objection was not taken by the answer, and for the defendants, that John Francis Kirwan having been made a defendant, and process prayed against him when he should come within the jurisdiction, it was not an objection which could have been taken by the answer, or which it was necessary to take, for the defendant might have duly appeared before or at the hearing.

The Court ordered the costs of the day to be paid by the plaintiff.

PELLY *v.* WATHEN.

1849: March 8th, 9th, 15th and 30th.

The lien of a solicitor on the deeds of his client is a legal right, which cannot be greater in extent than the interest of the client in the deeds, and does not enable the solicitor to retain the deeds against third parties, where the client could not as against such third parties give the solicitor a lien upon the property to which the deeds relate. In determining the extent of such lien, equity follows the law; and although the deeds might have come to the possession of the solicitor, without notice of a prior equitable claim, the Court gives effect as against the solicitor to such prior equitable right.[1]

A solicitor does not, as solicitor, acquire a lien for his costs upon the documents of his client which came into the possession of the solicitor, not in that character, but as mortgagee of the client's estate.

A solicitor does not acquire a lien for costs due to himself solely, upon documents which came into the joint possession of himself and his partner or partners; but he does not lose his lien for such costs upon documents which, having come into his own possession, are afterwards continued in the possession of himself and his partner or partners.

In a suit by puisne mortgagee to redeem two prior mortgages of distinct portions of the estate comprised in the plaintiff's security, and to foreclose the mortgagor

(a) Order XXXIII., May, 1845. See *Whitmore* v. *Ryan*, 4 Hare, 612.

[1] *Walker* v. *Sargeant*, 14 Verm. Rep. 247; *Sharlack* v. *Oland*, 1 Richardson's Rep. 207.

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on his default of redemption,—if the plaintiff should redeem neither of the prior mortgages, he is not entitled to any decree against the mortgagor; but the plaintiff in such a suit (the defendants not having objected or not being able to object that the suit is multifarious) may redeem one of the prior mortgages, and obtain a decree for redemption or foreclosure against the mortgagor in respect of that estate, without redeeming the other mortgage, and as to such other mortgage submitting to the dismissal of the bill.

A mortgagee contesting by his bill the right of a solicitor of the mortgagor to a lien upon documents relating to the mortgaged property, in priority to his (the plaintiff's) charge, but offering, in case such prior lien should be established, to pay the amount due in respect of the same, is not bound by such offer to redeem the documents to which the solicitor's lién extends, but may abandon his right to the documents and take such a decree as his position of mortgagee entitles him to, in priority to the lien of the solicitor.

Whether, and in what cases, a plaintiff, who has by the bill gratuitously offered to submit to certain terms, on his part, may, at or after the hearing of the cause, withdraw such offer, and still obtain relief in the suit,—*quære*.

The costs incurred in respect of conflicting claims of priority of lien or charge, in a suit for redemption and foreclosure by a puisne mortgagee, ordered to be paid by the parties who failed in such claims respectively, the plaintiff adding to his mortgage-debt the costs paid by him in respect of such claim as he had failed in establishing,—the question having arisen from the acts or conduct of the mortgagor.

William Lewis, the mortgagor, in June, 1829, deposited with Philip Wathen the title deeds of two *farms, [*352] called Nashend and Chantry, and certain turnpike-road shares, accompanied by a memorandum of agreement to convey and assign the property comprised in the deeds and the road shares to Philip Wathen, by way of mortgage for securing 4000*l.* and interest, for which sum Lewis at the same time executed his bond to Philip Wathen. Philip Wathen afterwards died, and the bond and securities became vested in Anna Wathen, his executrix.

By indenture, dated the 14th of September, 1839, Lewis executed a mortgage of his Minchenhampton, Bisley, and Stroud estates, and all other his real estate, including estates at Lyppiatt, which he had purchased, but the purchase of which had not then been completed, (excepting only a portion he had contracted to sell,) to the plaintiff Robert Parker Pelly, to secure several sums and interest not exceeding 10,000*l.* in the whole, with a power of sale.

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On the 14th of December, 1840, Lewis executed a mortgage of Stancombe Farm, and other parts of the Lyppiatt estates, (comprised in the plaintiff's mortgage of September, 1839,) of which the purchase was then incomplete, to Horatio James, to secure 3000*l.* and interest; and on the 8th of September, 1841, Lewis executed another mortgage of the same premises to Charles Barton, to secure 1000*l.* and interest. The premises comprised in the two last-mentioned indentures were, upon the completion of the purchase, on the 8th of January, 1842, conveyed, subject to the mortgages of the 14th of December, 1840, and the
[*853] *8th of September, 1841, to the defendant Thomas Bassett in fee, upon trust for Lewis, and a term of 1000 years created of the same property was assigned to the defendant John Gurney, to attend the inheritance. These conveyances were dated the 6th and 7th of August, 1841; but were not executed until the 8th of January, 1842.

On the 14th of February, 1842, soon after the completion of the purchase of the Lyppiatt estates, the mortgages of December, 1840, and September, 1841, (the priority of which to his own the plaintiff admitted,) were transferred to George Wathen; and on the 31st of August, 1842, a further sum of 673*l.* 0*s.* 7*d.* being due to the said George Wathen, the same was, with interest thereon, charged upon the premises comprised in the transferred mortgages.

The defendant George Wathen practised as a solicitor at Stroud, for several years, up to June, 1838, when Thomas Bassett entered into partnership with him. Wathen and the defendant Bassett practised until April, 1841, when John Gurney entered into the partnership, which was subsequently composed of Wathen, Bassett, and the defendant Gurney. George Wathen and the two firms successively were the solicitors of Lewis until the 27th of February, 1843, when they were discharged by him.

The bill was filed by Pelly, on the 15th of March, 1843, against George Wathen, Bassett & Gurney, Anna Wathen, and William Lewis. It alleged that the plaintiff had applied to the defendants Bassett & Gurney, to permit the plaintiff to inspect or take copies of or extracts from the title deeds and muniments in their pos-

session, in order that the plaintiff might exercise his power of sale, but the defendants had refused to *produce such deeds or documents. The bill denied the right [*354] of the defendants to a lien on the deeds as against the plaintiff, and it prayed that an account might be taken of what was due to George Wathen, under the indentures of December, 1840, and September, 1841, and that the plaintiff might be at liberty to redeem the said mortgaged premises. And, if the Court should be of opinion that the defendants Wathen, Bassett, & Gurney, or any or either of them were entitled in priority over the plaintiff to any charge or lien upon the mortgaged premises, or the title deeds and documents relating thereto, for or in respect of any bill or bills of costs due to them or any of them from William Lewis, that such bill or bills might be taxed, and upon payment of the same by the plaintiff, (which payment the plaintiff thereby offered to make,) the defendants Basset & Gurney might be decreed to convey and assign the mortgaged premises and terms of years, and deliver up the title deeds and documents to the plaintiff; that the plaintiff might be at liberty in like manner to redeem any charge or lien of Anna Wathen on the mortgaged premises in priority to the plaintiff; that an account might be taken of what was due to the plaintiff on his mortgage; and that Lewis might be decreed to pay the same, together with what the plaintiff should have paid in redemption of the premises to George Wathen, Anna Wathen, and Wathen, Bassett, & Gurney, and the costs of the suit, or be foreclosed, or that the mortgaged premises might be sold.

On the 30th of March, 1843, after the bill was filed, the portion of the Lyppiatt estates comprised in the mortgages which had been transferred to George Wathen were conveyed by Bassett to George Wathen in fee, and the term was assigned by Gurney to Cooke, in trust for George Wathen, as mortgagee, for securing the two sums of 4000*l.* and 673*l.* 0*s.* 7*d.*, and interest.

*The defendants Wathen, Bassett, & Gurney claimed a [*355] lien upon all the deeds, documents, and muniments in their possession relating to the mortgaged premises for the amount of their bills of costs, in respect of general business done for

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Lewis, the mortgagor, by George Wathen, Wathen & Bassett, and Wathen, Bassett, & Gurney, such deeds, muniments, and documents having been delivered into their possession without notice of the plaintiff's mortgage. George Wathen also claimed to hold the deeds and documents relating to the Lyppiatt estates.

At the hearing, it was referred to the Master to inquire what incumbrances there were upon the estates referred to, and to state their priorities, and also to state the circumstances, under which the deeds and documents relating to the property came into the possession of the defendants, the solicitors. The Master found the dates of the respective charges to the effect above stated. He found that the plaintiff aided Lewis in effecting the mortgages of the 14th of December, 1840, and the 8th of September, 1841, and did not disclose his own incumbrance of September, 1839; and that the transfer thereof to George Wathen, and the further charge to him, of the 31st of August, 1842, were also made without notice of the plaintiff's mortgage; and that the plaintiff had notice of the employment of the defendants Wathen, Bassett, & Gurney respectively, as the solicitors of Lewis, and that they so acted in the purchase of the Lyppiatt estates.

It appeared by the report, that the deeds and documents in the possession of the solicitors, or the survivor of them, were of four classes:—First, those relating exclusively to the mortgaged premises comprised in the deeds deposited with Philip Wathen; secondly, those relating to the mortgaged property which [*856] had come *into the possession of George Wathen, and of the firm of Wathen & Bassett, as attornies or solicitors of Lewis, before the date of the plaintiff's mortgage; thirdly, those which came into the possession of Wathen & Bassett, and Wathen, Bassett, & Gurney, in the same character, after the date of the plaintiff's mortgage; and fourthly, those which came into the possession of the last-mentioned firm, as the solicitors of Lewis, on the completion of the purchase of the Lyppiatt estates. The Master found, that the defendants George Wathen, Bassett, & Gurney had at the time of the decree, and that Gurney, and

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the personal representatives of George Wathen, and Bassett then had a lien on the deeds and documents included in the three last classes, in priority to the plaintiff's mortgage for the unpaid balance of costs for business done for Lewis by the successive firms of George Wathen, Wathen & Bassett, and Wathen, Bassett, & Gurney, down to the time of their discharge by Lewis; and that the amount of such lien for costs incurred whilst the business was carried on by George Wathen alone was 2004*l.* 9*s.* 4*d.*, by Wathen & Bassett 2847*l.* 10*s.* 10*d.*, and by Wathen, Bassett, & Gurney 776*l.* 12*s.* 8d.,—subject to the reduction (if any) of such respective bills on the taxation thereof.

Several exceptions were taken to the Master's report. The principal questions raised in the cause sufficiently appear upon the judgments. The case was argued upon the exceptions and further directions.

Mr. *Wood* and Mr. *Bevir*, for the plaintiff.

The *Solicitor-General* and Mr. *Bazalgette*, for the representatives of George Wathen and for the defendant Gurney.

Mr. *Follett*, for the representatives of Bassett.

*Mr. *Selwyn*, for the representatives of Anna Wathen; [*857] and

Mr. *Chandless*, for the representatives of Lewis, the mortgagor.

The cases cited were: on the nature and effect of the solicitor's lien, *Stedman* v. *Webb*,(*a*) *Bozon* v. *Bolland*,(*b*) *Clutton* v. *Pardon*,(*c*) *Richards* v. *Platel*,(*d*) *Mills* v. *Finlay*,(*e*) *Ex parte Sterling*;(*f*) as analogous to other liens acquired in the course of trade or business, without special contract, *Lawson* v. *Dickinson*,(*g*) *Jacobs* v. *Latour*,(*h*) *Clarke* v. *Gilbert*;(*i*) on the extent of the solicitor's

(*a*) 4 My. & Cr. 346. (*b*) Id. 354. (*c*) T. & R. 304. Per Lord Eldon.
(*d*) 1 Cr. & Ph. 79. (*e*) 1 Beav. 560. (*f*) 16 Ves. 258.
(*g*) 8 Mod. 306. (*h*) 5 Bing. 130. (*i*) 2 Bing. N. C. 343.

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lien as against other creditors and charges, *Molesworth* v. *Robbins*,(a) *Smith* v. *Chichester*,(b) *Blunden v. Desart*,(c) *Hoare* v. *Parker*,(d) *Furlong* v. *Howard*,(e) *Ex parte Nesbitt*,(f) *Young* v. *English*,(g) *Bernard* v. *Drought*,(h) *Ogle* v. *Story*,(i) on affecting the plaintiff with notice that the defendants were the solicitors of Lewis, and that they had the deeds in their possession, *Bozon* v. *Williams*,(k) *Ogle* v *Story*;(l) and if a lien should be established by the solicitors, on the effect of the length of time during which the solicitors had allowed the payment of their bills of costs to be in arrear, whereby, except by special contract, a large portion of the debt would be barred by the Statute of Limitations, in diminishing the amount of the lien as against third parties, *Camidge* v. *Allenby*.(m)

[*858] *VICE-CHANCELLOR:—The plaintiff became second mortgagee of the freehold estates of William Lewis. At that time, the legal estate in the property comprised in the plaintiff's mortgage was vested in a first mortgage, and the property in mortgage was also comprised in a term of years, which was vested in a trustee for the first mortgagee. In 1841, the property comprised in the plaintiff's mortgage was sold by the mortgagor, and, upon the completion of the sale, the legal estate in fee was, by indentures dated the 6th and 7th of August, 1841, conveyed to the defendant Bassett, a trustee for Lewis, and the term was upon the same occasion assigned to the defendant Gurney upon the like trust. Before and at the time of the sale, the defendant George Wathen and the defendants Bassett & Gurney were partners as solicitors, and were retained and employed by William Lewis as his solicitors, in transacting the business of the sale; and, upon the completion of the sale, the title deeds relating to the property in mortgage came into their hands, as solicitors for William Lewis. Wathen, Bassett, &

(a) 3 J. & L. 358. (b) 2 D. & War. 393. (c) Id. 405.
(d) 2 T. R. 376. (e) 2 Sch. & Lef. 115. (f) Id. 279.
(g) 7 Beav. 10 (h) 1 Moll. 38. (i) 4 B. & A. 735.
(k) 3 Y. & J. 150. (l) 4 B. & Ad. 735. (m) 6 B. & C. 373.

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Gurney claim a lien upon those deeds, for costs due from Lewis to them, or one of them, as solicitors for Lewis before the deeds came into their possession, and also for costs incurred since the deeds came into their possession. That the claim of the solicitors is, to some extent, good as against Lewis, cannot, I apprehend, be disputed. But the defendants, the solicitors, have set up a very extensive claim, and have contended that their lien is good, not only as against Lewis, but also as against the plaintiff, whose security, in point of date, has precedence of the lien of the solicitors, considering that lien as commencing at the time when the deeds came into their possession. The question to which this claim has given rise is the subject of exception, and this I shall first consider. In considering this point, I assume that the *defendants Wathen, Bassett, & Gurney had no notice of the plaintiff's claim until after the deeds came into their possession. [*359]

George Wathen, in addition to the claim of his firm or some of them to a lien for costs due from Lewis, was mortgagee of part of the property comprised in the plaintiff's mortgage for securing three sums of 3000*l.*, 1000*l.*, and 673*l.*; and on the 30th of March 1843, being a fortnight after the bill was filed, Basset conveyed the legal estate in fee to George Wathen, and Gurney assigned the term to Cooke as trustee for Wathen, as mortgagee; but it was not argued at the bar, nor could it have been argued with effect, that George Wathen's interest as mortgagee could give any support to the claim of lien on the deeds set up by the firm, or the members of the firm, against the plaintiff.

The question is perfectly simple. The plaintiff is mortgagee of the lands. His interest is equitable by reason only that the legal estate, at the time the plaintiff took his security, was in an earlier mortgagee. The mortgaged property has been sold, and the former mortgage paid off. In the transaction of the sale and purchase, the deeds came into the hands of the mortgagor's solicitor, whose lien against the mortgagor may, for argument sake, be admitted. The Master has found that the lien is good not only as against the mortgagor, but also against the plaintiff; to which finding the plaintiff has excepted.

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The general question was much considered by Sir Edward Sugden, in *Smith* v. *Chichester*,(a) in *Blunden* v. *Desart*,(b)
[*360] *and in *Molesworth* v. *Robbins*,(c) and if those cases are to be treated as authorities, they appear to me to decide this case in favor of the plaintiff.

In the first two cases, before Sir Edward Sugden the interest of the party claiming adversely to the solicitor appears to have been in fact, or is treated both in the argument and judgment, as a legal interest in the land to which the deeds related; and if the interest of the plaintiff were legal, I should have no hesitation in the principal case.

The law in general commits the custody of the title deeds of land to the person entitled in possession to the freehold. Can it be the law that such tenant (the tenant for life, for example) having only a limited interest can have power to pledge the deeds for more than his own interest in the lands, to the prejudice of the remainderman? Nothing but the most overwhelming authority could sanction an answer to this question in the affirmative. He could not so deal with the land itself. The lien of the solicitor gives no interest in the land, but only a right to retain the deeds until his debt is paid. No principle would sanction the conclusion that the solicitor could do more than retain the deeds as against the party who deposited them, to the extent of the interest of that party. The same reasoning applies to any limited interest. The client gives a lien to the extent of his own interest only,—that is to say, the lien is good against him, but no further; and accordingly, in *Smith* v. *Chichester* and *Blunden* v. *Desart* the law is so laid down upon numerous authorities cited in the judgments.

Expressions, however, occur throughout the judg-
[*361] ments *in both of the cases referred to, from which it might be thought that a legal interest in parties claiming adversely to the lien, was of the essence of the principle laid down in those judgments. The reasoning, however, is independent of that consideration. The reasoning is, that the lien of the

(a) 2 D. & War. 393. (b) 2 D. & War. 405. (c) 2 J. & L. 358.

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solicitor gives him no interest in the estate; that the right to the deeds is an incident to the right to the estate; and that the client cannot give his solicitor a lien on the deeds more extensive than he could give him on the estate. The right of the solicitor, it is said, is merely passive, and cannot be enforced by suit. The law simply enables him to work out satisfaction of his claim against his own client, by the inconvenience to which he can subject the latter by detaining his deeds; upon this the conclusion is founded, that the right of the solicitor is good only against his own client. His client, it is said, may give the solicitor a lien upon the deeds to the extent of his own interest in them, but not so as to affect the rights of third parties. This reasoning applies as strongly to the case of an equitable interest in the estate as to a legal interest. And accordingly in *Molesworth* v. *Robbins*, the interest of the party claiming adversely to the solicitor, being equitable only, Sir Edward Sugden applied to the case the same reasoning as he had done to the two former cases.

At one moment during the argument, it occurred to me that a distinction might be taken in favor of the solicitor, that the lien being a legal right, this court would not, where the possession of the deeds was obtained without notice of a prior equitable claim, disturb the possession to which the law attached a legal right; but I am satisfied that such a view of the case is fallacious. For before it could be held that the solicitors should in equity be allowed to retain the deeds, the nature and extent of the solicitors' lien must be determined; *and if the lien be [*362] limited at law, as I have supposed, equity, which in such cases can only follow the law, must place the same limit upon it. Upon this point I am quite satisfied to follow *Molesworth* v. *Robbins*, which I consider as a conclusive authority upon the question. Indeed, the distinction between the legal and equitable claimant can scarcely be said to exist, for the equitable incumbrancer must have a right as between himself and his mortgagor, and those claiming under him, subject to the equity in the land, to call for a conveyance of the legal estate, and the possession of the title deeds is unnecessary to enable the mortgagor to give such conveyance, and the conveyance once obtained would

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give the incumbrancer the right which is established by *Smith* v. *Chichester* and *Blunden* v. *Desart*. The circumstance that he had notice of the solicitor's claim at the time of taking the conveyance, cannot, of course, affect his rights in the case supposed.

Another question was argued with reference to the continuance of the lien after the successive alterations in the firm of solicitors by whom the deeds were held. On this point I am clearly of opinion that the lien, once acquired, would not be affected by the circumstance that the party entitled to it afterwards admitted a partner or partners in his business; but I also think that the deeds, which first came to the joint possession of the firm, did not thereby become subject to a lien for costs due to some or one of the partners separately, who may have acted as solicitor for the mortgagor before the constitution of the firm to which the deeds were delivered.

The cause was afterwards argued on further directions.

[*363] *VICE-CHANCELLOR:—The charges on the mortgaged property comprised in the plaintiff's security are, as I understand, first, George Wathen's two mortgages as assignee of the mortgages of 1840 and 1841, and a further charge created in 1842. These extend to a part only of the property. Secondly, Anna Wathen's mortgage on other parts of the property. Thirdly, the plaintiff's mortgage of September, 1839; and subject to these charges the party representing Lewis is owner of the equity of redemption. It appears to be clear, on the Master's report, that the property in mortgage to Anna Wathen, as the representative of Philip, and the property in mortgage to George Wathen, are distinct. The three mortgages of George I consider as one, there being, for the present purpose, no reason for separating them. In this state of things several questions have arisen, which are now to be disposed of.

First, a lien was claimed by George Wathen upon the title deeds which came into his possession, not as solicitor for Lewis, but as assignee of the above-mentioned mortgages of 1840 and 1841. Secondly, a question was raised with respect to the pro-

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per decree to be made as between the successive mortgagees and the mortgagor, excluding, for the present, the solicitor's claim of lien upon the deeds, as distinct from his claim under the mortgage. Thirdly, with regard to the effect of the offer or alleged offer in the bill to pay the amount of any lien which the solicitors or any of them might establish upon any papers in their hands. Fourthly, some questions of costs were argued with reference to the claims of lien, which have been made. And, fifthly, a question was raised with respect to the right of certain of the mortgagees to have a reference as to lasting improvements.

*As to the first point, I think George Wathen cannot [*364] sustain his claim of lien as solicitor upon the title deeds, which came into his possession, not as the solicitor of Lewis, but as the assignee of the mortgages of 1840 and 1841. If the extent of a solicitor's lien is to be governed by the law of lien in other cases, there can be no doubt that such is the proper conclusion: and I refer to the cases cited by counsel; the case of *Lawson* v. *Dickenson*(*a*) is to some extent an authority that the lien of the solicitor is governed by the same rules as other cases of lien. I have no doubt upon this point, regard being had to the Master's finding.

Upon the question of the form of the decree, I am reluctant to say anything. This is the common case of a bill by a puisne mortgagee against the prior mortgagee and mortgagor for redemption and foreclosure. The forms of decree in such cases are well understood, and, unless a difficulty is found by the officers of the Court charged with the duty of drawing up such decrees, it is not usual for the Court to do more than direct the usual decree to be drawn up. Two points were, however, made, which I will shortly notice. With respect to one point, argued by Mr. Chandless, I will only say, that, unless the Registrar in drawing up the decree shall find the form to be other than I suppose, I think Mr. Chandless must be right in contending that, if the plaintiff's bill should stand dismissed in consequence of the plaintiff not redeeming either of the prior mortgages, that is to say, the mort-

(*a*) 8 Mod. 306.

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gages of George Wathen, which I consider as one mortgage, or the mortgage of Anna Wathen, he the plaintiff would not be entitled to any decree, as against the mortgagor, for re-
[*365] demption or foreclosure. The inquiry as to *priorities decides nothing. I do not, however, agree with the argument, that the plaintiff is imperatively bound to redeem George Wathen's mortgages and also Anna Wathen's mortgage, under pain of having his bill dismissed as to both. He must, indeed, redeem George Wathen's mortgages altogether, or have his bill dismissed as to him; for it is George Wathen's right to insist that he shall be redeemed as to all his mortgages, or not any. Such, at least, I understand George Wathen's position to be. But the point made by the mortgagor's counsel was, that as between himself and the plaintiff, the only decree to which the plaintiff could be entitled was a decree for redeeming George Wathen's mortgages and Anna Wathen's mortgage, and also, that, if he did not redeem both, the decree must direct the dismissal of the bill as to both. Suppose the case of two estates belonging to a party who mortgages one to A. and another to B., and subsequently both to C. It could not be said that C. might not redeem A. without redeeming B. The case of *Cottingham* v. *Earl of Shrewsbury*,(a) certainly, has nothing to do with this question. In that case the decree made at the Rolls required the plaintiff, in the clearest terms, to redeem both mortgages, and directed the dismissal of the bill, if he did not redeem both. The question here is, not whether, if my decree were worded, as it was in that case, the plaintiff could redeem one only of the prior mortgages, but whether I may not so word the decree as to entitle the plaintiff to redeem both or either: and I am clearly of opinion that the plaintiff is entitled to have his decree so worded. I give no opinion as to whether the plaintiff would be entitled to such a decree, if George Wathen's mortgages and Anna Wathen's mortgage had comprised the same property:
[*366] that is not the case here. *The Master finds the property in George Wathen's mortgages and that in Anna's

(a) 3 Hare, 627.

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are not the same in any respect; but the plaintiff's mortgage includes the property in both the prior mortgages. Why, then, should he not be entitled to the decree he asks? No case was cited in support of the proposition, that in such a case a second mortgagee of two distinct properties mortgaged to two different persons may not redeem one without redeeming both.

The question, it must be remembered, is one in which the mortgagor only is interested. The mortgagees have no interest in it. The proposition, so considered, amounts to this, that a mortgagee cannot, as between himself and his own mortgagor, abandon part of his security, and work out satisfaction of his claim against the remainder of his security. This, I say, is, in substance, the proposition contended for. It is clear that the plaintiff might, out of Court or in a separate suit to which the mortgagor was not a party, have become first mortgagee of either of the mortgages which has priority over his own, and, having done so, he might, in a suit confined to the property of which he had thus become first mortgagee, have compelled the mortgagor to redeem him, or be foreclosed. The circumstance, that the plaintiff seeks to redeem both prior mortgages in one suit, is no reason for altering his rights as between himself and the mortgagor; and neither mortgagee can have any interest in that which is done as to the other. It cannot concern Anna Wathen whether George Wathen be redeemed or not, nor can it concern George whether Anna be redeemed. Suppose the simple case of a bill by a mortgagor against two separate mortgagees of distinct property, and no objection made by either of them to their being joined in the suit. I put such a case, because the second *mortgagee, as between the first mortgagee and [*367] the mortgagor, is in the same position as the mortgagor, —can either of those two defendants say, "unless the plaintiff shall redeem his other property, with which I have no concern, he shall not redeem me?"—I do not think that can be. The Registrar tells me, that he is satisfied the forms of the Court allow the redemption of one of the mortgages, and I cannot doubt it. I think, therefore, that the plaintiff is entitled to have a decree for redemption by the mortgagor as to the whole of the pro-

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perty, that is to say, both mortgages, if the plaintiff shall redeem both; or as to such one of the mortgages as he shall redeem, confining the order for dismissal to such mortgage as he shall not redeem; and following up the decree as to such mortgages or mortgage as he shall redeem by a decree for redemption or foreclosure against the mortgagor. If the plaintiff redeems both, the common decree follows and if only one, then his bill is dismissed as to the other; and with respect to that which he redeems, he takes the common decree of foreclosure against the mortgagor.(*a*)

(*a*) The Reporter has been favored by Mr. Shapter with the following note of a forclosure suit embracing distinct mortgages of distinct estates by the same mortgagor, which was heard before this branch of the Court:—

HOLMES *v.* TURNER.

1843: June 6th.

A mortgagee having separate mortgages created by the same mortgagor on two different estates, has not a right to foreclose both estates on non-payment of the aggregate amount of the mortgaged debts; but can only foreclose each estate separately, on non-payment of what is secured upon it.

Form of decree for foreclosure where the mortgagee has a legal mortgage for the whole of his debt on one of the mortgagor's estates, and an equitable mortgage for part of his debt on another of the mortgagor's estates.

THE bill was brought by Holmes and Wardroper against Turner, a lunatic, and Challen, his committee, and stated that Turner had, by indentures of lease and release of 31st January and 1st February, 1832, mortgaged an estate at Fittleworth and Pulborough unto the plaintiffs, to secure 1000*l.* and interest; and by deed poll of 26th July, 1832, had further charged the same property to the plaintiffs, to secure a further sum of 1000*l.* and interest; and by deed poll of the 21st of August, 1837, had further charged the same property to the plaintiffs, to secure a further sum of 1981*l.* and interest; and that, on the same 21st of August, Turner deposited with the plaintiffs the title deed of his estate at Slinfold, accompanied by a memorandum of that date, declaring that the deposit was made in order to further secure the said three sums of 1000*l.*, 1000*l.* and 1981*l.*, and interest. The bill then stated a deed poll of the 24th of August, 1839, whereby Turner further charged the Fittleworth and Pulborough estates with a further sum of 400*l.* and interest, to be paid to the plaintiffs. After stating the proceedings in the lunacy, the bill prayed that it might be declared that the hereditaments and premises comprised in the title deeds so deposited with the plaintiffs by the defendant John Turner, on the 21st day of August, 1837, and mentioned in the said memorandum of deposit, stood charged with, and are a security for, the said several sums of 1000*l.*, 1000*l.* and 1981*l.*, together with lawful interest thereon remaining due to the said plaintiffs; and that an account might be taken of what was due to the plaintiffs for prin-

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*The third point is one of more difficulty. The first [*368] observation is, that the offer in the bill is not embodied in the decree. I agree, however, that if the plaintiff was

cipal and interest on the said sums of 1000*l.*, 1000*l.*, 1981*l.* and 400*l.* so advanced on or secured by the said several mortgage deeds and other securities; and that the defendants might be decreed to pay to the plaintiffs the amount of what should appear due and owing to the plaintiffs on taking such account, together with the costs of this suit, by a short day, &c., the plaintiffs being ready and willing, on being paid the said principal money and interest, and costs, to re-convey unto the defendants, or as this court should direct, such of the said mortgaged hereditaments and premises as were vested in the plaintiffs by virtue of the said mortgaged indenture of the 1st day of February, 1832, and to re-deliver to the defendants, or to such person as this Court should direct, the title deeds so deposited by the defendant John Turner in the hands of the said plaintiffs as aforesaid; and that, in default of such payment, the defendant John Turner, and all persons claiming under him, might be foreclosed from all right and equity of redemption in and to the hereditaments and premises comprised in and charged by any of the said mortgage deeds and securities; and that the defendants, and all proper parties, might be decreed to join in conveying to the plaintiffs and their heirs, or as they should direct, free from all incumbrances, such of the aforesaid hereditaments and premises as were comprised in the said title deeds deposited in the hands of the plaintiffs, or that, in default of such payment as aforesaid, all the aforesaid hereditaments and premises might be sold by and under the direction of the Court, and that, out of the proceeds of such sale, the amount which, upon taking such account, should be found due as aforesaid, might be duly paid and satisfied; and that, in the event of a sale being ordered as aforesaid, the defendants, and all proper parties, might be ordered to join in making a valid and effectual conveyance of the said hereditaments and premises to any purchaser or purchasers thereof, and to deliver up to such purchaser or purchasers all title deeds, documents and evidences relating thereto; and for a receiver.

Mr. *Roupell* and Mr. *Wetherell*, for the plaintiffs.

Mr. *Shapter*, for the defendants.

It being objected, at the hearing, that the plaintiffs had no right to foreclose or sell the Slinfold estate in default of payment of the four mortgage debts, whilst three only were charged on it,

The Vice-Chancellor made a decree for foreclosure of the Fittleworth and Pulborough estates, on non-payment of the sums secured thereon; and for foreclosure of the Slinfold estates, on non-payment of the sums secured thereon; and for a receiver as to the Slinfold estate, and (if defendants did not object) of the Fittleworth and Pulborough estate.

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bound to do that which he has offered to do
[*369] for the *defendants in this case, (the decree having directed inquiries only) the defendant is not too late on further directions to claim such benefit of the offer as he is entitled to. Indeed, without the offer, the Court would

THIS Court doth declare, that the title deeds relating to the estate of Slinfold, in the county of Sussex, mentioned in the memorandum of the 21st day of August, 1837, in the pleadings &c., having been deposited by the defendant John Turner in the hands of the said plaintiffs, the said plaintiffs are entitled to be considered as mortgagees of the premises comprised in such title deeds; and this Court doth order and decree the same accordingly. And it is ordered, that it be referred to the Master &c., to take an account of what is due to the plaintiffs for principal and interest on the several securities in &c., *distinguishing what is due on such deposit* from what is due on the mortgage indentures and deeds poll relating to the estates at Fittleworth and Pulborough in the county of Sussex, in the pleadings mentioned. And it is ordered, that the Taxing Master &c., do tax the plaintiffs their costs of this suit; and, upon the defendants paying unto the said plaintiffs what shall be reported due to them for principal and interest *due on such deposit*, and their said costs, within six months after the Master shall have made his report, at such time and place as the said Master shall appoint, it is ordered, that the plaintiffs do deliver up all deeds and writings in their custody or power relating to the said premises at Slinfold, upon oath, to the said defendants, or to whom they shall appoint; but, in default of such payment, it is ordered, that the defendants do convey, and procure all proper parties to join in conveying the same to the said plaintiffs, or as they shall appoint, free and clear from all incumbrances made by them, or either of them, or by any person or persons claiming by, from, or under them; and the said defendants are to deliver, on oath, all deeds, papers and writings, in their custody or power relating thereto, to the said plaintiffs, or to whom they shall appoint. And it is ordered, that the Master do settle such conveyance, in case the parties differ about the same; *and*, upon the defendants paying to the said plaintiffs what shall be reported due to them for principal and interest on the said mortgage indentures and deeds poll relating to the said estates at Fittleworth and Pulborough, with such costs as aforesaid, within *the said six months hereinbefore mentioned*, it is ordered, that the plaintiffs do re-convey the premises comprised in the said indentures and deeds poll, free from all incumbrances made by them, or either of them, or by any person or persons claiming by, from or under them, and deliver up, upon oath, all deeds and writings in their custody or power relating thereto, to the said defendants, or to whom they shall appoint; but, in default of such payment, it is ordered, that the said defendant J. Turner dostand absolutely debarred and foreclosed of and from all equity of redemption of and in the last-mentionsd mortgaged premises. And it is ordered, that the Master do appoint a proper person to be receiver of the rents and profits of all the premises at Slinfold comprised in the hereinbefore mentioned title deeds. [Usual directions consequent on such appointment.] And for the better taking &c. Liberty to apply.

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*compel the plaintiff to do what was equitable, as the price of the decree he obtains. Lord Eldon has repeatedly made the observation, "I want no offer, if equity entitles me to do it. I will do whatever is equitable." But the defendants, the solicitors, have *contended that the offer in the bill is binding upon the plaintiff, whether he was equitably bound to do the thing he has offered to do or not. A gratuitous offer, they say, is equally available to them as one which the plaintiff was bound to make. The plaintiff, I understand, is now desirous of abandoning all claim to the documents in the possession of the solicitors, except those to which he has entitled himself in his character of mortgagee, discharged of the lien claimed by the solicitors,—which he might do unless his offer binds him. And this is the point I am called upon to decide. [*370] [*371]

I should very reluctantly sanction the proposition, that a party may, as a matter of course, withdraw an offer gratuitously made by his bill. It is impossible, in the abstract, to say what effect such an offer might have had upon the defence in the cause, or on the evidence given in support of it.

In *Dr. Battine's case*,(a) mentioned by Lord Eldon in *Davis* v. *Duke of Marlborough*,(b) Dr. Battine filed a bill to set aside an annuity deed, offering by his bill to repay the purchase-money of the annuity. Lord Eldon said that the offer was gratuitous; but nevertheless, the Court held the plaintiff to his offer. The question is, whether I ought to do so in the present case. The solicitors, the defendents, claim a lien upon the title deeds relating to the plaintiff's mortgage; and in this claim they have failed altogether, so far as the plaintiff is entitled to the deeds in respect of the mortgage, and so far as he considers those deeds in their possession to be material to his title as mortgagee. Suppose the only document upon which the solicitors have established a *lien against the plaintiff to be a duplicate copy of an immaterial paper relating to the mortgaged property, and that the offer is gratuitous, is the plaintiff, by reason of the offer [*372]

(a) 2 Swanst. 156, n. (b) Id. 134, 137.

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which he has made in this bill, and that only, to be compelled to discharge the amount of Lewis's bill to his solicitors? I am glad to escape from the necessity of answering that question, by observing that the offer does not, in strictness, extend to such a case. The bill denying the solicitor's right to a lien upon documents which came into his possession as mortgagee, (but supposing as an alternative that such a claim may be upheld by the Court,) offers in that case to redeem the deeds with the land. The case to which that offer applies does not arise, for I have determined against the claim of the solicitors. I cannot hold them to an offer in a case different to that to which the offer applies.

The next point is respecting the costs which have been occasioned by the contest in the cause on the solicitors' claim of lien upon documents. So far as the plaintiff has succeeded in establishing a right to documents upon which they claimed a lien as solicitors, they must pay the costs. So far as they have established a lien upon the documents claimed by the plaintiff, they must have their costs, that is, the costs occasioned by the claim in each case. The question I have to decide is, by whom the latter costs are to be ultimately borne. If the plaintiff asks no decree against them in respect of the documents upon which the solicitors have established their lien, he must pay the costs; for his abandonment of so much of the relief prayed by his bill is, upon the question of costs, analogous to a dismissal of his bill. The only question is, by whom the solicitors' costs, in respect of the lien established by them, are to be borne, whether by the plaintiff personally, or whether he is not to be [*373] *allowed to add them to his mortgage debt. I think the latter is the proper order.

Upon the last point, as to the question of repairs and lasting improvements, at present there is no foundation for any order. The case is not suggested in the answer. If a petition should be presented, the question will be, as in *Sandon* v. *Hooper*,(a) to what extent the mortgagees are bound before decree to establish that there have been such repairs and improvements as to entitle them to the reference. Upon this I give no opinion.

(a) 6 Beav. 246.

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1849.—Pelly v. Wathen.

DECLARE, that the defendant I. A. Cooke, as the personal representative of the late defendant George Wathen, has a lien on the deeds and papers in &c., mentioned to have come into the possession of George Wathen during the time that he was employed as the solicitor of J. Lewis and the late defendant William Lewis jointly, and William Lewis solely (except the indentures &c.), in respect of the costs of George Wathen, incurred during that period. And declare, that the said defendant I. A. Cooke, as such personal representative, and the defendant Mary Hooper, as the personal representative of the late defendant Thomas Bassett, have a lien upon such of the deeds and papers in &c., mentioned to have come into the possession of George Wathen and Thomas Bassett, during the time that they were employed as the joint solicitors of J. Lewis and William Lewis jointly, and William Lewis solely, previously to the 14th September, 1839, (being the date of the plaintiff's mortgage,) in respect of their costs incurred during that period. And without prejudice to any right of lien as against the defendant Jane Lewis, or the estate of the late defendant William Lewis, declare, that defendants I. A. Cooke and Mary Hooper, as such personal representatives as aforesaid, and the defendant John Gurney respectively, have not nor has any or either of them, as against the plaintiff, any lien for their or any or either of their costs on such of the deeds and papers in &c., and which, by the report, appear to have come into their or any of their possession subsequently to the 14th Sept., 1839; and that the defendant I. A. Cooke, as such &c., has, as against the plaintiff, no lien on any deeds or papers which first came to the possession of the subsequent firms of Wathen *& Bassett, or Wathen, Bassett, & [*374] Gurney for any costs due to George Wathen alone; and that the said defendants I. A. Cooke and Mary Hooper, as such &c., as aforesaid, as against the plaintiff, have no lien on any deeds or papers which first came to the possession of the firm of Wathen & Bassett, & Gurney, for any costs due to the firm of Wathen & Bassett. Compute subsequent interest upon the mortgage of the late defendant Anna Wathen and also upon the several mortgages of George Wathen. Carry on the accounts of moneys received or but for their wilful default &c., by the personal representatives of Anna Wathen. Let the Master certify the amount due to the said personal erpresentatives of Anna Wathen, for principal and interest on her mortgage, after &c., and for the costs of this suit. Carry on the account of the rents and profits of the hereditaments comprised in the mortgages of George Wathen, or any part thereof received by him or his representatives, or any person &c., or which, but for their wilful default &c. Let the Master state the amount due to the said defendant I. A. Cooke, as such &c. of George Wathen, for principal and interest on his said several mortgages, after &c., and for the costs of this suit, and after the set-off hereinafter directed. Tax the costs of Anna Wathen and her representatives, of this suit, and the costs of George Wathen and his representative, and of Thomas Bassett and his representative. and of John Gurney, of this suit, and of the said exceptions, (except such costs as have been occasioned by any claim of lien on the part of the said defendants, or any of them, and to which they are respectively hereinbefore declared not to be entitled); and tax the plaintiff his costs of this suit and of the exceptions, so far as the suit and exceptions have been occasioned by the claim to lien, which the defendants have failed to establish. Let the Taxing Master distinguish so much of the costs of the last-named defendants of

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this suit, and of the exceptions, as relate to the said lien, from the general costs of this suit. Let the costs of the plaintiff hereinbefore directed to be taxed, be set off against the costs of the defendant George Wathen and his representative, and Thomas Bassett and his representative, and John Gurney, of this suit, relating to the said lien hereinbefore directed to be distinguished from the general costs of suit. And if, upon such taxation and after such set-off, it shall be found that there is a balance due to the plaintiff or the said defendants, let the Taxing Master certify the amount thereof; and if, upon such taxation, it shall appear that there is a balance due to the said defendants I. A. Cooke, Mary Hooper, and John Gurney, after such set-off direct the plaintiff to pay unto the said defendants the amount of such balance. But if, upon such taxation, it shall appear that there is a balance due to the plaintiff, after such set-off, then direct that the said last-named defendants do pay unto the plaintiff the amount of such balance. And, upon the plaintiff paying

[*375] *unto the representatives of Anna Wathen what shall be certified to be due to them for principal and interest and costs of this suit, as aforesaid, within six months &c., order that the said defendants do release and convey the mortgaged premises, free and clear &c., and deliver all deeds, papers, and writings in their custody or power, relating thereto, to the plaintiff, or &c.; but in default of the plaintiff paying unto the said defendants such principal, interest, and costs as aforesaid, by the time aforesaid, let the plaintiff's bill from thenceforth stand dismissed out of this Court as against the defendants, the representatives of Anna Wathen, with costs to be taxed &c. And let the plaintiff's bill, so far as the same relates to the premises comprised in the mortgage of Anna Wathen, from thenceforth stand dismissed out of this Court as against the other defendants, with costs to be taxed &c. Tax such costs, and direct the plaintiff to pay the same. And, upon the plaintiff paying unto the defendant I. A. Cooke what the said Master shall certify to be due to him, as &c., for principal, interest and costs of this suit, relating to the mortgages of the said George Wathen as aforesaid, and also paying the defendants Mary Hooper and John Gurney respectively their costs of this suit of and relating to the said mortgages, within six months &c., order that the defendants I. A. Cooke, Mary Hooper and John Gurney, do release and convey the several mortgaged premises, free and clear &c., and deliver upon oath all deeds, papers and writings relating to the premises in their respective custody or power, and as to which the said defendants respectively are hereinbefore declared not to have any lien as against the plaintiff, to the plaintiff, or as he shall direct. But, in default of the plaintiff his paying unto the said defendant I. A. Cooke such principal, interest and costs as aforesaid, and to the said defendants Mary Hooper and John Gurney such costs as aforesaid, by the time aforesaid, let the plaintiff's bill be from thenceforth dismissed as against the defendant I. A. Cooke, Mary Hooper and John Gurney, with costs; and let the plaintiff's bill, so far as the same relates to the mortgages to George Wathen, from thenceforth also stand dismissed as against the representatives of Anna Wathen, and against Jane Lewis, with costs. Tax such costs &c., and direct the plaintiff to pay the same. Take an account of what is due to the plaintiff for principal and interest on his mortgage in &c., including therein any balance of costs which the plaintiff may pay to the said defendants in respect of such

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lien as aforesaid, and for his costs of this suit and of the exceptions. And, in taking such account, the Master is to have regard to any balance the plaintiff may receive in respect of costs occasioned by the said lien as aforesaid. And if the said plaintiff shall redeem the said defendants, or either of them, compute subsequent *interest on what the plaintiff shall so pay to the said defendants, or either [*376] of them. And let the Master certify the amount due to the said plaintiff for principal, interest and costs, and what he shall so pay to the said defendants, or either of them, as aforesaid, together with such subsequent interest thereon. Tax the plaintiff his costs of this suit, so far as the same relates to the premises comprised in his mortgage (other than the premises respectively comprised in the mortgages of Anna Wathen and George Wathen, in case he shall not redeem them) and also tax the costs of the plaintiff of this suit relating to the aforesaid lien, and of the said exceptions, so far as they relate to such lien. And, in case the plaintiff shall redeem the said defendants, or either of them, tax him his costs of so much of this suit as relates to the mortgage he shall so redeem as aforesaid. And upon the defendant Jane Lewis her paying unto the plaintiff what the Master shall certify to be due to him as aforesaid, within three months &c., direct the plaintiff to release and convey the said mortgaged premises he shall so redeem as aforesaid, and also the premises comprised in the plaintiff's mortgages other than those comprised in the said defendant's mortgages, free and clear &c., and deliver all deeds, &c., to the said defendant Jane Lewis, or as she shall appoint. But in default of the defendant Jane Lewis paying unto the plaintiff such principal, interest and costs, by the time &c., the said defendant is from thenceforth to stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption, of, in and to the said mortgaged premises the plaintiff shall redeem as aforesaid. And for the better taking &c. Liberty to apply.

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[*377] *SAYER *v.* SAYER.

INNES *v.* SAYER.

1848: Feb. 8th, 9th and 10th; March 3d and 21st. 1849: March 22d and 24th; April 28th.

Stock, over which the testatrix had a power of appointment, held to be described and appointed by a will, in which the power was not expressly referred to.

On a question, whether a power has been executed by a will, evidence of the state of the property is admissible, so far as it is material to the question, whether a particular part of such property is or is not described by the will; but, unless the circumstances of the property, when known, are found to exclude the primary and strict sense of the words which the testator has used, such strict sense must be adhered to; and the mere probability, however strong, that the words were used in a secondary sense, does not authorize the Court so to construe them.

A disposition of trust funds, over which the testatrix had a general power of appointment, not pursuing the formalities prescribed in the power, held to be, nevertheless, a good appointment in favor of a charity.

If it be doubtful on the words of a will, whether a specific or general legacy is given, the rule of the Court is to lean to the construction which makes the legacy general;[1] but this rule does not involve the proposition that the Court is to address itself to the construction of a will with any prepossession one way or the other.

THE testatrix, Judith Innes, was, at the date of her will, entitled, under three different instruments, to the dividends on several sums of stock for her life, with general powers of appointment as to part of the funds under two of the instruments. 1. Under a settlement made in February, 1800, on the marriage of herself and Thomas Innes, her deceased husband, she was entitled for her life to 1826*l.* 8*s.* 11*d.*, 3*l.* per cent. Consols, standing in the names of the trustees of that settlement, with a power of appointment of 1000*l.*, like stock, part thereof, by her last will and testament in writing, or any writing purporting to be her last will and testament, to be by her signed, sealed, and published, in the presence of and attested by two or more witnesses, and, in default of appointment, in trust for her next of kin living at the time of her decease. 2. The testatrix was entitled for her

[1] *Cogdell's ex'r.* v. *His Widow*, 3 Desau. 373.

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life to a sum of 559*l.* 4*s.* 9*d.*, New 3 1-2*l.* per Cents., produced by property acquired after her marriage, standing in the names of the trustees of an indenture of August, 1823, limited in remainder to the sisters of the testatrix and their issue. 3. And, under the will of her deceased husband, Thomas Innes, dated in February, 1824, the several sums of 10,000*l.*, 3*l.* per cent. Consols; 5000*l.*, New 3 1-2*l.* per Cents.; 800*l.* Long Annuities; and 1500*l.* 14*s.* 5*d.*, 3*l.* per cent. Reduced Annuities, constituting his residuary personal estate, stood in the names of the executors and executrix of such will, of whom the testatrix was one, to the dividends of which sums she was entitled for her life, *with remainder as to a third part of the same sums [*378] unto such person or persons, at such time or times, and in such parts, shares, and proportions, manner and form, as she, by any deed or deeds, writing or writings, to be by her duly executed, according to law, or by her last will and testament in writing, or any writing purporting to be or in the nature of her last will and testament, or codicil, to be by her signed and published in the presence of, and attested by two or more witnesses, should give, bequeath, direct, limit, or appoint the same; and, in default of such gift or appointment, the testator, Thomas Innes, bequeathed the same to his brother, Alexander Innes and his children, as therein mentioned.

The testatrix had also, at the date of her will, 800*l.*, New 3 1-2*l.* per Cents., standing in her own name, to which she was absolutely entitled, and which, by the additions she subsequently made, was augmented at the time of her death to 12,909*l.* 19*s.*, like stock.

The testatrix, by her will, dated in January, 1833, unattested and not referring to the power, gave to the treasurer for the time being of the Sailors' Home "1000*l.*, in the 3*l.* per cent. Consols;" to the treasurer of the Strangers' Friend Society "1000*l.*, in the 3*l.* per cent. Consols;" to the British and Foreign Bible Society 500*l.* in the 3*l.* per cent. Consols, and the like sum to the Church Missionary Society, to be paid within six months after her decease; and to Harriet Ker Innes 500*l.*, in the 3*l.* per cent. Consols, free of legacy duty, to be paid within such six months. The

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testatrix then proceeded: "The remainder in the 3*l.* per Cents., and three separate sums in the New 3 1-2*l.* per Cents., with 100*l.* a year, Long Annuities, and any other property I may die possessed of, of what nature or kind soever, I leave to my [*379] brothers," upon the trusts thereinafter *named. The testatrix made eight other unattested testamentary papers, giving legacies or revoking legacies previously inserted, the last of which papers was dated the 1st of September, 1836. At the foot of the eighth testamentary paper, the testatrix had written, "This will has not been witnessed, as I intend, if I am spared, to write it out fair." The testatrix made no appointment in exercise of her powers, unless such testamentary papers could be so considered.

The testatrix died in June, 1844, and the will and other testamentary papers or codicils were admitted to probate. There was no issue of the testatrix and her husband.

The suit of *Sayer* v. *Sayer* was instituted for the administration of the estate of the testatrix; and in that suit the treasurers of the several charities claimed to be allowed their several legacies as general legacies payable out of the personal estate. The Master allowed their respective claims. The report was excepted to by the residuary legatees under the will of the testatrix.

The case was argued by Mr. *Kenyon Parker*, Mr. *Romilly*, Mr. *Wood*, Mr. *Rolt*, Mr. *Faber*, Mr. *Malins*, Mr. *Glasse*, Mr. *Selwyn*, Mr. *Wickens*, and Mr. *Baggallay*, for the different parties.

The principal question argued was, whether the gifts of Consols, in the will of 1833, were to be treated as a disposition or an intended disposition of that species of stock over which the testatrix had powers of appointment under her marriage settlement and the will of her husband; and, preliminary to this question, the admissibility of any evidence with regard [*380] to the state of the property *in question at the date of her will, was contested. The cases referred to in the judgment and *Hosking* v. *Nicholls*(*a*) were cited.

(*a*) 1 Y. & C. C. C. 478.

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March 3rd.—VICE-CHANCELLOR:—The issue raised by these exceptions is, whether the will refers to specific things and the testatrix, in that manner, manifests her intention to execute her powers, or whether the legacies are merely general. The question is in substance one of "parcel or no parcel." The first bequests are clearly general in terms. Do the subsequent words, by that which the Court considers necessary implication, show that the previous words describe the property subject to the power? In considering this question I have referred to the state of the property subject to the powers of the testatrix, and also to the state of her own property at the date of her will.

A question was made at the bar, whether I was at liberty to advert to the state of the above property in construing this will. This question might be answered by reference to the decree, which directs the Master to ascertain the state of such property at the date of the will. It is, however, better to meet the objection directly. The objection proceeds upon a mistake as to the purpose for which the reference in the decree was made. When, in construing a will, the question is, whether a particular thing is described or not, the Court must admit evidence as to the thing said to be described, or it cannot be in a condition to determine whether the words of the will describe it or not. If evidence manifestly impertinent to that question be tendered, the Court is *bound at once to reject it; and this [*381] is decided by *Nannock* v. *Horton*,(a) and cases of that class to which I was referred,—the amount of the personal estate at the date of the will being immaterial where the will speaks not from its date but from the death of the testator. Where the evidence tendered may be material, the practice in equity is usually to admit it (as in this case) in the first instance, and reserve the question of its materiality until the hearing of the cause. In deciding upon its materiality the Court is bound to construe the words of the will in their strict and primary sense unless the circumstances of the case exclude that sense; and the Court is not at liberty to construe the words in any secondary

(a) 7 Ves. 390, 400.

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sense, only because the state of the property or other extrinsic circumstances may make it in the highest degree probable that the words were used in such secondary sense. The strongest cases on this point are *Nannock* v. *Horton*,(a) *Pocock* v. *Bishop of Lincoln*,(b) and *Doe* d. *Oxenden* v. *Chichester*.(c)

In truth, it is unimportant whether such facts as I have before me in this case are admitted or not in the first instance, for I should be bound to consider the will upon the hypothesis that the facts did exist; and the knowledge I have that they do exist, can have no effect upon my judgment beyond what the hypothesis would produce.

I have said more upon this subject than, in the present state of the authorities, can be necessary; but I have thought it right to do so, in order that it may be distinctly understood that I acknowledge the obligation I am under to construe the will strictly, excluding all the *conjectural interpretation, which the facts of this case are well calculated to suggest.

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It was said that my decision in this case must be governed by the same considerations as apply in deciding between a specific and general legacy, and that the Court in such case leans against specific, and in favor of general legacies. This proposition itself I do not dispute; but it must not be carried too far. If the words of a will are equivocal as giving a specific or general legacy, it is undoubtedly the rule of the Court to lean to the construction which makes the legacy general. Whether that rule applies to a case of description, like the present case, I do not inquire; but in no case, I conceive, does the proposition require a Judge to address himself to the construction of a will with any prepossession one way or the other. He is to consider whether the words of the will do or do not describe an existing subject, and, if they do, to give effect to them accordingly.[1] The question, whether

(a) 7 Ves. 390. (b) 3 B. & B. 27. (c) 4 Dow. 65.

[1] A legacy is specific, when it is a bequest of a particular thing, or sum of money, or debt, as distinguished from all others of the same kind, and capable of being designated and identified. *Bradford* v. *Haines*, 7 Maine Rep. 105.

Cases held to be specific:—A bequest of all the testator's right, interest and property in thirty shares of a designated bank, (*Walton* v. *Walton*, 7 John. Ch. Rep.

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the property subject to the power was comprehended in the description, was the point upon which the judgment proceeded in *Lovell* v. *Knight*.(a)

Proceeding upon this principle, I adopt the admission of counsel, that the bequests of Consols standing alone are general legacies, and that character they must retain, unless, from other parts of the will, the Court is satisfied that such is not the true construction of the will.

The first thing relied upon for the purpose of showing that the will, so far as concerns the legacies in Consols, applies to the property subject to the powers, was the word "remainder."
That word (it was said) showed *conclusively that the [*383]
legacies in stock were part of some fund, the "remainder"
of which was afterwards given. That observation is, I think, just; but it does not go far enough for the purpose for which it was used; for (taken alone) the word "remainder" might mean (as was argued) "remainder of stock at the death of the testatrix," a construction rather favored by the reference the testatrix makes to other property at her death. I think, however, (admitting this) I must, from the context, understand the word "remainder" as meaning remainder in Consols, and not in Reduced Stock,—whether existing stock, or stock at the death of the testatrix be intended.

Next, is there anything to show that existing stock, and not

262;) to a wife of "the whole of the property she brought to me," (*Warren* v. *Highfall*, 3 Desau. 47;) a definite number of shares in a definite company to remain unsold, and dividends to be divided among certain named legatees, (*Manning* v. *Craig*, 3 Green's Ch. Rep. 436;) a sum of money in such a bag, (*Lawson* v. *Stitch*, 1 Atk. 508;) or in the hands of a certain person, (*Hinton* v. *Parke*, 1 P. Wms. 540; *Pulsford* v. *Hunter*, 3 Bro. C. C. 416; *Crockat* v. *Crockat*, 2 P. Wms. 164; my East India Bonds, (*Sleech* v. *Thorington*, 2 Ves. 562;) the money due on an interest note given by A.; *Fryer* v. *Morris*, 9 Ves. 360;) my navy bills, (*Pitt* v. *Camelford*, 3 Bro. C. C. 160;) money due on A.'s bond, (*Davies* v. *Morgan*, 1 Beav. 405;) of *a part* or residue of a debt, (*Ford* v. *Fleming*, 1 Eq. Cas Ab. 302.) For other cases of legacies held specific, see *Gardner* v. *Hatton*, 6 Sim. 93; *Coleman* v. *Coleman*, 2 Ves. jr. 639; *Nelson* v. *Carter*, 5 Sim. 530; *Chaworth* v. *Beach*, 4 Ves. 555; *Choat* v. *Yeats*, 1 J. & W. 102; *Innes* v. *Johnson*, 4 Ves. 568; *Norris* v. *Harrison*, 2 Madd. 279; *Stickney* v. *Davis*, 16 Pick. 19; *Stout* v. *Hart*, 2 Halst. 44; *Brainerd* v. *Cowdrey*, 16 Conn. Rep. 1.

(a) 3 Sim 275.

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such stock as might be existing at the death of the testatrix, is the stock, the remainder of which, after satisfying the legacies in question, is the subject of the gift? If the definite article "the" had been repeated, and the expression had been "*the* remainder," —"*the* three separate sums," and "*the* Long Annuities," I think the case would have been made out. It is material to observe, that the clause in the will in which the words occur is a residuary clause. How can I understand the testatrix in a clause of her will, in which she is giving all she shall die possessed of, to give an enumeration of five items which had no existence at the time she was writing—"the remainder in Consols," "three separate sums of 3 1-2*l.* per Cents,—and one in the Long Annuities." If I knew nothing of the state of the assets of the testatrix at the date of her will, I should say, I must understand the words as referring to some existing things, unless, upon inquiry, I found no such things in existence, and that I could not decide the case until I knew whether such things did exist or not. But the case does not rest here. My view of the construction is con-
[*384] firmed by the reference to three separate sums of *New 3 1-2*l.* per Cents. These sums must stand under three separate titles, otherwise they would not exist as separate sums. Does, then, the omission of the definite article make a difference? I think the article must necessarily be implied. It is not expressed, only because the particulars enumerated were items in a sweeping clause, the concluding words of which include everything the testatrix should die possessed of. I cannot raise a doubt in my own mind as to the intention of the testatrix, and I think her words unequivocally express it.

I have not omitted to consider the circumstance that the testatrix had only a life interest in the 559*l.* New 3 1-2*l.* per Cents. It was a mistake, but I think it does not affect the conclusion to which I have felt it necessary to come.

DECLARE, that the [several parties entitled under the settlement of February, 1800] ought to elect between the benefits given them by the will of the testatrix and their respective shares in the 1000*l.* Consols under the settlement of February, 1800, and the dividends, &c., or such part thereof as was not duly appointed by the testatrix; and that the [several parties entitled under the deed of August, 1823]

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ought to elect between the benefits &c. and their respective shares in the 559*l.* 4*s.* 9*d.* 3 1-4*l.* per cent. Annuities, under the deed of August, 1823, and the dividends, &c. The costs of the defendant Harriet Ker Innes to be taxed and paid out of the residuary estate of the testatrix, and further proceedings in the suit to be stayed as against her.

The suit *Innes* v. *Sayer* was instituted by one of the four children of Alexander Innes, who were the residuary legatees under the will of the testator Thomas Innes, against his surviving executor, (the other children and residuary legatees being defendants) praying that the plaintiff's fourth share of the third part of the four *sums of stock might, as on default of appointment by the testatrix Judith Innes, be transferred to the plaintiff. After the judgment had been given on the exceptions in *Sayer* v. *Sayer*, the treasurers of the several charities were made parties to the suit *Innes* v. *Sayer*, by amendment, as adverse claimants on the third part of the 10,000*l.* 3*l.* per cent. Consols, one of such four sums. At the hearing, [*385]

1849: *March* 22*nd*.—The *Solicitor-General*, Mr. *Wood*, Mr. *Rolt*, Mr. *Blunt*, Mr. *Faber*, Mr. *Glasse*, and Mr. *Pirie*, appeared for the different parties.

The argument was on the point of the equitable right of the charities to the assistance of the Court in aiding the defective execution of the powers by the testatrix, supposing she had in fact intended such execution. The following authorities were cited:—*Piggot* v. *Penrice*,(*a*) where lands, limited by a settlement which the testatrix had power to revoke, were held to be well devised to charitable uses, without any revocation: *Rivett's case*,(*b*) a devise of copyholds without a surrender to the use of the will, held to be a good appointment: *Woodford Parish* v. *Parkhurst*,(*c*) a sufficient devise of a rent-charge out of copyhold lands without a surrender: *Attorney-General* v. *Sawtell*,(*d*) a will of

(*a*) Pre. in Ch. 471, n.; Comyns, 250; Gilb. Eq. Rep. 137, 138; Duke's Charitable Uses, 385, Bridgman's edit.

(*b*) Moore, 890; *S. C.* Duke's Charitable Uses, 74; Id. 366, Bridgman's edit.

(*c*) Duke's Charitable Uses, 378, Bridgman's edit.

(*d*) 2 Atk. 497.

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copyhold lands of which only the first two out of eleven sheets were signed by the testator, a good appointment of the estate; and where lands were appointed for charitable uses by the tenant in tail without fine or recovery, and were held to be well appointed as against the issue in tail: *Attorney-General* [*386] *v. *Rye*,(a) *Incorporated Law Society* v. *Richards*,(b) in which Sir Edward Sugden, adverting to the construction which had in some cases been given to the statute 43 Eliz. c. 4, describes it as "forced and unnatural;"(c) that the same principles of construction, in cases of doubt or difficulty, are applied in the case of legacies to charities, as to other legacies.(d) The cases of *Rodgers* v. *Marshall*,(e) *Chapman* v. *Gibson*,(f) *Attorney-General* v. *Skinners' Company*,(g) *Attorney-General* v. *Downing*,(h) and Sugden on Powers, Vol. 1, p. 254, pl. 5, 7th edit., were also referred to, on the construction or effect which has been given to the Statute of Charitable Uses, 43 Eliz. c. 4.

VICE-CHANCELLOR:—The Ecclesiastical Court has decided, that, notwithstanding the clause at the foot of the codicil of 1836, the will is a complete testamentary paper in this sense, that the testatrix means it to operate. If the testatrix meant the will of 1833 to operate, I have only to take the paper and inquire into its construction. The question of construction was the point I had to consider in the case of *Sayer* v. *Sayer*. I thought the language did necessarily refer to the property the subject of the power; and, referring to that property and intending the paper to operate as her will, (which I now assume to be the case,) I must conclude that the testatrix has declared her intention to execute the power. The only point, then, which has to be considered, is, what the effect of the will is to be.

[*387] *It is only in the case of the legacies to the charities, that the claim which I have now to consider can be made; and it appears to me, that the only question is, whether the autho-

(a) 2 Vern. 453, and cases there referred to. (b) 1 D. & War. 258.
(c) Id. 300. (d) *Attorney-General* v. *Sibthorp*, 2 Russ. & My. 107.
(e) 17 Ves. 294. (f) 3 Bro. C. C. 229. (g) 2 Russ. 407, 417.
(h) Amb. 571.

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rities ought to bind me. I must attend to the decisions to ascertain whether they cover a given point, and when I have done so, and find that there are decisions in analogous cases, and that there are also dicta of learned Judges pointing to the same conclusion, consider whether I ought, by any decision of mine, to shake that which is considered to have been the settled law, if not before the Statute of Elizabeth, certainly ever since. It cannot be denied that there are express decisions of the highest authority, that the Court will supply the want of a surrender of a copyhold in favor of a charity. The supplying the surrender of a copyhold, and the supplying the execution of a power which is defective in form, go hand in hand. It appears to me, that wherever you find a decision that the Court will supply the surrender, it follows, (unless this case be an exception) that the Court will also supply the defective execution of a power. Such a case is, by analogy at least, a strong authority for the proposition contended for.

With regard to a tenancy in tail, the distinction is palpable. No doubt the tenant in tail has the whole interest. It is not the case of a mere execution of a power. At the same time, if he does not acquire the dominion of the estate in the form which the law requires, it goes to the issue in tail as a quasi purchaser. The issue takes, not under the immediate ancestor, but under the author of the estate tail. Yet, even in this case, we find that, although the court will not perfect any intention which the testator may have manifested to bar the estate tail in favor of his creditor, wife, or child, that object not having been effected, the Court *will give effect to the intended dis- [*388] position of the estate in favor of a charity—carrying it therefore in the case of a charity, for some reason or other, beyond the case of the creditor, wife, or child. The existence of such a class of cases certainly furnishes a second ground for following what has hitherto been considered the rule of the Court.

The third ground is the dicta which unquestionably are to be found in favor of the proposition, that a charity is entitled, notwithstanding the power is not well exercised. The case of *Piggot*

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v. *Penrice*,(a) with the note,(b) appears to be an authority for the proposition in question. As the case is reported in Comyns,(c) it would appear to be a direct authority on the point. At all events, I cannot disregard it as a decision, unless those who ask me to do so can show me that the case is materially distinguishable from the present case.

So much of analogy and dicta being found, I may refer to the opinion of text writers; and when text writers of great experience treat it as a settled principle of law, that the Court will supply the execution—so much, as I have said, being found to justify their opinion,—that is also a reason why I ought not to take upon myself to unsettle what hitherto has been considered the rule of the Court.

The principle upon which the Court appears to go is this, that, if a person has power by his own act to give property, and has by some paper or instrument clearly shown that he intended to give it, although that paper, by reason of some informality, is ineffectual for the purpose, yet the party having the [*389] power of doing it by an *effectual instrument, and having shown his intention to do it, the Court will, in the case of a charity, by its decree make the instrument effectual to do that which was intended to be done. It is not for me to give any opinion, whether the principle is right or not. There appears to be very high authority for the application of the principle, independently of the Statute of Elizabeth; and it has been applied since the statute. I think, therefore, I ought not to entertain any question upon the point. If the point is to be hereafter considered and treated differently, it ought to be ruled by a higher authority than the Judge who presides in this Court.

There is another question, with reference to the different sums of Consols, which I must consider. It is, no doubt the intention of the testatrix that the persons who would take in default of appointment under her husband's will, should not take the residue of the stock. It is clear she meant to entrench on the 1000*l.*

(a) Pre. in Ch. 471. (b) Id. 473. (c) P. 250.

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stock under the settlement; for by her will she disposes of more than the third of the Consols to which the power under her husband's will extends. There is nothing upon the will to intimate that she intended the fund to come out of one of those sums of stock, rather than the other. I must take the will as saying, "There are two sums of Consols over which I have a power of appointment: with respect to that stock, I give so much to the charity, and the residue to certain persons named." Those persons cannot take under that appointment, although the charity can. I do not see my way to marshalling the claims on the different funds. If I attempted to do so, I might to some extent be giving effect to the appointment in favor of those persons who are excluded by the circumstance of its informality.

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*The case was afterwards spoken to on minutes. The [*390] 1000*l.* Consols, standing in the names of the trustees of the settlement of February, 1800, not being a subject of this suit, it was suggested that the charities should in this suit take no more than an appointed part of their legacies out of the Consols which formed part of the residuary estate of Thomas Innes to be administered in this suit.

DECLARE, that the testatrix intended by her unattested will, dated the 13th of January, 1833, to execute the general power of appointment given or reserved to her by the will of her late husband Thomas Innes, deceased, over one-third part of his residuary estate; and that the defective execution of the said power, by reason of the non-attestation of the will of the said testatrix, ought to be supplied in favor of the four charitable institutions therein mentioned.(*a*) Directions for transfer of the stock, and payment of the accrued dividends to the several treasurers accordingly. Such transfer and payment to be without prejudice to the right (if any) of the plaintiff and the other residuary legatees of Thomas Innes to enforce contribution in respect of the said sums, stocks and cash, against the 1000*l.*, 3*l.* per cent. Consols, standing in the names of the trustees of the settlement of February, 1800, on which the testatrix had a general power of appointment.

(*a*) See 1 Ves. 226, per Lord Hardwicke; 2 Russ. 420, per Lord Eldon.

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[*391] *MALINS *v.* GREENWAY.

1849: Feb. 16th.

A trust fund, consisting of a debt from the estate of a testator, was recovered in a creditors' suit by the *cestuis que trust*; in which suit the two trustees of the fund were defendants. The two trustees (for reasons which were not denied to be sufficient) appeared separately; and one of them dying before the cause was heard on further directions, it was held that he had acquired no lien for his costs on the trust fund in Court; and the petition of his personal representative, that his costs might be taxed, and provided for out of the fund, was refused, with costs.

BUCHANAN and W. Greenway were trustees in a deed, whereby G. Greenway covenanted to pay 1000*l.* for the benefit of the plaintiff, Mrs. Malins, for her life, with remainder to the other plaintiff's children. G. Greenway died, leaving the 1000*l.* unpaid. The plaintiff filed a creditors' suit against his executrix, alleging, that the trustees refused to join as plaintiffs, and making them defendants. The bill also made a special case against Buchanan, charging him as a partner with G. Greenway the testator, and as having received assets of the partnership applicable to the payment of the 1000*l.* At the hearing it was declared that Buchanan and W. Greenway were entitled to the 1000*l.* and interest as trustees for the plaintiff's and that they were entitled to stand as specialty creditors for the same on the testator's estate; and the usual accounts of that estate were directed, but no decree was made as against Buchanan. The produce of the testator's estate was paid into court and invested in the progress of the cause. Before the hearing on further directions, Buchanan died.

Buchanan under the above circumstances, had appeared in the suit and defended separately; and it not being proposed by the parties to make any provision for his costs, which amounted to about 150*l.*, a petition was presented by his personal representative for a reference to tax such costs, and that they might be paid out of the funds in court applicable to the payment of the 1000*l.* and arrears of interest. The petition came on with the further directions.

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Mr. *Bacon* and Mr. *J. H. Taylor*, for the petition, submitted *that the trust fund, although in court, and not [*392] actually standing in the names of the trustees, should be regarded as if it were in fact in their possession, and that the fund, if actually in the hands of the trustees, would be subject to their charges, before the satisfaction of any claim of the *cestuis que trust*. In this case there would be 500*l.* or 600*l.* arrears of interest coming to the tenants for life, besides the 1000*l.* principal money for the parties in remainder. The greater part of the arrears of interest accrued during the lifetime of Buchanan, and should therefore be treated as if actually in the joint possession of Buchanan and W. Greenway, and only be taken from them after satisfaction of the just charges of both. The present case was not in the nature of a revivor for costs,—it was a necessary step to protect and enforce the right of a party upon a specific fund.

The VICE-CHANCELLOR said, he had always thought, that, according to common sense and justice, the death of a party ought not to deprive his estate of the right to recover the costs which he had incurred in a suit existing at the time of his death. This applied as well to any one else, as to a trustee. The only doubt he had was, whether a trustee did not acquire a lien on the fund recovered in his name, or in a suit for its recovery, to which he was a party. Whatever might be the rule in that respect, he thought it did not apply to this case; for the costs incurred by the deceased defendant had arisen from the charges made against him apart from his character of trustee; and, if the defendant had been entitled to those costs, they ought to have been provided for at the hearing, by a dismissal of the bill, with costs, as to such charges; and the defendant would then have remained simply as a trustee, without the necessity of *in- [*393] curring any costs distinctly from those of his co-trustee.

He could not make a precedent in favor of the claim of a deceased defendant, whether trustee or otherwise, to costs, which the general rule of the Court did not allow. The practice of the Court, as to the costs of a deceased defendant, was much consi-

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dered by Sir Edward Sugden, in the case of *Bower* v. *Beamish*,(a) and the point was well established.

Petition refused, with costs.

CHALK *v.* RAINE.

1849 : July 19th.

Proof admitted on behalf of the plaintiff, of the execution of a deed by affidavit at the hearing, where the answer had not been replied to, but did not deny the execution.

THE plaintiff in a creditors' suit had not replied to the answer, and at the hearing proposed to prove as an exhibit, by affidavit, the execution of a deed not controverted by the answer. This was objected to, on the authority of *Jones* v. *Griffith*,(b) but

The VICE-CHANCELLOR adhered to his decision in *Rowland* v. *Sturgis*,(c) and received the evidence.

Mr. *Bacon*, Mr. *W. Morris*, and Mr. *Nalder*, were for the different parties.

(a) 2 J. & L. 228. (b) 14 Sim. 262. (c) 2 Hare, 520.

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*PRICE *v.* BERRINGTON. [*394]

1849: Febuary 23rd and 24th; March 7th; May 5th.

A bill to set aside, on the ground of lunacy and fraud, a conveyance of an estate by a party claiming the fee simple. The lunacy was established, but it appeared that the plaintiff was only entitled to a life estate in the property:—*Held*, that the plaintiff (and his personal representative after his death) was entitled to an account of the rents and profits during the life of the plaintiff, as against the parties in possession under the conveyance.

A bill was brought to set aside a deed of 1809, on the ground that the plaintiff, the grantor, was of unsound mind. The plaintiff was by inquisition found to have been lunatic, without lucid intervals, from 1796. The defendants alleged, that, by a deed of 1805, the lunatic had settled the estate for himself and wife for their lives, and for the benefit of their children in remainder. The children were made parties to the suit, and disclaimed, and offered to convey any interest they might have as the Court should direct:—*Held*, that this disclaimer and submission did not re-invest in the lunatic the interest which he would have had if the deed of 1805 had not existed, or entitle him to the relief which he might have had if the deed of 1805 had not been made; but, in confining the decree to the interest which had been reserved to the lunatic, the Court declared that it should be without prejudice to the rights of the children.

In a suit to set aside an appointment, on the ground of the unsoundness of mind of the appointor, who was the tenant for life of the estate, parties who would be entitled in remainder in default of appointment, cannot, either by joining as plaintiffs in a supplemental suit, or by offering in their answer to convey their interest for the plaintiff's benefit, enable the plaintiff to sustain the suit in respect of any relief beyond the duration of his own life estate.

On revivor by a party, who was both heir-at-law and administrator of a lunatic in a suit to set aside a conveyance made by the lunatic of his estate, it was held that the plaintiff had no title to the estate as heir-at-law, but that, as administrator of the lunatic, he was entitled to an account of the rents and profits during the life of the lunatic.

Where an equitable interest in an estate has been conveyed by a person of unsound mind to a party taking without fraud or notice of the unsoundness of mind, and the case is one in which the deed would be void at law on the ground of the lunacy, equity will relieve against the conveyance by the lunatic.

The Court will not direct an issue, unless the result of the issue must, in any event, be material.

THE plaintiff in the original bill, filed in June, 1836, was described as William Price, clerk, a person of weak mind, and incapable of managing his affairs, by Charles Price his eldest son, and heir-at-law, and next friend. The bill alleged, that the plaintiff

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had been in a state of imbecility and incapacity since 1789. That, in the year 1809, John Hodder Moggridge, knowing the fact of the plaintiff's imbecility and incapacity, and in order to defraud the plaintiff, induced him to execute an absolute conveyance in fee to him, the said Moggridge, of an estate called Tyr y Coed Cae, in Glamorganshire, of or to which the plaintiff was theretofore seized or entitled in fee simple in possession; that Moggridge knew the consideration of 2000*l.*, expressed in the said conveyance, was very inadequate, and that the minerals in the estate rendered it of great value; and that the 2000*l.* was not in fact paid, except in so far as Moggridge redeemed a mortgage [*395] for 600*l.*, previously existing upon *the property. The defendants were the devisees and executors of Moggridge. The bill prayed that the conveyance of 1809 might be set aside, and the estate re-conveyed; an account of the rents and profits as against the personal representatives of Moggridge; and the plaintiff offered to repay the consideration money which had been paid by Moggridge.

The answers stated several incumbrances made by the plaintiff upon the property before the sale to Moggridge. The defendants stated, that by deed of the 25th of November, 1805, a term of 1000 years in the estate was assigned to secure a sum of money owing to one Jenkins, by way of mortgage, and subject thereto, upon such trusts as the plaintiff and his wife should appoint, and, in default of such appointment, to the plaintiff for his life, with remainder to his wife for her life, remainder to the children of the plaintiff and his said wife as tenants in common. The defendants said, that by deeds of 5th and 6th of February, 1809, made between the plaintiff William Price and Mary his wife, of the one part, and Moggridge, of the other part, and by a deed of the 7th of February, 1808, made by the prior mortgagee and the parties to the two preceding deeds, the estate was, for the consideration of 2000*l.*, duly appointed and conveyed to Moggridge, his his heirs and assigns; that the balance of the consideration money was settled and paid to the plaintiff in 1822; and that, upon such payment, by a deed of release and confirmation, dated the 19th of March, 1822, made between the said Charles Price, as the eld-

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est son and heir apparent of the plaintiff, of the one part, and Moggridge, of the other part, reciting the deeds of the 5th and 6th of February, 1809; that, at the time of the execution of the same, Charles Price was a minor, by reason whereof he was not competent to join in or become party thereto with William Price and *Mary his wife for the assurance and con- [*396] firmation of the said messuages, &c., thereby appointed to Moggridge; that Charles Price had since attained twenty-one, and had been requested by Moggridge to execute a release of all his right, title, estate and interest, if any, in the said premises, which he had consented to do: Charles Price granted, released, and confirmed unto Moggridge, his heirs and assigns, all the estate, interest, claim, &c., at law or in equity, which he (Charles Price) had, or which he, his heirs, executors, or administrators should have, in respect of the said premises or otherwise, against Moggridge, his heirs, executors, or administrators, from the beginning of the world to the date thereof. The defendants said they believed that the plaintiff had been subject to occasional temporary fits of insanity, but with lucid intervals, during which he had been fully competent to manage his affairs.

In May, 1837, a commission of lunacy was issued, under which, on the 22nd of that month, it was found and returned, that the plaintiff, William Price, was a lunatic, without lucid intervals, and was not sufficient for the government of himself, his messuages, lands, tenements, goods, and chattels, and that he had been in the said state of lunacy from the 1st of June, 1786. The custody of the person of the plaintiff was granted to William Price the younger, and the custody of his estate to the said Charles Price.

In July, 1837, a supplemental bill was filed by the plaintiff William Price, a lunatic, by the said Charles Price, his committee, the said Charles Price being also a co-plaintiff, against the original defendants, the wife and the younger children of William Price, and certain mortgagees of the estate claiming under Moggridge; the supplemental bill stated, that the plaintiff Charles *Price did not claim any interest in the estate adversely [*397] to the original plaintiff, the lunatic, but was willing the same should be dealt with for his benefit. The prayer asked for

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the relief sought by the original bill, and also an injunction to restrain the cutting of timber or opening mines on the estate.

The answer of the wife and younger children of the lunatic disclaimed (as against the plaintiffs) any interest in the estate, adding, that they were willing, and thereby offered to convey any interest or right which all or any of them might have in the said estate to the use and for the benefit of the plaintiff William Price, in such way and subject to such limitations as this Court might direct, in case the said William Price should die without having been restored to a sound and disposing mind.

The original and supplemental causes were heard before the Master of the Rolls, on the 30th of June, 1840, when an issue was directed on the question, whether the plaintiff William Price was of sound mind at the time the deeds of the 5th, 6th, and 7th of February, 1809, were executed;(*a*) and it was directed that the plaintiffs in equity should be defendants at law.

The plaintiff William Price, the lunatic, died in January, 1841.

In April, 1848, Charles Price filed his bill of revivor and supplement, stating the death of his father, and alleging, that
[*398] thereupon his late father's right to the said *estate descended upon and became vested in the plaintiff Charles Price, as the heir-at-law; alleging also that he had obtained letters of administration of the personal estate of the deceased plaintiff. Some changes in the estates of the defendants, immaterial to the question, had taken place. The cause was heard and a decree made on the 3rd of June, 1848, for carrying out the former order, and for the trial of the issue.

The issue was tried at the Summer Assizes for Bristol, in 1848, and the jury found that William Price was not of sound mind at the time the deeds of February, 1809, were executed.

The causes were now heard upon the equity reserved.

The *Solicitor-General* and Mr. *Headlam*, for the plaintiff, sub-

(*a*) It was stated, from a note of the judgment, that the Master of the Rolls considered that there was no proof of the case of imposition and fraud which had been alleged, as distinct from the case of unsoundness of mind.

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mitted, that, the lunacy having been established, the plaintiff was entitled to a decree. The contrary proposition must assume that the issue was directed by the Court upon an immaterial question: *Lewis* v. *Thomas*.(a) Such relief was, in fact, the established rule of the Court: *Clerk* v. *Clerk*.(b) This Court would follow the law in such a case, and deal with the equitable interest of the plaintiff (as mortgagor) now improperly vested in the defendants, in the same manner as the Court of law would have dealt with the case if the interests had been legal; that is, that the Court would hold the transaction to be necessarily void, and direct a re-conveyance, or order the deeds (except, perhaps, the deed transferring the mortgage) to be delivered up to be cancelled. There might be an inquiry as to the purchase-moneys paid by *Moggridge, or those claiming [*399] under him, in discharge of the prior mortgage; and the defendants would be entitled to be treated as mortgagees in respect of such payments. The title of the original plaintiff had descended on the plaintiff Charles Price. The decree in the third suit affirmed this title. The suggestion, that the other children were interested, was displaced, *first*, by the fact that the lunacy had been found to exist from a date anterior to the deed of 1805, under which the interest was said to have arisen; and, *secondly*, by the fact that the children were before the Court, and made no claim to the estate, and in fact expressly disclaimed.

Mr. *Wood* and Mr. *Smythe*, for the trustees and executors of Moggridge, and Mr. *W. M. James*, for mortgagees and other parties also claiming under Moggridge.

The suit to rescind the purchase cannot be sustained on the mere proof of lunacy, unless there be some proof of fraud on the part of the purchaser, sufficient at least to show that he dealt with the vendor knowing him to be of unsound mind. The plaintiff, relying upon the lunacy alone, without showing that Moggridge can in any respect be blamed, is in the position of a

(a) 3 Hare, 26, 33. (b) 2 Vern. 412.

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party who seeks the aid of a Court of equity to enforce a right, which, if it exists, is purely a right at law, and one, moreover, that is very harsh in its operation. The case against the defendants cannot be put in a stronger form than that they have the misfortune to claim under instruments which are (as the plaintiff alleges) void at law. The answer to such a case is given by Sir William Grant in *Niell* v. *Morley*:(*a*) "If the plaintiff is right in saying all this is void at law, let him resort to law, and recover, if he can; but there is no ground for a Court of equity to advance his remedy:" *Sergeson* v. *Sealey*,(*b*) *Sentance* v. *Poole*.(*c*) In *Lady Kirkwall* v. *Flight*,(*d*) the plaintiff had, in 1835, been found a lunatic, by commission, from 1831. The bill was filed by her committee, to set aside a security executed in February, 1835, whereby, in consideration of 1000*l*., the plaintiff covenanted to pay 1260*l*. to the defendant, if the plaintiff or defendant should die before the 1st of January, 1836. At the hearing of the cause, the Court directed an inquiry, whether the 1000*l*., or any and what part thereof, was ever, and when, and how paid to the plaintiff, or any other person or persons, for her use, and by whom and under what circumstances, and how and by whom, and under whose authority and direction the same or any part thereof was applied. The Master found that the money was paid by the defendant at his solicitor's office, to Lady Kirkwall, by a cheque; that the cheque was paid by the bankers; but that there was no evidence to whom, or under what circumstances it was paid; that 49*l*. was applied in payment of the bill of the solicitor; but here was no evidence as to the application of the residue. The plaintiff excepted, on the ground that the delivery of the cheque did not amount to payment, and that there was no evidence of the payment to Lady Kirkwall. The exceptions were overruled, and it was ordered that the deed should stand as a security for the principal, interest and costs, and, upon payment thereof, should be delivered up; and the Master was directed to take an

[*400]

(*a*) 9 Ves. 482. (*b*) 2 Atk. 412. (*c*) 3 C. & P. 1.

(*d*) Lord Chancellor, 16th January, 1840; Vice-Chancellor of England, 7th November, 1842, not reported.

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account of what was so due. This in fact affirmed the transaction. Even at law, it is not every contract by a lunatic which is void: *Baxter* v. *Earl of Portsmouth*,(a) *Williams* v. *Wentworth*.(b) The plaintiff Charles Price is, however, estopped so far as relates to any claim in *his own right, by the deed of [*401] March, 1822. It is clear, that, if he was interested as a remainderman, he conveyed his interest by that deed to Moggridge; and there is no proof before the Court that Charles took any interest in the estate as heir-at-law; for the deed of 1805 is entirely undisplaced; and it is not by the concurrence of defendants in a suit that they can confer a title upon the plaintiff which he would not otherwise have: *Major* v. *Auckland*.(c) The disclaimer of the children in favor of the plaintiff does not, therefore, assist him, nor is the finding of the inquisition of lunacy conclusive against their interests under the deed of 1805. It is plain, that, after the lapse of time, no decree could be made for setting aside this purchase, which could have the effect of replacing the parties in the situation they were in before the transaction took place.

[The argument on the effect of the deed of March, 1822, according to the doctrine of estoppel, with reference to the interest of Charles Price as heir-at-law of the lunatic, is not given, as the question was not decided,—the Court holding, that the state of the pleadings precluded Charles Price from claiming in this suit as heir-at-law, or otherwise than as administrator of his father.]

VICE-CHANCELLOR:—The first question is, as to the effect of the decree so far as it has gone. This may be tried by supposing the original plaintiff to be still living, and to have been found a lunatic.

It has been observed by Mr. Wood, that the bill does *not treat the case as one of lunacy, in which the trans- [*402] action is void, but as one in which a fraud was practised on an imbecile person, in obtaining a conveyance of the estate.

(a) 5 B. & C. 170. (b) 5 Beav. 325. (c) 3 Hare, 77.

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It is said, that this being a case in which it is admitted that the legal estate did pass, (which it would not have done if the grantor had been lunatic) and which proceeds on the ground of fraud,—the fraud not being proved,—that the Court ought on that ground alone to dismiss the bill, notwithstanding the lunacy. I cannot accede to that argument. I am clear, that, in directing the issue, the Court must have been taken to have decided, that, if the lunacy was established, it would entitle the plaintiff to a decree; I must take it that the issue was properly directed, and, the lunacy having been established, I cannot dismiss the bill on the mere ground that fraud has not been proved.

It has, however, been argued that the lunacy alone is not sufficient, and that this Court will not give relief, unless, in addition to the lunacy, a fraud is practised. I do not understand it to be denied, that, if the party treating with the lunatic knew of the lunacy,—that is a fraud; but the argument is, that some fraud must be practised, in order to induce this Court to act.

The law, as I understand it, and as it appears to me that Sir William Grant lays it down, in *Niell* v. *Morley*,(*a*) is, that, if the invalidity of the transaction be established by the lunacy, and the nature of the relief sought is such as a Court of Equity would give (which in this case it is,) this Court will give relief, unless there be other reasons for refusing its interposition. Sir William Grant suggests the case of the Court not being able to restore the parties to the situation they were in before,

[*408] *as a ground for refusing to interfere. If in this case it were necessary that the lunacy should be established, and also the fraud, why was the issue directed? It is not the habit of the Court to direct an issue to avoid the necessity of deciding the point; because it may happen, if the issue be found one way, it would put an end to the case. The Court will see that the issue is necessarily material, in any event, to a decision of the principal or material question between the parties. According to the argument which has been addressed to me, the finding of the lunacy is wholly immaterial. I have been referred

(*a*) 9 Ves. 482.

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by Mr. Smythe to the case of *Butlin* v. *Masters*.(a) That suit related to a payment in the town of Northampton in discharge of tithes. Two questions were raised. One was a question of fact, whether it had been paid from time immemorial; and the other question was, whether, if paid, it was a good discharge of the tithes. Both were legal questions; and I thought the parties entitled to the decision of a Court of law upon them. The question then arose, how that decision was to be obtained. The usual course taken by the Court was to direct an issue, which will raise the question of law, as well as of fact; but inasmuch as the opinion of the learned Judge on the trial of the issue would not be that legal opinion which would satisfy or bind this Court, it was agreed between the parties, that, if the fact was found in favor of the defendant, the case must be carried either by a special case or a special verdict to a superior court. It became a question, whether it would be more expensive, in point of time or money, to get the issue of fact determined first, and send a case to a Court of law; or to let the parties go to a trial both on the law and the fact, with the certainty that the opinion of the Judge, on the point of law, might be carried to a *superior court. The result of some inquiry was, that [*404] time and expense would be saved by sending the issue of fact, and for that reason alone that course was taken. The Lord Chancellor thought that it was not the right course, and, I believe, allowed the parties to bring an action.

I must, in this case, take it to have been determined, that, if the lunatic were now living, the lunacy being established, a decree must, of course, follow.

I do not know what the evidence is as to the imposition alleged to have been practised; but, if the case be as the defendants tell me, that there is no fraud proved, the plaintiff must show the decree was meant to have the operation he would give to it if the lunacy was established.

The *Solicitor-General* replied, and argued that the plaintiff

(a) April 15th, 1846. Not reported.

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Charles Price was entitled to a decree as owner in fee of the estate, notwithstanding the deeds of 1805 and 1822.

VICE-CHANCELLOR:—I must be careful in this case to adhere to what has been already decided. It is a disadvantage that the evidence, if it be material, which was gone into at the hearing of the cause, is not now brought forward, as it should be, if it is to be relied upon. I do not see any evidence which I can act upon against those who claim under Moggridge, as showing that Moggridge had notice, at the time of this transaction, of the lunacy of William Price. I will take it that Mr. Protheroe's evidence goes to prove that, the day before the transaction took place, Protheroe and Moggridge were present with William
[*405] *Price. The verdict only says that William Price was insane at a certain time; but, however it may appear incidentally, from evidence given in support of the lunacy generally, I have no evidence whatever to show me that the plaintiff's state of mind was such that the persons transacting business with him, in his presence, must of necessity have seen that he was a person of unsound mind. If that issue be material, the parties ought to have guarded their case by providing for the trial of that point, or for some inquiry relating to it. It is certain that you may deal in the presence of a person who is undoubtedly lunatic, for days and months, without discovering his state of mind. I have no evidence to satisfy me that the state of mind of William Price was such as to be known either to Moggridge or Protheroe; and, if not, I do not know what evidence I have to show that Moggridge was in any other situation than that of a person who has had the misfortune to buy an estate which he loses owing to the lunacy of the vendor; and, if that were his true situation, he is an object rather of compassion than of reproach.

How does the case stand on the the pleadings? William Price filed his bill, claiming to be entitled to the fee, and relying on the insanity and the alleged fraud. The defendants claiming under Moggridge set up the deed of 1805, which shows,—if it shows anything,—that William Price was not seised in fee, and

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that the estate under that deed stood, in the events that happened, limited to the children of the plaintiff and his wife, as tenants in common in fee expectant on the deaths of the parents, who took life estates. That was, in effect, insisting that the children were necessary parties to the original bill; and that, I think, is also the effect of the case made by the defendants as to the deed of March, 1822. Charles Price then joined with his father in the *supplemental bill; and the case which Charles [*406] Price makes, is not, as I understand it, that there is no such deed as that which it was suggested gave him a common interest in one-seventh of the estate in remainder. But, admitting that the case may be so, he says that he does not claim adversely to his father. He does not, therefore, repudiate the share which he was said to take under the deed of 1805: and though, by the bill of revivor and supplement, he claims as heir-at-law by descent from his father, I must, as the pleadings stand, treat Charles Price as entitled to one-seventh of the estate after the termination of the life estate. Charles would be entitled as heir of his father, if the deed of 1805 were out of the way, (subject to the question which has been argued as to the deed of 1822.) As administrator of the estate of the father, he would, at all events, be entitled to an account of the rents and profits during his father's life, if I am right in saying that the frame of the suit does not, in this stage of the cause, prevent a decree from being made.

I must consider the original and supplemental suit as one suit. The supplemental bill is filed by Charles Price, as committee of William Price, for the purpose, amongst others, of making the children parties. It is in the answer to the original suit that the deed of 1822 is set up. Whether it is so set up as to entitle the defendants to have the benefit of it by way of estoppel, or whether it is to operate at all as an estoppel, is another question; but finding Charles Price joining with his father in the suit, on the suggestion, that, by reason of the deed of 1805, the original suit is defective, I cannot consider that the deed of 1822 was wholly inoperative on the ground that it was dealing with an estate with which Charles had nothing to do.

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[*407] *A material question also is,—what is the effect of the decree. This I have, to some extent, considered. Upon the decree for reviving the suit, and proceedings after the death of William Price, the benefit of the original proceedings would be obtained, having regard to the alteration in the circumstances of the parties. If the estate descended on the death of William Price, Charles would have the benefit of the suit, for the purpose of obtaining such relief as the case entitled him to. The submission of the defendants, the younger children, to convey any interest they might be entitled to, as the Court should direct, would not enable Charles to sustain a suit in which he had no interest; but when I find that the father had an interest, a tenancy in the real estate, either in fee or for life, that Charles is his administrator, and that Charles was also either entitled as heir, or as remainderman, to one-seventh part, subject to the questions on the deed of 1822, it appears to me that there is enough to satisfy the decree to the third suit, without saying that the decree has determined anything, except that Charles had some interest to entitle him to revive and maintain the suit.

As regards the mortgagees under Moggridge, if they are purchasers without notice they are not bound by any account which I may direct as against other parties, and I cannot deprive them of any term of years they may have got in. With regard to those who are interested under Moggridge, and have no term of years to protect them,—if, as the case now stands, nothing passed by Moggridge's conveyance, they are not in the condition of purchasers without notice, in the sense in which the Court can help them. They have no legal interest with which the Court can deal.

[*408] *March 7th.*—*VICE-CHANCELLOR:—At the close of the argument I decided that the plaintiff was entitled to relief, to the extent of having an account taken of the rents and profits of the estate in question in the cause, which accrued in the lifetime of William Price, who died after the institution of the suit; and I reserved my judgment upon the points, whether any other decree

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could be made in this suit, as to the real estate, and on the question of costs.

[His Honor stated the form of the pleadings, and the proceedings in the cause; the case made by the defendants as to the deeds of 1805 and 1822, and the answer of the wife and the younger children of William Price.]

If, after this case had been set up by the defendants, the plaintiff William Price still claimed the fee, it was open to him to traverse the suggestion as to the deed of 1805, or confess and avoid it, by showing that something had been done to remove the effect of that deed, or it became necessary to make parties, those who were said to be entitled in remainder, for the purpose of asserting such claim as they might have in the estate. The course taken was that of adding the wife and children as parties. This might have been done by amending the original bill, or filing a supplemental bill; but, before either of those steps had been taken, William Price was found a lunatic by inquisition, and it was necessary to bring that fact before the Court. Charles was appointed his committee, and a supplemental bill was filed, in which Charles, the committee, was made a plaintiff with the lunatic. Charles, therefore, whether he chose to assert his right to the property as one of the children and remaindermen or not, was a party to the suit, and the other children were made defendants. The offer of these defendants to convey their interests *in the property as the Court shall direct, cannot, [*409] I apprehend, be of any avail to the plaintiff. The Court can only look at the rights of the parties as the suit is constituted, and direct a conveyance according to those rights. If, in point of fact, the plaintiff has not established his right to relief, I can do no more than reserve to those parties any rights which they may have now or hereafter in this property.

The case of Charles is certainly subject to something more of difficulty. Charles, suing as committee, says by his bill, that he "does not claim any interest in the said estate adversely to the plaintiff William Price, but is willing that the same estate should

be dealt with and applied as may be most for the benefit of the plaintiff William, and to concur in any sale or conveyance which this Court may direct for that purpose." It is not necessary I should express any opinion as to what the Court would do in the case of two plaintiffs, one of whom has a title and the other has not, joining in a statement that one of them is willing to give the other the benefit of the title which is in himself,—supposing that, at this time, Charles had any interest. But, whilst the deed of March, 1822, was standing, Charles had, in fact, no interest, and therefore that statement may be put out of the case. It appears to me that the deed of March, 1822, had, as it stood, dispossessed Charles of any interest in the estate, and that, when the plaintiff William Price died, there was no longer any party upon the record entitled to prosecute the suit. The interests of the defendants, the younger children of Price and his wife, I consider to be untouched by this suit.

There must be a decree for an account of the rents and
[*410] profits accrued due during the life of the tenant *for life.

With regard to part of the costs of the suit, although the parties claiming under Moggridge will be entitled to their costs, as mortgagees of the estate, so far as this is a suit to redeem, yet, inasmuch as they have resisted the right to redeem, I apprehend that the proper decree as to those costs will be that which Sir Thomas Plumer made in the case of *Harvey* v. *Tebbutt*.(a) The decree must be without prejudice to the rights of the parties entitled in remainder, under the deed of 1805, to assert such claim as they may have to the real estate in any other suit or proceeding.

As against the mortgagees, the bill was dismissed with costs.

(a) 1 J. & W. 197.

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LUCAS *v.* JAMES.

1849: Feb. 27th; March 1st and 2d; April 18th.

On a treaty for an under-lease, a a memorandum of the terms of the intended agreement was prepared, stipulating that the lease should contain all usual covenants, and also the covenants, in the leases of the ground landlord, and the proposed lessee signed the memorandum, accompanying his signature by the qualification that he agreed thereto, subject to there being nothing unusual in the leases of the ground landlord. A draft of the proposed lease was afterwards submitted by the lessor's solicitors to the proposed lessee, who made some alterations and returned the draft with a request that the lessor would at once grant the lease as altered, or refuse it. The lessor's solicitor sent the draft back the same day, assenting to all the alterations except one, whereby the proposed lessee had expunged a clause in the draft restraining any assignment or demise by him without the consent of the lessor:—*Held*, that, upon the return of the draft lease, not acceding to all the alterations, and in the absence of any proof that the lessor was previously bound by the terms as to unusual covenants, introduced by the proposed lessee on his signing the memorandum, the contract was incomplete, and the proposed lessee was at liberty to determine the treaty.

Whether the principle would apply in a case where there was no real or substantial distinction between the terms of an offer by one party, and of a qualified acceptance or adoption of such offer by the other,—*quære*.

Whether the existence of a nuisance in the neighborhood of a house contracted to be purchased for a residence, which nuisance is known to the vendor, and is one which a provident purchaser could not discover, is a ground for refusing a decree for specific performance of the contract: and whether otherwise, if the nuisance be not known to the vendor,—*quære*.

A signature in pencil is not necessarily deliberative, and may be equally binding on the party making it as the signature, if written in another manner, would be.

A SUIT for the specific performance of an alleged agreement for an under-lease. The defendant denied *that [*411] any agreement had been concluded; and insisted, moreover, that, even if any such agreement had been signed, it had been done without a knowledge of circumstances existing at the time, affecting the property and rendering it impossible that he (the defendant) could have the benefit of the contract for the only purpose for which he had intended to enter into it, and for which alone the plaintiff, or her agents employed in the treaty, knew that he had intended to enter into it.

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Mr. *Wood* and Mr. *Glasse* for the plaintiff.

The *Solicitor-General*, Mr. *Lloyd*, and Mr. *Elmsley*, for the defendant.

On behalf of the defendant it was argued, that there was no acceptance by the defendant of the terms offered on behalf of the plaintiff, and nothing more than an offer of other terms by the defendant, not then accepted by the plaintiff, and subsequently withdrawn by the defendant, as he was entitled to do: *Holland* v. *Eyre*,(*a*) there was a change of purpose before the act was completed: *Doe* d. *Perkes* v. *Perkes*,(*b*) and that, if it were even doubtful whether the contract was concluded, or the matter still in treaty, the court would not interfere: *Stratford* v. *Bosworth*(*c*) and *Huddleston* v. *Briscoe*.(*d*)

On the evidence that the memorandum was not a conclusion of the agreement, afforded by the fact that the signature [*412] of the defendant was in pencil only, the *case of *Francis* v. *Grover*,(*e*) and the cases in the Ecclesiastical Court, there cited were mentioned.

On the part of the plaintiff, it was contended, that the agreement, at least to a certain extent, had been actually made; and the circumstance of variations having been intended, which were not made, did not render an agreement nugatory so far as it had actually been made: *Duncuft* v. *Albrecht*,(*f*) that a clear assent to certain terms was sufficient, even if differently understood: *Kennedy* v. *Lee*,(*g*) and that the terms, if any, which had not been concluded, were entirely of a subordinate nature, and, at the utmost would be determined by the reference to the master, if a reference were necessary. As to the sufficiency of the signature, within the statute, and also on other points in the case, *Winsor* v. *Pratt*(*h*) and *Ogilvie* v. *Foljame*(*i*) were cited.

(*a*) 2 S. & S. 194. (*b*) 3 B. & A. 489. (*c*) 2 V. & B. 341.
(*d*) 11 Ves. 583, 591. (*e*) 5 Hare, 39. (*f*) 12 Sim. 189, 198.
(*g*) 3 Mer. 441. (*h*) 5 Moore, 484. (*i*) 3 Mer. 53.

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On the question, whether, if the contract were to be taken as complete, the Court would interfere, looking to the unsuitableness of the property for the purposes of the defendant, the cases of *Drewe* v. *Hanson*,(*a*) *Smith* v. *Marrable*,(*b*) and *Shirley* v. *Davies*,(*c*) were cited; and it was observed, that specific performance had been decreed, although the premises had, in the interval, been destroyed by fire. On the consequence at law of defects in the subject of the contract, not known to the vendor, *Early* v. *Garrett*(*d*) and *Taylor* v. *Ashton*,(*e*) or, known to the vendor but not to his agent, *Cornfoot* v. *Fowke*(*f*) and *Fuller* v. *Wilson*,(*g*) and in *equity, of defects known to the vendor or his [*413] agent, *Gibson* v. *D'Este*,(*h*) S. C., *Wilde* v. *Gibson*.(*i*)

The authorities cited upon other points which arose and were argued in the case, but were not the ground of the decision, were:—That a covenant against alienation by the lessee is not an usual covenant, *Church* v. *Brown*,(*k*) that the title of the lessor must be shown, *Fildes* v. *Hooker*,(*l*) and had not been waived on the part of the defendant, *Deverell* v. *Lord Bolton*.(*m*)

VICE-CHANCELLOR:—The plaintiff is lessee for years, under Sir Richard Sutton, of a house, No. 57 Curzon-street, with the yard or garden at the back. The property is derived under two leases, and, as I understand, (for it does not, I think, appear upon the pleadings,) the yard or garden, or some part of it, is part only of the parcels comprised in one of the leases. The residue of the parcels comprised in that lease is now vested in third persons not before the Court. The covenants in both leases, *mutatis mutandis*, are the same; and amongst them is a covenant empowering the landlord to enter and determine the lease upon breach of any of the covenants. In January, 1848, the defendant agreed

(*a*) 6 Ves. 675. (*b*) 11 M. & W. 5.
(*c*) See 1 Sug. Vend. & Purch. 537, pl. § 8, 10th edit.
(*d*) 9 B. & C. 928. (*e*) 11 M. & W. 401. (*f*) 6 M. & W. 358.
(*g*) 3 Q. B. 58. (*h*) 2 Y. & C. C. 542.
(*i*) 1 H. L. Ca. 605. See Sir E. Sugden's Law of Real Property, 614.
(*k*) 15 Ves. 258. (*l*) 2 Mer. 424. (*m*) 18 Ves. 505.

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or treated for a lease, for seven, fourteen, or twenty-one years, of the house and premises. The treaty had terminated, or was on the point of terminating in an agreement, when the defendant made a discovery respecting the houses in the neighborhood which made it impossible that he could use the house as
[*414] a residence for his family, the purpose for which *alone he wanted it. Upon this, on the 17th of January, 1848, he wrote to the plaintiff's solicitors, declining to accept a lease of the house in question. The bill has since been filed, and the main question in the cause is, whether, at the time of writing the letter of 17th January, 1848, the defendant was bound to accept a lease from the plaintiff, or not.

The facts necessary to raise the question are these:—The plaintiff employed Mrs. Marsh, a house agent, to let the house for her. A Mr. Lofts was the clerk of Mrs. Marsh, and was the person who negotiated the matter personally with the defendant. Messrs. Fyson & Co. were the plaintiff's solicitors. The defendant had no professional assistance (except his own) before the 17th of January, 1848. On or about the 7th of January, Lofts (on the part of the plaintiff) and the defendant had come to general terms, upon which the plaintiff was willing to let, and the defendant to accept a lease of the premises. A memorandum, intended to express the terms of this agreement, was prepared by Lofts, signed by the plaintiff, and tendered to the defendant for his signature. After some discussion between Lofts and the defendant, it was arranged that a more formal agreement should be prepared by Lofts. This accordingly was done, and, on the 8th of January, Lofts again saw the defendant, and tendered the new memorandum for his signature. The memorandum is as follows:—

"Memorandum of agreement made and entered into this 7th day of January, 1848, between Flora Lucas, of, &c., of the one part, and William Milbourne James, of &c., of the other part. The said Flora Lucas hereby agrees to grant a lease for twenty-one years, (with the option, on the part of the said W. M. James, of determining the same at the expiration of the first
[*415] seven *or fourteen years,) of the house and premises, No. &c. [The memorandum expressed that the rent was to

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be 180*l.* a year, and that W. M. James thereby agreed to accept the said lease, which was to contain all the usual covenants and also those covenants expressed in the lease from Sir R. Sutton to the said Flora Lucas; and to pay the said rent free of all rates, taxes, or assessments, except the land-tax; and also to pay the insurance duty and premium, and the expense of the lease and counterpart,—Flora Lucas to pay the ground-rent to the free-holder, and rates and taxes to the 9th of February next; W. M. James to purchase for 20*l.* certain fixtures therein mentioned, to be paid, on taking possession, to Mrs. Marsh, on account of Flora Lucas.] In witness whereof, said parties have hereunto set their hands, the day and year first before written. N. B. It is understood that the fixtures now upon the premises are to be scheduled to the lease and left for the use of the said W. M. James, who will deliver same up, at the expiration of his tenancy, in as good condition as they now are."

The writing occupies two pages, leaving a small space, sufficient, and perhaps not more than sufficient, for the mere signature of the parties and the attestation of a witness. The defendant, after reading the memorandum in the presence of Lofts, wrote in pencil, on the third or fly-leaf of the memorandum, opposite or nearly opposite to the place left for the signatures, the following words: —"I have no objection to this agreement, supposing that there is nothing unusual in Sir R. Sutton's leases, which I presume there is not. W. M. J." And afterwards, at the instance of Lofts, wrote the following words, also in pencil, immediately below what he had previously written: "I agree to these terms, subject to the above observations: W. M. James;" and gave *the paper to Lofts, who took it away with him, and [*416] gave it to Messrs. Fyson & Co., who prepared a draft lease, and, on the 14th of January, sent it to the defendant, with a letter of that date, in the following words:—"We beg to send you herewith the draft of the lease of the house, No. 57 Curzon-street, which we have prepared in accordance with your agreement with Miss Lucas. The schedule of fixtures is not quite ready, but shall be sent in the course of to-morrow."

On the 15th of January, 1848, the defendant returned the draft

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lease with sundry alterations in and remarks upon it, in his own handwriting, and with his name and initials subscribed thereto, and accompanied by a letter, stating that he returned them the draft with some alterations; adding, "he has only altered the draft in matters which he considers essential, and he must beg, therefore, that the lessor should at once grant him the lease as so altered, or refuse to do so."

Messrs. Fyson & Co., on the receipt of the letter, on the same day returned the draft to the defendant, with their remarks thereon, and accompanied by a letter as follows:—

"January 15th.

"Sir,—We send you this draft lease again, which we have altered and modified with reference to your remarks. The covenants as inserted by us precisely correspond with those contained in our client's lease from Sir R. Sutton, but we have endeavored to alter them to meet your wishes. Our client is quite prepared to complete the matter on our agreeing to the terms of the lease.

"We are, &c.,

"FYSON, CURLING & HOPE."

[*417] *The result of these communications between Fyson & Co. and the defendant (as I understand it,) was, that Fyson & Co. submitted to all the alterations which the defendant required in the draft lease, with a single exception, which was this:—The draft, as prepared by Fyson & Co., prevented the defendant from assigning or underletting the premises without license, whereas the defendant required that his power to assign or underlet should be unconditional. This Fyson & Co. declined. In this state the matter was on the 17th of January, 1848.

On the 17th of January the defendant wrote the following letter, thereby finally determining the agreement:—

"Mr. James presents his compliments to Messrs. Fyson & Co., and regrets that he is under the necessity of breaking off the negotiation for a lease of the house No. 57, Curzon-street. Independently of the objections to the draft proposed, and to the lease from Sir Richard Sutton, under which Miss Lucas is stated to derive her title, and which would themselves prevent Mr. James

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from taking the lease, he thinks it right to add, that he has just received such information as to the character of several houses immediately around, as to render it quite out of the question to take the house for a family residence."

Some further communications took place between Fyson & Co. and the defendant, in which they abandoned the only point then in controversy between them as to the terms of the draft lease, and insisted that the defendant was not then (on the 17th of January, 1848,) in a condition to refuse to accept the lease.

The plaintiff, by her bill, prays the specific performance *of the contract which she alleges has been made, [*418] and insists also, that the defendant has waived his right to inquire into the landlord's title.

Several points are made by the defendant. First, that, on the discovery of the character of certain houses in the immediate neighborhood of the house the subject of the treaty, he had a right to abandon the agreement if it had been made. I wish authority could have been produced in support of that proposition, for it is plain that the defendant must suffer, and that seriously, if the contract is to be enforced in equity. The law, as stated by Sir Edward Sugden, respecting defects in the subject of a contract, (and I believe correctly,) is this: that if the vendor, at the time of the contract, does not know of the existing defect in the estate, the Court will enforce the contract; otherwise, perhaps, if the defect be known to the vendor, and be one which a provident purchaser could not discover. I presume the law is the same where the value is affected by a nuisance in the neighborhood. The hardship of the position of the defendant would be this: that he would be compelled to accept a lease with a present knowledge of a defect, which knowledge he may be bound to disclose to a purchaser or lessee under himself. Legal reasons may, however, be adduced in support of this state of law, and the utmost weight I can give to the consideration of the point in the present case is this, that I must, on behalf of both parties, try the case, in other respects, strictly between them.

The second point made by the defendant was, that there was no signature by him to the alleged agreement, within the Statute

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of Frauds; that, so far from the memoranda being considered or intended to be conclusive, the negotiation had been subsequently carried on as to *the land tax, fixtures, and other matters, and that the memoranda had been made by him in pencil, because they were not intended to be binding until the covenants in Sir Richard Sutton's leases had been examined. [*419]

To the statement in the defendant's answer upon that subject I give entire credit; but can I bind the plaintiff by that which may truly have passed in the defendant's mind, but which cannot be said to have been matter of agreement or stipulation between himself and Lofts? I think not. If that which was written in pencil had been written in ink, and Lofts had been dead, and nothing more had passed or nothing more was known except what the paper itself found in the plaintiff's possession discloses, or if Lofts had been out of the way, and the plaintiff had acted for herself, could I have said that the defendant had not made the agreement which the paper contains, and had not authenticated the agreement by his signature? The first pencil memorandum may be considered as deliberative; but the second leaves no room for doubt or question as to the meaning which must be attributed to the party who wrote it. The words, "I agree," &c., standing alone, would, in general, be conclusive, but they acquire additional force by the juxtaposition. The party who wrote the words "I agree" &c., must be deemed to have intended something more than the previous words express. A paper of such a character, found in the possession of the lessor, must *prima facie* bind the defendant. The only question then is, whether the circumstances that the writing of the defendant is in pencil, and the evidence of Lofts, and the letters of Fyson & Co. before the 17th of January, and the answer, together furnish ground for depriving the plaintiff of the benefit which the document alone would, in my opinion, give her. I think not. Indeed, the letters support the construction *I put upon the document, and if the case rested here, my judgment would, I think, be with the plaintiff. [*420]

The third and next question requires a very grave consider-

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ation. The defendant says, that the first pencil memorandum to which he annexed his initials, introduced a material variation into the memorandum of the 7th of January, which was tendered to him for his signature by Lofts. He says, that Lofts had no authority to assent to such variation, and that the memorandum, with such variation, although signed by him, was nothing more than a proposal on his part for the plaintiff's acceptance or rejection, and that, until the plaintiff had assented to the variation, she was not bound by the act of Lofts; that there was not, in fact, any agreement between the plaintiff and the defendant. He says, in effect, that when, on the 8th of January, he gave the memorandum to Lofts, with his pencil additions thereto, he had rejected the plaintiff's proposal, and made a different proposal of his own; and that, until the plaintiff had acceded to his terms, there was no agreement between the plaintiff and him.' He had proposed and signed *terms* only; but, without the plaintiff's accession to those terms, there was no agreement. The point is made by the answer in the following terms. After giving the defendant's account of his interview with Lofts, upon the occasion of the pencil memoranda being added, he proceeds:—The "said Henry Lofts then stated that he would show what defendant had written to plaintiff and to her solicitors, and that the original lease should be sent for the defendant's perusal immediately; but defendant saith he was never informed, and he is not aware, that the plaintiff ever assented to the alleged agreement with the conditional term as to the contents of Sir R. Sutton's lease, which the defendant had introduced therein; and defendant doth not believe that the plaintiff *ratified or consented [*421] to such alteration before the defendant had altogether repudiated the agreement and declined to take the house on lease, as after mentioned." The words, "as after mentioned," refer to the letter of the 17th of January, 1848. In another part of the answer the word "proposal" is used, with reference to the legal effect of the memorandum, with the pencil additions.

If the defendant is right in his premises, that is, if the memorandum with the pencil additions was a mere proposal signed by the defendant for the plaintiff's acceptance or rejection, and if

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the plaintiff had not acceded to it before the 17th of January, the defendant's conclusion is, I think, correct. For, upon that hypothesis, when the defendant wrote the letter of the 15th of January, there was no agreement: the case still rested in proposal. In that letter the defendant says, "My terms appear upon the draft lease, and I require the plaintiff to assent to or refuse them." The assent was by Fyson & Co.'s letter of the same day, qualified as to a material covenant; and this, according to the case of *Holland* v. *Eyre*,(a) left the defendant at liberty.[1] Nothing more passed before the letter of the 17th of January, 1848. It becomes necessary, therefore, to examine the premises upon which the defendant's conclusion is founded.

If I were at liberty to speculate, I should hazard the conjecture, that, between the 8th and the 17th of January, the plaintiff had been informed of what had passed between Lofts and the defendant on the 8th, and that she adopted the acts of Lofts, as her agent. I should so conjecture, because I find from [*422] a passage in the answer, *which was not read in evidence (and, if read, would not prove the fact,) that Lofts, between the 8th and the 14th, (I infer these dates from the transactions alluded to,)—that Lofts, in the course of that interval, told the defendant that the plaintiff had desired him (Lofts) to go to the solicitors, to say that they were not to make any difficulties about the covenants, and not to insist upon any covenants that were not absolutely necessary; and that he had instructed the solicitors accordingly. But whatever my conjectures on that subject may be,—if it be necessary that the plaintiff should prove an actual acceptance on her part of the terms offered after the 8th,—I cannot, upon the pleadings and evidence now before me, hold that such was the case, and make a decree in the plaintiff's favor. The point is prominently put forward in the answer, as

(a) 2 S. & S. 194.

[1] For cases as to what will amount to an agreement where parties are separate, and all the negotiation is carried on by correspondence, and within what time either party may retract, see *Adams* v. *Lindsell*, 1 Barn. & Ald. 680; *McCulloch* v. *The Eagle Ins Co.*, 1 Pick. 277; *Mactier* v. *Frith*, 6 Wend. Rep. 103; *Brisban* v. *Boyd*, 4 Paige's Ch. Rep. 17; *Averill* v. *Hedge*, 12 Conn. Rep. 436.

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a substantive ground of defence to the bill. The onus lay upon the plaintiff. The witnesses to prove it were Lofts or the solicitors, the former of whom has been examined by the plaintiff, but no evidence is given on the point. As far as actual evidence goes, the point is with the defendant.

That this point in the defendant's case cannot be considered as disposed of in argument, without inquiring whether Lofts, or the solicitors (who clearly adopted Loft's acts,) had not an implied authority to conclude an agreement with the defendant on the plaintiff's behalf, with the variation introduced by the pencil memorandum. The question may be thus stated: whether, if the plaintiff had authorized Lofts to sign the memorandum of the 7th of January on her behalf, upon the same being signed by the defendant, Lofts had not an implied authority to bind her, by signing the same, with the pencil additions thereto. To try this, I begin by assuming the variation to be substantial, and that the defendant had filed his bill to enforce such an agreement, *on the 8th of January, before anything more [*423] had passed; and the plaintiff in this suit had met the bill by a plea, which neatly raised the question, whether Lofts had implied authority or not to dispense with the covenants in Sir Richard Sutton's leases. How did that matter stand on the 8th of January? Whether usual or unusual, the proviso for re-entry for breach of any covenant made it indispensably necessary to the plaintiff, as well as the defendant, that those covenants should be inserted in any lease the plaintiff might grant. The lessee might well look into the original leases before he agreed to accept a lease of the property in them; but his lease must contain those covenants, or, at all events, he must observe them. The plaintiff could not do otherwise than insist upon the insertion of the covenants, whether usual covenants or not.

If, then, on the evening of the 8th of January, the plaintiff had been informed of the conditional contract which Lofts had made, might she not have said, "I have no power to dispense with, nor could the defendant accept of a dispensation from any of the covenants in Sir Richard Sutton's lease, whatever their nature may be? The insertion of all those covenants, whether usual or

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unusual, in the defendant's lease is matter not of choice, but necessity. The defendant may, before he agrees, satisfy himself as to the covenants. But I will not leave to future litigation a term in the contract which I cannot possibly dispense with. Therefore it was that I authorized an absolute contract, and I will not be a party to one that is conditional on such a point." I am satisfied, that, unless the difference between the memorandum as originally drawn, and as altered by the pencil addition, could be treated as unreal, the plea must have been allowed. In considering the point, regard must especially be had to the
[*424] position both of the *plaintiff and defendant with respect to Sir Richard Sutton's leases. Whatever the willingness of the plaintiff might be to meet the defendant's objections, she could not dispense with Sir Richard Sutton's covenants; and if the plaintiff might have objected, so might the defendant. There was no agreement until both had assented to the same terms.

But it may be argued that the covenants in Sir Richard Sutton's leases are so plainly not unusual, that the distinction between the memorandum as originally drawn and as altered by the pencil additions is merely verbal. Upon the former of these points,—the character of the covenants,—I give no opinion; and, as an abstract proposition, I will not deny that a case might exist in which the Court would be bound to consider an attempted distinction as plainly nugatory; but the case cannot be of that character, only because the Court may, after argument, come to the conclusion that given covenants are not unusual. The case, to be brought within the scope of that reasoning, should be one in which the Court is in a condition to treat the defence as plainly litigious, and nothing else. I think that observation cannot be applied to this case, and that, on the 8th of January, the case was with the defendant.

The most favorable way of looking at the case for the plaintiff, is to suppose that defendant's acts, after the 8th of January, were successive offers, gradually approaching to the plaintiff's terms, until they reached a point at which the solicitors had implied authority to bind the plaintiff; but that will not be enough; for,

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if owing to the want of implied authority in Lofts or the solicitors, the memorandum of the 7th of January was on the 8th only a proposal, it was only a proposal on *the 15th; [*425] and the letter of the defendant on that day, brought the case within *Holland* v. *Eyre.*

I lay out of the case the concession made by the plaintiff after the 17th of January. The question before me is, what was the position of the parties upon that day. And I think it was the same as on the 15th of January.

There are two other points which I shall briefly notice before I state the conclusion to which I have come. One of these was made by the defendant, founded upon the case of *Fildes* v. *Hooker.*(*a*) I do not, in the least degree, doubt the power of the Court to enter upon the question of title at the hearing of the cause, or to make such a question a ground for dismissing the bill; but, in order that it may be proper so to deal with a cause, the defect, or supposed defect in the title should be prominently put forward in the pleadings. I cannot say that I think such is the case here. The question on these pleadings is, agreement or not; and the question of title in such a case ought to be the subject of reference to the Master, which would afford the opportunity of taking all proper objections on that ground.

Upon the only point remaining, I shall observe merely, that the defendant appears to me to deny, as positively as Mr. Lofts asserts, that the defendant waived inquiry into the landlord's title.

Many of the observations I have made may be considered as extra-judicial; but having considered the case at large, and having come to the conclusion that the case is one in which I ought not to help either party, by any relaxation of the strict practice of the Court, *and finding that the plaintiff has [*426] omitted to prove a point, the proof of which was in her power, if the point could be proved, I have thought it right to state my opinion upon each part of the case.

My conclusion is, that the bill must be dismissed with costs.

(*a*) 2 Mer. 424.

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SENTANCE *v.* PORTER.

1849: July 14th.

On a reference for an account of what was due to the defendant in respect of a lien on deeds, the Master found the amount, and the plaintiff thereupon offered to pay it, and terminate the suit, upon delivery up of the deeds, which offer the defendant refused to accept. The Court, on further directions, refused the defendant the costs of the proceedings subsequent to the offer.

It is not irregular in such a case, to bring before the Court, by motion, at the time of the hearing for further directions, circumstances affecting the right of the parties to costs in the cause.

IN a suit for the delivery up or redemption of deeds, upon which the defendant claimed a lien, it was referred to the Master to state what was due to the defendant in respect of such lien. The Master found a smaller sum to be due to the defendant than he had claimed; and, upon the intimation of the Master's finding, the plaintiff offered to pay the defendant the amount found due, and his costs of suit until that time, upon the delivery up of the deeds. The defendant refused the offer, and the report was made and confirmed without exception.

The plaintiff, by motion brought on with the hearing for further directions, supported by affidavit of the offer of payment which had been made, asked that the defendant should be ordered to pay the costs incurred since the time of such offer.

Mr. *Green* and Mr. *W. Morris*, for the motion, cited *Sivell* v. *Abraham*(*a*) and *Millington* v. *Fox*.(*b*)

[*427] Mr. *Bacon* and Mr. *Tenison Edwards*, contra, said, *that the defendant was not bound to accept the payment which had been offered; he was at liberty to reserve to himself the opportunity of excepting to the Master's report. The application by motion was irregular, on further

(*a*) 8 Beav. 598. (*b*) 3 My. & Cr. 338.

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directions; such a matter should have been brought on by petition.

The VICE-CHANCELLOR said, that in the point of form, except in a few special cases, it was immaterial whether an application was made by motion or petition; there was, therefore no objection to the motion in form. The litigation which had taken place since the plaintiff had offered to pay the amount of the lien and the costs, had been wholly unnecessary. The defendant should have accepted the payment, and delivered up the deeds. The case was new, and he would not, therefore, order the defendant to pay the costs of the plaintiff incurred subsequent to the report. The defendant must deliver up the deeds, upon payment of the sum found due, and the costs up to the time of the report. Of the subsequent proceedings and the motion, each party should bear his own costs.(*a*)

*MARSHALL *v.* SLADDEN. [*428]

1849: May 26th, 28th, 29th and 30th; August 10th.

Construction of a power of sale and exchange, in a settlement.

Circumstances in which the exercise of a power of sale, although not inconsistent with the terms in which the power is created, would, notwithstanding, be a breach of trust.

Reciprocal duties of trustes and *cestuis que trust*, where it becomes necessary to raise money to discharge incumbrances on, or otherwise deal with the trust property.

Circumstances in which it is improper for a retiring trustee to appoint a new trustee without communication with the *cestuis que trust*.

Trustees ought not to exercise a power of selecting new trustees for the mere purpose of continuing the trust property under the management of a particular solicitor, even if the trustees they select be otherwise unobjectionable.

A trustee who retired and allowed a new trustee to be appointed, without communication to his *cestuis que trust*, is not a necessary party to a suit complaining of such new appointment, and seeking to displace such new trustee and appoint others,—all relief against the retired trustee being waived.

(*a*) See *Penny* v. *Beavan*, supra, p. 133.

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1849.—Marshall v. Sladden.

Semble, the cases in which a mere agent may be made a party to a suit, and costs prayed as relief against him, are limited to cases of fraud, in the sense in which fraud is understood in a Court of equity, to which the agent is a party, and do not apply to a case in which, though the agent acts erroneously, he acts openly and avowedly.

THE bill was filed on the 11th of October, 1847, by Louisa, the wife of the defendant James Marshall, and James and Louisa H. F. Smith, against Thomas Penny and William Marsh, the trustees of a settlement made on the marriage of Mrs. Marshall with her first husband, and against William Sladden, the solicitor of the trustees. The bill complained of the conduct of the trustees, as having unnecessarily occasioned costs, which they were about to raise and pay by means of a sale of the estate comprised in the settlement. The bill alleged, that the intended sale, which was advertised to take place on the 22d of October, 1847, was a fraud upon the power of sale contained in the settlement, and it prayed that an account might be taken of the receipts and disbursements of the trustees, and the defendant Sladden, their solicitor, disallowing therein the costs complained of; that new trustees might be appointed, instead of the defendants; that they might be restrained by injunction from proceeding with the sale, and might pay the costs of the suit.

The power of sale in the settlement provided that it should be lawful for the trustees therein named, and the survivor
[*429] of them, and the heirs of such survivor, (*subject to the mortgages, at any time or times thereafter, but during the life of John Maule Smith (the husband) with his consent to dispose of and convey, either by way of absolute sale or in exchange for or in lieu of other freehold, copyhold, or leasehold hereditaments in England or Wales, all or any part of the hereditaments thereby appointed and released, and the inheritance thereof in fee simple, to any person or persons, for such price or prices in money, or for such equivalent in freehold, copyhold, or leasehold lands, tenements, or hereditaments, as to the said trustees, or the survivor, &c., should seem reasonable and expedient; and to make such sale or sales as aforesaid, either by public or private contract, and in one or more lot or lots, and either at the

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same time or different times. [Power to buy in, rescind contracts, resell, &c., and upon any such exchange to give or receive any sum of money by way of equality of exchange.] And it was thereby agreed and declared, that, when all or any of the hereditaments thereby appointed and released, should be so sold for a valuable consideration, or any money should be received for equality of exchange, the trustee, or the survivor, &c., should, with or out of the money to arise from such sale or sales, or so to be received for equality of exchange, in the first place pay all costs, charges and expenses which should have been incurred upon any such sale or sales, or exchange or exchanges, or otherwise, in the execution of the trusts and powers thereby created; and after payment thereof should, so far as such money would extend, pay off and discharge the principal sums or sum of money, interest, costs, charges, and expenses for the time being secured upon the said hereditaments thereby released; and, after making the aforesaid payments, should, if and when they or he should think proper so to do, lay out *and invest the [*430] residue (if any) of the said money, arising from such sale or sales, or so to be received for equality of exchange, or any part of such residue, in the purchase of freehold, copyhold, or leasehold estates; and that the trustees should settle and accrue, as well the hereditaments so to be purchased as the hereditaments to be taken in exchange, upon the same trusts and for the same intents and purposes as are thereby declared of and concerning the hereditaments thereby appointed and released. And it was thereby further agreed and declared, that, until the said residue of the said money arising by any such sale or sales, or to be received for equality of exchange, should be laid out and invested as thereinbefore mentioned, or in case the same or any part thereof should not be so laid out or invested, the trustees should lay out and invest the same upon government or real securities in England, and alter and transpose the said stocks, funds, and securities, for or into other stocks, funds, or securities of the like nature, as often as they should deem expedient, and hold the same upon the trusts thereinbefore expressed of the hereditaments thereby appointed and released.

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Mr. *Rolt* and Mr. *Goodeve*, for the plaintiffs.

The *Solicitor-General* and Mr. *Speed*, for the defendant Sladden.

Mr. *K. Parker* and Mr. *Terrell*, for the defendants Penny and Marsh, the trustees.

The argument was, first, that the intended sale was either illegal, or an improper exercise of the power; in either of which cases the Court would restrain the trustees from parting
[*481] with the legal estate: *Mortlock* v. *Buller*;(a) and in such a case, the solicitor, who became a party to such a transaction, under circumstances showing that the interests of the *cestuis que trust* were not consulted, was properly made a defendant: *Fyler* v. *Fyler*,(b) *Harvey* v. *Mount*,(c) *Beadles* v. *Burch*,(d) *Bowles* v. *Stewart*,(e) *Le Texier* v. *Margravine of Anspach*,(f) Lord Redesdale's Treatise on Pleading, 3rd edit., p. 153, 4th edit., p. 189. On the limitations or qualifications, which this rule, as applied to persons in the situation of mere attornies or agents for the principal parties, has received in modern practice, *Keane* v. *Robarts*,(g) *Dove* v. *Everard*,(h) and *Attwood* v. *Small*,(i) were cited.

August 10*th*.—VICE-CHANCELLOR:—The plaintiffs are beneficially interested in an estate called East Studdal Farm, comprised in a settlement dated the 12th of October, 1844, made on the marriage of the plaintiff Louisa Marshall with her first husband, John Maude Smith. The plaintiff Louisa Marshall is tenant for life to her separate use. In execution of powers in the settlement, the estate became subject to a mortgage for securing 5500*l*.; and interest at 4 per cent., which mortgage was vested in J. Jarvis, before and at the time of the transfer of the same mortgage by Jarvis to Wraith, in August, 1847. The original trustees of the settlement were Thornton and defendant Thomas Penny. Thorn-

(a) 10 Ves. 292. (b) 3 Beav. 550. (c) 8 Beav. 439.
(d) 10 Sim. 332. (e) 1 Sch. & Lef. 209, 227. (f) 15 Ves. 159.
(g) 4 Madd. 332. (h) 1 Russ. & My. 231.
(i) 6 C. & F. 232. Per Lord Cottenham, Id. 352, *et seq.*

ton retired from the trust in the summer of 1846, and James Holland was appointed in his stead.

*On the 27th of January, 1847, Jarvis gave notice that [*432] the rate of interest must be raised to 5 per cent., or the mortgage paid off. This notice was, (as I understand,) formally given both to the plaintiffs and to the trustees; but this point, however is not material. Both had notice of Jarvis's determination, and both, by their solicitors, acted upon it. Walker, in the transactions that followed, was and acted as solicitor for the plaintiffs, Sankey for Jarvis, and the defendant William Sladden (who up to this time had been solicitor for the plaintiffs) for the trustees.

Walker, it appears, had a friend named Wraith, who was willing to advance the 5500*l.*, and such further sum as would cover the costs of the transfer at 4 per cent., and to stipulate for a continuance of the loan for five years. Sladden, however, insisted that the trustees were the proper parties to carry out the transaction; and he also, on behalf of the trustees, and under their authority, proceeded to procure the money necessary to pay off Jarvis's mortgage.

By a letter from Holland the trustee, to Sladden, dated the 13th of January, 1847, it would appear that Holland was at that time of opinion that a transfer of Jarvis's mortgage, at 4 per cent., and not a sale, was the proper course to be adopted, provided the mortgagee would consent to the mortgage remaining as long as desired by the mortgagor. I say, a mortgage, in preference to a sale, because, from the bill and otherwise, I think it must be collected that the question between a sale and the transfer of the mortgage had been brought forward almost immediately after Jarvis's notice.

A triple correspondence took place between the three solicitors, Walker, Sankey, and Sladden. In the result *Walker procured the mortgage to be transferred by [*433] Jarvis to Wraith, as a security for 5639*l.* 2*s.* 6*d.* (a sum made up of 5500*l.* principal, 46*l.* 4*s.* 6*d.* interest, and 92*l.* 18*s.* costs,) and with a stipulation expressed in the deed, for the continuance of the mortgage during five years. This transfer was made without the deed being submitted to the trustees, and with-

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out their being apprized of the intended addition to the principal debt.

The deed is dated the 9th of August, 1847: it was not, I understand, executed by Wraith. Notice of it appears to have reached Sladden immediately, for in August, Sladden by letter asks for a copy of the transfer. After this, on the 4th of September, Holland retires from the trust, and the defendant Marsh was appointed trustee in his stead. This appears to have been done without consulting the plaintiffs, or James Marshall, or any one on their behalf. Marsh is a near relative of Sladden. He is, I understand, a trustee of the settlement made upon the second marriage of plaintiff Louisa Marshall with defendant James Marshall, but Sladden was the solicitor on the occasion of that settlement.

In the meantime Sladden, professing to act under the direction of the trustees, had treated and agreed with one Williamson to advance a sum exceeding 5500*l.*, at 4 1-4*l.* per cent., for the purpose of paying off Jarvis's mortgage and costs incurred by the trustees, including costs and expenses incurred in relation to the treaty and agreement with Williamson. On the 25th of September Sladden gave notice to Walker, that it was the intention of the trustees to sell the estate. This letter was as follows:—

"The trustees of the estate, instead of involving themselves in litigation, and instead of incurring further
[*434] *expense for the purpose of obtaining a transfer from Mr. Wraith by the proceedings mentioned, will endeavor to do the best they can for the estate, under the circumstances which now exist, and will proceed under Mr. Parker's advice to a sale of the estate under the powers given in the settlement. I wish also to inform you, that the trustees have incurred considerable costs and expenses with respect to the advance intended to have been made by Mr. Williamson and his clients, which are chargeable upon, and which will be charged by them against the estate, and that, rather than incur the expense or responsibility of raising (in the present state of things) a further sum by way of mortgage, under the power given them in the settlement, to pay the costs, charges, and expenses they have

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incurred, they will retain the same out of the purchase-money of the estate. Should the trustees be unsuccessful in effecting a sale, they will then determine upon the propriety of raising a further sum for the purposes mentioned, by way of mortgage."

I have already noticed, that Sladden had insisted from the outset, that the trustees, and not the plaintiffs, were the proper persons to carry out the transfer of Jarvis's mortgage. The letter of the 25th September still insists upon this, and speaks of procuring a conveyance from Wraith. This, it is said, counsel have advised the trustees they had a right to do.

On the 11th of October, 1847, the bill was filed.

The plaintiffs insist, that no costs incurred by the trustees, in relation to the treaty and agreement with Williamson, ought to be charged upon the trust estate; that the attempt to sell was a breach of trust; that the appointment of Marsh as trustee was improper; that *Sladden had so acted, by receiving [*435] rents and otherwise, as to make himself primarily liable to them as an accounting party, and also liable for the costs of the suit, as having concerted with the trustees, for his own purposes, the sale which it is the object of this suit to prevent. The bill accordingly prays the removal of the present trustees, and the appointment of new; and that no costs, incurred by the trustees in relation to the transfer of Jarvis's mortgage, or in relation to the retirement of Holland or appointment of Marsh, may be allowed against the estate. The bill also prays, as against the trustees and against Sladden, accounts of their receipts and payments in respect of the trust; and that they may pay the costs of this suit.

The course which the argument took makes it convenient that I should explain my views under two different heads: first, by considering the case as against the trustees only—that is, supposing Sladden were not a party; and, secondly, whether Sladden is properly made a party.

In the argument upon the first of these heads, some extreme points were contended for. It was said, that the plaintiffs were the proper parties to raise the money for the discharge of Jarvis's mortgage, and that the interference of the trustees was altogether

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improper. If Jarvis had simply sought to transfer his security to a stranger, without the privity of the parties interested as mortgagors, the proposition contended for might have passed without notice; for in that case, the position of the parties interested in the estate would not have been altered by the transfer. But when the trustees received from the mortgagee the notice of February, 1847, it became their duty to protect the estate against the possibilities of sale or foreclosure by the mortgagee; [*436] and *this they could only do by seeing that the money required for the discharge of the mortgage was forthcoming. This would be their duty, in the simple case of paying off the existing debt. But when, in addition to this, it was intended to increase the debt upon the estate by adding to it the plaintiff's costs of carrying out the transaction, and also by converting the interest then due into principal,—a satisfactory explanation of which I have not heard—I can have no hesitation in saying, the transaction was one upon which the trustees ought to have been consulted, and that, as it now stands, it is irregular and improper. Like observations apply as to the stipulation for five years. Wraith ought to have been required to execute the deed. It is no answer to this to say, that any sum improperly charged upon the estate may be struck off; or that Wraith, by accepting benefits under the deed, is bound by such of its provisions as impose duties upon him. Matters such as these are not to be left to future litigation. The estate should be protected by proper deeds, and the office of trustees is to take care that it is so protected; and if the controversy between Sladden and Walker had been directed and confined to the points above noticed, I should have had comparatively little difficulty in dealing with this case. But this is not the simple case with which I have to deal.

I agree with the plaintiff's counsel, that the principal point to be tried in this case is, whether the sale, which it is an object of this suit to prevent, was or not a justification on the part of the trustees. I must consider the bill as filed for the purpose (in part at least) of preventing the intended sale. And with reference to this, the three points arise:—first, are the costs incurred

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in relation to Jarvis's mortgage properly chargeable upon the trust estate? If so, secondly, were the *trustees [*437] justified in raising them by sale? And, thirdly, can the sale be justified under the power of sale and charge contained in the settlement of October, 1844?

In noticing these points, I will begin by supposing Wraith's mortgage free from objection. And, first, with respect to the costs incurred in relation to Jarvis's mortgage. For the reasons already mentioned, I think the trustees are *prima facie* entitled to the costs. The question is, whether (being so entitled in the first instance) they were justified in putting the estate to expense in their endeavors to raise money after they had notice that the plaintiffs had the money at command, upon the terms proposed by Wraith. That notice would have justified them in requiring that Wraith should bind himself to advance the money when required. But I am satisfied that I ought not to charge the estate with any costs occasioned by their treaty and agreement with Williamson, after the trustees had notice of Wraith's offer, or such notice as ought to have put persons acting in the trust upon inquiry. So far, therefore, as the sale had for its object the payment of costs incurred after such notice, I think the purpose of the sale was not legitimate.

The view which I take of this case makes it unnecessary that I should consider the second and third points apart from each other. The settlement of October, 1844, empowers the trustees to raise money by mortgage for the purpose of paying costs. But after repeated consideration of the power of sale and exchange contained in the settlement of October, 1844, and comparing the clause with common precedents of powers of sale and exchange, I am satisfied that the parties to the settlement of October, 1844, contemplated the possibility of its becoming expedient to sell the *estate without reference [*438] to any contemplated exchange, and that they intended, as in terms they have done, to arm the trustees with a power for that purpose. I may observe, with reference to what Lord

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Eldon said in the case of *Mortlock* v. *Buller*,(a) that he does not lay it down as an absolute proposition, that, under the ordinary power of sale and exchange, trustees can in no case sell, except with a view to a contemplated exchange. He says only that a very special case must exist to justify such a course. But whether I am right or not in my construction of the clause in question, it is clear that the trustees cannot justify the sale which it is the object of this suit to prevent, unless the sale was determined upon as the course most for the benefit of the plaintiffs, irrespective of the controversy between Walker and Sladden. Now, giving the trustees credit for having intended to speak the truth in their answers in this cause, I cannot, upon the evidence before me, hesitate in coming to the conclusion that the trustees put themselves into the hands of Sladden, to an extent which has deprived the plaintiffs of the benefit of that independent judgment, on the part of the trustees, to which they were entitled; and that the sale, which it is the object of this suit to prevent, was resorted to by Sladden as the means of carrying the controversy between himself and Walker to a successful result on the part of the former. And, inasmuch as part, at least, of the costs for which it is intended to provide by the sale is not, in my opinion, properly chargeable upon the estate, I think the sale, if completed, would have involved to some extent a breach of trust, and that the suit has been occasioned, in part, by conduct for which the trustees are responsible, and of which the plaintiffs have a right to complain. The precise day [*439] on which *the trustees had notice of Wraith's offer I need not determine. I am quite clear it must be ascribed to a very early date in the transactions.

With respect to the retirement of Holland and the appointment of Marsh, I have no hesitation in saying, that the appointment of Marsh, without communication with the plaintiffs, was improper. Admitting that the mere letter of the settlement of October, 1844, would justify the appointment, still, in the circumstances of this case, it was improper. The trustees must have

(a) 10 Ves. 292.

known that the plaintiffs would, and with just reason, have opposed such an appointment. It was made obviously at Sladden's instance, in order to keep the trust more completely under his dominion. This is not the course which trustees ought to pursue; and I must consider the trustees as responsible for the acts of Sladden. I must, in fact, consider his acts as their acts.

Upon the assumption, then, that Wraith's mortgage is free from objection, it would follow that the trustees have been altogether in the wrong (in what has been done by Sladden on their behalf), since they had notice of Wraith's mortgage. But this difficulty arises—Wraith's mortgage is not free from objection; and the plaintiffs have not the benefit of the argument against the trustees, that, in Wraith's offer, of which the trustees had notice, a transaction was contemplated which was in strict accordance with the trust. Indeed, the trustees might, with some appearance of reason, contend that they were altogether justified in disregarding a notice which had terminated in a breach of trust. But this, I think, would be a too lenient, as it would be a very technical view of the case. Had the trustees, as I think they ought to have done, communicated with Walker as soon as they had notice of Wraith's offer, it *is impossible to [*440] doubt that the objection to Wraith's mortgage (which is very trifling in amount) would have been obviated. Sladden's motive for not doing so cannot be mistaken; and if in this suit I could correct that which is wrong in Wraith's mortgage, I should have no doubt as to the proper order to be made. In that case the plaintiffs would have had to repair in this suit a breach of trust, to which they were parties, as well as that of which they complain; and I should have repaired both breaches, giving no costs of this part of this suit. And I think I ought not to make any difference upon the point of costs, because another suit may be necessary in respect of Wraith's mortgage (in whose absence I cannot clear the trust estate), unless the parties have the good sense to set the matter right without suit.

Upon the whole, I think the proper decree to be made upon this part of the case, is to remove the trustees, and appoint new ones, without prejudice to the right of any of the parties to com-

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plain of Wraith's mortgage; and in this suit to give no costs, so far as the suit is addressed to the purpose of removing the trustees.

With respect to the account.—In the absence of Holland, and in accordance with the arrangement made at the hearing, the decree for the account must not be carried back further than the retirement of Holland; which (as I understand) was on the 4th of September, 1847. There is nothing in the mere absence of Holland to prevent my saying—if, upon the merits, it would be right so to say—that the plaintiffs have a right to require that neither Penny nor Marsh shall continue trustees.

Next, as to Sladden being a party.—I incline strongly *to the opinion that the counsel who drew this bill had, [*441] not in his mind the case in which it has been holden that solicitors, concerned in the perpetration of fraud, may, upon a bill filed to be relieved against such fraud, be made parties to it, and costs prayed against them as matter of relief. I think the case intended to be made against Sladden was confined to this,—that he had made himself directly liable to account to the Plaintiffs as a trustee. Upon this point I retain the opinion I expressed at the hearing. Sladden swears that he acted as agent of the trustees in all his receipts and payments of the trust property. This is in accordance with the presumption to which the facts of the case *prima facie* give rise. The *onus* is upon the plaintiffs to prove the contrary; and the plaintiffs, for the reason I stated at the time of the argument, have not done this.

If, however, I am to consider the bill as seeking to charge Sladden with costs, upon the ground that he was an accomplice with the trustees in the wrong of which the bill complains, my conclusion is against the plaintiffs' right to a decree in that respect.

The practice which, in certain cases, entitles a party to make a mere agent a defendant to a suit, and pray costs against him, is certainly a practice of a very anomalous character, and is open to all the objections pointed out by the Lord Chancellor in *At-*

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wood v. *Small*.(a) If the Court had determined that every one who assisted another in committing a wrong should be answerable for the injury sustained by the party aggrieved, the practice would not be open to some of the observations which apply to it in its existing state. But that is not the state of the case. [*442] The agent is not liable for *the injury committed, but is only a surety for the costs incurred in redressing the wrong. And the question is, whether the present case falls under the practice.

After what has fallen from the Lord Chancellor, I may with confidence assume that the practice will not be extended to any cases to which it has not already been actually applied. And the question is, how those cases are to be defined. Lord Redesdale, in his Treatise on Pleadings, appears to refer the origin of the practice to the case of an arbitrator making a corrupt award. Such cases are very peculiar. The arbitrator is himself, in fact, the wrong-doer. In cases of fraud properly so called, the like observation is correctly applied. If the agent actually misleads the party aggrieved by a *suggestio falsi*, or a *suppressio veri*, which he is under an obligation to disclose, he also himself does the specific wrong of which the party complains, as in the case of the arbitrator. And if the practice be confined to such cases, the practice, however anomalous, is limited in its application. Lord Redesdale's observations, upon a fair construction of them, appear to me to confine the practiceto cases of fraud. And, as far as my researches have gone, the Court has never made a decree against a mere agent, under this practice, except upon the ground of fraud. I asked counsel, during the argument, whether any case could be found, in which the Court had made such a decree, except upon the ground of fraud. No such case was produced. But some late cases were referred to, in which, from the language of the judgment, it would certainly appear that the Master of the Rolls may have thought, although he did not so decide, that a solicitor, who, by his advice and agency, helped his client to commit a wrong, was within the practice, although not actually

(a) 6 C. & F. 352, *et seq.*

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a party to any fraudulent misrepresentation or concealment, *and although no communication may have [*443] taken place between him and the party aggrieved.

The observations of the Master of the Rolls are entitled to the greatest weight; but I cannot bring myself to think that the present case is within the practice. In one sense, indeed, Sladden may be considered chargeable with fraud, for every wilful act, by which a wrong is committed, may, in a moral point of view, be so considered. But there is nothing of false suggestion, or improper concealment, or undue influence, or other fraud, in its technical sense, or any fraud, except in the general sense above adverted to, with which Sladden is chargeable. The conduct of the trustees, under his advice, or his conduct, (whichever way I am to consider it,) has been openly and avowedly adverse to Walker and his clients. I cannot think that such a case is within the anomalous practice I am considering.

Stopping here, I think the bill should be dismissed as against Sladden,—but, adverting to the cases at the Rolls, to the difficulty I have felt, and to Sladden's conduct in the transactions which are the subject of this suit, I think I am not violating the rule generally acted upon by the Lord Chancellor,—of throwing the costs of a suit on the unsuccessful party,—by dismissing the bill against Sladden, without costs.

It was said, however, in argument, that, as the plaintiffs had sought relief against Sladden, upon the specific ground of fraud, and failed to obtain such relief, Sladden is entitled to his costs, under a settled rule, which was lately acted upon in *Lady Wilde's case*,(a) in the House of Lords. I do not think the present case is *within that rule. It is not the mere [*444] use of the word fraud in the pleadings, that will bring a case within its operation. When acts are charged against a party, which in themselves are fraudulent, the Court, upon the question of costs, always considered the bill as imputing fraud, although the word "fraud" may not be used in the bill. Lord Cottenham made that remark in *Pickering* v. *Pickering*,(b) in my

(a) *Wilde* v. *Gibson*, 1 H. L. Ca. 605. (b) 4 My. & Cr. 289.

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hearing as counsel; and I have always held, that the mere use of the word fraud in the pleadings ought not to affect the question of costs, where the case made is not one of fraud in the proper sense of the term, and the word fraud is only used in the vague and general sense I above referred to, which appears to me to be the case in the present bill.

Dismiss the bill, without costs as against Sladden. Remove the trustees, and refer it to the Master to appoint new trustees. No costs of the suit, so far as it seeks the removal of the trustees and appointment of new ones. Account of the trust property, such account, by consent, not to be carried back further than the retirement of Holland. Reserve further directions and costs of suit, except those above provided for. The decree to be without prejudice to the right of any of the parties interested to complain of Wraith's mortgage in any other suit or proceeding.

[*445] *ATTORNEY-GENERAL *v.* MURDOCH.

1849: June 29th and 30th; July 2d, 3d, 4th, 5th, 6th, 7th, 9th and 10th; Nov. 7th.

Distinction between a trust created for the use of Protestant Dissenters generally, and for the use of an existing congregation of Protestant Dissenters belonging to a particular minister: in the former case Presbyterians, Baptists and Independents, are included; in the latter, the terms of the trust open an inquiry into the the particular character of the congregation which is the object of the trust.

It is not necessary, in order that the Court may be enabled to enforce a trust for a certain congregation of Dissenters, that the trust should be declared by any deed or writing; the Court may ascertain, from evidence of usage or otherwise, the particular trusts to which the property is dedicated.

Where trusts of a meeting-house in England are created for the use of a congregation, to be in as strict connexion as is practicable with the Established Church of Scotland, no person is entitled to be a minister of the meeting-house whose opinions or acts constitute a disqualification for the ministry of that church; and the fact that the meeting-house is locally situated beyond the jurisdiction of that Church is immaterial.

In determining the question, whether a particular minister was disqualified as a minister of the Established Church of Scotland, the Court considered whether the acts of such minister had brought him within the predicament which, according to the terms of a declaration of the General Assembly of that Church, constituted a dissolution of his connexion with it, without determining whether the sentence of a particular presbytery, depriving him of his license, was or was not conclusive as a disqualification.

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1849.—Attorney-General v. Murdoch.

An information filed in March, 1846, at the relation of four persons, who were four of the trustees appointed by a deed of October, 1835, of a meeting-house and premises at Berwick-upon-Tweed, called the Low Meeting-house, and a bill by the same four persons as plaintiffs, against Alexander Murdoch, the officiating minister of the meeting-house, and the trustees who were not plaintiffs. The information and bill sought a declaration that the Low Meeting-house and premises were subject to trusts for the appropriation of the same as a place of public religious worship on the model of the Church of Scotland, and in as strict connection with the same as was practicable; and that no person was qualified for, or competent to exercise the office of minister or pastor of the Low Meeting-house, without being a licentiate and a recognized minister of the Church of Scotland, and in full connexion therewith, and such further declaration of the trusts of the property as the Court should think proper; that the defendant Murdoch might be restrained from occupying and using the pulpit, and from preaching and teaching in, and in any manner officiating as the minister or pastor of the Low Meeting-house; and that, if necessary, he might be removed; that *the defendants Wilson, [*446] Smith, and Thompson, trustees who had concurred with Murdoch, might be restrained from allowing the use of the pulpit to any person, and from permitting any person to preach or teach in the Low Meeting-house, not being such licentiate and recognized minister, and from allowing the premises to be used in any manner otherwise than as a place of public religious worship on the model and in the strict connexion aforesaid; that all necessary and proper directions might be given for the election of a fit minister; and that the defendants Wilson, Smith, and Thompson, might be declared guilty of a breach of trust, and removed; and that new trustees might be appointed.

Upon the institution of the suit an injunction was applied for to restrain the defendants from using or permitting the pulpit to be used in the manner complained of. The Court on that occasion considered that the case differed from that of *The Attorney-*

General v. *Welsh*,(a) in the fact that the original trust was not so conclusively proved, as would justify the Court in giving the relief sought upon an interlocutory application; and the Court refused by injunction to do more than restrain the defendant Murdoch from teaching or preaching in the Low Meeting-house otherwise than in conformity with the doctrine, discipline, and practice of the Church of Scotland.

The information and bill were taken *pro confesso* against the defendant Thompson, and the answers of the other defendants, except Murdoch, Wilson, and Smith, were not replied to. The evidence entered into in support of the information and bill, and on the part of the defendants Murdoch, Wilson, and [*447] Smith, was voluminous, *and included, besides the instruments relating to the particular property, many matters of public and individual history, relating to the dissenting bodies in Berwick and elsewhere, and to the persons who had from time to time officiated as ministers at the Low Meeting-house.

The first minister of the congregation, which became at a later period the possessors of the Low Meeting-house, of whom any evidence appeared, was named Ogle. Ogle was minister of the congregation in 1685. He was succeeded by Foster, and Foster was succeeded by John Turner; other ministers had succeeded from time to time, and the defendant Alexander Murdoch was appointed in 1836.

The first instrument under which the meeting-house appeared to have been acquired by the predecessors of the present congregation, was an indenture of feoffment, dated the 27th of September, 1717, whereby John Simpson enfeoffed John Douglas and his heirs with a burgage or tenement, barn and garden, therein described. John Douglas, in consideration of 105*l*., conveyed the premises by lease and release, dated the 21st and 22d of May, 1719, to Stow and five others, and their heirs. Stow and the three other surviving releasees, by lease and release of the 29th and 30th of July, 1734, in consideration of 100*l*. conveyed the

(a) 4 Hare, 572.

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premises then described as "all that burgage or tenement and garden thereunto belonging, (on part whereof there has been lately erected a house, now used as a meeting-house for a congregation of Protestant Dissenters,") to Sibbitt and Temple, and their heirs. Sibbitt and Temple, by lease and release of the 1st and 2nd of August, 1734, for the same consideration conveyed the premises, by the same description, to Stow and seven others, their heirs and *assigns. By lease and release, [*448] dated the 9th and 10th of January, 1766, made between Stow, apparently the surviving releasee named in the preceding deed, of the one part, Hodgson and several others, described as members and contributors to the support of the pastor of and belonging to the meeting-house,—and John Gardner of the other part, reciting the deeds of August, 1834, and that the premises by right of survivorship were then legally vested in Stow, it was witnessed, that Stow did thereby declare that the premises were so conveyed upon trust only, and to and for the people or congregation of Protestant Dissenters, then known by the name of the congregation or people belonging to the Reverend Master John Turner, and to and for no other use, intent, or purpose whatsoever; and Stow thereby conveyed the same to Hodgson and the other parties of the second part, upon corresponding trusts.(a) The subsequent deeds down to those of October, 1835, under which the plaintiffs and defendants became trustees, referred to the deed of January, 1766, as expressing the trusts of the property.

Proceedings were instituted against Mr. Murdoch before the Presbytery of Dumfries, and in August, 1845, sentence was pronounced by that Presbytery, declaring that Mr. Murdoch had by his own act ceased to be a licentiate of the Church of Scotland as by law established, and that he was thenceforth disqualified, not only from receiving any presentation or appointment to a parochial or other spiritual charge in the said Church of Scotland, but also from retaining the status of a minister of the said Church in any place whatsoever, unless reponed by the competent ecclesias-

(a) These are stated in the judgment, infra, p. 464.

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tical judicatory. Mr. Murdoch had protested against the jurisdiction of the Presbytery of Dumfries; and he adduced
[*449] evidence in the cause for the purpose of *showing that it was not binding upon him, or that he was not thereby disqualified for the ministerial office in the Church of Scotland.

The conclusion of the Court, on the result of the evidence of the trusts, as they were to be collected from the general usage of the parties who had been in the enjoyment of the trust property, and on the consequences of the acts by which it was alleged that the connection of Mr. Murdoch with the Church of Scotland had been severed, appear in the judgment to which some notes have been added where they seemed necessary to explain the facts referred to.

The *Solicitor-General*, Mr. *Little*, and Mr. *T. D. Salmon*, for the information and bill; and

Mr. *Lewin*, for the defendants, who concurred in the view of the trust taken by the plaintiffs, relied upon the principles laid down in *The Attorney-General* v. *Munro*,(a) and *The Attorney-General* v. *Welsh*.(b) They also cited *Attorney-General* v. *Drummond*,(c) *Milligan* v. *Mitchell*,(d) *Broom* v. *Summers*,(e) *Attorney-General* v. *Pearson*,(f) and *Craigdallie* v. *Aikman*.(g) And on the argument that the trusts must be ascertained, in the absence of distinct expression, by usage, *Archbishop of York* v. *Stapleton*,(h) *Attorney-General* v. *Parker*,(i) and *Chad* v. *Tilsed*.(k)

Mr. *Rolt*, Mr. *Malins*, and Mr. *Selwyn*, for the defendants Murdoch, Wilson, and Smith.

[*450] *On the part of the defendants it was contended, that the alleged connection of the congregation of the Low Meeting-house, with the Established Church of Scotland, was not

(a) 2 De G. & S. 122. (b) 4 Hare, 572. (c) 1 D. & War. 353
(d) 1 My. & K. 446; *S. C.* 3 My. & Cr. 72. (e) 11 Sim. 353.
(f) 3 Mer. 409. (g) 2 Bligh, 529; *S. C.* 1 Dowl. 1.
(h) 2 Atk. 136. (i) 3 Atk. 576. (k) 2 B. & B. 403.

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supported by the evidence. It was not found in the deeds of trust. There was nothing in those deeds to limit the use of the property to any particular class of Protestant Dissenters. The declaration by Stow, in the deeds of 1766, could not properly be imported into the trust; but, even if introduced, there was nothing in that declaration beyond the fact, that John Turner was the minister which was perfectly consistent with the generality of the trust. There was no distinct proof that the successive ministers had been licentiates of the Established Church of Scotland, or even that John Turner had been a minister of that Church. All the historical facts were opposed to the pretended connection: it could not have existed in 1685, when the congregation was first formed, for the Church of Scotland was then Episcopal. The limitation to a class of Dissenters, separated by any definite boundary from other Dissenters, necessarily involved the existence of creeds or articles of subscription; but the existence of any such restrictions among the Protestant bodies dissenting from this Church in this country was contradicted by the history of the times in which this foundation took its rise, and by the known repugnance of the Dissenters of that age to such restrictive formulæ. All the inferences to be drawn from the later efforts of this congregation, and others holding similar opinions, to unite themselves closely with the Established Church of Scotland, was against the probability of the previous existence of any such union,—an union which was, moreover, in the nature of things, impossible, inasmuch as the Established Church of Scotland could not impart any of their rights or privileges as an establishment to persons adopting their religious opinions beyond the *border nor could such persons in England [*451] be members of, or be represented for any practical purpose in the General Assembly of the Church of Scotland. It was impossible the union could be anything more than sympathy derived from a conformity in religious views. It was substantially, though not formally, analogous, for example, to the sympathy which was felt by some of the clergy and laity in the Church of England for the congregations separated from the Church of Rome, to be found in the remoter parts of Piedmont and Savoy,

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and through whom many of such persons appeared to be anxious to trace the preservation of a primitive faith anterior to the Reformation. This kind of sympathy might be, as in fact it was, more or less fervent at different times, and it might cease altogether; but the position of the parties on either side was wholly unaffected by the changes that took place in the light in which they regarded each other.

They cited *Attorney-General* v. *Gardner*,(a) *Leslie* v. *Birnie*,(b) and *Lady Hewley's case* (*Attorney-General* v. *Shore*.)(c)

Nov. 7th.—VICE-CHANCELLOR:—The dispute in the present case has arisen out of circumstances analogous to those which gave raise to the case of *The Attorney-General* v. *Welsh*,(d) and *The Attorney-General* v. *Munro*.(e) The defendant Murdoch was elected minister or pastor of the Low Meeting-house at Berwick, in the year 1836, and was, as I understand, the thirteenth minister who had held that office since the congregation was
[*452] first formed, and *of which the congregation now using and claiming to be the owners of the Low Meeting-house at Berwick are the successors. Mr. Murdoch was, at the time of his election as minister, a licentiate and ordained minister of the Established Church of Scotland. The Attorney-General and plaintiffs allege that Mr. Murdoch has since adhered to that body, which, after the decision in the *Auchterarder case*,(f) seceded from the Established Church of Scotland, and constitutes what is now called the Free Church; and the case of the Attorney-General and the plaintiffs is, that Mr. Murdoch having thus adhered to the body known as the Free Church, has become disqualified for and is incompetent to exercise the office of minister or pastor of the Low Meeting-house.

If, at the close of the argument, I had been as fully aware, as I now suppose myself to be, of what was actually decided in the

(a) 2 De G. & S. 102.
(b) 2 Russ. 114.
(c) 11 Sim. 592; *S. C.*, 9 C. & F. 355.
(d) 4 Hare, 572.
(e) 2 De G. & S. 122.
(f) See Robertson's Report, 2 vols.; see also 6 C. & F. 646.

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case of the *Attorney-General* v. *Munro*, there would have been only one point in the present case, at the utmost, upon which I should have thought it necessary to reserve my judgment; and as that point is the only one upon which, after the best consideration which I have been able to give to the present suit, I think any difficulty can be entertained, I shall endeavor, in the observations I am about to make, to point out how much of this case I consider as virtually decided by the *Attorney-General* v. *Munro*. In order to do this with greater distinctness, I shall begin with supposing that the trusts which the Attorney-General and the plaintiffs contend are the trusts of the Low Meeting-house, are declared by deed, as they were in the cases of *The Attorney-General* v. *Welsh*, and *Attorney-General* v. *Munro*; and in considering the case upon that hypothesis, I will assume that Mr. Murdoch has seceded from the Established Church of Scotland and adhered to the Free Church, and that the Act of the General Assembly, of the 2nd of June, 1845,(a) applies to Mr. Murdoch. Upon these hypotheses the case of the *Attorney-General* v. *Munro* is a distinct authority, entitling the plaintiffs to the relief they ask. [*453]

The *Attorney-General* v. *Welsh* was, I believe, the first of the cases of this class which came before the Court. The second was the present case, upon the notice for an interim injunction, in July, 1845; but at that time *The Attorney-General* v. *Munro* had not come before the Court; and in giving my judgment in the case of *The Attorney-General* v. *Welsh*, and afterwards on the motion in the present case, I abstained from giving any opinion on one point, which is now concluded by *The Attorney-General* v. *Munro*. I did not hesitate to state my opinion, that the decision in the first *Auchterarder case* was in its nature declaratory; that it introduced no alteration in the Established Church of Scotland, and decided only what was the then position of that Church. I was pressed with an argument of the defendants, that whatever the case might be as to Scotch churches locally

(a) This act is stated fully in the judgment of the Vice-Chancellor Knight Bruce, in *Attorney-General* v. *Munro*, 2 De G. & S. 191.

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situated in Scotland, and subject to the jurisdiction of the Established Church of Scotland, the question of non-intrusion involved no question of doctrine, discipline, or practice, and that it was purely speculative as regards any proprietary church locally situated in England. Upon the value of this argument I gave no opinion, deciding only, that, upon the evidence then before me, it was impossible I could act upon it; but the decision of *The Attorney-General* v. *Munro* has set that question at rest. The point arose *in that case, and was, I think, rightly decided. If, therefore, the trusts of the Low Meeting-house at Berwick are such as the Attorney-General and the plaintiffs say they are; and if those trusts were declared by deed; and if Mr. Murdoch has seceded from the Established Church of Scotland, and adhered to the Free Church; and if the Act of the General Assembly, which I have referred to, applies to Mr. Murdoch, there can be no doubt as to the conclusion to which I must come. The case is bound by authority. The circumstance that the Low Meeting-house at Berwick is locally situated in England, and is not subject to the jurisdiction of the Established Church of Scotland, makes no difference.

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The next point which suggests itself is, whether the absence of a deed, declaring the trusts of the property comprised in the indentures of 1719, makes any difference. It was not argued, nor could it have been argued with success, that there was any rule of law which, in a case circumstanced as this is, makes a deed or even a writing necessary to the case of the Attorney-General and the plaintiffs. The consequence of the absence of such deed or writing is, that the Attorney-General and the plaintiffs have had cost upon them the burthen of proving otherwise that the trusts of the Low Meeting-house were such as they say they were, in order to entitle them to the decree they ask. This is the question which I stated at the outset has been the real question of difficulty in the present case; and to the consideration of this question I have accordingly directed my best attention. But it will be most convenient that I should reserve this point for the last, and assume, for argument's sake only, whilst I am observing upon other points of the case, that it is to be

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answered in favor of the Attorney-General and the plaintiffs—at least, to this extent, that no person is eligible to, or entitled to hold *the office of minister of the Low Meeting- [*455] house, whose opinions and acts constitute a disqualification for the ministry of the Established Church of Scotland.

I have hitherto assumed that Mr. Murdoch has, by some positive act or acts, both seceded from the Established Church of Scotland and adhered to the Free Church. From the charge of formal secession, Mr. Murdoch must, I believe, be at once acquitted, except so far as adherence to the Free Church involves in it a secession from the Established Church. I do not find that Mr. Murdoch has, by signing any deed of demission, or other formal act, in terms seceded from the Established Church of Scotland. But is any such express act of secession necessary? The answer to this question must be in the negative. The Act of the General Assembly, of the 2nd of June, 1845, in terms decides that adherence to the resolution of the Synod, held at Berwick on the 16th of April, 1844,(a) was alone *sufficient [*456] to dissolve the connexion between the adhering mem-

(a) See 4 Hare, 585, n. (a) See also 2 De G. & S. 183, 184. The Resolutions of the Synod of the Presbyterian Church of England, held on the 16th of April, 1844. in the Low Meeting-house at Berwick, should perhaps be more fully stated than in the former note. They were as follows:—"First, that the Synod having been originally formed and constituted by the voluntary association or union of the several presbyteries that composed it, each presbytery acting in the forming and constituting of such association, or union, or synod, by and in virtue of those powers spiritual which Christ Jesus has conferred upon associating church officers, for the good and government of his church, and having for some years existed as a synod, without assuming to itself any denominational title or designation, did in A. D. 1839, in the free exercise of its own heaven-derived authority, assume to itself the designation or title of the Synod of the Presbyterian Church of England in connexion with the Church of Scotland; that at the time when this designation or title was assumed, there existed no synodical connexion whatsoever between this Church and the Church of Scotland as by law established, and that no jurisdiction was exercised, or even claimed by the latter Church over the former; that the latter clause of the fore-cited title or designation of this Church, viz. 'in connexion with the Church of Scotland,' therefore neither was, nor could be intended or understood to indicate a connexion between the two Churches, which involved a right of jurisdiction on the one part, or an acknowledgment of submission on the other, seeing the Church of Scotland in General Assembly convened, solemnly declared, in A. D. 1834,

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bers of the Synod of Berwick and the Established
[*457] *Church of Scotland. The Act of the Assembly treats the adherence itself as a repudiation of that connexion.

that, being an established Church, she neither did possess legally, nor could constitutionally exercise ecclesiastical jurisdiction in England. Seeing also that since the fore-cited title or designation was assumed, this Church has in all matters pertaining to its own economy, and the administration thereof, acted in the most entire independence of the Church of Scotland, nor was its right so to do even so much as called in question, even when certain ministers of this Church, who had received their orders in the Church of Scotland, were deposed from the holy ministry by sentence of presbyteries of this Church, acting by warrant from this Synod; that, consequently; the fore-cited clause in the title or designation of the Church was assumed only in order to distinguish this Church from another denomination, viz. Socinians or Unitarians, who, without having any right whatsoever to the name, call themselves, and are called by others, English Presbyterians; and also from certain denominations of orthodox Presbyterians resident in England, viz. those connected with the 'Scottish United Secession and Relief Churches.' But the fore-cited clause, viz. in connexion with the Church of Scotland, having led to various misapprehensions, as if a connexion involving a right of jurisdiction on the one side, and an acknowledgment of submission on the other, did exist between the Church of Scotland as by law established, and this Church, and various or sufficient reasons having arisen to render it expedient that the present designation of this Church should be altered, wherefore the associated presbyteries constituting this Church, in synod assembled, acting upon their own authority, as set down in the premises, and possessing the same right and power now to alter as at the first to assume their present designation, hereby resolve, decree and declare, that the designation or title of this Church shall from this time forth be the 'Presbyterian Church in England;' as also this Synod further resolves and declares, that, being and continuing the same corporate body, it has hitherto been unchanged in doctrine, discipline, government or mode of worship, (in respect of all which each member of this Synod solemnly adheres to his ordination vows, and will continue, through grace, stedfastly to maintain and adhere to the same) the Presbyterian Church in England will continue to assert all its lawful claims, and to maintain all its lawful possessions, rights and privileges, of what sort soever they be, as the same have been hitherto claimed or possessed by this Church. Secondly, that this Church shall, through the grace of Almighty God, as an independent branch of the Church of Christ, and in virtue of its own inherent powers of self-government and jurisdiction, administer its religious ordinances, make is disciplinary and ritual regulations, and exercise its spiritual jurisdiction, and further maintain inviolate all the rights, powers and privileges, wherewith Christ has invested it, in all matters according to the premises. Thirdly, that in all acts of intercourse with another branch or other branches of the Church of Christ, or in forming or maintaining a friendly relation or relations with such branch or branches of the church of Christ, this Church shall assert, provide for, and

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The words are—"That, as the several members of the said synod and presbyteries have, by adhering to the said Resolutions, ceased to be ministers or licentiates of the Church of Scotland as by law established, and repudiated their connexion with the said Church, they are no longer entitled to officiate in any church or chapel in connexion with the Established Church, and are therefore not to be held as ministers or licentiates of the Church of Scotland."(*a*) Upon reference to the resolutions of the Synod held at Berwick, mentioned in the Act of the Assembly, of the 2nd of June, 1845, it will not appear that there is anything in them which imports secession from the Church of Scotland on the part of the individual members at the Synod, except what is involved in adherence to the Free Church, and (I do not know whether the observation is worth making,) that, before the Act of the 2nd of June, 1845, the connexion, which in 1836 was formed between the *Established Church of Scotland and the [*458] Presbytery of Berwick, was dissolved.

The next question then is, whether Mr. Murdoch has so acted as to have brought himself within the scope of the Act of the General Assembly, of the 2nd of June, 1845? If this question be identical with the question, whether Mr. Murdoch's avowed opinions are those of the Free Church, or of the Established Church of Scotland, there is not, as it appears to me, any room for doubt; but as the evidence appears to me to prove this and a great deal more, I will not embarrass the case by making Mr. Murdoch's private opinions a matter of separate consideration. If it be necessary to decide the point, I think Mr. Murdoch must be considered as an adherent to the Resolutions of the 16th of April, 1844,(*b*) which, by the Act of the General Assembly, of the 2nd of June, is declared to have *ipso facto* dissolved his connexion with the Established Church of Scotland. The fact that he holds the opinions of the Free Church is a step only in the proof of the adherency; and those opinions, and the charge of adherency, ap-

maintain its own freedom and independence in all matters spiritual, according to the premises."

(*a*) See 2 De G. & S. 192.

(*b*) See note, supra, p. 455.

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pear to me incontestably proved by Mr. Murdoch's let-
[*459] ter of the 8th of September, 1843,(a) *in answer to the plaintiff's letter of the preceding day, by the admissions in his answer, which was read by the plaintiffs as evidence in support of their case,(a) by the part which he took in the proceedings of the 16th of April, 1844,(b) by his connexion with the Synod and Presbytery of Berwick, and by the part taken by him in the controversy relating to the Free Church and the Established Church of Scotland. A man adheres to an opinion when he remains firmly fixed in that opinion,—he adheres to a Resolution when, being present at the meeting at which the Resolution is come to, he assents to it, and gives it the authority of his voice and sanction. No particular form of doing this can be requisite. The Judge who has to decide the case must, as a juryman, decide upon the evidence before him, whether the party

(a) Mr. Murdoch, in his letter, in answer to the question, whether he had given his adherence to the Free Church, said, inter alia, "As to having joined the Free Church, it may rather be said to have joined ours, that is to say, holds the standards of the Church of Scotland, without any civil beneficence. I have made no change in joining any party, but hold now, as I ever did, the principles of the Scottish Church. That Church itself maintains that our Synod can have no other but a symbolical connexion with it, that is to say, by its standards. Both parties in Scotland have all along maintained that Presbyterians like ourselves, in England, are in these circumstances, and are a co-ordinate and independent Church. To this co-ordinate Church I belong, and, as yet, it has not joined, nor probably will join itself to either of these parties. In no other relation did or can the Established Church of Scotland ever recognize any Presbyterian Church of Scotland. It is only, however, manly and candid for me to state, that, like every other man, I claim to myself the right to express as well as to entertain a decided opinion in this matter, which is all that I have done, having neither signed nor (from the circumstances I have stated) been required to sign, either the act of separation from the Establishment in Scotland, or the deed of demission, which the seceding ministers all did."

(b) Mr. Murdoch, by his answer, said, "That, as to the points of difference, he thought the Free Church was in the right, and had entertained and expressed that opinion,—that he might have stated that he should decline to accept a presentation to a church in Scotland, if it were offered to him; but he declined to answer whether, if such presentation were now offered to him, he would accept the same; or, if not, why he would accept the same."

(c) Mr. Murdoch was present at the meeting, and seconded the resolution to adopt the overture of that day. Supra, p. 455, n.

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charged with adherency is or not proved to have adhered in the sense above explained. In *The Attorney-General* v. *Munro* the Vice-Chancellor Knight Bruce so reasoned on this part of the case. He reviewed the several acts of Mr. Munro, for the purpose of seeing whether the charge of adherency made against that gentleman was or not substantiated, and concluded by saying *that the evidence taken together had convinced [*460] him that Mr. Munro, by his opinion and acts, had placed himself in the predicament of adherency stated in the Act of the General Assembly, of the 2nd of June, 1845. The acts of Mr. Munro in that case, upon which the opinion of the Court was founded, were more numerous than are those upon which I found my opinion in the present case; but I think there is enough in this case to justify the like conclusion. In the absence of denial or explanation on the part of Mr. Murdoch, I cannot but regard him as an adherent to the Berwick Resolutions of the 16th of April, 1844, to which the Act of the General Assembly refers. I find no such denial or explanation, as can take away the effect of the acts referred to, bearing on Mr. Murdoch's position with respect to the Established Church of Scotland; and as no change in Mr. Murdoch's opinion is suggested, I must consider his opinions as being the same now as they were in April, 1844.

I think it right, however, to add, that, in a case like the present, in which I am called upon to administer the trusts of a charity, I am not prepared to admit that it is necessary for the plaintiffs to prove the adherency of Mr. Murdoch to the Resolutions of the 16th of April, assuming (as I now do) that no person is eligible to, or entitled to retain the office of minister of the Low Meeting-house, whose opinions and acts constitute a disqualification for the office of minister of the Established Church of Scotland. It appears to me, that the Attorney-General and the plaintiffs have proved enough, if they have proved that Mr. Murdoch is under such a disqualification. The Act of the Assembly, of the 2nd of June, 1845, was addressed to particular subjects; namely, the acts of particular ministers of the Church of Scotland, in adhering to the Resolutions of the 16th of *April; but the offence was not one of form: it con- [*461]

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sisted in the public declaration of particular opinions, which opinions, so declared, operated in the way pointed out by the Act of Assembly. If I find these opinions entertained, and openly declared, and acted upon by Mr. Murdoch, can I (upon the assumption which I now make) avoid holding that he is disqualified for the office of minister or licentiate of the Established Church of Scotland, and consequently, no longer qualified to hold the office of minister of the Low Meeting-house at Berwick, only because the Attorney-General and the plaintiffs may not have succeeded in proving his adherency to the Resolutions of the 16th of April, 1844? The argument must be, that an Act of Assembly, or some ecclesiastical judicatory, is necessary; and that this Court cannot incidentally determine that Mr. Murdoch's opinions and acts disqualify him for the office of minister of the Established Church of Scotland, however plainly and publicly those opinions may be declared. I cannot think that such a conclusion would be right. In this case, I consider the evidence as proving, beyond dispute, that Mr. Murdoch is a member of the Free Church. I cannot consider that point as being really at issue in this cause; and, if that be so, the consequence must be in this suit the same as if adherency to the Resolutions of the 16th of April, 1844, had been (as in fact I think it really is) proved. I adhere to the opinion I expressed in *Welsh's case*. In the above conclusion, my judgment may possibly have erred; but since I have read the judgment in *The Attorney-General* v. *Munro*, I have considered that case as settling every point which is necessary for the decision of the present case. Upon the questions of of fact, so far as I have hitherto considered them, I think the evidence satisfactory.

I come now to that question in this case which re-
[*462] lates *to the trusts of the Low Meeting-house at Berwick, and upon this part of the case I will not deny the existence of considerable difficulty. Strange as it may seem, the history of dissent appears to show that the objection entertained by dissenters to tests and subscriptions was so strongly felt by all, that it would almost appear to have been a sufficient bond of union between different denominations and classes of dissenters

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as against the Established Church, however much the dissenters may have differed among themselves. *Lady Hewley's case*(a) is in point. The bequest in her will was held to be a bequest to Protestant Dissenters; and it was decided, without reference to Lady Hewley's religious opinions, that three distinct classes of dissenters, namely Presbyterians, Baptists, and Independents, were objects of her bounty. I need not pursue this point further; but, however this may be in the case of a general bequest to Protestant Dissenters, I cannot very readily come to the conclusion that a particular congregation, building a meeting-house for their own use, can have intended the same thing, and considered it a matter of indifference whether the minister they elected was a Presbyterian, Baptist, or Independent. Any of these classes of dissenters may think it right to permit a minister of a different denomination of dissenters occasionally to fill the pulpit; but it is quite another thing to suppose that an existing congregation would not require some more positive standard of truth than the mere exclusion of tests and subscription.

In this case, however, it was said that the terms of the foundation deed decided the question, and showed that the trusts of the Low Meeting-house, were trusts for Protestant Dissenters generally. To that argument *I was at the hearing of [*463] the cause, and I still am opposed. The deeds which are said to evidence the trusts are four in number. The first were dated the 21st and 22nd of May, 1719, by which the parcel of land upon which the Low Meeting-house at Berwick was afterwards erected and now stands, was conveyed to trustees for the use of an existing congregation of Protestant Dissenters. The existence of this congregation appears to be carried back as far as the year 1686, and in 1719 John Turner was minister of the congregation. There is nothing in the language of this deed which appears to throw any light upon the subject of the present inquiry. In July, 1734, it became necessary to appoint new trustees of the Low Meeting-house; and by indentures of the 29th and 30th of July, 1734, the surviving trustee of the deed

(a) 9 C. & F. 355; 11 Sim. 592.

of 1719 conveyed the property to other trustees, who, by indentures of the 1st and 2nd of August, 1734, reconveyed to the old and some new trustees upon trust for the congregation to whom the Low Meeting-house then belonged. In the deed of July, 1734, the Low Meeting-house is described as a house then used as "a meeting-house for a congregation of Protestant Dissenters." The same description is applied to the Low Meeting-house in the deed of August, 1734. By indentures of lease and release of the 9th and 10th of January, 1766, the Low Meeting-house at Berwick was again conveyed to new trustees. In that deed, which recites the prior deeds of August, 1734, one Stow, who was a party to the deeds of 1734, declared that the Low Meeting-house had been conveyed by the indentures of August, 1734, "upon trust only, and to and for the people and congregation of Protestant Dissenters then known by the name of the congregation or people belonging to the Reverend Master John Turner, and to and for no other use, intent, or purpose whatsoever;" and by the indentures of 1766, the Low Meeting-house was conveyed *to new trustees, in trust for the people or congregation then lately belonging to the said John Turner, and whereof John Gardner (a party to the deeds of 1766) was then pastor or minister, and in the trust and confidence that the trustees to whom the Low Meeting-house was thereby conveyed should permit the same to be used, occupied, and enjoyed, as and for a meeting-house or place for the assembly of a particular church or congregation for the worship or service of God, by the society or congregation of Protestant Dissenters known by the name of the congregation late belonging to the said John Turner, and whereof the said John Gardner was then the pastor or minister, and for the use and convenience of all such others as should thereafter come into and join the said society, and attend the worship of God in the said place, and should contribute and pay towards the support of the minister for the time being of the said congregation, and towards keeping the said meeting-house in repair. In this deed was contained a power of appointing new trustees, and the persons so to be appointed trustees are to be such sober and religious persons, being

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Protestant Dissenters of good credit and reputation, and also members of the said meeting-house, and contributors towards the support of the pastor thereof for the time being, as were most likely to defend, perform, and promote the trusts thereinbefore expressed.

New trustees have been since appointed from time to time, but in none of the deeds subsequent to 1766 is anything found to alter the argument as it stands upon the deeds I have already noticed. The argument for Mr. Murdoch and those who take part with him was, that the deeds above cited show that the trusts of the Low Meeting-house were trusts for Protestant Dissenters generally; that I must refer the deeds of 1734 and 1766 *back to the year 1719, when the land upon [*465] which the Low Meeting-house was built was conveyed to trustees for the use of an existing congregation of Protestant Dissenters, and treat the whole as a foundation deed declaring a trust for a congregation of Protestant Dissenters generally, and not Protestant Dissenters of any particular denomination. If this argument were well founded, (and for the purposes of the argument I will suppose all the deeds to be dated in 1719,) and these trusts are to be taken as the trusts upon which the property was originally acquired, and to which it was dedicated in 1719, it would follow that Presbyterians, Baptists, and Independents, are alike included in the trusts of the deeds. I have heard nothing to satisfy me that those trusts have been varied by anything that has since taken place, but I am satisfied the argument is not sound. There is a fallacy in confounding words of gift with words of recital. A gift to Protestant Dissenters would, according to the decision in Lady Hewley's case, include Presbyterians, Baptists, and Independents; but a gift to an existing congregation of Protestant Dissenters raises a very different question as to the parties for whose benefit it is intended. The simple gift raises the question, what is meant by the words Protestant Dissenters. The recital raises the question, of what class of persons did the congregation of Master John Turner consist. To those persons the deeds, by the recitals they contain, show the property in question to belong; and it would be

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a violation of every rule of construction and common sense to say, that the words of the deeds in question were equivalent to a declaration of trust in favor of Protestant Dissenters of every denomination, if in fact, as the information and bill allege, the congregation of John Turner was a congregation of Presbyterian Dissenters, in as strict connexion as was practicable with
[*466] the Established *Church of Scotland. Upon this point of the case I cannot bring myself to think there is reasonable ground for doubt. The question is as to the character of the congregation of John Turner. With respect to the clause in the deed of 1766, for the appointment of new trustees, it does not, upon consideration, alter the view I have already taken, although, at the time of the argument, it appeared to me to weaken in some degree the observations arising upon the other part of the deeds. But this I now think it does not; for the qualification required in the persons to be appointed new trustees refers back to the anterior parts of the deed and the trust thereby declared, which raises the same question as before—what was the character of the congregation of Master John Turner? The requisition is, that the trustees shall be not only Protestant Dissenters, but members of the congregation.

Another point, much dwelt upon in argument, was the sense to be attached to the expression found in the information and bill, that the Low Meeting-house was in connexion with the Established Church of Scotland. In criticising that expression, I think the Attorney-General and plaintiffs are entitled to have the expression read as if they had invariably used the expression in as strict a connexion with the Established Church of Scotland as was practicable; and the meaning of the information and bill in this respect (whether proved or not is another question,) appears to me to be free from doubt. Their case is, that the congregation of Master John Turner was a congregation of Presbyterian Dissenters; that the Established Church of Scotland was their model; and that they were in as close connexion with that Church, taking their ministers from it and submitting to its jurisdiction, as was compatible with the fact that the
[*467] Low Meeting-house at Berwick was locally *situated

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beyond the jurisdiction of the Established Church of Scotland. An illustration of this is found in the proceedings which took place at the constitution of the English Presbytery of Berwick, and in the later proceedings, by which the connexion between the Presbytery of Berwick and the Established Church of Scotland was afterwards dissolved. The aptness or the correctness of the expression is not now the question, but the meaning of the words in these pleadings; and upon that I cannot bring myself to doubt. An actual and complete connexion between the Low Meeting-house at Berwick and the Established Church of Scotland, such as would make the former an integral part of the latter, might not be practicable, by reason of the locality of the former, and the limits of the jurisdiction of the latter; but the connexion was to be as complete as this, and perhaps some other difficulties, would admit of.

The next question then is, what, upon the evidence in the cause, was the character of the congregation of Master John Turner in 1719? Was it a congregation of Protestant Dissenters, composed indifferently of Presbyterians, Baptists, and Independents? or was it a congregation of Presbyterian Dissenters in this sense, that the Established Church of Scotland was the model of the Low Meeting-house at Berwick, and that no one was eligible to be minister of the Low Meeting-house whose opinions disqualified him for the office of a minister of the Established Church of Scotland?

In giving my answer to this question, I shall (without going into details, which would really be useless) refer briefly to the leading grounds upon which my opinion has been formed. One is, that the all but uniform, if not uniform practice of the congregation has been to elect ministers who were licentiates of the Established Church of Scotland. The accidental [*468] election of a minister not being such licentiate or minister, would not, in my opinion, affect the inference to be drawn from an uniform practice, unless it were distinctly proved, that, in the excepted case, the person elected was not a Presbyterian, but a dissenter of a different denomination; and I cannot consider that any such proof has been given in the present cause. A

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second point, which I cannot but think important, is the practice of the congregation of the Low Meeting-house at Berwick, proved to be almost uniform, of sending for a minister to some Scotch Presbytery, when, from the illness of their own ministers, or other accidental circumstances, occasion required they should supply the absence of their own ministers. The third and last point I shall notice, is the direction of the English Presbyteries by the General Assembly of the Established Church of Scotland, at the instance of the former. Combining this with the admitted connexion between the Low Meeting-house and the Presbytery of Berwick, I cannot but conclude that I have, in 1837, the unqualified admission of the congregation of the Low Meeting-house at Berwick, and of Mr. Murdoch their minister, that at that time the Low Meeting-house sought to establish, and did establish, as close a connexion with the established Church of Scotland as was practicable; and that such connexion was maintained by the congregation of the Low Meeting-house at Berwick, until the disputes arose which led to the formation of the Free Church.

Opposed to this were certain Resolutions, which, on the 9th of July, 1809, and again on the 7th of May, 1821, were come to by the congregation or their elders, relating to the election of ministers to the Low Meeting-house. By these Resolutions it was declared, that no person could be admitted as a [*469] candidate unless he *had been educated for, and licensed by, the Established Church of Scotland. Such Resolutions, it was said, were inconsistent with the idea that such a qualification as the Resolutions required was recognized by the congregation from the beginning. I cannot admit the force of that argument. It is obvious that it may have been intended for a much more limited purpose than that of introducing, for the first time, ministers of a totally different denomination from Presbyterians. At all events, I cannot, without more explanation than has been offered me, give to these Resolutions the sweeping effect which the defendants' arguments require me to do.

Some points of minor importance were pressed upon me; but,

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with the view which I take of the case of *Attorney-General* v. *Munro*, in its bearing on the case now before me, it does not appear to me that I can usefully entertain the consideration of any other points than those I have already noticed.

With respect to the trustees, the opinion I have expressed respecting the position of Mr. Murdoch involves in it, as a consequence, that the trustees who have taken part with him against the plaintiffs have in fact committed, or supported Mr. Murdoch in committing a breach of trust. But I have felt bound to consider, especially with a view to the question of costs, whether the case is not one in which Mr. Murdoch and the trustees may not have been justified in saying that they were entitled to have the opinion of the court upon the case, and in which they ought not to be charged with the costs of obtaining that opinion. My conclusion, however, is, that the trustees who have taken part with Mr. Murdoch ought to be removed, and new trustees appointed in their stead; and that the costs *ought to [*470] follow the event of the suit, and be paid by Mr. Murdoch and the trustees who have taken part with him. My conclusion upon this point is founded upon this—that the real question between the parties has been, not whether a minister who, by reason of his opinions, was disqualified for being a minister of the Established Church of Scotland, was disqualified for being a minister of the Low Meeting-house at Berwick; but whether Mr. Murdoch, by adhering to the Free Church, had become disqualified for the ministry of the Established Church of Scotland. In this view of the case there is nothing to distinguish the present case from *The Attorney-General* v. *Munro*, either upon the question of removing the trustees, or upon the question of costs.

Upon the declaration to be contained in the decree, I have had great difficulty; for the evidence does not fully satisfy me that the foundation deed of the Low Meeting-house requires that the minister should be a minister of the Established Church of Scotland, provided his opinions, upon all matters of doctrine, discipline, and practice, do not disqualify him from being such minister; but I see no means of securing the due performance of the trusts of the Low Meeting-house, except by requiring that the minister

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shall be a minister of the Established Church of Scotland. He may be such minister *de facto*, and yet be disqualified for being a minister of the Low Meeting-house at Berwick; but I think the congregation of the Low Meeting-house are entitled, as the only means of securing their rights, to a declaration, that the minister of the Low Meeting-house must be a minister of the Established Church of Scotland.

[*471] *TOWNSEND *v.* MARTIN.

1849: Feb. 23d.

A bequest of 5000*l.* Consols, with a direction, that, if the testatrix should not have sufficient stock to answer the legacy, her executors should, out of her residuary estate, purchase enough to make up the deficiency:—*Held* to create a specific, and not a merely demonstrative legacy.

THE will of Lucy Sutherland, dated 1842, contained several specific legacies of different sums of 3*l.* 10*s.* per Cent. Stock standing in her name, followed by a bequest of Consols in these words:—"I give and bequeath the sum of 5000*l.* Bank 3*l* per Cent. Consolidated Annuities unto all and every the children of the late Henry Bonham of Portland-place, who shall be living at the time of my decease (except Lady Garvagh and Mrs. Peters, and the eldest son,) equally to be divided between them, share and share alike." Immediately after this bequest was the following direction:—"And I direct, that, if at my death I shall not have sufficient stock standing in my name to answer the several legacies hereinbefore given by me as in that stock, that my executors and trustees do out of my residuary estate, purchase sufficient to make up the deficiency." The testatrix bequeathed various other legacies by her will and codicils. There was more than sufficient Consols belonging to the testatrix at her death to satisfy the said 5000*l.* legacy. On the cause coming on for further directions, the children of Henry Bonham presented their petition, suggesting that the assets were insufficient for payment

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of the legacies in full, and praying that the legacy of 5000*l.* Consols, and the dividends which had accrued, might be transferred and paid to them.

The question was, whether the legacy of 5000*l.* Consols was a specific legacy, or whether it was merely demonstrative.

Mr. *Kenyon Parker* and Mr. *Hetherington* appeared for the children of Henry Bonham.

The *Solicitor-General*, Mr. *C. P. Cooper*, Mr. *Wood*, Mr. *Goldsmid*, Mr. *Fooks*, Mr. *G. S. Moore*, and Mr. *E. G. White*, for the other parties. [*472]

The authorities cited were:—*Roberts* v. *Pocock*,(*a*) where the legacy was to be paid out of a particular fund, which failed; *Raymond* v. *Brodbelt*,(*b*) where the testator had appropriated funds to answer the legacy; *Hosking* v. *Nicholls*,(*c*) in which a legacy of "4000*l.* capital stock in the 3*l.* per Cent. Consols, or in whatever of the government funds the same should be found invested," was held to be specific; *Queen's College* v. *Sutton*,(*d*) and *Fountain* v. *Tyler*.(*e*) On demonstrative legacies, *Rogers* v. *Clarke*,(*f*) 2 Jarm. 594, n.,(*o*) 1 Rop. Leg. 198, 4th edit.

The VICE-CHANCELLOR said, he was of opinion the result of the authorities was, that this legacy must be held to be specific. There was good reason for such a construction. Although a mere gift of a certain sum of stock, as in the first part of this bequest, did not alone make the legacy specific, yet a gift of a sum of stock, with a direction that if the stock should not be in existence, the legatee should have an equivalent sum of money, or, as in this case, that the deficiency in the sum bequeathed should be made up, pointed to the consequence, that, on a failure of the stock, in the absence of any provision for that event, the legatee would either wholly or in part have lost the benefit of the gift.

(*a*) 4 Ves. 150. (*b*) 5 Ves. 199. (*c*) 1 Y. & C. C. C. 478.
(*d*) 12 Sim. 651. (*e*) 9 Price, 94. (*f*) Cooper, 376.

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[*473] *MOWER *v.* ORR.

1849: May 8th.

A testator, by his will made since the Wills' Act, (7 Will. 4, & 1 Vict. c. 26,) gave to his son, a residuary share of his estate. The son died after the Act came into operation, and before the date of the will, leaving children:—*Held*, that, under sect. 33 of the Wills' Act, the gift took effect, although, according to the law prior to the statute, there would have been no effectual devise or bequest.

Where a testator by his will gave his estate, including copyhold of inheritance, leaseholds, merchandise, money in the funds, and cash, to his children and grandchildren, in twenty aliquot shares, and directed some of such shares to be invested in the government funds for the infant legatees, and requested his executors on his death to get his property together and divide it, it was held, that the will must be taken to direct a sale and conversion of the copyhold estate.

THE testator, W. Orr, of Islington, Middlesex, by his will, dated in 1844, after stating that his property consisted of copyholds, leasehold houses, merchandise in Australia, cash at his bankers and in the public funds, and that, as it was so scattered about and not realized, he could not state what he should die worth, proceeded:—

"I have, therefore, decided to divide it into twenty shares, and I dispose of the same as follows, at my death: To my son William Morgan Orr, of Hobart Town, six shares: to my son Robert Orr, of Islington, six shares; to my son Alexander Orr, of Port Philip, South Australia, four shares; and the remaining four shares I bequeath as follows: Two shares, part thereof, I give to my daughter Mary, the wife of J. Mower; and two shares, to be invested in the government funds, for the use of the children of J. Mower by my daughter Mary, to be invested, as aforesaid, in the names of my executors hereafter named, the interest of which to be appropriated to their education, and the principal to be divided amongst them as they severally attain the age of twenty-one years."

The testator appointed his sons William Morgan Orr and Robert Orr his executors, adding a request that they would, on his death, use their exertions to get his property together, and divide it according to his intention therein expressed.

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William Morgan Orr, the son, died in November, 1848, in Van Diemen's Land. He left children.

*Mr. *Roundell Palmer* and Mr. *Mott*, for the plaintiff, [*474] and Mr. *Torriano*, for the personal representatives of William Morgan Orr, referred to the case of *Winter* v. *Winter*,(a) and the cases there cited. The circumstances of the present case brought it within one of the classes of events for which, in that case, it was held that the Act was intended to provide,—where "the testator, in providing for an absent child, was ignorant of the fact that such absent child was dead."(b)

Mr. *W. Morris* and Mr. *Frith*, for the heir-at-law of the testator, who was the eldest son of William Morgan Orr, and also for other members of the family, argued that there was no intestacy as to the shares given to William Morgan Orr, and that the case was distinguishable from *Winter* v. *Winter* by the material fact, that, in that case, the bequest was originally a valid bequest to a person living at the date of the will. Here the bequest was never valid: the legatee was dead when the will was made. William Morgan Orr was not, therefore, a person "to whom any real or personal estate" was "devised or bequeathed," within the Wills' Act;(c) there was no valid "devise or bequest," and, therefore, no devise or bequest which could either lapse or take effect under the law as it existed before the statute. The case of *Wild* v. *Reynolds*,(d) before Sir Herbert Jenner Fust, was also adverted to, as conflicting with *Winter* v. *Winter*, and proceeding, not upon any difference in the circumstances, but upon a different construction of the statute. The fact that the children in that case had died before the Wills' Act came into operation was not relied upon, or adverted to, and it would even appear that that fact was not in evidence.

*Vice-Chancellor:—I regret that the case of *Winter* [*475]

(a) 5 Hare, 306. (b) Id. 313. (c) See 1 Vict. c. 26, s. 33.
(d) Notes of Cases in the Eccles. & Mar. Courts, Vol. 5, p. 1; 1 Williams on Executors, 183, 4th edit.

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v. *Winter* was not carried before the Lord Chancellor, if any doubt was entertained respecting it. It appeared to me, and I still think, that the words of the statute are large enough to take in all cases in which the issue intended to be benefitted dies leaving issue, and any of the issue survive the testator, if the will was made, and the party for whom the gift was intended, died after the Wills' Act came into operation. I do not think the construction of the word "lapse" should narrow the effect of the rest of the clause. I did not decide the case of *Winter* v. *Winter* without consulting with an eminent Judge upon the point. In the case in the Ecclesiastical Court, the children died before the Wills' Act came into operation, and the decision in that case is not, therefore, inconsistent with *Winter* v. *Winter*. It appears to me, that the construction I then put upon the statute gives effect to the intention of the testator and of the legislature; and I see no reason to depart from that construction.

A second question was, whether the real estate of the testator, which was copyhold of inheritance, part holden of the manor of Canbury or Canonbury, in the county of Middlesex, descendible in gavelkind, and part of the manor of Kimpton or Koe Kennington, in the same county, descendible as at common law, ought under the trusts of the will to be sold, or whether the legatees or parties beneficially entitled under the will, took the real estate as unconverted. Upon this point,

Mr. *Frith*, for the customary heir of W. M. Orr, argued that the legal estate in their several shares of the copyholds [*476] *was devised to the several children of the testator, to whom the same was given by the will: *Patton* v. *Randall*,(a) and therefore, that the infant defendant, the only son of W. M. Orr, as his sole customary heir in both manors, was entitled to the undivided 6-20ths of the copyholds. The direction to the executors to get the property together was not applicable to

(a) 1 J. & W. 189.

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the real estate, and the directions that they should divide or invest it, did not necessarily imply a sale: *Cornick* v. *Pearce*.(a)

Mr. *Roundell Palmer* distinguished this case from that of *Cornick* v. *Pearce*. He cited, also, *Rigden* v. *Pierce*.(b)

The VICE-CHANCELLOR said, he was of opinion that the testator in this case must be understood as directing the conversion of his copyhold estate into personalty. The division of the entire property into a number of shares, and the directions contained in the will as to the investment and disposition of some of such shares, precluded the supposition that the testator intended the copyholds should remain unsold. In *Cornick* v. *Pearce*, it appeared to him that the purposes of the will would, in the circumstances of that case, be effected without a conversion of the whole estate. There was a plain direction that the estate should be enjoyed in specie until the division was to take place; and the literal construction of the will did not require a sale of the whole estate, either for the purpose of the division or the settlement of a moiety.

DECLARE, that, according to the construction and effect of the will, &c., the copyhold estates in &c., ought to be sold, and *that the same have de- [*477] scended subject to a trust for the sale thereof to the respective persons found, &c., to be the heirs of the testator, according the custom of the respective manors of which the same were holden. And declare, that, under the will, the clear residue of the testator's personal estate, together with the moneys to arise from the sale of his real estate, ought to be divided into twenty equal parts or shares; that the defendant Robert Orr, as the legal personal representative of the testator's deceased son William Morgan Orr, is entitled to six of such twenty equal parts or shares, as part of the personal estate of the said William Morgan Orr; and that the defendant Robert is also in his own right entitled to six other of such parts or shares; and that the defendant Alexander Orr is entitled to four other of such parts or shares; and that the defendant Mary, the wife of J. Mower, is entitled to two other of such parts or shares; and that the two remaining parts or shares ought to be invested in the purchase of Consols, for the benefit of the plaintiffs in the first mentioned cause, Mary, Maria, Anne and Alice, and the defendant William, and such other children (if any) of the said Mary Mower, as may be born before the eldest of such children attains the age of twenty-one years.

(a) Next case, p. 477. (b) 6 Madd. 353.

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CORNICK *v.* PEARCE.

1848: Dec. 5th.

The testator gave his real and personal estate to trustees, upon trust to apply the rents, issues and proceeds for the benefit of his two daughters, with a direction, on the youngest attaining twenty-one, to divide the whole into two equal moieties, of which the testator gave one moiety to his two daughters equally, and directed the other to be placed out upon government or real securities, and the dividends and interest thereof to be paid to the daughters for their lives, and upon their death, the said moneys and effects to be divided amongst their children:—*Held*, that there was no conversion by the will, of the moiety of the real estate devised to the daughters on the youngest attaining twenty-one.

A SUIT for the execution of the trusts of the will of J. M. Hansford, instituted by the trustees. The will was as follows:—

"I give, devise, and bequeath unto my two friends Jesse Cornick and John Budden, all and every my freehold, copyhold, leasehold and other estates, of whatever tenure or holding I possess and enjoy the same, situate, lying, and being in the parishes of Bradpole or Loders, or elsewhere in the county of Dorset, and also all my stock in trade, cattle, implements in hus-
[*478] bandry, household *goods and furniture, linen, china, moneys, securities for money, and all other my personal estate and effects of every sort and kind: To hold the same and every part thereof unto the said Jesse Cornick and John Budden and to the survivor of them, his heirs, executors, administrators and assigns, according to the different natures and qualities of the same respectively; upon trust, nevertheless, to receive and take the rents, issues, and proceeds thereof, and to apply the same to the best advantage, for the maintenance and advancement in the world of my two daughters, until the youngest of them shall attain her full age of twenty-one years; and when and as soon as my said youngest daughter shall have attained her said age of twenty-one years, then upon trust to divide the whole of my said estate and effects into two equal moieties, one moiety of which it is my will shall be divided equally between my two daughters, share and share alike; and the other moiety I direct my trustees to place out on government or real securities, the dividends and

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interest of which I give and direct to be paid to my two daughters, during the term of their natural lives; and upon the death of my said daughters, then upon trust to divide the said moneys and effects amongst the children equally. If either my said daughters shall die leaving a husband surviving, then it is my will and desire that the husband shall enjoy her share for his life, and upon his decease such share shall come back to the surviving daughter, her executors, administrators and assigns."

After giving some specific legacies, the testator directed that all his estate, both freehold and personal, should be subject to the payment of his debts and funeral and testamentary expenses; and he appointed the said two persons his executors.

*The testator died in 1837, leaving his two daughters [*479] Susannah and Phœbe surviving; Phœbe, the younger daughter, attained twenty-one on the 9th of April, 1839. Both daughters married, and died leaving their husbands surviving. Phœbe died in December, 1840, leaving Susannah her heiress-at-law, and Susannah died in October, 1841, leaving her infant daughter Susannah Axe Pearce her heiress-at-law.

Phœbe and her husband had, by a post-nuptial settlement, made in October, 1840, conveyed an undivided fourth part of the real estate to a trustee, upon trust for the husband and wife for their respective lives, with remainder as they or the survivor of them should appoint, and in default of appointment, for the husband in fee. The Master found that no appointment had been made.

Mr. *Prior*, for the plaintiffs.

The *Solicitor-General* and Mr. *Kinglake*, for the husband and administrator of Susannah, argued that the whole of the real estate must be taken as converted into personalty, upon Phœbe attaining her majority in April, 1839. The direction to divide the estate at that time, and invest a moiety in government securities, necessarily implied a direction to sell.

Mr. *Wood* and Mr. *Batten*, for the infant daughter and heiress of

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Susannah, denied that, by any necessary implication, a sale of the estate was directed. The settlement contemplated by the testator might be effected by a charge on the estate, without a sale, or by a sale of a moiety. They also contended, that the settlement made by Phœbe, in October, 1840, was [*480] voluntary and *ineffectual: *Holloway* v. *Headington*;(a) and that, at her death, Susannah took the other fourth part of the real estate which had now also descended upon the infant.

Mr. *G. L. Russell*, for the husband and administrator of Phœbe, relied on the fact, that the conveyance of October, 1840, was executed with such formalities as would have passed the legal estate of the wife at law, and that the case was one in which equity would follow the law.

VICE-CHANCELLOR:—I do not think the argument is conclusive, that the property must be held to be converted, because, after a division of the estate into moieties, there is a direction to invest one moiety. The direction to invest arises out of and is rendered necessary by the settlement of the property which the testator had in view. I think the ground upon which I must decide this case is very plain. I must take the words as they stand, and abide by them, unless there is something in the will which is repugnant to their strict meaning. The property is to be enjoyed in specie, and at a certain period there is to be a division of one moiety between the two daughters. As to the remaining moiety, the trusts are to invest it. If the testator had said that the moiety of the estate was to be sold for the purpose of the investment, the case against the conversion of the other moiety would have been too clear to have admitted of an argument. Construing the words strictly, there is no direction which requires a conversion, except as to the moiety which is to be settled. As to that moiety alone, is there an act to be done which makes a sale necessary? The words apply only to the moiety after the division has been made.

(a) 8 Sim. 324.

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*It is very improbable that the testator contemplated the sale of part and not of the whole estate; but the literal construction of the will does not make it necessary to imply a direction to convert the whole. [*481]

DECLARE, that the defendant Susannah Axe Pearce, as the heiress-at-law of her deceased mother Susannah, is entitled to one-fourth part of the clear residue of the testator's real estate, together with the interest arising therefrom since the 24th of October, 1841, when the said Susannan died. Declare, that the defendant [the husband of Susannah] is entitled to one-fourth part of the residue of the testator's personal estate, together with the income arising therefrom, from the 9th of April, 1839, during the lifetime and since the death of the said Susannah, and also to the income arising from the said one-fourth part of the real estate of the said testator, from the said 9th of April, 1839, and during the life of the said Susannah. Declare, that the defendant [the husband of Phœbe] is entitled to one-fourth part of the clear residue of the testator's real and personal estate, with the income arising therefrom, since the 9th of April, 1839. Declare, that the defendants [the two husbands] in right of their respective wives during their lives, and after their respective deaths in their own right, as tenants for life, each of one-fourth part of the said testator's estate became entitled as from the 9th of April, 1839, until the realization of the testator's estate, each to the yearly sum of 12*l.* 6*s.* 9*d.*,(*a*) being the income which would have been produced by the investment of one-fourth part of the clear residue of the testator's estate.

(*a*) This was the result, as found by the Master, of what the income produced by the moiety of the clear residue of the real and personal estate would have been, if the same had been converted into money and invested in Consols at the end of twelve months from the testator's decease.

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[*482] *WARING *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

1849: June 2d, 4th, 5th, 6th and 7th.

The plaintiffs contracted to execute works on a railway, to the satisfaction of the engineer of the company, by the 1st of October, 1848, making such alterations in, and hastening the works, as the engineer should direct; and the company agreed to pay for such works a stipulated sum, and thereof to pay a proportionate part monthly, according to the value of the works which the engineer should certify to have been done, retaining 5*l.* per cent. of the certified amount; and the contract provided that all disputes as to fact, discretion or opinion, were to be referred to the absolute determination and award of the engineer, whose decision was to be final, and without appeal; and if the engineer should be dissatisfied with the works, the company might take possession of and complete the same, at the expense of the plaintiffs, after giving them fourteen days' notice. The works were delayed, with the assent of the company, but in January, 1849, the engineer required the works to be prosecuted with increased speed, and insisted that the line should be opened on the 1st of June. On the 21st of May, the company gave notice to the plaintiffs, in the terms of the contract, that they would, at the expiration of fourteen days, take possession of and proceed with the works. The plaintiffs thereupon filed their bill to restrain the company from taking such possession, alleging, that when the plaintiffs were proceeding with due speed, the engineer had, by the authority of the directors, ordered that the works should be delayed for a considerable time; that the company had waived the completion of the works by October, 1848; and that the plaintiffs were only bound to carry on and complete the same at a rate computed on the footing of the original contract, and modified by the delay which the company had required; that the engineer had, by the order of the directors, given monthly certificates for less than a fair proportion of the contract sum, according to the work actually done at such times; that a large sum was due to the plaintiffs, which had not been paid; and that the company had not, in fact, paid all the sums which had been certified. The bill denied any default on the part of the plaintiffs, and charged that the notice was given for the fraudulent purpose of avoiding the payment of sums due to the plaintiffs, and of ejecting them from the works, and procuring other persons to finish the works at an earlier period than the plaintiffs were bound to do. The bill also prayed an account of what was due to the plaintiffs from the company in respect of the works, and an injunction to restrain the company from proceeding against the plaintiffs for penalties under the contract, on the ground of their non-completion.

Upon demurrer by the company, it was objected, first, that the contract had not been completed on the part of the plaintiffs, and that it was not a contract of which, as against the plaintiffs, if they had been defendants, the court could have decreed a specific performance; and, secondly, that the entire control of the works

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was by the contract given to the engineer, whose decision was to be without appeal; but,

Held, that the plaintiffs were entitled to the aid of a court of equity, and that the demurrer must be overruled.

It is no objection to relief, in such a case, that it depends on a variation of or a departure from the contract made by the directors and officers of an incorporated company, such variation or departure not being made under the authority of their common seal.

THE bill stated an agreement, dated the 2nd of March, 1847, made between the plaintiffs and the defendants, and under the common seal of the latter, whereby the plaintiffs contracted to construct and lay down a specified portion of the railway, extending for about 10 miles, according to the directions from time to time, and in all particulars to the complete satisfaction of John Fowler, the then engineer, or the engineer for the time being of the *Company, in the order, manner, and form [*483] shown upon the specification and working plans then prepared by John Fowler, and all such future and other plans, drawings, and documents as might thereafter be furnished by the engineer for the time being, in his discretion, within the prescribed limits of deviation; and that the whole of the said works should be completed on or before the 1st of October, 1848, time being thereby admitted to be of the essence of the contract. The contract provided, that the plaintiffs should also, within the same time, do such works as might be required by the engineer or his deputies or assistants, if such works, although not mentioned in the contract or specification, might be reasonably inferred therefrom, without any extra charge to the Company; and that any alterations, additions, or omissions, desired by the Company or their engineer, during the progress of the works, however extensive or important the same might be, should be complied with and executed by the plaintiffs, the extra expense or saving thereby occasioned to be ascertained by the engineer of the Company, according to his uncontrolled discretion, and added to or deducted from the gross sum payable to the plaintiffs; and nothing contained in the contract as to the alterations, additions, or omissions, was to affect the covenant as to the time of completion of

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the works. If the works were not completed by the time named, the plaintiffs were to pay 150*l.* per diem as stipulated damages, from the last day thereby limited, until the day when the engineer of the Company should certify the whole to be completed, such certificate not to be unreasonably withheld or delayed; and the foregoing provision was not to prevent the Company from recovering further or other damages for such non-completion. If the plaintiffs should not in every respect abide by and fulfil the stipulations of the contract and the specification, (save as the same might be varied by the direction [*484] *of the Company as aforesaid,) or in case of delay or default, or if they should not complete the works within the time limited, and to the entire satisfaction of the engineer, the Company were to be at liberty, after the expiration of fourteen days' notice to the plaintiffs, to purchase and provide all necessary materials, and employ competent workmen to prosecute and complete or expedite the prosecution or completion of the works; and the Company might retain and deduct the costs of such materials and their expenses and damages arising from any such breach of the contract, from any money which might be payable to the plaintiffs under the contract. In case of the exercise of such power by the Company, the plaintiffs were not to hinder the Company from prosecuting or completing the works, or from using or applying for that purpose any materials or implements belonging to the plaintiffs which might be near the works, for the loss, wear, and tear of, and damage to which materials or implements, the Company were not to be answerable. The materials and things brought upon or near the works, to be used thereon, with some exceptions, were not to be removed until the completion of the contract, and were, until then, to be considered as equitably mortgaged to the Company, for the security of their payments and advances for the full performance of the contract. The Company were to pay to the plaintiffs 112,000*l.* (subject to the stipulations as to increase and diminution) for the execution of the works, by monthly instalments, as the engineer should upon being furnished by the plaintiffs with an account in writing, at the end of any month, certify to be the proportionate value of

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the materials actually used and worked up, and of the work actually done by the plaintiffs within the said month, the Company retaining 5*l.* per cent. of such certified value, until the fulfilment of the contract. In case possession should not be given of any lands essential *to the prosecution of the [*485] works, such delay was not to prejudice the contract, but the time for the completion of the works was to be enlarged for such length of time as, in the opinion of the engineer, might be lost to the plaintiffs by reason of not having possession. And lastly it was agreed between the parties, that if any dispute should, arise in respect of the said matters, whether of fact, discretion, or opinion, the same was to be referred to the absolute determination and award of the said John Fowler, or other the engineer of the Company, and his decision was to be final and conclusive, and without appeal; and in case the engineer should refuse to act as such referee, then each of the parties was to appoint an arbitrator, who were to choose a third person, and the decision of such three persons, or any two of them, was to be in like manner final and conclusive.

Among the general conditions and specifications referred to in the contract, it was provided, that the engineer should at all times have power to direct the contractor to facilitate or push the works, whether partially or wholly, and of whatever kind or nature, and the plaintiffs were, immediately on such directions being given, to increase the number of their workmen and carry the same into effect.

The bill stated, that, from the time when they commenced the works down to about the 12th of November, 1847, the plaintiffs proceeded in the execution thereof in such a manner as would have insured the completion of the works before the time limited by the contract; and that, on the 1st of November, 1847, the value of the works actually done by the plaintiffs, and for which they were then entitled to receive payment, subject to the deduction of 5*l.* per cent., amounted to more than 21,000*l.*, and that the amount actually paid to *the plaintiffs by [*486] the Company up to the same time, amounted only to 17,500*l.*; and, although the plaintiffs had regularly furnished the

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Company with a monthly statement of the works done, they were unable to obtain from the Company any further payment; that, having entered into the agreement on the faith of the Company duly observing the stipulations on their part, and relying on the payments being regularly made, the plaintiffs were exposed to serious loss and inconvenience, inasmuch as they had every week to pay very large sums in wages and other expenses; that the plaintiffs had an interview on the subject with Fowler, on the 12th of November, 1847, and the plaintiff Henry Waring then complained that the sums paid by the Company had been so inadequate to the work done, and requested Fowler to give his certificates for the future on a more just and liberal scale, to which Fowler replied, that he would see what he could do; that Fowler stated, that the Company did not require the completion of the works within the time specified, and that he authorized the plaintiffs to make arrangements for proceeding more slowly in the execution thereof, and in particular gave orders for delay as to certain part of the works, although it would have been advantageous to the plaintiffs if they had proceeded at the rate originally required; that, notwithstanding such diminished rate of progress, the sums actually paid by the Company from time to time, in respect of the works, fell very far short of what was actually due to the plaintiffs; that, in October, 1848, the Company was very much embarrassed, and unable to provide money for the payments falling due; and that, upon the representations of the directors, made at a meeting on the 24th of October, 1848, which the plaintiffs and other contractors had been invited to attend, that the Company was unable to continue cash payments,

[*487] and, at the request of the directors, the plaintiffs *consented to receive certain bills of exchange and debentures, not in satisfaction, but by way of security for part of the sums falling due to them from the Company.

The bill then stated, that, in January, 1849, the plaintiffs received a letter from Fowler, urging the completion of the works, ready for the government inspectors, on the 13th of May, 1849. The bill alleged, that the plaintiffs, immediately on receiving such letter, proceeded with all possible speed, and at a more rapid

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rate than would have been necessary for completing the works within the contract time, if such rate of proceeding had been pursued from the commencement. On the 16th of February, Fowler wrote to the plaintiffs a letter, expressing his dissatisfaction with the state of the works. On the 13th of March, Fowler again wrote to the plaintiffs, stating that he should be glad to hear they had completed their arrangements for opening the line on the 1st of June, 1849. The bill stated some other letters which passed between Fowler and the plaintiffs, the former complaining that the work was not sufficiently advanced, and the latter stating that it would be impossible to accomplish it by the time named, and complaining that the payments had not been duly made. The last of the letters of Fowler, dated the 14th of May, stated that it was clear that the Company must take the work into their own hands; and, at an interview on the 22nd of May, Fowler said he was determined to have the line open by the middle of July.

The bill set forth a notice, dated the 21st of May, 1849, from the solicitors of the Company to the plaintiffs, which stated, that, owing to the various neglects, defaults, and breaches of the contract, by the plaintiffs, therein alleged, the Company would, immediately after *the completion of fourteen [*488] days from the time of notice, purchase materials and employ competent persons for the completion of the contract, and hold the plaintiffs liable for the damages the Company might thereby sustain; the notice also required the plaintiffs not to remove their plant or materials.

The bill denied all the breaches of contract stated in the notice, and alleged that the plaintiffs had done certain extra works, for which they had not been paid by the Company; and that, on the 1st of May, 1849, the plaintiffs had executed works under the contract, to the amount of 102,786*l.* 2*d.*, subject to the deduction of 5*l.* per cent.; and that the extra work amounted to the sum of 8932*l.* 15*s.* 3*d.*; and that the plaintiffs had received, on account of such works, only 98,000*l.* or thereabouts, and 2000*l.* in debentures, and that more than 10,000*l.* was due to the plain-

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tiffs; but that Fowler unjustly and unreasonably withheld his certificates in respect thereof.

The bill charged, that, under the circumstances, the Company had waived the completion of the contract by the 1st of October, 1848, and, in consequence of such waiver, the plaintiffs were only bound to carry on and complete the works at a reasonable rate, and within a reasonable time, computed on the footing of the original contract, but modified by the delay which had taken place at the instance and with the assent of the Company; and that the plaintiffs were only bound to proceed with the works at such a rate of progress as would, if adopted from the commencement, have sufficed for the entire completion of the works within the contract time.

The bill charged, that the notice was given for the fraudulent purpose of evading or postponing the payment [*489] *of the sums due to the plaintiffs under the contract, and for the purpose of ejecting the plaintiffs from the works, and procuring other persons to finish the same at an earlier period than the plaintiffs, under the circumstances, were bound to do; that the engineer had, for such purposes, fraudulently avoided giving the plaintiffs any precise and definite instructions as to the increased amount of power or materials which he required them to employ; that, at the time of giving the notice the plaintiffs had not made any default in carrying on the works; and that, until the 8th of January, 1849, the plaintiffs had not received any instructions to expedite the same, but the same had, ever since that date, been carried on at a rate of progress considerably exceeding what would have been necessary if the previous delay, at the instance of the Company, had not taken place; that the plaintiffs had always had on the works an ample supply of plant and materials; that the Company was unwilling or unable to pay the sum due to the plaintiffs, and, in order to defraud them thereof, Fowler, by the order of the directors, had unjustly and unreasonably withheld the certificates, and had wilfully and knowingly given certificates for smaller sums than were really due; and had, by the order of the directors, unjustly withheld the certificates, and given such insufficient certificates, for the

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purpose of compelling the plaintiffs to complete the works within an unreasonable time, and to carry on the same at a greater rate than that at which they were bound to carry on the same, having regard to the said circumstances.

The bill prayed, that it might be declared that the plaintiffs were not bound by the stipulations of the contract of the 2nd of March, 1847, as to the completion of the works within the time thereby limited; and that the Company had waived all right to insist on any *penalty, or forfeiture, or damages, [*490] by reason of the non-completion of the works within such time; that an account might be taken of what was due to the plaintiffs from the Company in respect of the works included in the contract and the extra works; and that the Company might be restrained by injunction from removing the plaintiffs from the works, or otherwise disturbing or hindering them in their execution, and from taking possession of the plaintiffs' plant and materials, or furnishing or providing materials and implements, or engaging or employing agents or workmen for executing the works, or prosecuting or executing the same,—from exercising the rights given to the Company by the contract, with reference to the materials or implements brought by the plaintiffs upon the works, from insisting on any rights of forfeiture or penalties under the contract, by reason of the non-completion of the works within the said time, and from commencing or prosecuting any action or suit against the plaintiffs, for the purpose of enforcing any such forfeitures or penalty, or of recovering any damages on account of the non-completion of the works within such time.

The Company demurred to the bill for want of equity.

The *Solicitor-General* and Mr. *Osborne*, in support of the demurrer, contended that there was no case for the interference of a Court of equity,—first, because the agreement was one of which the Court could not decree a specific performance, and in which, therefore, the Court would not interfere against one of the parties while it could give no relief to the other: *Kemble* v.

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Kean,(a) *Kimberly* v. *Jennings*,(b) *Ranger* v. *The Great* [*491] *Western Railway Company*.(c) Secondly, it appeared *by the bill that the power of deciding upon the rights and duties of the parties, in the execution of the terms of the contract, had been conclusively committed to the engineer, and that the decision of the engineer had, in fact, been adverse to the plaintiffs on every point: *Ranger* v. *The Great Western Railway Company*,(d) *Heap* v. *Archbishop of Canterbury*.(e) Thirdly, that any departure from the agreement, in order to be binding upon the Company, must be, like the agreement itself, under the common seal of the Corporation, or authorized by some instrument under such seal: *Mayor &c. of Ludlow* v. *Charlton*.(f) They contended, that the general charges of fraud were of no weight, where the particular allegations, to which they must be referred, did not, as they insisted in this case they did not, amount to such fraud as would give the Court jurisdiction: *Munday* v. *Knight*.(g)

Mr. *Wood* and Mr. *Erskine*, for the plaintiffs, on the first point which had been urged on behalf of the defendants, cited *Dietrichsen* v. *Cabburn*(h) and *Storer* v. *The Great Western Railway Company*.(i) On the second point,—that the absolute control of the works, without appeal, had been committed to the engineer,—they relied on the allegations in the bill, of the partial and corrupt conduct of the engineer, which had been deemed a sufficient ground of equity in the case of *M'Intosh* v. *The Great Western Railway Company*.(k) On the objection, that the waiver or alteration of any of the terms of the contract could only be under the common seal of an incorporated Company, [*492] they cited *Faviell* v. *The Eastern Counties* *Railway Company*(l) and the Companies Clauses Consolidation Act, stat. 8 Vict. c. 16, s. 90. The case of *Nixon* v. *The Taff Vale Railway Company*(m) was also cited.

(a) 6 Sim. 333, (b) Id. 340. (c) 1 Railw. Cas. 50.
(d) 1 Railw. Cas. 48, 49. (e) Cited Id. 49. (f) 6 M. & W. 315.
(g) 3 Hare, 497. (h) 2 Ph. 32. (i) 2 Y. & C. 48.
(k) Before the Vice-Chancellor Knight Bruce, December 12th and 14th, 1843; De G. & S. ; S. C., 2 Hall & T. 250.
(l) 2 Exch. 344. (m) 7 Hare, 136.

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VICE-CHANCELLOR:—It is impossible to read Lord Cottenham's judgment, in the case of *Dietrichsen* v. *Cabburn*,(a) and to suppose he intended to throw any doubt on what was considered the settled law of the Court. The Court does not give relief to a plaintiff, although he be otherwise entitled to it, unless he will, on his part, do all that the defendant may be entitled to ask from him; and if that which the defendant is entitled to, be something which the Court cannot give him, it certainly has been the generally understood rule, that that is a case in which the Court will not interfere. In the common case of a bill for specific performance by a purchaser, the Court will not direct a conveyance unless the plaintiff will pay what is due. The Court can decree that, and the Court will, therefore, in that case, give relief; but if that which the plaintiff is to give on a bill for specific performance be something to be done at a future time, and which the Court cannot enforce, the understood rule has always been, that the Court in that case will not give relief, and I do not think the Lord Chancellor meant, in the case of *Dietrichsen* v. *Cabburn*, to throw any doubt whatever on that rule. If, in the present case, the allegations came to this, that the plaintiffs had not done all which on their part they were bound to do, and could not at once perform it, I apprehend the case would fall within the general rule. It is, however, contended, that, according to the allegations in the bill, the plaintiffs, up to the time of complaining, had performed all they were bound to *do; but, if this be so, still there remains [*493] behind something to be done by the plaintiffs; and if that which remains to be done by them hereafter be something the Court cannot secure to the defendants, I cannot help thinking the case may fall within the observations of the Vice-Chancellor in *Ranger* v. *The Great Western Railway Company*.(b) The bill asks for an account, but if the account be inseparably connected with the general subject of the contract, then, unless I can decide the general question in the plaintiffs' favor, the case of the account will not help them. If I am to hold that this is a

(a) 2 Ph. 52. (b) 1 Railw. Cas. 50.

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contract which the Court cannot specifically perform, it becomes a material question, whether the account is inseparably connected with it.

One of the objections taken to the account being decreed is, that Mr. Fowler and the engineers for the time being were selected by the parties themselves to be the sole judges; and I think, that if it now appeared that Mr. Fowler, or the engineers for the time being, in the discharge of their duties, had honestly addressed themselves to the question of what was due, and in the exercise of their discretion had determined what was due to the plaintiffs, and accordingly given certificates of the sums the plaintiffs were entitled to, there would be no equity for this Court to interfere. In that case the judge whom the parties had selected would have decided the case, and from that judge there would, according to the settled rule be no appeal. In such a case it would be as strong,—it cannot be stronger,—than the case of an arbitrator. If, however, the judge whom the parties had agreed shall settle the question between them either refuses to decide the question, or acts corruptly in forming his decision, then, however [*494] the parties may *have agreed that the judgment of a given individual shall be conclusive, and that the works shall not be ascertained by measure and value, the defendants cannot be heard to say that the corruption of their own agent, or his refusal to act, is to deprive the plaintiffs of their due remuneration for the work which they have done. If, in such circumstances, there be no mode of ascertaining the amount of the work but measure and value, the party must be entitled to be paid according to measure and value.

The question is, whether the allegations of this bill do or do not amount to this, that the selected judge, Mr. Fowler, or the other principal engineer, have done one of two things: that they have either not addressed themselves to the question of what was due, or, having done so, they have, for the corrupt purpose alleged in the bill, given a certificate for less than in point of fact they knew at the time was due to the plaintiffs; and whether it is to be considered as a case in which that fact would be conclusively proved at the hearing of the cause supposing the bill to

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be taken *pro confesso*, or the defendants to have admitted by their answer the truth of the allegations.

I entirely accede to the argument, that a general charge of fraud, coupled with a special case, which is intended to make out the fraud, will not be treated as of any importance unless the particular facts alleged amount to a fraud; but the allegation of a fraudulent purpose in doing a particular act is a different thing from a general and vague charge of fraud. It certainly appears to me, that, on general demurrer, I must hold these charges of fraud to be in form sufficient. The value of the allegation is another question.

If the allegation, that certificates have been fraudulently *withheld, be sufficient as a foundation for the [*495] interference of this Court, the truth of the allegation must be in some manner tried. There must be an account taken, or some mode must be adopted for ascertaining the amount of what is due to the plaintiffs. The question may be, whether that account is to be taken at law,—whether the measure of damage is to be ascertained at law, or in this Court.

The effect of what has been done is, that the plaintiffs are deprived of the right they had at law, under the contract, to proceed on the certificates; and they are placed in this difficulty, that whereas they were entitled from month to month to have the amount due to them ascertained, the whole of the work has become buried in a number of months, and they have to go back and ascertain the amount due to them under great disadvantage.

Another difficulty suggested in the way of relief in this case is, that it is not complete: that what is asked by this bill is only part of the right. If the case can be founded on the question of account, independent of jurisdiction in respect of fraud, the proposition may be, that every month a bill might have been filed to ascertain what was due to the plaintiffs. I am not certain that the Lord Chancellor has not gone the length of saying that that might be done, in one of the earliest cases he decided, when he was Master of the Rolls. A bill was filed to restrain the infringement, by one of the firm, of the partnership contract during its continuance. Lord Cottenham in that case said, that the part-

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nership was to go on for a certain number of years, and if, in order that it may go on beneficially to both parties, there is some one thing that the Court can enforce, there is no reason [*496] *why the Court should not enforce that one thing, and still leave the partnership undisturbed.(a)

Suppose the case of a partnership, in which one partner is to have a salary allowed to him in proportion to the amount of the profits made, and that, by the contract, the partnership accounts are to be settled at the end of every six months, with the view of showing the state of the profit and loss account,—if the other partner were to refuse to come to any settlement of accounts so as to ascertain the amount of the allowance, the Court, by refusing to interfere, might permit the party to be deprived of his allowance until the end of the partnership.

If, in this case, all that the plaintiffs are to do had been done, the case of *M'Intosh* v. *The Great Western Railway Company* is an authority that the plaintiffs are entitled to the assistance of a Court of equity. There has, it is true, been no suppression or misrepresentation of facts; and, perhaps, the wrong of which the plaintiffs complain, through a moral fraud, is not a fraud in the technical sense of the word; and, if the plaintiffs were under no difficulty in enforcing their rights at law, it might not be a wrong which would give this Court jurisdiction.

June 6th.—VICE-CHANCELLOR:—I have referred to the cases which were mentioned in argument, and particularly to the case of *M'Intosh* v. *The Great Western Railway Company;* and, in order to try the question now before me, I have supposed, [*497] first, *that all the works contracted to be done by the plaintiffs had been done, which then brings this case within that of *M'Intosh* v. *The Great Western Railway Company;* and upon that view of the case I have read the charges in the bill.

It appears to me that this case is not substantially distinguishable from *M'Intosh* v. *The Great Western Railway Company;* and

(a) See *Taylor* v. *Davies*, 4 Law Journ. N. S. Chanc. 18.

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I could not, therefore, allow this demurrer without disregarding that case, which, upon the best consideration I can give to it, is, I certainly think, well decided. The principle of the Court is, that, if a wrong be committed by the species of fraud suggested in that case, this Court has jurisdiction to give relief. I do not say to what extent it will go.

The only question, then, is, whether the fact, that the works are not complete, and that something remains to be done, makes any difference. It seems to me that it does not. There may be some inconvenience as to the number of cases in which the plaintiffs might have had occasion to file bills; they have, however, acquired a right which is perfect in itself, and of which right they have been deprived by the alleged acts of the defendants; and where there is an integral right, the fact that the whole dealings between the parties would involve something more, does not, according to the modern cases, constitute any objection to the interference of the Court as to that particular right. I am not sure whether the observations of Lord Eldon, as to having the entire transaction wound up by the suit, would have extended to this case.

I am of opinion, that the case is one in which the plaintiffs would be entitled to some relief. I am not called upon now to say what that relief will be. I follow the case of *M'Intosh* v. *The Great Western Railway* *Company, in holding [*498] that this demurrer must be overruled.

Affirmed by the Lord Chancellor. 2 Hall & T. 250.

June 7th & 8th.—The plaintiffs moved for the injunction to restrain the Company from taking possession of the works and materials. The Company consented not to take the plant and implements belonging to the plaintiffs. The injunction was refused.

EVANS *v.* DAVIES.

1849: March 7th.

Construction of the word "children" as under the special words of a will, describing both legitimate and illegitimate children.

A testator bequeathed legacies to his *children*, M., S., J., W., and N., appointing his wife their guardian, and directing the application of the interest for their maintenance. He then directed that the remainder of his personal estate, and the residue of the proceeds of certain real estates, should be divided between all his children of his first and second marriages. The testator then charged other parts of his real estates with certain annual payments, and directed that the remainder of the rents and profits should be divided among all his *said children*. The testator then directed, that, in case one or more of the children by his second wife should die without issue under twenty-one, their shares and legacies should go between his second wife and such of his *children* by her as should be living, and he gave the residue of his estate to all and every of his *children*:—*Held*, that the said *S.*, who was a child by the second wife before marriage, was within the description of "children" contained in the will, and entitled to share with the legitimate children of the testator in the residuary gifts.

ROBERT MORGAN, by his will, dated in 1840, after devising his real estate to trustees, as to a part thereof, for sale, and bequeathing his personal estate to the same trustees, whom he appointed his executors, and directing that they should stand possessed of the trust-moneys, in the first place for the payment of his debts and funeral and testamentary expenses, proceeded as follows:—"In the second place, to pay the sum of 1000*l.* to each of my children, Martha, Sarah, Joseph and William, and the sum of 700*l.* to my son Noah; and in the third place, to divide the remainder, if any, equally between all my children by my first and second marriage, share and share alike." The testator then directed that the said sums of 1000*l.* a piece should be paid to his said children, Martha, Sarah, Joseph, and William, on their respectively attaining the age of twenty-one [*499] years, or being married by consent of his said *trustees and his wife, whom he appointed their guardians during their minority; and that, in the meantime, the principal should be invested, and the interest applied towards their maintenance and education. The testator then declared the trusts of the

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residue of his real estate, after certain payments were made thereout (except an estate called Brynyffynon) to be as follows:—"To divide the remainder of the said rents and profits yearly and every year between all my said children, share and share alike, as tenants in common." The testator then declared, that, in case his son Noah or daughter Martha should die without leaving issue, then the legacy and share of the one so dying should go to the other of them; but, in case both of them should die without leaving issue, then their said legacies and shares should go to his children by his said second wife only, share and share alike. The testator then proceeded:—"In case any one or more of my children by my said second wife should die without leaving issue before he or she attain the age of twenty-one years, the share or interest of each one or more in my last-mentioned real and personal estate, together with the hereinbefore mentioned legacies bequeathed to them respectively, to go between my said second wife and such of my children by her as shall be living, share and share alike, to their and each of their executors, administrators, or assigns; but, in case all my children by my said second wife should die without leaving issue before they respectively attain the age of twenty-one years, then their respective shares and interests in my said real and personal estate to go to my said second wife, if she should survive them, and to her executors, administrators, and assigns, forever; but, in case of her decease, such shares and interests to go to my children by my first wife, or such of them as shall be living, share and share alike; and, in case none of my children by my said first wife shall be then living, then such shares and interests to go to their issue lawfully *begotten, share and share alike; and, in default of any such issue, to the persons entitled thereto as next of kin. I hereby further direct and declare, that, on the decease of my said second wife, the annuity bequeathed to her under this my will shall go to such of my children as shall be living at the time of her death, share and share alike." The testator then devised the Brynyffynon estate to his trustees, upon trust to permit his wife, during her life, and also his children respectively

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who should be unmarried, until the youngest of his said children should attain his or her age of twenty-one years or be married, to occupy the same, they paying a certain rent. And, subject to such occupation, the testator directed that the rents and profits thereof should be divided amongst his children in the same manner as he had given the rents and profits of the residue of his real estate. The testator then gave and devised all the residue of his estate to his trustees, upon trust to pay and apply the same unto and amongst all and every of his children, share and share alike.

It appeared by the Master's report, that Noah and Martha, and a married daughter named Mary, were children of the testator by his first wife, and that Sarah, Joseph, Robert, and William were children by his second wife, but that Sarah was born before marriage.

The question was, whether Sarah could take any interest in the property devised and bequeathed by the testator to his children generally.

Mr. *Kenyon Parker* and Mr. *Daniel*, for the trustees.

The *Solicitor-General*, Mr. *Sandys*, and Mr. *C. M. Roupell*, for the infant defendants, (other than Sarah,) contended,
[*501] that the word "children" must be construed *to mean legitimate children exclusively: *Wilkinson* v. *Adam*,(a) *Fraser* v. *Pigott*,(b) *Bagley* v. *Mollard*,(c) *Dover* v. *Alexander*.(d)

Mr. *Temple* and Mr. *Milne* appeared for other parties.

Mr. *Selwyn*, for the defendant Sarah.

The testator has upon his will defined the meaning which he attached to the word "children," by describing Sarah as one of them. There is no absolute rule that legitimate and illegitimate children may not take under the same description, if it be sufficiently plain that such is the meaning of the testator. The rule

(a) 1 V. & B. 422. (b) 1 Younge, 354. (c) 1 Russ. & My. 326.
(d) 2 Hare, 275.

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is, that, in the primary sense of the word, legitimate children only are comprehended; but if such a restriction be inconsistent with the general disposition of the will, the more enlarged meaning may be adopted. The only consistent interpretation of the language in this case would include Sarah: *Beachcroft* v. *Beachcroft*,(a) *Bayley* v. *Snelham*,(b) *Gill* v. *Shelley*,(c) *Meredith* v. *Farr*.(d)

The case of *James* v. *Smith*,(e) and 2 Jarman's Tr. Wills, p. 144, were also cited.

VICE-CHANCELLOR:—There is no doubt as to the general rule, that, if the word "children" be so used by the testator that it can be possibly understood to mean legitimate children only, it will not be extended to others.[1] If, however, the will *plainly refers to given individuals, and it be clear that [*502] they are described by the word "children," the Court is not precluded by any of the received rules of law from giving effect to the intentions of the testator. There cannot be any doubt in this case of the testator's intention to include Sarah amongst the children to whom he has given the residue of his property. It appears to me, that, in order to prevent Sarah from taking, I must give to the word "children" in this will a meaning contrary to the language of the testator.

(a) 1 Madd. 430. (b) 1 S. & S. 78. (c) 2 Russ. & My. 336.
(d) 2 Y. & C. C. C. 525. (e) 14 Sim. 214, 216.

[1] *Hone* v. *Van Schaick*, 3 Barb. Ch. Rep. 488; S. C., 3 Edw. Ch. Rep. 474; *In matter of Hallet*, 8 Paige's Ch. Rep. 375; *Gardner* v. *Heyer*, 2 Paige's Ch. Rep. 11.

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ASHHURST *v.* MILL.

MILL *v.* ASHHURST.

1847: March 15th. 1848: April 15th and 27th; Dec. 14th.

A sum of money was charged upon an estate as portions for younger children, according to the appointment of the parents, to take effect after their deaths; and the parents, in contemplation of the marriage of their daughter, and of a settlement which her intended husband proposed to make, appointed 5000*l.*, part of the sum so charged, to the daughter, in case the marriage should take effect.

By a settlement of the same date, a jointure was secured to the daughter by the husband. The marriage took place, and some years afterwards, the father being then dead, an arrangement was made for the sale of the estate, and for the investment in the funds of the sum necessary to provide for the portions. The money was accordingly raised, and invested in the names, among others, of the daughter and her husband, and a declaration executed, in which the trusts of the stock purchased with the 5000*l.* was declared to be (subject to the life-interest of the mother) for the daughter absolutely. After the death of the father and mother and the husband, the Court, at the suit of the representative of the husband, rectified the declaration of trust by declaring the 5000*l.* to be the property of the husband, inasmuch as it did not appear that the husband intended to part with his interest in the fund, or do more than approve of the change of security; the the declaration of trust omitting any recital of the settlement on the marriage, and it appearing from the letters which had passed between the solicitors of the parties, when the declaration was made, that neither of such solicitors was aware of that settlement, or of its effect as to the portion of the daughter.

Variation of the effect of a deed, made for the purpose of carrying into effect a family arrangement, where it contained a declaration of right inconsistent with the actual rights of the parties, and there was no evidence that the inconsistency was known to or contemplated by the parties or their solicitors, or that their actual rights were intended to be altered.

A SUM of 10,000*l.* was, by a settlement of July, 1782, charged upon certain lands, as portions for the younger children of Sir John Morshead and Dame Elizabeth his wife, as the father and mother should by deed appoint, and subject to life interests in the father and mother; a term of 1500 years in the lands was created to raise such sum.

By a deed of appointment, of the 1st of January, [*503] 1800, *between Sir John Morshead and Dame Elizabeth

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his wife of the first part, Selina their daughter of the second part, and Sir Charles Mill of the third part, reciting the settlement of 1782, an intended marriage between Sir Charles Mill and Selina, and that, in prospect thereof, Sir John and Lady Morshead had agreed to appoint 5000*l.*, part of the 10,000*l.*, for the portion of Selina, Sir John and Lady Morshead in pursuance of their power, and in consideration of the intended marriage, and of the settlement which Sir Charles Mill made upon the said Selina, thereby appointed, that, in case the marriage should take effect, the said 5000*l.* should, after their own deaths, be raised and paid to Selina.

By the settlement on such marriage, which was dated also the 1st of January, 1800, Sir Charles Mill, in consideration of the marriage, and of the said sum of 5000*l.*, the portion of Selina appointed by the other deed, granted to Selina and her assigns for her life, in case the marriage took effect and she should survive him, a rent-charge of 500*l.* a year. After the marriage, in March, 1804, Sir Charles Mill having in right of his wife received a legacy of about 2500*l.*, granted to her a further rent-charge of 500*l.* a year for her life, if she should survive him.

Sir John and Lady Morshead had three children, Frederick, John, and Selina. Sir John Morshead died in 1813, leaving Lady Morshead and the three children surviving. Upon his death, the lands comprised in the term of 1500 years became vested in Sir Frederick Morshead, his eldest son, for an estate of inheritance, subject to that term. Subsequently, by an agreement dated in May, 1816, Lady Morshead and Sir Frederick agreed that the lands should be sold, and that, out of the proceeds of the sale, the 10,000*l.* should be invested in the names of trustees for Lady Morshead for life, and, at *her death, for the [*504] parties entitled thereto. The lands were accordingly sold, and the 10,000*l.* was paid to Mr. Hayes, of the firm of Messrs. Budd & Hayes, the solicitors of Sir Frederick and Lady Morshead, and was invested in 9589*l.* 4*s.* 10*d.* Navy 5*l.* per Cent. Stock, in the names of Sir Charles and Lady Mill, John Morshead, and T. P. Hayes.

The question in the cause arose upon an indenture, dated the

28th of August, 1819, being a declaration of trust of the 9539*l.* 4*s.* 10*d.* stock.

This deed was made between Dame Elizabeth Morshead of the first part, Sir Charles Mill and Selina his wife of the second part, John Morshead of the third part, T. P. Hayes of the fourth part, Sir Frederick Morshead of the fifth part, and Edward Morshead and T. H. Budd of the sixth part. It recited the settlement of 1782, the appointment of January, 1800, a subsequent appointment of the other 5000*l.* to John Morshead, the death of Sir John Morshead, the agreement of May, 1816; that administration to the last survivor of the trustees of the term of 1500 years, limited to that term, had been granted to T. P. Hayes; that several parts of the estates had been sold, and the 10,000*l.* paid to T. P. Hayes; that T. P. Hayes had, at the request and by the direction of Dame Elizabeth Morshead, Sir Charles Mill, and Selina his wife, and John Morshead, invested the same in 9539*l.* 4*s.* 10*d.* Navy 5*l.* per Cent. Annuities; and it proceeded as follows:—

"It is hereby witnessed, declared, and agreed, by and between all the parties hereto, and particularly the said Dame Elizabeth Morshead, Sir Charles Mill, and Dame Selina his wife, and John Morshead, do hereby severally agree, declare, and direct, [*505] that they, the said Sir Charles *Mill and Dame Selina his wife, John Morshead, and T. P. Hayes, and the survivors or survivor of them, and the executors, administrators and assigns such survivor, shall stand and be possessed of and interested in the said sum of 9539*l.* 4*s.* 10*d.* Navy 5*l.* per Cent. Annuities, so purchased with the sum of 10,000*l.* sterling as aforesaid, and now standing in their names in the books, &c., upon the trusts hereinafter mentioned, expressed, and declared, of and concerning the same; that is to say, upon trust to pay to or permit and suffer the said Dame Elizabeth Morshead or her assigns to receive and take the interest, dividends, and yearly proceeds of the said sum of 9539*l.* 4*s.* 10*d.* Navy 5*l.* per Cent. Annuities during her life, for her own use and benefit, and after her decease, in trust to assign and transfer one equal half part of the said sum of 9539*l.* 4*s.* 10*d.* Navy 5*l.* per Cent. Annuities, to the said Dame Selina Mill, her executors, administrators, or assigns, to and for

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her or their own absolute use and benefit; and to assign and transfer the other moiety thereof to the said John Morshead, his executors, administrators, or assigns, to and for his or their absolute use and benefit."

The dividends on the fund were paid to Lady Morshead during her life. Sir Charles Mill died in 1835, and his widow Selina afterwards married Mr. Ashhurst. Lady Morshead died in 1845.

Soon after the death of Lady Morshead, it became a subject of dispute whether Mrs. Ashhurst was entitled to half of the 9539*l.* 4*s.* 10*d.* stock, in respect of the 5000*l.* appointed to her by the deed of January, 1800; or whether such half of the fund was part of Sir Charles Mill's estate.

The original bill was filed in November, 1845, by Mr. Ashhurst and Selina his wife, against the trustees *of the [*506] fund and the personal representative of Sir Charles Mill, claiming the moiety of the 9539*l.* 4*s.* 10*d.* stock, under the deed of the 28th of August, 1819. Sir J. B. Mill, the personal representative of Sir Charles Mill, by his answer insisted that the declaration in the deed of August, 1819, was made by mistake. Upon the hearing of the cause, on the 15th of March, 1847, the Court, not entertaining any doubt, that, upon the construction of the deed of the 28th of August, 1819, the plaintiff Selina Ashhurst was entitled to the moiety of the stock, held that the effect of the deed could not be avoided by way of defence, on the ground alleged; and that, in order to determine the rights of the parties, treating the declaration contained in the deed of the 28th of August, 1819, as the result of a mistake, a suit must be instituted to impeach the deed. The Court ordered the original cause to stand over, with liberty to the parties to file a cross bill. In pursuance of the leave thus given, the second suit was filed in April, 1847, by Sir. J. B. Mill, against Mrs. Ashhurst (her husband being dead) and the trustees, alleging that the deed of August, 1819, was only intended by Sir Charles and Lady Mill, and the other parties thereto, to operate as a substitution of the stock for the charge on the land, and not to have any further effect or operation; and it prayed a declaration that a moiety of the stock was a part of the personal estate of Sir Charles Mill,

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and that, if necessary, the deed of the 28th of August, 1819, might be rectified by expunging the declaration of trust therein contained of a moiety of the stock in favor of the defendant Selina Ashhurst, and by inserting, in lieu thereof, a declaration that, after the decease of the said Dame Elizabeth Morshead, the said moiety of the stock should be held in trust for the person or persons who, if the said estates had not been sold, would have been entitled to the moiety appointed to the defendant Selina [*507] Ashhurst of the *sum of 10,000*l.* charged thereon, or in such other manner as the Court should think fit.

The defendant Mrs. Ashhurst, by her answer, said, that she was satisfied from her knowledge of the business-like habits and character of Sir Charles Mill, that he never signed any deed relating to his affairs, without previously knowing its purport; that their marriage settlement of January, 1800, remained in Sir Charles Mill's possession until the year 1824, when he delivered the same to her (the defendant) together with the appointment of the same date, and, at the same time, desired her to keep the same, as they would be of use to her; that she was ignorant of the intention of Sir Charles Mill and the other parties to the deed of August, 1819; however, she believed it was the deliberate intention of Sir Charles Mill that she (the defendant) should have the 5000*l.*, or the stock which represented the same; and she was advised that he had sufficiently indicated such intention by executing the declaration of trust, and by subsequently delivering to her the deed of 1800, accompanied with the expressions referred to.

It appeared that Messrs. Budd & Hayes, the solicitors of the Morshead family, by whom the sale and transactions of 1819 were conducted on their behalf, were ignorant of the contents or effect of the settlement of January, 1800. Mr. Daman, a solicitor of Ramsey, acted in the transaction for Sir Charles and Lady Mill. All that appeared to have taken place in the course of the communications between the parties, having direct reference to their interests in the 5000*l.*, arose upon a question suggested by a conveyancer who examined the title to the estate on behalf of one of the purchasers. He had observed, "If the 5000*l.* appointed

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to Lady Mill was settled, the settlement should be recited, and the trustees *made parties." Mr. Hayes on the [*508] 1st of July, 1819, wrote to Mr. Daman with reference to this inquiry, and requested an answer as soon as possible. On the 17th of July Mr. Daman thus replied to Mr. Hayes:—

"I waited on Sir Charles and Lady Mill myself this day, and they approve of your proposed arrangement for investing the money in the funds; and they are both quite satisfied that the 5000*l.* in question has never been the subject of any settlement whatever. Sir Charles Mill settled a jointure on his wife previously to their marriage, which he afterwards increased; and Lady Mill in particular is quite sure that it was understood that her portion was not to be, and that it never was, settled in any way. As I did not act for Sir Charles Mill at the time of his marriage, I was not before aware of the above circumstances."

Some other parts of the correspondence are adverted to in the judgment. The draft of the declaration of trust of August, 1819, was prepared by Messrs. Budd & Hayes, and approved by Mr. Daman on behalf of Sir Charles and Lady Mill. Mr. Daman had since died. A letter written by him to Messrs. Budd & Hayes, in January, 1820, stated that he had written a full explanation of the business to Sir Charles Mill, and sent his principal clerk to obtain the execution of the deed and the power of attorney, to enable Lady Morshead to receive the dividends. It appeared also that he had made and retained a copy of the declaration of trust for Sir Charles and Lady Mill.

The defendant examined Mr. Cocks, the banker of Sir Charles Mill, who deposed to his capacity for and accuracy in business, and to the improbability, in his opinion, *that [*509] Sir Charles Mill would execute any deed without knowing its effect.

The two causes were now heard together.

The *Solicitor-General* and Mr. *Lloyd*, for Mrs. Ashhurst, insisted upon the plain legal effect of the deed of August, 1819, and contended that there was no evidence of any mistake. Sir Charles

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Mill was not bound to insist upon his marital right to the 5000*l.*, nor was he bound to insist upon the right which the deed of 1800 gave him. There was not the slightest evidence to rebut the supposition that he intended to give the 5000*l.* to his wife. That intention was consistent with, and would perfectly explain the deed of August, 1819; and the wife, by her answer, has distinctly stated her belief that Sir Charles Mill did not intend to exercise his rights so as to deprive her of the benefit of her portion. There was nothing unreasonable in the transaction. In such a state of things, the Court would not depart from the effect of the instrument. If a doubt or ambiguity arose as to the intentions of the parties, the rule of law was, that the deed must be taken as the ultimate expression of that intention: *Marquis of Breadalbane* v. *Marquis of Chandos.*(a) It was not the duty of the party relying upon the instrument to show that it expressed the intention of the parties to the contract; that must be assumed. It lay upon those who sought to alter the import of a deed on the ground of mistake, to prove, by the clearest evidence, that that which was the purpose of all the contracting parties had, by some error in language, failed to be effected Lord Thurlow, in *Shelburne* v. *Inchiquin*,(b) said, "It must be strong irre-
[*510] fragable *evidence;" and Lord Hardwicke, in *Henkle* v. *The Royal Exchange Assurance Company*,(c) said, "It ought to be the strongest proof possible." The equity on the ground of mistake, and not of fraud (*Irnham* v. *Child*,)(d) implied the existence of a common mistake, in which all the parties interested partook. So far from there being evidence of such a common mistake, it was denied by Lady Mill,—it could not appear that it existed in the case of Sir Charles Mill, for he was dead, and the deed which he had executed was the only evidence of his intention in the transaction; and the case against the deed, therefore, entirely failed. The deed was, moreover, a family arrangement, which, independent of the consideration of the strict

(a) 2 My. & Cr. 711, 740.
(b) 1 Bro. C. C. 338, 341.
(c) 1 Ves. 317.
(d) 1 Bro. C. C. 92.

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rights of the parties, the Court would go far to support: *Stockley* v. *Stockley*.(a)

Mr. *Rolt* and Mr. *Prior*, for the representative of Sir Charles Mill, denied that the cases of rectification of instruments, on the ground of mistake, were confined to those where the mistake was common to all parties. If any party to an instrument had parted with an interest which he was not bound, and had not intended, to convey, or if an interest in property, of which a party had the dominion, had been vested in others in a manner contrary to his intentions, the Court would relieve against the error. In this case, there was in fact no doubt that the right of Sir Charles Mill to the fund in question had escaped the attention of the parties; and this was in truth not denied by the answer of Mrs. Ashhurst. They cited *Barstow* v. *Kilvington*,(b) *Duke of Bedford* v. *Marquis of Abercorn*,(c) *Marquis of Exeter* v. *Marchioness of Exeter*.(d)

Mr. *Giffard*, for the trustees.

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*VICE-CHANCELLOR:—The facts necessary to be stated, [*511] in order to show upon what the question depends, are few and simple. In April, 1819, as soon as the sale had been effected, a correspondence was opened between Mr. Hayes, who, with his partner Mr. Budd, were solicitors for the Morshead family, on the one part, and Sir Charles Mill on the other part, with a view to the completion of the conveyances and the other arrangements consequent upon the sale. Sir Charles Mill put the affair into the hands of his solicitor, Mr. Daman, between whom, as solicitor for Sir Charles, and Messrs. Budd & Hayes, or Mr. Hayes on the part of the Morshead family, the correspondence continued down to the end of the year 1819, about which time the deed dated in August, 1819, was executed, that deed having been approved by Mr. Daman on the part of Sir Charles Mill. Mr. Daman is dead, and no material evidence,

(a) 1 V. & B. 23.
(b) 5 Ves. 593.
(c) 1 My. & Cr. 312.
(d) 3 My. & Cr. 321.

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except that which is furnished by the correspondence and the deed itself, is before me. Mrs. Ashhurst does not by her answer suggest that Sir Charles Mill ever communicated to her any intention to alter the title to the moiety of the 10,000*l.*, which he acquired under the deed of 1819, or to give her any beneficial interest in it.

The first observation that occurs is, that the recitals in the deed of August, 1819, do not mention the deed of the 1st of January, 1800, by which Sir Charles Mill became entitled to the moiety of the 10,000*l.* It contains all the recitals material to show the true state of the title, except that. It contains a recital of the agreement between Lady Morshead and Sir Frederick Morshead, that, at the death of Lady Morshead, the 10,000*l.* should go to the persons entitled thereto; and then follows the declaration in favor of Lady Mill and John Morshead, which is in accordance with the *title shown by the recitals, but is not in accordance with the true state of the title as affected by the settlement of the 1st of January, 1800. Now, if there were no intention on the part of Sir Charles Mill to alter the title to the moiety of the 10,000*l.* by the deed of August, 1819, and the trust in favor of Lady Mill was declared upon the supposition that it was hers, that is, if the settlement of January, 1800, was merely overlooked by mistake, it can scarcely, I think, be argued, that Sir Charles Mill, if living, would not have been entitled to be relieved against so plain a mistake. Even in the cases of compromise of disputed rights, arrangements will be set aside, where it can be satisfactorily proved that the parties acted under a mistake. On this point the dictum of Lord Eldon, in *Stockley* v. *Stockley*(*a*) and the case of *Harvey* v. *Cooke*,(*b*) are authorities. If in this case the real purpose of the deed of August, 1819, were to change a security and nothing more, an erroneous declaration of right, proceeding from a mistake such as I now suppose, could not be permitted to affect the actual right. There has been no delay affecting the title to relief. Lady Morshead

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(*a*) 1 Ves. & B. 30. (*b*) 4 Russ. 34.

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died in 1845, and nothing occurred after August, 1819, to call attention to the subject, until her death.

Then, is the alleged mistake made out? It is admitted that the arrangement of 1819 arose solely out of the agreement for the sale of the estate between Lady Morshead and her son; and the letter Mr. Hayes wrote to Sir Charles Mill, in April, 1819, opening the correspondence on the subject, is in accordance with that fact; and it is deserving of notice, that Mr. Hayes in that letter writes about the 10,000*l.*, as if it were unaffected *by any dealings since 1782. By Mr. Daman's letter [*513] of the 9th of April, 1819, in answer to that of Mr. Hayes, from which it appears that Sir Charles Mill had handed the business over to him, Mr. Daman treats the transaction as one in which he is simply to see that the deeds prepared, or to be prepared, by Mr. Hayes on the part of the Morshead family, are in accordance with the rights of Sir Charles Mill. In the next letter, dated the 9th of May, Mr. Hayes, writing to Mr. Daman, says, "Out of the purchase-moneys 10,000*l.* is to be invested to answer the portions of Lady Mill and Mr. Morshead, at Lady Morshead's death;" and he adds, "You will get Sir Charles and Lady Mill to name a person in whose name the fund should be invested." In this letter again, as in the former, Mr. Hayes treats the money as belonging to Lady Mill. The next letter is dated the 30th of June, 1819, from Hayes to Daman, and the same mistake appears to be continued. Mr. Hayes says, "I think the best names for the investment will be Sir Charles Mill, Lady Mill, Mr. John Morshead, and myself. I beg you will submit this to Sir Charles and Lady Mill, with my respects, and acquaint them that Lady Morshead and Mr. John Morshead will approve of the plan, if they do." In a postscript he says, "A declaration after the investment is completed must be signed by the parties in whose name it is made." The parties here suggested include Lady Mill, who had no interest in the fund. Nothing can be more plain than that, up to this time, the correspondence had proceeded upon a mistake as to Lady Mill's interest in the trust-moneys. The next letter, dated the 1st of July, 1819, from Hayes to Daman, puts this beyond all dispute. He states the

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inquiry which had been made by one of the purchasers, and desires an answer as soon as possible; and then follows a letter from Daman to Hayes, of the 17th of July, in which, after apologizing for the delay, he says, "I waited on Sir Charles
[*514] and *Lady Mill myself this day, and they approve of your proposed arrangement for investing the money in the funds, and they are both quite satisfied that the 5000*l.* in question has never been the subject of any settlement whatever. Sir Charles Mill settled a jointure on his wife previous to their marriage, which he afterwards increased; and Lady Mill, in particular, is quite sure that it was understood that her portion was not to be, and that it never was, settled in any way. As I did not act for Sir Charles Mill at the time of his marriage, I was not before aware of the above circumstances."

It is plain from the expression in that letter, that the parties spoke from recollection (which in fact was perfectly accurate,) that the 5000*l.* was not the subject of the marriage settlement. But there is nothing, down to this point, favorable to the supposition that the attention of Sir Charles Mill or Daman was called to the settlement of the 1st of January, 1800, except the reference in Hayes's letter of the 1st of July, 1819, to the appointment of 5000*l.* to Lady Mill; and there is no ground for supposing that Mr. Daman knew of any reason for the use of the name of Lady Mill as one of the trustees of the fund.

In this state of things, the declaration of trust prepared by Hayes was sent to Daman, and it appears to have been approved by him on the part of Sir Charles before the 18th of December, 1819; for on that day Hayes sends the engrossment, and says, "You have the draft of the deed in case you like to examine the engrossment with it." Nothing afterwards occurred in the correspondence requiring notice, except that Daman mentions that he had requested Lady Mill's signature. From what took place it is impossible to infer that anything was contemplated beyond a transfer of security.

[*515] *Then, as to the deed of August, 1819. It was prepared by Mr. Hayes, and follows exactly the course which the original mistake would lead one to expect. It recites

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documents which show a title in Lady Mill. The recital of the intention, that, at the death of Lady Morshead, the money is to be paid "to the parties entitled thereto," must in construction mean entitled thereto according to the preceding recitals; and the subsequent declaration following upon it is (in effect) as matter of construction, only a declaration that such are the rights of the parties. Upon this alone I think the same conclusion follows.

Then, what is the theory which is to explain this? It is, that Sir Charles Mill privately instructed Daman that Lady Mill was to have the 5000*l*. I confess I cannot admit that. The theory supposes that the real state of the title was present to the mind of Sir Charles Mill. If so, why did he conceal the state of the title, when the result of his supposed intention to benefit Lady Mill is stated upon the face of the deed. The hypothesis is too extreme to be admitted; and when to this is added Mr. Cock's evidence, the theory is still more inadmissible. The evidence of Mr. Cocks is, that Sir Charles Mill was a man of business, and not likely to execute a deed which he did not thoroughly understand, or without knowing what his rights were. This cannot be said to be consistent with the fact that Sir Charles Mill should have executed a deed intending thereby to confer a benefit upon his wife, such deed not setting out the state of the title to the property to which it related, or in any manner showing that he was not merely transferring the property for the purpose of security, but was in fact parting with it. I cannot see that the statement, that the deed of settlement was actually delivered by Sir Charles Mill to Lady *Mill at all affects [*516] the question of the intention of Sir Charles Mill in executing the declaration of trust.

The decree will direct the dismissal of the first bill, and the transfer of the fund in the second suit. The case is not one in which costs should be given.

[Affirmed 14th December, 1848.]

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PHILLIPSON *v.* GATTY.

GATTY *v.* PHILLIPSON.

1848: July 21st, 24th, 25th and 26th; Nov. 7th.

A *cestui que trust* discovering a breach of trust, but not receiving any benefit from it, or conniving in it for any purpose, and not recognizing the transaction, is not precluded from complaining of it merely on the ground that he abstained from making such complaint until long after he first knew of it.

Where stock stood invested in trust, for the mother for life, with remainder to her son and daughter and their children, the daughter knew of an application by the son for a loan from the trustees of part of the trust-moneys, upon his personal security, and that the trustees were willing to make the loan, with the consent of her mother, the tenant for life, and that the loan was, in fact, afterwards made. The daughter objected to the loan in her communications with her mother, but did not otherwise oppose it, and had not any communication with the trustees on the subject:—*Held*, that this was not such acquiescence on the part of the daughter to the loan as to preclude her from charging the trustees with the breach of trust, in a suit instituted seven years after the transaction took place.

Held, also that the daughter was not precluded from so charging the trustees, by the fact that she knew that the mother had (untruly) stated to her son that she (the daughter) had consented to the loan, such statement of the daughter's consent never having been communicated to the trustees, or constituted any part of the sanction or authority under which they acted.

It was not necessary to decide the simple case, whether, if the daughter had permitted the son, in the belief that the daughter consented to it, to obtain the loan from the trustees, they could have availed themselves of any defence to the suit, which the son might have, as against the daughter; for, in this case, the letters of the son to the mother, requesting the loan, and upon which the mother's consent was given, proposed not to affect the daughter's rights as against the trustees.

An investment by trustees of 2183*l.*, trust funds, which they were empowered to lend on real security, in a mortgage of house property in a town, occupied for commercial purposes, and valued at 2800*l.*, a value also, in some measure dependent on the performance of covenants,—*held* not to be justified.

Where trustees, having power to invest in Government or real security and vary such investment from time to time, sold out stock for the purpose of investing the produce of the stock in a mortgage which they were not justified in taking, it was *held* that the Court could not treat the sale of the stock as lawful, and the investment as unlawful, so as to satisfy the trust by replacing the *money*; but that the whole must be treated as one unjustifiable transaction, and that the trustees must replace the *stock*.

Where trustees lent the trust-moneys to one of the *cestuis que trust*, upon a contract

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which constituted a breach of trust, the Court in a suit by the trustees against all the *cestuis que trust*, refused, as against the *cestuis que trust* who had obtained the loan, to make a decree for the repayment of the money, contrary to the terms of the contract.

THE defendants, Gatty and Owen, were trustees of a sum of 4539*l.* 5*s.* 10*d.* 3*l.* per cent. Consols, which they *held upon the trusts of a settlement, and of an appointment made in exercise of a power contained in the settlement. At the time of the transactions which were the subject of these suits, the fund stood upon trust for Eliza Phillipson for her life, and after her decease, for her son Richard Phillipson and her daughter Mary Ann Phillipson, in equal shares; and in the event of either Richard or Mary Ann dying in the lifetime of their mother leaving issue, the share of him or her so dying was to go and be equally divided, if more than one, among his or her child or children in equal shares; but in case of the death of either Richard or Mary Ann, in the lifetime of the mother, without leaving issue, the share of him or her so dying was to go to the survivor. [*517]

The settlement creating the trust empowered the trustees from time to time, with the consent in writing of the husband and Eliza Phillipson the wife, and the survivor of them, to invest, sell out, and re-invest the trust-moneys in the public funds of Great Britain, or upon real security in the same kingdom. Eliza Phillipson had survived her husband.

In 1835, a sum of 2191*l.* 15*s.* 8*d.* Consols, part of the trust funds, was sold out, for the purpose of raising 2000*l.* sterling, which was lent upon mortgage to a Mr. Wynne, thereby reducing the trust stock to 2347*l.* 10*s.* 2*d.* Consols. Wynne's mortgage was afterwards paid off, and the 2000*l.*, instead of being invested according to the terms of the trust, was lent to Richard Phillipson the son, upon his personal security. This step was taken with the consent of Eliza Phillipson, communicated in a letter from her, dated the 1st of October, 1837, to Gatty and Owen, the trustees (Exhibit X,) which was in the following words:—

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"Gentlemen,—I have reconsidered the subject in ques-
[*518] tion since I wrote to you, and I beg to inform you *that I now give my sanction to your advancing my son Mr. Richard Phillipson the sum of 2000*l.*, now in loan to Mr. W. W. E. Wynne, and to allowing the annual interest to go towards the annual allowance I make him."

The loan to the son was carried into effect by an indenture of the 9th of November, 1837, made between the son and the trustees, reciting the title of the parties to the trust fund, and that Richard Phillipson, having occasion for the loan of 2000*l.*, had requested the trustees to lend him that sum, which they had agreed to do, out of moneys belonging to them on a joint account, upon the same being secured by mortgage of the share of Richard Phillipson in the moneys in which he was interested under the settlement; and Richard Phillipson thereby assigned his share of the funds comprised in the settlement to the trustees, with a proviso for a re-assignment in case Richard Phillipson should pay interest on the same at 4*l.* per cent. half-yearly, and repay the principal to the trustees within six months after the death of Eliza Phillipson; which Richard Phillipson also thereby covenanted to do.

In March, 1838, the trustees, at the proposal of Richard Phillipson, sold out the 2347*l.* 10*s.* 2*d.* Consols, and lent the produce of the sale, amounting to 2183*l.* 3*s.* 8*d.*, to a Mr. Langstaffe, upon mortgage of a freehold dwelling-house, shops, and warehouses, in the town of Northampton. Part of this property had been demised by Langstaffe for a term of years, with other property, of which Langstaffe was himself lessee; and by the terms of the demise Langstaffe was bound to keep the demised premises in repair. In 1841, the lessor of the leasehold portion of the premises comprised in Langstaffe's demise, recovered
[*519] that portion of the property in ejectment, *owing to a breach of covenant by Langstaffe, in omitting to repair, and his lessees thereupon determined their tenancy of the freehold portion of the premises comprised in the mortgage, which thenceforward remained unoccupied.

The original bill was filed in March, 1844, by Mary Ann

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Phillipson the daughter,(a) insisting that the loan of the 2000*l.* to Richard Phillipson was a breach of trust, and that the loan of the remainder of the trust-moneys on the Northampton mortgage had been made upon the security of property of inadequate value; and praying that the trustees might be decreed to replace the entire sum of 4539*l.* 5*s.* 10*d.* Consols. The trustees thereupon filed their cross bill against Eliza Phillipson, Richard, and Mary Ann, charging, that, in the employment of the trust-money, Richard Phillipson had been throughout the agent of his mother and sister, and that all which was complained of in the original suit had been done with the knowledge and sanction of the three; that, if Mary Ann had not previously sanctioned the transactions in question, she knew of them at the time, and had not objected to, but had, on the contrary, acquiesced in them; and that, whatever the rights of any children of Richard or Mary Ann might be, neither Eliza Phillipson nor Richard or Mary Ann were entitled to complain of the state of the trust funds. The trustees also by their answer to the original suit insisted, that the property comprised in the Northampton mortgage had been of adequate value at the time the mortgage was made. The cross bill prayed, that Richard Phillipson might be decreed to repay the trustees the 2000*l.*, that the advance might be declared to have been made with the consent of Eliza Phillipson, *and that the trustees might be indemnified [*520] out of her life interest and the interest of Richard in the trust funds. With regard to the Northampton mortgage, the trustees by their cross bill offered to deal with the security as the Court should direct, and prayed a declaration that they were not liable to make good any loss owing to a deficiency in the security; and that Eliza Phillipson, Richard, and Mary Ann might pay the costs of the cross suit, and the two former the costs of the original suit.

Evidence was gone into,—first, as to the alleged agency of Richard,—secondly, as to the sanction of or acquiescence in the loan to him by the mother and sister,—and, thirdly, as to the

(a) See *Phillipson* v. *Gatty*, 6 Hare, 26.

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adequacy of the value of the property comprised in the Northampton mortgage, and the alleged concurrence of the *cestuis que trust* in taking that security.

The Court decided, that the point made by the trustees, of the general agency of Richard, or his general authority to act for his mother and sister, had not been established. The special authority given by Eliza Phillipson for the loan to Richard was not disputed. The privity or acquiescence of Mary Ann was sought to be shown by the fact that she was with her mother when the application of her brother for the loan of the 2000*l.* was made,—that the letter of her mother, sanctioning the loan, was read to her before it was sent,—and that the mother, in a letter to Richard, dated the 1st of October, 1837, (Exhibit W,) after referring to the reluctance of Mary Ann to assent to the proposal as to the loan, adds, "However, I am happy to inform you, she desires me to say, she will accede to your desire in consenting to my writing to Mr. Gatty to lend it, as you will see on the other side." The letter concluded, "Will you tear [*521] off *the half sheet, and direct it to Mr. Gatty?" This referred to the letter (Exhibit W,) which was written on the same sheet. It did not appear that this statement of the mother, as to Mary Ann, had been communicated to the trustees; and the mother, by her evidence in the cause, stated, that the representation as to Mary Ann having acceded to her brother's desire was untrue, and that the passage in the letter to that effect was written without the consent and against the will of Mary Ann. The letters of Richard Phillipson to his mother, requesting the loan of the 2000*l.* stated that the trustees, who were persons of honor and responsibility, would be personally responsible to Mary Ann and to the infant *cestuis que trust*. The evidence went to show that Mary Ann had objected to the loan of the 2000*l.* to her brother, but it did not appear that the fact of her objecting to it had been communicated to the trustees.

With respect to the Northampton mortgage, it appeared that the proposal to change the investment from stock to real security had been made by Richard Phillipson in a letter to Mr. Gatty, one of the trustees, dated the 12th of October, 1837, which was

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as follows:—"There is a sum in Consols, 2847*l.*, the remainder of the sums in trust to you and Owen. This produces my mother nearly 70*l.* a year, but, if sold out at the present price of stock, it would fetch 2250*l.*, which, at 4*l.* per cent. on mortgage will yield her 90*l.* a year. I therefore propose that you should place it out on a secure mortgage, taking an early opportunity of realizing at the high price of stock. I have written to her on the subject, and will try and get a good freehold security in Warwickshire." The proposal for the Northampton mortgage was afterwards made by Richard Phillipson, and it was accepted at his suggestion. At the time the security was taken, the property was *situated in a very advantageous position for mercantile purposes, and it had been a short time before valued, with a view to another mortgage then in contemplation, at 2800*l.* In 1842 the trustees had offered the property for sale, but no more than 1800*l.* was bid for it. A depreciation in the value had arisen from the unforeseen circumstance of the trade being diverted from Northampton by the subsequent formation of railways passing at a distance from it. A portion of the property had been demised at 90*l.* a year, by a lease, of which upwards of ten years were unexpired; but the continuance of that lease was dependent on the performance of covenants by Langstaffe, and was, after the mortgage, determined by his default, as above stated. [*522]

Mr. *Walker* and Mr. *Giffard*, for Mary Ann Phillipson.

The *Solicitor-General* and Mr. *Rasch*, for Eliza Phillipson and Richard Phillipson.

Mr. *Bethell*, Mr. *Wood*, and Mr. *E. F. Smith*, for the trustees.

The cases cited,—on the title of the *cestuis que trust* to relief, and on the mode of adjusting the relief, in respect of the breach of trust, as between the tenant for life and the party entitled in remainder, who had sanctioned or acquiesced in the breach of trust, and the other parties interested in the trust-moneys, were

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Fuller v. *Knight*,(a) *Brice* v. *Stokes*,(b) *Gregg* v. *Wells*,(c) *Woodgatt* v. *Gresley*,(d) *Munch* v. *Cockerell*,(e) and *Franco* v. *Franco*.(f)

[*523] *On the question, whether the trustees were justified in making the investment on the Northampton mortgage, *Stickney* v. *Sewell*.(g)

VICE-CHANCELLOR, (after stating the facts of the case):—I am of opinion, that there is nothing in the letter X alone which can be read against Mary Ann Phillipson, so as to deprive her of her right to relief against the trustees. The letter emphatically expresses the sanction of Eliza Phillipson, the mother, to the loan, but not that of Mary Ann; and the evidence of the mother is, that Mary Ann, who was with her at Paris when the letter X was written, objected to it. The trustees could not, upon that letter alone, have acted upon the supposition that they had the plaintiffs' sanction for what they were doing. They cannot, upon letter X alone, successfully contend that they have been led into a breach of trust by anything Mary Ann either said or did, to sanction the loan before it was made. The case of the trustees, therefore, as against her, must depend upon some subsequent acquiescence on her part in a known breach of trust. But, in absence of any authority precedent, I cannot find any evidence of such acquiescence as should deprive her of her right to enforce her claim against the trustees. Had she, indeed, with knowledge of the breach of trust, taken any benefit from it, or recognized the transaction with Richard Phillipson as valid, the case might have been otherwise; but nothing of that sort appears. Her interest in the 2000*l.* was reversionary, and liable to be determined altogether in favor of Richard Phillipson, by her death without issue in the lifetime of her mother. The case,

[*524] *therefore, in the strongest way of stating it against Mary Ann, is simply that of a *cestui que trust* discover-

(a) 6 Beav. 205. (b) 11 Ves. 319. (c) 10 A. & E. 90.
(d) 8 Sim. 180. (e) 5 My. & Cr. 178. (f) 3 Ves. 75.
(g) 1 My. & Cr. 8.

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ing a breach of trust, and not complaining the instant she had notice of it. If the evidence, upon a reasonable construction, led to the inference that Mary Ann, having had notice of the breach of trust, had connived at it for the purpose of accommodating Richard Phillipson or consulting his wishes, a different conclusion might have been come to. But the effect of the evidence on my mind is the opposite of this. I think the plaintiff had her own interests, not improperly, in view, and did *bona fide* object to the loan in question; and the only observation I consider her open to on this point is, that she appears to have wanted strength of mind to come forward, in the first instance, and oppose herself to her mother and brother. But I cannot hold the trustees thereby discharged from a breach of trust, for which they cannot say they had the sanction of Mary Ann.

The case, however, may be considered as open to other considerations, when viewed with reference to the letter W from the mother to the son. The son had requested his mother's sanction to the loan of the 2000*l.* upon personal security, saying to her that the trustees were willing if she would sanction the act. This, for some time, she had refused to do, on the ground that Mary Ann's interest might be injured by it. But in the letter W she states that Mary Ann had acceded to her brother's desire. According to the evidence of Eliza Phillipson, this statement was untrue, and Mary Ann objected altogether to the loan. The letter, however, was read to her by her mother before it was sent; and, though she objected to it, she had not, as I have already observed, strength of mind enough openly to oppose herself to the acts of her mother and brother.

*Now, if in those circumstances the letter W had been [*525] communicated to the trustees by Richard Phillipson, that circumstance, coupled with the fact that Mary Ann Phillipson was informed of its contents, though she did not sanction but objected to the statement therein, that she consented to the loan, might have placed the trustees in a better position against Mary Ann than they now stand in; for they might then have contended, that she had, as in the case put by Lord Eldon in *Evans* v. *Bick-*

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nell,(*a*) stood by and permitted them to act upon representations made by Richard Phillipson respecting her interests, which she knew to be false. But this was not the case. The trustees do not pretend that they knew of or acted upon the statement in letter W. The letters they rely upon in their answer in the original suit are letter X and the letter of the 12th of October, 1837, from Richard Phillipson to them; and in the cross suit they rely upon the letter X alone, and ask no relief against Mary Ann Phillipson in respect of the 2000*l*. It is not, therefore, part of the case of the trustees that they acted upon the supposition that Mary Ann sanctioned beforehand what they did.

There is, however, a question yet to be noticed respecting the 2000*l*., by which at one time I felt pressed. Admitting that the trustees were not misled by letter W, it in terms justified Richard Phillipson in supposing that Mary Ann consented to the loan, and if, acting under an impression so created with her knowledge, he has made a contract with the trustees, which the letter authorized, that might deprive Mary Ann of a right to complain that Richard had got possession of the money from the trustees; and if she were barred from complaining of that, the trustees [*526] might also have a right to *contend that she was barred from complaining of their conduct. In other words, they might have had a right to shelter themselves from the consequence of their breach of trust under a case made by Richard Phillipson, although they were ignorant of that case at the time the breach of trust was committed. This is in material points distinguishable from the case I have before considered.

Upon the best consideration, however, I can give the case, I think the trustees cannot so protect themselves. The case, I may observe, is not a case specifically made by the trustees either as defendants or as plaintiffs. In the cross suit, as I have said, no relief is prayed against Mary Ann in respect of the 2000*l*.; and as to that, the trustees rely upon the letter X and the letter of the 12th of October, 1837; and that alone might perhaps be an

(*a*) 6 Ves. 174.

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answer to the case. But my opinion is, that, upon the merits, the case is not sustainable by the trustees.

The trustees, it will be remembered, are supposed to have known nothing of letter W. The case supposed is, that the trustees, having acted upon letter X only, have since the transaction discovered the letter W. The case, therefore, must be tried simply and entirely between Mary Ann and Richard Phillipson; and, in considering this point in the case, care must be taken to distinguish which of the letters relating to the 2000*l.* are brought home to the knowledge of Mary Ann before the loan was made, and it will, I believe, be found that that knowledge is confined to the letters W and X, and the letter of the 12th of October, 1837. Indeed, if all the correspondence between the mother and son as to the 2000*l.* were read, which in strictness it cannot be, it would not materially affect the case as to the 2000*l.* as between Mary Ann and the trustees. The inquiry upon *the [*527] correspondence must be, did Mary Ann authorize Richard to borrow the trust money upon terms not authorized by the trust, so as to discharge the trustees from the liability to her, and so sanction a loan by the trustees to Richard Phillipson upon terms such as are found in the deed of the 9th of November, 1837, a loan upon personal security not to be called in until six months after the death of Eliza Phillipson. If Richard Phillipson cannot make out such a case from the correspondence, he cannot justify the transaction in question as against his sister, and she certainly is entitled to have the case strictly construed in her favor. Indeed, when the correspondence is examined at large, it will be seen that what the son proposed was, that the trustees were not only to look into and satisfy themselves of the sufficiency of the security, but were to remain liable to the plaintiff for any deficiency. This is repeated again and again in Richard Phillipson's letters. In effect, by acceding to Richard Phillipson's wishes, so far as by not contradicting her mother's statement, she assented to them upon his terms, and those terms reserved her rights against the trustees, which are within the scope of this suit. I cannot, therefore, consider the deed of the 9th of November, 1837, as

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authorized by the statement in letter W, as between the plaintiff and her brother.

The case, therefore, stands thus:—the trustees were originally liable for 2000*l.* They have no defence except under Richard Phillipson; and the supposed case under Richard Phillipson fails. I think this is so upon the whole correspondence, but it clearly is so upon the letters of the 1st and 12th of October, 1837, which alone are brought home to Mary Ann Phillipson.

Next, as to the Northampton mortgage,—the agency [*528] *of Richard not being established,—the case resolves itself into that which, at the time of the argument, I supposed. Did the trustees by that investment, discharge themselves from liability as to their *cestui que trust?* The mortgage-money was 2183*l.* The value of the security, taking it upon the evidence, was 2800*l.*, supposing the covenants in the lease of the property let with it to be observed. The covenants relating to other property, if broken, might, as they did, impair the value of the security. The property did not consist of acres of land, which may be let, rendering a rent, but property in a town, the value of which depends upon its position, and is liable, therefore, to be affected by various changes. It was suggested that the alteration created by the railroad materially affected the property. I have examined the case of *Stickney* v. *Sewell*,(a) and it appears to me impossible, without overruling that case, that I can hold that this was a proper security; and, therefore, I must hold in the first suit, that the trustees, as between themselves and Mary Ann did not by that mortgage discharge themselves from the liability to her.

Then comes another material question,—are the trustees to replace the stock, or the money produced by the sale? Mr. Wood argued that they were liable to make good the money only, distinguishing the sale, which he said was lawful, from the investment, which I have decided to have been a breach of trust. My opinion is, that the trustees must replace the stock. There was no authority to sell, except with a view to the re-investment; and here the sale was made with a view to the investment I

(a) 1 My. & Cr. 8.

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I have condemned. It was all one transaction, and the sale and investment must stand or fall together.

*I think that the second suit, considered as a cross [*529] suit by the trustees against Mary Ann Phillipson, does not alter the case as it stands upon the original suit. Stopping here, the decree would be a decree in favor of Mary Ann, as plaintiff, against the trustees, to replace the capital; but as Mary Ann has no present interest in the income, the question would remain, how is the income to be dealt with; and this, according to the common course, being a question between co-defendants, would result in an inquiry. In this case, however, the trustees have filed a bill against Mary Ann, and against the mother and son, making claims which include in truth the application of the income of the fund to be brought into Court, or replaced by the trustees. My decision upon the case made in the second suit will dispose of that question, and therefore dispense with the necessity of further inquiry.

The question then is—what is the proper decree to be made in the second suit?

Eliza Phillipson sanctioned the trustees in lending the 2000*l.*, if they thought fit, to her son; but she gave no guarantee, expressed or implied, to the trustees that she would replace the stock, if any parties more remotely interested should complain. If no sanction had been given by her to the loan, and if there be no contract between her and the son binding her to allow the son to receive the income, she would be entitled to relief as to that. It does not appear to me, that any contract between the mother and son, which the Court can act upon, has been proved; and, therefore, in that simple case the income of the 2000*l.* would be payable to the mother. But can she make such a claim against the trustees? I think not. By sanctioning the loan of the 2000*l.* to Richard, she consented, as between herself *and the trustees, to take Richard as her debtor for the [*530] income of the 2000*l.* during her life. She can have no claim against the trustees, therefore, in respect of that income, unless she can make out that the effect of the deed of the 9th of November, 1837, is to create a loan upon other terms than those

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sanctioned. But can she successfully contend for this? Her position is widely different in that respect from that of Mary Ann. Mary Ann gave no sanction to the trustees directly, nor did they know she had permitted her mother untruly to represent to Richard that she (Mary Ann) had consented to the mother herself sanctioning the loan. Eliza Phillipson, after a long treaty for the loan to the son upon personal security, directly sanctioned the trustees in making the loan. She says, indeed, by her answer to the second suit, that she did not intend to sanction them in doing any act not authorized by the original trust; but however that may be, I cannot excuse her as a party to the original settlement from notice that a loan upon personal security was a breach of trust. The income of the 2000*l.* must, therefore, be paid to the trustees, and she must through them get it from Richard Phillipson. As to the Northampton mortgage, Eliza Phillipson must receive the income from that portion of the fund.

The next point is,—how does the case stand between the trustees and Richard Phillipson? He of course is liable for the income of the 2000*l.*, and cannot, in my opinion, complain of the Northampton mortgage. But is Richard Phillipson to pay the 2000*l.* at once, treating the loan as a breach of trust, to which he was a party, or is the contract of the 9th of November, 1837, to stand good as between him and Eliza Phillipson on the one side, and the trustees on the other? The question is, why,

[*531] on a bill framed as this is, not as was *observed in *Franco* v. *Franco*,(*a*) to execute the trust, but a suit between the trustees and Richard Phillipson, both parties to a breach of trust,—why am I to alter the contract voluntarily made between them,—a contract specified in a deed, and guarded by mutual covenants. In *Franco* v. *Franco* the loan which constituted the breach of trust was for a temporary purpose, and the bill did not infringe upon, but was consistent with, the contract between the parties to the breach of trust. That is not the case here. Here the contract is for a loan upon personal security for

(*a*) 3 Ves. 75.

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a definite period ending six months after the death of Eliza Phillipson. I think I ought not to set aside that contract as between the parties to it,—the interests of the *cestuis que trust* being unaffected by it,—for they by the supposition are not precluded from suing the trustees, nor from suing Richard as a party to the breach of trust, although they are not bound to sue any but their trustees.

DIRECT the trustees to pay into Court 2000*l.*; the same, when paid in, to be invested &c., and let the dividends thereon be paid to the trustees during the life of Eliza Phillipson, with liberty to apply upon her death. Direct the premises comprised in the mortgage to be sold, with the approbation of the Master, &c., and let the moneys to be produced by the sale be paid into Court, and invested &c., and the dividends be paid to Eliza Phillipson, widow, during her life, with liberty to apply upon her death. Declare that the trustees ought to make up the difference between the Consols and money to arise from the sale of the mortgaged premises and the 2347*l.* 10*s.* 2*d.* Consols, in case the money to arise from the sale shall not be sufficient to purchase the said 2347*l.* 10*s.* 2*d.* Consols. Tax the costs of Mary Ann Phillipson of the first cause, and also tax the costs of the other *cestuis que trust*, except Eliza Phillipson and Richard Phillipson. Let Mary Ann Phillipson pay the costs of such other *cestuis que trust*, and add them to her own costs; and direct the trustees to pay the said costs of Mary Ann Phillipson, *and the [*532] costs so to be paid by her. Dismiss the trustees' bill with costs, as against Mary Ann Phillipson.*

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* The decree was affirmed by the Lord Chancellor on the 10th of March, 1849; but Eliza Phillipson having died since the decree of the Vice-Chancellor, the same was by consent varied, by directing the trustees to pay Mary Ann Phillipson 1000*l.*, one moiety of the 2000*l.* secured by the deed of the 9th of November, 1837.

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WHISTON *v.* THE DEAN AND CHAPTER OF THE CATHEDRAL CHURCH OF ROCHESTER.

1849: July 27th; August 1st, 2d and 8th.

The master of a grammar school, appointed by the Dean and Chapter of a Cathedral Church, and which grammar school was, by the statutes imposed by the founder, directed to be established and maintained from the endowments of such church, which were held in frankalmoigne:—*Held*, not to be a *cestui que trust* of the stipend and emolument of the office, but to be only an officer of the Cathedral Church, appointed to perform one of the duties imposed upon it by the statutes.

In such a case, whoever may be visitor,—whatever may be the interest of such visitor in the matter in dispute, or whatever may be the right of the schoolmaster to a mandamus or prohibition at law,—the Court of Chancery cannot, in the exercise of its ordinary jurisdiction by bill, try the right of the schoolmaster to his office.

The Court of Chancery cannot be called upon, in every dispute arising about a right of office, as a matter of course to prevent the party from being displaced until the right shall have been tried. There are cases, even of irreparable mischief, in which the Court cannot give any ultimate relief, and will not therefore interfere between adverse claimants.

THE cathedral church of Rochester was founded and endowed in the 33rd year of Henry VIII, with estates which had belonged to the dissolved monastery or priory and church of St. Andrew, of that city, to hold such lands and hereditaments to the Dean and Chapter, and their successors, from the King and his successors, "*in puram et perpetuam eleemosynam.*"

The statutes given by the King for the government of the cathedral body were as follows:

De Numero integro eorum qui in Ecclesia Cathedrali Roffensi sustententur.

Imprimis, statuimus et ordinavimus ut sint perpetuo in dicta Ecclesia unus Decanus, sex Canonici, sex Minores Canonici, unus Diaconus, unus Sub-diaconus, sex Clerici Laici, unus Magister Choristarum, octo Choristæ, duo Informatores Puerorum
[*533] in Grammatica, quorum *unus sit Præceptor, alter Sub-præceptor, viginti Pueri in Grammatica, erudiendi, sex Pauperes de sumptibus dictæ Ecclesiæ alendi, duo Sub-sacristæ,

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unicus Janitor, qui et Barbi-tonsor erit, unus Pincerna, unus Coquus, unus Sub-coquus. Qui quidem in eadem Ecclesia Cathedrali numero præscripto, unusquisque in suo ordine, juxta statuta et ordinationes nostras, sedulo inserviant.

De Qualitatibus, Electione, et Admissione Decani. Juramentum Decani.(a)

De Officio Decani.

De Visitatione Terrarum.

Demissio Terrarum et Tenementorum ad Firmam.

De Traditione Bonorum Decano.

De Residentia Decani.

De Obedientia Decano, &c. Monstranda.

Quum doceat Divus Paulus Præpositis obediendum esse: volumus et mandamus ut jam Canonici et cæteri Ecclesiæ nostræ Ministri, omnes et singuli, ipsum Decanum caput suum et ducem agnoscant, ipsumque reverentur et in omnibus rebus ac mandatis licitis et honestis, quæ statuta nostra concernunt, aut ad bonum regimen et statum, Ecclesiæ nostræ pertinent, ipsi Decano aut ipsius Vice-gerenti, aut, illis absentibus, seniori secundum admissionem Canonico pareant, obediant, adsistant, et auxilientur.

De Qualitatibus, Electione, et Admissione Canonicorum. De Juramento Canonicorum.

De Residentia Canonicorum.

De Canonicis in Ecclesia nostra habendis.

De Mensa Canonicorum.

De Stipendio Decani et Canonicorum.

**De Electione Officiariorum, et Pœna Absentium Tempore Electionis Officiariorum.* [*534]

De Officio Vice decani.

De Officio Receptoris.

(a) Only those statutes, and parts of statutes, are fully set out, which were thought to affect the position of the master of the school. The titles of the whole are stated.

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De Officio Thesaurarii.

De Qualitate, Electione, et Admissione Minorum Canonicorum et Clericorum. Juramentum, &c.

De Residentia Ministrorum.

De Præcentore et ejus Officio.

De Sacrista et Sub-sacrista.

De Choristis et eorum Magistro.

De Pueris Grammaticis et eorum Informatoribus.

Ut pietas et bonæ literæ perpetuo in Ecclesia nostra suppullescant, crescant, floreant, et suo tempore in gloriam Dei, et Reipublicæ commodum et ornamentum fructificent, statuimus et ordinamus, ut ad electionem et designationem Decani, aut eo absente Vice-decani, et Capituli, sint perpetuo in Ecclesia nostra Roffensi viginti pueri pauperes et amicorum ope destituti, de bonis Ecclesiæ nostræ alendi, ingeniis (quoad fieri potest) ad discendum nati et apti. Quos tamen admitti nolumus in pauperes pueros Ecclesiæ nostræ antequam noverint legere, scribere, et mediocriter calluerint prima Grammaticæ rudimenta, idque judicio Decani et Archididascali; atque hos pueros volumus impensis Ecclesiæ nostræ ali, donec mediocrem Latinæ Grammaticæ notitiam adepti fuerint, et Latine loqui et Latine scribere didicerint; cui rei dabitur quatuor annorum spatium, aut, si ita Decano et Archi-didascalo visum fuerit, ad summum quinque annorum et non amplius. Volumus autem ut nullus nisi Ecclesiæ nostræ Roffensis Chorista fuerit in pauperem discipulum Ecclesiæ nostræ eligatur, qui nonum ætatis suæ annum non compleverit, vel quintum decimum ætatis suæ annum non excesserit. * * *

[*535] Statuimus præterea, ut, per Decanum, vel eo absente *Vice-decanum, et Capitulum, unus eligatur Latine et Græce doctus, bonæ famæ et piæ vitæ, docendi facultate imbutus, qui tam viginti illos Ecclesiæ nostræ Pueros, quam alios quoscunque Grammaticam discendi gratia ad Scholam nostram confluentes, pietate excolat et bonis literis exornet; hic in Schola nostra primus obtinebit, et Archi-didascalus sive Præcipuus Informator esto. Rursum per Decanum, aut eo absente Vice-deca-

num, et Capitulum volumus, virum aliquem eligi, bonæ famæ et piæ vitæ, Latine doctum, docendique facultate imbutum, qui sub Archi-didascalo pueros docebit prima scilicet Grammatices rudimenta, et proinde Hypo-didascalus sive Secundarius Informator appellabitur. Hos vero Informatores Puerorum volumus, ut regulis et docendi ordine, quem Decanus et Capitulum præscribendum duxerint, diligenter et fideliter obsecundent. Quod si desidiosi, aut negligentes, aut minus ad docendum apti inveniantur, post trinam monitionem a Decano et Capitulo amoveantur, et ab officio deponantur. Omnia autem ad functionem suam spectantia se fideliter præstituros juramento promittent.

De Pauperibus et eorum Officio.
De Inferioribus Ecclesiæ nostræ Ministris.

De Communi Mensa omnium Ministrorum.

* * * * * * *

In qua quidem aula Præcentor, vel eo absente primus admissione Minor Canonicus, in superiore mensa primus accumbat. Deinde Archi-didascalus et cæteri Minores Canonici et Magister Choristarum. In secundo ordine sedeant Diaconus et Sub-diaconus, sex Clerici et Hypo-didascalus. In tertio ordine sedeant Pueri Grammatici et Choristæ. In secundo prandio sedeant Subsacristæ, Pincerna, Janitor, et Coquus. Morum Censor in Aula erit Præcentor, aut eo absente primus admissione *Minor Canonicus, qui viros immorigeros arguet; [*536] Pueros autem arguent etiam ipsorum Præceptores, ut omnia cum silentio, ordine, et decore agantur in Aula.

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Nimirum pro vescentibus in primo ordine, id est, pro singulis Canonicis Minoribus, pro Primario Informatore Puerorum Grammaticorum, et pro Magistro Choristarum, per mensem, sex solidos pro mensa et communiis communiter viscentium. In secundo ordine, nimirum pro Diacono et Sub-diacono, singulis Clericis, ac Inferiore Informatore Puerorum Grammaticorum, per mensem, quatuor solidos et octo denarios pro mensa et communiis singulorum communiter vescentium. In tertio ordine, nimirum pro

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singulis Pueris Grammaticis et Choristis, per mensem, tres solidos et quatuor denarios.

* * * * * * *

Postremo omnes Ministri Ecclesiæ nostræ communiter victitantes ordinationibus, formulis, et statutis, quæ per Decanum et Capitulum hisce de rebus olim edentur, parere et obsequi debent.

De Vestibus Ministrorum quas Liberatas vocant.

* * * * * * *

Recipient singuli Minores Canonici et Superior Informatòr Grammatices quatuor virgatas panni pro togis suis, pretium cujuslibet virgatæ quinque solidos. Recipiet Magister Choristarum pro veste sua tres virgatas panni, pretium virgatæ quinque solidos. Recipient Diaconus, Sub-diaconus, singuli Clerici, et Inferior Informator Grammatices pro vestibus tres virgatas panni, pretium virgatæ quatuor solidos. Recipient et alii ministri

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De Stipendiis Ministrorum in Ecclesia Nostra.

Statuimus et volumus ut ex bonis communibus Ecclesiæ nostræ, præter communias et liberatas superius assignatas,
[*537] solventur stipendia omnibus ministris *Ecclesiæ nostræ per manus Thesaurarii singulis anni terminis, per æquales portiones, ad hunc qui sequitur modum, viz.

	£	s.	d.
Singulis Minoribus Canonicis pro portione sua	5	2	8
Superiori Informatori Grammatices	8	8	8
Magistro Choristarum	5	7	0
Inferiori Informatori Grammatices	2	19	2
Diacono	2	19	2

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De Celebratione Divinorum.

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Volumus præterea ut uterque Informator Grammatices, Diebus Festis, Choro intersit, Insignibus Choro convenientibus indutus; quorum alter super Minores Canonicos, alter post Minores Canonicos proximum in Choro locum obtinent. Ad hæc Pueros

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Grammaticos qui sumptibus Ecclesiæ nostræ aluntur, festis diebus volumus Choro interesse, et officium sibi mandatum a Præcentore sedulo facere, nisi alias per Hypo-didascalum amandentur.

* * * * * * *

De Communi Ærario, de Custodia Sigilli et Munimentorum. De Ratione seu Computo quotannis reddendo.

De Corrigendis Excessibus.

Ut in Ecclesia nostra morum integritas servetur, statuimus et volumus, ut si quis Minorum Canonicorum, Clericorum, aut aliorum ministrorum, in levi culpa deliquerit, arbitrio Decani, aut eo absente Vice-decani, corrigetur. Sin gravius fuerit delictum (si justum judicabitur) ab iisdem expellatur a quibus fuerit admissus. Si quis autem Canonicorum in offensa *aliqua aut [*538] crimine, unde Ecclesiæ nostræ grave scandalum oriri possit, culpabilis inventus fuerit, is per Decanum, aut eo absente Vice-decanum, admoneatur; quod si, tertio admonitus, se non emendaverit, apud Episcopum Visitatorem suum accusetur, et illius judicio corrigatur. Pauperes vero quoties deliquerint correctionem Decani, aut eo absente Vice-decani, judicio reservamus; qui si incorrigibiles permaneant, per Decanum, cum Capituli consensu, a nostra Ecclesia expellantur, et omnia in ea emolumenta perdant.

De Eleemosynis et Scholasticis in Academiis Studentibus.

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Statuimus præterea, ut ex bonis Ecclesiæ nostræ quatuor Scholares puperes in Academiis nostris semper alantur, qui in artium liberalium ac in sacræ theologiæ studia assidue et diligenter incumbent; dvo videlicet in Academia Oxoniensi et duo alii in Academia Cantabrigiensi. Neminem vero alium ad hoc nostrum beneficium percipiendum admitti volumus, nisi qui sit super quintum decimum et infra vicesimum ætatis suæ annum, quique Grammatica ita calleat, ut ad liberales artes discendas aptus et idoneus existat. Hos autem quatuor scholasticos volumus ut Decanus, aut eo absente Vice-decanus, et Capitulum ex hac nostra schola semper eligant, et stipendio nostro donatos ad

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Academiam ingenii cultum capiendi gratia mittant. Quod si in hac Schola nostra nullus huic muneri idoneus inveniatur, alium undecunque prædictis qualitatibus ornatum, Decano, aut eo absente Vice-decano, et Capitulo deligere permittimus, in dictis Academiis Collegii aut Domus alicujus Socius aut Discipulus modo non fuerit. His Scholaribus pro studiorum suorum progressu varias quotannis numerari volumus pensiones, videlicet, donec Baccalaureatus insignia adepti fuerint, id quod intra quadriennium omnino fieri duxerimus, quinque libras;
[*539] *Baccalaurei autem per triennium proxime sequens, post quod tempus statim Magister Artium titulo eos insignire volumus, sex libras assequentur; postea vero, ut ardentius sacræ Theologiæ incumbant, sex libras et tredecem solidos et quatuor denarios recipient; illud etiam decernimus, ut decedentibus sive amotis, sive Baccalaureis, seu Artium Magistris, aut superiori Gradu insignitis, illi qui numero deficientium supplebunt, in primi ordinis scholastices admittantur. Decanus autem, aut eo absente Vice-decanus, curabit ut hii Scholares Pennsionarii ad certum aliquem locum, seu Collegium, seu Aulam, seu Hospitium in Academia una aut altera destinentur. Quod si intellexerit, certoque cognoverit, negligentes, desidiosos, aut ab Academia evagantes quique famam suam a gravioris criminis nota non tuentur, quique Baccalaurei aut Artium Magistri non fuerint præscripto tempore, quique postea Theologiæ studio gnavam operam non impenderent, qui denique præter pensionem nostram summam septem librarum annui valoris adepti fuerint, hac nostra pensione et stipendio penitus destitui et carere volumus.

De Capitulis celebrandis.

De Visitatione Ecclesiæ.

* * * * * *

Nos, Episcopi Roffensis qui pro tempore fuerit fide et diligentia freti, eundem Ecclesiæ nostræ Cathedralis Roffensis Visitatorem constituimus, volentes et mandantes, ut pro Christiana fide et ardenti Pietatis zelo vigilet, et graviter curet, ut hæc statuta et ordinationes Ecclesiæ nostræ a nobis editæ inviolabiliter obser-

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ventur, possessiones et bona tam spiritualia quam corporalia prospero statu floreant, jura, libertates, et privilegia conserventur et defendantur. Atque ut hæc ita fiant, statuimus et volumus, ut Episcopus ipse, quoties a Decano vel a duobus Canonicis rogatus fuerit, imo licet non *rogatus, semel tamen quovis [*540] triennio ad Ecclesiam nostram in persona propria (nisi grandis obstiterit necessitas,) alioquin per Cancellarium suum accedat, Decanum, Canonicos, Minores Canonicos, Clericos, cæterosque omnes Ecclesiæ nostræ Ministros, in locum congruum convocet. Cui quidem Episcopo præsentis statuti vigore plenam concedimus potestatem et authoritatem, ut super singulis articulis in statutis nostris contentis, et de quibuscunque aliis articulis statum, commodum, aut honorem Ecclesiæ nostræ concernentibus, Decanum, Canonicos, Minores Canonicos, cæterosque Ministros interrogat, et cogat eorum quemlibet per juramentum Ecclesiæ præstitum veritatem dicere de omnibus delictis et criminibus quibuscunque compertis et probatis: juxta delicti et criminis mensuram puniat Episcopus atque reformet, omniaque faciat quæ ad vitiorum reformationem necessaria videbuntur, quæque ad visitatoris officium de jure pertinere dignoscentur. Quos quidem omnes tam Decanum, qqam Canonicos et alios Ecclesiæ nostræ Ministros, quoad omnio præmissa, volumus et mandamus ipsi Episcopo parere et obedire. Statuimus autem in virtute juramenti Ecclesiæ nostræ præstiti, ut nemo contra Decanum, aut Canonicos, aut aliquem Ministrorum Ecclesiæ nostræ quicquam dicat aut enunciet, nisi quod verum crediderit, aut de quo publica vox et fama circumlata fuerit.

* * * * * *

De Precibus, &c.

The plaintiff was appointed Head Master of the Grammer School of the Church, at a Chapter holden on the 1st of December, 1842, and thereupon took the oath prescribed for the Minor Canons and Ministers. The stipend of the plaintiff as Master, was fixed by the Chapter at 150*l.* per annum, with the free occupation of a house, and a portion of the payments which should

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be made for the instruction, in the school, of boys not upon the foundation.

[*541] *In the month of February, 1848, the plaintiff called the attention of the Dean and Chapter to the circumstance of the inadequacy of the sums mentioned in the statute and allowed for the maintenance of the four scholars at the Universities, and to the propriety and justice of augmenting the four exhibitions by a sum proportioned to the diminished value of the currency, and the increase of the revenues of the cathedral body. The plaintiff again made a similar communication in the month of June following; to which the Chapter-clerk, by the direction of the Dean and Chapter, replied on the 30th of that month, acquainting the plaintiff that the Dean and Chapter did not doubt the correctness of the facts he mentioned, but that he was mistaken in his inferences respecting the obligation imposed upon them by the statutes. The plaintiff replied, that it was a question, not of inference, but of construction of the words of the statute, which might be properly translated, "We ordain, that, out of the funds of our church, four poor scholars be always maintained in our Universities." On the 21st of July, the Chapter-clerk wrote to the plaintiff, in explanation of his former letter, stating, "The Dean and Chapter intended me to say, that they did not doubt the correctness of the facts you mentioned respecting the changes which have taken place in the value of money, but that they dissented from the conclusion at which they presumed you wished to arrive, that they are bound to increase the exhibitions of the scholars. And as they then intended, so they now desire, to close the correspondence with you on the subject by this expression of their opinion, since, however well intended your application may have been, they cannot admit the principles upon which it is founded."

[*542] The plaintiff replied to this letter on the following day, observing that, in compliance with the desire of *the Dean and Chapter, he abstained from any further discussion, or from comment on the letter, concluding,—"but my duty to the Grammar School compels me to ask this question,—am I to understand that the Dean and Chapter refuse to comply with

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the following clause in their statutes:- Statuimus ut ex bonis Ecclesiæ nostræ quatuor scholares, &c." Other letters were addressed by the plaintiff to the Dean and Chapter in the months of August and October following; and soon after the latter communication, the plaintiff took the opinion of counsel on the case of the scholars, and was advised by them, that his view of the duties imposed on the Dean and Chapter in their behalf was substantially correct. He was also advised, that if the Dean and Chapter refused to provide for the due maintenance of the scholars, the Bishop of Rochester, as visitor, should be applied to; and that it was probable the visitor would think it right, that the question should be decided by the Court of Chancery, and would so deal with the case, as to bring the question before that Court. The plaintiff applied to the Bishop by letters of the 15th and 17th of December, 1848, to which the Bishop, on the 30th, replied, that he would cause the petition to be heard as soon as he should have had an opportunity of consulting with his legal advisers as to the proper mode of proceeding; adding, that the Ecclesiastical Commissioners, as well as the Dean and Chapter, were interested in the question the plaintiff had mooted; and that the Dean and Chapter could not therefore give any definite reply to his memorial, without first consulting the Commissioners,—that all this would cause delay, and that it was to be feared that the plaintiff must look forward to a longer state of suspense than he had been prepared to expect. The plaintiff replied to the Bishop, on the 13th of January following, by calling his Lordship's attention to a decision of the Master of the Rolls in the case *of *The Attorney-General* v. *Wimborne School, Ex* [*543] *parte The Ecclesiastical Commissioners*,(a) as showing that the Ecclesiastical Commissioners could not interfere with or depart from the legal application of the funds of the cathedral church, according to the terms of the endowment. The Bishop in answer said, that the probability of the matter coming before him as visitor of the cathedral, would prevent any ex parte communication being made to him. In answer to a letter in March,

(a) 10 Beav. 209.

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complaining of the delay, the Bishop said, that he should be at Rochester in the ensuing week, and observed, that the plaintiff was claiming privileges, which, if they ever existed, had been in abeyance for 300 years, and that he did not think that fifteen months was a long period to wait for the adjudication of a question of so much importance. After further communications from the plaintiff, he was, in April, 1849, informed by the Bishop, that, after due inquiry, his Lordship found that the Court of Chancery was the proper tribunal before which the plaintiff must lay his complaint against the Dean and Chapter of Rochester.

In May, 1849, the plaintiff published a pamphlet, intituled "Cathedral Trusts, and their Fulfilment;" in which the subject of the distribution of cathedral revenues, and the efforts which the plaintiff had unsuccessfully made in the case of the Rochester Scholars, were stated and discussed.

At a Chapter holden on the 28th of June, 1849, it was resolved to remove the plaintiff from his office of Master; and an instrument, setting forth the grounds of the proceeding, was sealed. The instrument was read to the plaintiff, who [*544] attended the Chapter in compliance *with a summons to that effect, and a copy was delivered to him. It was in the following words:—

"To all to whom these presents shall come, the Dean and Chapter of the Cathedral Church of Christ and the Blessed Virgin Mary of Rochester, send greeting:—Whereas, Robert Whiston, Clerk, Master of Arts, Master of the Grammar School of the said Cathedral Church, has lately written and caused to be printed and published a pamphlet, intituled 'Cathedral Trusts, and their Fulfilment,' of which the scope and tendency are to cast odium on the Dean and Chapter of the said Cathedral Church, and the Dean and Canons thereof individually, and to hold them up, collectively and individually, to the reproach and contempt of the subordinate members of the Cathedral, the inhabitants of the city, and her Majesty's subjects in general; and which pamphlet contains many scandalous and libellous passages directed against the Dean and Chapter of the said Cathedral Church, and the

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Dean and Canons thereof individually, and also against the Lord Bishop of the Diocese, the Visitor of the said Cathedral Church, and likewise against the members of divers other cathedral churches; particularly at p. 42, where the Dean and Chapter of the said Cathedral Church of Rochester are charged with a violation of ordinances, all of which they have solemnly sworn to observe, and with suppressing to their own profit offices and payments meant for the benefit of the poorer members of their Cathedral; and at p. 48 the following words: 'Not only do the Dean and Chapter of Rochester disregard the statutes and loosen the obligation of the oaths for which so much reverence has been professed, but they also violate the law.' And at p. 49, after setting forth the words of the respective oaths of the Dean and Canons, the writer proceeds: 'Such are the oaths taken by the *Dean and Canons of Rochester; and I assert, [*545] that, after taking them, and after pleading the statutes and ordinances of their founder, and although bound to keep the latter,—every individual member of the Chapter, by the strongest and most sacred ties,—they, notwithstanding, continue to swell their dividends by disregarding their statutes and loosening the obligations of their oaths. This assertion,—a very grave and serious one,—I shall prove in detail hereafter.' And at p. 92, in treating of the stipends of the foundation scholars, the writer observes: 'In one case only, that of Durham, has even an approximation been made to the fulfilment of this duty. In all the rest it has been entirely disregarded; and in the cases of Canterbury, Worcester, Ely, and Rochester (till 1842,) under aggravated circumstances of malversation.' And at p. 93, after stating that the cases of Ely and Rochester have been pre-eminently bad, and quoting from a declaration said to have been signed by an existing Canon of Rochester for his brethren, the writer proceeds in the following terms, speaking especially of the Dean and Chapter of the said Cathedral Church of Rochester: 'It is not, I think, too much to say, that such acts, with such words, are "*contra fidem, contra jusjurandum, contra rempublicam.*"' And at p. 100 the writer proceeds, and alleges: 'Such was the state of things in 1831 and 1834; and I feel that I am

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not using language too harsh in affirming, that the then apportionment of the cathedral funds between the Chapters and their Schools, displays, except at Westminster, a disregard of justice, and a preference of money to principle, which, in ordinary cases of trust, would be visited with the severest reprobation, if not with the penalty of restitution. But the trustees in this case are dignified and beneficed clergymen, who solicit charitable contributions for other schools from those whom they wrong; [*546] and who, after reminding their *congregations, week by week, from their cathedral pulpits, of the strict and solemn account which we must all one day give before the judgment-seat of Christ, and exhorting them, almost in the same breath, to pray for a blessing on all seminaries of sound learning and religious education, then go with subtlety and take away from their own school the founder's blessing, and deny to their neighbors' children their birthright and inheritance. The Dean and Chapter of Rochester, in particular, would not conceal their conscientious opinion, that, for certain ends, certain means (not adverse to their own interests) were better and safer than others, because less obviously at variance with the intention of their founder. It would be well, and perhaps safer for them, if they would themselves regard the opinions of others, who hear exhortations, so obviously at variance with practice, from men who have called God to witness that they will do what they do not, though it may be done as it should be, not by taking from any man anything that is his, but by rendering unto every man his due.' And in p. 102, the writer proceeds, and further alleges: 'In fact, nothing but the assurance of such sympathy, and the consciousness of a righteous cause, with faith in the power of it, could have sustained the persevering and, as yet, single-handed efforts which I have made to prevail upon the Dean and Chapter of Rochester to carry out the intention of their founder, upon every ground of justice and equity, which they once maintained most successfully and advantageously to keep their patronage, and which they now abandon to keep up their dividends.' And at the same page the writer also alleges: 'For more than fifteen months I have waited, labored, and striven in vain for justice.

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I have found that she has left the Cathedral Precinct. It is not her home.' And whereas the laws of this realm provide a remedy for any wrong or grievance *that may exist, [*547] and do not permit any man openly to vilify the character of another, or to impute to him wicked motives or intentions. And whereas the said Robert Whiston, Master of the Grammar School of the said Cathedral Church of Rochester, by writing and causing the above pamphlet to be printed and published, has been guilty of a very grave offence, and, in the judgment of the Dean and Chapter, has proved himself to be utterly unfit and unworthy to be any longer intrusted with the instruction and superintendence of the foundation boys in their Grammar School; and the said Dean and Chapter, in Chapter duly assembled, have resolved that he is unfit and unworthy to continue in the office of Master of the Grammar School of the said Catheral Church of Rochester, and that he hath, by such his misconduct as aforesaid, forfeited all the rights, advantages, privileges, and emoluments of that office; and have resolved and ordered that he be forthwith amoved, removed, deprived, and displaced of and from the office of Master of the said Grammar School, and of and from all houses, lands, profits, emoluments, commodities, advantages, and appurtenances whatever, to the said office in anywise incident, belonging, or appertaining. Now know ye, that we, the Dean and Chapter of the Cathedral Church of Christ and the Blessed Virgin Mary of Rochester, have, by our whole and mutual assent, consent, and agreement, deprived, amoved, removed, and displaced, and by these presents, for ourselves and our successors, do deprive, amove, remove, and displace the said Robert Whiston of and from the said office and place of Upper and Head Master of the King's School or Grammar School of and belonging to the said Cathedral Church of Christ and the Blessed Virgin Mary of Rochester, and of and from all houses, lands, fees, stipends, allowances, perquisites, payments, sum and sums of money, augmentations, pensions, profits, emoluments, commodities, rights, [*548] liberties, claims, advantages, and appurtenances whatsoever, to the said office and place incident, belonging, or in

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anywise appertaining, or with the same now or at any time heretofore had, held, occupied, used, taken, or enjoyed. In witness," &c.

The plaintiff filed his bill against the Dean and Chapter for an injunction to restrain them from removing him from his office of Upper or Head Master, and from proceeding to the election of any other person as Head Master of the School during the plaintiffs retention or incumbency of the office; and from impeding or in any manner interfering with the plaintiff in the enjoyment of his rights, interests, and privileges as such Head Master; and from bringing any action or other proceeding against the plaintiff to disturb him in his office, or in the exercise or performance of his powers or duties, or in the enjoyment of his rights, interests, or privileges. A motion for an injunction was made in the terms of the prayer.

The *Solicitor-General* and Mr. *D. W. Lewis*, for the motion.

First, the publication of the pamphlet, which is the subject of complaint, was neither an offence against the statutes nor a breach of duty in the plaintiff as schoolmaster. That it raised a question of grave inquiry in a legal point of view, cannot be doubted: *Attorney-General* v. *Mayor of Bristol*,(a) The charge with reference to the neglect of cathedral trusts extended to the cathedrals of the new foundation generally, and not to Rochester alone [*549] The office of schoolmaster rather imposed *the duty of bringing forward the claims of the scholars; and, after applying to the Dean and Chapter in vain, the plaintiff cannot be blamed for seeking to avail himself of the influence of public opinion and sympathy. The statute "*De Visitatione*" contained an implied sanction of such a course. The plaintiff had not departed from the tone or language in which a public question might properly and energetically be discussed. It was impossible not to say, there were duties imposed and not fulfilled. No individual was, however, named, and no personal attack or invective was resorted to. It was not the falsehood, but the truth of the

(a) 2 J. & W. 294.

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reasoning which had provoked the hostility of the defendants. The Dean and Chapter had, it was true, only followed the steps of their predecessors, and this might have placed them in the unhappy position of parties who were committing almost a prescriptive wrong; but it was not the less a wrong.

Secondly, the plaintiff was not one of the "*ministri*" within the statute "*De Corrigendis Excessibus.*" In conformity with the statute, "*si desidiosi, aut negligentes, aut minus ad docendum apti inveniantur,*" the schoolmaster might be removed; but the defendants did not insist on any such ground, or on any cause, which, by the express words of the statutes, or by implication, could be brought within them. The defendants, indeed, had not professed to act in pursuance of the statutes.

Thirdly, supposing the removal to have been founded upon any statutable cause, it was illegal and void, inasmuch as it was a judgment pronounced without the shadow of a trial, or even a hearing: *The Queen* v. *Smith*,(a) **The King* [*550] v. *Bishop of Ely*,(b) *Doe* v. *Gartham*,(c) *The King* v. *Gaskin*.(d)

Fourthly, the plaintiff had then been wrongfully removed from the office and deprived of the stipend and house which had been assigned to him in virtue of his office, and the question was only as to the form of his remedy. First, the plaintiff had no remedy in the Ecclesiastical Court. The case must be governed by the founder's statutes, and was not within the ordinary ecclesiastical constitution of the Church. Secondly, the Dean and Chapter could not propely exercise jurisdiction in such a case if they possessed it. They were disqualified by their own act from being judges in an appeal against that act. But the Dean and Chapter were not the parties to whom an appeal should be made. They were not a purely ecclesiastical corporation, but resembled an ordinary college. They had no plenary authority over or discretion in dealing with the officers created by the statutes, except for the necessary performance of divine service and the govern-

(a) 5 Q. B. 614. (b) 2 T. R. 336, 338. (c) 8 Moore, 368.
(d) 8 T. R. 209.

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ment of the establishment: *Dean and Chapter of Dublin* v. *The King*.(a) The rights of the plaintiff were derived from the same charter and constitution as those of the Dean and Chapter; he is not their officer merely. The School is not an integral part of the "Ecclesia" but a collateral or separate institution, and the authority of the Dean and Chapter over it is limited to the particular cases in which the power is given by the statutes. Thirdly, the Bishop has no visitorial power in a question relating to the amotion of the Master; such a power is not given, and cannot be implied. But if, under his general powers as visitor, the [*551] Bishop had jurisdiction in *a matter relating to the Master or to his functions, still the powers of the visitor would be inadequate to the relief in this instance. According to the case of the defendants and the tenor of the instrument which they had executed, the plaintiff had been removed, and was no longer a member of the church or of the cathedral establishment. The visitor had no jurisdiction to direct the deed to be cancelled, or to compel the defendants to re-elect the plaintiff, even if he might have determined any question between the parties whilst in their former position. Even if the jurisdiction of the visitor to give relief were perfect and unquestionable, the Bishop as well as the Dean and Chapter, was, in the circumstances which had taken place, disqualified from acting as judge in respect of the complaint which the Dean and Chapter had brought against the plaintiff. It was a case in which the Bishop, formerly as Dean of Worcester, (also a cathedral of the new foundation) as well as in his existing capacity, was too much affected by the matter in dispute to be a disinterested judge: *Dean of York's case*,(b) *The King* v. *Bishop of Ely*.(c)

Fifthly, the plaintiff having no remedy in any Court of limited jurisdiction, could only appeal to a Court of common law or a Court of equity. Any departure from, or excessive exercise of powers given by the statutes, was clearly within the jurisdiction of the Courts of law, by mandamus or prohibition, in cases to which such remedies were applicable: *The King* v. *The Dean and*

(a) 1 Bro. P. C. 73, Toml. edit. (b) 2 Q. B. 1. (c) 1 Sergt. Wils. 266.

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Chapter of Rochester,(a) *Dean and Chapter of Dublin* v. *The King*,(b) *The King* v. *Bishop of Ely*,(c) *The King* v. *Bayley*,(d) *Ex parte Smyth*,(e) *In re Dean of York*.(f) The Courts of law are not, however for this purpose *accessible in vacation. [*552] Independently of that ground of interposition, equity will interpose to protect the title to an office pending the trial of the right and would, for that purpose, restrain the defendants from electing another Master and parting with the stipend of the plaintiff, or ejecting him from the house in the meantime.

[It having been suggested that the frame of the suit precluded the latter argument, it was by consent of the defendants agreed that the bill should be taken as if amended by praying, in the alternative, an injunction to restrain the defendants from any further proceeding pending the trial of the case in the proper Court.]

Sixthly, the plaintiff, however, relied on the broad ground, that the defendants were trustees of their funds, to satisfy, among a variety of purposes, the schoolmaster's stipend. There was a trust for the school and for the schoolmaster, as the person who embodied and represented the idea of the school. The funds were in the hands of the Dean and Chapter as a Corporation, created for the convenient devolution of the title. The Dean and Chapter were not the "Ecclesia," and what the individual members of the corporation took out of the income, they took as part of the general body of *cestuis que trust*, extrinsic to the corporation, namely, the "Ecclesia." The case might justly be considered different, if the funds were those of the Dean and Chapter, but they were not, they were the funds of the Dean, the Canons, the Minor Canons, the Schoolmaster and others, who were to receive individually their stipends through the Treasurer. The Dean and Chapter had accepted the endowments charged with the maintenance of the school and the payment of the Master's stipend; and the Master, upon his appointment, acquired a right

(a) 3 B. & Ad. 95. (b) 1 Bro. P. C., Toml. edit. 73. (c) Ubi supra.
(d) 1 B. & Ad. 761. (e) 3 A. & E. 724. (f) Ubi supra.

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which the defendants could not repudiate: *Attorney-*
[*553] *General* v. **Christ's Hospital.*(a) It was not to be said, that if the plaintiff were a *cestui que trust*, so also the lower servants of the establishment must be. There was a plain distinction between those, who like the schoolmaster had freehold offices, and those whose engagements for menial purposes were necessarily subject to determination at the will of the governing body. There was a duty annexed to the legal ownership in the corporation, to apply the property and income for the benefit of the general body, which might be termed "Ecclesia." The "common goods," out of which the Master's stipend was to come, were the goods of the general body, of which the Dean and Chapter were only part. The School and its Master are objects of a trust attached to the corporate ownership of the Dean and Chapter. These reasons, while they establish the general argument as to the trust, also distinguish the present case from that of *The Attorney-General* v. *Magdalene College, Oxford.*(b) The dispute there was, as to a matter of mere internal management. The master was one officer of the corporation, i. e. the college, and the legal property was in the college, and the goods out of which the master's stipend was to be paid, were the common goods of the college or corporation, and not (as here) of a body wider than and extrinsic to the corporation. The defendants in this case were trustees, and were removing the schoolmaster whose office gave him a beneficial interest in the trust, for having imputed to them a breach of duty in the same trust, as to which he had intimated his intention of taking proceedings in this Court. This was amply sufficient to give the Court jurisdiction on this motion: *Attorney-General* v. *The Governors of the Foundling Hospital,*(c) *Dummer* v. *The Corporation of Chippenham.*(d)

[*554] *Mr. *Roundell Palmer* and Mr. *J. H. Low*, for the defendants.

The application was founded upon the mistake of supposing,

(a) Taml. 393.
(b) 10 Beav. 402.
(c) 2 Ves. jun. 41,
(d) 14 Ves. 252.

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that the defendants were trustees for their officers. There was no trust in this case, within the sense in which that term was understood in equity. The school of which the plaintiff had been master, was one of a class, peculiar to cathedral churches, or, before the Reformation, to cathedrals and monasteries. The error was, in supposing that this school stood in the same position as a simple grammar school within the control of this Court, in the exercise of its jurisdiction over charitable foundations. This belonged to the class of claustral, as distinguished from secular grammar schools.(*a*) The claustral schools had no independent endowments, but depended on the bodies to which they were attached. "Grammar schools in the country and in some cities were lately maintained with the revenues of chauntries, that belonged to those churches; wherein, or else in chauntry-houses, the Priest taught. So that, the chauntries being dissolved, the schools fell with them;" Hist. and Antiq. Un. Oxford, by Anthony a Wood, vol. 2, p. 103. So, in this case, the school was only a part of the cathedral establishment, and not an independent or a separate foundation: *Attorney-General* v. *Magdalen College, Oxford*,(*b*) *Rex* v. *Bishop of Ely*.(*c*) The master of the school was one of the officers employed in the internal administration of the cathedral establishment. He could not be regarded as a *cestui que trust*, otherwise than as the porter, cook, and other officers, whose maintenance was provided for by the statutes, were entitled to that character. All those officers, including the *schoolmaster, were allowed to participate [*555] in the common goods, or (as described in the stat. 3 & 4 Vict. c. 113, s. 52) the "divisible corporate revenues," but they had no independent rights as *cestuis que trust*. The Cathedral Church and its officers were governed by the statutes, and their regulation was not left open and subject to the jurisdiction of the

(*a*) See History and Antiquities of University of Oxford, by Anthony a Wood, Vol. 2, p. 712.

(*b*) 10 Beav. 402. See also n., p. 564, infra.

(*c*) Duke's Charitable Uses, Bridgman, 331.

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Court of Chancery: *Attorney-General* v. *Middleton.*(a) The jurisdiction was in the Bishop, as laid down in the statute "*De Visitatione Ecclesiæ.*"(b) If the visitor, where the visitatorial power existed, refused to act, he might be compelled to do so by mandamus, and if he exceeded his powers, he might be restrained by prohibition, but there was no appeal against his judgment: *Attorney-General* v. *The Master and Fellows of Catherine Hall, Cambridge,*(c) *The King* v. *Bishop of Chester,*(d) *The King* v. *Bishop of Chester,*(e) *Rex* v. *Bishop of Ely,*(f) *Phillips* v. *Bury,*(g) *The King* v. *Bishop of Worcester,*(h) *Attorney-General* v. *Talbot,*(i) *Dr. Snape* v. *The Bishop of Lincoln.*(k) The jurisdiction of this Court extended, not to lands and property held, as in this case, in frankalmoigne, but to lands and property in which the legal owners had not the beneficial interest, and to property, the disposition of which fell within the statute of Charitable Uses. The jurisdiction, under the latter statute, was co-extensive with the jurisdiction of the Court of Chancery in like matters, and that which was excepted from the one, was not within the other. Where a trust was created, whether for a general or a special charitable purpose, the charity not being vested in the persons who were to partake of it, but in others for their [*556] benefit, the visitatorial power did not *arise: *Green* v. *Rutherforth.*(l) In such cases a trust would be enforced as against a corporation, as well as against an individual. The Court of Chancery, being said to be always open, had issued the writ of prohibition in Vacation, when the application could not be made to the courts of common law. The writ had not, however, in such cases been granted upon any equitable ground, but precisely upon the same ground as a court of law would have acted, if that court had been accessible: *Anon.*, 1 P. Wms. 476; *Iveson* v. *Harris.*(m)

The defendants objected to the jurisdiction in this case only

(a) 2 Ves. 327. (b) Supra, p. 539. (c) Jac. 381, 392.
(d) 1 W. Bl. 22. (e) 1 Barnard. 52. (f) 1 Cowp. 315.
(g) 1 Ld. Raym. 5; *S. C.* per Holt, C. J., 2 T. R. 346.
(h) 4 M. & S. 415. (i) 1 Ves. 78. (k) 1 Barnard. 93, 122.
(l) 1 Ves. 462, 472. (m) 7 Ves. 251.

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as an important duty to their successors, and other bodies of the same constitution. They would prefer to argue the case on its merits. The language of the publication of which they complained was calculated to bring disrespect and contempt upon the Dean and Chapter, and to impede them in the performance of their duties. It was, moreover, an unfair and inaccurate representation of the case as against the Dean and Chapter. A late statute (3 & 4 Vict. c. 113,) had taken from them all discretion in the administration of the Cathedral funds, and prevented them from augmenting out of those funds the allowance of the scholars. The publication of partial statements of cases under or about to be the subject of adjudication had been a ground of committal by courts, both of law and equity, (*Ex parte Van Sandau*;)(a) and had always met with severe reprehension.

The *Solicitor-General* in reply.

The distinction attempted to be made between the school in question and other grammar schools has not been established. There are certain funds to be applied, and which have invariably been applied for the *maintenance of the [*557] school. This is the same state of things which in other grammar schools has given the Court jurisdiction. It created a charitable trust. The capitular body was perfect without a school, and the school was not therefore an integral or essential part. The support of the school was, however, a condition of the endowment imposed by the founder, and it was therefore in the nature of a trust. The case did not differ from that of *Dummer* v. *The Corporation of Chippenham*.(b) But the argument founded on the power of the visitor could scarcely avail the defendants in this case. If the plaintiff had misconducted himself as they allege, it was their duty to bring the case before the visitor, and not to act upon their own authority where the statutes were silent. By the course adopted the defendants had in effect themselves superseded or assumed to supersede the authority of the visitor, to whom, according to their present

(a) 1 Ph. 445, 605, per Lord Cottenham. (b) 14 Ves. 252.

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argument, the case ought to have been referred. The very argument itself amounted to an admission that the defendants had acted illegally, and established a case, at least for the temporary interference of the Court; for the jurisdiction of the visitor, if now appealed to and exercised, would not protect the plaintiff in the enjoyment of the temporalities of his office, by preserving his stipend and emoluments, such as the enjoyment of the house assigned to him, pending a trial before the proper Court: *The King* v. *The Bishop of Durham*.(a) The Court would therefore grant the injunction.

VICE-CHANCELLOR:—I have never entertained a doubt, that, if it could be established that the Dean and Chapter were trustees for the Master of the Grammar School, he would be [*558] entitled *to the assistance of the Court in enforcing the execution of the trust. If the appointment of the plaintiff as schoolmaster gave him a right to the stipends prescribed by the statutes as a *cestui que trust* against his trustees, there is no question whatever that the mere circumstance of the Dean and Chapter being a corporation or an ecclesiastical body would not remove the case from the jurisdiction of the Court. Two questions arise on the present motion: first, whether the plaintiff is such *cestui que trust;* and, secondly, if he be so, whether he has been lawfully displaced. Supposing the Bishop to be the visitor, and that he has not interfered, I do not know why the Court should not in a plain case declare the right of the plaintiff; or, if the case were one of more difficulty, the Court might retain the proceedings, giving liberty to the party to proceed by action at law, or might direct an issue, or order the proceedings to stand over to enable the parties to try the question at law by an application for a mandamus. One of these courses must be taken, assuming the case to be clearly one of trust. It cannot, however, be denied that there are cases,—I do not say that this is one of them,—in which the jurisdiction is in the visitor, and not in a

(a) 1 Burr. 567.

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court of equity. The case of *Magdalen College*,(a) is an example of that class of cases. If the case be within the scope of those decisions, and the jurisdiction be altogether in the visitor, the question will arise, whether I can interfere. No doubt many incidental questions may arise, giving a court of law or equity jurisdiction. The visitor may not have acted, or may have declined to act. The right course in such cases may be to apply to the Court of Queen's Bench for a mandamus; or, if the Bishop be about to interfere where he has no jurisdiction, the party may apply for a prohibition.

*There is great difficulty in drawing the line between [*559] colleges where there are fellows and various other persons who receive stipends under the statutes of such colleges, and establishments of the kind now before the Court, where there exists a common fund, which has been given to the body by the founder, who has chosen to direct in what manner that body should act, and has imposed the obligation of maintaining a certain number of officers having particular duties, and to whom particular stipends are directed to be paid. Although, in speaking of the office of schoolmaster, he has been adverted to in argument as an individual standing upon the same footing as subordinate officers,—such as the janitor or others,—it is only for the purpose of illustrating his legal position; for the duties of the schoolmaster are acknowledged, and undoubtedly are, of a very high order. For the purpose of the argument, the founder is considered as saying, that there shall be certain funds, and certain officers payable out of those funds, such as a schoolmaster, choristers, and others, who shall fill various offices, and perform various duties. All these persons apparently fall within the same category in point of description, although they are unequally paid, and their duties are not of equal importance. Unless it is to be argued that the janitor, for instance, on being discharged, may come to this Court and allege a trust in his favor, and call upon the Court to decree accordingly, it may be difficult to say that the master, if he be within the same category, has a right to come to the

(a) 10 Beav. 402.

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Court and allege such a trust. I must carefully read the statutes, and examine the cases which have been cited.

[*560] *August 8th.*—*VICE-CHANCELLOR:—At the close of the argument in this case, I recognized the undoubted jurisdiction of this Court in all cases of trust, in the sense in which that word is used in this Court in the ordinary case of trustee and *cestui que trust.*

The first question to be determined in this case is, whether the relative positions of the defendants and of the plaintiff are those of trustee and *cestui que trust.* That this is the first question to be determined is manifest from the reasoning of the Court in all the cases, beginning with *Philips* v. *Bury*,(*a*) and *Green* v. *Rutherforth*,(*b*) down to and including the *Attorney-General* v. *Magdalen College.*(*c*) The answer which I feel compelled to give, after examining, I believe, every case that was cited in argument bearing upon it, is, that this is not a case of trust in the sense above explained; but that the Master, upon the true construction of the statutes, ought to be considered only as an officer of the Cathedral Church, appointed for the purpose of performing one of the duties imposed upon the Cathedral Church by the statutes of the founder. I cannot, in this case, for the purposes of the question I have to determine, distinguish the position of the Master from the position of the Master in the *Attorney-General* v. *Magdalen College*, or from the other cases in the books, in which similar questions have arisen between collegiate bodies and persons holding offices appointed by the founder, but which persons have not been members of the collegiate body. I cannot, upon the construction of the statutes, in this case say, that [*561] the Master is not one of the "Ministri" *spoken of in the statutes. But, if the contrary of this could be maintained, I cannot discover a ground for holding that the Master is a *cestui que trust* of the Cathedral Church, only because he receives a stipend payable out of the common funds of the defendants, which would not equally oblige me to

(*a*) 1 Ld. Raym. 5; *S. C.* per Holt, C. J., 2 T. R. 346. (*b*) 1 Ves. 462.
(*c*) 10 Beav. 402; infra, 564, n.

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hold that every officer mentioned in the statutes, to whom a livery and a stipend are given, is also a *cestui que trust*. The case of the *Attorney-General* v. *Magdalen College* is a direct authority in point; and I am satisfied with following that authority.

Excluding, then, the case of trust, and assuming also, what I certainly am not disposed to question, (though I give no opinion upon the point,) that the removal of Mr. Whiston from the mastership, without hearing him in his defence, was a wrong, the question is, in whom is the jurisdiction to redress that wrong.

If there be a visitor, whose powers are not so circumscribed as to exclude the jurisdiction, I apprehend it is clear, that the jurisdiction must be in that visitor, and that his decision upon the point is final. This is so broadly stated in all the cases since *Phillips* v. *Bury*, that it cannot be necessary that I should refer to authorities in support of it. The case of *The King* v. *Bishop of Chester*,(*a*) shows that the rule applies as well to cathedral as to other bodies.

The jurisdiction of the Court of Queen's Bench may be called in by mandamus, to compel the visitor to act; and the jurisdiction of that Court, and in some cases of the Court of Chancery also, may be called in by prohibition, *to restrain the visitor from exceeding his jurisdiction; and [*562] where there is no visitor, or the power of the visitor is extinct or suspended, (*Manchester College case*,)(*b*) or is not pleaded in proceedings for a mandamus (*Dr. Bentley's case*,)(*c*) the Court of Queen's Bench may be the proper Court to redress the wrong. Attention to these distinctions will reconcile with the law as I have stated it much that was pressed upon me in argument by the plaintiff's counsel.

In this case, I am called upon to decide, that the Court of Chancery has jurisdiction by bill, as matter of course, to try the question in dispute between the plaintiff and the defendants.

In making the inquiry, whether this proposition is well founded, I need not determine whether the Bishop of Rochester

(*a*) 1 W. Bl. 22. (*b*) 1 Barnard. 52; 1 W. Bl. 22. (*c*) Fortescue, 202.

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is in this case the visitor; or whether, if he be visitor, he has such an interest in the matter in dispute as to occasion *pro hac vice* a suspension of his visitorial powers; or whether the right of visitation is in the Crown, to be exercised by the Lord Chancellor upon petition; or whether the plaintiff could, by an application for a prohibition, have protected himself against the continuance of the wrong of which he complains, as in the case of the *Dean of York*,(a) or, lastly, whether the Court of Queen's Bench could, by mandamus, order the plaintiff to be restored to his office. The only question I have to determine is, whether the Court of Chancery, in the exercise of its ordinary jurisdiction by bill, in a case in which no trust exists, can try the plaintiff's right to the office of schoolmaster, from which the de-
[*568] fendants have exercised the power *of excluding him. I am of opinion that this question must be answered in the negative. Excluding trust, I cannot find a single authority which supports the proposition.

I could, on many accounts, have wished for the opportunity of explaining more in detail the grounds on which the above opinion has been formed. But, having come to the conclusion I have stated, I have thought it best to give the parties the earliest possible opportunity of having my judgment reviewed, if it should be thought erroneous.

One other point remains to be noticed. It was said for the plaintiff, that the Court, at all events, would preserve things *in statu quo* until the right should be determined by the proper tribunal. That this was not the object of the bill, as originally framed, is manifest. The object of the bill, at the time the argument commenced, was to obtain the judgment of this Court upon the main question, namely, the plaintiff's right to the office of schoolmaster, notwithstanding the acts complained of. The bill, as amended by consent during the argument, has made it a bill for the execution of the trust, and not a bill for the protection of property *pendente lite*, which is a bill of a special character. But, waiving all objection upon the ground of form, I cannot recog-

(a) 2 Q. B. 1.

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nize the general proposition, that, in every case of a dispute arising about a right of office, the Court of Chancery can be called upon, as a matter of course, to prevent the claimant from being displaced until the right shall have been tried; and no special case for the interference of the Court has been made before me. There are numerous cases, even of irreparable mischief, in which the Court has refused to interfere *between adverse claimants, where no ultimate relief [*564] could be had in this Court.

I regret, therefore, being under the necessity of refusing this motion, with costs.

THE ATTORNEY-GENERAL *v.* MAGDALEN COLLEGE, OXFORD.

The following abstract of the information, and of the answer of the College in this case, has been thought useful, as showing some facts that do not appear in the brief report, 10 Beav. 402 et seq.:—

The information was filed by the Attorney-General at the relation of the Town Clerk of Oxford, against the President and Scholars of Magdalen College, Oxford, and the Rev. W. S. Henderson and the Rev. T. W. Lancaster, the acting master and usher of the grammar school connected with the College. It commenced by stating certain royal licenses, and a charter of incorporation, under which William Waynflete, Bishop of Winchester, was authorized by King Henry VI. to found a college in the University of Oxford, and to endow it with lands, and to make statutes for the government of the said college and its possessions, and for the application of its revenues; that the Bishop commenced and proceeded to complete the buildings of the college; and that, adjoining the said college, and separated therefrom by a narrow lane, he erected and founded a grammar school, and built a school-room, chapel, refectory, and buildings for such grammar school; and that he also erected and founded another grammar school at Waynflete, in Lincolnshire; and that he placed a master and usher in, and gave them possession of, the said school at Oxford; that the site of the college and of the said two grammar schools, and also various possessions, were duly conveyed to and vested in the college; and that, in the year 1483, the Bishop finally founded and established the college, and duly made and executed a certain deed-poll for the regulation of the said college and schools, containing statutes for the government of the college and its possessions, under which the college had ever since been and still was governed.

The information then set forth a summary of the statutes, by which it was appointed, that the college should consist of a president, forty fellows, thirty scholars, called demies, four chaplains, eight clerks, and sixteen choristers; that the president was to have authority over all persons in the college, according to the statutes, *with the care of the due administration of the revenues; and that, [*565] after providing for the necessary expenditure, he was "to take *care and*

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cause the surplusage, and what remained over, to be carefully kept for the improvement and benefit of the college." That the president was to have a salary of 20*l.* a year over and above certain other fixed emoluments; that the allowances for the commons of the fellows, the scholars, *the head and under masters of the grammar school*, and the chaplains, "*out of the common goods of the college*," were to be of certain specified amounts; and that, "should there be any surplus, it was to be applied to the behoof of the college."

The information then stated the special clauses in the statutes relating to the grammar school masters:—"That there should be *in the said college forever*, one master or informer in grammar, to be alike hired and removed by the president, who was freely and gratuitously to inform, teach, and instruct all persons whomsoever, who might attend the grammar school, which was so as aforesaid built and situate hard by the said college; and that, under the said master, there was to be an usher, engageable and removable in form aforesaid." That such master should be paid 10*l.*, and such usher 100*s.* per annum, *out of the common goods of the college, in addition to their chambers and weekly commons, which commons were to be equal to those of the fellows of the college.* That, in case of retirement, the master or usher should give six months' notice to the president; that any master or usher found incapable, &c., should be removed by the president; that the fellows or scholars of the college were not to interfere with the maintenance of discipline among the scholars of the grammar school by the master or usher, without the leave of the president; and that every master and usher, upon his admission, should take an oath of obedience to the statutes (so far as they concerned himself) before the president. The information also stated certain other clauses of the statutes relating to the school at Waynflete in Lincolnshire, by which it was provided, that there should also be a master of that school forever, to be in like manner appointed and removable by the president of the college, who should instruct gratuitously all persons whatever going to that school, and who should receive 10*l.* per annum "out of the goods of the college, *videlicet*, out of the profits and rents arising in the county of Lincoln."

The information proceeded to state, that, after the foundation of the college, a master and usher of the grammar school at Oxford, and a master of the school at Waynflete, were duly appointed, and duly received the stipends and emoluments provided for them by the founder; that many eminent masters presided over the said school; and that the whole of the buildings so erected by the said

[*566] *William Waynflete at Oxford, were duly used for the said grammar school for many generations; that the said grammar school at Oxford was attended by boys from various places, and was of great advantage to the inhabitants of Oxford; that the school-room, as built by the founder, was capable of accommodating 200 boys; and that it continued, from its foundation to the year 1790, and subsequently, to be attended by upwards of 100 boys, who were instructed in grammar.

The information then alleged, that "Some time ago the president and scholars determined to abolish the said grammar school, and obtain possession of, and convert to their own use, the property and revenues thereof;" that the president had permitted the master and usher to exact payments from the boys who attended the school, and had appointed unfit persons to be masters and ushers, paying them only small stipends, without commons or rooms; and that the president sent the choris-

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ters to be instructed in the grammar school; and that, by such means, nearly all the scholars in the said grammar school were compelled to leave the same; that, about the year 1815, the college pulled down the old school buildings under the authority of a private Act of Parliament, which was obtained upon the representation that the school was one for choristers of the college only, and which directed the substitution of other suitable buildings, but that no suitable buildings had since been founded; and that there was not now a proper master or usher; but that the defendant Henderson, (who was one of the demies of the college) and the defendant Lancaster, claimed to be master and usher, and were employed by the college to instruct the sixteen choristers in a small turret room, which was used instead of the old school-room; and that it was intended to erect buildings on the site of the old school for the general purposes of the college.

The information then charged, that the possessions of the college greatly increased in value, and that the annual income was now far more than sufficient for the support of the college and grammar school at Oxford; and that the stipend of the president had been raised from the sum of 20*l.* a year to a very large sum; and that a very large sum was now allowed for the commons and stipends of the fellows, and handsome and commodious rooms had been provided for their residences; and that the president and fellows yearly divided large sums of the revenues of the college among themselves, contrary to the provisions of the statutes.

The prayer of the information was for an injunction to restrain the college from erecting any buildings on the site of the school for their own use; and for a declaration that the school was a public *grammar school, and that the [*567] president ought to hire and appoint fit and proper persons to be the master and usher thereof; and that the college might be decreed to provide for the master and usher commons equally with the fellows, and might be decreed to allow the master and usher to have proper rooms in the college; and that it might be declared that the master and usher were entitled to participate in the increased revenues of the college; and that the master was entitled to a stipend equal to one-half of that now received by the president, and the usher to one equal to half the stipend of the master; and that the college might be ordered either to build and provide all necessary and convenient buildings for the said grammar school on the original site thereof, or to restore the said ancient grammar school and the buildings connected therewith; and for general relief.

The college, by their answer, stated, that the old school buildings were erected by the founder before the date of the statutes, upon land previously vested in the college by the original instrument of foundation, and described in that instrument and in the royal charter as part of the site of the college itself; that, except by the erection of such buildings, and by the directions contained in the statutes as to the appointment, maintenance, duties and remuneration of the schoolmaster and usher, the school mentioned in the information was never in any manner founded or endowed; that the school was in truth not a separate foundation, but merely part of the college establishment, and always had been and still was maintained on that footing. It was admitted that the old school buildings had been taken down as stated in the information, and no others as yet provided (though it was in contem-

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plation immediately to erect suitable buildings;) that it had been usual for the college to allow the master and usher to require and receive payments from any boys (not being members of the college establishment) who were permitted to attend the school, the view practically taken of the founder's intention being, that none but the choristers and other members of the college, who might not need instruction in grammar, had a right to claim gratuitous education in the school; and that the master and usher were not recognized as having any right to participate in the increased revenues of the college, though certain augmentations of their statutable stipends had been from time to time made by the voluntary liberality of the president and fellows. All intention of abolishing or suppressing the school was denied, but the college asserted their right to continue to deal with it as part of the collegiate establishment; and they submitted, that, as such, it was subject to the exclusive authority of the Bishop of Winchester, the visitor of the college appointed by the statutes; and that the Court of Chancery had no jurisdiction to administer any part of the relief sought by the information.

[*568] *MONYPENNY *v.* DERING.

1850: February 28th; March 1st, 2d, 5th, 6th, 8th and 9th; April 16th; May 4th and 7th.

Devise of lands of gavelkind tenure to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son of P. M. for life, and after his decease for the first son of such first son and the heirs male of his body, and in default of such issue for every other son of P. M. successively for the like interests and limitations; and in default of issue of the body of P. M. or in case of his not leaving any at his decease, or T. M. for life, and after his decease for T. G. M., the eldest son of T. M., for life, and after his decease, for the first son of T. G. M. and the heirs male of his body; and in default of issue of the body of the said T. G. M., for every other son of T. M. successively, for the like estates and interests; and, on failure of all such issue of the body of T. M., upon trust for him, his heirs, and assigns forever; provided that, if P. M., or T. M., or any of their issue, should become entitled to the Jodrell estate, then the trustees should stand seised of the devised premises, upon trust, for the next person entitled thereto under his will, as if the person so succeeding to the Jodrell estate were dead. T. M. died after the date of the will, and the testator by a codicil declared that his trustees should stand seised of the devised estates, upon trust, for his wife for her life; and from and after her decease, upon the trusts declared by his will, subject to the declaration therein contained with reference to the Jodrell estate:—*Held*, that P. M. took an estate for life only.

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That T. G. M. took an estate for life in remainder after the life estate of P. M., contingent on P. M. not leaving any issue at his decease, and determinable on his becoming entitled to the Jodrell estate.

That the eldest son of T. G. M. took a contingent remainder in tail, after the determination of the life estate of his father.

THE question arose on the will and codicil of James Monypenny, devising certain estates in the county of Kent, of gavelkind tenure.

By the will, dated the 11th of February, 1804, the testator, after devising portions of his real estates, gave and devised his house called Maytham Hall, with the appurtenances, and all the rest, residue, and remainder of his manors, messuages, farms, lands, tenements, hereditaments, and real estate, except as thereinbefore devised, unto his brothers Phillips Monypenny, Thomas Monypenny, and Robert Monypenny, and their heirs, and the heirs of the survivor of them, to have and to hold the same and every part thereof unto and to the use of them the said Phillips Monypenny, Thomas Monypenny, and Robert Monypenny, and their heirs, and the heirs of the survivor of them, upon the trusts thereinafter expressed. The testator then directed his trustees, within six months next after his decease, to sell and dispose of so much of his real estates thereinbefore devised as should be sufficient to pay his debts, funeral and testamentary expenses, and *certain legacies in exoneration of his per- [*569] sonal estate, and proceeded:—"And, subject to the above, my said trustees, and the survivors and survivor of them and his heirs, shall stand seised of all and every my said real estates to them devised, for payment of all and every my debts as aforesaid, upon trust to permit and suffer my said brother Phillips Monypenny to receive and take the rents, issues, and profits thereof, for and during the term of his natural life, without impeachment of waste; and from and immediately after his decease, upon trust for the first son of the body of the said Phillips Monypenny for and during the term of his natural life, and from and immediately after his decease, upon trust for the first son of the body of such first son, and the heirs male of his body; and, in default of such issue, upon trust for all and every other

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the son and sons of the body of my said brother Phillips Monypenny, severally and successively according to seniority of age, for the like interests and limitations as I have before directed respecting the first son and his issue; and in default of issue of the body of my said brother Phillips Monypenny, or, in case of his not leaving any at his decease, upon trust for my said brother Thomas Monypenny, for and during the term of his natural life, without impeachment of waste; and from and immediately after his decease, upon trust for Thomas Monypenny,(a) the eldest son of my said brother Thomas Monypenny, for and during the term of his natural life, without impeachment of waste; and from and immediately after his decease, upon trust for the first son of the body of the said Thomas Monypenny, son of my said brother Thomas Monypenny, and the heirs male of his body; and in default of issue of the body of the said Thomas Monypenny the son, upon trust for all and every other the son and sons [*570] of the body of my said *brother Thomas Monypenny, for the like estates and interests, severally and successively, according to seniority of age; and in failure of all such issue of the body of my said brother Thomas Monypenny, upon trust for him, his heirs, and assigns for ever. But I do hereby declare, that, if it shall happen at any time hereafter, that my said brothers or either of them, their or either of their issue, shall become entitled to the real or copyhold estate, or any part thereof, late of Elizabeth Jodrell, widow, daughter of the late Phillips Gybbon, situate in the said parish of Rolvenden, in the parishes of Denenden, Tenterden, or either of them, or elsewhere, then and in that case, and immediately upon such event taking place, my said trustees, and the survivors of them and his heirs, shall stand seised of my said estates hereinbefore devised, for the benefit of my said brothers and their issue, upon trust for the next person entitled thereto under and by virtue of this my will, in the same manner as they would have done if the person so succeeding to the said estates late of the said Elizabeth Jodrell were actually dead."

(a) The defendant, Thomas Gybbon Monypenny.

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By a codicil, dated in July, 1818, after the death of the testator's brother Thomas, the testator devised the same estates to trustees, upon the like trusts, for sale, and payment of his debts, &c.; and, as to such parts whereof no sale should be made, he declared that his trustees should stand seised thereof, upon trust to permit his wife to receive the rents and profits thereof for her life; and from and immediately after her decease, upon the trusts declared by his will, and subject to the declaration therein contained, in case his said brothers, or either of them, their or either of their issue, should become entitled to the estate of Elizabeth Jodrell.

The testator died in 1822, and his widow in 1826; Phillips Monypenny died in 1841, without issue, having, *in 1827, suffered a recovery of the devised estates to [*571] the use of himself in fee, and having subsequently charged the estates, upon the marriage of his nephew Robert Joseph Monypenny, the eldest son of Robert otherwise Richard, the youngest brother of the testator, with the payment of a jointure of 300*l.* a year to Susannah, the wife of his said nephew, in the event of her surviving both the uncle and nephew. Phillips Monypenny by his will devised or attempted to devise the estates, after charging them with certain annuities, to the use of his nephew Robert Joseph Monypenny for life, with remainder to Robert Phillips Dearden Monypenny, the eldest son of Robert Joseph Monypenny for life, with remainder to his first and other sons successively in tail male, with remainders over. Under this devise, upon the death of Phillips Monypenny, Robert Joseph Monypenny, his nephew, entered into receipt of the rents and profits. Robert Joseph Monypenny died in 1842, and thereupon his son Robert Phillips Dearden Monypenny, an infant, by his guardians, claiming under the same will of Phillips Monypenny, entered into receipt of the rents and profits, subject to the jointure of Susannah, the mother of the infant, with which his uncle Phillips Monypenny had charged the estates.

The bill was filed in November, 1842, by Robert Thomas Gybbon Monypenny, the eldest son of Thomas Gybbon Monypenny, who was the eldest son of Thomas Monypenny, the

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brother of the testator, against Robert Phillips Dearden Monypenny, the infant in possession, and all the other parties claiming to be interested in the estates through or under Phillips Monypenny, and also against his father Thomas Gybbon Monypenny, the trustees of the legal estate, and the heirs in gavelkind. The plaintiff by his bill claimed to be entitled under the will of the testator, James Monypenny, and by the operation
[*572] of *the shifting clause therein contained, to an equitable estate tail in possession in the real estates devised by the will of James Monypenny; and if the estates had not shifted from Thomas Gybbon Monypenny to the plaintiff, then the plaintiff claimed to be entitled to the same estates in remainder immediately expectant on the life estates of Thomas Gybbon Monypenny therein. The bill prayed a declaration in the alternative according to this claim, and that the defendants, the guardians of Robert Phillips Dearden Monypenny, might account for the rents and profits received by them since the death of Robert Joseph Monypenny, and, the plaintiff being an infant at the time the bill was filed, that a competent part of the income might be applied for his maintenance.

The Master, by his report, found that there was no issue of Phillips Monypenny; and he found also the other material facts relating to the pedigree of the plaintiff and the defendants, the surviving issue of Phillips and Robert otherwise Richard, the deceased brothers of the testator, and the heirs-at-law and heirs in gavelkind of the testator and his deceased brothers, nephews, and grand-nephews.

The cause was heard on the 17th of November, 1845, when a case was ordered to be stated for the opinion of the Court of Exchequer. The case, and the judgment of that Court, will be found in the Report, 16 Meeson & Welsby, p. 418.

The cause was then heard upon the equity reserved, and, on the 7th of May, 1847, for the reasons stated in the judgment reported below, a supplemental case was added to the first case, on which the opinion of the Court of Exchequer had been taken and the two cases were sent for the opinion of the Court of Common Pleas.

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*The questions were the same on the two cases sent to the Court of Common Pleas as those in the case sent to the Court of Exchequer, except that for the words "devised property," in the latter case,(a) were substituted the words, "Maytham Hall property," in the original, and "Lower Maytham Hall property" in the supplemental case submitted to the Court of Common Pleas; and except also, that, in the supplemental case, an estate to the use of trustees to preserve contingent remainders was interposed immediately after the life-estate of Phillips Monypenny. [*573]

The certificate of the Court of Common Pleas was as follows:—

First, We are of opinion that Phillips Monypenny took an estate for life in remainder after the life estate of the widow Mary Monypenny.

Second, We think that Thomas Gybbon Monypenny took an estate for life in remainder after the life estate of Phillips Monypenny, contingent on Phillips Monypenny not leaving any issue at his decease, and determinable on his (Thomas Gybbon Monypenny) becoming entitled to the estate of Elizabeth Jodrell, and also a remainder in tail general after the estate tail of Robert Thomas Gybbon Monypenny.

Third, We think that Robert Thomas Gybbon Monypenny took a contingent remainder in tail male after the determination of the life estate of his father.

Fourth, We think that Phillips Monypenny acquired no estate or interest under the recovery.

Fifth, We think that Susannah Monypenny took no estate or interest under the said deed.

Sixth, We think the co-heirs in gavelkind took a remainder in fee after the several estates above mentioned. [*574]

(Signed) W. H. Maule,
C. Cresswell,
E. V. Williams.

The cause again came on to be heard on the equity reserved.

(a) See 16 M. & W. 424.

Mr. *Humphry*, Mr. *Rolt*, and Mr. *Charles Hall*, for the plaintiff.

The *Solicitor-General*, Mr. *Malins*, Mr. *Roundell Palmer*, Mr. *Coote*, Mr. *Willcock*, Mr. *Rogers*, Mr. *Faber*, Mr. *Borton*, Mr. *Browell*, Mr. *F. T. White*, Mr. *Cotterill*, and Mr. *Bagshaw*, jun., for the several defendants.

The arguments appear upon the judgment. The authorities there referred to, and also the following cases, were cited:—On the cy-pres doctrine, as applicable to the present question, *Smith* v. *Lord Camelford*,(a) *Bristow* v. *Warde*,(b) *Seaward* v. *Willock*,(c) *Somerville* v. *Lethbridge*,(d) *Jesson* v. *Wright*,(e) *Fetherston* v. *Fetherston*,(f) and Fearne Cont. Rem. 522.

Upon the question of the effect of the alternative event, on which the gift over was expressed to be dependent, *Longhead* v. *Phelps*,(g) *Crompe* v. *Barrow*,(h) *Crump* v. *Norwood*,(i) *Minter* v. *Wraith*,(k) *Goring* v. *Howard*,(l) *Wilson* v. *Eden*,(m) *Proctor* v. *Bishop of Bath and Wells*,(n) *Robinson* v. *Hardcastle*,(o)
[*575] *Cambridge* v. *Rous*,(p) *Southby* v. *Stonehouse*,(q) *Purefoy* v. *Rogers*,(r) *Doe* v. *Selby*,(s) *Mackworth* v. *Hinxman*,(t) *Stanley* v. *Stanley*,(u) and *Doe* v. *Allcock*.(v) And as to the classes of issue which the alternative might embrace, *Langley* v. *Baldwin*,(w) *Attorney-General* v. *Sutton*,(x) *Ellicombe* v. *Gompertz*,(y) *Parr* v. *Swindels*,(z) *Blackborn* v. *Edgley*,(a) *Stanley* v. *Lennard*,(b) *Foster* v. *Earl of Romney*.(c)

(a) 2 Ves. jun. 698, 703, 704, 711, 712, 714. (b) 2 Ves. jun. 349.
(c) 5 East, 198, 207. (d) 6 T. R. 213, 216. (e) 2 Bligh, 1.
(f) 3 C. & F. 67. (g) 2 W. Bl. 704. (h) 4 Ves. 681.
(i) 7 Taunt. 362. (k) 13 Sim. 522. (l) 16 Sim. 395.
(m) 1 Exch. 786; *S. C.*, 11 Beav. 289. (n) 2 H. Bl. 358, 362.
(o) 2 T. R. 242, 247, 251, 253, 254, 781. (p) 8 Ves. 13, 14, 24, 25.
(q) 2 Ves. 610. (r) 3 Saund. 388. (s) 2 B. & C. 926.
(t) 2 Kee. 658. (u) 16 Ves. 491. (v) 1 B. & A. 137.
(w) 1 P. Wms. 59, 759; Amb. 356.
(x) 1 P. Wms. 755, 765, 767. (y) 3 M. & C. 151. (z) 4 Russ. 283.
(a) 1 P. Wms. 601, 605. (b) 1 Eden, 87; 2 Jur. 384. (c) 11 East, 594.

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April 16th.—VICE-CHANCELLOR:—The question in this cause arose under the will of James Monypenny, the testator in the cause, by which he gave real estates to his brothers and certain of their descendants. The estates, as expressed to be given by the will, were equitable estates; but as the property is of large amount, and the questions raised by some of the claimants involve considerations of difficulty and importance, I thought it right (and the result has, I think, justified my opinion) to obtain the assistance of a Court of law upon the construction of the will. Accordingly, a case was stated for the opinion of the Court of Exchequer, in which the limitations of the will were so moulded as to present (so at least it was supposed at the time,) for the consideration of the Court of law, the same questions as to the rights of the claimants under James Monypenny's will, as were presented to this Court by the actual limitations in the will.

*Upon the case, so stated, the Barons of the Ex- [*576] chequer gave me their opinion; and the cause came before me upon the certificate of the learned Barons, and was argued during several days in the month of April, 1847, upon the question, whether I should confirm the certificate of the Court of Exchequer, or send a case to another Court, or decide the case according to my own opinion.

Amongst other points pressed upon me upon that occasion was this: that the questions raised by the case sent to the Court of Exchequer were not in all respects identical with those which would arise in this Court upon the will of James Monypenny; for that, inasmuch as the estates created by his will were equitable estates only, a Court of equity would support such of the contingent limitations of the will as were expectant upon the life estate of Phillips Monypenny (assuming that he took a life estate only under the will,) and that the counsel for Thomas Monypenny's branch of the family had thereby been prevented offering arguments in the Exchequer, which would arise in their favor in this Court; and it was therefore insisted by the counsel for that branch of the family, that a case ought to be stated, in which trustees to preserve contingent remainders should be inserted in such a manner as to prevent those contingent estates

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being destroyed by the tenant for life, which a Court of equity would preserve in the case of equitable limitations, although, at law, those contingent estates might be destroyed, unless they were preserved by the usual limitations to trustees to preserve contingent remainders.

Other points, including the doctrine laid down in *Cole* [*577] v. *Sewell*,(a) were also brought before me, as points *which had not received the consideration of the Court of Exchequer. It was also said, that the question upon which the Court of Common Pleas have since certified in favor of Thomas's branch of the family, viz. that which depends upon the alternative limitation of the estate to Thomas's branch of the family, had not been argued in the Court of Exchequer, although it appears by the printed report of the case, that the Barons of the Court of Exchequer expressed an opinion on the point at the time their judgment was given upon the case.

Upon the whole argument, I thought it right to seek further assistance from a Court of law; and accordingly, a supplemental case, embodying limitations to trustees to preserve contingent remainders in the way proposed was stated, and that case, together with the case which had been previously sent to the Court of Exchequer, was sent for the opinion of the Court of Common Pleas.

That Court has since certified to me its opinion upon the case laid before it, differing materially from the opinion of the Court of Exchequer. The cause was again argued before me, in the month of March last, and I am now to state the conclusion to which I have come.

In order that my view may be understood, it will be sufficient that I should state the case which was sent to the Court of Common Pleas. The difference between that case and the case sent to the Court of Exchequer will not, I think, embarrass the statement I have to make. The case sent to the Court of Common Pleas, consisting of that sent to the Exchequer, with a supplemental case, is in substance as follows:—

(a) 4 D. & W. 1.

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James Monypenny was seised in fee of certain estates in Kent, called "The *Maytham Hall estate" and "Lower [*578] Maytham Hall estate," which were of gavelkind tenure.

James Monypenny made his will, dated 11th February, 1804, and thereby devised the Maytham Hall estate to the use, that his brother Phillips Monypenny should receive the rents and profits for his life, without impeachment of waste, remainder to use of the first son of the body of Phillips Monypenny for life, remainder to first son of such first son and the heirs male of his body, and in default of such issue, to the use of every other son of Phillips Monypenny successively, for the like interests and limitations. And in default of issue of the body of Phillips Monypenny, or in case of his not leaving any at his decease, to the use of the testator's brother, Thomas Monypenny, for life, without impeachment of waste, remainder to use of Thomas Monypenny,(a) eldest son of the testator's brother Thomas Monypenny, for life, without impeachment of waste, remainder to use of the first son of Thomas Monypenny, son of Thomas Monypenny (the testator's brother), and the heirs male of his body; and in default of issue of the body of said Thomas Monypenny the son, to the use of every other son of Thomas Monypenny (the testator's brother) successively; and on failure of all such issue of the body of Thomas Monypenny (the testator's brother) to the use of him in fee; with a proviso, that if either of testator's brothers, or any of their issue, should become entitled to any part of the real or copyhold estate of Elizabeth Jodrell, then the estates before devised to the testator's brothers and their issue should go to the next person entitled under the will, as if the person succeeding to the estate of Elizabeth Jodrell were dead. And the *testator added a power to the devisees to cut timber [*579] and grant leases, according to the terms laid down in the will.

The testator's brother Thomas Monypenny died between the date of the will and a codicil to be presently mentioned, leaving

(a) Afterwards Thomas Gybbon Monypenny the father of the plaintiff.

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his son, Thomas Gybbon Monypenny, in the will named Thomas Monypenny, surviving.

The testator executed a codicil, dated the 25th of July, 1818, in which, after reciting the death of his brother Thomas Monypenny, he revoked the devise of his house, Maytham Hall, and devised it to the use, that his wife should take the rents and profits for life, without impeachment of waste, subject to keeping the place in repair, remainder to the uses expressed of the same in his will, and subject to the proviso, in case and if the devisees under the will should become entitled to Elizabeth Jodrell's estate.

Two other codicils were made, not affecting the disposition of the real estate.

The testator died in June, 1822, and left his widow, his brother Phillips, and Thomas Gybbon Monypenny surviving him.

The testator's widow entered into the receipt of the rents till her death in 1826. After her death, Phillips Monypenny entered into the receipt of the rents and profits till his death.

In 1827 Phillips Monypenny suffered a recovery of the estate in question, which was declared to enure to the use of Phillips Monypenny in fee.

[*580] By a settlement dated the 10th of June, 1885, on *the marriage of Robert Joseph Monypenny, Phillips Monypenny charged the Maytham Hall estate with a sum of money as a jointure to Robert Joseph Monypenny's wife.

In January, 1841, Phillips Monypenny died without having had any children, having by will devised the Maytham Hall estate, amongst others, to the use of Robert Joseph Monypenny, for life, remainder to his eldest son Robert Phillips Dearden Monypenny for life, remainder to his first and other sons in tail male, &c.

Robert Joseph Monypenny entered into the receipt of the rents and profits of the estate on the death of Phillips Monypenny. In September, 1842, Robert Joseph Monypenny died, and his son Robert Phillips Dearden Monypenny entered into receipt of rents and profits of the estate, subject to the widow's jointure, and is now in possession.

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Thomas Gybbon Monypenny has become entitled to and is now in possession of Elizabeth Jodrell's estate, and has a son, Robert Gybbon Monypenny, the plaintiff in this cause.

The co-heirs, (or those who represent them) of the testator at the time of his death, and of Phillips Monypenny, are before the Court as defendants.

The plaintiff Robert Thomas Gybbon Monypenny claims as tenant in tail male. The defendant Robert Phillips Dearden Monypenny claims as devisee for life under will of Phillips Monypenny, subject to his mother's jointure, on the ground that Phillips Monypenny acquired the fee simple by the recovery in 1827; and he also claims in the alternative, as representing two of the co-heirs in gavelkind of the testator. The defendants William David Cathcart Monypenny, Robert Blackwell *Monypenny, and Phillips Howard Monypenny [*581] are infants and remaindermen in tail next after Robert Phillips Dearden Monypenny, under the will of Phillips Monypenny. William David Cathcart Monypenny is also tenant in tail next to the plaintiff, under the will of the testator, if the recovery of 1827 be void. The defendant Thomas Gybbon Monypenny claims as tenant for life under the will of the testator, on the ground that the estate did not shift on his becoming entitled to Elizabeth Jodrell's estate, and he also claims by descent as one of the co-heirs in gavelkind to testator. Susannah Monypenny claims her jointure under the settlement of 1835. The defendant Elizabeth Charlotte Sewell claims a legacy charged on the estate by Phillips Monypenny's will. Other defendants claim as representing the co-heirs in gavelkind of the testator, on the ground that all the devises in the testator's will and codicil, after the devise to the first son of Phillips Monypenny, were void.

A supplemental case was also sent for the opinion of the Court, to the following effect:—The testator also devised the Lower Maytham Hall estate to the use of his brother Phillips Monypenny for life, without impeachment of waste; and after the determination of that estate by forfeiture or otherwise in the life of Phillips Monypenny, to trustees to preserve contingent remainders, re-

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mainder to the uses declared in the will concerning the Maytham Hall estate. By his codicil of 25th of July, 1818, he repeated the same language with reference to the Lower Maytham Hall estate as he had used with reference to the Maytham Hall estate, substituting only the words "Lower Maytham Hall" for the words "Maytham Hall;" and for the circumstances of the case the Court was referred to the statements made respecting
[*582] the *claim made to the Maytham Hall estate only, substituting the Lower Maytham Hall estate for the Maytham Hall estate.

Such being the case upon which my opinion is to be founded, I may here state, that there are three different parties whose claims have to be considered:—First, Parties claiming under Phillips Monypenny, who contend, that, by force of the limitations in the will, and the acts done by him, he acquired an absolute interest in, or power of disposition over, the property of the testator. Secondly, Parties claiming under the limitation in the will in favor of Thomas's branch of the family. Thirdly, The heirs-at-law of the testator.

The Court of Exchequer was of opinion, that, under the will and codicil of the testator, Phillips Monypenny took an estate for life, expectant on the death of the testator's widow, with remainder to his eldest son for life, and that all the subsequent limitations are void for remoteness, and consequently, that neither Thomas Gybbon Monypenny nor his son took any estate under the devise in question; and also, that, by virtue of the recovery, Phillips Monypenny acquired an estate in fee simple by wrong, liable to be defeated by the parties having rightful title. The Court of Exchequer having thus expressed an opinion that Phillips Monypenny took an estate for life only under the will and codicil of testator, it is not necessary, for the present purpose, that I should further pursue the opinion of that Court.

The Court of Common Pleas was of opinion, that Phillips Monypenny took an estate for life in remainder after the life estate of the widow, and that Thomas Gybbon Mony-
[*583] penny took an estate for life in remainder *after the life estate of Phillips Monypenny, contingent on Phillips

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Monypenny not leaving any issue at his decease, and determinable on his (Thomas) becoming entitled to the estates of Elizabeth Jodrell; and also a remainder in tail general after the estate tail of Robert Thomas Gybbon Monypenny; and that Robert Thomas Gybbon Monypenny took a contingent remainder in tail male after the determination of the life estate of his father; and that Phillips Monypenny took nothing under the recovery.

There is an apparent want of verbal precision in the certificate of the Court of Common Pleas, in not having distinguished between the two different estates which were the subject of the case originally sent to the Court of Exchequer, and of the supplemental case which was sent to the Court of Common Pleas. But no doubt can exist as to the meaning of the certificate of the Court of Common Pleas as a guide for the judgment of this Court; and the inaccuracy I have alluded to (if it be one) need not be further adverted to.

From this certificate it appears that the Court of Common Pleas agreed with the Court of Exchequer in holding that Phillips Monypenny took only an estate for life. The apparent difference of opinion between the two Courts with respect to the effect of the recovery suffered by Phillips Monypenny must, I presume, be referred to the circumstance, that, in the case before the Court of Exchequer, there were no trustees to preserve contingent remainders, in remainder expectant on Phillips Moneypenny's life estate, whereas, in the supplemental case before the Court of Common Pleas, an estate to trustees to preserve contingent remainders was, as to the Lower Maytham estate, limited in remainder expectant on the life estate of Phillips Monypenny.

*The ground of the real difference of opinion between [*584] the two Courts, with respect to Thomas's branch of the family requires explanation.

The case is this:—By the terms of the will the estate is given over to Thomas's branch of the family "in default of issue of the body of Phillips Monypenny, or in case of his not leaving any at his decease." Now, the Court of Exchequer held the limitation to Thomas's branch of the family to be void, on the ground that those limitations were void for remoteness. The counsel for

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Thomas's branch of the family contended, in the Court of Common Pleas, that the estate was given over to Thomas's branch of the family in two different events: namely, first, "a failure of issue of Phillips at his death;" and secondly, "an indefinite failure of issue of Phillips;" and that, if the second of these limitations were too remote, the first, at all events, was not so. The Court of Exchequer appear to have considered this argument, although it was not insisted upon before that Court by the plaintiff's counsel; but they considered that the two members of the sentence pointed at only one event, viz. the failure of issue of Phillips, and that the "dying without issue living at his death" was included in the more general words, which pointed at an indefinite failure of issue. The Court of Common Pleas, on the other hand, thought that two distinct events were in substance expressed, and that, as the event which was not too remote had occurred, the limitations to Thomas's branch of the family should be supported.

I now proceed to consider the several points by which the counsel for the three claimants have endeavored to support the cases of their respective clients.

In doing this, I feel that the best service I can render [*585] *the parties is, to state the observations which have occurred to me upon hearing this case argued for the third time, with the assistance of the two certificates now before me, whether those observations are strictly essential to my conclusion or not.

The first part of the case which I shall consider is that of the parties who claim under Phillips Monypenny, who certainly are not agreed amongst themselves as to the course of argument by which their case is most likely to be carried to a successful issue.

In order that these parties may succeed, it is necessary that they should make out that Phillips Monypenny, at the time of suffering the recovery, was in some sense (i. e. either absolutely or in remainder, expectant on the failure of his own issue male, of which there were none,) tenant in tail in possession of the estates of James Monypenny. In this all parties claiming under Phillips Monypenny are agreed. But they were not agreed as to

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the construction of the will, by which their conclusion would best be arrived at.

Mr. *Malins*, for some of these parties, contended, that, at the death of the testator, Phillips Monypenny took (subject to the life estate of the widow of the testator) an estate tail in possession, not liable to be displaced by any subsequent event.

This line of argument was not adopted by the counsel for other parties in the same interest. Mr. Roundell Palmer's argument was, that, under the will and codicil, Phillips Monypenny took by implication an estate tail in remainder, expectant on the death of the testator's widow and failure of his own issue male, and that, at the time of suffering the recovery, this estate tail in *Phillips Monypenny was an estate in possession, sub- [*586] ject to open and let in the estates which by the will were limited to the male issue of Phillips Monypenny. I shall begin by considering the latter of these arguments.

Admitting, for the purposes of the argument, that the law would imply such an estate tail in remainder in Phillips Monypenny, as the argument supposes, the Court of Exchequer was of opinion that such remainder would be void for remoteness. This is expressed in the reasons given by that Court for its certificate. I have not the benefit of knowing so fully as I could desire, in what way the Court of Common Pleas reasoned upon the whole case. But upon this particular point it appears to me that the Judges of the Court of Common Pleas must have agreed with the Barons of the Exchequer. The question is, whether that opinion is correct.

The ground upon which the Court of Exchequer considered the remainder (admitting the implication contended for) as void for remoteness, was this:—In the limitation to the male issue of Phillips Monypenny no estates are given to the second, third, and other sons of the eldest son of Phillips Monypenny. Unless, therefore, estates to the second, third, and other sons of the eldest son of Phillips Monypenny can be supplied by construction, without the aid of the cy-pres doctrine, or that the cy-pres doctrine is sufficient to remove the objection, there would obviously

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be a possible chasm between the determination of the estate given to the eldest branch of Phillips Monypenny's children, and the ulterior limitation in the will, which would cause the limitation to Thomas's branch of the family to be void for remote-
[*587] ness. The question then is, does this chasm *in the limitation to the male issue of Phillips Monypenny irremediably occur in this will.

The first question is, whether, upon an examination of the whole will, it is so manifest that the testator supposed that he had given estates to the second, third, and other sons of the first son of Phillips Monypenny in that part of the will in which the sons of Phillips Monypenny and certain of their descendants are expressly provided for, as in *Langston* v. *Langston*,(a) to which I shall presently refer, that the Court is to insert limitations to the second, third, and other sons of the eldest son of Phillips Monypenny immediately after the limitation to the eldest son and the heirs male of his body, and before the limitation to the second, third, and other sons of Phillips Monypenny. This question, I may here observe, precedes and is quite independent of the cy-pres doctrine.

The argument in favor of the omitted estates being found in the context of the will was two-fold. First, it was said that the gift over in default of issue of Phillips Monypenny showed that the testator must have intended that the second and other sons of the first son of Phillips Monypenny should take the estate. Secondly, that the limitations to all the male descendants of the second, third, and other sons of Phillips Monypenny, and corresponding limitations in Thomas's branch of the family, were sufficient evidence that limitations to the second, third, and other sons of the first son of Phillips Monypenny were omitted by mistake.

Without examining the accuracy of the former of these propo-
sitions it is sufficient to say, that, if it be admitted,
[*588] *it furnishes no sufficient ground for implying estates by purchase to the omitted issue. I asked for, but did not get any authority for such a proposition. The utmost effect

(a) 3 Bligh, N. S. 167.

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which can be given to the limitation over in default of issue of Phillips Monypenny must be that of giving some estate to Phillips Monypenny himself, which, if not altered by him, would give a chance of succession to the omitted issue. This, as a question of construction, is, I think, too plain for argument. With respect to the second proposition, the bare possibility that the testator may have purposely excluded the omitted issue would alone be sufficient to prevent me from inserting in the will estates which the testator has in fact omitted. The use of the word "*such*," in the successive limitations to the sons of Phillips Monypenny and their descendants gives precision to the language of the testator, which leaves me no doubt that I am right in holding that I must not read the will as if it contained estates by purchase to the second and other sons of the eldest son of Phillips Monypenny.

The next point which it will be most convenient to notice, is that which was fully argued in the Court of Exchequer, namely, whether the cy-pres doctrine can be applied to the present case. The Court of Exchequer was of opinion that the cy-pres doctrine could not be applied to this case, principally on the ground, that the estates to be created by the Court would, if undisturbed by the acts of the parties, carry the property to persons whom the testator had purposely excluded; namely, the second, third, and other sons of the eldest son of Phillips Monypenny. In considering this question it may be useful to observe, that it applies exclusively to that part of the will which contains the limitations to certain of the male descendants of Phillips Monypenny. *The question is, whether that part of the will [*589] is to be modified by the cy-pres doctrine.

In the course of the argument I said, that the rule involved in the cy-pres doctrine was not a rule of construction. That mode of expression may perhaps be open to criticism; for, as the rule determines to whom the estate is given by the will, it may be going too far to say, that it is not a rule of construction; but my meaning was not, I think, misunderstood: my meaning was, that the rule was inoperative in determining, in the first instance, what the testator had said by his will. That must be deter-

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mined, in the first instance, without regard to the cy-pres doctrine. Then, and not before, the question arises, whether the will thus interpreted, without reference to the cy-pres doctrine, is within the cases to which the doctrine applies. The cy-pres doctrine itself may be thus stated with sufficient accuracy for the present purpose. If a testator expresses himself in terms which show that he intended that the devisee and his issue should take the lands, but has attempted to do that in a way which the law will not permit, courts of law consider, that the intention to benefit the persons designated must have been the primary object of the testator, and that the mode of doing this is a merely secondary consideration. And in such cases, rather than the whole intention of the testator should be disappointed in both particulars, the Court will disregard the mode in which the testator intended to effectuate his intention, and will substitute for the mode indicated by the testator, such other mode of limitation as will best effectuate or give a chance of effectuating the testator's primary intention. Of this doctrine, it may, I believe, be correctly said, that the Courts have never applied it [*590] so as to destroy estates *which were valid as given by the will, but have only applied it by enlarging the estate of a tenant for life into an estate of inheritance, so that if it were allowed to descend, according to the course of law, it would carry the estate to the object of the testator's bounty. The doctrine in fact gives a chance to those who would be wholly disappointed without it, at the expense of the heir-at-law, but not at the expense of any object of the testator's bounty. This will appear by an examination of the authorities, including *Pitt* v. *Jackson*.(a)

I now start from the point at which I had arrived before I began to advert to the cy-pres doctrine, by assuming that the will in question does not (apart from the cy-pres doctrine) i. e. by construction of the words only, expressly or by implication, give estates by purchase to the second, third, or other sons of the eldest son of Phillips Monypenny. The question then

(a) 2 Bro. C. C. 51.

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arises,—Am I to give an estate tail to the eldest son of Phillips Monypenny, so as to fill up the chasm in the limitations to the male descendants of Phillips Monypenny, which chasm makes the limitations to Thomas's branch of the family void for remoteness? The objection is, that, by so doing, I should give estates to the second, third, and other sons of the eldest son of Phillips Monypenny, whom, by the supposition, the testator purposely excluded. It would be very difficult to say, that, by such a process, I should be merely sacrificing the mode in which the testator intended to effectuate a given purpose, in order to effectuate that purpose. The intention of the testator to exclude the second, third, and other sons of the eldest son of Phillips Monypenny himself, and their male issue, is *ex hypothesi* as much part *of the primary object of the testator as [*591] any devise in his will. Indeed, the mere gift by the Court to persons purposely excluded is a contravention of the testator's primary object. If the number of persons purposely excluded be supposed as numerous as those whose interests the cy-pres doctrine would possibly preserve, there seems no reason for preferring one part of the testator's intention to the other.

When the observations of the Court of Exchequer are applied to the principle upon which the cy-pres doctrine is said to be founded, it is impossible not to feel their force; and when I first read them, I thought them conclusive upon the point to which they were applied. But the question is one of authority, and the limits of the doctrine, such as the cy-pres is, (being arbitrary in its foundation) must be determined by decision. Now, the case of *Pitt* v. *Jackson* has been said to carry the doctrine to the very verge of the law, but not beyond it; and that case is of undoubted authority at the present day. Upon examining that case, it will be found open to the same observations as the case of *Nicholl* v. *Nicholl*,(a) so far as that case gave, or by possibility might give, the estate to persons excluded by the testator in *Pitt* v. *Jackson*; for, in that case, the eldest of the class, who got

(a) 2 W. Bl. 1159.

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the entire estate, was intended only to take part of it, and the excess was given him by the cy-pres doctrine.

I cannot, therefore, but think it at least doubtful whether the reasoning of the Court of Exchequer does not in substance trench upon the authority of *Pitt* v. *Jackson*. *Nicholl* v. *Nicholl* is so unsatisfactorily reported, that, if it were not for *Pitt* v. [*592] *Jackson*, and what Lord Eldon *and other Judges have said of that case as an authority, I should not feel pressed, as I do, upon this point.

The question upon the cy-pres doctrine, however, must be decided by authority; and the question is, whether any of the cases cited are authorities for that which is contended for in the present case. The only cases cited in support of the application of the cy-pres doctrine to this case, except *Nicholl* v. *Nicholl* and *Pitt* v. *Jackson*, were *Langston* v. *Langston*, *Humberston* v. *Humberston*,(*a*) and *Chapman* v. *Brown*.(*b*) The first of these cases has no bearing upon the question I am now considering. The House of Lords in that case decided, that, upon the construction of the whole will, irrespective of the cy-pres doctrine, it was manifest that the eldest son was intended to take in that part of the will from which his name was omitted, and that the words of the will expressed that intention, which brought the case to the same state as if his name had been inserted there. I have no evidence in this case that the second, third, and other sons of the eldest son of Phillips Monypenny were intended to take in that part of the will which contains the limitations to the sons of Phillips Monypenny and certain of their issue. *Humberston* v. *Humberston* was a case of executory trust.

In *Chapman* v. *Brown*, the decision proceeded upon the ground that the word "son" was used as *nomen collectivum*, which brought the case within the rule in *Shelley's case*, as was properly admitted at the bar. This is manifest, as well from the argument of the counsel as the judgment of the Court.

(*a*) 1 P. Wms. 332; 2 Vern. 737; Pre. Ch. 455; Gilb. Eq. Ca. 128.
(*b*) 3 Burr. 1626.

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*It was suggested that the above objection might be [*593] avoided by giving to the eldest son of Phillips Monypenny an estate tail male determinable upon the failure of the eldest branch of his family; and a passage was referred to in Coke Littleton, 22, a., in which it is said, "Of all the estates tail most coarcted or restrained that, I find in our books, is, where lands were given to a man and his wife and one heir of their bodies lawfully begotten, and to one heir of the body of that heir only."

Assuming that the passage just cited would be an authority for giving to to the eldest son of Phillips Monypenny an estate tail male restrained to the eldest branch of his family, the remoteness of the ulterior limitations in the will of James Monypenny would be cured. But other difficulties would remain. It is manifest, according to legal rules of construction, that James Monypenny did not intend that his property should go over to Thomas's branch of the family so long as there was issue male of Phillips, and that he intended that all the issue male of Phillips should take the property before Thomas's branch of the family. Now the estate proposed to be given to the eldest son of Phillips Monypenny, according to the passage cited from Coke Littleton, would not supply, by purchase or otherwise, estates to the second, third, and other sons of the eldest son of Phillips Monypenny, or to their descendants. And the only way of giving such estates to those parties would be by giving an estate tail male or general to Phillips Monypenny himself, in remainder expectant on the estates expressly given to certain of his Phillips Monypenny's male descendants. This would give Phillips Monypenny the power of doing that which in fact he has attempted to do, viz.—acquire an absolute interest in the property at the expense of Thomas's branch of the family. This, I am aware, is no legal objection to the Court giving him an estate tail by implication; but it *is a strong reason for not doing this, [*594] if the intention of the testator can be secured without doing so; and the conclusion to which I have come upon this part of the case is, that if the cy-pres doctrine is to be applied to the will of James Monypenny, it ought to be applied by giving

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to the eldest son of Phillips Monypenny an estate tail male (unrestrained to the eldest branch of his family,) with remainders to the second, third, and other sons successively of Phillips Monypenny in tail male: or by giving him an estate tail descendible to the heirs male of the body of his father, according to Littleton, sect. 30, and *Mandeville's case*, cited there by Lord Coke.(*a*) I may observe, that I see no objection to the Court giving the property by cy-pres in any mode in which the testator might himself have given it.

Another objection urged against the application of the cy-pres doctrine was founded upon the tenure of the land. It was said, that, however right it might be to apply the doctrine to socage lands, it had never been applied to gavelkind land; that the doctrine was inapplicable to lands of such tenure, as it was to personal estate; and that the primary intention of the testator would no more be secured in the one case than in the other, by the application of the cy-pres doctrine. I may perhaps doubt whether, if the lands to which the doctrine was first to be applied had been of gavelkind tenure, the doctrine would have been applied. It might indeed happen that there never should be more than one male descendant in the family; and in that case the practical working of the doctrine in lands of gavelkind tenure would be the same as if the lands were of socage tenure. But such an accident *ex post facto* would not support the proposition upon which the cy-pres doctrine is founded, viz.—that [*595] the Court, by giving *an estate tail to the first tenant for life, had thereby placed the property in a position in which (if nothing be done to disturb it) the law itself would carry the property to those for whom the testator intended it. The testator in this case certainly intended the property to go entire to those to whom he gave it in succession. The devisable nature of gavelkind lands, in the matter of succession, makes this impossible unless by accident. *Pitt* v. *Jackson* is the converse of this, and not an authority for it.

Leaving the consideration of the cy-pres doctrine for the mo-

(*a*) Co. Litt. 26, b.

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ment, and assuming (for argument sake) that it is to be applied to the will of James Monypenny (for if it be inapplicable, the ulterior remainders will be void for remoteness) the next question which it will be convenient to advert to is this: What construction am I to put upon the words "default of issue," describing the event upon which the property is given over to Thomas's branch of the family? The case by the supposition is this: estates are given to all the male issue of Phillips Monypenny, and the property is given over upon a general failure of issue of Phillips Monypenny. Are the words "in default of issue" to be read referentially to the issue before spoken of, or to the issue of Phillips Monypenny generally? The importance of this question in the present case cannot be overlooked. If the words "in default of issue" refer to the issue male of Phillips Monypenny, that is, if they are to be read as if the testator had said, "in default of such issue," Thomas's branch of the family will stand next in remainder to such issue male. If, on the other hand, the words "in default of issue" refer to a general failure of issue to Phillips Monypenny, he Phillips Monypenny will take an estate tail general by implication, in remainder, expectant upon the failure of his issue male, and the recovery suffered by him will bar the limitations *to Thomas's branch of the [*596] family. Now, the strong inclination of my opinion is, that the words "in default of issue" ought to be construed in the restricted sense above suggested, i. e. in default of such issue. I think this must be so in principle as in common sense; and I should say upon authority also, although I admit the authorities are conflicting upon the subject. When a testator provides for a particular class of issue, and gives the estate over in default of issue, the natural meaning of the words is referential to the issue he has been speaking of, and to no other. It is morally impossible that a testator who has just provided for one class of issue in express terms, and intends to provide for any other issue, should not, in favor of the latter objects as of the former, make express provision for them also. I agree with Mr. Jarman in lamenting that Courts of law have, upon such very slight distinction, departed from the rule of giving to the words "in default of issue

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their natural referential construction. Where, indeed, the whole will manifests an intention to provide for an entire class of objects, and the will has not fully provided for that class by express gift, that may well justify the Court in departing from the natural construction of the words, rather than that the objects of the testator's bounty should be disappointed. But, without some such adequate reason, the natural import of the testator's words with reference to the context should be adhered to. I have frequently stated my opinion upon this point; and I was referred to some reported cases in which I have done so. I do not refer to my own decisions as authorities, but only to show that the opinion I now express is not new. I am clear that the learning of modern decisions supports my opinion; and I think the language and decision of the Lord Chancellor, in *Elicombe* v. *Gompertz*,(a) confirms it.

[*597] *My conclusion at this point of the case, agreeing with both certificates, is, that Phillips Monypenny took an estate for life only, unless Mr. Malins' argument is to prevail. That argument I agree with both Courts in rejecting. It would have the effect of destroying estates which are well given as the will stands; and no authority was produced authorizing so bold a construction. I do not go through the cases cited by counsel, as they were clearly distinguishable from the present case, and, as explained by the judgments given in them, are clearly referable to principles not involved in the present decision. I agree, therefore, with both Courts in holding that Phillips Monypenny took an estate for life only.

The only remaining question is, as to the point upon which the Barons of the Court of Exchequer and the Judges of the Court of Common Pleas have differed, viz. as to the effect to be given to the alternative clause in the will.

It is admitted, that, if a testator gives over his property upon either of two distinct events, one of which is, and the other is not, too remote, the devise will take effect if that event should happen which is not too remote. The argument on the part of

(a) 3 M. & C. 151.

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the heir-at-law was, that in this case the property was not given over in two distinct events, for that the death of Phillips Monypenny without leaving issue at his death, and a general failure of issue, imported the same event happening at different times, that is to say, a determination of Phillips Monypenny's estate tail. This is the view taken of the case by the Court of Exchequer. The Barons considered the death of Phillips Monypenny without leaving issue at his death as included in the general failure of issue, and thought that no effect could be given to the former words distinct from the latter. On the other hand it was argued, that, if in the one event, viz. "dying [*598] *without leaving issue at the death," the estate had been given to one person, and in the case of a failure of issue at a more remote period, to another, the Court would regard the events as distinct, although in one sense they describe the same thing, that is to say, a determination of the estate tail; that it was a settled rule of construction that effect should be given to every word of the will, if a sensible effect could be given to them; that, in the present case, different and important consequences would follow, and that the Court was therefore bound to consider the time and circumstances under which the estate tail determined as distinct events; and that this neglect of the rule of construction just adverted to would defeat the intention of the testator, whereas the observance of it would preserve such intention. It was further said, that this point was not argued in the Court of Exchequer on behalf of Thomas's branch of the family; and this I am quite satisfied was the case. It is consistent with this to suppose Mr. Malins is correct in saying, that it was argued by himself in the Court of Exchequer on behalf of his clients; and (I may add) adverting to the conclusion come to by the Court of Common Pleas, Mr. Malins may have exercised a sound discretion in having argued the case rather than have left it to the unassisted judgment of the Court, although the point was not argued by his opponents.

In the course of the argument upon this part of the case, I suggested that the will might possibly be read as if the testator had devised his estate to Phillips Monypenny for life; and if he shall

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die without leaving issue at his death, to Thomas's branch of the family; and if he shall leave issue living at his death, then to such issue in strict settlement; and in default of issue of Phillips Monypenny, then to Thomas's branch of the family.

*This, it was said, would require a material alteration [*599] in the collocation of the words. I do not fully assent to that observation; for it is impossible that the gift over in the event of Phillips Monypenny dying without leaving issue at his death, could take effect if he left issue at his death; and my reading of the will would only express in terms what is necessarily involved in the testator's language.

I must admit, however, that the effect might be different; for, although in both cases the gift over would be a remainder, in one case it would be a remainder immediately expectant on the life estate of Phillips Monypenny. In the other it would be a remainder expectant on an estate tail supposed to be in Phillips Monypenny. I shall, therefore, abandon the suggestion I made, and look at the case as it appears to have been looked at by both Courts by which it was considered.

I have read the judgment of the Court of Queen's Bench in *Wilson* v. *Eden*,(a) and without saying that it overrules the opinion of the Barons of the Exchequer, (in the case before me,) upon the alternative limitation, which I think it does not, I think I must regard it as an authority, that an event single in itself (as the determination of an estate tail,) may properly be considered in the same light as two events, with reference to the time when such determination may take place.

The question then is, how I ought now to deal with the case. It has already been fully argued five times, at great length, and with great learning on each occasion; three times in this Court, and twice before two different Courts of common law; and I have to some *extent the opinion of the Court of [*600] Queen's Bench on that point (the alternative limitation,) on which the Courts of Exchequer and Common Pleas have

(a) See 1 Exch. 786; 11 Beav. 289; and Q. B. Rep., Nov. 16, 21, and Dec. 18, 1849.

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differed. Can I reasonably expect to get further assistance by adding two more arguments, one in the Queen's Bench and another in this Court, before the case can be the subject of appeal? or can I reasonably hope, that a case of so much importance and difficulty must not at last be decided in the House of Lords?

Now, in order to deprive Thomas's branch of the family of the benefit which the certificate of the Court of Common Pleas does in effect give them, I must decide that *Nicholl* v. *Nicholl* and *Pitt* v. *Jackson* are not binding upon me, for the reasons assigned by the Court of Exchequer; and also, that the estate is given over to Thomas's branch of the family, upon a general failure of issue of Phillips Monypenny, and not on a failure of issue male only; and also, that the conclusion come to by the Court of Common Pleas on the alternative limitation in the will, is erroneous.

Not venturing to say that I entertain a confident opinion upon the case, I think I shall best consult the interests of the parties, and the justice of the case, by making a declaration of right in favor of Thomas's branch of the family.

May 4th & 7th.—Upon speaking to the cause upon the minutes, it was proposed to take a declaration of the rights of the parties, in conformity with the foregoing judgment; and the counsel for the plaintiff submitted, that he should be declared to be tenant in tail in possession. This was objected to by the parties claiming under Phillips Monypenny, on the ground that [*601] Thomas Gybbon Monypenny *had not become entitled to the Jodrell estate in such a manner as to bring the shifting clause into operation. It also appeared, that, upon the answers of Thomas Gybbon Monypenny and John Casley, one of the guardians of the infant defendant Robert Phillips Dearden Monypenny, it was stated that deeds dated respectively the 3rd and 4th of October, 1837, had been executed by Phillips Monypenny and Thomas Gybbon Monypenny, for confirming the Jodrell estate, by the former to the latter, and the Maytham Hall estate by the latter to the former.

After argument upon the question, whether the infant defendant in possession of the estates in question or the adult parties,

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were bound by the statement of the case upon which the Court had proceeded, it was referred to the Master to inquire and certify whether the defendant Thomas Gybbon Monypenny ever, and when, and how, and under what circumstances, became entitled to the real or copyhold estates or any part thereof of Elizabeth Jodrell; and also, whether the several indentures of the 3rd and 4th of October, 1837, mentioned in the answers of the defendants John Casley and Thomas Gybbon Monypenny, were ever executed; and if so, when, and under what circumstances, and by whom; and the said Master was to be at liberty to state any circumstances relating to the matters thereby referred to him specially, as he might think fit.

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[*602] *MEMORANDA.

In the Vacation after Hilary Term, 1849, Mr. Serjeant *Kinglake* received a patent of precedence.

In Easter Term, 1849, *W. Page Wood*, Esq., one of Her Majesty's Counsel, was appointed Vice-Chancellor of the Duchy and County Palatine of Lancaster, in the place of *Horace Twiss*, Esq., deceased.

In the vacation after Trinity Term, 1849, the Hon. Mr. Justice *Coltman* died, and Mr. Serjeant *Talfourd* was appointed one of the Judges of the Court of Common Pleas.

In December, 1849, *John Elijah Blunt*, Esq., was appointed one of the Masters in Ordinary, in the place of *William Wingfield*, Esq., resigned.

In the Vacation after Hilary Term, 1850, *Michael Prendergast*, Esq., *H. Bliss*, Esq., *C. S. Greaves*, Esq., *William Charles Townsend*, Esq., *C. Hoggins*, Esq., *William Carpenter Rowe*, Esq., *Thomas Colpitts Granger*, Esq., *P. F. O'Malley*, Esq., *Edwin James*, Esq., *Barnes Peacock*, Esq., and *Kenneth Macaulay*, Esq., were appointed of Her Majesty's Counsel.

The Right Honorable *John Lord Campbell*, Chancellor of the Duchy of Lancaster, was, in Hilary Vacation, 1850, appointed Chief Justice of the Court of Queen's Bench, in the place of The Right Honorable *Thomas Lord Denman*, resigned.

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TO THE

PRINCIPAL MATTERS.

ABATEMENT.

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ACCOUNT.

1. By a contract for the execution of railway works, after specifying certain works to be done for a gross sum, it was provided, that extra works, which the company or their engineer should, by any writing under his hand, require to be executed, should be deemed to be included in the contract, and should be paid for at a certain rate; and that the contractor should not be entitled to make any claim for any alteration or addition which he might make without such written and signed instructions:—*Held*, by the Vice-Chancellor of England, (affirmed on appeal by the House of Lords) that a suit for an account of the moneys due to the contractor, in respect of the works done under the contract, was a proper subject of jurisdiction in equity. *Nixon* v. *The Taff Vale Railway Company*, 136

2. *Held*, by the Vice-Chancellor Wigram, (upon exceptions) that a direction for an account of extra works done by the plaintiff under and by virtue of the contract, did not authorize any account to be taken of works (other than the specified works) done by the contractor, with the privity of the company, without written instructions; but that the court would give the plaintiff liberty to bring his action at law against the company, in respect of works done without such instructions,—not, however, relieving him against the legal effect of the lapse of time during the proceedings in equity. *Ib.*

3. *Quære*, whether, if the contractor could not, in covenant, recover for extra works done for the company without written instructions, he might not recover in assumpsit. *Ib.*

4. It is not an objection to a decree for one purpose, that it may involve the necessity of taking an account, which account it may possibly be necessary to take in another suit for another purpose. *Kirwan* . *Daniel*, 347

See JURISDICTION, 1, 6, 7.
LUNACY, 1, 4.

ACQUIESCENCE.

Quære, whether, from the relation existing between the vendor and purchaser of land, constituting the purchaser a trustee of the purchase-money for the vendor, there arises any other than a constructive trust, as to which the relief in equity, by analogy to the Statute of Limitations, will be barred by long acquiescence. *Tbft* v. *Stephenson*, 1

See ACCOUNT, 2.
TRUSTEE AND CESTUI QUE TRUST, 13.

ACTION.

See AGREEMENT.

ADMINISTRATION SUIT.

1. In a suit for administering the estate of one who had been the personal representative of another, the party entitled to a share of the residuary estate of such other person, carried in a claim for such share as a debt before the Master, but the Master disallowed the claim, on the ground that such residuary share could not be allowed as a debt, unless it appeared that the clear residue, after payment of debts, &c., had been ascertained —*Held*, that, in such a case, the claimant ought to have forthwith applied to the Court for a direction to the Master to receive the claim, or to be examined *pro interesse suo*, or for leave to file a bill for the administration of the estate in question, or take some such proceeding, and to stay the distribution of the estate of the representative in the meantime; and that he ought not to have delayed his claim until after the Master's report, and the order on further directions. *Rogers* v. *Rogers*, 19

2. That where, after such delay, the claimant of the residuary share filed his bill against the parties in the administration suit, the Court, though it stayed the general distribution of the fund, would not stay the payment of the costs under the order on further directions. *Ib.*

See COSTS, 6.
MISREPRESENTATION.
GENERAL ORDER, XXX. OF AUGUST, 1841.
PARTIES, 1.

ADMIRALTY COURT.

See JURISDICTION, 1, 2.

ADMISSION.

See PAYMENT INTO COURT.

ADVANCEMENT.

See PORTION, 4, 5.

ADVERSE POSSESSION.

See JURISDICTION, 5.

AFFIDAVIT.

See EVIDENCE, 5.

AGENCY.

See SOLICITOR AND CLIENT, 3.

AGENT.

Semble, the cases in which a mere agent may be made a party to a suit, and costs prayed as relief against him, are limited to cases of fraud, in the sense in which fraud is understood in a Court of equity, to which the agent is a party, and do not apply to a case in which, though the agent acts erroneously, he acts openly and avowedly. *Marshall* v. *Sladden*, 428

AGREEMENT.

1. The payee of two promissory notes being about to sue the maker, the brother of the maker agreed to pay 200*l.* to the payee, in trust for E., or 6*l.* 10*s.* per quarter so long as the 200*l.* should be unpaid, so that the notes should be suspended and rendered inoperative so long as the brother continued to pay the 6*l.* 10*s.* a quarter to the payee; and on payment of the 200*l.* all claim on the notes to cease, and the same to be given up. The brother not having paid the 6*l.* 10*s.* to the payee, for two quarters, but having paid these sums to E., the *cestui que trust*, (as the latter admitted) the payee brought his action upon the notes against the maker: —*Held*, in error, reversing the judgment of the Queen's Bench, that the agreement could not be pleaded in bar to the action upon the notes, but might be the subject of a cross action. *Beech* v. *Ford*, m 208

2. *Held*, in equity, that the agreement must be construed as a contract by the brother, to provide for E. the annuity of 25*l.*, or the gross sum of 200*l.*, as a substitute for the two notes, and by the payee that the two notes should thenceforth be only a security for the performance of such contract; and not as an agreement, under which the original right of the payee against the maker would revive on any failure of the quarterly payments by the brother. *Ib.*

3. That the brother was entitled to the specific performance of the agreement in equity, not on the ground of the circuity of cross actions which the rule of law occasioned, but on the ground that this

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court, by modifying its decree, could give to all parties the benefit of the agreement, whilst a court of law, being unable so to modify its judgment, could not give to one party the benefit of the agreement without depriving another party altogether of such benefit. *Ib.*

4. A father, upon the marriage of his daughter, covenanted with the husband, his executors, &c., by deed or will to give, leave, and bequeath unto his (the covenantor's) daughter an equal share with his other children of all the real and personal estate of which he should die seised or possessed. The daughter died in the lifetime of the father, and the father, having made some disposition of property in favor of a son in his lifetime, by his will devised and bequeathed his real and personal estate for the benefit of his widow and surviving daughters:—*Held*, by the Court of Common Pleas, and by this Court concurring in the certificate,—that the husband and covenantee had not, under the circumstances, any good cause of action against the executer of the father; and that, if the father had died possessed of no personal estate, the husband could not have recovered any substantial damages in such action. *Jones* v. *How*, 267

5. In a suit by the administratrix of a deceased child, claiming, under a covenant by the father, an equal share with his other children of his real and personal estate, against his devisees and executors, and, for that purpose, praying that his residuary estate might be ascertained,—the suit not being framed as a creditors' suit,—the residuary legatees under the will of the father are necessary parties. *Ib.*

6. On a treaty for an under-lease, a a memorandum of the terms of the intended agreement was prepared, stipulating that the lease should contain all usual covenants, and also the covenants, in the leases of the ground landlord, and the proposed lessee signed the memorandum, accompanying his signature by the qualification that he agreed thereto, subject to there being nothing unusual in the leases of the ground landlord. A draft of the proposed lease was afterwards submitted by the lessor's solicitors to the proposed lessee, who made some alterations and returned the draft with a request that the lessor would at once grant the lease as altered, or refuse it. The lessor's solicitor sent the draft back the same day, assenting to all the alterations except one, whereby the proposed lessee had expunged a clause in the draft restraining any assignment or demise by him without the consent of the lessor:—*Held*, that, upon the return of the draft lease, not acceding to all the alterations, and in the absence of any proof that the lessor was previously bound by the terms as to unusual covenants, introduced by the proposed lessee on his signing the memorandum, the contract was incomplete, and the proposed lessee was at liberty to determine the treaty, *Lucas* v. *James*, 410

7. *Quære*, whether the principle would apply in a case where there was no real or substantial distinction between the terms of an offer by one party, and of a qualified acceptance or adoption of such offer by the other. *Ib.*

8. *Quære*, whether the existence of a nuisance in the neighborhood of a house contracted to be purchased for a residence, which nuisance is known to the vendor, and is one which a provident purchaser could not discover, is a ground for refusing a decree for specific performance of the contract: and whether otherwise, if the nuisance be not known to the vendor. *Ib.*

9. A signature in pencil is not necessarily deliberative, and may be equally binding on the party making it as the signature, if written in another manner, would be. *Id.* 419

See INFANT.
NOTICE.
PARTNERSHIP.
VENDOR AND PURCHASER.

AMENDMENT.

1. Where a plaintiff has obtained an order of course to amend his bill, after one or more answers has been filed, he can obtain no further order of course to amend, although he has called for and obtained an answer to the amended bill from the defendants or defendant, who had answered the original bill, and although other defendants may not have answered the original bill. *Winthrop* v. *Murray*, 150

2. If the right of the plaintiff to an order of course to amend be barred as against one defendant, it is barred against all. *Ib.*

3. The amendment of the bill, by adding the personal representative as a party, and by introducing the disclaimer of such personal representative upon the record will not sustain the suit of the heir-at-law. *Griffith* v. *Ricketts*. *Griffith* v. *Lunell* 305

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ANNUITANT.

It is sufficient that the memorial of an annuity, inrolled pursuant to the act 53 Geo. 3, c. 141, should, under the head "Consideration, and how paid," state the amount of the consideration, and whether paid in money, notes, or bills, as the case may be; without stating to whom the same was paid, or the fact that part of such consideration was paid to a third person in redemption of a prior incumbrance on the property. *Moody* v. *Hebbard*, 182

See LEGACY, 6, 8, 11.

ANSWER.

See AMENDMENT, 1.
DISCOVERY.
INTERPLEADER, 3.
PAYMENT INTO COURT.
PLEADING.

ANTICIPATION.

See HUSBAND AND WIFE.

APPOINTMENT.

1. Two funds were settled for the benefit of a husband and wife for their respective lives, with remainder to their children, as to one fund, as the parents should appoint, and as to the other fund, in equal shares. The husband and wife resided abroad, and received the dividends through Coutts & Co., and, previously to the marriage of one of their sons, they signed a document, expressing, that they thereby disposed of a certain sum "standing in the English bank of Coutts & Co." in favor of such son and his wife, and the children of the intended marriage: —*Held*, that the settled funds were sufficiently referred to by the instrument of disposition; that it did not refer exclusively to the fund subject to the power of appointment; that the son was entitled to his share of the other fund, and to have the sum mentioned in the instrument of disposition made up out of the fund subject to the appointment. *Sheffield* v. *Von Donop*, 42

2 Where an appointment of a trust fund reserved a power of revocation, but did not reserve a power of new appointment, it was held, that, upon the exercise of the power of revocation, a new appointment might be made. *Ib.*

3. Stock, over which the testatrix had a power of appointment, held to be described and appointed by a will, in which the power was not expressly referred to. *Sayer* v. *Sayer*. *Innes* v. *Sayer*, 377

4. On a question, whether a power has been executed by a will, evidence of the state of the property is admissible, so far as it is material to the question, whether a particular part of such property is or is not described by the will; but, unless the circumstances of the property, when known, are found to exclude the primary and strict sense of the words which the testator has used, such strict sense must be adhered to; and the mere probability, however strong, that the words were used in a secondary sense, does not authorize the Court so to construe them. *Sayer* v. *Sayer*. *Innes* v. *Sayer*, *Ib.*

5. A disposition of trust funds, over which the testatrix had a general power of appointment, not pursuing the formalities prescribed in the power, held to be, nevertheless, a good appointment in favor of a charity. *Ib.*

See POWER.
TRUSTEE AND CESTUI QUE TRUST, 3, 8.

APPOINTMENT OF TRUSTEES.

See TRUSTEE AND CESTUI QUE TRUST, 2, 3, 7, 8,

APPOINTMENT OF RESIDUE.

See LEGACY, 5.

APPRENTICE FEE.

See PORTION, 4.

APPROPRIATED CAPITAL.

See JOINT-STOCK COMPANY, 1, 2, 3.

APPROPRIATION.

See PRINCIPAL AND SURETY, 4.

ARBITRATOR.

See JURISDICTION, 7.

ASSIGNEES.

See HEARING.

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ASSIGNMENT.

See LESSOR'S TITLE.
VENDOR AND PURCHASER.

ASSUMPSIT.

See ACCOUNT, 3.

ATTORNEY AND CLIENT.

See DISCOVERY, 1.

CHILDREN.

AWARD.

See STAT. 8 VICT. c. 18, s. 85.

BANKRUPT.

See HEARING.

BAPTISTS.

See TRUSTEE AND CESTUI QUE TRUST, 9.

BEQUEST TO DECEASED CHILD.

See STATUTE OF WILLS, 7 WILL. 4 & 1 VICT. c. 26.

BILL AND ANSWER.

See EVIDENCE, 5.

BILL.

See AMENDMENT.
PLEADING, 3.

BOND.

See STAT. 8 VICT. c. 18, s. 85.

BREACH OF TRUST.

See TRUSTEE AND CESTUI QUE TRUST, 4, 13.

CATHEDRAL.

See DEAN AND CHAPTER.

CHARITY.

See APPOINTMENT, 5.

CHILDREN.

1. Construction of the word "children" as under the special words of a will, describing both legitimate and illegitimate children. *Evans* v. *Davies*, 498

2. A testator bequeathed legacies to his children, M., S., J., W., and N., appointing his wife their guardian, and directing the application of the interest for their maintenance. He then directed that the remainder of his personal estate, and the residue of the proceeds of certain real estates, should be divided between all his children of his first and second marriages. The testator then charged other parts of his real estates with certain annual payments, and directed that the remainder of the rents and profits should be divided among all his said children. The testator then directed, that, in case one or more of the children by his second wife should die without issue under twenty-one, their shares and legacies should go between his second wife and such of his children by her as should be living, and he gave the residue of his estate to all and every of his children:—*Held* that the said *S.*, who was a child by the second wife before marriage, was within the description of "children" contained in the will, and entitled to share with the legitimate children of the testator in the residuary gifts. *Evans* v. *Davies*. 498

See STAT. 7 WILL. 4 & 1 VICT. c. 26.

CIRCUITY.

See AGREEMENT, 3.

CLAUSTRAL SCHOOL.

See JURISDICTION, 9.

COMMERCIAL PROPERTY.

See TRUSTEE AND CESTUI QUE TRUST, 17.

COMMON SEAL.

See JURISDICTION, 8.

COMPROMISE OF SUIT.

See SOLICITOR AND CLIENT, 1.

CONDUCT OF SALE.

1. Under a decree, directing the sale of an estate, but not directing by whom the sale shall be conducted, the Master is not bound to give the conduct of the sale to the plaintiff, but may, in his discretion, if he considers it more beneficial to the estate, give the conduct of the sale to other parties. *Dixon* v. *Pyner*, 331

2. Grounds on which the conduct of a sale, under the decree of a Court, may properly be given to parties other than the plaintiff. *Ib.*

CONGREGATION.

See TRUSTEE AND CESTUI QUE TRUST, 9, 10.

CONNIVANCE.

See TRUSTEE AND CESTUI QUE TRUST, 13.

CONSIDERATION.

See ANNUITY.

CONSTRUCTION.

See AGREEMENT, 2.
CHILDREN, 1, 2.
CONVERSION, 7.
HUSBAND AND WIFE.
LEGACY, 1, 5, 12.
PORTION, 1.
PRINCIPAL AND SURETY, 4.
RESIDUARY SHARE.
STATUTE OF WILLS, 7 WILL. 4, & 1 VICT. C. 26.

Construction of a power of sale and exchange, in a settlement. *Marshall* v. *Madden*, 428

CONSTRUCTIVE TRUST.

See ACQUIESCENCE.
LIS PENDENS.

CONTINGENT REMAINDER.

See DEVISE, 2, 3.

CONTRACT.

See ACCOUNT, 1, 2, 3.
AGREEMENT.
JURISDICTION, 7.
LESSOR'S TITLE,
MISREPRESENTATION.
TRUSTEE AND CESTUI QUE TRUST, 1, 19.

CONVERSION.

1. Conveyance of the equity of redemption of real estate to trustees, for sale, for the benefit of the creditors of the author of the deed, and upon trust, if there should be any surplus, to pay the same to him, his executors, administrators and assigns, to and for his and their own absolute use and benefit:—*Held* to be a conversion of the real estate into personalty, as between the real and personal representatives of the author. *Griffith* v. *Ricketts*. *Griffith* v. *Lunell*, 299

2. *Held*, also, that the ultimate surplus of the proceeds of the real estate being reserved to the author of the deed, and the deed not being revoked, and no attempt having been made to revoke it, it was not material as between the real and personal representatives of the author, whether the deed was or was not revocable. *Ib.*

3. That the question whether the surplus proceeds of the trust property belonged to the real or personal representative, was not affected by the state,—whether of realty or personalty.—in which such surplus was found, although the state of the property might affect the character in which such surplus would go to the one or the other of such representatives. *Ib.*

4. If the author of a deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate, from the delivery of the deed, and is equivalent to a gift of the expectancy of his heir-at-law to his personal estate. *Ib.*

5. The principle is the same in the case of a deed as in the case of a will; but in the former case the conversion takes place in the lifetime of the party making it,—in the latter, not until his death,—and the rights of the real and personal representatives, in each case, are governed by the simple effect of the instrument. *Ib.*

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6. The onus of proving the re-conversion is on the plaintiff, who claims under the heir-at-law of the author of the deed. *Griffith* v. *Ricketts*. *Griffith* v. *Lunell*, 299

7. Where a testator by his will gave his estate, including copyhold of inheritance, leaseholds, merchandize, money in the funds and cash, to his children and grandchildren, in twenty aliquot shares, and directed some of such shares to be invested in the government funds for the infant legatees, and requested his executors on his death to get his property together and divide it, it was held, that the will must be taken to direct a sale and conversion of the copyhold estate. *Mower* v. *Orr*, 475

8. The testator gave his real and personal estate to trustees, upon trust to apply the rents, issues, and proceeds for the benefit of his two daughters, with a direction, on the youngest attaining twenty-one, to divide the whole into two equal moieties, of which the testator gave one moiety to his two daughters equally, and directed the other to be placed out upon government or real securities, and the dividends and interest thereof to be paid to the daughters for their lives, and upon their death, the said moneys and effects to be divided amongst their children:—*Held*, that there was no conversion by the will, of the moiety of the real estate devised to the daughters on the youngest attaining twenty-one. *Cornick* v. *Pearce*, 477

See DEBTOR AND CREDITOR, 2.
TENANT FOR LIFE AND REMAINDER-MAN.

COPYHOLD.

Suit by a lord of the manor against a tenant of lands within the manor, to restrain the defendant from taking stone from lands in his occupation. The defendant by his answer alleged, that it was and had been a common practice in the manor, to remove the stone which laid immediately under the surface, for the benefit of cultivation. At the hearing, the court made a decree for a perpetual injunction,—the defendant declining to try his right to take the stone in an action at law, to be brought against him by the plaintiff. *Cuddon* v. *Morley*, 202

CORPORATION.

See JOINT-STOCK COMPANY, 4.
JURISDICTION, 8.

COSTS.

1. Motion by the executor of a defendant, as against whom a bill was dismissed, with costs, since the stat. 1 & 2 Vict. c. 110, the defendant having died before taxation of his costs, that the Master might proceed with such taxation,—the suit not having been revived,—refused, with costs. *Robertson* v. *Southgate*, *Harmer* v. *Southgate*, 109

2. Upon a motion by the defendant to dismiss the bill, upon payment of satisfaction to the plaintiff of the debt or claim made by the suit, and certain costs of the suit, the court will, in some circumstances, determine the question of costs to be paid by the defendant, as where such question is purely collateral to the subject of the suit. *Penny* v. *Beavan*, 133

3. The costs of the plaintiff in a creditors, suit, in opposing a motion to dismiss for want of prosecution by a party named executor, who had renounced probate and disclaimed, was refused to a creditor whose bill was dismissed upon payment of his claim by the acting executor. *Ib.*

4. The mere offer from a defendant to pay a claim and costs (without motion) held not to disentitle the plaintiff to his costs of the subsequent proceedings in the suit. *Ib.*

5. Costs of the day are not given, where a cause is ordered to stand over at the hearing, owing to an abatement or imperfection of the suit, which happened after the cause was at issue. *Fussell* v. *Elwin*, 29

6. Costs, where two estates, those of the testator and the executor, are administered in the same suit. *Culsha* v. *Cheese*, 246

7. The costs of more than two counsel disallowed in taxation between party and party, notwithstanding the third counsel was retained after the counsel by whom the pleadings had been drawn had been called within the bar. *Green* v. *Briggs*, 279

8. In taxation between party and party, it is not the practice to allow the common retaining fee to counsel. *Ib.*

9. Before the 120th order of May, 1845, the expense of attending the Master by counsel was not allowed between party and party, except on references for scandal. *Ib.*

10. The costs incurred in respect of conflicting claims of priority of lien or charge, in a suit for redemption and foreclosure by a puisne mortgagee, ordered to be paid by the parties who failed in such claims respectively, the plaintiff adding to his mortgage-debt the costs paid by him in respect

of such claim as he had failed in establishing,—the questions having arisen from the acts or conduct of the mortgagor. *Pelly* v. *Wathen*, 372

11. A trust fund, consisting of a debt from the estate of a testator, was recovered in a creditors' suit by the *cestuis que trust;* in which suit the two trustees of the fund were defendants. The two trustees (for reasons which were not denied to be sufficient) appeared separately; and one of them dying before the cause was heard on further directions, it was held that he had acquired no lien for his costs on the trust fund in Court; and the petition of his personal representative, that his costs might be taxed, and provided for out of the fund, was refused, with costs. *Malins* v. *Greenway*, 391

12. On a reference for an account of what was due to the defendant in respect of a lien on deeds, the Master found the amount, and the plaintiff thereupon offered to pay it, and terminate the suit, upon delivery up of the deeds, which offer the defendant refused to accept. The Court, on further directions, refused the defendant the costs of the proceedings subsequent to the offer. *Sentance* v. *Porter*, 426

13. It is not irregular in such a case, to bring before the Court, by motion, at the time of the hearing for further directions, circumstances affecting the right of the parties to costs in the cause. *Ib.*

See ADMINISTRATION SUIT, 2.
DISMISSAL OF BILL.
LIEN, 1, 2, 3.
PLAINTIFF.
SOLICITOR AND CLIENT.
TAXATION.

COUNSEL.

See COSTS, 7, 8, 9.
DISCOVERY, 1.

COVENANT.

See ACCOUNT, 2, 3.
AGREEMENT.
PARTIES, 3.
VENDOR AND PURCHASER.

COVERTURE.

See INFANT.
PORTION.

CREDITOR.

See ADMINISTRATION SUIT, 1, 2.

CREDITORS' SUIT.

See COSTS, 3, 6, 11.
MISREPRESENTATION.

CROSS ACTION.

See AGREEMENT, 1.

CUSTODY OF INFANTS.

See NEXT FRIEND.

CUSTOM.

See COPYHOLD.

CY-PRES DOCTRINE.

See DEVISE, 1, 2, 3.

DAMAGE.

See STAT. 8 VICT. c. 20, s. 6.

DAMAGES.

See AGREEMENT, 4.

DEAN AND CHAPTER OF A CATHEDRAL CHURCH.

See JURISDICTION, 9, 10, 11.

DEBTOR AND CREDITOR.

1. A., being indebted to a larger amount than his personal estate was sufficient to pay, died intestate as to his real estate, which descended upon his daughter and heiress at law, a minor. The daughter married during her minority, having entered into articles to settle the estates, upon her attaining her majority, for the benefit of the parties to and the issue of the marriage, with power to vary the settlement within six months after she attained her age of twenty-one years. After the said six months had expired, the estates were settled, with power of revocation; and,

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by a subsequent deed, the uses were revoked, and the same estates were appointed to trustees for sale, and payment of the debts of A., and, subject to such trusts, for the benefit of the husband and wife, and issue of the marriage. After the death of the wife, the deeds of settlement and appointment were set aside at the suit of one of the children of the marriage, and the estates to be decreed to be re-conveyed to the uses expressed in the articles:—*Held*, subsequently, in a suit by a creditor of A., that the real estate was subject to the payment of such parts of A.'s debts as his personal estate was insufficient to pay. *Pimm* v. *Insall*, 193

2. A conveyance for the benefit of creditors held not to be revocable by the author, as against any creditors with whom such communications had taken place, as would give them an interest under the deed, but, at the utmost, to be revocable only as to the surplus proceeds of the estate, after satisfying such creditors; and whether, the deed was revocable at the option of the author, as to such surplus,—*quære*. *Griffith* v. *Ricketts*, *Griffith* v. *Lunell*, 299

DECREE.

See Apportionment of Residue.
Jurisdiction, 6.
Mortgagor and Mortgagee, 1, 3, 4.
Payment into Court.
Trustee and Cestui que Trust, 2.

DEEDS.

See Lien, 1, 2, 3.

DEFECTIVE EXECUTION OF POWER.

See Appointment, 5.

DEFENDANT.

See Amendment, 1, 2.
Costs, 1, 2, 4, 10, 11, 12.
Interpleader.
Jurisdiction, 6.
Taxation.

DEMONSTRATIVE LEGACY.

See Legacy, 13.

DEMURRER.

See Joint-stock Company.
Jurisdiction, 5, 7, 8.
Vendor and Purchaser.

DEPOSITIONS.

See Evidence, 3.

DEVIATION.

See Account, 2.

DEVISE.

1. Devise of lands of gavelkind tenure to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son of P. M. for life, and after his decease for the first son of such first son and the heirs male of his body, and in default of such issue for every other son of P. M. successively for the like interests and limitations; and in default of issue of the body of P. M. or in case of his not leaving any at his decease, for T. M. for life, and after his decease for T. G. M., the eldest son of T. M., for life, and after his decease, for the first son of T. G. M. and the heirs male of his body; and in default of issue of the body of the said T. G. M., for every other son of T. M. successively, for the like estates and interests; and, on failure of all such issue of the body of T. M., upon trust for him, his heirs, and assigns forever; provided that, P. M., or T. M., or any of their issue, should become entitled to the Jodrell estate, then the trustees should stand seised of the devised premises, upon trust, for the next person entitled thereto under his will, as if the person so succeeding to the Jodrell estate were dead. T. M. died after the date of the will, and the testator by a codicil declared that his trustees should stand seised of the devised estates, upon trust, for his wife for her life; and from and after her decease, upon the trusts declared by his will, subject to the declaration therein contained with reference to the Jodrell estate:—*Held*, that P. M. took an estate for life only. *Moneypenny* v. *Dering*, 568

2. That T. G. M. took an estate for life in remainder after the life estate of P. M., contingent on P. M. not leaving any issue at his decease, and determinable on his becoming entitled to the Jodrell estate. *Ib.*

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3. That the eldest son of T. G. M. took a contingent remainder in tail, after the determination of the life estate of his father. *Ib.*

See VOID DEVISE.

DEVISE TO DECEASED CHILD.

See STATUTE OF WILLS, 7 WILL. 4 & 1 VICT. c. 26.

DEVISEE.

See DISCOVERY, 1.
GENERAL ORDER XXX. OF AUGUST, 1841.

DILIGENCE.

See INTERPLEADER.

DISCLAIMER.

See AMENDMENT, 3.
LUNACY, 2.

DISCOVERY.

1. Confidential communications made by a party to his attorney or counsel do not cease to be privileged by the fact that the attorney or counsel afterwards becomes interested as devisee of the property, to the title of which such communications related. *Chant* v. *Brown*, 79

2. Upon exceptions for insufficiency to the answer of a party who had been the attorney in the transactions impeached, and who refused discovery, on the ground of privilege, the Court cannot regard the subsequent consent of the client to the disclosure of the matters inquired after, for the question of sufficiency must be determined as of a time anterior to the exceptions. *Ib.*

DISMISSAL OF BILL.

Where the same solicitor appeared for two defendants, one of whom had, and the other had not, filed his answer so long a time previously, as to entitle him to move to dismiss the bill for want of prosecution, the court refused such a motion by the former defendant, with costs. *Winthrop* v. *Murray*, 150

See COSTS, 2.
GENERAL ORDER XXXII. OF AUGUST, 1841.

DISSENTERS.

See TRUSTEE AND CESTUI QUE TRUST, 5.

DIVISION.

See CONVERSION, 7. 8.

DOCUMENT.

See EVIDENCE, 4.

EJECTMENT.

See JURISDICTION, 5.

ELDEST SON.

See LEGACY, 3, 4.

EQUAL SHARE.

See AGREEMENT, 2.

EQUITABLE MORTGAGE.

See MORTGAGOR and MORTGAGEE, 3.

EQUITY.

See JURISDICTION.

ESTABLISHED CHURCH OF SCOTLAND.

See TRUSTEE AND CESTUI QUE TRUST, 11, 12.

ESTATE FOR LIFE.

See DEVISE, 1, 2.

ESTATE TAIL.

See DEVISE, 2, 3.

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EVIDENCE.

1. On interlocutory applications, which are necessarily heard upon affidavits, the court does not dispense with the rule, that on disputed points, the best evidence in the power of the parties must be given; and therefore, it is not sufficient for a party to state, upon affidavit, the purport and effect of a document which he has the means of producing. *Stamps* v. *The Birmingham, Wolverhampton, and Stour Valley Railway Company*, 255

2. The evidence of a witness taken *de bene esse* before a cause is at issue, and not published before the hearing, may be published after the hearing, for the purpose of being used on a question referred to the Master, if the witness cannot then be examined. *Forsyth* v. *Ellis*, 290

3. Upon the motion by a defendant to suppress depositions supported by the affidavit of a witness, that the evidence which she gave before the commissioner, was not truly represented in the depositions, and that she had mistaken the meaning of a technical expression used in the interrogatories, the court refused to suppress the depositions, but gave the parties liberty to re-examine and cross-examine the witness *viva voce* before the Master, (the commission being issued after decree) upon the disputed parts of the depositions; and also gave the plaintiff liberty in the same manner to examine, and the defendant to cross-examine, the commissioner and his clerk. *Dobson* v. *Land*, 295

4. A person served with a *subpœna duces tecum*, under the General Order XXIV., of May, 1845, to produce a document at the hearing of the cause, may, at such hearing, be called upon his subpœna, and asked whether he produces the document and if he declines to produce it, why he so declines, or other like questions confined to the mere purpose of production. *Griffith* v. *Ricketts*. *Griffith* v. *Lewell*, 301

5. Proof admitted on behalf of the plaintiff, of the execution of a deed by affidavit at the hearing, where the answer had not been replied to, but did not deny the execution. *Chalk* v. *Raine*, 393

See APPOINTMENT, 4.
RECTIFYING DEED, 2.

EXAMINATION DE BENE ESSE.

See EVIDENCE, 2.

EXAMINATION.

See EVIDENCE, 4.

EXCEPTIONS.

See DISCOVERY, 2.

EXECUTORS.

See COSTS, 1, 6.
POWER.

EXERCISE OF POWER.

See BREACH OF TRUST.

FAMILY ARRANGEMENT.

See RECTIFYING DEED, 2.

FORECLOSURE.

See MORTGAGOR AND MORTGAGEE 1, 2, 3, 4.

FOUNDER.

See JURISDICTION, 9, 10.

FRANKALMOIGNE.

See JURISDICTION, 9.

FRAUD.

See AGENT.

FUND IN COURT.

See COSTS, 11.

FURTHER DIRECTIONS.

See PAYMENT INTO COURT.

GENERAL ASSEMBLY.

See TRUSTEE AND CESTUI QUE TRUST, 12.

GENERAL LEGACY.

See LEGACY, 12.

GENERAL ORDER.

XXX. of August, 1841.

Where the suit involves the administration of the estate, and distribution of the residue the devisees in trust do not, under the 30th order of August, 1841, sufficiently represent the persons beneficially interested in the estate. *Jones* v. *How*, 270

XXXII. of August, 1841.

If a suit be instituted against defendants jointly and severally liable within the meaning of the 32nd Order of August, 1841, the plaintiff cannot, after the cause stands for hearing, dismiss his bill, or waive the relief, as to some or one of such defendants, and prosecute the cause against the others only under that order; and, therefore, where one of such defendants became bankrupt during the progress of the cause: at the hearing, the assignees in the bankruptcy were held to be necessary parties. *Fussell* v. *Ekwin*, 29

XXXIX. *Id.*

See PARTIES, 2.

XVI. of May, 1845.

See AMENDMENT.

XXIV. *Id.*

LXV. *Id.*

See AMENDMENT.

LXVI. *Id.*

See DISMISSAL OF BILL.

CXVIII. *Id.*

See DISMISSAL OF BILL.

CXX. *Id.*

See COSTS, 9.

GRAMMAR SCHOOL.

See JURISDICTION, 9.

GUARANTEE.

See PRINCIPAL AND SURETY,

HEARING.

If, at the hearing of the cause, it be stated and admitted, that a defendant on the record has become bankrupt since the institution of the suit, the plaintiff is not (in ordinary cases) at liberty to disregard the bankruptcy, and take a decree against the defendant, as if no bankruptcy had occurred; but the cause will be ordered to stand over, that the assignees may be made parties. *Fussell* v. *Ekwin*, 29

See COSTS, 5.
EVIDENCE, 5.

HEIR-AT-LAW.

See AMENDMENT, 3.
CONVERSION.
DEBTOR AND CREDITOR, 1.
VOID DEVISE.

HUSBAND AND WIFE.

By a post-nuptial settlement a sum of money, the property of the wife, was vested in trustees, upon trust to pay the income as the wife should from time to time appoint, not by way of anticipation; and in default of appointment, to the wife for her separate use independent of G., her husband; and from and after her death, to G., the husband for life; and from and after the death of the survivor, to the children of the marriage, as therein mentioned; and if there should be no children and the wife should survive G., the husband, the whole trust property to be paid to her, and if G., the husband, should survive the wife, then, at his death, as the wife should appoint, or, if no appointment, to her next of kin.

Held,—that, there being no definite term during which the trustees were directed to pay the income as the wife should appoint, or for her separate use, and the direction to pay to herself being made with reference only to the marital rights of G., the then existing husband, and there being no protection, by the express words of the settlement, afforded against a future

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marriage of the wife—the provision for the separate use and the clause against anticipation had no force after the death of G. the husband, and during a second coverture of the wife; and that, therefore, the second husband had power to assign the interest of the wife in the trust property. *In the Matter of the Act* 10 & 11 *Vict. c.* 96 *and In the Matter of Gaffee's Settlement*, 101

See DEBTOR AND CREDITOR, 1.
INFANT.
NEXT FRIEND.

ILLEGITIMATE CHILDREN.

See CHILDREN, 1, 2.

INCUMBRANCE.

See ANNUITY.
TRUSTEE AND CESTUI QUE TRUST, 5.

INDEMNITY.

See INTERPLEADER, 2.

INDEPENDENTS.

See TRUSTEE AND CESTUI QUE TRUST, 9,

INFANT.

Articles made upon the marriage of a minor, covenanting to settle her real estate on attaining her majority, for the benefit of herself and her husband, and the issue of her marriage, precludes the husband, during the coverture, from doing or concurring in any act inconsistent with the articles, but are not binding upon the wife. *Pimm* v. *Insall*, 193

See NEXT FRIEND.

INJUNCTION.

Where an injunction is applied for upon a distinct ground, which fails, it will not, in general be granted upon another ground which has not been put forward, but which, it appears, might have been put forward in the circumstances of the case. *Castelli* v. *Cook*, 89

See AGREEMENT, 2.
COPYHOLD.
See INTERPLEADER.
JURISDICTION, 1, 2, 3.

"INJURIOUSLY AFFECTED."

See STAT. 8 VICT. c. 20, s. 6.

INQUIRY BEFORE THE MASTER.

See EVIDENCE, 2.

INSUFFICIENCY.

See DISCOVERY, 1, 2.

INSUFFICIENT SECURITY.

See TRUSTEE AND CESTUI QUE TRUST, 17.

INTERLOCUTORY PROCEEDINGS.

See EVIDENCE, 1.

INTERPLEADER.

1. The right of the plaintiff in interpleader, is to be protected not merely from double liability, but from double vexation; and he is not therefore bound to show the existence of an apparent title in each of the defendants who are claimants of the property in dispute. *East and West India Dock Co.* v. *Littledale*, 57

2. The stakeholder is entitled to relief by suit of interpleader, and is not bound to accept an indemnity from either of the claimants, although the claimant offering such indemnity shows an apparant title to the property in dispute. *Ib.*

3. A defendant in interpleader cannot generally be ordered to interplead, by bringing or defending a suit in respect of the property in question, until he has put in his answer, or the bill is taken *pro confesso* against him; but where the defendant seeks, as an indulgence, time to answer beyond that which the general rule allows, he must satisfy the Court that the case cannot with justice be put in a course for determination without further delay; and, in this case, the further time was granted only upon the defendant forthwith proceeding to try his legal right by defending the action which had been brought by the other defendant, against the stakeholder. *Ib.*

4. The plaintiff in interpleader under-

takes by his suit to use all proper diligence to get in the answer of, or take the bill *pro confesso* against, each of the defendants; and if any delay should occur in such proceedings, any defendant may apply as against the plaintiff, for a dissolution of the injunction, or for the delivery up of the subject of interpleader, as the case may be. *Ib.*

INTESTACY.

See RESIDUARY SHARE.

IRREPARABLE INJURY.

See JURISDICTION, 5, 11.

ISSUE.

See DEVISE, 2.
LEGACY, 1.
TRIAL OF ISSUE.

ISSUE MALE.

See LEGACY, 3, 4,

JOINT SOLICITORS.

See PARTNERSHIP, 1, 2.

JOINT-STOCK COMPANY.

1. The Eastern Union Railway Company was authorized by several acts of parliament to make railways from Colchester to Ipswich, Ipswich to Bury St. Edmonds and Norwich, and from Ipswich to Harwich, and, for those purposes, to raise moneys by shares and loans, not exceeding certain sums in the whole. The same company was also, by a distinct act, authorized to purchse and complete the Hadleigh Junction Railway, and for that purpose, by shares or loan, to raise a sum not exceeding 100,000*l.* In a suit brought by the proprietor of a scrip certificate for stock, forming part of the capital raised in pursuance of the acts authorizing the company to purchase the Hadleigh Junction Railway, and make the Harwich line, —charging, that the company was about to misapply the 100,000*l.* raised under the Hadleigh act in the construction of the Norwich line, and seeking to restrain such misapplication,—the demurrers of the company and the directors, for want of equity, were overruled. *Bagshaw* v. *The Eastern Union Railway Company*, 114

2. Where a company is authorized by act of parliament to raise moneys for a specific purpose only, it is not competent to any majority of the shareholders of the company to divert such moneys to another purpose against the will of a single shareholder; nor could unanimity amongst the shareholders make such a diversion lawful. *Ib.*

3. *Quære*, whether a company, having powers to construct several branch and extension railways, and to raise certain distinct sums of money for such respective works,—such moneys being declared to be part of the general capital of the company,—may or may not lawfully apply moneys in the execution of one undertaking, which they were empowered to raise for another. *Ib.*

4. The company, in its corporate character, was properly made a defendant to such a suit by some of the members. *Ib.*

5. The proprietor of a scrip certificate, whether registered or not, (such proprietor not being in default,) may sue on behalf of himself and all other proprietors of like certificates, and of the stock which they represent, or into which they are convertible, where the proprietors of certificates and stock are very numerous; there being no incompatibility in the interest of the registered and unregistered proprietors to preclude the plaintiff from representing both classes of persons. *Ib.*

6. The original subscriber of the sum represented by the scrip certificate, and vendor of the same to the plaintiff, is not a necessary party to the suit, inasmuch as the contract between such original subscriber and the company gave the former the right to assign his interest and be discharged, and such interest was duly assigned by him to the plaintiff, and the plaintiff was accepted by the company in his stead. *Ib.*

JUDGMENT CREDITOR.

See PARTIES, 3.

JURISDICTION.

1. If relief which is a proper subject of the jurisdiction of another Court, be dependent upon relief to be given in this Court, or if the relief which is properly a subject for this Court, cannot be given except that which belongs to another jurisdiction be also given,—this Court, to prevent multiplicity of suits, may give both kinds of relief; but if the relief

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which is sought in a suit be of different kinds, within the jurisdiction of different Courts, and independent of each other, although relating to the same transaction, —the right in this Court to one kind of relief, will not necessarily draw along with it the right to the other; and therefore, where the bill by a part owner of a ship, against the master and other part owners, prayed an account of the past earnings of the ship, to which the plaintiff was entitled, his right to that relief afforded no reason for going on to restrain the sailing of the ship until security, according to the practice of the Admiralty Court, was given for the plaintiff's shares. *Castelli* v. *Cook*, 89

2. The Court of Chancery will not (in a case within its jurisdiction) interfere beyond, or otherwise than, the Court of Admiralty would interfere at the suit of some part owners to control the management or restrain the sailing of a ship,—there being no question as to the ownership, and the only dispute being as to the powers of the owners *inter se*.—*Semble*. *Ib.*

3. Whether the Court of Chancery has a concurrent jurisdiction with the Court of Admiralty, to restrain the sailing of a ship at the suit of the minority, or some of the part owners, until security for its return shall be given by the majority, or others; or whether it is necessary that other circumstances should exist, — as questions of property or otherwise, to draw the subject within the jurisdiction of the Court of Chancery,—*Quære*. *Ib.*

4. Objections to relief, on the ground that, although part that is asked is, yet the other part is not, within the jurisdiction of the Court, are not analogous to objections for multifariousness, where unconnected subjects of equitable jurisdiction are united in the same suit. *Ib.*

5. To the bill of plaintiff, alleging that, under a settlement thereby stated, he was entitled to an estate, of which the defendant was in possession, and had been so for nineteen years; the plaintiff had not discovered his title until a very recent period; and that he had since brought an ejectment against the defendant, to recover the premises, which action stood for trial at the next Assizes; and praying an injunction to restrain the defendant from cutting down and selling ornamental and other timber of great value, and thereby occasioning irreparable injury to the estate which the bill charged that the defendant threatened and intended to do—a demurrer, for want of equity, was allowed. *Davenport* v. *Davenport*, 217.

6. The Court may proceed with a cause so far as a final order can be made, notwithstanding the absence of an interested party who is out of the jurisdiction; but where the suit was brought to enforce a charge upon the produce of the estate of an absent party, in the hands of his agents and consignees, in performance of an agreement to which the consignees were parties, the Court refused to direct an account to be taken of the amount of such produce received by the consignees; for, as the absent party would neither be bound by the account of what was due to the plaintiff in respect of the charge on the estate, nor be compelled by the decree for payment of what was so found due, to allow in the accounts of his consignees the payment to be made by them in pursuance of such decree, the accounts of the receipts of the produce of the estate by the consignees could not be taken for any final purpose. *Kirwan* v. *Daniel*, 347.

7. The plaintiffs contracted to execute works on a railway to the satisfaction of the engineer of the company, by the 1st of October, 1848, making such alterations in, and hastening the works, as the engineer should direct; and the company agreed to pay for such works a stipulated sum, and thereof to pay a proportionate part monthly, according to the value of the works which the engineer should certify to have been done, retaining 5*l.* per cent. of the certified amount; and the contract provided that all disputes as to fact, discretion, or opinion, were to be referred to the absolute determination and award of the engineer, whose decision was to be final, and without appeal; and if the engineer should be dissatisfied with the works, the company might take possession of and complete the same, at the expense of the plaintiffs, after giving them fourteen days' notice. The works were delayed, with the assent of the company, but in January, 1849, the engineer required the works to be prosecuted with increased speed, and insisted that the line should be opened on the 1st of June. On the 21st of May, the company gave notice to the plaintiffs, in the terms of the contract, that they would, at the expiration of fourteen days, take possession of and proceed with the works. The plaintiffs thereupon filed their bill to restrain the company from taking such possession, alleging, that when the plaintiffs were proceeding with due speed, the engineer had, by the authority of the directors, ordered that the works should be delayed for a considerable time; that the company had waived the completion of the works by October, 1848; and that the plaintiffs were only bound to carry on and complete the same at a rate computed on the footing of

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the original contract, and modified by the delay which the company had required; that the engineer had, by the order of the directors, giving monthly certificates for less than a fair proportion of the contract sum, according to the work actually done at such times; that a large sum was due to the plaintiffs, which had not been paid; and that the company had not, in fact, paid all the sums which had been certified. The bill denied any default on the part of the plaintiffs, and charged that the notice was given for the fraudulent purpose of avoiding the payment of sums due to the plaintiffs, and of ejecting them from the works, and procuring other persons to finish the works at an earlier period than the plaintiffs were bound to do. The bill also prayed an account of what was due to the plaintiffs from the company in respect of the works, and an injunction to restrain the company from proceeding against the plaintiffs for penalties under the contract, on the ground of their non-completion. Upon demurrer by the company, it was objected, first, that the contract had not been completed on the part of the plaintiffs, and that it was not a contract of which, as against the plaintiffs, if they had been defendants, the Court could have decreed a specific performance; and, secondly, that the entire control of the works was by the contract given to the engineer, whose decision was to be without appeal; but, *held*, that the plaintiffs were entitled to the aid of a Court of equity, and that the demurrer must be overruled. *Waring* v. *The Manchester, Sheffield, and Lincolnshire Railway Company*, 482

8. It is no objection to relief, in such a case, that it depends on a variation of or departure from the contract made by the directors and officers of an incorporated company, such variation or departure not being made under the authority of their common seal. *Ib.*

9. The master of a grammar school, appointed by the Dean and Chapter of a Cathedral Church, and which grammar school was, by the statutes imposed by the founder, directed to be established and maintained from the endowments of such church, which were held in Frankalmoigne: —*Held*, not to be a *cestui que trust* of the stipend and emolument of the office, but to be only an officer of the Cathedral Church, appointed to perform one of the duties imposed upon it by the statutes. *Whiston* v. *The Dean and Chapter of the Cathedral Church of Rochester*, 532

10. In such a case, whoever may be visitor,—whatever may be the interest of such visitor in the matter in dispute, or whatever may be the right of the schoolmaster to a mandamus or prohibition at law,—the Court of Chancery cannot, in the exercise of its ordinary jurisdiction by bill, try the right of the schoolmaster to his office. *Ib.*

11. The Court of Chancery cannot be called upon, in every dispute arising about a right of office, as a matter of course to prevent the party from being displaced until the right shall have been tried. There are cases, even of irreparable mischief, in which the Court cannot give any ultimate relief, and will not therefore interfere between adverse claimants. *Ib.*

See ACCOUNT, 1.
AGREEMENT, 1.
LUNACY, 5.

KNOWLEDGE OF BREACH OF TRUST.

See TRUSTEE AND CESTUI QUE TRUST, 13, 15.

LACHES.

See ADMINISTRATION SUIT, 1, 2.

LANDS.

See INJURIOUSLY AFFECTED.

LANDS CLAUSES CONSOLIDATION ACT.

See STAT. 8 VICT. c. 18.

LEASE.

See NOTICE.

LEGACY.

1. Where a testator,—after giving legacies to his daughters for their respective lives with remainder to their respective issue, and in default of issue, the share of the daughter so dying to the survivors,—directed, that in case any or either of his daughters should happen to die before such legacy or bequest should have become vested in her, leaving issue, then such legacy or bequest should descend to, or become the property of, such issue: it was *held*, that the word "survivor" must be taken in its strict sense; but that, under the clause of substitution, a survi-

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vor's share of a legacy to a daughter who died without leaving issue (such survivor's shares being necessarily contingent upon survivorship) passed to the children of a daughter of the testator who died in his lifetime, leaving issue that survived him. *Willetts* v. *Willetts*, 38

2. The testator, after directing his personal estate to be invested, gave the income of the same and of his real estate to his wife for her life, and directed that after her death his trustees should sell his real estate, "and pay, distribute, and divide" the money thence arising, and the money at interest, and he thereby gave and bequeathed one-third thereof unto his cousin, J. S., "if he should be then living, but if he should be then dead, unto his legal representative or representatives, if more than one, share and share alike." J. S. died in the lifetime of the testator's widow, leaving a widow and children:—*Held*, that, upon the death of J. S., his widow and children, as the persons who would, in case of intestacy, be entitled to his personal estate, according to the Statute of Distributions, took vested interests in the third of the residue, in equal shares as tenants in common. *Smith* v. *Palmer*, 225

3. Gift of stock in the public funds, upon trust to pay the dividends to the four brothers and two sisters of the testator, in equal shares, for their respective lives, and after their respective deceases, to pay the dividends unto and amongst the eldest sons or son of his said brothers, and the survivors and survivor of them, for their lives or life, in equal shares and proportions, upon their attaining twenty-one, with a provision for maintenance in the meantime; and after the decease of such eldest sons or son, to pay the said dividends unto and amongst the eldest male issue only for the time being of their bodies, *ad infinitum*, forever:—*Held*, that the bequests to the brothers and sisters of the testator were valid. *Harvey* v. *Towell*, 231

4. That the bequests in remainder to the four eldest sons of the four brothers, each of whom had a son living at the death of the testator, were valid; but that such eldest sons took absolute interests in their several shares of such stock. *Ib.*

5. Real and personal estate given to trustees, upon trust to pay the income to the testator's wife for her life, and within or at the expiration of ten years from the death of the survivor of himself and his wife, to sell and convert the same into money, and out of the income to pay annuities to several persons and classes of persons for the said term of ten years, with pecuniary legacies to the same persons and classes, and also to other persons, at the expiration of that time, and annuities to other persons for the lives of the annuitants, and specific legacies to others. The residue was then given to all and every the several legatees before named, (with exceptions,) rateably and in proportion to the amount of their respective legacies. The wife survived the testator:—*Held*, that the "legatees before named" should be construed to be the legatees taking benefits out of the fund which fell in at the wife's death, and the "legacies" such legacies as remained to be satisfied at the expiration of the ten years. *Bromley* v. *Wright*, 334

6. That annuitants for life, not having other legacies, were legatees of shares in the residue. *Ib.*

7. That the specific legatees, including one taking a bequest of a watch, chain and seals, were entitled to share in the residue according to the value of their respective legacies. *Ib.*

8. That annuitants, who survived the testator and died before the expiration of the ten years, when their pecuniary legacies were payable, took vested interests in such annuities and legacies. *Ib.*

9. That a class described as "the children" of B., but not otherwise named, came within the description of "legatees before named." *Ib.*

10. That the widow of the testator did not take under the residuary gift. *Ib.*

11. That the annuities which ceased at the expiration of the ten years, were not legacies in respect of which the annuitants took any share in the residue. *Ib.*

12. If it be doubtful on the words of a will, whether a specific or general legacy is given, the rule of the Court is to lean to the construction which makes the legacy general; but this rule does not involve the proposition that the Court is to address itself to the construction of a will with any prepossession one way or the other. *Sayer* v. *Sayer*. *Innes* v. *Sayer*, 376

13. A bequest of 5000*l*. Consols, with a direction, that, if the testatrix should not have sufficient stock to answer the legacy, her executors should, out of her residuary estate, purchase enough to make up the deficiency:—*Held* to create a specific, and not a merely demonstrative legacy. *Townsend* v. *Martin*, 471

LEGAL REPRESENTATIVE.

See LEGACY, 2.

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LESSOR AND LESSEE.

See LESSOR'S TITLE.
NOTICE.
VENDOR AND PURCHASER.

LESSOR'S TITLE.

An agreement, signed by A. and B., for the sale by A. and purchase by B. of the fixtures in a lease at a certain price, and that A. shall execute an assignment of his interest in the house to B., to bear date on a certain day—*Held* to be a contract by B. to take such assignment when executed; and B. having inspected the lease, and the assignment to A., and subsequently directed A. to cause an assignment to him, B., to be indorsed *totidem verbis*, it was *held* that B. was precluded from calling for the lessor's title. *Smith* v. *Capron*, 191

LICENCE.

See VENDOR AND PURCHASER.

LIEN.

1. The lien of a solicitor on the deeds of his client is a legal right, which cannot be greater in extent than the interest of the client in the deeds, and does not enable the solicitor to retain the deeds against third parties, where the client could not as against such third parties give the solicitor a lien upon the property to which the deeds relate. In determining the extent of such lien, equity follows the law; and although the deeds might have come to the possession of the solicitor, without notice of a prior equitable claim, the Court gives effect as against the solicitor to such prior equitable right. *Pelly* v. *Wathen*, 351.

2. A solicitor does not, as solicitor, acquire a lien for his costs upon the documents of his client which came into the possession of the solicitor, not in that character, but as mortgagee of the client's estate. *Ib.*

3. A solicitor does not acquire a lien for costs due to himself solely, upon documents which came into the joint possession of himself and his partner or partners; but he does not lose his lien for such costs upon documents which, having come into his own possession, are afterwards continued in the possession of himself and his partner or partners. *Ib.*

See COSTS, 11.
LIS PENDENS.
STATUTE OF LIMITATIONS, 3 and 4 WILL. 4, c. 27.
TRUSTEE AND CESTUI QUE TRUST, 1.

LIFE ESTATE.

See DEVISE, 1, 2.

LIS PENDENS.

The right of the vender to recover the purchase-money, as a lien or charge upon the land, is not preserved by the existence of a suit by the creditors of the devisor of the estate, under whose will the sale took place, for the administration of his estate; nor by suits by the residuary devisees and legatees of the purchaser for the administration of his estate. *Toft* v. *Stephenson*, 1

LOAN.

See TRUSTEE AND CESTUI QUE TRUST, 14, 17, 18, 19.

LUNACY.

1. A bill to set aside, on the ground of lunacy and fraud, a conveyance of an estate by a party claiming the fee simple. The lunacy was established, but it appeared that the plaintiff was only entitled to a life estate in the property:—*Held*, that the plaintiff (and his personal representative after his death) was entitled to an account of the rents and profits during the life of the plaintiff, as against the parties in possession under the conveyance. *Price* v. *Berrington*, 394

2. A bill was brought to set aside a deed of 1809, on the ground that the plaintiff, the grantor, was of unsound mind. The plaintiff was by inquisition found to have been lunatic, without lucid intervals, from 1796. The defendants alleged, that, by a deed of 1805, the lunatic had settled the estate for himself and wife for their lives, and for the benefit of their children in remainder. The children were made parties to the suit, and disclaimed, and offered to convey any interest they might have as the Court should direct:—*Held*, that this disclaimer and submission did not re-invest in the lunatic

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the interest which he would have had if the deed of 1805 had not existed, or entitle him to the relief which he might have had if the deed of 1805 had not been made; but, in confining the decree to the interest which had been reserved to the lunatic, the Court declared that it should be without prejudice to the rights of the children. *Ib.*

3. In a suit to set aside an appointment, on the ground of the unsoundness of mind of the appointor, who was the tenant for life of the estate, parties who would be entitled in remainder in default of appointment, cannot, either by joining as plaintiffs in a supplemental suit, or by offering in their answer to convey their interest for the plaintiff's benefit, enable the plaintiff to sustain the suit in respect of any relief beyond the duration of his own life estate. *Ib.*

4. On revivor by a party, who was both heir-at-law and administrator of a lunatic, on a suit to set aside a conveyance made by the lunatic of his estate, it was held that the plaintiff had no title to the estate as heir-at-law, but that, as administrator of the lunatic, he was entitled to an account of the rents and profits during the life of the lunatic. *Ib.*

5. Where an equitable interest in an estate has been conveyed by a person of unsound mind to a party taking without fraud or notice of the unsoundness of mind and the case is one in which the deed would be void at law on the ground of the lunacy, equity will relieve against the conveyance by the lunatic. *Ib.*

MAINTENANCE.

See PORTION, 3.

MANDAMUS.

See JURISDICTION, 10.

MANOR.

See COPYHOLD.

MARITAL RIGHT.

See HUSBAND AND WIFE.

MARRIAGE SETTLEMENT.

See DEBTOR AND CREDITOR, 1.
INFANT.

MARRIED WOMAN.

See NEXT FRIEND.

MASTER.

See CONDUCT OF SALE.
TRUSTEE AND CESTUI QUE TRUST, 2.

MASTER OF A CATHEDRAL GRAMMAR SCHOOL.

See JURISDICTION, 9.

MEMORIAL.

See ANNUITY.

MISREPRESENTATION.

A. having accepted bills for the accommodation of B. who was unable to take them up, entered into an agreement to provide for payment of half of the amount of the outstanding bills as they became due,—a third person, party to the agreement, charging certain property to the extent of 1500*l.* for the benefit of A. by way of security, which property such third person alleged to be his own, and a security amply sufficient in value above incumbrances. More than half of the amount of the bills was afterwards paid by A., but the property of the third party charged as a security proved to be heavily incumbered, and insufficient: — *Held*, in a suit by A. against the executors and devisees of the third party, that the misrepresentation as to the surplus value being proved, A. was entitled to have so much of the sum of 1500*l.* and interest as the specific property was insufficient to pay, raised and paid out of the general estate of the testator. *Ingram* v. *Thorp*, 61

MISTAKE.

See EVIDENCE, 3.
RECTIFYING DEED, 1, 2.

MONEY.

See TRUSTEE AND CESTUI QUE TRUST, 18.

MORTGAGE.

See TRUSTEE AND CESTUI QUE TRUST, 17.

MORTGAGOR AND MORTGAGEE.

1. Where a mortgage is made to two for a sum of money, of which each had lent a portion, one of the mortgagees may file a bill of foreclosure, making the other mortgagee a defendant, and the plaintiff in such a suit is entitled to the usual decree of foreclosure, on default of payment of the whole mortgage debt, in the proportions due to the plaintiff and defendant respectively, together with their respective costs. *Davenport* v. *James*, 249

2. A mortgagee having separate mortgages created by the same mortgagor on two different estates, has not a right to foreclose both estates on non-payment of the aggregate amount of the mortgaged debts; but can only foreclose each estate separately, on non-payment of what is secured upon it. *Holmes* v. *Turner*, 367, n.

3. Form of decree for foreclosure where the mortgagee has a legal mortgage for the whole of his debt on one of the mortgagor's estates, and an equitable mortgage for part of his debt on another of the mortgagor's estates. *Ib.*

4. In a suit by a puisne mortgagee to redeem two prior mortgages of distinct portions of the estate comprised in the plaintiff's security, and to foreclose the mortgagor on his default of redemption,—if the plaintiff should redeem neither of the prior mortgages, he is not entitled to any decree against the mortgagor; but the plaintiff in such a suit (the defendants not having objected or not being able to object that the suit is multifarious) may redeem one of the prior mortgages, and obtain a decree for redemption or foreclosure against the mortgagor in respect of that estate, without redeeming the other mortgage, and as to such other mortgage submitting to the dismissal of the bill. *Pelly* v. *Wathen*, 351

See COSTS, 10.
LIEN.
PLEADING, 2.

MOTION.

See COSTS, 1, 2, 13.
DISMISSAL OF BILL.
PAYMENT INTO COURT.

MULTIFARIOUSNESS.

See JURISDICTION, 4.

MULTIPLICITY OF SUITS.

See JURISDICTION, 1.

MUTUALITY.

See AGREEMENT, 6, 7.

NEW TRUSTEES.

See TRUSTEE AND CESTUI QUE TRUST, 2, 7, 8.

NEXT FRIEND.

It is not necessary to name a next friend of the petitioner, on the petition of a married woman, under the stat. 2 & 3 Vict. c. 54, for access to infants in the custody of the father. *In re Margery Groom*, 38

NEXT OF KIN.

See LEGAL REPRESENTATIVE.

NOMINATION.

See TRUSTEE AND CESTUI QUE TRUST, 2, 7, 8.

NOTICE.

During a treaty for an assignment of a lease, the plaintiff produced the lease of the defendant, and the defendant looked at the lease and the indorsement by which the original lessee had assigned the lease to the plaintiff, and in which it was stated, that the assignment was made with the license of the lessor. The defendant afterwards requested the plaintiff to cause the proposed assignment to be indorsed on the lease *totidem verbis* with the assignment thereon to himself. Upon a bill for specific performance, the defendant denied by his answer, that he had seen the covenant against assignment without license; but the court concluded, upon the circumstances, that the defendant had notice of that covenant. *Smith* v. *Capron*, 189

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See SOLICITOR AND CLIENT, 1.
STAT. 8 VICT. c. 18.
TRUSTEE AND CESTUI QUE TRUST, 13, 14, 15.

NUISANCE.

See AGREEMENT, 8.

OFFER BY BILL.

See PLEADING, 3.

OFFICE.

See JURISDICTION, 10, 11.

OUT OF JURISDICTION.

See JURISDICTION, 6.

PARLIAMENTARY POWERS.

See JOINT-STOCK COMPANY, 1, 2, 3.

PARTIES.

1. Persons who claim specific portions of property in the possession of another at the time of his death, are not necessary parties to a suit for administration of the estate of the deceased person. *Barker* v. *Rogers*, 19

2. A submission by the defendant "to the judgment of the Court, whether" certain persons "ought to be made parties to the suit," may be properly set down as an objection for want of parties, under the 39th order of August, 1841. *Ib.*

3. To a bill by the covenantee for specific performance of a covenant entered into by a tenant in tail in remainder, to disentail the estate after the decease of the tenant for life, judgment creditors of the tenant in tail, whose debts have been made charges on his estate, under the statute 1 & 2 Vict. c. 110, are not necessary parties. *Petre* v. *Duncombe*, 24

4. In a suit by cestuis que trust against the trustees of a settlement for an account, and execution of the trust, the suggestion by the defendant, of a doubt whether some part of the property of which they have possessed themselves as trustees, may not belong to the estate of the settlor, does not render the representative of the settlor a necessary party. *Gaunt* v. *Johnson*, 154

See AGENT.
CORPORATION.
GENERAL ORDER XXX OF AUGUST, 1841.
HEARING.
JURISDICTION, 6.
MORTGAGOR AND MORTGAGEE 1.
TRUSTEE AND CESTUI QUE TRUST, 8.

PARTNERSHIP.

1. Two sets of parties having projected a railway on a similar line, agreed to consolidate the project, and appointed as solicitors of the proposed company, the plaintiff and defendant, whom they had respectively consulted prior to the consolidation. The two solicitors accepted the appointment without making any definite arrangement as to the division of the business, or of the emoluments of the office, and a much larger portion of the work was done by the defendant than by the plaintiff. In a conversation between them about six months after the appointment, and before the principal part of the business was transacted, the plaintiff stated, as the result of his inquiries into the practice in like cases, that the allowance for office expenses and personal trouble in such limited partnerships between solicitors, was made by each party retaining, besides his expenses and disbursements, from ten to twenty-five per cent. on the amount of the net charges for the business done, and which principle he considered satisfactory; and the defendant, in reply, observed, that there could be no misunderstanding about it between honorable men. Upon a bill by the plaintiff, claiming an account and division of the profits of the business done by the company, upon the footing of an equal copartnership, and offering to allow twenty-five per cent. upon the work done separately, to the partner who did it,—the court, in the circumstances, made a decree accordingly. *Webster* v. *Bray*, 159

2. Issues directed on the questions whether the solicitors of a railway company were partners in the business done by them for the company; and, if partners, whether in equal shares. *M'Gregor* v. *Bainbrigge*, 164, n.

See LIEN, 3.
PRINCIPAL AND SURETY, 1, 2, 3.

PART-OWNER.

See JURISDICTION, 1, 2, 3.

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PAYMENT INTO COURT.

It is not the practice to order the payment of money into Court upon motion made after the decree in a cause and before the hearing for further directions, founded merely on admissions in the answer. *Binns* v. *Parr*, 288

PENCIL.

See AGREEMENT 9.

PERSONAL ESTATE.

See CONVERSION.

PETITION.

See COSTS, 13.
NEXT FRIEND.

PLAINTIFF.

One of several plaintiffs having concurred in authorizing a suit to be instituted, and after its institution instructing the solicitor for the plaintiffs not to take any further proceedings in the cause, is not, upon further proceedings being taken, entitled to an order that the solicitor shall indemnify him in respect of the subsequent costs of the suit. *Winthrop* v. *Murray*, 152.

See AMENDMENT.
CONDUCT OF SALE.
INTERPLEADER.

PLEADING.

1. A defendant may state in his answer, and take issue upon, matters which happened after the bill was filed; but the Court will not deal with the subject of the suit by interlocutory order founded upon matters which occur after the answer has been filed, and are not brought forward by amendment, by supplemental bill, or by supplemental answer. *Stamps* v. *The Birmingham, Wolverhampton, and Stour Valley Railway Company*, 258

2. A mortgagee contesting by his bill the right of a solicitor of the mortgagor to a lien upon documents relating to the mortgaged property, in priority to his (the plaintiff's) charge, but offering, in case such prior lien should be established, to pay the amount due in respect of the same, is not bound by such offer to redeem the documents to which the solicitor's lien extends, but may abandon his right to the documents and take such a decree as his position of mortgagee entitles him to, in priority to the lien of the solicitor. *Pelly* v. *Wathen*, 351

3. *Quære*, whether, and in what cases, a plaintiff, who has by the bill gratuitously offered to submit to certain terms, on his part, may, at or after the hearing of the cause, withdraw such offer, and still obtain relief in the suit, *Ib.*

See AGENT.
AMENDMENT.
COSTS, 7.
LUNACY, 2, 3, 4.

PORTION.

1. By a settlement of trust funds for the benefit of a husband and wife for their lives, with remainder to the children of the marriage equally, it was provided, that if the husband should, during his life, advance or pay any moneys for or on account of the advancement or preferment in life of any child of the marriage, or in case any lands or tenements, moneys, goods or chattels, should descend or come by or from him unto or for the benefit of any such child, then such moneys, goods and chattels, and the value of such lands or tenements, should be accounted as part or in full of the portion provided by the settlement, unless the husband should by writing declare the contrary:—*Held*, that the advances and payments referred to in the first part of the provision should be construed advances and payments made *inter vivos*, perfected in the lifetime of the husband; and that the lands, tenements, moneys, goods or chattels, in the second part of the clause, should be confined to matters not perfected, or not having effect until after his death. *Douglas* v. *Wilks*, 318

2. That property which, during the coverture, accrued to the husband and wife, in right of the wife, and by a settlement, to which the husband and wife were parties, was settled upon them for their lives, with remainder to their children, as they or the survivor of them should appoint, (but which was not otherwise received or reduced into possession by the husband) was not property to be accounted for, as part of their portion, by the children to whom the husband and wife, or the survivor of them, afterwards appointed it. *Ib.*

3. That the value of a leasehold house assigned by the husband in his lifetime

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to one of the children of the marriage, for his more comfortable maintenance and support, did not affect the share of such child of the trust fund. *Ib.*

4. That an advance by the husband in his lifetime to one of his daughters, of a sum of money, for the purpose of apprenticing her son,—the share of such daughter of the trust fund having been settled upon herself and her husband, with remainder to her children,—did not affect the share of such daughter of the trust fund. *Ib.*

5. Payments or advances to children out of an estate, other than that from which they derive portions, are not to be taken as made in or towards satisfaction of such portions. *Ib.*

POSSESSION.

See JURISDICTION.

POWER.

A power contained in a settlement of real estate on trust for sale, enabled one of the parties, his executors, administrators and assigns, on a vacancy to appoint a new trustee. The party so empowered died, having by his will named three executors, one of whom renounced probate; and the vacancy in the trust having occurred, it was held, that the two acting executors had power to appoint the new trustee. *Earl Granville* v. *M'Neile*, 156

See APPOINTMENT, 1, 2, 3, 5.
SALE AND EXCHANGE.
TRUSTEE AND CESTUI QUE TRUST, 2, 3.

PRACTICE.

See AMENDMENT.
CONDUCT OF SALE.
COSTS.
DEMURRER.
DISMISSAL OF BILL.
EVIDENCE.
GENERAL ORDERS.
INTERPLEADER.
MOTION.
NEXT FRIEND.
OUT OF JURISDICTION.
PARTIES.
PAYMENT INTO COURT.
STAYING PROCEEDINGS.

PRESBYTERIANS.

See TRUSTEE AND CESTUI QUE TRUST, 9.

PRINCIPAL AND SURETY.

1. Under a guarantee given to a banking-house, consisting of several partners, for the repayment of such bills, drawn upon them by one of their customers, as the Bank might honor *and* any advances they might make to the same customer, within a certain time: it was *held*—That the guarantee ceased upon the death of one of the partners in the Bank, before the expiration of the time to which the guarantee was expressed to extend. *Holland* v. *Teed*, 50

2. That bills accepted before the death of the partner and payable afterwards, were within the guarantee. *Ib.*

3. That the amount guaranteed could not be increased by any act of the continuing firm and the customer, after the death of the partner, although such amount might be diminished by such act. *Ib.*

4. That, in the particular form of the guarantee, the amount guaranteed in respect of the bills honored by the Bank, was not to be reduced by the amount of a balance owing from the Bank to the customer when the guarantee ceased, such balance having been afterwards paid in the course of business between the continuing firm and the customer. *Ib.*

PRIVILEGED COMMUNICATION.

See DISCOVERY, 1.

PRO CONFESSO.

See INTERPLEADER, 3.

PROFITS.

See SOLICITOR AND CLIENT, 3.

PROFESSIONAL CONFIDENCE.

See DISCOVERY, 1.

PROHIBITION

See JURISDICTION, 10.

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PRO INTERESSE SUO.

See ADMINISTRATION SUIT, 1,

PROSECUTION.

See DISMISSAL OF BILL.

PROTESTANT DISSENTERS.

See TRUSTEE AND CESTUI QUE TRUST, 9.

PUBLICATION.

See EVIDENCE, 2.

QUALIFIED ACCEPTANCE OF OFFER.

See AGREEMENT, 6, 7.

RAILWAY CLAUSES CONSOLIDATION ACT.

See STAT. 8 VICT. c. 20.

RAILWAY COMPANY.

See PARTNERSHIP.

RAILWAY WORKS.

See ACCOUNT, 1, 2.
JURISDICTION, 7.

REAL ESTATE.

See CONVERSION.
DEBTOR AND CREDITOR, 1, 2.

RE-APPOINTMENT.

See APPOINTMENT.

RECTIFYING DEED.

1. A sum of money was charged upon an estate as portions for younger children according to the appointment of the parents, to take effect after their deaths; and the parents, in contemplation of the marriage of their daughter, and of a settlement which her intended husband proposed to make, appointed 5000*l.* part of the sum so charged, to the daughter, in case the marriage should take effect. By a settlement of the same date, a jointure, was secured to the daughter by the husband. The marriage took place, and some years afterwards, the father being then dead, an arrangement was made for the sale of the estate, and for the investment in the funds of the sum necessary to provide for the portions. The money was accordingly raised, and invested in the names, among others, of the daughter and her husband, and a declaration executed, in which the trusts of the stock purchased with the 5000*l.* was declared to be (subject to the life-interest of the mother) for the daughter absolutely. After the death of the father and mother and the husband the Court, at the suit of the representative of the husband, rectified the declaration of trust by declaring the 5000*l.* to be the property of the husband, inasmuch as it did not appear that the husband intended to part with his interest in the fund, or do more than approve of the change of security; the declaration of trust omitting any recital of the settlement on the marriage, and it appearing from the letters which had passed between the solicitors of the parties, when the declaration was made, that neither of such solicitors was aware of that settlement, or of its effect as to the portion of the daughter. *Ashurst* v. *Mill*. *Mill* v. *Ashurst*, 502

2. Variation of the effect of a deed, made for the purpose of carrying into effect a family arrangement, where it contained a declaration of right inconsistent with the actual rights of the parties, and there was no evidence that the inconsistency was known to or contemplated by the parties or their solicitors, or that their actual rights were intended to be altered. *Ib.*

REDEMPTION.

See ANNUITY.
MORTGAGOR AND MORTGAGEE.

RE-EXAMINATION.

See EVIDENCE, 3.

REMOTENESS.

See DEVISE, 2, 3

REPLICATION.

See EVIDENCE, 5.

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REPRESENTATIVES.

See LEGACY, 2.

RESIDUARY DEVISE.

See VOID DEVISE, 1, 2.

RESIDUARY SHARE.

A gift by a will, of one-sixth of the testatrix's residuary estate to S. W., revoked by a codicil, and the same sixth given to S. W. for life, with a direction, after her decease, to pay a legacy thereout, and that the remainder of such sixth should sink into the residue of her (the testatrix's) personal estate, and be disposed of accordingly:—*Held*, that the remainder of the sixth share of the residue was not thereby given to the other residuary legatees, but was undisposed of. *Humble v. Shore*, 247

RETAINER.

See COSTS, 8.

REVIVOR.

See COSTS, 1.
LUNACY, 4.
TAXATION.

REVOCATION.

See APPOINTMENT, 2.
DEBTOR AND CREDITOR, 2.
RESIDUARY SHARE.

SALE.

See CONDUCT OF SALE.
CONVERSION, 7.

SALE AND EXCHANGE.

See CONSTRUCTION, 1.

SATISFACTION.

See PORTION, 2, 3, 4, 5.

SCANDAL.

See COSTS, 9.

SCHOOLMASTER.

See JURISDICTION, 9, 10.

SCRIPHOLDER.

See JOINT-STOCK COMPANY, 5.

SECURITY.

See JURISDICTION, 1.

SEPARATE USE.

See HUSBAND AND WIFE.

SETTLOR.

See PARTIES, 4.

SHIFTING CLAUSE.

See DEVISE, 2.

SHIP.

See JURISDICTION, 1, 2, 3.

SOLICITOR.

See DISMISSAL OF BILL.
PARTNERSHIP.
PLAINTIFF.
TRUSTEE AND CESTUI QUE TRUST, 7.

SOLICITOR AND CLIENT.

1. The solicitor of the plaintiff in a foreclosure suit, in which a decree for sale before the master was made by consent, prosecuted the suit to the settlement of the particulars and conditions and appointments of the day of sale, when the plaintiff and the defendant, (by his solicitor,) having notice of the claim of the plaintiff's solicitor for the costs of the suit, compromised the suit on the terms of paying the plaintiff a certain sum in discharge of the debt and costs, part of which sum was immediately paid to the plaintiff. Upon the petition of the plain-

tiff's solicitor, the Court ordered the costs of the plaintiff's solicitor in the suit to be taxed, and by the plaintiff and defendant, or one of them. *White* v. *Pearce*, 276

2. The solicitor of a defendant in the cause, and who is himself a defendant in the same cause, and appears by a second solicitor, cannot be allowed more than one bill of costs, if it appears that the second solicitor has, either before or after his retainer, agreed to allow his client, the first solicitor, a portion of the profits of his costs in the cause. *Deere* v. *Robinson*, 283

3. If, in the judgment of the Taxing Master, there be ground to suspect that an arrangement has been made between solicitors in the cause, by which a portion of the profits of the bill of costs of one is to be paid to another, it is in the discretion of the Taxing Master to require affidavits from the solicitors as evidence of the facts, and, if such an arrangement should appear, the bills of costs ought to be taxed as in case of agency. *Ib.*

4. A., B., and C. were defendants in the cause, against whom the bill was dismissed, with costs. B. and C. acted as the solicitors of A., and appointed D. to act as their own solicitor in the same cause. After the retainer, an agreement was entered into between B. and D., whereby D. agreed to allow B. and C. a portion of the profits of his bill of costs: —*Held*, that the agreement constituted D., in substance, an agent for B. and C., and that the separate bills of costs of B., and of C. and D., were properly taxed as a joint bill, and that all such costs as would not have been allowed in a case of agency, were properly disallowed. *Ib.*

See DISCOVERY, 1.
LIEN, 1, 2, 3.

SPECIFIC LEGACY.

See LEGACY, 12, 13.

SPECIFIC LEGATEE.

See LEGACY, 7.

SPECIFIC PERFORMANCE.

To a bill by the covenantee for specific performance of a covenant entered into by a tenant in tail in remainder, to disentail the estate after the decease of the tenant for life, judgment creditors of the tenant in tail, whose debts have been made charges on his estate, under the statute 1 & 2 Vict. c. 110, are not necessary parties. *Petre* v. *Duncombe*, 24

See AGREEMENT, 3, 7, 8.
JURISDICTION, 7.
LESSOR'S TITLE.
NOTICE.
PARTIES, 3.
VENDOR AND PURCHASER.

STAKEHOLDER.

See INTERPLEADER, 2.

STATUTE 53 GEO. 3, c. 141.

See ANNUITY.

STATUTE 3 & 4 WILL. 4 c. 27, s. 25, (LIMITATIONS.)

See TRUSTEE AND CESTUI QUE TRUST.

STATUTE 3 & 4 WILL. 4, c. 27, s. 40. (LIMITATIONS.)

A contract for the sale of an estate was made in March, 1811; the agreement being, that the purchase-money should be paid on the 13th of May following; and the purchaser was let into possession immediately on the execution of the contract. The purchase-money was not paid; but the purchaser and persons claiming under him continued in possession. In 1844, the assignees of the vendor filed their bill, claiming a lien on the estate for the purchase-money and interest from the day fixed for the completion of the contract:—*Held*, that the right of the vendor to recover the purchase-money, as a lien or charge upon the land, was barred by the 40th section of the statute 3 & 4 Will. 4, c. 27. *Tbft* v. *Stephenson*, 1

STATUTE OF WILLS, 7 WILL. 4 & 1 VICT, c. 26, s. 25.

See VOID DEVISE, 2.

STATUTE 7 WILL. 4 & 1 VICT. c. 26, s. 33.

A testator, by a will made since the Wills Act, (7 Will. 4 & 1 Vict. c. 26,) gave to his son a residuary share of his estate. The son died after the Act came into operation, and before the date of the will,

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leaving children:—*Held*, that, under sect. 33 of the Wills Act, the gift took effect, although according to the law prior to the statute, there would have been no effectual devise or bequest. *Mower* v. *Orr*, 473

STATUTE 1 & 2 VICT. C. 110.

See COSTS, 1.

STATUTE 2 & 3 VICT, C. 54.

See NEXT FRIEND.

STATUTE 8 VICT. C. 18. S. 18, (LANDS CLAUSES CONSOLIDATION ACT.)

A railway company, empowered to take lands for the purposes of the undertaking, is not restricted by the Lands Clauses Consolidation Act to one notice, but may, after a notice for taking certain lands, give a further notice for taking other lands within the prescribed limits,—such additional lands being necessary for the works. *Stamps* v. *The Birmingham, Wolverhampton, and Stour Valley Railway Company*, 251

STATUTE 8 VICT. C. 18, S. 85.

The proceedings under the 85th section of the Lands Clauses Consolidation Act are not necessarily invalid because the award was signed on a day subsequent to the day on which the money was paid into court, and the bond given. *Id.* 256

STATUTE 8 VICT. C. 20, S. 6. (RAILWAY CLAUSES CONSOLIDATION ACT.)

In the case of damage to a party whose lands are not entered upon, but are injuriously affected by the exercise of the power of a railway company upon their own lands, or upon the lands of another party, and for which damage compensation is required to be made by section 6 of the Railway Clauses Consolidation Act, (8 Vict. c. 20,) it is not unlawful for the company to execute the works which occasion the damage, before the amount of compensation for the same is ascertained, paid or deposited. *Hutton* v. *The London and South Western Railway Company*, 259

STAYING PROCEEDINGS.

See COSTS, 2, 3, 12.

STOCK.

See TRUSTEE AND CESTUI QUE TRUST, 18.

STONE.

See COPYHOLD.

SUBPŒNA DUCES TECUM.

See EVIDENCE, 3.

SUBSEQUENT CIRCUMSTANCES.

See PLEADING, 1,

SUBSTITUTION.

See LEGACY, 1.

SUPPLYING DEFECTIVE EXECUTION OF POWER.

See CHARITY.

SUPPRESSION OF DEPOSITIONS.

See EVIDENCE, 3.

SURVIVOR.

See LEGACY, 1.

TAXATION.

See COSTS, 1, 7, 8, 9.
SOLICITOR AND CLIENT, 3, 4.

The survivors of several defendants, against whom a bill has been dismissed with costs, to be taxed, and paid by the plaintiff, are entitled to proceed with the taxation of their costs, notwithstanding the death of one of such defendants, without a revivor of the suit, and although the surviving defendants and the deceased, in his lifetime, had carried in a joint bill of costs for taxation. *Hunter* v. *Daniel*, 281

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TENANT.

See COPYHOLD.

TENANT FOR LIFE AND REMAINDERMAN.

1. Where a term of years is bequeathed to a legatee for life, with remainder over, and the legatee for life, having joined with the executors in selling and assigning the term to a purchaser for a sum of stock, survives the duration of the term, the legatee for life, and not the legatee in remainder, is entitled to the stock, although the latter was not a party to the sale. *Phillips* v *Sarjent*, 33

2. If the legatee in remainder (not being a party to the conversion) sues for a portion of the purchase-money in the lifetime of the tenant for life, whether the Court will do more than secure the fund, or whether it will apportion the fund according to the value of the respective interests.—*Quære.* *Ib.*

See DEVISE, 1, 2, 3.
LUNACY, 3.

TENANT IN TAIL.

See SPECIFIC PERFORMANCE.

TERM OF YEARS.

See TENANT FOR LIFE AND REMAINDERMAN, 1.

TIMBER.

See JURISDICTION, 5.

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TITLE.

See INTERPLEADER, 1.
LESSOR'S TITLE.
VENDOR AND PURCHASER.

TRIAL AT LAW.

See COPYHOLD.
ISSUE.

TRIAL OF ISSUE.

The Court will not direct an issue, unless the result of the issue must, in any event, be material. *Price* v. *Berrington*, 403

See PARTNERSHIP.

TRUSTEE.

See CONDUCT OF SALE.
COSTS, 11.
POWER.

TRUSTEE AND CESTUI QUE TRUST.

1. Under a contract for the sale of land, the equitable title of the vendor, and those representing him, to recover from the vendee, and the obligation of the vendee to pay—the purchase money, in the sense in which it is described as a trust, is not an express trust, within the 25th sect. of the stat. 3 & 4 Will. 4, c. 27; and therefore, that the right of the vendor, as such cestui que trust, to a lien or charge upon the land for the amount of the purchase money, is not kept on foot, under the provision contained in that section. *Toft* v. *Stephenson*, 1

2. Upon reference to the Master to appoint new trustees, in a case where the power of appointments is vested by the author of the trust in a party to the cause, the Master will have regard to such power in selecting the trustees from the persons proposed by that party and by others, but the Master is not bound to approve of the persons nominated by such party in preference to other persons whom he may consider more eligible; and his decision is not open to exception merely because he has not chosen the persons nominated by the party to whom the power was given. *Middleton* v. *Reay*, 106

3. *Semble*, where parties in a cause have a power of appointing new trustees, and it is proper for the appointment to be made in the cause, there should be special directions to the master to approve of proper persons to be nominated by the parties having the power, if it be intended to preserve their right of nomination. *Ib.*

4. Circumstances in which the exercise of a power of sale, although not inconsistent with the terms in which the power is created, would, notwithstanding, be a breach of trust. *Marshall* v. *Sladden*, 428

5. Reciprocal duties of trustees and *cestuis que trust*, where it becomes necessary to raise money to discharge incumbrances on, or otherwise deal with the trust property. *Ib.*

6. Circumstances in which it is improper

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for a retiring trustee to appoint a new trustee without communication with the *cestuis que trust*. *Ib.*

7. Trustees ought not to exercise a power of selecting new trustees for the mere purpose of continuing the trust property under the management of a particular solicitor, even if the trustees they select be otherwise unobjectionable. *Ib.*

8. A trustee who retired and allowed a new trustee to be appointed, without communication to his *cestuis que trust*, is not a necessary party to a suit complaining of such new appointment, and seeking to displace such new trustee and appoint others,—all relief against the retired trustee being waived. *Ib.*

9. Distinction between a trust created for the use of Protestant Dissenters generally, and for the use of an existing congregation of Protestant Dissenters belonging to a particular minister: in the former case Presbyterians, Baptists, and Independents, are included; in the latter, the terms of the trust open an inquiry into the particular character of the congregation which is the object of the trust. *Attorney-General* v. *Murdoch*, 445

10. It is not necessary, in order that the Court may be enabled to enforce a trust for a certain congregation of Dissenters, that the trust should be declared by any deed or writing; the Court may ascertain, from evidence of usage or otherwise, the particular trusts to which the property is dedicated. *Ib.*

11. Where trusts of a meeting-house in England are created for the use of a congregation, to be in as strict connexion as is practicable with the Established Church of Scotland, no person is entitled to be a minister of the meeting-house whose opinions or acts constitute a disqualification for the ministry of that church; and the fact that the meeting-house is locally situated beyond the jurisdiction of that Church is immaterial. *Ib.*

12. In determining the question, whether a particular minister was disqualified as a minister of the Estalished Church of Scotland, the court considered whether the acts of such minister had brought him within the predicament which, according to the terms of a declaration of the General Assembly of that Church, constituted a dissolution of his connexion with it, without determining whether the sentence of a particular presbytery, depriving him of his licence, was or was not conclusive as a disqualification. *Ib.*

13. A *cestui que trust* discovering a breach of trust, but not receiving any benefit from it, or conniving in it for any purpose, and not recognising the transaction, is not precluded from complaining of it merely on the ground that he abstained from making such complaint until long after he first knew of it. *Phillipson* v. *Gatty*. *Gatty* v. *Phillipson*, 516

14. Where stock stood invested in trust, for the mother for life, with remainder to her son and daughter and their children, the daughter knew of an application by the son for a loan from the trustees of part of the trust-moneys, upon his personal security, and that the trustees were willing to make the loan, with consent of her mother, the tenant for life, and that the loan was, in fact, afterwards made. The daughter objected to the loan in her communications with her mother, but did not otherwise oppose it, and had not any communication with the trustees on the subject:—*Held*, that this was not such acquiescence on the part of the daughter to the loan as to preclude her from charging the trustees with the breach of trust, in a suit instituted seven years after the transaction took place. *Ib.*

15. *Held*, also, that the daughter was not precluded from so charging the trustees, by the fact that she knew that the mother had (untruly) stated to her son that she (the daughter) had consented to the loan, such statement of the daughter's consent never having been communicated to the trustees, or constituted any part of the sanction or authority under which they acted. *Ib.*

16. It was not necessary to decide the simple case, whether, if the daughter had permitted the son, in the belief that the daughter assented to it, to obtain the loan from the trustees, they could have availed themselves of any defence to the suit, which the son might have, as against the daughter; for, in this case, the letter of the son to the mother, requesting the loan and upon which the mother's consent was given, proposed not to affect the daughter's right as against the trustees. *Ib.*

17. An investment by trustees of 2183*l.* trust funds, which they were empowered to lend on real security, in a mortgage of house property in a town, occupied for commercial purposes, and valued at 2800*l.*, a value also, in some measure dependent on the performance of covenants,—*held* not to be justified. *Ib.*

18. Where trustees, having power to invest on government or real security and vary such investment from time to time, sold out stock for the purpose of investing the produce of the stock in a mortgage which they were not justified in taking, it was *held* that the Court could not treat the sale of the stock as lawful, and the investment as unlawful, so as to satisfy the

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trust by replacing the money; but that the whole must be treated as one unjustifiable transaction, and that the trustees must replace the stock. *Ib.*

19. Where the trustees lent the trust-moneys to one of the cestuis que trust, upon a contract which constituted a breach of trust, the Court, in a suit by the trustees against all the cestuis que trust, refused, as against the cestui que trust who had obtained the loan, to make a decree for the repayment of the money, contrary to the terms of the contract. *Ib.*

See JURISDICTION, 9, 10.
LIS PENDENS.
PARTIES, 4.
POWER.

TRUST FOR SALE.

See CONVERSION.

VENDOR AND PURCHASER.

The vendor's bill, in a suit for specific performance of an agreement to take an assignment of a lease, stated a covenant in the lease not to assign without the license of the lessor, but did not aver that the plaintiff had or could obtain such a license:—*Held*, upon demurrer, that the court, at the hearing of the cause, upon such facts, would not dismiss the bill, but would refer it to the Master, to inquire whether the vendor could make a good title; and that the demurrer must, therefore, be overruled. *Smith* v. *Capron*, 185

See ACQUIESCENCE.
JOINT-STOCK COMPANY, 6.
LESSOR'S TITLE.
LIS PENDENS.
NOTICE, 1.
STATUTE OF LIMITATIONS (3 and 4 WILL. 4, c. 27.)
TRUSTEE AND CESTUI QUE TRUST, 1.

VISITOR.

See JURISDICTION, 9, 10.

VOID DEVISE.

1. Upon the marriage of the testator and the testatrix, certain estates were settled to the use of the husband for life, remainder to the wife for life, remainder to the children of the marriage, and, in default of issue of the marriage, to the use of the survivor of the husband and wife, and his or her heirs and assigns. The testator, by his will, made during the coverture (having other estates not in settlement) devised all his real estates to the testatrix for her life, and, upon her decease, to the use of A. B., and C., in trust for sale, and out of the proceeds of such sale, and the residue of his personal estate, to pay certain legacies, and subject thereto to stand possessed of one-fourth part of the said trust-moneys, for such purposes as the testatrix should appoint, and, in default of appointment, for her next of kin; and to pay and dispose of the other three-fourths equally amongst A. B., and C., their executors, administrators and assigns. The testator died in the lifetime of the testatrix, leaving no child of the marriage. The testatrix, by her will, made in 1839, after the death of A., B. and C., reciting, that she believed it was the testator's wish that the settled estates should pass by his will, and she was desirous of fulfilling his wishes, devised the settled estates to the uses by the testator's will declared concerning the same, and in exercise of the power of appointment given to her by the testator of the fourth of his estate, appointed the same to her trustees, upon the trusts which she declared of her own residuary estate, and directed her real estate to be sold and fall into such residue, which she bequeathed to several legatees:—*Held*, that there being, in the events which happened, no uses declared of the settled estates by the will of the testator, the specific devise of such settled estates by the will of the testatrix was void, or incapable of taking effect. *Oulsha* v. *Cheese*, 236

2. That the heir-at-law of the testatrix did not take the settled estates as the subject of a void or ineffectual devise; but that, under the Wills Act (7 Will. 4 & 1 Vict. c. 26,) the setted estates passed by the residuary devise in the will of the testatrix, for the benefit of her residuary legatees,—the case not being one in which a contrary intention appeared within the meaning of that statute. *Ib.*

See DEVISE, 2, 3.

WASTE.

See JURISDICTION, 5.

WILL.

See VOID DEVISE.

WITNESS.

See EVIDENCE, 4.

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