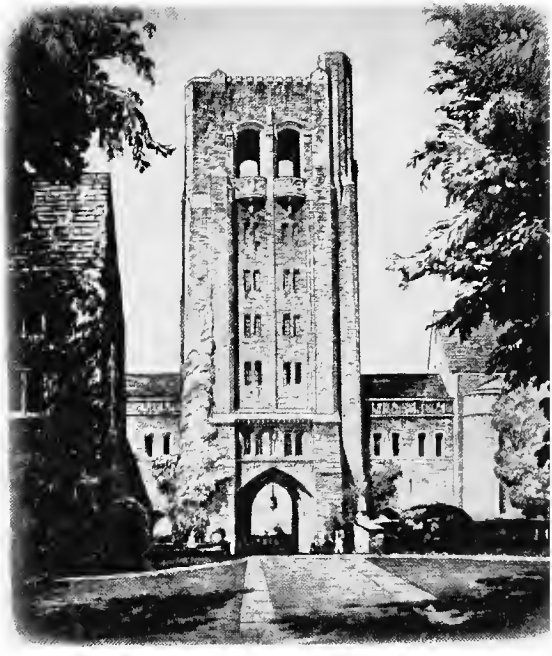

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CASES ON EQUITY JURISDICTION.

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CASES ON EQUITY JURISDICTION.

CHAPTER I.

BILLS TO PERPETUATE TESTIMONY.

LORD DURSLEY *v.* FITZHARDINGE BERKELEY.

BEFORE LORD ELDON, C., JULY 7 and 9, 1801.

[*Reported in* 6 *Vesey*, 251.]

THE bill, filed by four infant sons of Earl Berkeley against his two other infant sons, and against Admiral Berkeley and his infant son, stated that Earl Berkeley, under the will of Lord Berkeley of Stratton, is seised for life of estates in the county of Dorset, with remainders to his first and other sons in tail male; remainder to Admiral Berkeley for life, and to his first and other sons in tail male; remainder to the testator's right heirs. Earl Berkeley has six sons living: *viz.* the four infant plaintiffs and two infant defendants: the eldest, Lord Dursley, born in 1786; the second in 1788; the third in 1789; the fourth in 1795; the fifth in October, 1796; and the sixth in February, 1800.

The bill proceeded to state pretences that the plaintiffs are not the lawful issue of the Earl and Countess of Berkeley; alleging that they were not lawfully married until the 16th of May, 1796, after the birth of the plaintiffs, when the Earl was married to the Countess at Lambeth church by her maiden name of Mary Cole, spinster; and charged that they were married on the 30th of March, 1785, at the parish church of Berkeley, in the county of Gloucester, by banns, which were published, and the ceremony performed, by the Reverend Augustus Thomas Hupsman, deceased, who was curate of that parish at the time of the publication of banns, and vicar of the parish at the time of the marriage. The second marriage was solemnized only as an act of caution and prudence in respect to any children that might be afterwards born, the first marriage having been a considerable time concealed at the request of the Earl, and there being great reason, at the time the said marriage was made public and the second marriage had, to apprehend that the registry of the first marriage had been lost, and that a difficulty might occur in proving such marriage satisfactorily; particularly, as Hupsman was dead, and the person who officiated as clerk at the ceremony, and

who was one of the subscribing witnesses to the marriage, was also dead, or not to be found; but which registry and the entry of the publication of banns have lately been found; and as evidence the plaintiffs charge that the Earl, being desirous that the marriage should be kept secret for some time, consulted Hupsman as to the best manner of celebrating it so as that it should not be known to his friends. Hupsman recommended him to be married at the parish church of Berkeley by banns; which were accordingly published, and the marriage had in the presence of William Tudor and Richard Browne; and the entry was duly made of the publication and the due registry of the marriage, signed by the parties and the witnesses. The bill farther charged that Hupsman several times afterwards, and prior to the birth of the plaintiff, Lord Dursley, informed several persons of the marriage; and many persons in the neighborhood believed it; and the Countess herself soon afterwards mentioned it to the Earl in the presence of others; and he did not contradict her. The prayer of the bill was that the testimony might be perpetuated.

To this bill the defendants Admiral Berkeley and his son put in a demurrer, stating that the plaintiffs have not by their bill made a case to entitle them to have their witnesses examined, and their testimony perpetuated against the defendants; that it appears by the bill that the two other defendants are the natural and lawful sons, born in lawful wedlock, and that they are tenants in tail male; and the limitations to Admiral Berkeley and his first and other sons in tail male are posterior to the estates in tail male given to the other defendants, and therefore these defendants are not necessary parties to the bill, nor ought to have been made defendants; and the putting them to answer the bill and to be parties to the examination of the witnesses tends to create expense upon the part of the defendants.

The other defendants waited the result of this demurrer.

Mr. *Richards* and Mr. *Hollist* for the demurrer. There are now parties upon the record, who are tenants in tail in remainder anterior to any interest in Admiral Berkeley and his son. How the plaintiffs can sustain the bill against those parties is not now the question; but these defendants, who have demurred, are not bound to answer; nor are the plaintiffs entitled to perpetuate testimony against them. The habit of this Court is not to bring before it, in any discussion as to real estate, any person standing in interest behind a clear tenant in tail. In selling an estate for the payment of debts, the familiar practice is not to call upon any person, as a defendant, who is posterior to an actual tenant in tail in existence; upon the principle that formerly the tenant in tail had to a certain extent and in certain cases the absolute interest in him, and now has such an interest as this Court considers capable of being made absolute. He is always treated as having the whole and complete interest; and though he is only an infant, whose acts will not bind him, and this Court does not require that the infant should have a Privy Seal for the purpose of suffering a recovery, yet it will act upon the estate

of the infant tenant in tail as if he was an adult tenant in fee; directing a sale, &c. This sort of case cannot be distinguished from that of a bill for payment of debts and other familiar cases, but must be governed by the same principle. In the one case as well as the other, all the interest is before the Court when the tenant in tail is before the Court. Suppose Lord Berkeley was tenant for life, with remainder to his eldest son in fee, and the bill was filed by the eldest son against Admiral Berkeley, who, if the eldest son was not legitimate, would be the heir: the bill could not be maintained; for clearly the defendant would have no interest: the law not considering such a possibility. There is no case upon this point, though there are some bearing an analogy to it. In Mitford,[1] cases are put, in which the plaintiffs had no certain interest. In this instance, the defendants, in the contemplation of the Court, have only an expectancy and possibility, which the Court will not acknowledge. In the case of the next of kin of a lunatic they are always considered as having more than merely an expectancy; for the Court calls upon them, in the application of the personal property, to object or consent. They have therefore an inchoate interest; and yet they have no right to file a bill, having only that sort of expectancy of which the law cannot lay hold. These defendants are in the same condition. There is a distinction between a bill to examine witnesses *de bene esse* and this bill: the former is generally brought by a person out of possession, and having witnesses infirm or aged, or a single witness, and in aid of his trial at law. This sort of bill is directly the contrary: a bill brought by a person in possession, having no opportunity to examine his witnesses at law, the party meaning in future to resist. Philips *v.* Carew,[2] though in appearance a bill to perpetuate testimony, was in fact a bill to examine *de bene esse.* In opposition to this are Parry *v.* Rogers,[3] and a *dictum* by Lord Hardwicke in Brandlyn *v.* Ord.[4] Shirley *v.* Earl Ferrers[5] was also a case of examination *de bene esse;* and by a manuscript note it appears that the order was made upon the defendant's refusing to go to issue in the manner proposed; and upon that Lord Camden refused a similar application upon an affidavit that the witness was sixty-three and impaired in his health, May 8th, 1769. In The Duke of Dorset *v.* Girdler,[6] respecting a right of fishery, it was held that the plaintiff was entitled to examine his witnesses, as he was in possession, and there was no disturbance. These cases really do not apply to the subject. In Smith *v.* The Attorney General,[7] before Lord Bathurst, assisted by Lords Chief Justice De Grey and Chief Baron Skynner, it was laid down that any person having a real interest in reversion or remainder may file such a bill; and the Lord Chancellor referred to something of the same kind laid down by Lord Hardwicke. In Lord Suffolk *v.* Green,[8] which is similar to the case of a person not

[1] Mitf. 138. [2] 1 P. Wms. 116. [3] 1 Vern. 441.
[4] 1 Atk. 571. [5] 3 P. Wms. 77. [6] Prec. Ch. 531.
[7] In Chancery, 1777. [A report of this case, taken from the note-books of Sir Samuel Romilly, has recently been published. See Romilly's Notes of Cases, 54.—ED.]
[8] 1 Atk. 450.

disturbed, but liable to be disturbed, Lord Hardwicke said, though it is not noticed in the report, that he did not know in what case a party has not a right to perpetuate testimony; but that he must have a right, present or future. The position laid down in that way is not supported by decision; and is much too large. There are but two cases on the subject: Tyrell *v.* Co,[1] and Seabourn *v.* Chilston, or Seybourne *v.* Clifton.[2] The former is rather against this demurrer. The defendant to such a bill might have demurred; unless it was alleged that the marriage had actually taken place. The other case appears in the Register's Book[3] by the name of Seabourne *v.* Clifton. It appears from the Register's Book that the bill was filed by the son and heir of *Seabourne* against a purchaser under a forged deed. Mr. Justice Archer was desired by the Lord Keeper to talk to the judges upon it; and in 1670 the bill was dismissed upon the plaintiff's motion, with 40*s.* costs: the defendant's counsel stating that she had taken advantage of a slip to put in a demurrer. It is easy, therefore, to conjecture what was the opinion of the judges. The bill might have been amended.

Upon the second point, a bill of foreclosure is never filed against any one except the tenant for life and the first tenant in tail. Reynoldson *v.* Perkins.[4] The depositions taken in one cause may be read in another, upon the same question, against parties claiming under the same title. Terwit *v.* Gresham;[5] The Corporation of London *v.* Perkins;[6] Nevil *v.* Johnson;[7] Earl of Bath *v.* Bathersea.[8]

All these parties are equally purchasers under the same will. It is very extraordinary that this bill should not have been filed till after the death of Hupsman. There is no allegation that Tudor is aged or infirm.

Mr. *Mansfield*, Mr. *Romilly*, and Mr. *Stanley*, in support of the bill. It is perfectly established that this bill lies for every person having a legal right which he cannot bring into immediate discussion, however it arises. It is so described in Mitford,[9] and the instance of a person in possession without disturbance is put only as one case to illustrate the general doctrine; and in a subsequent part[10] it is stated that a demurrer to this bill will seldom hold, excepting where the subject can be immediately investigated at law. In the only two cases mentioned as applicable, there was an immediate right, though not immediately vested. Seabourne *v.* Clifton is the only case in which it is said such a bill could not be supported upon a reversion; but the nature of the case shows no bill could be supported. First, the plaintiff was a volunteer; 2nd, the defendant was a purchaser under a forged deed which he believed good. That ground appearing on the bill was sufficient to prevent equity from giving any relief or aid against him. The other cases cited have no application. The decisions in these cases are considered as decisions against the estate, to which the party succeeds with all the

[1] 1 Roll. Ab. 383. [2] Nels. 125; cited 2 Vern. 159; 1 Eq. Ca. Ab. 354.
[3] Reg. B. 1669; B. Fol. 520, 1670; B. Fol. 499. [4] Amb. 564.
[5] 1 Ch. Cas. 73. [6] 4 Bro. P. C. 157. [7] 2 Vern. 447.
[8] 5 Mod. 9. [9] Mitf. 51. [10] Mitf. 131.

obligations put upon it by this Court. The Corporation of London *v.* Perkins was upon tolls; as to which reputation is evidence. In Smith *v.* The Attorney General this point was treated as perfectly clear, and it was expressly stated that a bill by a plaintiff in such a situation will lie. Chief Baron Skynner says it is not necessary that the parties should have a present interest; that it is more likely to be future; certain, though future. Lord Chief Justice De Grey says there are cases in which there is a present right, but not possession, as a remainder upon an estate for life in possession, and contingent, executory interests, which are rights in property, though not in possession. That case proceeded upon the want of interest present or future. The cases of bills to examine witnesses *de bene esse* proceed exactly upon the same ground; for the plaintiff cannot, on account of the circumstances, have the benefit of that testimony immediately at law. The principle is the same. There is an immediate interest which cannot be immediately tried at law.

Upon the circumstances of this case the second marriage itself naturally excites doubts as to any prior marriage. There is a clear vested interest in the plaintiffs. They cannot bring the matter into immediate litigation, having no present interest. None of them are purchasers; they are all volunteers under the same will. The object of the bill is merely to perpetuate testimony; not to execute a trust, or for any other relief. It is much to be lamented that the difficulty of perpetuating testimony is so great, and that from the strictness of the law in rejecting hearsay evidence, admitted in the law of many countries, rights are lost by the death of witnesses. For such a bill, nothing more is necessary than that the plaintiff and defendant have an interest; but no authority requires that interest to be immediate and in possession. A contingent remainder I should have thought a sufficient interest in the plaintiff, but these are vested remainders.

Next as to the remoteness of the interest of these defendants. They complain that the evidence may be used against them, and yet that they are put in a situation to cross-examine. There is no decision that a bill of this sort will not lie against a party having a certain, though remote, interest. They have a clear interest, capable of fine and conveyance. In consequence of death they may be the only persons with whom the plaintiffs or their issue may have the contest. The ground is that there is a right which cannot immediately be brought into dispute. Parties having trusts to execute, &c., certainly need not go farther than the first tenant in tail; though I do not know that it has been decided that they may not, to meet the accident or death, and avoid bills of revivor. But the present subject of consideration is not what is to be done where the estate is to be acted upon. The inconvenience, mischief, and failure of justice are all on one side, if there are no means of preserving the testimony between persons having a right in an estate, and others having a future right, naturally leading to a contest. In such a bill as this the plaintiff is bound to pay the costs. The evidence

taken against a first tenant in tail could not be used at law against a remote tenant; and I should have thought it also clear in this Court, there being no privity between them, but clearly not at law; and the only object of the bill is to preserve evidence to be used at law. All that has been decided is that it is not necessary to make more than the first tenant in tail parties. 2 Eq. Ca. Ab. 166, Pl. 8. The ground is the inconvenience, upon which a positive rule has been established, that where the first tenant in tail is before the Court, no person more remote shall dispute that decree; but that is only a positive rule of equity, — a very wise rule, from the great inconvenience, expense, and delay, by making so many parties. That cannot apply where nothing is desired but to preserve evidence for a court of law, and it is impossible to draw any inference from the cases requiring relief. The principle of this bill is to guard against the inconvenience that may happen at some future time by the loss of the evidence, — an inconvenience much more likely to happen with regard to a remote title. This very case was put by Lord Chief Justice De Grey, who says perhaps such a bill may be filed by a person entitled in remainder in tail under a strict settlement, suspecting a person prior to him to have been born before marriage; and he observes that the interest may never take effect, as the estate tail may continue for ever. No instance has been produced of a demurrer by a subsequent remainder-man because not made a party. In Mildmay *v.* Mildmay, a bill as to timber, Lord Redesdale was of opinion that all the remainder-men *in esse* should be made parties.

Mr. *Richards* in reply. No instance is produced of perpetuating testimony against an interest behind a tenant in tail. It is no answer that the defendants are entitled to their costs; and that practice itself shows that it is improper to bring any person but the first tenant in tail before the court. Where the court is called upon to execute a trust, the rule is general that if a defendant is not a necessary party he may demur. In Mildmay *v.* Mildmay the persons standing behind the tenant in tail did not object: secondly, the question was as to cutting timber, and in whom was the property of the timber cut; whether it ought not to be secured in court for the first tenant in tail attaining twenty-one, capable of alienating. If this devise had been to the use of trustees, in trust for Lord Berkeley for life, with remainder to his first and other sons in tail, remainder over, and the first son filed a bill, calling on the trustees to execute any prior trust, and then to convey, suggesting a doubt whether he was legitimate, and wishing to establish his right against the trustees, he must have made the next brother a party, having the question to litigate with him. Can it be necessary to bring all the remainder-men before the Court? It may be so, for the purpose of acting upon the estate, *sub modo;* but not in such a case as this, and where there are six other remainders in tail before these defendants can be introduced. Their interest is of no value whatsoever. It is very inconvenient, therefore, that they should be put to the expense of this suit. Lord Chief Justice De Grey, in the passage referred to, expresses

that opinion with a degree of caution, and the case he puts is not of a tenant in tail after six others. Suppose the number greater; it would be extremely harassing to hold that they may all be made parties merely because hereafter they are to have their costs, which is no sort of remuneration.

The Lord Chancellor. Before I decide this case, which is very singular, I shall look into all the authorities cited; not on account of the singularity of the case, but as to the general doctrine. No difficulty is alleged as to examining Tudor. In arguing this demurrer, the fact as to the first marriage must for the present be taken to be true. The question therefore is, whether, according to the rules of this Court the plaintiff has a right to perpetuate the testimony of that circumstance, taken for the present as a fact? It is going beside the fact to examine the probability, or the reason of not bringing forward the alleged illegitimacy in the life of the clergyman, who, it is alleged, celebrated the marriage. The story does not hang very well together, as to the publication of banns in the parish church, recommended by him as the best mode of keeping the marriage secret. There might be a marriage *de facto*, and a colorable publication of banns; and it might be convenient to him that the real circumstances by which he had contrived a marriage *de facto* should not come out. His greater or less degree of criminality, however, certainly cannot affect these children. I must also lay out of the question whether there could be a more convenient, just, or effectual mode of ascertaining the fact of the marriage at present, or whether it could be ascertained. The bill does not seek to ascertain it, but to preserve the means of duly trying the fact, when an opportunity shall arise of conveniently and usefully trying it. This plaintiff comes, stating himself not to have the means, by any gift of property by his father, or otherwise, of trying the question at present; his father not having furnished those means by a conveyance or surrender of his estate. The question therefore is, whether a tenant in tail in remainder, without the means of provoking a trial at present, can file such a bill. It appears to me very difficult to conceive that he has not that right. The case of Smith *v.* The Attorney General went upon this: that the next of kin of the lunatic had no interest whatever in the property. Put the case as high as possible: that the lunatic is intestate; that he is in the most hopeless state, — a moral and physical impossibility, though the law would not so regard it, that he should ever recover, even if he was *in articulo mortis*, and the bill was filed at that instant, — the plaintiff could not qualify himself as having any interest in the subject of the suit. The case of an heir apparent was very properly put by Lord Chief Justice De Grey in his most luminous judgment. Upon that occasion he said he never liked equity so well as when it was like law. The day before, I heard Lord Mansfield say he never liked law so well as when it was like equity, — remarkable sayings of those two great men which made a strong impression on my memory. Lord Chief Justice De Grey said that at law the heir apparent cannot have the writ *de ventre inspiciendo* in the life of his ancestor,

as for that purpose he must be *verus hæres*. If the ancestor was in a fever, a delirium, having made no will, and it was not possible for him to recover, still the law would look upon him as mere heir apparent, having nothing but an expectation, which is different from an expectancy in the legal sense, and as having no interest whatever upon that ground. In Smith *v.* The Attorney General it was held that the bill would not lie. It is not to be taken upon the single *dictum* of any of the learned judges who assisted upon that occasion, but the whole judgment went upon distinguishing between that expectation which the next of kin have in that case, and any sort of right which the law allows to be an interest. A contingent interest is not the less a present interest. It was not doubted in that judgment that a vested interest, though in possibility the least valuable that could be conceived, is yet of some value in consideration of law, and gives a right to preserve testimony. In the course of that cause cases were cited which go to this; that though the next of kin could not file a bill, or the heir apparent in the case put, yet they might respectively enter into contracts with respect to their expectations and possibilities, the evidence upon which they might perpetuate. The law would frame an interest in respect of the contract, and with reference to that they would have a right to perpetuate testimony, though they could not qualify themselves as to any interest in the subject itself.

It appears, therefore, that, unless there are grounds for entertaining doubt, with which at present I am not impressed, the plaintiff has a sufficient interest to support this bill, if these defendants are proper parties. As to that, independent of the intermediate estates tail, upon the principles I have already stated there can be no doubt, for their interest is exactly of the same species, though less valuable because posterior. Next, does the intervention of the other estates tail prevent their being proper defendants? If so, the converse must certainly be maintained; for, if these estates tail intervening could prevent their being defendants, the consequence would follow, that, if these defendants contended, upon the strongest evidence of circumstances, that the elder children were illegitimate, and were able to represent this case, that the two youngest children were of very tender years and of such puny constitutions that there was no moral probability that either of them would attain the age of twenty-one, it must be admitted, upon these principles, that these defendants could not, as plaintiffs, sustain a bill of this sort. That would not be very convenient to justice. I can conceive a power in a tenant in tail to say a remainder-man should not file such a bill. Suppose an eldest son illegitimate, and the father expressly devised to him in tail, leaving the reversion to descend; and that he also had a son by marriage, and a dispute had arisen: the eldest insisting he was not illegitimate, and the younger that the first marriage was to his mother, and he, as reversioner, should file a bill to perpetuate testimony. I am not quite sure that, in such a case, the elder might not say he, being in possession as tenant in tail, might suffer a recovery, and destroy the reversion, and therefore equity could not interfere. That might perhaps

be sustained by analogy to other cases: as where there was a tenant of a lease for lives to him and the heirs of his body, and the lease was renewed to him and his heirs; according to the ordinary doctrine the equitable title would attach upon the legal estate, and upon a bill by a person entitled in remainder, for the purpose of attaching the equities of the old lease upon the new one, the Court said it was nugatory; for by a deed he might bar them all, and say he did not choose the equities of the old lease should attach upon the new one. That might possibly apply to the case I have just put, and support a demurrer by the elder son to the bill of the younger, upon the ground that a recovery would bar him.

But that is very different from this case; for no one can at present bar the estate tail. The argument cannot vary from the number of estates tail. These defendants at the utmost can only contend that there are two remainder-men in tail, infants, neither of whom may ever be able to bar them. As to the consequence in point of convenience, I am much struck with the argument in support of the bill. Is it inconvenient to general justice or to these defendants that they should be parties? First, the question imports all the persons to take an estate, all the interests making up the fee, and it is as necessary in the view of what general justice requires that the testimony should be perpetuated against these defendants as that they should perpetuate the non-existence of the plaintiff's title; and with regard to the individuals it cannot be unjust to secure to these defendants the opportunity of cross-examining now to the extent in which there must be a cross-examination. They must decide for themselves as to the prudence of leaving the story with all the doubt that hangs about it, or of cross-examining; but if it is fit to cross-examine, justice requires that the defendants who may be affected by the evidence (for it is admitted in the argument for the demurrer, that the evidence will bind them), should have the opportunity of deciding for themselves whether it is prudent, and whether they will now have the cross-examination. I express it thus, for it may be that now only they will have the opportunity. I agree to the answer to the objection as to the costs. It is a sufficient ground for protecting a defendant from a suit, that he may be vexed by it, independent of any pecuniary consideration; and if he can defend himself against the demand, it is not an answer that he will some time or other have his costs.

In my present view of this case the demurrer must be overruled, unless I should alter that opinion upon looking at these cases.

July 9.

Lord Chancellor. I have looked through all the cases upon this subject, and I cannot find any case having a tendency to affect the opinion I intimated, except that case stated in Eq. Ca. Ab. and also in Vernon, under the name of Seaborne *v.* Clifton, which in both books stands thus: a bill by a person claiming a reversion to perpetuate testimony against a purchaser for valuable consideration. The books treat

the demurrer as having been allowed upon that ground, and in Vernon it is stated that the bill was dismissed, and the party lost the estate for want of examining the witnesses. I am much obliged to Mr. Hollist, who has furnished me with an extract from that case in the Register's Book, from which it appears that the case amounts to no decision at all. The son filed the bill upon this point: that his deed was genuine and the other forged. The causes of demurrer were: 1st, that this was a strange court to prove a forgery in; 2nd, a purchase for valuable consideration. The judge presiding here gave no opinion, but desired Mr. Justice Archer to talk with the judges upon it. The result does not appear. Unquestionably the bill was not dismissed upon any of the grounds stated in the printed books, but under a suggestion that the defendant had taken advantage of a slip to put in a demurrer, leave was given to the plaintiff to withdraw his bill on payment of very moderate costs. That is by no means an authority that, if two persons are claiming a reversion where one only can be entitled to it, a bill to perpetuate testimony will not lie. Nor did it establish a principle which I think very difficult to maintain, that if one of them had sold his title to a third person, a bill to perpetuate testimony could not be maintained, for such a bill calls for no discovery from the defendant, but merely prays to secure that testimony which might be had at that time if the circumstances called for it. If, therefore, that case had only this distinction of a purchase for valuable consideration, it would require a good deal of consideration before it should be disposed of, as turning upon a principle not applicable to this case. But taking that not to be an authority upon this case, and particularly not to be an authority upon the reasons given in the printed books, it seems to me that, independent of the circumstance of there being four plaintiffs here and six tenants in tail, the whole reasoning in Smith *v.* The Attorney General goes to this point, that a remainder-man has a present interest, future in enjoyment, but as real in the contemplation of the law as if he was then seised in fee; and as against another person having a real interest of the same nature, that case has gone the length of deciding that a bill to perpetuate testimony is capable of being supported, and a demurrer to it could not be allowed.

The specialties of the case are, that there are four plaintiffs, all tenants in tail, and two defendants tenants in tail, standing at all events with priority of interest and priority of title to Admiral Berkeley and his son; but, upon the principles I before stated, it seems to me that those specialties will not take this case out of the rule; particularly where the two tenants in tail are infants, and never may have the enjoyment; and where, upon the single fact of a legal marriage in 1785, the title of all these children will be to be decided. I am much struck with the circumstance (though it may have been unavoidable) that the bill states a case clear of doubt, and then clothes it with infinite doubt; for it states this case: that there was a marriage in fact in 1785; that there is a living witness of that marriage; that there is a register; that there was

a due publication of banns, and that there is now an entry of the marriage producible, signed by the parties and by the witnesses to that marriage. If these circumstances stood alone, the bill would not state a case of any doubt or a case of perishable testimony, if I may so express myself; but upon the whole, enough has been stated of the circumstances upon this bill to raise as questionable a case in fact as could be put upon a record; for it states that the marriage was, for certain reasons, intended to be kept secret for some time, and the means of accomplishing that object are certainly very singular, the marriage being attended with as much publicity and notoriety as could be given to it: a marriage in the parish church of Berkeley, and, according to this bill, attended with a due publication of banns, with all the circumstances that belong to a marriage, a due registry and signing by all the parties present; and it alleges that the thing was quite notorious; that the clergyman and parties were constantly talking about it; and it became the habit and repute of the place. The bill alleges that, because apprehensions were entertained — upon what foundation does not appear — that the registry was lost, and because the clergyman was dead, and one of the witnesses was either dead or not to be found, — under these circumstances it was thought prudent to have another marriage. As a circumstance of evidence for the consideration of a jury, that is pregnant with a great deal of observation; for, however prudent it might be as to the future issue, it was not marked with singular prudence to marry again under the maiden name of the lady, in order to prove the legitimacy of four children born antecedent to the second marriage. A great deal of consideration ought to be had, if this should come before a jury, which course it probably must take at last, as to the actual treatment of the children born before and after this marriage in the family.

But whatever difficulties arise in my mind upon this, the plaintiff has stated upon his bill a case of an actual legal marriage, to be proved under all the difficulties that belong to it: with respect to which I think, upon the principles I stated before, he has a right to perpetuate testimony. Independent of the consideration of general justice, and the particular ground in this case, cases might be put — and none can warrant the observation more than this cause — in which a bill to perpetuate testimony may be an excessively dangerous proceeding, and upon that ground it is handsomely done towards justice by the plaintiff to make Admiral Berkeley and his son parties. He must be well acquainted, or at least has a better chance than others of being acquainted, with all that has passed in the family; and therefore he will have the opportunity, if he chooses to make use of it, to take a complete view of all the circumstances, to decide upon the condition of these children, and to bring out all the known facts, that it may be determined for the sake of those who are infants what it may be proper to do with regard to the cross-examination; whether there should be any cross-examination; or, if any, to what extent.

I do not know who is the next friend of the children claiming under

the second marriage; but I must say that, whoever he is, no man ever took upon himself a more solemn and more delicate duty. If he, for any reasons of connection with any part of the family, does not exert himself for those children as zealously as if he was supporting his own claim to the dearest interest in life, he does not do his duty to those children. I say this, because, though this bill may be as properly conducted as it may be most essential to the justice due to the children claiming under the first marriage that it should be conducted, yet, if it should not be so conducted, it may be an instrument of mischief and oppression, or what would even require a harsher name, to the children claiming under the second marriage. It is some consolation to the Court that the bill can be maintained against persons who have an interest of a pecuniary value, which will enable them to aid those who stand in the sacred relation of next friend to the children claiming under the second marriage. *Demurrer overruled.*

ALLAN *v.* ALLAN.

BEFORE LORD ELDON, C., MAY 20, 21, 1808.

[*Reported in* 15 *Vesey*, 130.]

THE bill in this cause, filed by Robert Allan, and Hannah, his wife, and their infant children, by their father and next friend, against John Allan, and George Allan the younger, stated that Ann Allan, by her will, devised several estates mentioned, and all other her real estates in the counties of York and Durham, unto and to the use of her cousin James Allan the elder, and his assigns, for and during his life, without impeachment of waste; and after his decease then she gave and devised all her said several freehold, leasehold, and copyhold estates, and all other her real estates, &c., unto and to the use of her cousin George Allan the elder (eldest son of James Allan the elder), for his life, without impeachment of waste; and after his decease she devised all her said estates to trustees, their heirs and assigns for ever, to the use of them and their heirs, upon the trusts, and subject to the powers, provisoes, and limitations after expressed; that is to say: in trust for the defendant George Allan the younger, eldest son of George Allan the elder, for life, without impeachment of waste; with remainder to the same trustees, to preserve contingent remainders; and, from and after his decease, in trust for his first and other sons, and the heirs male of the body and bodies of such son and sons; and, in default of such issue, in trust for all and every other son or sons of George Allan the elder, severally, successively, and in remainder, as before limited with respect to the sons of George Allan the younger; and, in default of such issue, in trust for her cousin James Allan the younger, another

son of James Allan the elder, for life, &c., with similar remainders to his first and other sons; and, for default of such issue, in trust for her cousin Robert Allan, since deceased, the father of the plaintiff Robert Allan (another son of James Allan the elder), for life, without impeachment of waste; with remainder to the trustees to preserve contingent remainders; and after his decease in trust for his first and other sons, and the respective heirs male of such son and sons; and, for default of such issue, in trust for James Allan the elder, his heirs and assigns for ever.

The bill further stated, that after the death of the testatrix, in 1785, James Allan the elder died without issue; upon which George Allan the elder entered, and died; leaving the defendant George Allan the younger, his only child; who entered upon, and became possessed of, the devised estates, never having had any issue. James Allan the younger, another son of James Allan the elder, and the next in remainder under the will, also died, without leaving any issue; and Robert Allan the elder, the father of the plaintiff Robert Allan, who was next in remainder to James Allan the younger, died; leaving the plaintiff Robert Allan, his eldest son and heir-at-law, and John Allan, the other defendant, his younger son, his only male issue surviving.

The bill also stated that George Allan the younger, the present tenant for life, is also heir-at-law of James Allan the elder, to whom the ultimate remainder in fee is limited, in failure of issue male of the several persons taking under the limitations. The plaintiffs, Robert and Hannah Allan, were married in 1792, at Gretna, in North Britain, being both of full age; and the other plaintiffs, William, Robert, John, and George, were the issue of that marriage. The bill then, suggesting pretences of doubts as to the legality of that marriage, and meeting them with proper charges, prayed a discovery, and that the plaintiffs, Robert Allan and Hannah his wife, may be at liberty to examine witnesses to their marriage, and the subsequent births of their children, and that the testimony may be perpetuated.

To this bill a demurrer was put in.

Mr. *Bell*, in support of the demurrer. This bill cannot be supported, as far as it is a bill by the father, having a vested remainder in tail, to perpetuate testimony as to his marriage, and establish the legitimacy of his children. Whether married or not, he has an estate-tail; his interest therefore cannot be affected by the fact which the testimony is to establish. As to his children, it is equally clear that the bill cannot be supported, according to the principle, admitted in the case Lord Dursley *v.* Fitzhardinge Berkeley, and Smith *v.* The Attorney-General,[1] that an heir apparent cannot during the life of his ancestor file a bill to perpetuate testimony to the fact that he is the heir. The question upon this demurrer is, Whether an heir in tail can, during the life of his ancestor, maintain a bill to perpetuate testimony to the fact

[1] See *Ante*, p. 3, n. 7.

that he is heir in tail. The interest of an heir apparent of either description is much less substantial, affording less foundation for such a bill, than the expectation of the next of kin of a lunatic upon the event of his death.

Mr. *Hart* and Mr. *Wetherell*, for the plaintiffs.

The object of this bill is to perpetuate testimony of a fact upon which the title of the plaintiffs depends. Any person who has any interest in any subject of property, which interest has not fallen into possession, the right to which cannot be brought to decision and depends upon testimony which may be lost before that opportunity can arise, is entitled to come here for the purpose of perpetuating that perishable testimony. The interest of the issue in tail is very distinct as to all persons except the tenant in tail, — a remote interest certainly, but which is regarded by the Court, considering that all the rights may remain as they now stand until the lives in succession may drop, with the possibility that they may drop in the series of limitation in which they stand in the will. In that respect these plaintiffs may unite their interests. The interest of the issue in tail is not to be compared to the mere expectancy of an heir. This is an expectancy in law, which cannot be defeated except by an act of the ancestor, who may by a fine annul that expectation; but without that act the issue must, upon the death of the tenant in tail, inevitably succeed *per formam doni*, having that expectancy which the law regards as an interest. As your Lordship observes in Lord Dursley *v.* Fitzhardinge Berkeley, the right cannot depend upon the proximity or the value of the interest. The interest of the issue in tail cannot be set up against the father, as he can immediately, by barring the entail, render that interest nugatory; but this bill is filed by the tenant in tail jointly with his issue, asserting that he has no intention to affect their rights; and the question is, whether the tenant in tail, though embracing in himself all the remainders over, and the issue jointly, have not a present interest which will enable them to establish those facts that will keep the estate in their family. An estate-tail has this peculiar nature depending upon the statute, that the issue, though taking in one sense by descent as an heir at law, take also under the same title as the ancestor through whom they claim; both deriving title by one common instrument, that title in the issue capable of being affected only by a particular act, an heir-at-law having a mere hope of succession.

The reply was stopped by the Court.

The Lord Chancellor. I take it as admitted, at present, that this is an equitable estate tail, though perhaps that may deserve examination in the case of a confused will, as this appears upon the bill. If it was a legal estate, the wife might have an interest in respect of her right to dower. The issue, perhaps, are not very accurately called heirs in tail. They are not remainder-men, but issue only; in common parlance issue in tail of the tenant in tail. These persons thus standing upon the record as plaintiffs, the father must be supposed to sue for some interest

which his children have in the subject of the suit. One of the defendants stands behind the plaintiff Robert Allan as tenant in tail under the will.

From the state of facts appearing upon this record, it is obvious that Robert, the father, with a view to make good his title, has no interest whatever in proving the fact of his marriage, the remainder in tail being vested in him. The other plaintiffs are neither tenants in tail nor remainder-men in tail; but the issue of a person who is *de facto et de jure* tenant in remainder in tail, having in him the whole interest. The father having no interest whatever to sustain a bill to perpetuate testimony, as far as he is concerned, the question is, whether the children have such a present interest in this estate, and therefore such an interest in perpetuating the testimony, that they can, in respect of their interest, maintain this bill.

Some things are very clear. First, it is perfectly immaterial how minute the interest may be; how distant the possibility of the possession of that minute interest, if it is a present interest. A present interest, the enjoyment of which may depend upon the most remote and improbable contingency, is nevertheless a present estate; and, as in the case upon Lord Berkeley's will, though the interest may, with reference to the chance, be worth nothing, yet it is, in contemplation of law, an estate and interest. On the other hand, though the contingency may be ever so proximate and valuable, yet, if the party has not, by virtue of that, an estate, the Court does not deal with him. I except the case of a wager, and the interest in respect of that wager. Upon that ground the case of Smith *v.* The Attorney-General was decided; the case of Mr. Newport, a lunatic, upon a demurrer by Lord Thurlow, who was then Attorney-General; and Lord Kenyon contended that the argument must go to the extent even of an admitted intestacy and irrecoverable lunacy; that, if the party and every witness could not live an hour, yet the title of the next of kin must be repelled, and that bill was repelled: the Court holding that it was nothing but an interest in expectancy, which did not entitle him to come to this Court and to maintain his right; and Lord Chief Justice De Grey reasoned by analogy to the case of the distinction between *hæres apparens* and *verus hæres*, that the former could not have the writ *de ventre inspiciendo*, as the other might; concluding that, upon the same ground, the heir to a fee-simple estate could not support this claim.

Then, is there any such specialty in the case of the issue in tail during the life of the tenant in tail, that, though the eldest son of tenant in fee could not maintain such a claim, the heir male apparent of tenant in tail male, or the issue of tenant in tail, may? That must depend upon this: whether that heir male or issue in tail have an expectancy in the common sense, or that species of expectancy which is, in contemplation of law, a present interest. Originally an estate tail was an estate upon condition, to become a fee when issue was had. It was then in the power of the tenant in tail to alien; but still it was not an

absolute estate; as, if he did not take advantage of that power, and did not alien, the estate would have descended according to the form of the gift; but there is no case in which the tenant in tail has not been considered, as between him and his issue, as having the entire interest. The statute *de donis* certainly does say that the estate is to go according to the form of the gift, and gives the forms of the writs, which are of different sorts; but I cannot find that any formedon was ever brought by the issue during the life of the tenant in tail. That demonstrates that the estate is in the tenant in tail for the time being himself, and then the reasoning that applies to tenant in fee must apply to tenant in tail. Therefore, however unfortunate the circumstances of this case are, I cannot find a principle upon which this bill can be maintained. There are trustees to preserve contingent remainders, representing also the legal inheritance of the whole estate. I have not much considered how far those trustees could maintain a bill which must be attended with great difficulty, but it is sufficient at present to observe that they are not plaintiffs. *The demurrer was allowed.*

ANDREWS *v.* PALMER.

BEFORE LORD ELDON, C., NOVEMBER 13, 1812.

[*Reported in* 1 *Vesey & Beames*, 21.]

A MOTION was made by the plaintiff for the publication of depositions taken *de bene esse*, on the ground that the witness examined had sustained a serious bodily injury, and would be perfectly incapable of attending a trial at law.

Mr. *Hart*, Mr. *Wilson*, and Mr. *Heald*, in support of the motion, contended that the publication of depositions taken *de bene esse* might pass, where the witness was, from indisposition, incapable of attending the trial.

Sir Samuel Romilly and Mr. *Wetherell* opposed the motion, on the ground that all the applications for this purpose were upon the death of the witness; but where there is only a temporary cause preventing the examination, which may be removed, the Court will be extremely unwilling to order publication. The witness may recover, and be able to attend at the trial.

THE LORD CHANCELLOR. I have a recollection of some case where this was much considered; and I believe the course taken was to order the officer in whose possession the original deposition was to attend with it at the trial; and, if it was proved to the satisfaction of the court of law that the witness was unable to travel and attend, then the original deposition should be tendered to be read in the court of law. That gets rid of much danger, as the deposition, if published, could not be read

at law unless it was proved to the satisfaction of the Court that the witness could not be examined at the trial.[1] In the one way you have the deposition published that ought not to be published if that fact should not be established; in the other you have the benefit of it without publication, unless it should be proved that it is necessary. This affidavit is too loose, that the witness will not be able to travel for a considerable time. The surgeon ought to have made an affidavit with reference to the time when the trial is to come on, pledging his professional judgment to the probability that the witness will not be able to attend at that time. If the affidavit was more precise in that respect, I think I ought to make such an order as I have mentioned.

An affidavit was afterwards produced, more precisely worded, and the order was made accordingly.

ANGELL *v.* ANGELL.

BEFORE SIR JOHN LEACH, V. C., NOVEMBER 13, 20, AND 26, 1822.

[*Reported in* 1 *Simons & Stuart*, 83.]

THIS case was heard on demurrer to the bill, which prayed for a commission to examine witnesses abroad, and to perpetuate their testimony.

The bill stated that John Angell, by his will, dated Sept. 21, 1774, executed so as to pass freehold estates, gave and devised to the heirs male, if any such there were, of William Angell, the first purchaser at Crowhurst, and father of his great-grandfather, John Angell, Esquire, and their male heirs for ever, all his lands and estates, both real and personal, in Surrey, Kent, and Sussex, nevertheless subject and liable to such conditions as should be thereafter mentioned, and should not be otherwise disposed of and given; and if there should be no male heirs or descendants of the same William, or the first Angell, of Northamptonshire, in order as they should be found or made apparent, and if there should be none of those in being, or that should be apparent, and plainly and legally make themselves out to be Angells, and so related and descended, he then gave all his estates whatsoever, both real and personal, to William Browne, Esquire, grandson to Mrs. Frances, the wife of Benedict Browne, Esquire, who was an Angell, and his male heirs for ever.

The bill then stated that there were many persons resident in England of the name of Angell, and that several of them had endeavored to establish a claim under the devise to the heirs male of William Angell, the first purchaser at Crowhurst, or to the male heirs of the first Angell, of Northamptonshire, but that all of them had failed to produce satisfac-

[1] See *Lutterel* v. *Reynell*, 1 Mod. 284.

tory evidence in support of their claim; and that, in fact, there were no male heirs now in existence of the body of the said William Angell, the first purchaser at Crowhurst, but that the plaintiff was the male heir of William Angell, of Crowhurst, by collateral descent, in manner thereinafter mentioned. The bill then traced the descent of the plaintiff from the only brother of William Angell, the first purchaser at Crowhurst.

It also stated that, some time after the death of the testator, a person of the name of Benedict Browne entered upon the estates, and took possession of them, assuming to be entitled under the devise to William Browne and his male heirs; and that this person, in order to strengthen his pretended title, had taken upon himself the additional surname of Angell, and exercised various acts of ownership by selling and letting divers parts of the estates; and that a part of the real estates, of considerable value, was now in the possession of this person, as the ostensible owner and proprietor thereof, or of his under-tenants; but that the plaintiff had as yet been unable to trace, with any certainty, who were in possession of other parts of the estates, so as to name them as defendants to this bill.

The bill stated also that the plaintiff had, ever since the testator's death, resided in America until within the last two years, during which time he had twice come over to England in order to investigate his right and assert his claim to the estates in question; and that it was not till within these two years that he had been made acquainted with the provisions of the will of John Angell, or with the fact that he was the heir male of William Angell, the first purchaser at Crowhurst.

It then stated that the plaintiff was about to commence an action at law to recover possession of the estates of which the defendant was so in possession, and that in such action it would be necessary for him to prove, amongst other things, the several facts before mentioned relating to his descent; and that the same could be proved by divers other persons now resident in America, and out of the jurisdiction of the Court, but that such persons were very aged, and likely to die before the plaintiff could bring his action to trial, and that he would lose the benefit of their testimony at such trial unless their evidence was perpetuated in this court.

The bill prayed that the plaintiff might be at liberty to examine his witnesses, and that their testimony might be preserved and perpetuated, and that a commission might be granted for the examination of his witnesses in the United States of America, and other parts beyond the seas, and for general relief.

To this bill the defendant demurred on two grounds. First, for want of equity generally; secondly, because the plaintiff had not annexed to his bill an affidavit of any of the circumstances by means of which the testimony of the witnesses whom he prayed he might examine in order to perpetuate their evidence, was in danger of being lost.

The Court called upon Mr. Pemberton, the counsel for the plaintiff, to produce some authority in support of such a bill as this, which sought

to perpetuate the testimony of witnesses where no action at law had been brought, and nothing was averred in the bill to show that an action could not be brought immediately. No such authority could be produced at this time, and the case was therefore allowed to stand over for a week.

NOVEMBER 20.

Mr. *Pemberton*, for the bill. This bill prays for a commission to examine witnesses abroad, and is in fact a bill for a commission and for a discovery. It must be considered to be a bill for discovery, because it contains interrogatories as to how the defendant is entitled to the lands in question. It is clear, from the authorities, that a bill for discovery will lie before an action at law is brought. There has, indeed, been a difference in the practice on this point; but the latest authorities are in favor of the doctrine that there may be a bill for discovery before an action is brought. This could not be considered as a bill for relief merely because it prays for a commission to examine witnesses. Moodalay *v.* Morton [1] is an express decision that a demurrer will not hold to a bill for a commission to examine witnesses, because no action has been brought. Mendes *v.* Barnard is another authority to the same effect; and another case — Emmot *v.* Aylet — is mentioned by Sir Lloyd Kenyon, in his judgment in Moodalay *v.* Morton. It is said by Lord Eldon, in The City of London *v.* Levy,[2] that, "where the bill avers that an action is brought, or where the necessary effect in law of the case stated by the bill appears to be that the plaintiff has a right to bring an action, he has a right to a discovery to aid that action so alleged to be brought, or which he appears to have a right and intention to bring." The same reasoning which applies to the case of a bill for discovery must apply also to a bill for a commission to examine witnesses, because they are bills of the same nature, and in both cases the costs must be paid by the plaintiff.[3] It might be said, that if a bill for a commission was brought before action, the plaintiff might never bring his action; but the same thing might be said of a bill for discovery. The demurrer, even if good as to the other parts of this bill, does not extend to the discovery which is sought by it.

Mr. *Bell* and Mr. *Ellison*, for the demurrer, relied on the general rule that a bill of this nature could not be sustained before action, and contended that Moodalay *v.* Morton and the other cases cited were cases of exception on account of particular circumstances; and they cited the case of Pitt *v.* Short, before Lord Eldon, Trinity Term, 1810, in which it was decided that a demurrer would hold to a bill for a commission to examine witnesses in aid of an action, if the bill did not state that an action had actually been brought.[4] As to the demurrer for want of an affidavit, it was laid down expressly by Lord Redesdale,[5] that the want

[1] 2 Dick. 652; 1 Bro. C. C. 469. [2] 8 Ves. 404. [3] Mitf. 120.
[4] This case is not reported, but was cited from a MS. note of Mr. Newland's.
[5] Mitf. 41 and 121.

of an affidavit to a bill of this kind is good cause of demurrer. This was plainly a bill for relief, and not a mere bill for discovery.

NOVEMBER 26.

THE VICE-CHANCELLOR. When this case was opened, it appeared to me that there were other objections to the bill than those which had been suggested, and which might be taken advantage of under the general demurrer, namely, that if considered as a bill to perpetuate testimony, it was defective, because it did not allege that the matter in question could not be made the subject of an immediate action; and that if it could be considered as a bill to examine witnesses abroad in aid of an action at law, it was defective, because it did not allege that an action was then pending. And I directed the case to stand over for a week, in order to have those points considered.

Upon the second argument, the counsel for the plaintiff produced the case of Moodalay *v.* Morton as an authority for the proposition that this Court would entertain a bill for a commission to examine witnesses abroad in aid of a trial at law, although no action at law was then pending.

The jurisdiction which courts of equity exercise to perpetuate testimony is open to great objections. First, it leads to a trial on written depositions, which is much less favorable to the cause of truth than the *vivâ voce* examination of witnesses. But what is still more important, inasmuch as those written depositions can never be used until after the death of the witnesses, and are not, indeed, published till after the death of the witnesses, it follows, whatever perjury may have been committed in those depositions, it must necessarily go unpunished. And this testimony has, therefore, this infirmity, that it is not given under the sanction of the penalties which the general policy of the law imposes upon the crime of perjury. It is for these reasons that courts of equity do not entertain bills to perpetuate testimony generally, for the purpose of being used upon a future occasion, unless where it is absolutely necessary to prevent a failure of justice.

If it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, no such suit is entertained. But if the party who files the bill can by no means bring the matter in question into present judicial investigation (which may happen when his title is in remainder, or when he is himself in possession), there courts of equity will entertain such a suit; for otherwise the only testimony which could support the plaintiff's title might be lost by the deaths of his witnesses. Where he is himself in possession, the adverse party might purposely delay his claim with a view to that event. It is, therefore, ground of demurrer to a bill to perpetuate testimony generally, that it is not alleged by the plaintiff that the matter in question cannot be made by him the subject of present judicial investigation. But courts of equity do not merely entertain a jurisdiction to take or preserve testimony generally to be used on a

future occasion, where no present action can be brought, but also to take and preserve testimony in special cases, in aid of a trial at law, where the subject admits of present investigation. At law no commission to examine witnesses who are abroad, for the purpose of being used at the trial, can go without the consent of the adverse party. Courts of equity will, upon a bill filed, grant such commission without the consent of the adverse party. So courts of equity will entertain a bill to preserve the testimony of aged and infirm witnesses, to be used at the trial at law, if they are likely to die before the time of trial can arrive; and will even entertain such a bill to preserve the testimony of a witness who is neither aged nor infirm, if he happen to be the single witness to support the case.

I have already observed that the case of Moodalay *v.* Morton has been cited on the present occasion as an authority that courts of equity will entertain a bill for a commission to examine witnesses abroad in aid of a trial at law where a present action may be brought and is not brought. When that case comes to be accurately examined, it will be found not to sustain, nor even to favor, such a general proposition. The object of the bill there was to discover, by the examination of witnesses in the East Indies, whether the persons who had done the act complained of had or not the authority of the East India Company, for the purpose of determining whether redress was to be sought against the East India Company or the person who had done the act individually. The cases cited principally apply to this view of the case; and the learned judge proceeds upon it. If a bill will he for the purpose of ascertaining facts upon which it must depend against whom the action is to be brought, such a bill must necessarily precede the action; and this case, being a case of specialty and exception, rather disproves than affirms the general propositions for which it was cited.

If a bill for a commission to examine witnesses abroad, to be used on a trial at law, were entertained before any action actually commenced, then, inasmuch as it is not pretended that there is any time limited within which the future action is to be brought, this consequence might follow; that the plaintiff in the bill, having obtained this written testimony, not given under the sanction of the penalties of perjury, might delay his action until after the deaths of those witnesses for the adverse party resident in this country and subject to *vivâ voce* examination, whose evidence might be in opposition to this written testimony, and thus the justice of the case might be defeated. On the other hand, no reason of justice, or even of convenience to the party plaintiff in such a bill, requires that he should be permitted to file it before he has actually commenced his action. The necessary effect of such a bill is to suspend the trial until the commission is returned, and to secure to him the benefit of his foreign evidence, and all further delay of trial is injustice to the other party.

I am therefore of opinion, both upon authority and upon principle, that a bill for a commission to examine witnesses abroad in aid of a trial at

law, where a present action may be brought, is demurrable to, if it do not aver that an action is pending.

The present bill alleges that the witnesses in America, whom the plaintiff purposes to examine in support of the action which he avers he intends to bring, are aged and infirm, and likely to die before the plaintiff may be able to bring the said intended action to a trial. I have stated that courts of equity will entertain bills to preserve the testimony of such witnesses, in order to prevent the failure of justice by their deaths before trial, even where the subject admits of present judicial investigation. In the case of Phillips *v.* Carew,[1] it seems to have been held by the Master of the Rolls, and also by the Lord Chancellor upon a re-hearing, that such a bill would lie before an action actually commenced, provided the plaintiff annexed to his bill an affidavit of the truth of his alleged statement with respect to the witnesses. If that case is to be followed as an authority, it would not assist the present plaintiff, for he has annexed no such affidavit to his bill; and the want of the affidavit is assigned here as a special cause of demurrer.

The principle of that case (supposing it to be correctly reported) is not, however, very satisfactory. Written depositions, on account of the infirmity which I have before referred to, are never to be received where, with reasonable diligence, *vivâ voce* testimony may be had, and the circumstance that the witnesses are aged and infirm should be rather a reason for the action being immediately brought, to give the better chance of their living till the trial, than a reason for permitting the action to be indefinitely delayed at the pleasure of the plaintiff. Whenever such a case occurs again, the principle of Phillips *v.* Carew will come to be reconsidered.

On the part of the plaintiff it is, however, argued, that if the demurrer could otherwise be supported, it must fail, because it extends to the discovery as well as to the relief, and that if the plaintiff be not entitled, for the reason stated, to perpetuate testimony or to examine his witnesses abroad, yet still he is entitled to a discovery.

I am not of that opinion. *Primâ facie*, it must be intended that the discovery is incidental to the relief. This plaintiff might perhaps have used expressions which would have made the discovery a substantive part of his case. It is sufficient to say that he has used no such expressions in this bill; and that the discovery is only sought for by the common form of interrogatory. *Demurrer allowed.*

[1] 1 P. Wms. 117.

LANCASTER *v.* LANCASTER.

BEFORE SIR LANCELOT SHADWELL, V. C., JANUARY 23, 1834.

[*Reported in* 6 *Simons*, 439.]

THIS was a bill to perpetuate the testimony of witnesses to a will. The defendant had been taken on attachment for want of answer, and committed to the Fleet.

Mr. *Cooper*, for the plaintiff, now moved for liberty to sue out a commission to examine the witnesses as if the cause were at issue, saying that the defendant still refused to put in his answer. He cited *Coveny* v. *Athill*,[1] and *Frere* v. *Green*.[2]

THE VICE-CHANCELLOR made the order on the authority of the case in Dickens.

ATTORNEY-GENERAL *v.* RAY.

BEFORE WIGRAM, V. C., APRIL 27, 1843.

[*Reported in* 2 *Hare*, 518.]

IN the year 1836, on the expiration of a lease from the Crown to Ray and another, Mr. Richardson, a surveyor, was appointed, on behalf of the Crown, to report whether the property was left in the state in which the lessees had covenanted to leave it. In Trinity Term, 1838, an information in the nature of an action of covenant was brought by the Crown against Ray, to which action he pleaded in May following. The replication was not filed until Trinity Term, 1840: notice of trial was given in May, 1841, and at the same time notice of a motion to examine Richardson *de bene esse*, which motion the Crown afterwards abandoned. In June, 1841, the present bill was filed to perpetuate the testimony of Richardson, on the ground of his infirm health, and the witness was accordingly examined. In January, 1843, Richardson died.

[1] 1 Dick. 355. [Dec. 20, 1762. The plaintiff brought his bill to perpetuate the testimony of his witnesses. The defendant stood out all process of contempt, and was brought up on an *alias pluries habeas corpus*, for want of his answer, and the plaintiff's clerk in court attended with the record of the bill, to have the same taken *pro confesso*; but the plaintiff by his bill praying no relief, and as he, by the defendant's persisting in his contempt, was prevented serving a subpœna to rejoin and bringing the cause to issue, whereby he was in danger of losing the benefit of his witnesses, SIR THOMAS CLARKE, M. R., after taking time for consideration, gave the plaintiff leave to sue out a commission to examine the witnesses, though no answer were come in. — ED.]

[2] 19 Ves. 319.

Mr. *George Maule*, for the Attorney-General, moved that the depositions might be published, and that the officer might be ordered to attend with the depositions at the trial at law. Andrews *v.* Palmer; Jervis *v.* White.[1]

Mr. *G. L. Russell*, for the defendant, argued that, after the very dilatory manner in which the proceedings at law had been carried on, the order ought not to be made. Angell *v.* Angell; East India Company *v.* Naish;[2] Duke of Dorset *v.* Girdler;[3] Dew *v.* Clarke.[4]

If the Court is bound to give any assistance after so much delay, it will not be by directing publication of the depositions; for that might be regarded at law as a decision of this Court on the admissibility of the evidence: the order will be confined to simply directing that the whole record shall be taken down. The order must not be so framed as to prejudice any question as to the evidence which might arise at law. Duke Hamilton *v.* Meynal;[5] Brown *v.* Thornton.[6]

THE VICE CHANCELLOR said that this Court could not, in simply exercising the necessary jurisdiction over its records, in a suit merely to perpetuate testimony, be supposed to give any opinion of the value or admissibility of the evidence; the depositions should be published, and the whole record produced at the trial.[7]

ORDER.

This Court doth order that the depositions in chief of J. Richardson, taken in this cause, be forthwith published, and it is ordered that the proper officer and officers do attend with and produce to her Majesty's Court of Exchequer, at the Sittings after this present Easter Term, to be holden in Westminster Hall, in the county of Middlesex, or on such day and time as shall be appointed by the said Court of Exchequer, for the trial of a certain information at law depending in her Majesty's said Court of Exchequer, wherein her Majesty's said Attorney-General is informant, and Henry Bellward Ray, and, &c., as executors, &c., are defendants, the original record of the whole of the proceedings filed in this Court in this suit, and also the original interrogatories upon which the said J. Richardson was examined in chief as aforesaid, by one of the examiners of this Court, and the original depositions of the said J. Richardson, so taken as aforesaid by the said examiner, and either of the parties is to be at liberty to make such use of the said proceedings, interrogatories, and depositions on the said trial as by law they can. — *Reg. Lib. A.* 1842, *fol.* 1102.

In 3 Hare, 335, there is the following note to the foregoing case: In the report of this case (2 Hare, p. 518) it appears that the order directed, among other things, that the proper officer should attend and produce on the trial at law the original record of the proceedings filed in the suit. No objection was made with respect to the order for the production of the original interrogatories and depositions in the Examiner's Office, but the Clerk of Records and Writs requested that the application, so far as related to the original records in that office, might be made to the Master of the Rolls, referring to the stat. 1 & 2 Vict. c. 94. The motion as to the latter documents was accordingly made before the Master of the Rolls, when his Lordship, after reserving the question for consideration, finally refused the order;

[1] 8 Ves. 313.
[2] Bunb. 320.
[3] Prec. Cha. 531.
[4] 1 S. & S. 108.
[5] 2 Dick. 788; S. C. *Anon.* 2 Ves. 497.
[6] 1 Myl. & Cr. 248; per Lord *Cottenham*.
[7] The form of order which follows was suggested by the registrar (Mr. Monro) as having been adopted in some former precedents found in the office.

observing that there was no sufficient proof before him that the production of the original record was absolutely necessary on a trial relating to a civil matter; that great inconvenience would ensue if the officers of the court were required to attend at different parts of the country with the records; and that such documents ought not to be exposed to the risk of loss or injury, or removed from their proper depositories. The reasons for refusing the order were so well explained in Hennell *v.* Lyon,[1] that it would be sufficient to refer to that case.

ELLICE *v.* ROUPELL.

BEFORE SIR JOHN ROMILLY, M.R., FEBRUARY 26 AND 27, MARCH 20 AND 21, APRIL 15, AND MAY 7 AND 8, 1863.

[*Reported in* 32 *Beavan*, 299, 308, 318.]

THIS was a bill to perpetuate testimony, filed by two gentlemen named Ellice and Manners Sutton against Richard Roupell and Sarah Roupell.

The bill alleged that Richard Palmer Roupell (deceased) was seised in fee of the Roupell Park estate, and that by an indenture of the 26th of September, 1853, and made between R. P. Roupell and Sarah his wife of the one part and William Roupell their son of the other part, R. P. Roupell and his wife, in consideration of natural love, conveyed the Roupell Park estate to William Roupell in fee. It alleged that this deed was executed by R. P. Roupell and his wife, and was attested by Alfred Douglas Harwood, and that it was duly acknowledged by Mrs. Roupell before Mr. Justice Talfourd.

William Roupell afterward mortgaged the estate for £100,000, and the mortgages became vested in the plaintiffs, who, in February, 1862, entered into possession of the estate, except a stable and coach-house.

Richard Palmer Roupell died in September, 1856.

In April, 1862, the interest being in arrear, the plaintiffs advertised the estate for sale by auction, but they were prevented selling it by a notice of Richard Roupell (another son of R. P. Roupell), who claimed the estate as heir-at-law or devisee of R. P. Roupell. The plaintiffs thereupon brought an action of ejectment to recover the stable and coach-house, which Richard Roupell at first defended, but he withdrew before the trial, and the plaintiffs obtained judgment.

The bill stated, that the defendants alleged that R. P. Roupell did not execute the conveyance of 1853, and that the plaintiffs had no right or title to the estate, and that, upon the father's death, his son Richard Roupell became entitled to the whole estate. It also stated that Sarah Roupell alleged, that on the death of her husband, she, as devisee under his will, became entitled to the estate. The plaintiffs charged that there were several other persons besides A. D. Harwood (and one of

[1] 1 B. & A. 184–187.

whom was old and infirm) who could prove the validity of the indenture and the right of the plaintiffs, and that R. P. Roupell admitted his son's title under the indenture. The plaintiffs charged that the matters aforesaid, and in particular the validity of the said indenture, could not be made the subject of judicial investigation, and inasmuch as the defendants might delay to dispute the validity of the indenture and to prosecute their claim, until such time as they might think proper, the plaintiffs were in danger of losing the testimony of A. D. Harwood and the other witnesses.

The bill prayed, "that the plaintiffs might be at liberty to examine A. D. Harwood and other their witnesses who could prove any matters or things tending to shew and establish the due execution, by R. P. Roupell and Sarah his wife, of the indenture of the 26th day of September, 1853, and the right and title of the plaintiffs thereunder, upon the several matters thereinbefore mentioned or any matters connected therewith, and that the testimony of A. D. Harwood and of other the plaintiffs' witnesses might be recorded and preserved, in and by this honorable Court, in order to the perpetuity thereof, and that, if necessary, the plaintiffs might have a commission for the examination of the said witnesses or any of them."

The plaintiffs filed interrogatories, and Mrs. Roupell in December, 1862, put in a full answer thereto.

The plaintiffs then amended their bill, and the only new statements were as follows:—That R. P. Roupell knew that he (William Roupell) entered into possession by virtue of the said indenture, and that from the time when William Roupell entered into possession, R. P. Roupell treated him as owner of the said estate. That they (the defendants) admit, that in the year 1854 William Roupell entered into possession of part of the Roupell Park estate, and that they ought to set forth under what title he did so. That the defendant Sarah Roupell admits that she executed the indenture of the 26th of September, 1853, and acknowledged it before a judge, and she ought to set forth the full particulars as to the said indenture and her execution and acknowledgment thereof, and as to R. P. Roupell's knowledge of the said indenture.

To the amended bill, Sarah Roupell, on the 16th of February, 1863, put in the following plea to all the discovery, relief, and order sought by the bill:—

"Saith, that since the answer of this defendant Sarah Roupell filed in this cause on the 17th December, 1862, the plaintiffs have, on the 2d February, 1863, filed a bill in this honorable Court against this defendant Sarah Roupell, and also against Richard Roupell, and also against Frederick Chinnock" and other parties [naming them], "and thereby the plaintiffs state the contention of this defendant Sarah Roupell and the said defendant Richard Roupell, that the indenture dated 26th September, 1853, in the said re-amended bill stated, was a forgery, and deny the truth of such contention, and raise the issue, whether the said indenture was or was not a forgery, and pray that this defendant,

Sarah Roupell, and the said defendant Richard Roupell may be restrained, by the order and injunction of this honorable Court, from commencing or prosecuting any action or actions to recover from the plaintiffs the hereditaments which are comprised in the said indenture of the 20th of January, 1854, in the said re-amended bill mentioned. And, by the said secondly-filed bill, the plaintiffs have made the several matters in the said re-amended bill mentioned, and in particular the validity of the said indenture dated the 26th September, 1853, the subject of judicial investigation. And this defendant saith, that she has, since the filing of her said answer, ascertained, by the means aforesaid, that it is not true, and she saith that it is not true, that the said several matters in the said re-amended bill mentioned, and in particular the validity of the said indenture dated the 26th September, 1853, cannot be made, by the plaintiffs, the subject of judicial investigation. All which matters and things in this plea stated this defendant avers to be true, and pleads the same."

The plea now came on for argument.

Mr. *Selwyn* and Mr. *C. Swanston*, in support of the plea, argued, that the equity of the present bill depended on the statement of the inability of the plaintiffs to make the matters in dispute the subject of judicial investigation at the present time; but that the contrary now appeared from the second bill filed by the plaintiffs themselves. That this fact, being introduced into the record by plea, displaced the equity on which the bill was founded. That the fact pleaded having occurred since the filing of the answer, it might properly be made the subject of a plea. That as to the technical difficulty in pleading, the General Orders (14th Consolidated Order, rule 9) provided against the old objection, that a plea was overruled by an answer.

Mr. *Hobhouse* and Mr. *Cotton*, for the plaintiffs, argued that the objection raised by the plea, if valid, ought to have been pleaded at first to the bill, and that, by answering, the defendant had waived the objection. That the defendant could not plead and answer to the same bill, such a course being inconsistent; and that the objection was not removed by the 14th Consolidated Order, rule 9, which only removed the technical difficulty, in cases where part of the subject covered by a plea was also answered. Attorney-General *v.* Cooper.[1]

THE MASTER OF THE ROLLS. The plea comes on in a very unusual form. Two gentlemen named Ellice and Manners Sutton, who have advanced £100,000 on the security of this estate, have filed this bill *in perpetuam rei memoriam*, to prove the validity of a deed which is impeached by the defendants and is alleged to be a forgery. The course which this Court always adopts, in bills to perpetuate testimony, is very simple and straightforward. Where a person files such a bill raising an issue which can be tried at once at law, this court holds, that it is not a proper case for a bill to perpetuate testimony; on the contrary, as the

[1] 8 Hare, 166.

evidence, when taken, cannot be used, if the witnesses are alive, and as the depositions are sealed up and can only be used when the case arises hereafter, it would be idle for this Court, when the question might be tried at once, and the witnesses themselves might be examined, to perpetuate their testimony.

If the case depend solely upon the testimony of one witness, or of witnesses who were very old, then the court allows that person to be examined *de bene esse* without the necessity of a bill to perpetuate testimony.

But where a person in possession of an estate hears that another intends to impeach his title, upon the ground that the title deed by which he holds the estate is a forgery, then, as the person in possession can take no step to establish his title, and as the person out of possession will not bring an ejectment against him until his witnesses are dead, it has always been held, that the person in possession may file a bill to perpetuate the testimony of his own witnesses, in order to frustrate the design of the person who delays bringing forward his case until the witnesses who can speak to the truth of the defence are no longer in existence.

In this case the plaintiffs are mortgagees and have entered into possession, claiming, not the absolute title to the estate, but as mortgagees only. They are accordingly liable to account hereafter to the rightful owner of the equity of redemption, in that strict and severe form in which this Court always directs the accounts to be taken as against mortgagees in possession. If this plea to the bill had been filed in the first instance, I should have had to consider whether the ordinary rule of the Court, which would undoubtedly apply if the plaintiffs were in possession as purchasers of this estate, applied to the case of a mortgagee. A mortgagee can file a bill to foreclose and realize his security, and there are various other modes by which he might bring before the cognizance of the Court the question of the validity of this deed. If a mortgagee obtained a decree of foreclosure against the persons who alleged that the deed was a forgery, it would be impossible for them to contest the validity of that decree, after it had been enrolled and the time for appealing to the House of Lords had expired.

I am much disposed to think, though I have not been able to find any authority on the subject, that if this plea had been filed in the first instance it would have been a good plea, or perhaps upon the statement in the bill itself a demurrer might have been successfully filed to it. But the peculiarity of the present case is this: The defendant's pleader seems to have thought, upon the authority of the cases, that as the plaintiffs, the mortgagees, were in possession of the estate, their case was analogous to that of purchasers of the inheritance; which they were at law though not in equity; and thereupon he answers the bill. The matter is carried on in a very peculiar form, for, by filing interrogatories, it is sought to make the bill perform the double function of a bill to perpetuate testimony and a bill of discovery. I do not wish to pre-

judge the question, whether the answer can be used at any future time in any other proceeding, but this is clear: that the depositions cannot be used so long as the witnesses are alive, and that, if living, they must be examined again. It is also clear that a defendant may himself take advantage of a suit of this description. If the plaintiff examine his witnesses and the defendant merely cross-examines them, then the plaintiff has to pay all the costs; but if the defendant think fit to take advantage of the suit, he may examine his own witnesses to establish his own case, and then the costs are divided; but even then, the depositions of a deceased witness can only be used against the defendant with relation to the subject-matter stated in the bill.

Here the defendant has thought fit to answer all the matters stated in the original bill; it is then re-amended, and the defendant is called upon to answer all the various matters in the amended bill. This singularity then takes place: In the Vice-Chancellor's Court another bill is filed by the plaintiffs, and in which the validity of the mortgage deed is directly put in issue; that is to say, the validity of the conveyance to the mortgagor; and the defendant then says: "If I had known this before, I would have pleaded it, because it depended upon you, the plaintiffs, as you yourselves have shown, to bring the question in dispute before a court for immediate decision."

I am of opinion, that the fact of the plaintiffs having done so does not alter the law on the subject, and that it was just as competent for the defendants to do this when the bill was first filed as it is now. The defendant was bound to know it, or at least cannot plead ignorance of the law as a justification for his acts. That being so, I think that when the defendant pleads that this matter can at once be tried in court, and that the plaintiff himself has shown that it can, he is merely doing that which he might have done in the first instance, and which would have made it unnecessary for him to answer any part of the bill.

It is true that the rule of pleading now is, that a plea does not overrule an answer; but I concur with the observation, that the object of the 9th Rule of the 14th Consolidated Order was, to prevent a *bonâ fide* plea from being overruled by the mere technical objection that the plea covered a part of the same matter as the answer, and that this was the sole meaning of that order.

There is, however, a great deal of substance in the old rule, that you must not answer a matter that is pleaded to. It is obvious that if you did, in a case where the bill asks for relief, the plaintiff would not know what evidence he would have to adduce. But here this appears in a very striking form, for if the plea is allowed, the bill is out of court, for the plaintiffs can only take issue on the plea, and it is undoubtedly true that the other bill stated in the plea has been filed in another branch of this court. Therefore, this bill is out of court if the plea be allowed, and yet the defendants have answered all the matters contained in the original bill, and have even cross-examined the plaintiff's witnesses. I

am of opinion, that having so done, this defendant is not at liberty afterwards to file a plea, and that, if she intended to plead at all, she ought to have pleaded in the first instance.

That being so, I shall not allow the plea, but direct it to stand for an answer, and give the plaintiffs liberty to except.

MARCH 20 AND 21.

The case now came on for argument, on exceptions to the answer for insufficiency. The case was shortly this: —

The plaintiffs filed a bill against Sarah Roupell and Richard Roupell to perpetuate the testimony of the due execution of a deed, which constituted the title of the property under which the plaintiffs were mortgagees in possession, and which the defendants alleged to be a forgery. The defendant Sarah Roupell put in an answer to this bill, answering it fully. The plaintiffs then amended their bill, to which they required an answer, and they filed seven interrogatories of a more searching character on the same subject. The defendant Sarah Roupell pleaded to the amended bill, that the plaintiffs had since commenced a suit in equity to determine the validity of that deed, and that consequently the plaintiffs could not maintain a suit to perpetuate testimony. That plea was, on argument, disallowed, and was ordered to stand for an answer, with liberty to the plaintiffs to except. The defendant filed no further answer, and the plaintiffs having filed exceptions for insufficiency, they now came on for argument.

Mr. *Rolt*, Mr. *Hobhouse* and Mr. *Cotton*, for the plaintiffs, in support of the exceptions, argued that the defendant was bound to give the discovery required, in order to settle the points on which issue was to be taken, and that it had always been the practice to require a discovery in bills for perpetuating testimony. That the defendant having answered must answer fully, and could only protect herself from discovery by plea or demurrer. They also argued, that the new practice as to taking evidence prevailed in the case of a bill to perpetuate testimony; Knight *v.* Knight;[1] King *v.* Allen;[2] Bevan *v.* Carpenter;[3] Thorpe *v.* Macauley;[4] The Earl of Belfast *v.* Chichester;[5] Cardale *v.* Watkins;[6] Cresset *v.* Mitton;[7] Mitford's Pleading;[8] General Orders of 5th of February, 1861; 15 & 16 Vict. c. 86.

Mr. *Selwyn* and Mr. *Swanston*, for the defendant Sarah Roupell, argued, that as the sole object of the bill was to perpetuate the testimony of witnesses, no further discovery could be required than what was necessary to obtain that object. That the plaintiffs, having got an answer, might file a replication and join issue at once, and that no further discovery could aid them. That a defendant was only bound to answer that which was material to the relief prayed or the order asked, and might object, by answer, to giving a discovery of any thing

[1] 4 Mod. 1. [2] 4 Mod. 247. [3] 11 Sim. 22.
[4] 5 Mad. 218. [5] 2 Jac. & W. 439. [6] 5 Mad. 18.
[7] 1 Ves. Jun. 449, and 3 Bro. C. C. 481. [8] Pages 53, 54 (4th ed.)

which was immaterial for that purpose, and that the rule as to answering fully did not apply to immaterial matters; Lord Dursley *v.* Fitzhardinge Berkeley; Scott *v.* Mackintosh;[1] Agar *v.* The Regent's Canal Company;[2] Redesdale;[3] Hirst *v.* Peirse;[4] Story's Eq. Pl.;[5] Angell *v.* Angell; Moodalay *v.* Moreton;[6] Wyatt's Pr. Reg.;[7] Turner's Ch. Pr.[8]

Mr. *Cotton*, in reply.

April 15.

The Master of the Rolls. The defendants have contended that the plaintiffs are not entitled to any further or better answer than they have already got. This involves the consideration of matters which, owing to the recent changes made in the practice and procedure of the court, have in a great measure become obsolete.

The first question to be considered is, whether this is a bill of discovery, in the proper and technical sense of that word? I speak of the technical sense of the word "discovery," because, as Lord Redesdale observes in his work on pleading, "Every bill is in reality a bill of discovery, but the species of bill usually distinguished by that title is a bill for discovery of facts resting in the knowledge of the defendant, or of deeds or writings or other things in his custody or power, and seeking no relief in consequence of the discovery, though it may pray the stay of proceedings at law till the discovery should be made."[9]

The question here is, first, whether this is a bill of discovery in that limited and technical sense of a bill of discovery, as distinguished from other bills, as thus defined by Lord Redesdale; and I am of opinion that it is not a bill of discovery, in this technical sense so defined by Lord Redesdale. A bill of discovery proper is filed to aid the jurisdiction of some other court, and the better to enable the plaintiff in equity to prosecute or defend such proceedings; and it usually, if not necessarily, states the existence of such proceedings, as the title of the plaintiff to insist on such discovery. That is not so done in the present case. A bill to perpetuate testimony is treated by Lord Redesdale as a separate and distinct species of bill from a bill of discovery, properly so called. Accordingly, in the preceding page of his work,[10] Lord Redesdale observes: "Original bills not praying relief have been already mentioned to be of two kinds, 1st, bills to perpetuate the testimony of witnesses; and 2d, bills of discovery." Here, by the words "bills of discovery," he means bills of discovery properly so called, according to the definition I have already read.

This view of the case is confirmed by Lord Eldon, who, in the case of Lord Dursley *v.* Fitzhardinge Berkeley, expressly states that a "bill to perpetuate testimony calls for no discovery from the defendant,

[1] 1 Ves. & B. 504. [2] Sir G. Cooper, p. 212. [3] Page 306 (4th ed.).
[4] 4 Price, 339. [5] Chap. VII. [6] 2 Dick. 652.
[7] Page 74. [8] Vol. 1, pp. 218, 219 (6th ed.).
[9] Mitford, Plead., p. 53 (4th ed.). [10] Page 51.

but merely prays to secure that testimony which might be had if the circumstances called for it."

Whether the two objects could be united in one bill, and pray the perpetuation of testimony, as to one matter which could not then be made the subject of legal proceedings, and also discovery as to another subject which was the subject of legal proceedings, I express no opinion. Whether any two matters could be so united in substance as to make it possible for one and the same bill to include both subjects in it, it is not necessary for me to decide, or indeed to inquire, for I am satisfied that this is not the condition of the present bill; it is one and the same subject-matter respecting which it is sought to perpetuate testimony and to obtain discovery, and as no relief is prayed by it, the discovery, if at all, must be in aid of the jurisdiction of some court other than the Court of Chancery, and to further the prosecution of some proceeding existing or possibly impending in that court. If this be correct, and if the subject be the same respecting which both the discovery and the perpetuation of testimony is sought, then the bill is defective, so far as it asks for the perpetuation of testimony, which cannot be afforded if the matter is ripe for decision in any court, and the evidence could be given there. It follows from hence, that, as collateral to the perpetuation of testimony, the discovery, in the proper sense of that term, is wrong. This is, in truth, a bill to perpetuate testimony and nothing else, and it cannot be converted, at the option of the plaintiffs, into a bill of discovery, in the sense so defined, as I have already stated, in Lord Redesdale's book.

The case of the Earl of Suffolk *v.* Green,[1] which was much relied upon in argument before me, does not, in my opinion, contradict or oppose the opinion of Lord Eldon and Lord Redesdale already cited. That was not properly a suit to perpetuate testimony, it was properly a bill of discovery in aid of proceedings relating to a bond then in force, with a prayer to be at liberty to examine *de bene esse* a witness who was alleged to be very old and infirm.

There is no doubt but that a bill of discovery may ask for the examination of a single witness, one on whom the whole case depends, and may, in so doing, ask to perpetuate his testimony, and also, in like manner, for a commission to examine witnesses abroad; but it is essential to distinguish between a bill for the perpetuation of testimony, properly so called, and a bill of discovery, in which, as in a bill for relief in this court, an order may be obtained to examine a witness *de bene esse*, and thus perpetuate the testimony of that particular witness. It is true that in both cases witnesses are or may be examined *de bene esse*, but in a bill to perpetuate testimony, it is because the matter cannot be tried in this or in any court, and to have the evidence ready for a future time. In a bill of discovery proper, the witness may also be examined in like manner, but this is lest he should happen to

[1] 1 Atk. 450.

die before the time comes for giving his evidence in court, and then the latter proceeding is in aid of the jurisdiction of some court other than the Court of Chancery, where proceedings are actually pending or are immediately abont to be instituted; but in a suit to perpetuate testimony, properly so called, as in the case of Lord Dursley *v.* Fitzhardinge Berkeley and in the present case, the existence of such a suit in any court would be a good ground of demurrer or plea.

So again, in an ordinary suit for relief in this court, an order may be obtained to examine an aged and infirm witness *de bene esse*, for fear his evidence should be lost before the time arrives in which he might give it regularly; but this is quite distinct from the examination of witnesses under a bill to perpetuate testimony, where the evidence is or ought to be sealed up till the time arrives, when, if the witness deposing be dead, the evidence may be used.

I am of opinion, therefore, that the case of The Earl of Suffolk *v.* Green does not decide this case in favor of the plaintiff, and on consulting the record in that case, it appears that, in fact, no further answer was put in.

I have requested the gentlemen of the Record and Writ Office to assist me in examining the records of the Court, in the cases which have already occurred. For this purpose, I gave them a list of twenty-eight causes relating to perpetuation of testimony, which are to be found in the books. In all those cases, the records have been examined, and in one case and one only of them, viz., Brandlyn *v.* Ord,[1] a further answer was put in, but this does not appear to have been contested or brought before the attention of the Court. I cannot consider it as governing this case, but I mention it as favorable to the contention of the plaintiffs, as far as it goes.

Considering this case, therefore, as belonging to the class of bills to perpetuate testimony, properly so called, and not a bill of discovery, properly so called, I have to consider, whether, in that view of the case, the plaintiff can insist on these interrogatories being answered. Lord Redesdale, in the passage I have cited, very properly observes, that "every bill is in reality a bill of discovery, and in this general sense, as contradistinguished from a bill of discovery properly and technically so called, a bill to perpetuate testimony is a bill for discovery; but in that general sense, so expressed by Lord Redesdale, the plaintiff is only entitled to obtain such discovery as will be material for the relief asked, where the bill does seek relief, or as will be material for the order required, where the bill does not seek relief, but asks for an order not properly or technically called relief. This, if it required authority, is clearly and distinctly laid down in Scott *v.* Mackintosh,[2] Agar *v.* The Regent's Canal Company,[3] and in Hirst *v.* Peirse.[4] It is also founded on common sense, for if this were not the law, the plaintiff, who had stated a case asking for no relief or assistance from the

[1] 1 Atk. 571. [2] 1 Ves. & B. 504. [3] Sir G. Cooper, 212. [4] 4 Price, 339.

Court, might examine a defendant in all the details of his past life and parentage, and gratify an idle and fruitless curiosity, which would in no respect assist him in his suit.

What is it then that a plaintiff in a bill to perpetuate testimony requires? It is this, and only this: that the defendant shall admit his title to examine such witnesses as he may may think fit, on the various matters and issues stated in his bill. Beyond this, the inquiry is idle and fruitless; the answer of the defendant cannot be used against him in any further proceeding, and if the bill be brought to a hearing, it will be dismissed with costs. This is established in Hall *v.* Hoddesdon,[1] Welby *v.* The Duke of Portland,[2] and Anon.[3] It is true that such dismissal does not prejudice the evidence already given; but all this shows that as soon as the first answer is put on the file, the plaintiff has, on filing a replication, full power to examine what witnesses he may choose on the various issues stated in his bill. Unless the right of the plaintiff to compel an answer were confined to what he seeks by his bill; or, in other words, his right or title to examine witnesses respecting the points stated in the plaintiff's bill, it is plain that the Court could never draw any line, or tell where to stop the plaintiff in his examination of the defendant on interrogatories. Everything, except what consists in an admission or denial of the plaintiff's right to examine witnesses *in perpetuam rei memoriam*, would be equally material, or, rather, equally immaterial, and the whole birth, parentage, education, and early life of the defendant might be inquired into by the plaintiff, and the Court would be able to fix on no principle by which to stop the inquiry or curiosity of the plaintiff.

It is said that, by the modern practice, the parties themselves can be examined, and that this is a mode of examining the defendants; but the answer to that is obvious; the proper mode of examining a defendant as a witness is the same as that of examining all the other witnesses, and as it is only by so examining them that their depositions can be made evidence at a future period, so it is only by examining a defendant in like manner that his evidence can be perpetuated in common with that of the other witnesses.

Upon the fullest consideration I have been able to give to this case, I am of opinion that it would be contrary to the principle of pleading, as laid down by Lord Redesdale and Lord Eldon, to convert a bill properly filed to perpetuate testimony into a bill for discovery, in the technical sense in which the words are used by Lord Redesdale, and that if it be not so converted, and if it be treated as a bill of discovery only in the general sense of that term in which Lord Redesdale observes that "every bill is in reality a bill of discovery," then that the discovery sought is not material to the only order which can be obtained by the plaintiff in this suit, and that consequently the answer to these interrogatories, which cannot be read for any legitimate purpose, either

[1] 2 P. Wms. 161. [2] 6 B. P. C. 39. [3] 2 Ves. Sen. 496.

in this suit or in any other proceeding, is not material for the purpose of this suit, and cannot be required, and consequently that these exceptions must be disallowed with costs.

MAY 7.

The plaintiffs having filed a replication, the defendant now moved to stay all proceedings in this suit, with costs, to be paid by the plaintiffs.

The *Solicitor-General* (*Sir R. Palmer*), Mr. *Selwyn*, and Mr. *C. Swanston*, in support of the motion. The statement in the first bill, that no proceedings could be taken to try the question, prevented the defendants' demurring to it. Angell *v.* Angell. But the plaintiffs have since filed a second bill raising the same question, and which clearly shows that the first suit is unnecessary and useless. Though the defendants failed, in consequence of mere technicalities, from availing themselves of this objection by plea, those technicalities do not exist on this motion. The two suits which raise the same point ought not to be allowed to proceed, for if they do, the same witnesses will be examined twice over, while, if any special necessity exists for their immediate examination, it may take place *de bene esse* in the second suit. As this suit can never be brought to a hearing, the objection cannot, as in an ordinary case, be effectually taken by the answer, and it is, therefore, properly brought forward by motion. The proceedings in this suit ought therefore to be stayed.

As to the costs, the defendants, who have examined no witness on their own behalf, are clearly entitled to them. Blinkhorne *v.* Feast,[1] ——— *v.* Andrews.[2]

Mr. *Baggallay*, Mr. *Hobhouse*, and Mr. *Cotton* were not heard.

THE MASTER OF THE ROLLS. This case is very singular in its circumstances, but in addition, it seems destined to raise a number of peculiar points of pleading. This motion is, as I said during the argument, in substance the re-argument of the plea. This was not disputed; but it was said that upon this motion the defendants are relieved from the technicalities to which they were subject in regard to the plea. But it is necessary that some rules of pleading should be preserved; here is a bill for perpetuating testimony, it is not demurred to, but an answer is put in which admits the plaintiff's right to examine witnesses *in perpetuam rei memoriam*, and a plea to it is afterwards overruled. Is it open to the defendants, after they have admitted the plaintiff's title to what they ask by their bill, to come and say that, by reason of some other proceeding taken by the plaintiffs in another court, they are not entitled to what they ask, and that all the proceedings in this suit ought to be stayed? If the plaintiffs had filed their bill to perpetuate testimony, and it appeared upon the face of it that they could at once bring the matter before a court of law, and try the question, the bill would have been open to a demurrer. But if the defendant does not

[1] 1 Dick. 153. [2] Barnardiston (C. C.), 333.

think fit to demur, but answers the bill, can he afterwards come and stay the proceedings on the ground that this is a matter which may be at once tried at law? Would not this Court say, If you wish to avail yourself of this defence, you ought to have done so at the proper time by plea or demurrer? Does it make the thing more clear that a suit has since been instituted?

This, which is a distinct question of pleading, is, whether a defendant, who has admitted the title of the plaintiffs to this species of order, can afterwards say he was wrong in making the admission, and ask that all the proceedings might be stayed. How can I tell under what circumstances the other bill has been filed?

Take this case, which actually happened: a man who was tenant for life, with remainder to his first son in tail, married, first at Gretna Green, had a son born, and was afterwards married again at St. George's, Hanover Square. On his first son coming of age, he and his father cut off the entail and mortgaged the property to A B, who, finding that the eldest son was born before the second marriage, filed a bill to perpetuate testimony as to the Scotch marriage, and proceeded to examine his witnesses. Now, suppose this had happened; that when the eldest son had examined one-half his witnesses, the father had died, and that the second son claimed the estate, would not the eldest son have been allowed to proceed in the examination of his witnesses, or would the question be made more clear by the second son's bringing an ejectment to recover the estate? I apprehend that the Court would, in such a case, allow the examination of the witnesses to proceed.

In this case, on a former occasion, I gave directions for the examination in the Registrar's Office of every reported case relating to this subject, but in none of them can such a motion as the present be found. I do not say that this is conclusive, but such a case as I have stated must have arisen.

I am of opinion that this motion cannot be sustained.

The plaintiffs have brought a bill claiming a right to examine witnesses *in perpetuam rei memoriam;* that right has been admitted, and they are entitled to the order peculiar to suits of this nature. I cannot go into circumstances of the other suit, the objects of the two suits not being identical. I must, therefore, refuse this motion with costs.

MAY 8.

The *Solicitor-General* stated that it had been agreed that proceedings in this suit should be stayed, on terms which had been arranged between the parties.

EARL SPENCER *v.* PEEK.

BEFORE LORD ROMILLY, M.R., FEBRUARY 15, 1867.

[*Reported in Law Reports, 3 Equity Cases,* 415.]

THIS was a demurrer to a bill to perpetuate testimony.

The bill stated that the plaintiff was lord of the manor of Wimbledon; that a small portion of the hereditaments comprised in the manor was copyhold; that the wastes of the manor consisted of "an ancient common, called Wimbledon Common, Putney Heath, Roehampton Green, and divers other pieces or parcels of waste, comprising 1,000 acres or upwards;" that the lords of the manor had from time immemorial enjoyed and exercised the right, without the consent of any person or persons, of digging and taking away, and giving authority to dig and take away, any portions of the soil of the said common or other wastes, and of making bricks, pipes, or tiles, of the clay so dug, and selling the same; that the plaintiff, as such lord, had caused portions of the soil to be dug and taken away, and had caused bricks to be made on the common from clay dug thereout, and to be sold for his own benefit, but had not, by the exercise of any of his rights, prejudiced the common rights (if any) of the tenants of the manor in respect of the common or other wastes; that on Dec. 1, 1866, a bill was filed against the plaintiff by the defendant, suing on behalf of himself and all other the freehold and copyhold tenants of the manor, alleging that he was a tenant of the manor, and that until recently the soil of the common was only dug under the superintendence of officers appointed by the tenants at general courts baron, and praying for an injunction to restrain the plaintiff from using the soil of the common for making bricks, and for an account of the profits made by him from the sale of the soil and bricks; that the said suit of Peek *v.* Earl Spencer was still pending, and that the plaintiff had entered an appearance therein, and was preparing his answer, but that a considerable time must elapse before issue could be joined, and that a material portion of the plaintiff's evidence in support of his defence in that suit, consisting of the testimony of four aged persons named in the bill, who had lived all their lives in the neighborhood, and were the only persons now living capable of giving testimony as to some of the matters in litigation in Peek *v.* Earl Spencer, was in danger of being lost; and it charged that the plaintiff was entitled to have such testimony perpetuated, not merely with a view to supporting, in Peek *v.* Earl Spencer, his title in respect of the matters in litigation in that suit, but also for supporting the title of the plaintiff and his successors in respect of the same matters, if they should thereafter become the subject of litigation or judicial investigation between any of the tenants of the manor for the time being and the plaintiff or any of his succes-

sors in title; and it prayed that the plaintiff might be at liberty to examine the said four persons in respect of the matters and for the purposes aforesaid, and that their testimony might be perpetuated in order that the same might be used "as well in connection with the said suit of Peek *v.* Earl Spencer, as at all other proper times as occasion shall require."

No affidavit had been filed with the bill.

The defendant demurred on three grounds, viz.: 1st, Want of equity; 2nd, Uncertainty in the description of the wastes of the manor; 3rd, the omission to file an affidavit.

Mr. *Baggallay*, Q.C., and Mr. *E. R. Turner*, for the demurrer. First. A bill to perpetuate testimony is demurrable, unless it is expressly alleged, or appears from the statements in the bill, that the matter to which the testimony is alleged to relate cannot be made the subject of present judicial investigation. Mitford on Pleading;[1] Story, Eq. Pl.;[2] Angell *v.* Angell; Ellice *v.* Roupell. Again, a bill to examine witnesses *de bene esse* can only be filed in aid of proceedings at law, and since courts of law have had power to take such evidence, bills of the latter class have become obsolete. But this bill alleges that the matter to which the testimony it seeks to perpetuate relates is actually in litigation in this court. The plaintiff may obtain an order to examine these witnesses *de bene esse*, in the suit of Peek *v.* Earl Spencer, before putting in his answer: Bown *v.* Child;[3] and the evidence so taken would be just as available to him in any future litigation as if it had been taken in this suit. Moreover the plaintiff could at once institute a suit in the nature of a bill of peace against the tenants of the manor to establish his alleged right. Maddock's Chancery Practice;[4] Weeks *v.* Staker;[5] Arthington *v.* Fawkes;[6] Conyers *v.* Lord Abergavenny;[7] Lord Tenham *v.* Herbert.[8]

[The Master of the Rolls. There are many cases of such bills after actions have been brought against the lord; but could he file a bill *quia timet* until his right had been disputed?]

It is submitted that he could. This bill, however, alleges that the right has been disputed, and is the subject of a pending suit. It therefore appears upon the face of the bill that this suit is useless and unnecessary.

Second. The statement in the bill that the wastes of the manor consist of an ancient common called Wimbledon Common, Putney Heath, Roehampton Green, and "divers other pieces or parcels of wastes, comprising 1,000 acres or upwards," is not a sufficiently distinct statement of the right claimed by the plaintiff, in respect of which he seeks to perpetuate testimony; it would be impossible for the defendants to cross-examine the witnesses without knowing what are the "divers pieces or parcels of waste" to which the bill refers. On this

[1] Pages 52, 150.
[2] S. 303.
[3] 3 Sim. 457.
[4] Page 168, 2d ed.
[5] 2 Vern. 301.
[6] 2 Vern. 356.
[7] 1 Atk. 285.
[8] 2 Atk. 483.

ground, therefore, also, the bill is demurrable. Gell *v.* Hayward;[1] Cresset *v.* Mitton.[2]

Third. If this is to be treated as a bill to examine witnesses *de bene esse*, it is demurrable on the ground that no affidavit was filed with it. Mitford on Pleading;[3] Philips *v.* Carew.[4]

[THE MASTER OF THE ROLLS desired the plaintiff's counsel to confine their arguments to the first ground of demurrer.]

Mr. *Jessel*, Q.C., and Mr. *Holmes*, for the bill. This is a bill for two objects. 1st, To perpetuate testimony with a view to possible future litigation; and 2nd, To examine witnesses *de bene esse* with a view to the pending suit of Peek *v.* Earl Spencer.

Assuming that it is demurrable as to the second, still, if it is good as to the first, a general demurrer must be overruled. If the allegations as to the suit of Peek *v.* Earl Spencer were struck out of the bill, a sufficient case would be stated to support a bill to perpetuate testimony; but those allegations are inserted only to show that the defendant is a person who disputes the plaintiff's alleged rights.

[THE MASTER OF THE ROLLS referred to Frietas *v.* Dos Santos.[5]]

There the real object of the bill was to restrain an action as to a particular sum of money, and a general allegation of mutual accounts was held insufficient to support the bill. Here the bill shows a clear case for perpetuating testimony without reference to the suit of Peek *v.* Earl Spencer. It is no objection to a bill to perpetuate testimony that the defendant, or any other person except the plaintiff, can make the matter to which the testimony relates the subject of immediate judicial investigation. Unless the plaintiff is, or can make himself, *dominus litis* in a present suit, he has no means of preserving evidence. The present defendant may at any time dismiss his bill in Peek *v.* Earl Spencer, or he may die or become bankrupt, and the suit may not be revived; and in any of these cases the plaintiff will lose the benefit of this evidence. That the rule, as stated by Lord Redesdale,[6] is confined to the case of the plaintiff himself, having no present right of action or suit, is explained by Mr. Jeremy's note, and is clearly pointed out in Story's Eq. Pl.[7], where he adds to Lord Redesdale's statement these words: "Or if they can be so investigated, the sole right of action belongs exclusively to the other party." In Angell *v.* Angell, Sir John Leach says, "If the party who files the bill can by no means bring the matter in question into present judicial investigation . . . . then courts of equity will entertain such a suit; for otherwise the only testimony which could support the plaintiff's title might be lost by the death of the witnesses. Where he himself is in possession, the adverse party might purposely delay his claim with a view to that event." So here, if the plaintiff applied to examine these witnesses in the other suit, the present defendant might immediately dismiss his bill in that suit, and

[1] 1 Vern. 312. [2] 1 Ves. 449; 3 Bro. C. C. 481. [3] Page 150.
[4] 1 P. Wms. 117. [5] 1 Y. & J. 574. [6] Mit Pl. p. 52.
[7] Page 303.

file a new bill when they are dead. It may be said that if the defendant were to dismiss his bill, the plaintiff might file a bill to perpetuate testimony, but in the mean time the witnesses may die, and, therefore, the plaintiff is entitled to have their evidence taken now in a suit which cannot be stopped without his consent. Unless, then, the plaintiff can at once file a bill to establish his right, this bill, so far as it seeks to perpetuate testimony with a view to future litigation, is not demurrable. But a lord of a manor cannot file such a bill unless his right has been attacked either by actions at law or by some act entitling him to an injunction. In Weeks *v.* Staker[1] and Arthington *v.* Fawkes[2] injunctions were granted to restrain cutting timber or pulling down fences.

In Phillips *v.* Hudson,[3] all the authorities were searched, and no case could be found of a bill of peace by a lord of a manor in undisturbed possession.

But this bill may be supported, so far as it seeks to examine witnesses in support of the plaintiff's defence in Peek *v.* Earl Spencer. It does not follow that, because a defendant may obtain an order to examine them in that suit, he may not file a bill for the same purpose, just as a defendant may file a cross bill for the purpose of discovery, although he might obtain the discovery by interrogating the plaintiff.

Lord Romilly, M.R. I am of opinion that this demurrer must be allowed. The principle which is laid down in all the cases is, that if the matter to which the required testimony is alleged to relate can be immediately investigated in a court of law, and the witnesses are resident in England, a demurrer will hold. This is laid down by Lord Redesdale in many of the passages where he mentions those cases. It is contended that this can only apply where the plaintiff in a bill for the perpetuation of testimony can himself bring an action and have the matter tried; but I apprehend that to be a mistake, and that if the matter is in the course of investigation in a suit, that removes the exact objection. It is stated by Mr. Justice Story, laying down the same rule, that where a right of action lies in the defendant, although the matter might be investigated in a court of justice, still the bill would lie; and I assent to that view of the case. What Mr. Justice Story means is, that where the right is in the other party to bring an action against the plaintiff who files the bill to perpetuate testimony, he may maintain such a bill if no such action is brought. It is quite new to me, and I believe nobody will find such a case in the books, that where a person brings an action or files a bill against a defendant in respect of a matter to be tried, which the defendant might not have been able himself to have put in a course of litigation to get determined, that defendant can file a bill to perpetuate testimony as to the matters in litigation in that suit. I do not believe that any such bill can be found, and it would, in my opinion, be contrary to principle and precedent. It is obvious that if a person files a bill in this court against a

[1] 2 Vern 301. [2] 2 Vern. 356. [3] Law Rep. 2 Ch. 243.

person who is the owner of an estate, alleging that he is, by reason of certain circumstances, a trustee for the plaintiff, and asking that he shall be compelled to account and deliver it up, a bill by the defendant for the perpetuation of testimony would not lie. The passage in Sir John Leach's judgment in Angell *v.* Angell has been, in my opinion, misunderstood; he expressly points out that it is where an investigation is not about to take place in a court of justice that such a bill would lie. He says, "if it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, no such suit is entertained; but if the party who files the bill can by no means bring the matter in question into present judicial investigation (which may happen when his title is in remainder, or when he himself is in possession), there courts of equity will entertain such a suit; for otherwise the only testimony which could support the plaintiff's title might be lost by the deaths of his witnesses. Where he is himself in possession, the adverse party might purposely delay his claim with a view to that event." But if, instead of delaying his claim with a view to that event, he brings forward his claim immediately, then, as the question will be made the subject of immediate judicial investigation, and as a suit is instituted for that purpose, a bill to perpetuate testimony cannot be brought in aid of the defence to that suit: it can only be brought where the question is not about to be made the subject of judicial investigation. Mr. Jessel felt that this was the pinch of the case, and accordingly his argument rested upon this, that the plaintiff in the other suit may dismiss his bill at any moment.

Unquestionably he may, and if there is no bill pending, then the lord of the manor may file a bill for the perpetuation of testimony for the purpose of establishing his rights in the manor; but if the matter is about to be investigated in a pending suit, so long as that suit is in existence, his proper course is to apply in that suit for an order to examine witnesses *de bene esse*, and not to file a bill for the perpetuation of testimony. It would be a great oppression on the plaintiff in the first suit, if he were to be made a defendant in a suit for the perpetuation of testimony, as he would have to go through the expense of the whole of such a suit, the greater part of which might not be necessary. A case for the perpetuation of testimony is not confined to old and infirm witnesses, or to a single witness who alone can speak to the matter. In a case where you examine witnesses *de bene esse* it is so confined. In a case for the perpetuation of testimony you may examine everybody, and all the evidence is sealed up, and only brought out when occasion requires it, and if the witnesses are alive it cannot be used, and the evidence must be taken over again. If I were to allow this suit to continue, Earl Spencer might examine all the inhabitants of the town of Wimbledon and the neighborhood, whatever their ages, and the plaintiff in the suit of Peek *v.* Lord Spencer would be compelled to cross-examine them, and that evidence would be sealed up, and not one of the depositions could be used in case they should be

alive at the time the evidence is taken in the first suit. That is not the object of a bill to perpetuate testimony; such a bill is not to be used as a defence to an existing suit. This is a case in which the plaintiff might have obtained an order for the examination *de bene esse* of these old witnesses. As a bill for that purpose, I do not think that this bill can properly be sustained. The order ought to have been obtained by a proceeding in the other suit itself. I am therefore of opinion that this demurrer ought to be allowed, with costs.

CHAPTER II.

BILLS QUIA TIMET AND BILLS OF PEACE.

LORD BATH *v.* SHERWIN.

BEFORE COWPER, LORD KEEPER, TRINITY TERM, 1706.

[*Reported in Precedents in Chancery*, 261.]

A BILL was brought for a perpetual injunction to stay the defendant from bringing any more ejectments to try his title at law, suggesting that the plaintiff had five verdicts, and that it was an unreasonable vexation, &c.; therefore to put his title in perpetual peace was the end of the bill.

The Lord Keeper, after this had been fully debated, took time to consider of it, and now delivered his opinion, viz., that, to give the court an original jurisdiction, there ought to be a fraud, or a trust, or some accident fall out in the case, to prevent some great inconvenience, as between a lord of a manor and the tenants thereof, to settle the several rights, if, in case the right between the lord and the several tenants was to be settled in separate actions, the difficulty upon the lord would be insuperable, by reason of the multiplicity of suits at law; the like in settling boundaries, &c.: therefore this Court will interpose and direct an issue to be tried, and the conscience of the Court thereby informed and satisfied, this Court will then put the whole in peace by a perpetual injunction.

But this case, he said, was in its nature new, and did not fall under the general notion of a bill of peace; this being only between A and B, and one man is able to contend against another, and if the courts of law on new demises will not suffer the former verdicts to be pleaded, he could not help it: he said he was satisfied of the vexatiousness of the defendant in this case, but if it was a grievance, it was in the law, which was proper for another jurisdiction, viz., the parliament, to reform, and that it would be arrogance in him, by decrees or injunctions, to take upon him the reformation of the law.

SAME CASE ON APPEAL.

IN THE HOUSE OF LORDS, JANUARY 17, 1709.

[*Reported in* 4 *Brown's Cases in Parliament* (*Toml. ed.*) 373.]

GEORGE, Duke of Albemarle, was in his lifetime seised in fee of divers manors, lands, and hereditaments in the several counties of York, Lancaster, Lincoln, Middlesex, Essex, Hertford, and Berks; and in December, 1669, he settled the same, after his own death, to the use of his son Christopher for life; remainder to his first and other sons in tail male; remainder to his own right heirs.

On the 3d of January, 1669, Duke George died, whereupon Duke Christopher, his son, by virtue of the settlement, entered and enjoyed during his life, and died in 1687, without issue; after whose death, part of the estate reverted to the Crown, other part to one Thomas Pride, as grandson and heir of Thomas Monk, the elder brother of Duke George, who afterwards sold the same to John, Earl of Bath, the grandfather of the present appellant, the Earl; and as to the residue of the estate, Elizabeth, Duchess of Albemarle, the widow of Duke Christopher, who afterwards intermarried with Ralph, Duke of Mountague, was entitled to great part thereof during her life; and the appellants were severally entitled, under Duke Christopher, to most of the said real estate, part in possession, and the rest in reversion, expectant on the Duchess's death.

Several years after the death of Duke Christopher, a pretence was set up by Thomas Pride, that Ann, Duchess of Albemarle, Duke Christopher's mother, who had formerly been married to one Thomas Radford, was never married to Duke George; or, if she was, yet that her first husband was then alive, and was also living at the birth of Duke Christopher, on the 14th of August, 1653; and consequently that Duke Christopher was not the lawful issue or heir of Duke George, but that Pride, as the real heir-at-law of Duke George, was entitled to the whole estate.

On this title Pride caused an ejectment to be brought on his own demise for part of the estate, against the said John, Earl of Bath, Ralph, Duke of Mountague, and others; and this cause being tried at the bar of the Court of Queen's Bench on the 6th day of February, 1694, by a Hertfordshire jury, a verdict upon full evidence was given for the defendants.

After Pride's death, Thomas Pride, his son, upon the same title, caused another ejectment to be brought on his demise for other part of the estate, against the same parties; and upon the trial of this cause at the bar of the court by an Essex jury, on the 24th of April, 1696, a verdict was given again for the defendants upon full evidence.

Thomas Pride, the son, afterwards died, leaving three children, who

having all died without issue, Elizabeth, the late wife of the respondent Sherwin, became his heir-at-law; and thereupon she and her said husband, on the same pretence of title, caused an ejectment to be brought on their demise, for a different part of the estate, against Sir Walter Clarges and others; and this ejectment being also tried at the bar of the Court of King's Bench by a Yorkshire jury, on the 8th of May, 1700, a private verdict on full evidence was given for the then defendants, and Sherwin and his wife, being duly called, suffered a nonsuit. But notwithstanding this, they soon afterwards thought proper to bring another ejectment, on the same title, for the same lands, and against the same parties, and this being tried in the same manner on the 15th of November, 1700, a verdict was given for the defendants upon full evidence.

But Sherwin and his wife, still restless and uneasy, made use of various practices and contrivances to prevail upon the tenants of Sir Walter Clarges to attorn to them, and in part succeeded; whereupon Sir Walter Clarges caused an ejectment to be brought against Sherwin and his wife, and their tenants, as well on his own single demise as on the demise of the executors of Duke Christopher; and this cause being tried at the bar of the same court by a Yorkshire jury, on the 4th of May, 1703, a verdict was given for the plaintiff.

The single question upon all these trials was, whether Duke Christopher was the lawful son and heir of Duke George, or not? The jurors upon each of them were gentlemen of quality and character in the said several counties; and the judges who tried the causes took great time and pains in the trial, and expressed themselves well satisfied with the verdicts.

Notwithstanding the uniform event of these five trials, Sherwin and his wife caused other declarations in ejectment to be delivered for different parts of the estate, in the possession of the appellants; and they also took upon them to borrow money, and to grant several derivative interests in this estate to the several other respondents; whereupon the appellants, in Michaelmas Term, 1703, exhibited their bill in Chancery against the respondents, praying that all questions touching the legitimacy of Duke Christopher, or concerning his being the son and heir of Duke George, might be quieted and extinguished; and to that end, that a perpetual injunction might be awarded, to stay all further proceedings at law upon the said pretended title, and to prevent multiplicity of suits and endless vexations.

On the 28th of June, 1706, this cause was heard before the Lord Chancellor Cowper, when his Lordship was pleased to decree that the bill should stand dismissed, with costs.

But from this decree the plaintiffs appealed; and on their behalf it was insisted that a perpetual injunction ought to have been granted, upon the circumstances of the case, and because the matter and only point in question had undergone so many and such strict examinations, and had been so fully settled by no less than five trials at bar, all the

same way and in the most solemn manner possible. That such pretence of title ought the rather to be silenced, because Duke Christopher lived near twenty years after the death of his father; and during all that time enjoyed as well the paternal estate of the family as the honors of it, in the capacity of heir male of the body of Duke George, and could not have enjoyed the same, had he not been so: that neither Thomas Pride the father, or Thomas the son, or Elizabeth Sherwin, in all this period, ever set up or pretended to have any title to any part of the paternal or other estate; but, on the contrary, owned Duke Christopher to be (as he really was) the lawful son and heir of Duke George, and so he was also acknowledged by King Charles II., King James II., and King William; was received and sat as such in the House of Peers, and under that title was appointed lord lieutenant of several counties in England, and also generalissimo of the Western Plantations. That there seemed still a higher reason for a court of equity, after so many solemn trials, to interpose in this matter, since it was to silence an odious question touching the legitimacy of a noble person, started and prosecuted after his death; and, by the present method of proceedings in ejectment, the appellants, unless relievable in equity, would be liable to perpetual suits and vexations upon the same question. As to the objection that, the common law having fixed no bounds to the number of trials in ejectment, persons were at liberty to prosecute in that way as often as they pleased, and therefore a court of equity ought not to restrain their right, it was answered that the method of trying the title to inheritances by ejectment was of no very long standing, for the ancient way of trying such rights was in real actions, and there the wisdom of the common law had fixed proper limits to such prosecutions, for preventing vexatious and endless contests. And, as so great an inconvenience, and even abuse of the law was practised in this case, it was highly reasonable that a court of equity should interpose and obviate the mischief, by granting a perpetual injunction; after the right and the only matter in question had been tried so often, and fairly settled by so many solemn and concurring verdicts. That there were many precedents, where courts of equity granted perpetual injunctions for quieting inheritances after two trials, and where only one of those trials had been directed by such court; and it was conceived that the reason in this case was full as strong, where the respondents, by their own choice, had tried the single point in question by five several juries in three different counties.

On the other side it was contended that, where any person has a right of entry into lands, he may by law enter whenever and as often as he pleases, and, when in possession, may make a lease; and if the lessee be disturbed, an ejectment may be brought in his name. And this right the law had not thought fit to limit or restrain, but looked upon the party's bearing his own charges, and paying his adversary's costs, to be a proper penalty on the one, and a sufficient compensation to the other; so that upon these terms he might bring as many ejectments as

he pleased: and therefore to reverse the present decree would be directly to make a new law. That the title of the respondents was the title of an heir-at-law, who is the favorite of the law; but that of the appellants was at best but the title of a volunteer, and therefore not to be protected against the heir. That for some part of the estate no ejectment had yet been tried, and the respondents were in possession of other part of it, which the appellants could not recover without a trial; so that the question could not be considered as closed while, with respect to any part of the estate, it remained untried. And that the matter in question was purely a matter of fact, triable by a jury, without involving any one point proper to give a court of equity jurisdiction; nor was there any one precedent of such a decree as the appellants sought for in this case, where the question was singly a point of fact, between heirs at law on the one side, and persons claiming under a voluntary conveyance on the other.

But, after hearing counsel on this appeal, it was ordered and adjudged that the decree of dismission complained of should be reversed; and that the Court of Chancery should forthwith issue a perpetual injunction to stay the proceedings at law of the defendants in chancery, and all claiming under them, against the now appellants, and all claiming under them, upon the pretended title of the said defendants, grounded upon the alleged illegitimacy of Christopher, late Duke of Albermarle.[1]

MAYOR OF YORK *v.* PILKINGTON AND OTHERS.

BEFORE LORD HARDWICKE, C., DECEMBER 5, AND MARCH 13, 1737.

[*Reported in* 1 *Atkyns*, 282.]

A BILL was brought in this court, to quiet the plaintiffs in a right of fishery in the river Ouse, of which they claimed the sole fishery for a large tract, against the defendants, who, as it was suggested by the bill, claimed several rights, either as lords of manors, or occupiers of the adjacent lands, and also for a discovery and account of the fish they had taken.

The defendants demurred to the bill, as being a matter cognizable only at law.

THE LORD CHANCELLOR. Such a bill against so many several trespassers is improper before a trial at law; a bill may be brought against tenants by a lord of a manor for encroachments, &c., or by tenants against a lord of a manor as a disturber, to be quieted in the enjoyment of their common; and as in these cases there is one general right to be established against all, it is a proper bill, nor is it necessary all the commoners should be parties; so likewise a bill may be brought by a parson for tithes against parishioners, or by parishioners to establish a

modus, for there is a general right and privity between them, and consequently it is proper to institute a suit of this kind.

There is no privity at all in the case, but so many distinct trespassers in this separate fishery; besides, the defendants may claim a right of a different nature, some by prescription, others by particular grants, and an injunction here would not quiet the possession, for other persons, not parties to this bill, may likewise claim a right of fishing.

It is more necessary, too, in this case, there should be a trial at law, for it does not clearly appear whether there is a right even in the plaintiffs, and if it should eventually come out that the corporation of York are lords of this fishery, then would be the proper time to have an injunction to prevent their being disturbed in their possession. His Lordship therefore allowed the demurrer.

This demurrer was set down to be reargued on March 13, 1737, when, in support of it, it was urged, that though it is charged in the bill that this bill is to prevent multiplicity of suits, yet that was never allowed in this court, where the defendants have all different titles, and depend upon various matters and rights, and is not like the case of lords and tenants, or parsons and parishioners, nor properly under the rule of bills of peace, for no other party who has a title or right of the same nature could be bound by this bill: the plaintiffs say they have a prescriptive right; this being a public royal river, the defendants, being lords of manors, may have the same right, or for the same reason they cannot prescribe for that, unless for some consideration paid.

Mr. *Attorney-General*, *e contra*. The defendants never attempted to set up this exclusive privilege till now, but have always applied for leave to the plaintiffs; the defendants are owners of lands and lords of manors adjoining to this river, and it may properly be determined whether the plaintiffs have that sole and separate right of fishery, and that is incumbent on the plaintiffs to prove: such bills have been brought by the city of London for some certain duties, and though a great many particular rights have been insisted on, yet a general issue has been directed to try the right. In the case of *v.* Carter, 1734, a bill was brought by the lord of the manor of Stepney, for sixpence on every load of hay carried to Whitechapel; though the lord, housekeepers, and seavengers claimed each some right in the sixpence, yet one general issue was directed by Lord Talbot to try that question, and the demurrer in that case was overruled.

The Lord Chancellor. When this case was first argued, I was of opinion to allow the demurrer; but I have now changed my opinion.

Here are two causes of demurrer, one assigned originally, and one now at the bar, that this is not a proper bill, as it claims a sole right of fishery against five lords of manors, because they ought to be considered as distinct trespassers, and that there is no general right that can be established against them, nor any privity between the plaintiffs and them.

In this respect it does differ from cases that have been cited of lords

and tenants, parsons and parishioners, where there is one general right, and a privity between the parties. But there are cases where bills of peace have been brought, though there has been a general right claimed by the plaintiff, and yet no privity between the plaintiffs and defendants, nor any general right on the part of the defendants, and where many more might be concerned than those brought before the Court: such are bills for duties, as in the case of the city of London *v.* Perkins[1] in the House of Lords, where the city of London brought only a few persons before the Court, who dealt in those things whereof the duty was claimed, to establish a right to it, and yet all the king's subjects may be concerned in this right; but because a great number of actions may be brought, the Court suffers such bills, though the defendants might make distinct defences, and though there was no privity between them and the city.

I think, therefore, this bill is proper, and the more so because it appears there are no other persons but the defendants who set up any claim against the plaintiffs, and it is no objection that they have separate defences; but the question is, whether the plaintiffs have a general right to the sole fishery, which extends to all the defendants; for notwithstanding the general right is tried and established, the defendants may take advantage of their several exemptions, or distinct rights.

Another cause of demurrer is, that the plaintiffs have not established their title at law, and have therefore brought their bill improperly to be quieted in possession. Now it is a general rule that a man shall not come into a court of equity to establish a legal right, unless he has tried his title at law, if he can; but this is not so general an objection as always to prevail, for there have been variety of cases both ways.

There are two cases reported together in Prec. in Ch. 530, Bush *v.* Western, and the Duke of Dorset *v.* Serjeant Girdler; in the former it was held that a man who has been in possession of a watercourse sixty years, may bring a bill to be quieted in his possession, although he had not established his right at law; in the latter, that a man who is in possession of a fishery may bring a bill to examine his witnesses *in perpetuam rei memoriam*, and establish his right, though he has not recovered in affirmance of it at law; otherwise, if he is interrupted and dispossessed, for then he had his remedy at law.

In the present case the demurrer was overruled.

[1] 3 Bro. P. C. (Toml. ed.) 602.

LORD TENHAM *v.* HERBERT.

BEFORE LORD HARDWICKE, C., DECEMBER 17, 1742.

[*Reported in* 2 *Atkyns*, 483.]

THE plaintiff brought his bill, in order to establish his right to an oyster fishery, and to be quieted in the possession of it, against the defendant Herbert, who claims the piece of ground where this fishery is, as belonging to his manor.

The defendant demurred to this bill, as it is a matter properly triable at law.

THE LORD CHANCELLOR. Undoubtedly there are some cases in which a man may, by a bill of this kind, come into this court first; and there are others where he ought first to establish his right at law.

It is certain, where a man sets up a general exclusive right, and where the persons who controvert it with him are very numerous, and he cannot, by one or two actions at law, quiet that right, he may come into this court first, which is called a bill of peace, and the Court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant.

As to the case of the Corporation of York and Sir Lionel Pilkington, the plaintiffs there were in possession of the right of fishing upon the river Ouse, for nine miles together, and had constantly exercised that right; and as this large jurisdiction entangled them with different lords of manors, it would have been endless for the corporation to have brought actions at law.

But where a question about a right of fishery is only between two lords of manors, neither of them can come into this court till the right is first tried at law.

Lord Tenham does not charge, in this case, any possession for the last thirty-eight years, so that this is in the nature of an ejectment bill: the plaintiff says that this piece of ground *aquâ cooperta* belongs to him; Mr. Herbert insists it belongs to him; so that this may very properly be determined at law, as it is a mere single question, to try the right between two persons; and it is not like the case of the Corporation of York, who must have gone all round the compass to have come at their right at law.

Therefore the demurrer must be allowed.

DILLY *v.* DOIG.

BEFORE LORD LOUGHBOROUGH, C., NOVEMBER 19, 20, 1794.

[*Reported in* 2 *Vesey, Junior,* 486.]

THE plaintiff was proprietor of an improved edition of Entick's Dictionary, and had obtained an injunction to restrain the defendant from selling a spurious edition printed at Edinburgh.

Mr. *Thompson* moved, upon notice, for leave to amend the bill, by making another bookseller, who had procured several copies of the spurious edition from Edinburgh, with a view to sale, a party, without prejudice to the injunction. He said the bill only sought to establish one general right; and cited Mayor of York *v.* Pilkington, 1 Atk. 282.

THE LORD CHANCELLOR. The mode proposed would be more inconvenient than separate bills. The right against the different booksellers is not joint, but perfectly distinct: there is no privity. If the defendant against whom you had got the injunction had transferred his books to another, I would have followed it. In the case cited, the bill was to prevent multiplicity of suits; one general right was liable to invasion by all the world: so a bill to establish the custom of a mill: they stand upon a distinct ground. I do not remember any case upon patent rights in which a number of people have been brought before the Court as parties, acting all separately upon distinct grounds: it has always been against a particular defendant. In a case here not long ago, upon Bolton and Watt's patent, there were several bills.

The motion was refused.

SIMPSON *v.* LORD HOWDEN.

BEFORE LORD COTTENHAM, C., AUGUST 30, 1837.

[*Reported in* 3 *Mylne & Craig,* 97.]

THE LORD CHANCELLOR. This was an appeal from an order of the Master of the Rolls, overruling a demurrer; the case, therefore, must depend altogether upon the statements in the bill. The bill states the formation of a company, in the year 1835, for the purpose of making a railway, to be called "The York and North Midland Railway Company," to which the plaintiffs were subscribers; that the proposed railway, as described in the plans deposited according to the regulations of parliament, passed through part of the defendant's lands; that afterwards, and when it was too late to alter the line, the defendant expressed his dissent, and subsequently petitioned the House of Commons against the bill; and that thereupon an agreement was entered into between the

defendant and the plaintiffs, in their individual capacity, dated the 4th of May, 1836, whereby they agreed, in consideration of his assenting to the bill, that they would endeavor, in the next session, to obtain an act to deviate the proposed line, and to adopt another line; and, within six months after the passing of the act, pay him 5,000*l.* towards compensation for damage by the deviated line; and if they should not succeed, in the following session, in getting an act for the deviated line, then to pay so much more, for additional compensation for the original line, as certain referees should award; and should pay 100*l.* per acre for all land taken for the purposes of the railway. The bill then states that the act passed, and that it was provided that the powers of taking land for the purposes of the act should cease, if not exercised within two years. It then states that, after the passing of the bill, and before the company had taken any part of Lord Howden's land, a new and better line was suggested to them, avoiding all Lord Howden's land; and that they had presented a petition to Parliament, to enable them to adopt this amended line. The bill then alleges that the agreement was against public policy and illegal, and that it was not intended that the 5,000*l.* should be paid unless some damage was sustained; but that Lord Howden, nevertheless, had brought an action for the 5,000*l.*; and prays that the agreement may be cancelled, or that it may be declared that the 5000*l.* was not payable unless the land were taken; and for an injunction to restrain Lord Howden from proceeding in the action.

To this bill a general demurrer was put in; and in support of it the argument was, first, that the contract was not void, as being illegal or against public policy, and that there was therefore no ground for interfering with the obligation imposed by it; or, secondly, if it be impeachable, yet, as the grounds of objection to it appear upon the face of the contract itself, and might therefore be taken advantage of at law, equity ought not to interfere.

The Master of the Rolls, as I am informed, decided the case, and overruled the demurrer, upon the first point, not particularly alluding to the second.[1] . . .

The second objection to the bill is, that the illegality, if any, appearing on the face of the contract, is cognizable at law, and that equity, therefore, ought not to interfere. This must depend upon authority; it being alleged, for the defendant, that there was no instance of a court of equity having entertained jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality which appeared upon the face of it; and in which case, therefore, there was no danger that the lapse of time might deprive the party to be charged upon it of the means of defence.

In Colman *v.* Sarrel,[2] a case is referred to, in the argument, as having been then recently decided by Lord Thurlow, in which he is stated to have held that, where an instrument cannot be proceeded upon at

[1] So much of the judgment as relates to the first point has been omitted. — Ed.

[2] 1 Ves. Jr. 50

law, there is no ground to come into equity for relief; and in the case of Colman *v.* Sarrel itself, his lordship dismissed the original bill, seeking to have a deed delivered up, although, upon a cross-bill seeking a performance of its provisions, he gave the parties an opportunity of trying the question of illegal consideration at law. In Franco *v.* Bolton,[1] Lord Thurlow allowed a demurrer to a bill to set aside a bond, alleged to have been given *pro turpi causâ*, after a verdict for the obligee, although the illegality of the consideration did not appear upon the face of the bond. In Gray *v.* Mathias,[2] a bill was filed to set aside a bond which appeared, upon the face of it, to have been given *pro turpi causâ*. The question of jurisdiction upon that ground was argued; and Chief-Baron Macdonald, with the assent of the three other Barons, dismissed the bill with costs, not professing to decide upon the question of jurisdiction, but, what amounts to the same thing, that in such a case a court of equity ought not to interfere; stating that the plaintiff himself alleged that the instrument was a piece of waste paper, and was good for nothing, upon the face of it; that, whenever it was produced, it would appear to be good for nothing, the plaintiff himself alleging that he had an irrefragable defence against it. This is a very distinct authority against the jurisdiction contended for by the plaintiffs. The cases upon the Annuity Acts, Byne *v.* Vivian,[3] Byne *v.* Potter,[4] and Bromley *v.* Holland,[5] all in the fifth volume of Vesey, and the latter case reported upon appeal, in the seventh volume of Vesey,[6] do not appear to me to be applicable to the present case; for in none of them did the circumstance which created the invalidity of the transaction appear upon the face of the deeds, and in none of them were the objections confined to defects in the memorial, but depended upon evidence *dehors*, such as the mode of paying the consideration, of which the evidence might at a future time be lost. In the latter of these cases, Bromley *v.* Holland, Lord Alvanley expressed great doubt as to the jurisdiction, but thought himself bound by the prior decision of Byne *v.* Vivian. When the same case came before Lord Eldon,[7] he expressed a similar opinion as to the jurisdiction, but supported it, in that case, upon the preceding authorities, and by suggesting[8] that, by destroying the deed and giving evidence of its contents, the variance between the deed and the memorial might no longer appear. He also refers the jurisdiction to deliver up bills and notes to a similar ground, viz. that the evidence might be lost; and observes,[9] "There is considerable difference between the case of a bill of exchange upon which, on the face of it, there can be no demand, and an instrument which, upon the face of it, purports to affect real property; and that is to be applied in some measure to the case of a bill without a stamp;" and he again says, "I do not go the length that, if it is clear that no use can be made of the instrument, that is ground enough for the equitable jurisdiction to take it out

[1] 3 Ves. 368.
[2] 5 Ves. 286.
[3] 5 Ves 604.
[4] 5 Ves. 609.
[5] Ibid. 610.
[6] Page 3.
[7] See 7 Ves. 16.
[8] Page 20.
[9] Page 21.

of the possession of the party who can make no use of it beneficial to himself."[1] In Jervis v. White,[2] upon a motion by one partner to have a bill delivered up which had been accepted by the other partner in the name of the partnership, there are some observations of Lord Eldon which have been supposed to favor the jurisdiction contended for; but they must be taken with reference to the subject he was discussing, and the circumstances of the case, which, as stated in the sixth volume of Vesey,[3] exhibit a case of gross fraud in the formation of the partnership, and, therefore, in the origin of the legal obligation against which protection was sought by the bill. In that case, there could be no doubt, upon that statement, as to the jurisdiction of this Court. So, in Ware v. Horwood,[4] the facts, as stated in the tenth volume of Vesey,[5] amounted to gross fraud in the origin of the transaction.

Of the general jurisdiction of this Court, therefore, there could be no doubt; and Lord Eldon, in adverting to the general question of jurisdiction, is so far from asserting it as was contended for by the plaintiffs, that he refers it to cases in which the legal question arises incidentally, or in which "the variety and multiplicity of the suits that might be brought at law and in equity furnish some principle in equity, of which the Court will take advantage for the purpose of deciding, once for all, whether the securities be valid or not."[6] In Hayward v. Dimsdale,[7] the deed was impeached upon the ground of oppression, and because it was executed in contemplation of bankruptcy, and that the sum stated in it was not what was supposed to be due, but a sum supposed to be fully equal to the debt, and therefore inserted as a security. No illegality appeared upon the face of the deed, and many of the grounds upon which it was impeached were purely equitable. The demurrer, therefore, was necessarily bad, and the case has no application to the present. It is to be observed, as to one class of cases generally referred to upon this subject, viz., bills to set aside annuities, that they not only depend upon facts not appearing upon the face of the instrument, but that, except in those cases in which the statute gives authority to set aside the instrument, law affords a very inadequate remedy; for, first, the annuitant may repeat his action as often as the annuity becomes payable, and if the invalidity of the annuity be fully established, still the consideration money would remain in hands which ought not to retain it; and by the mode in which courts of equity deal with the payments on account of the annuity as against the consideration paid for it, an account is raised which a court of equity alone can properly take. It is not a mere declaration of the illegality of the instrument, but it involves the duty of restoring the parties, as nearly as possible, to their original situation, which a court of equity alone can effect. So the cases upon policies of insurance always represent transactions which, if true, would afford a defence to an action, yet, as proceeding

[1] See page 22. [2] 7 Ves. 413. [3] Page 738.
[4] 14 Ves. 28; see pp. 32, 33. [5] Page 209.
[6] 14 Ves. 33. [7] 17 Ves. 111.

from misrepresentation or fraudulent suppression, clearly give jurisdiction to courts of equity; and, in these cases also, the return of the premium would be to be arranged, if such cases were ever brought to a hearing, of which, however, there are very few precedents. In Jackman *v.* Mitchell,[1] Sir S. Romilly stated that there was no case of a decree for delivering up a bond appearing upon the face of it to be void, and referred to the case of Ryan *v.* Mackmath.[2] Lord Eldon did not controvert that proposition, but said that the proposition did not arise, the instrument not being bad upon the face of it, but bad only as it might be proved to be so *aliunde*. In Harrington *v.* Du Chastel, referred to by Lord Eldon in Bromley *v.* Holland,[3] and reported in a note in the second volume of Mr. Swanston's Reports,[4] the illegality did not appear upon the face of the bond, and the corrupt contract was not between the obligor and obligee; and, upon the motion for the injunction, the Lord Chancellor expressed doubts whether a court of law could relieve. In Law *v.* Law,[5] the Lord Chancellor says, "It is agreed on all hands that this bond is good at law; wherefore the representative of the obligor is obliged to come hither for relief."

If, then, there be no case in which this jurisdiction has been exercised, and if I find Lord Thurlow, in the case referred to in Colman *v.* Sarrel, and the Court of Exchequer in Gray *v.* Mathias, deciding against it; Lord Alvanley, in Bromley *v.* Holland, regretting that the jurisdiction had been assumed in the cases of annuities; and Lord Eldon, in the same case directly, and in Ware *v.* Horwood inferentially, disclaiming the jurisdiction contended for; it only remains to be considered whether any such cogent reason exists in the present case, as to make it my duty to assume the jurisdiction, and so, for the first time, to establish a precedent for it.

Now, I find no fact stated in this bill impeaching the legality of the instrument, beyond what appears upon the face of the instrument. If there should be a decree for the plaintiffs, it would be merely to deliver it up, — no consequential relief, no account to be taken, no provision for restoring the parties to their original position. Whether the defendant proceed in the action he has brought, or bring another, the same questions must be raised and decided at law as are raised in the bill. Why should a court of equity, in this case, assume to itself the decision of a mere legal question, contrary to its usual practice? Would it do so if a bill were filed to have a note or bill delivered up drawn upon unstamped paper, or upon a wrong stamp? But what would be the consequence of retaining such a bill? Unless an injunction were granted, the action would proceed. If the plaintiff at law were to recover, it can hardly be supposed that this Court would restrain execution, upon its own opinion of a point of law, after a court of law had decided it in favor of the demand. That a party has not effectually availed himself of a defence at law, or that a court of law has errone-

[1] 15 Ves. 581; see p. 585. [2] 3 Bro. C. C. 15. [3] 7 Ves. 3; see p. 19.
[4] Page 158, n. [5] Cas. t. Talbot, 140.

ously decided a point of pure law, is no ground for equitable interference; and if the defendants at law obtain a verdict, and the illegality of the instrument be thereby established, the whole object of the plaintiffs in equity will be obtained. Is it, then, a case in which a court of equity will, by injunction, restrain further proceedings in the action, and take to itself the exclusive jurisdiction over this legal question? I apprehend not; for not only will the Court wish, in some way, to obtain the opinion of a court of law upon a purely legal question, but, by permitting the action to proceed, it will afford to the parties the most speedy, cheap, and satisfactory means of deciding the question between them.

As to the point raised by the bill, whether, in the events which have happened, the plaintiffs in equity are liable to pay the 5,000*l.*, it is purely a question of construction, which may be dealt with at law quite as well as in equity, and which, therefore, cannot affect the question of jurisdiction.

In the absence, therefore, of any decision in favor of the jurisdiction contended for by the plaintiffs, and with the authorities against it to which I have referred, and seeing no benefit which can arise, in this or any other such case, from this Court assuming the jurisdiction, I am of opinion that the demurrer ought to be allowed.

FOXWELL *v.* WEBSTER,

AND

FOXWELL *v.* OTHER DEFENDANTS.

BEFORE KINDERSLEY, V. C., NOVEMBER 19 AND 20, 1863.

[*Reported in* 2 *Drewry & Smale*, 250.]

IN this case Foxwell was the assignee of a patent granted to Judkins for sewing and stitching machines, and he had filed 134 bills against Webster and other defendants, to restrain infringement of his patent.

Four motions were now made by four groups of defendants, amounting in the whole to seventy-seven. The notices of motion differed in some slight particulars, but the substance of them all was nearly the same, that the suits should be consolidated in this sense; viz., that either one suit to be selected by the plaintiff should be prosecuted, and proceedings in the others stayed until the determination of that one suit, or until the validity of the patent should be established in it; or that issues in a suit by Foxwell against one or more of the defendants should be tried as to the validity of the patent (the common case of all the defendants being that the patent was bad, though each denied infringement if the patent was good); that in the mean time the other suits should be stayed, or that in the mean time at least the time for answer-

ing should be enlarged till the determination of the model suit. All the defendants appearing were willing to be bound by the decision in the model suit as to the validity of the patent; but each reserved to himself his defence on the ground of non-infringement.

It should be observed that the machines alleged to be infringements were somewhat numerous; but that all the defendants present — and it was said all the absent defendants — used some one or more of these machines, each of which was alleged to be more or less different from Judkins's, so that the defendants were capable of being grouped, though it did not appear in what number of groups, even as to infringement.

Mr. *Rolt*, Mr. *Kay*, and Mr. *Bagshawe* appeared for nineteen defendants.

Mr. *Osborne* and Mr. *F. Waller*, for another group.

Mr. *Freeling*, for another group.

Mr. *C. Roupell*, for another group.

The substance of the arguments was as follows: —

Where you have a general exclusive right alleged to be vested in the plaintiff, and a general denial of that right by numerous defendants, the Court will say that the validity of the right shall be determined once for all against all the defendants, before trying the fact, as against each defendant, whether each defendant has infringed the right; for if the right cannot be supported, there is an end to the question of infringement. The Court will even exercise this right in a single suit, and instances are frequent where, on a motion for an injunction or receiver, the Court has directed preliminary proceedings at law to try the validity of the right before proceeding further. *A fortiori* will it do so where there are a great many suits, in all of which the defendants challenge the right. At law, where there is a case of this kind, a plaintiff claiming one right in separate actions against a great number of defendants, consolidation is of course, and pending the decision of the consolidated action, all the others are stayed. These suits are oppressive; their object is to crush a whole trade. The plaintiff ought to have followed the usual course of trying his case against one or two defendants, and those suits would have probably settled the question in most of the other suits; such wholesale litigation is an oppression, too, upon the public; if these suits are all to go on, this Court will have nothing to do for the next two years but to try Judkins's patent. It will be said on the other side that the plaintiff has a right to discovery; but he has no such right if his patent is invalid; and under cover of his *primâ facie* title he is asking 134 separate manufacturers or users to divulge to him the secrets of their trade. The defendants offered to be put on terms to let the plaintiff have inspection of the machines used by them, or to file affidavits stating the nature of such machines.

The following authorities were cited: Kent *v.* Burgess,[1] Fullagar *v.* Clark,[2] Bacon *v.* Jones,[3] Lord Tenham *v.* Herbert,[4] Mayor of York *v.*

[1] 11 Sim. 361.
[2] 18 Ves. 481.
[3] 4 Myl. & Cr. 433.
[4] 2 Atk. 483.

Pilkington,[1] Chitty's Practice,[2] Mayer *v.* Spence,[3] De la Rue *v.* Dickinson,[4] Scomburne *v.* Wilson,[5] Damer *v.* Portarlington.[6]

Mr. *Glasse*, Mr. *Locock Webb*, and Mr. *T. Aston* (of the common law bar), for the plaintiff, were not heard.

The Vice-Chancellor. There are four motions before me, made in this state of things: the plaintiff is, or alleges himself to be, the proprietor of a patent for sewing-machines. The defendants in the different suits are 134 in number, and the plaintiff alleges them to have separately infringed his patent; and it is apparent that these are motions in which a great number of persons are combining together to resist the plaintiff's claim.

Now this is the position of the patentee: if he were to attempt to bring together in any one suit any number, even more than one defendant, and any one defendant were to object that he ought not to be mixed up with the others, the objection would be successful; for a patentee has no right to join as defendants any number of persons infringing; not even two.

Now here the plaintiff has filed 134 bills against 134 different persons, who he alleges are infringing; and it is said, how can it be necessary to file so many bills? Why does not the plaintiff proceed against some one infringing, and see the result before filing any more bills? I have no doubt the plaintiff would be very glad if he could take that course safely; for the filing of each bill must be a considerable expense to him. But it is a settled rule of this Court that if a person wishes to obtain an injunction he must not sleep upon his right, he must come to the Court speedily; and if in this case the plaintiff had proceeded against one or more of the persons alleged to be infringing, and abstained from filing bills against the others, his remedy by injunction as against them would have been prejudiced. It would be in vain for him to say he was waiting the result of a trial against some others. Each one would have a right to say, "I have nothing to do with any other infringer; you charge me with a wrong; you ought to have come with your charge at once." Therefore, assuming the patent to be valid, the patentee must, in order to preserve all his rights, proceed without delay against every separate infringer.

Then it is argued that the course taken is oppressive. Against whom is it oppressive? how is any one defendant oppressed because others are also attacked? If it be meant that there is an association of defendants who have made a common fund against the plaintiff, and that association will be put in a worse position, that is certainly a circumstance that I cannot look at. Well, then, it is further said that the course taken is oppressive against the public, if 134 suits are to be allowed to go on by the same plaintiff claiming in the same right. And I agree that in the abstract the Court would endeavor to have the whole consolidated, so as to have but one or two trials; but then it can only do

[1] 1 Atk. 282. [2] Page 1347 (11th ed.). [3] 1 John. & H. 87.
[4] 3 K. & J. 388. [5] 3 K. & J. 390. [6] 2 Phil. 30.

so consistently with what is just to the plaintiff. It cannot do so at the expense of his clear rights.

Now, what is asked by the motions in these four cases? What is asked is in substance to stop all the suits till one of them is disposed of, or, in the alternative, to stop them until at least the validity of the patent is determined in one suit, or until further order; and that in the mean time the proceedings in the other suits may be stayed, or that the time for answering in the other suits may be enlarged; the defendants in the other suits undertaking to be bound so far as concerns the decision of the validity of the patent; but not undertaking to be bound as regards the question of infringement. Now let us see how far the defendants are entitled to what they ask.

There are before me seventy-seven suits, leaving fifty-seven still untouched. It is contended that I ought now to direct an issue or issues to be tried before me for determining in the first instance the validity of the patent. The notice of motion does not in terms ask that, but I will assume that not to be material. Cases are cited to show that, if justice requires it, the Court will direct as a preliminary the trial of some question, which, if decided against the plaintiff, leaves him no *locus standi* for further relief. And no doubt the Court has, upon motions for an injunction or a receiver, where it has seen that it was necessary, directed an issue to try the preliminary question; and it will do that where there is a single suit. But here it is contended that, because there is a great number of suits, the defendants may on their motion ask that, until the decision of the preliminary question, they shall not be troubled with those suits. Now, I am not going to determine that, under given circumstances, the defendants might not be entitled to that. I will assume that such circumstances may exist. But what is asked here is not merely that, it is asked that in the meantime the defendants shall not be obliged to answer. Now here there are in each case questions between the plaintiff and each defendant: first, questions going to the validity of the patent, and a question whether each defendant has infringed. It is urged that if the patent is bad it is immaterial whether any defendant has infringed it. The plaintiff says, on the other hand, "I do not object to a stay of proceedings at the proper time; I do not want to go on with all the suits at once; but I want your answers before any thing else is done; either admit infringement, or let me know by your answers what you have done and what you are doing, so that, if I succeed in establishing my patent, I may have at the hearing such a decree as your answers may entitle me to." The plaintiff has, I think, a right to assume that the answers will be such as to entitle him to a decree against each defendant.

It is quite true that there may be cases upon exceptions, where the Court will say, if the defendant has answered as to that which is material as the foundation of the suit, he shall not be obliged to go into details. But here what is asked is, not to put in even that species of limited answer, but not to put in any answer at all, sufficient or insuf-

ficient; and certainly that could not be allowed if it were the case of a single suit. But then it is said that because there are 134 suits it is different. How is it different? Has not the plaintiff, as against each defendant, a right to know what are the machines he uses; what is their structure, &c.? No one defendant is required to put in 134 answers, or to answer as to any thing except what he separately has done. The fact that there are 134 suits does not affect the duty of each defendant to answer the interrogatories addressed to him, and which will or may give the plaintiff the benefit of a decree. Then, as to the action that has been tried,[1] I will assume that there has been no decision in favor of the plaintiff. I will assume that he will get no equitable relief till he has established his legal right; on that assumption the conclusion to which I come is this: that according to the abstract proposition, that the Court will, where there is the case of a single individual, taking proceedings at law or in equity against a great number of persons infringing the same right, do all it can in the way of consolidation, to avoid multiplicity of suits, it will do so only so far as is consistent with justice to both parties.

The object of these motions is to do that which may be in the abstract reasonable, but which is to deprive the plaintiff of his right to discovery. The mistake made in these motions is, that this is not the state of the cause for them. The defendants have come too soon. I must dismiss the motions, but in dismissing them I mean the order to be without prejudice to any application after answer, with a view to regulate the course of these numerous proceedings.[2]

SHEFFIELD WATERWORKS *v.* YEOMANS.

Before Lord Chelmsford, C., November 8 and 9, 1866.

[*Reported in Law Reports, 2 Chancery Appeals,* 8.]

The bill in this case was filed against John Yeomans and five defendants on behalf of themselves and all other the persons named in any of certain pretended certificates, and stated, that in March, 1864, a reservoir belonging to the Company of Proprietors of the Sheffield Waterworks, the plaintiffs in this case, burst, and occasioned an inundation, whereby many persons lost their lives, and the property of

[1] An action, which had been settled without any final decision, was referred to in the arguments.

[2] These motions were carried by appeal to the Lord Chancellor, and by consent of the parties, at his Lordship's suggestion, an issue between Foxwell and one defendant representing the seventy-six others, and some more who (by leave) came in under his Lordship's order, was directed to be tried as to the validity of the patent. [4 De G. J. & S. 77. — Ed.]

very numerous persons was damaged. That, by the Sheffield Water Works Act, 1864, commissioners were appointed who were to inquire into the damages occasioned by the inundation, and any person claiming damages under the Act was directed to lodge a statement of his claim at the office of the commissioners. Where, on any claim, damages were assented to by the company, or assessed by the commissioners, the costs of the claimants were to be borne and paid by the company, and the commissioners were to certify accordingly. All such costs were to be payable by the company at the expiration of six months after the making of the commissioners' general certificate, but were, in case of difference, to be taxed and settled on production of a certificate of the commissioners by a Master of a superior court of law at Westminster. If any costs payable under the Act were not paid within twenty-eight days after demand in writing, the certificate of the commissioners respecting such costs should have the effect, as against the company, of a judgment recovered for the amount of such costs. That the claimants for compensation under the Act were 7,315 in number, and many of them were poor and ignorant, and employed improper persons to represent them; and the commissioners, therefore, made a regulation that no certificate should be issued except to the claimant in person. That there was a difference of opinion between the commissioners as to whether the powers of the commissioners had not expired, and 1,500 certificates, which the plaintiffs alleged to be invalid, were delivered by some of the commissioners to the defendant, John Yeomans, the town clerk of Sheffield. That, unless the Court interfered, the defendant, John Yeomans, and other persons by his permission, would produce these invalid certificates and have them taxed, whereupon judgment would be issued, and such proceedings would seriously prejudice the plaintiffs, by compelling them to defend themselves on very numerous improper taxations, occasioning them very large costs and expenses. That the question whether these certificates were valid or invalid was the same as to all of them, and that the persons named therein were too numerous to be made defendants, but were properly represented by five of them, who were named as defendants.

And the bill prayed that the defendant, John Yeomans, might be restrained from delivering these certificates except as the Court should direct, and that the defendants and all other persons named in any of these certificates might be restrained from having them taxed, or procuring any taxation or judgment against the plaintiffs, and that all these certificates might be delivered up to be cancelled, and, if necessary, that it might be declared that the same were invalid.

To this bill the defendants, except Yeomans, demurred, and the Vice-Chancellor Kindersley overruled the demurrer.[1]

[1] March 7. Vice-Chancellor Kindersley said: There were in this case a number of persons, each alleging that he was entitled, as against the company, to be paid a certain sum to be ascertained in respect of costs. Each claim was founded on the

The five demurring defendants appealed.

Mr. *Baily*, Q.C., and Mr. *Rodwell*, for the demurrer, contended that the certificates were valid, and the rights of the claimants to costs were made absolute by the Act. The court of law would be able to decide the questions. Re Wraithby.[1]

Mr. *Glasse*, Q.C., and Mr. *Bagshawe*, for the bill, cited Story's Equity Jurisprudence.[2]

Mr. *Lindley*, for the defendant Mr. Yeomans.

Mr. *Baily*, in reply.

Lord Chelmsford, L.C. The Vice-Chancellor appears to have decided this case against the defendants on two grounds: First, That the bill was a bill of peace, and therefore proper in its form and character; Secondly, That the point raised by the demurrer depended upon questions of fact which had to be proved, and that ought therefore to be reserved for the hearing. His Honor accordingly overruled the demurrer, reserving to the defendants the benefit of it at the hearing, and reserving till the hearing the costs of the demurrer.

Perhaps, strictly speaking, this is not a bill of peace, as the rights of the claimants under the alleged certificates are not identical; but it appears to me to be within the principle of bills of this description. The rights of the numerous claimants for costs all depend upon the same question, — the validity of certificates sealed under the circumstances stated in the bill. Each of the 1,500 persons, if he obtained the certificate from Mr. Yeomans, might produce it to a Master of one of the superior courts of common law, and obtain, as a matter of course, a taxation of the costs. He might then enter up judgment and sue out execution, and no application could be made in any of the common-law

same state of circumstances, and what would be successful in one case would be so in all. Each insisted that he was entitled to have out of the custody of the town clerk these documents, in order to adopt the process under the Act to recover the costs — that is, to go to the taxing-master, and get judgment entered up, and issue execution. It was, therefore, the case of one body against a number of separate individuals, each claiming as against the one body a certain right, the right being the same in all, and the same reasons and arguments applying to all. Now the question was, whether this was not precisely a case for a bill of peace, *quoad* the form and nature of the bill. Where there were a number of persons claiming as against one, or one person against a number, and where all were claiming alike, that was a case for a bill of peace; and this came within the true object of such a bill. The bill sought to restrain the issuing of the documents pending the question, and so far the demurrer could not be sustained.

The Vice-Chancellor then said that the other question was, whether the documents ought to be delivered up and cancelled, or whether the parties ought to be allowed to have them, and pursue their legal remedy. That depended on whether these were proper certificates, and that again depended on all the details and facts as to what was done by the commissioners and their clerk, by their direction.

The Vice-Chancellor refused, under the circumstances, to decide that question on demurrer, as it was a question for the hearing, and said that the demurrer must be simply overruled, reserving to the defendants the benefits thereof at the hearing, and reserving the question of costs.

[1] 11 Jur. N. S. 954.

[2] Vol. II. §§ 853, 854.

courts to stop the proceedings, although it may turn out, in the result of this suit, that the certificates are wholly invalid. It is true that, if the certificates have no validity, a motion might be made in the court where judgment was entered up, and from which the execution issued, to set aside that execution, but not until considerable expense had been incurred, and possibly after the same course of proceeding to judgment and execution had been taken by many of the claimants. It seems to me to be a very fit case, by analogy, at least, to a bill of peace, for a court of equity to interpose and prevent the unnecessary expense and litigation which would be thus occasioned, and to decide once for all the validity or invalidity of the certificates upon which the claims of all the parties depend.

The remaining question is, whether the question ought to be decided upon demurrer. It was pressed very strongly upon me that this was always considered to be a matter entirely for the discretion of the judge, and that no case could be produced in which, when it had been determined in the court below that the question ought not to be disposed of upon demurrer, the appeal court had overruled that decision. Whether any such case can be found or not (and none has been produced), it seems to me that where a judge of great experience and judgment has arrived at the conclusion that a case ought not to be decided upon demurrer, whether on account of its importance, or by reason of facts and circumstances which he considered necessary to be found in order satisfactorily to decide the question raised by the bill, it would not be a proper exercise of the authority of an appellate court to overrule this decision, unless it was satisfied that the whole case was open upon the demurrer. I agree, however, with the Vice-Chancellor, that the validity of the certificates for costs is not capable of a satisfactory determination without the proof of facts which are not admitted by the demurrer, and I must decline to anticipate such proof by deciding the case upon the pleadings as they stand; therefore, the Vice-Chancellor's order appealed from must be affirmed, and the appeal dismissed, with costs.

PHILLIPS *v.* HUDSON.

BEFORE LORD CHELMSFORD, C., JANUARY 15 AND 18, 1867.

[*Reported in Law Reports, 2 Chancery Appeals*, 243.]

THE bill in this case was filed by George Phillips, and stated that he had been admitted, as heir of his father, to all the lands and hereditaments held of the manor of Tooting Beck, in the county of Surrey, except one small tenement. That Tooting Common formed a portion of the said manor, and the whole of the profits coming or arising from the common (with the exception of a portion of the woods thereupon,

which belonged to the lords of the manor) had by immemorial custom always belonged to the tenants of the manor, and were now vested in the plaintiff and the owners of the other small tenement. That the defendants, T. Hudson, H. Willis, and W. Borradaile, were the lords of the manor. That the defendants had recently begun to assert rights over the common, and in particular to cut, remove, and dispose of the turf and loam on the common, and threatened to remove and dispose of the remaining turf and loam thereupon, and the plaintiff prayed that it might be declared that he and the owners of the aforesaid small tenement, as the only tenants of the manor, were entitled to the whole of the profits coming or arising from or out of the common (subject to the rights, if any, of one John William Brown therein, and to the aforesaid rights of the defendants); or otherwise that the rights of the plaintiff in the said common might be ascertained and declared, and that the defendants might be restrained from cutting, removing, or disposing of the turf and loam on the said common, or otherwise interfering with the rights of the plaintiff over the said common.

The defendants, by their answer, alleged that their predecessors had from time immemorial, and that they themselves intended to, cut, remove, and dispose of such part of the turf and trees as they should think expedient.

Evidence was entered into on both sides, and the plaintiff produced a certified copy from a record in the Augmentation Office of a survey and grant made in the reign of King Edward VI., when the manor belonged to the Crown, in which it was stated that the value of the ground and soil was nothing, for that the tenants always used to take the whole of the profits thereof coming or arising, except certain of the woods.

The cause came to a hearing before the Master of the Rolls, who, on May 23, 1866, made a decree directing the following inquiries: 1. What persons are entitled to any and what rights of common over the common of Tooting Beck? 2. Whether the plaintiffs are entitled to any and what parts of the soil of the said common? 3. An inquiry what persons are now exercising any and what rights over the said common? and the said persons were to be at liberty to come in under the decree.[1]

The defendants appealed.

Mr. *Selwyn*, Q.C., and Mr. *Kekewich*, for the appellants. This is not a bill on behalf of others, but by one of the two only copyholders. It was admitted that there is no authority for such a bill, but if such a bill would lie, the records of the Court would contain many such, for in nearly every common the rights of the lord and commoners are uncertain. How are the costs to be borne? If such bills are entertained, the Court will have to frame a complete code of rules about them and about the manner of raising the costs. Besides, on the

[1] THE MASTER OF THE ROLLS: I think in this case I may properly make a decree. It is of a singular description, but I think there is authority sufficient for it. His Lordship afterwards said: I think I shall be doing good; that is a strong consideration with me.

evidence the plaintiffs have failed completely. *Primâ facie*, the common belongs to the lord, and the commoners must produce evidence to displace his right; but the evidence is the other way.

Mr. *Jessel*, Q. C., and Mr. *Bury*, for the plaintiff. This bill is in the nature of a bill of peace, and an individual commoner can maintain such a bill to prevent his being disturbed: Spence, Eq. Jur.,[1] where several cases in the Registrars' books are mentioned. Mayor of York *v.* Pilkington;[2] Lord Sefton *v.* Lord Salisbury;[3] Arthington *v.* Fawkes;[4] Mitf. Pl.[5] We show that at the date of the grant all the soil and the profits belonged to the tenants, and there is nothing to show that it has ever been taken away. We show *primâ facie* evidence, and if they rely on any release or presumed release by us, they should have pleaded it, and we could then have met their case. If the defendants say that the bill ought to have been filed on behalf of all the other copyholders, and that is held to be so, the bill can stand over to be amended by adding parties.

Mr. *Selwyn*, in reply. All the cases cited in Spence were by consent or else for other objects. In Arthington *v.* Fawkes, the lord sued all the tenants.

Lord Chelmsford, L. C. Notwithstanding the arguments on the part of the plaintiff, I still entertain an opinion which, from the very opening of the case, I certainly felt very strongly, that this decree cannot be supported.

It has been said that the Master of the Rolls had no difficulty whatever in making the decree appealed from; but I think the words of his Lordship are very far from expressing a confident opinion that he was right in the conclusion at which he had arrived, and he seems to have been considerably influenced by the circumstance that he might in this way be doing good (as he expresses it), by enabling the rights of the parties, with respect to a sum of money which had been paid by way of compensation for some land taken by a railway company, to be ascertained.

Now, nobody ever disputed, what all the authorities from a very early period state, that a bill may be filed by an individual to determine the customs of a manor. But, then, all previous bills were filed by the plaintiff on behalf of himself and the other persons whose rights are involved, and the question here is whether this is what is technically called a bill of peace of that description.

Can this bill, then, in any sense, be considered to be a bill filed by the plaintiff in respect not only of his own rights, but of the rights of other persons, and those persons so numerous that the Court, according to the exercise of its jurisdiction in cases of this description, would interfere to prevent a multiplicity of suits? It is perfectly clear that the only claim which is set up in respect of these profits of common, or

[1] Vol. I. p. 656, 657 [2] 1 Atk. 282. [3] 7 W. R. 272.
[4] 2 Vern. 356. [5] 5th ed. p. 169.

rights of common, is the right of the plaintiff himself, and the owners of a small tenement, who do not interfere, and no objection can possibly arise to their not being made parties, because it is not a bill of that description which requires that they should be parties to the suit.

Then, besides common of pasture, the plaintiff claims all the profits of the common, with the exception of the woods, and, as evidence, has produced a document from the Augmentation Office; but I have very great doubt whether it is evidence at all for the plaintiff in this case, because, what is it? It is a survey which comes from the Augmentation Office of the possessions of the Crown — a survey made for the purposes of the Crown, and just the same as if it had been a survey made by a private owner, in which a statement is made that the ground and soil of the common, containing in the whole 140 acres, is valued at nothing, for that the tenants of the manor have always used to take the whole profit thereof coming or arising. Now, suppose a private person, who is lord of a manor, had for his own purposes a survey made in which such a statement was contained, and that the tenants of the manor were to get hold of that survey, and endeavor to use it against the lord, can it be said they would be allowed to do so, and that they could get what is really a private memorandum (it is only public because it is Crown land, and the analogy is the same), and make it available for these purposes against the title of the lord?

However, assuming that these documents are evidence, and evidence for the tenants, they amount merely to this, that in the time of Edward VI. the whole of the profits of the common belonged to the tenants, with the exception of the woods. But, as has been very properly asked, what were the profits at that time? It does not say that the tenants are entitled to the soil (that is most important), or that they are entitled to take the whole of the profits coming or arising from the soil; and the question here is, whether the lords are entitled to interfere with the rights of the tenants (whatever they may be) by digging turf and loam; that is, taking a portion of the soil? Upon that subject the evidence is perfectly conclusive, because, giving all the effect which the plaintiff requires to these documents which come from the Augmentation Office, still the evidence on the part of the defendants shows most distinctly that, with regard to the taking of the soil itself (which is really the question), that right has been exercised for a period of nearly fifty years without interruption and without dispute. For this period the lords and ladies of the manor have taken the turf and the soil, and have sold it for their own advantage. Therefore, supposing that the plaintiff had a right to file such a bill, to have the rights which he claims in the profits of the common established, and to restrain the lords from infringing on his rights, his case entirely breaks down upon the proof, for he establishes no right whatever, except a right of common of pasture. He does not shew that the lords have interfered with that right in any illegal manner; that is, that they have been doing any act which they had not a lawful right to do; and, there-

fore, supposing even that he had a right to file this bill, still the case entirely fails upon the proof.

Then what does the plaintiff's case really amount to? He says: "I have certain rights of common, which have been interfered with by the illegal acts of the lord; I come to the court to have those rights declared." But the answer is: "If this is a disturbance of your common, why do you not bring your action? You may maintain an action; prove your right of common, prove that the lords have invaded that right, and you will recover at law. You can only maintain your individual right to come here by connecting some other persons, and saying that this bill is, in fact, not merely a bill to establish your right, and to have the lords restrained on your behalf, but that you are claiming a right in which a number of other persons are interested, and therefore, according to the ordinary mode in which the Court will exercise jurisdiction to prevent multiplicity of suits, you ask the Court to interfere in your favor, and in favor of those other persons who are interested with you." Under these circumstances, with very great respect for the Master of the Rolls, who appears, as I have already said, to have entertained very great doubt whether he ought to make a decree in this case, I cannot conceive how in a case of this kind there can possibly be the decree which is prayed for.

It is said that this is clearly a bill to establish the doubtful rights of commoners. If that is so, I can hardly understand the observation of the Master of the Rolls, that the case is of a "singular description," because everybody knows it is common, I will not say very frequent, to have a bill of that kind either by the lord against his tenants, or by the tenants against the lord; but it is certainly a bill of very singular description in the view I have taken, which, if correct, may account for this expression on the part of the Master of the Rolls. Therefore I feel that I am not doing any very great violence when I express an opinion that the Master of the Rolls ought not to have directed the inquiries contained in his decree. He has, in fact, directed a very large inquiry, and even more than the plaintiff asked for, by inviting all persons to come in, and by ordering advertisements to be issued that they might know there was this question to be litigated. It would be very hard indeed upon the lord to have these questions determined at his expense. Under all the circumstances, therefore, I feel little difficulty in coming to the conclusion that the decree of the Master of the Rolls must be reversed, and the bill be dismissed with costs, including the costs below and the costs of this appeal.

Mr. *Jessel* mentioned that the rule had always been, subject to any modification, not to give costs of the appeal at all when the judgment below was reversed, and such costs had only been given in very recent cases.

THE LORD CHANCELLOR. But where there is no foundation whatever for the bill, and when I am of opinion that the bill ought to have been dismissed with costs at the former hearing, it ought to be dismissed with costs upon the appeal. The question is, who has occasioned all the expense?

SCOTT *v.* ONDERDONK AND ANOTHER.

In The New York Court of Appeals, June Term, 1856.

[*Reported in* 14 *New York Reports*, 9.]

Appeal from a judgment of the Supreme Court affirming a judgment of the City Court of Brooklyn in favor of the plaintiff on a demurrer to the complaint. The action was brought in March, 1852, against Onderdonk and the city of Brooklyn. The complaint stated that the plaintiff was the owner of two lots of land situate in the city of Brooklyn; that in November, 1848, the city sold the lots at auction to pay an alleged assessment thereon for constructing a well and pump in one of the streets, and that Onderdonk became the purchaser for the term of a thousand years at the price of $23.28; and that the common council of the city executed and delivered to him a certificate of the sale. This certificate was set out in the complaint. It recited the making of the assessment, the proceedings to collect the same, and the advertisement and sale of the lots to Onderdonk, and certified that at the expiration of two years from the sale he would be entitled to a conveyance of the premises for the term for which they were sold. The complaint stated that a copy of the certificate was in March, 1849, filed in the clerk's office of Kings county, and entered in a book kept by the clerk where certificates of sales of land for taxes were entered; and then alleged "that no such assessment or tax as was mentioned in the certificate had ever been made and confirmed; that the proceedings had and taken by the city and its officers in respect to laying and imposing the assessment, the confirmation thereof and sale, were irregular, illegal, defective, and void; that the resolutions of the common council passed in respect to the assessment and sale were not presented to the mayor for his approval, and that the mayor did not approve thereof as required by the statute." It was further stated in the complaint that Onderdonk claimed that by virtue of the certificate he was entitled to receive from the city a lease of the premises for the period mentioned therein, but that as yet no lease had been executed to him; that, as the plaintiff was advised, the certificate, by reason of the filing and entry of a copy thereof in the clerk's office, was presumptively a lien upon the premises, or showed presumptively a power in some one other than the plaintiff to create an estate therein, whereas in fact no such power or lien existed, and the certificate was a cloud upon his title, diminishing the value of the property and preventing its sale. It was averred that the defendant Onderdonk, on request to do so, had refused to cancel the certificate or release his pretended rights under it. The defendant Onderdonk appeared and demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The City Court overruled the demurrer and gave judgment for the plaintiff, setting aside the certificate of sale and directing it to be cancelled, declaring

the proceedings and sale void, requiring Onderdonk to release to the plaintiff his pretended claim to the land, and perpetually enjoining the city from executing any conveyance pursuant to the sale. On appeal, the judgment was affirmed by the Supreme Court in the Second District. The defendant Onderdonk appealed to this Court.

J. E. Burrell, for the appellant, insisted: I. That upon the complaint the city of Brooklyn had no colorable right or authority to sell and convey the premises. It was therein alleged that the city had no such right or authority. That, upon the statements of the complaint, a conveyance by the city would not be a cloud upon the plaintiff's title.[1]

II. That the defendant claiming under the certificate of sale would be compelled to establish the right and authority of the corporation to sell, and to show a compliance with the provisions of the statute, step by step, including the very matters which the complaint alleges do not exist.[2]

III. The alleged defects, to wit, the non-levying of the tax or assessment, and the omission of the mayor to approve the resolution referred to, being facts which the purchaser must prove before the certificate can operate, and the objections alleged being such as are apparent upon the face of the proceedings, through which the purchaser must claim, do not render the certificate or conveyance a cloud upon the respondent's title, so as to authorize the interference of a court of equity.[3]

P. V. R. Stanton, for respondent, insisted: That the certificate set forth in the complaint was an apparent lien on the premises. That it was sufficient in form. That it recited that the proceedings requisite by the statute to authorize the sale were had. That the assessment, sale, and certificate were authorized by law to be made; and the statute declared that when the certificate was filed and entered in the clerk's office, it became a lien upon the premises.[4]

DENIO, C. J. The substance of the complaint is, that, without having laid an assessment affecting the plaintiff's lots, the corporation proceeded to sell them as though they had been legally assessed; that the defendant Onderdonk became the purchaser at the sale, receiving a certificate of the purchase, and is seeking to consummate the transaction by obtaining a conveyance of the property from the corporation for a long term of years. Though it is improbable that the sale was made without the pretence of a valid assessment, the defendants have

[1] Cox *v.* Clift, 3 Barb. 481.

[2] Fleetwood *v.* The City of New York, 2 Sandf. 479; Sharp *v.* Speir, 4 Hill, 76; Striker *v.* Kelley, 7 Id. 9; S. C. 2 Denio, 323; Doughty *v.* Hope, 3 Denio, 249; S. C. 1 Comst. 79; Laws of 1834, p. 106.

[3] Cox *v.* Clift, 3 Barb. 481; S. C. 2 Comst. 122; Livingston *v.* Hollenbeck, 4 Barb. 16; Van Rensselaer *v.* Kid, Id. 19; Fleetwood *v.* The City of New York, 2 Sandf. 479; The Mayor, &c. *v.* Merserole, 26 Wend. 132; Van Doren *v.* The Mayor, &c., 9 Paige, 386; Wiggin *v.* The Mayor, &c., Id. 16; Bouton *v.* The City of Brooklyn, 15 Barb. 387.

[4] Laws of 1834, p. 90, §§ 26, 42, 72; Laws of 1833, pp. 507, 518.

chosen to put themselves upon the naked case that there was no assessment; and the question to be determined is whether, conceding such a state of things to exist, the plaintiff, before he has been actually disturbed, is entitled to maintain this action, and to have a judgment arresting the proceeding and setting aside what has been done. Ordinarily a party must wait until his rights have been actually interfered with before he can implead another from whom he anticipates an injury. But there are several exceptions to this rule; and when the jurisdiction in law and equity was administered in different courts and by different forms of proceeding, it was a common case for a party to appeal to a court of equity for relief against an apprehended injury to be effected by his adversary by some act *in pais* or by some legal proceeding which he could not defend himself against upon the principles of the common law. This class of cases has been narrowed by the law abolishing the distinction between the two jurisdictions; and now, as a general rule, if the party claiming relief has a good defence, whether it be of a legal or equitable nature, and if he can only be divested of his rights by some suit in court instituted by his adversary, he must wait until he is thus challenged, when he will be in time to bring forward his defence. That there is a certain degree of inconvenience in this rule, in many cases which may be supposed, is admitted; but the evil would be much greater if every person who could show that what he claimed to be his rights was questioned by some other person, could call such person into court and compel him to disclaim or to litigate the matter in advance. Courts have commonly occupation enough in determining controversies which have become practical, without spending time in hearing discussions respecting such as are merely speculative or potential. The most prominent of the inconveniences referred to have been remedied by legislation, or by the settled practice of the courts. Thus, a party claiming to be the owner of lands may, after a certain length of possession on his part, compel the determination of the claim of any other person to the title of such land.[1] So of the cases to which the remedy by bill of interpleader formerly applied. Besides these cases, there is a principle of equity which remains in force notwithstanding the confusion of remedies, by which a person may in certain cases institute a suit to remove a claim which is a cloud upon the title to his property.[2] If, however, the claim is based upon a written instrument which is void upon its face, or which does not in its terms apply to the property it is claimed to affect, there seems to be no reason for entertaining a litigation respecting it, before it is attempted to be enforced; for the party apprehending danger has his defence always at hand. In such a case this court has determined that no action at the suit of the party apprehending injury will lie.[3] The same reason applies to cases where the claim requires the existence of a series of

[1] 2 R. S. 312; Laws of 1848, ch. 50; Code, § 449.

[2] Hamilton *v.* Cummings, 1 John. Ch. 517; Story's Eq. § 700 *et seq.*

[3] Cox *v.* Clift, 2 Comst. 118.

facts or the performance of a succession of legal acts, and there is a defect as to one or more of the links. The party must in general wait until the pretended title is asserted. This principle is also very well settled by authority.[1] In both these classes of cases the party whose estate is questioned may naturally wish to have the matter speedily determined, as he may in the mean time suffer inconveniences and even actual damage on account of the discredit attaching to his title by reason of the unfounded claim. But unless the circumstances are such as to sustain an action for slander of title, the law regards the injury too speculative to warrant its interference. I am not able, therefore, to concur in the views of the City Court of Brooklyn, contained in the opinion which has been laid before us, to the effect that in every case where an instrument in the hands of another person is calculated to induce the belief that the title of the plaintiff is invalid, an action will lie to set it aside. In this case, therefore, if Onderdonk, the purchaser at the corporation sale, in asserting his title after he had perfected his purchase, would be obliged to prove the laying of the assessment as well as the other proceedings anterior to the conveyance, I should be of opinion, that the complainant had not established a case for relief. Neither the proceedings of the corporation, nor the conveyance to Onderdonk when obtained, would constitute such a cloud upon the plaintiff's title as is contemplated by the rule. It would be impossible for Onderdonk to recover the possession of the lots, for he could not establish the existence of the assessment, and the plaintiff might rest in perfect safety. But the 45th section of the charter of the city of Brooklyn provides that the conveyance under such a sale as was made in this case, which is to be executed under the corporate seal, shall briefly set forth the proceedings had for the sale of the premises, and that by force thereof the purchaser shall be entitled to the possession, and to the same remedy to recover such possession as is provided by law for the removal of tenants who hold over after the expiration of their terms, and that such "conveyance shall, in any such proceeding, be deemed *primâ facie* evidence of the facts therein recited and set forth."[2] A conveyance properly prepared under this provision would recite the ordinance or resolution of the common council imposing the assessment, and such recital would be presumptive evidence of the existence of that ordinance. It is true the owner of the land would be at liberty to disprove it, if he could obtain the evidence; but the statute contemplates that the purchaser shall be furnished with a document bearing on its face *primâ facie* evidence of a title in him, and can only be impeached by proof *aliunde* of the falsity of its recital. The authorities to which I have referred admit that in such cases the party is not compelled to take the hazard of the loss of his evidence, but may, while it is attainable, call

[1] Van Doren *v.* The Mayor, &c. of New York, 9 Paige, 388; The Mayor, &c. of Brooklyn *v.* Merserole, 26 Wend. 132.

[2] Laws of 1834, p. 108.

the party holding such a document into court and have the matter determined at once, so that the cloud upon his title may be dispelled. If the plaintiff would be entitled to set aside a conveyance, upon the facts stated in the complaint, if one had been obtained, then, inasmuch as the purchaser is seeking to obtain such a conveyance and the corporation of Brooklyn is ready to execute one, as is apparent from the terms of the certificate of sale, it is right that they should be enjoined from proceeding further towards that object. For the single reason, therefore, that the statute gives to the conveyance the effect which has been mentioned, I am of opinion that the City Court was right in overruling the demurrer, and giving the plaintiff the relief which he sought.

Judgment affirmed.

WARD AND ANOTHER *v.* DEWEY.

IN THE NEW YORK COURT OF APPEALS, MARCH TERM, 1858.

[*Reported in* 16 *New York Reports*, 519.]

APPEAL from the Supreme Court. The plaintiffs averred in their complaint that in 1837 their father died seised of a farm in Schoharie county, leaving a widow, Eleanor, and the plaintiffs, with two other children (C. S. Ward and Polly Ward), his only heirs-at-law. That prior to May 3, 1850, Polly Ward conveyed all her interest in the farm to C. S. Ward. That on May 3, 1850, the widow, Eleanor, whose dower had never been assigned, and C. S. Ward, were in the sole and exclusive occupation of the farm, and on that day executed a mortgage to secure $2,600 to the defendant, Dewey, upon the whole farm. That they had no power or authority to execute a mortgage upon any part of the farm, except the one-half belonging to Chapman S. Ward in his own right by descent and as purchaser from Polly, and that neither of them then or since have claimed any interest in more than one-half of said farm. That the defendant, Dewey, knew when he received the mortgage that the plaintiffs were the owners of the undivided half of the farm, and that the said mortgagors had no right or authority to give a mortgage upon more than the undivided half thereof. That the defendant, Dewey, had commenced an action against the mortgagors, and obtained therein judgment for a foreclosure of the mortgage and the sale of the farm. That he had caused notice of a sale, under such judgment, of the whole farm, to be published and posted, as required by law upon judicial sales. That the mortgage and judgment, so far as they purported to cover the undivided half of the farm belonging to the plaintiffs, were a cloud upon their title, and that a sale under them would be highly injurious to the interests of the plaintiffs. That the defendant claims and pretends that the mortgagors had power to execute the mortgage as a valid lien upon the whole farm, and that a sale under

the mortgage would cut off all the right and title of the plaintiffs as heirs-at-law. That the plaintiffs had requested the defendant not to sell the half of the farm belonging to them, but that he persisted in declaring his determination to sell the whole farm under the notices aforesaid. The complaint further averred "that the mortgagors claim no interest in the said farm adverse to the title of these plaintiffs to the one undivided half of said farm, and are willing that the title of the plaintiffs thereto should be established." The plaintiffs prayed an injunction to restrain the sale; that their title to an undivided half of the farm might be quieted, and that the judgment and mortgage, so far as they purported to be a lien on such undivided half, might be set aside. The defendant demurred to the complaint. At a special term, held by Mr. Justice Harris, the defendant had judgment on the demurrer, but was denied costs. On appeal, this judgment was reversed, at General Term in the Sixth District, and the demurrer overruled, with judgment for the relief demanded in the complaint, unless the defendant should elect to pay costs and answer within thirty days. The defendant declined to avail himself of the right to answer, and final judgment having been perfected against him, appealed to this Court.

James E. Dewey, for the appellant.

L. Tremain, for the respondents.

PRATT, J. It may be assumed, I think, that at the time of the commencement of this suit the plaintiffs were in possession of the premises as tenants in common with the mortgagors of the defendant. This fact is not directly averred in the complaint, but it would seem to follow as a legal deduction from the facts that are averred therein. It is alleged in the complaint that the ancestor under whom the plaintiffs claim to hold by inheritance died seised in fee of the premises, leaving the plaintiffs, Chapman S. Ward, and one other child, heirs-at-law, and that the mortgagors, Chapman S. Ward and the widow, at the time of the execution of the mortgage, although in the exclusive occupation, claimed no interest, nor did they at the commencement of the suit claim any interest, in more than an undivided one-half of the land thus mortgaged. There is nothing, therefore, in these allegations to overthrow the presumption that all the heirs remained, at least in contemplation of law, in possession as tenants in common up to the time of the commencement of the suit.

Assuming this to be the relation which the owners of the premises sustained to each other at the time of the execution of the mortgage, we come to the principal question in the case, to wit, whether the mortgage purporting to be executed upon the whole premises created such a cloud upon the title of the plaintiffs as to call for the interposition of the equitable powers of the Court to remove it. I do not conceive that the proceedings to foreclose this mortgage can at all affect the question. If the mortgage itself creates no cloud upon the title of the plaintiffs, the proceedings to foreclose the equity of redemption have added nothing to it.

The rule is well settled that when a defect appears upon the face of the record through which the opposite party can alone claim title, there is not such a cloud upon the title as to call for the exercise of the equitable powers of the Court to remove it.[1] But when such claim appears to be valid upon the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, it presents a case for invoking the aid of a court of equity to remove it as a cloud upon the title. The case of fraud in procuring a deed to be executed which apparently conveys the title, or the case of the sale of land by a sheriff and the execution of a deed to the purchaser after redemption, or a sale upon a paid judgment, is a familiar illustration of a case of the latter kind.

The question then is, to which of these two classes does the case at bar belong. If the ancestor in this case had executed a deed of conveyance, to his children, of the premises, to be held by them equally as tenants in common, the defect in the defendant's claim to the plaintiffs' portion of the premises would be apparent upon the record, and no one would dispute but that it belonged to the class first above suggested. But I am unable to distinguish such a case from the one before us. It is true the deed, as a mere instrument, is well enough, and no flaw appears upon it, taking it separately from the chain of title of which it forms a link. But looking at it thus, it of course shows no title at all, and would be deemed perfectly harmless, affecting in no manner the title of the plaintiffs. It is only as a link in a chain of title that it can have any effect. It will therefore become necessary for any person claiming under this deed to show the relation which the grantors held to the ancestor who died seised of the premises; and the moment that is shown, the deed, instead of constituting a conveyance of the whole premises, constitutes a conveyance of one undivided half only. I know of no better method of illustrating this than by assuming that the foreclosure is completed by a sale, and that the purchaser brings an action to recover possession. Proof of title in the ancestor, and of the mortgage, with the requisite proceedings to foreclose, would show no title at all. There would be a palpable defect in the record, growing out of the want of proof of any title in the mortgagors. It would be manifestly necessary for the claimant to supply this defect. Without evidence to supply it, no one, I think, would contend that there was any cloud upon the title sufficient to call for the aid of a court of equity. A court of law would not hesitate to nonsuit upon such proof of title. But to supply this defect it would be necessary for the claimant to show the relation which the mortgagors held to the ancestor; and then it would appear that they only owned an undivided half of the premises, although they had assumed to mortgage the whole. As soon, therefore, as this relation should be established, the defect in the title of the claimant would be manifest upon the record itself, as clearly as it would if the

[1] Cox v. Clift, 2 Comst. 118; Piersoll v. Elliott, 6 Peters, 95.

heirs had claimed under a recorded conveyance to them from the ancestor. It seems to me, therefore, to present plainly a case in which the defect in the claim appears upon the face of the record.

It seems to have been assumed, at General Term in the court below, that the mortgagors were in possession at the time of executing the mortgage; and the decision of the case seems to have been based somewhat upon that assumption. I have shown that this assumption is erroneous, but if it is not I cannot perceive how that strengthens the plaintiffs' case. The complaint expressly avers that the mortgagors, at the time of executing the mortgage and up to the commencement of this suit, made no claim of title to any more than their actual interest in the premises. Possession without claim of title is not a very important element in the deduction of title. There is no statute of limitation to the right of entry as against a squatter of that kind.

But if we assume that the mortgagors were at the time of executing the mortgage, and now are, in the exclusive possession of the premises, holding adversely, there would still be no necessity of resorting to a court of equity for relief. The legal action to recover the possession would afford ample relief. It is only parties in possession, or who hold some future estate which gives them no right to immediate possession, upon whom any necessity rests of resorting to a court of equity for aid to remove a cloud from their title. But when they have the right to immediate possession, the common-law action of ejectment, as it was formerly called, with a trial by jury, is the proper remedy.

It was suggested, upon the argument in behalf of the plaintiffs, that the purchaser upon the mortgage sale might make the mortgage title the basis of an adverse possession, which, in time, might bar the plaintiffs' right. This point seems to me to be based upon some confusion of ideas. If the plaintiffs are now in possession, I cannot comprehend how any adverse possession can be set up against them so long as they continue in possession. And if they are out of possession, the fear that they will neglect, themselves, to assert their title for twenty years, until their right of entry shall be barred by the Statute of Limitations, is a species of *quia timet* for which the principles of equity jurisdiction suggest no remedy. The fear, by a party, of his own negligence affords no ground of relief in a court of equity; at least, I have found no precedent for such a case.

In fine, I think the cases of Cox *v.* Clift and Piersoll *v.* Elliott, *supra*, were much stronger than the case at bar for the interposition of a court of equity.

Upon the whole, therefore, I think the judgment of the General Term should be reversed, and that of the Special Term affirmed, with costs of appeal to the General Term.

SELDEN, J. The jurisdiction exercised by courts of equity in setting aside and cancelling void instruments will appear to be involved in some confusion, unless the proper distinctions are observed. Bills have been filed for the purpose of cancelling promissory notes, bills of exchange,

policies of insurance, bonds, &c., as well as deeds, mortgages, and other instruments affecting real estate; and all these have been repeatedly entertained by the courts. There is, however, an obvious distinction between those instruments which merely create a personal claim against a complainant, and those which affect his property, and especially his real estate. The first can rarely do him any injury so long as they remain dormant, while the latter may create such a cloud upon his title as seriously to impair its value.

In the first of these two classes of cases, the question is involved in some doubt, whether courts of equity will interfere to set aside the instrument, where there is a complete defence at law. Lord Thurlow was inclined not to entertain jurisdiction in such cases.[1] But Lord Loughborough, afterwards, in Newman *v.* Milner,[2] and Lord Eldon, in Bromley *v.* Holland,[3] and in Jervis *v.* White,[4] took the opposite ground. Chief Baron Richards, also, in Dunean *v.* Worrall,[5] admitted with apparent reluctanee that relief might be given in equity against a policy of insuranee, notwithstanding it was entirely void at law.

In eases, however, where the title to real estate is or may be affected, it seems never to have been regarded as a sufficient objection to a bill seeking relief in equity, that the eomplainant has a perfect legal defence. The distinction seems to have been first practically taken in the case of Byne *v.* Vivian,[6] which belongs to a class of English cases known as the annuity cases. It was a bill to set aside and eancel an annuity bond, and came before Lord Chancellor Loughborough, in 1800. In 1797, three years before, the same learned chancellor had decided the case of Franco *v.* Bolton,[7] refusing to set aside a similar bond, although void, on the ground that since the case of Collins *v.* Blantern,[8] the defence was available at law. In Byne *v.* Vivian, however, he sustained the bill and cancelled the bond.

On looking into the latter case we see a plain reason for this apparent ineonsisteney. In Franeo *v.* Bolton the annuity was secured by the mere personal bond of the grantor, while in Byne *v.* Vivian the bond was aecompanied by a mortgage of real estate. The arguments of counsel in this last case are worthy of notice, as initiating, or at least insisting upon, two distinetions, both of whieh have become a part of the settled law on this subject. The objection to the annuity arose under the aet of 17 George III.,[9] called the Annuity Act, which provided that "a memorial of every deed, bond, instrument, or other assurance, whereby any annuity should be granted after the passing the act, should be enrolled in the Court of Chancery," &e. The memorial in this ease was defeetive, and the annuity void. Mansfield, for the defendant, insisted that the Court ought not to entertain jurisdiction, for the reason

[1] Ryan *v.* Mackmath, 3 Bro. C. C. 15; Colman *v.* Sarrel, 1 Ves. 50; Hilton *v.* Barrow, Id. 284.
[2] 2 Ves. 483.
[3] 7 Id. 3.
[4] Id. 413.
[5] 10 Price, 31.
[6] 5 Ves. 604.
[7] 3 Id. 371.
[8] 2 Wils. 341.
[9] Ch. 26.

not only that there was a good defence at law, but that that defence appeared upon the face of the proceedings under which the defendant must claim. He said: "In this case the proof lies upon the person who wishes to avail himself of the instrument. He must produce a memorial; and if he does not, the other party may get a copy of it from the office."

Sir John Mitford, on the other hand, pressed the consideration that the securities affected the title to real estate. He said: "This is an incumbrance upon the estate, which cannot be disposed of till this term is disposed of. A court of equity has taken jurisdiction in cases where the security has been void at law. The party has a right to come to have the property cleared, and that the other shall not retain the security merely to keep a cloud upon the title." It goes to show the force of the consideration, that the securities were a cloud upon the title, that it was sufficient, in the view of the chancellor, to overcome the very cogent argument of Mr. Mansfield.

The case of Byne *v.* Potter,[1] arose immediately after that of Byne *v.* Vivian, and, being precisely similar, was decided in the same way.

A few months afterwards the case of Bromley *v.* Holland,[2] an annuity case, similar in its features to the two last, came before the Master of the Rolls, who hesitated to follow the decision of Lord Loughborough, and made a somewhat modified decree; but when the case came up on appeal,[3] Lord Eldon, who had succeeded Lord Loughborough as chancellor, reversed the decree of the Master of the Rolls, and made a decree in accordance with the decisions in Byne *v.* Vivian and Byne *v.* Potter. In doing this he seems to have been influenced mainly by the distinction taken by Sir John Mitford, in Byne *v.* Vivian, between mere personal securities and those which create a cloud upon title. He says: "Whatever difference there may have been in such cases (upon bills of exchange, notes, &c.), it seems to me there is considerable difference between the case of a bill of exchange, upon which, on the face of it, there can be no demand, and an instrument which, upon the face of it, purports to affect real property;" but he also said that if the question were *res integra* his mind "would be considerably affected by the very able argument addressed to the Court by Mr. Mansfield, in Byne *v.* Vivian."

That argument would no doubt have prevailed, but for the great weight given to the consideration that the securities cast an apparent shade over the title. The distinction between cases where the invalidity of the instrument appears upon its face and where it does not, is now universally recognized; although Chancellor Kent, in Hamilton *v.* Cummings,[4] came to the conclusion, after an elaborate review of the cases, that it was unsound. In Simpson *v.* Lord Howden,[5] Lord Chancellor Cottenham allowed a demurrer to a bill, filed to set aside an agreement void as against public policy, on the ground that the illegality was ap-

[1] 5 Ves. 609. [2] Id. 610. [3] 7 Id. 3.
[4] 1 John. Ch. 517. [5] 3 Myl. & Craig, 99.

parent upon the face of the instrument. The same has been held in several cases in our own and other American courts.[1]

But none of these cases contain any thing which in the least impairs the doctrine advanced in Byne *v.* Vivian and the subsequent cases, that a court of equity will entertain jurisdiction of a suit to set aside a deed or instrument, although it may be void at law, provided it purports to affect real estate and will cast a cloud upon it. They merely ingraft upon that doctrine this additional proviso, viz., that if its invalidity appears upon the face of the deed itself, or of the proceedings which the party claiming under it must necessarily produce in order to establish a title, the Court will not relieve.

It is suggested that in this case the defect does appear upon the face of the mortgage, as it is not executed and does not purport to be executed by the plaintiffs. That defect, however, does not become apparent until the plaintiffs have first established their title by extrinsic evidence. It is clearly, therefore, not a case where the invalidity of the instrument appears upon its face; neither is it a case in which, in the graphic language of Judge Gardiner, in Cox *v.* Clift, the plaintiffs have "a perfect legal defence written down in the title-deeds of their adversary." None of the cases, therefore, in which relief has been denied upon that ground, have any direct bearing upon this.

Does the mortgage in question, then, create a cloud upon the plaintiff's title? None of the cases define what is meant by a cloud upon title, nor attempt to lay down any general rules by which what will constitute such a cloud may be ascertained. Each case seems to have been decided upon its own peculiar circumstances. There are some things, however, which may be regarded as certain: a cloud upon a title does not mean a legal as contradistinguished from an equitable title; a deed, as we have seen, may constitute a cloud upon the title, although the defence is as perfect in law as in equity. It is to be inferred from the cases, as well as from the natural import of the term, that any thing is a cloud which is calculated to cast doubt or suspicion upon the title, or seriously to embarrass the owner either in maintaining his rights or in disposing of the property.

On the other hand it is equally clear that the mere existence of a deed purporting to convey certain premises, but accompanied by no circumstances giving it apparent validity, would not operate as such a cloud upon the title as to justify the interposition of the Court. If an entire stranger assumes to convey the premises to which he has no shadow of title, and of which another is in possession, no real cloud is thereby created. There is nothing to give such a deed even the semblance of force. It can never be used to the serious annoyance or injury of the owner. A word of explanation would dissipate the apparent cloud.

But it may, I think, be safely assumed that when such circumstances

[1] Mayor, &c., of Brooklyn *v.* Meserole, 26 Wend. 136; Van Doren *v.* Mayor, &c., of New York, 9 Paige, 388; Cox *v.* Clift, 2 Comst. 118; Piersoll *v.* Elliott, 6 Peters, 95.

exist, in connection with a deed, as not only give to it an apparent validity, but will enable the grantor to make out a *primâ facie* title under it, a cloud is created. It cannot be necessary, to constitute a cloud, that the conveyance should be sufficient *per se*, without being connected with any other evidence, to make out a *primâ facie* title; because no conveyance, even if valid, could do this. In showing title under a deed by the grantee himself, or in showing that the deed constitutes a cloud upon another's title, it is necessary to show some sort of title, either real or apparent, in the grantor. But is it material in what manner the title of the grantor is shown? Suppose a grantee in a deed, void for some reason not appearing upon its face nor in any of the previous deeds, is able to show a regular chain of conveyances from the people of the State down to his immediate grantor, then, of course, no one could doubt that the deed would constitute a cloud upon the title. But suppose, in tracing back the title to its ultimate source, a grantor is found who was, at the time of the conveyance, in actual possession of the premises, is it necessary to go farther? It clearly would not be, in making title under the deed; neither, I apprehend, could it be in showing that the deed created a cloud upon the title. Were it otherwise, a cloud could never be shown short of showing a chain of conveyances from the people down. Can it make any difference, then, how far back it is necessary to go before arriving at a grantor in possession? Is not the evidence of title just as strong in case the immediate grantor, as if any remote grantor, was in possession? There can be but one answer to these questions.

Let us, then, apply these principles to the present case. The mortgagors, owning one-half the premises and being in possession of the whole, execute a mortgage upon the whole. These facts would be sufficient to maintain an ejectment suit against the plaintiffs, and to turn them out of possession. Can it be said that a deed which would enable the grantee to overcome the *primâ facie* evidence of title which actual possession affords does not constitute a cloud upon the title? It is no answer to say that the plaintiffs, by introducing evidence on their part, could overthrow the title made under the mortgage. This is so in every case where a mere cloud exists.

It is said that, to maintain the suit, the plaintiffs "must be in danger of, or must have cause to fear, an injury or obstruction to their legal title," and that the fear must be well founded. This position I think unsound. The idea of real danger is not necessarily involved in that of a cloud upon title. If the title is obscured, so as to render the right of the real owner less clear, there is a cloud. If it will embarrass the owner in making a sale of the property, he is injured; and this consideration was urged in the earliest cases on the subject, as will be seen by referring to the argument of Sir John Mitford, in Byne *v.* Vivian.[1]

Another position taken by the defendant's counsel is, that as the

[1] 5 Ves. 604.

mortgagors and the plaintiffs were tenants in common, the possession of one was the possession of all. This, in my view, is the most plausible answer given to the plaintiff's case. The complaint, however, avers that the mortgagors were in the sole and exclusive occupation of the premises; and this allegation is admitted by the demurrer. The possession of one tenant in common may be exclusive, where his co-tenant is ousted. The point rests, therefore, upon the distinction between occupation and possession. There is, no doubt, a distinction between the two, because there may be a legal or constructive possession where there is no actual occupation. This, however, cannot, I think, be material in the present case. Suppose an ejectment suit brought upon a claim of title under this mortgage: all that the plaintiff would have to show would be the mortgage and exclusive occupation by the mortgagors. The plaintiffs in this case, having no actual possession, but at most only a constructive possession, would be as effectually driven to the proof of their title, by that evidence, as if there had been no tenancy in common.

The complaint alleges that the defendant has proceeded to foreclose the mortgage, and has obtained the usual judgment of foreclosure; and that he has published a notice of sale in which he describes the entire farm as the premises to be sold. Under these circumstances my own conclusion would have been that the mortgage does create a cloud upon the title of the plaintiffs, and that the judgment should be affirmed; but my associates think that the case does not show, in other words, that the demurrer does not admit that the mortgagors were, at the time of the execution of the mortgage, in the exclusive possession of the mortgaged premises, and, assuming that they are right in this, I concede that the judgment should be reversed.

Roosevelt, J., concurred in the opinion of Selden, J.; all the others in that of Pratt, J.

Judgment at General Term reversed, and that at Special Term affirmed.

THE NEW YORK AND NEW HAVEN RAILROAD COMPANY *v.* ROBERT SCHUYLER, WILLIAM CROSS, & 324 others.

In the New York Court of Appeals, June Term, 1858.

[*Reported in* 17 *New York Reports*, 592.]

Appeal from the Supreme Court. The complaint was filed in January, 1855. Three hundred and twenty-six persons are joined as defendants. One of them, William Cross, demurred to the complaint upon several grounds, which, so far as material, appear from the opinion which follows this statement.

The facts set forth in the complaint are as follows: —

The plaintiff is a corporation, owning and operating a railroad extending from New Haven to New York. The capital authorized by the charter is limited to $3,000,000, represented by thirty thousand shares of stock, all of the shares except seventy-eight having been issued, and the capital paid in, less about $700 on the seventy-eight shares, several years since. Transfer books of the stock were kept at the city of New York and two other places, where transfers of the stock were made and certificates issued as occasion required. From the organization of the company, in 1846, to the 3d of July, 1854, Robert Schuyler was the president and transfer agent of the company, having his station and place of business at the office of the company in New York. As early as October, 1853, he commenced a series of fraudulent acts, extending over the whole period of time intermediate that date and the 3d of July, 1854, during which time, unknown to the plaintiff, he issued and disposed of a large number of certificates of stock of the company, which on their face purported to be genuine, were executed and signed in the same manner as genuine certificates, and undistinguishable from them, but which in fact were fraudulent over-issues for his own private purposes. Some of these he issued to a firm of which he was a member; the others were issued to divers other persons.

In other instances, after making transfers of stock for other parties on the books of the company, he failed to cancel the old certificates which were surrendered for that purpose, but fraudulently reissued them as genuine certificates of stock owned by himself.

In furtherance of his designs, he allowed clerks of his firm to give the firm and himself a false credit on the stock ledger of the railroad company, by which it was made ostensibly to appear that such firm and himself had stock to their credit on the books of the company to the amount of $1,000,000, when in truth it owned none.

Those false certificates purporting to be genuine, and those originally genuine certificates which, instead of being cancelled, were reissued, were used by Robert Schuyler in his own, and in the business of his firm, under representations that they were genuine, chiefly for the purpose of borrowing money; were sold openly in the market as genuine stock in some instances, and have passed in this way into the hands of the defendants, the present holders.

In some instances, this over-issued stock has become commingled with genuine, by having, in the regular course of business, been transferred and incorporated into a certificate with the genuine.

The whole false issue amounts to near $2,000,000.

Nine thousand three hundred and eighty-three shares now stand on the books of the railroad company, in the names of twenty-nine persons and firms to whom it had been transferred by the firm to which Schuyler belonged. The balance of such over-issues has gone to the hands of two hundred and sixty-six other persons and firms at different times, in different amounts, from different persons; and many of these holders are also the holders of genuine stock.

Intermediate the 29th June and the 3d of July, 1854, Schuyler, the president and transfer agent of the company, being sick, Mr. Worthen, the vice-president, who was also one of the directors, undertook, but, as the plaintiff says, without authority, to act as transfer agent in the place of Schuyler, and, unaware of Schuyler's frauds, transferred four thousand four hundred and forty-six shares of that false stock for twenty-one different persons and firms; supposing the certificates he received and transferred to be genuine.

Some of the holders of this over-issue, as the complaint alleges, took, knowing the certificates were fictitious; some with reason to believe so; some on usurious contracts; many under circumstances which should have put them on inquiry, and many others under circumstances and upon considerations unknown to the plaintiffs.

They all claim rights against the company; some that they are stockholders; others that they are either stockholders or have a right of action against the company for their losses. Some claim damages to the full nominal par value of the certificates they hold; others for the money they have actually advanced; while all assert a claim upon the company in some form. It is not averred that some of these fraudulently issued certificates have not gone into the hands of entirely innocent parties, for value.

Several of the defendants have sued the company. Some suits are pending in the Supreme Court; some in the Superior Court, and others in the Common Pleas of New York city. Other suits are threatened. The complaint joins, in this suit, Robert Schuyler and all the alleged owners or holders of this over-issued stock, and prays that the certificates may be decreed illegal and void, and be surrendered up and cancelled; that, until these questions are all settled, those who have sued be stayed in their proceedings; that those who have not, be enjoined from suing; that the suits now pending be consolidated with this, and closes with the usual general prayer for such further or other relief as is meet and proper.

The defendant, Cross, had judgment at Special Term, allowing the demurrer and dismissing the complaint as to him. Upon appeal, the Supreme Court, at General Term in the First District, affirmed this judgment, and the plaintiff appealed to this Court.

William C. Noyes, for the appellant.

Francis B. Cutting, for the respondent.

COMSTOCK, J. This case is somewhat special and extraordinary in its circumstances, and must be determined upon principles of reason and justice, with the aid of such analogies as the law will afford.

It is well settled that the directors or managers of a corporation are trustees for the holders of its stock. It is on this ground that the shareholders are entitled to relief in equity against an actual or threatened waste or misapplication of its corporate funds. It seems also to be settled that a suit for that purpose must be brought in the name of the corporation, unless it appears that the directors refuse to prosecute,

or are themselves the guilty parties answerable for the wrong. If they do thus refuse, or are thus answerable, the shareholders may sue in their own names; but, in such a case, the corporation must be made a defendant, either solely or jointly with the directors sought to be charged.[1] I have nowhere seen it laid down that the corporation itself, considered as a pure legal abstraction, is a trustee for its stockholders; yet it is not difficult to see that certain trust relations exist between it and them. A corporation aggregate is clothed with a legal title to its real and personal estate, franchises, and privileges, while the shareholders, as individuals, have in them equitable interests; the interest of each being in proportion to the amount of stock which he holds. The corporation is entitled to receive, and does receive, the gross amount of the earnings; upon a trust, however, or at least under a duty, to pay over to the stockholders the net profits, as dividends upon their stock. If not under all circumstances bound to make and pay over in money the dividends earned, it must, at all events, use them for the shareholders' benefit, in the prosecution of its legitimate enterprises, and subject to ultimate accountability. If these relations are not precisely defined in the books, it is because the occasion has not arisen requiring this to be done.

The New York and New Haven Railroad Company is a corporation aggregate, invested by its charter with certain privileges and powers, and with a legal title to all the real and personal estate acquired in the construction and operation of its road. Its genuine and undoubted stock amounts to $3,000,000, and by its charter cannot exceed that amount. All this stock, with an exception of no importance to the question before us, has been paid for, and is held by shareholders whose rights as such are not called in question. But, in addition to the $3,000,000 of undoubted stock, Mr. Schuyler, the president of the company, issued at different times, for his own private purposes, fraudulent and spurious certificates of stock, to the amount of nearly $2,000,000, which are now held by the numerous parties against whom this suit has been instituted. The president was the duly authorized agent to superintend the transfer of stock from any existing shareholder to another party, with authority in all cases to issue a new certificate, upon a transfer of the stock it represented being duly made in the books, and upon a surrender of the old one. The spurious certificates before mentioned were not based upon any transfer of genuine stock, nor did they represent stock in any sense whatever. In their appearance, however, they were genuine, and duly authorized. In form they were like those which represented the real stock of the company, and they were signed by a person who was known to have authority to sign under the conditions above named. Thus they obtained more or less currency throughout the community, being taken by various parties without attending to the forms and conditions prescribed by the charter and by-laws of the company, regulating the transfer of stock.

[1] Robinson *v.* Smith, 3 Paige, 222, and cases there cited.

This extraordinary fraud could not fail to place the corporation in a situation of extreme difficulty and embarrassment. What was to be done with the spurious stock certificates? Were the holders to be recognized? Were they to share in the dividends, and were they entitled to vote at elections? Was the stock of the company practically increased to $5,000,000, when the charter confined it to $3,000,000? If this could not be done, then was the company bound to pay, in damages to each holder of these false instruments, the value which the genuine stock had borne in the market? These were grave questions, about which gentlemen of great eminence in their profession, and the courts also, differed. In the courts of original jurisdiction, it was determined, after the institution of this suit, that the corporation was, in some form, bound to make good the false certificates. On appeal to this Court, we held them void to all intents and purposes, and that the corporation and its genuine stockholders were entirely unaffected by them.[1]

Such was the situation of this company on the discovery of these acts of Mr. Schuyler. As a pure creation of law, the corporation was not a sentient being; but the law, nevertheless, clothed it with authority which enabled it to act, by its board of directors, as a natural person, within the sphere of its powers and duties. It had therefore the rights which a natural person would have in analogous situations; and, in order to evolve the principle of this controversy, we may suppose that a natural person is clothed with the legal title to, and is in possession of, an extensive line of railroad, receiving the gross earnings for the purpose of dividing the net profits amongst a large class of individuals, whose right, in certain fixed proportions, is evidenced by a certificate or declaration of trust, which each one holds, signed by the legal owner or his authorized agent. If, then, a new class of individuals should come forward claiming the same rights, and presenting, as the evidence thereof, instruments of the same kind in all respects, bearing on their face all the appearances of genuineness and authority, but in fact unauthorized and spurious, what would be the rights and the duty of the legal owner in that exigency? Upon the settled principles of equity, it would be his right and his duty to call the false claimants into court, in order to remove the cloud upon the equitable interests of those whom he represented. It would be his right, as owner of the legal estate, to bring to a determination every claim upon that estate, in law or equity, resting upon facts and documents giving to it, *primâ facie*, all the appearances of genuineness and validity. It would be his duty to call for such a determination, as the representative of numerous equitable interests carved out of his estate and placed under his protection. These are principles so familiar and elementary that citations from the books are not required to support them.

With the aid of these analogies, we can come to a conclusion as to the rights of this corporation in the exigency which had arisen at the commencement of this suit. It stood, as we have seen, in a *quasi* trust

[1] Mechanics' Bank *v.* The New York and New Haven Railroad Company, 3 Kern. 599.

relation to its shareholders, holding, as it did, the legal estate, and they having, as individuals, an equitable right in the net earnings or income of the same estate. They also had a right to vote at the elections of the company, to the exclusion of all other persons. If the corporation yielded these rights to the holders of its original and genuine stock, and rejected the claims of those who held the false certificates, it became at once exposed, not merely to one, but to a multiplicity of suits, involving, as we have seen, questions of no inconsiderable difficulty. In these circumstances, its right of resort to a court of equity, in order to have the spurious certificates cancelled and annulled, does not admit of a doubt, provided those instruments were such, in character and appearance, as to bring them within the principles on which courts of equity administer protective and preventive justice. There is no head of equity jurisdiction more firmly established than that which embraces the cancellation of instruments which are capable of a vexatious use after the means of defence at law may become impaired or lost, or when they are calculated to throw a cloud upon the title or interest of the party seeking relief. But the jurisdiction does not universally attach on the mere ground that the deed or other contract is invalid. If the invalidity plainly appears on the face of the writing, so that no lapse of time or change of circumstances can weaken the means of defence, it is held that no occasion arises for a suit in equity to decree its cancellation. And the doctrine now is, that such instruments do not, in a just sense, even cast a cloud upon the title or interest, or diminish the security of the party against whom the attempt may be made to use them. If, on the other hand, the invalidity does not appear on their face, the jurisdiction is not confined to instruments of any particular kind or class. Whatever their character, if they are capable of being used as a means of vexation and annoyance, if they throw a cloud upon title or disturb the tranquil enjoyment of property, then it is against conscience and equity that they should be kept outstanding, and they ought to be cancelled. These principles of general jurisprudence are believed to be decisive in favor of the right of this corporation to demand the cancellation of the false stock, and to maintain a suit in equity for that purpose. On their face, as we have seen, the certificates of this stock are undistinguishable from those which are genuine and true. They confer, therefore, upon each holder a *primâ facie* right as a stockholder. The evidence of such right must in every case be repelled by showing that the certificate does not represent the actual stock of the company, and it is impossible to say that the means of repelling these claims will always be as perfect as they were when the frauds in which they originated were first discovered.

It is true, we held in the case already mentioned, that the company could successfully defend an action brought against it for refusing to recognize one of these certificates; but the defence rested, as it must if actions were to be brought upon every other certificate, upon the extrinsic facts to be proved. Conceding, even, that every one of these

claims may be defended, at whatever distance of time and under whatever circumstances they may be pressed upon the corporation, this by no means meets the equity of the case. If, as we have held, no just claim against the corporation arises out of these certificates, it is plainly unconscientious and inequitable that they should be kept on foot. Their very existence, outstanding, is unjust, because it must of necessity exercise a most depressing influence upon the real stock of the corporation. We all know how sensitive are values in property of this description; and what conceivable facts could cast a deeper shadow over every genuine shareholder's interest than a spurious issue of $2,000,000 of stock, evidenced by certificates apparently valid, and under which every holder boldly and confidently asserted his claim? The fact is not alleged in the complaint, but we can scarcely err in supposing that, on the discovery of these frauds, every share of valid stock must at once have lost nearly one-half of its market value. That depression must continue, in a greater or less degree, while the certificates are allowed to stand. A decision against one of them, in an action founded upon it, is not a determination against any other one, and cannot, while the others are outstanding, restore to the genuine stock the value which justly belongs to it. To say that the shareholders must remain in such a condition of insecurity and doubt, and must hold their shares under such a depression, would be to sanction a species of injustice which ought to be prevented. These shares of stock are a description of property as much entitled to invoke the protective remedies peculiar to courts of equity as any other.

In applying these remedies to any other kind of property thus clouded and depressed by a written instrument professing to be, and on its face actually being, an incumbrance upon it, no doubt, it seems to me, would arise; and I think there is no well founded doubt in the present case. And, besides these considerations, which affect the interests of the individuals whose legal identity in this controversy is lost in the corporate body representing them, we are to regard also the serious embarrassment which cannot fail to attend the internal administration of the affairs of the corporation itself. When this large addition of false stock became known, under which the holders confiently claimed to be shareholders, how could the corporation intelligently and safely proceed to regulate its elections and divide its earnings? These were difficulties which nothing short of a judicial determination, against the spurious issue and cancelling the false certificates, could effectually remove.

One of the views presented on the argument in support of the complaint was, that the corporation, as a trustee of the property and funds under its control, was entitled in that character to ask the advice and direction of a court of equity in regard to its obligations and duties in the circumstances which had occurred. Without having particularly examined this theory, I very much doubt whether it can be maintained. I have already spoken of the relations between the corporate body and its shareholders as having some analogy to those between trustees and

cestuis que trust; but those relations are nevertheless *sui generis*, and they point to the corporation rather as the proper representative of its genuine stockholders, in a controversy of this kind, than as a trustee entitled for its own sake to ask the advice of the Court as to the mode of discharging its functions. When a trustee invokes the interference of equity on such a ground, he does it for his own protection; and the interests of the beneficiary are not of themselves an element of the jurisdiction. But it is difficult to separate, even in abstract contemplation, the rights and interests of a corporation from those of the shareholders. If the corporation exceeds its powers, or misappropriates its funds, the stockholder may complain, or if the evil be only threatened, he may arrest it by injunction; but if the controversy is with third parties, the interests of the corporate body and of the individuals who compose it are so nearly identical that a separation in theory or practice would seem to be impossible.

For this reason there is a great difficulty in sustaining the present suit as one brought by a trustee to be advised and directed in regard to the proper line of duty towards the *cestuis que trust* and those who claim to stand in that relation. But the same reason unerringly indicates the corporation as the organ through which the shareholders are to be heard when legal wrongs are to be redressed or equitable remedies are to be invoked. If, therefore, I have been successful in showing that the fraudulent certificates of stock are instruments of such annoyance and vexation, in depressing values and disturbing the fair enjoyment of rights, that they ought not to be allowed to stand, then this suit by the corporation rests firmly upon that branch of equity jurisdiction which includes the cancellation of such instruments.

The views which have been taken assume the invalidity of all the certificates fraudulently issued by Schuyler. Upon the facts stated in the complaint, which the demurrer admits to be true, and upon the principles laid down in the case of the Mechanics' Bank against this company (*supra*), it is impossible to say that any one of them is a valid representative of stock, or a claim of any kind against the corporation. It appears, indeed, that most of the certificates have passed into the hands of third parties; and the decision of the Court below assumes that those parties, in good faith, paid for or advanced value upon the shares. On that ground it was further assumed that their rights were superior to those of the corporation and the holders of its actual and genuine stock. This is a view of the question which holds a prominent place among the reasons given for dismissing the complaint. But since the Court below pronounced its judgment, the other case mentioned came before us on appeal, and the contrary doctrine was very precisely determined, and upon the fullest consideration. Adhering as we do to that decision, and looking at the case as the complaint states it, all the certificates in question must share the same fate; and the present case will not be embarrassed by the necessity of rendering different judgments in respect to different parties. In saying this much, however, it

is not designed to prejudge the rights of any person in special circumstances, to be defensively alleged and proved, differing in their character from any yet called to our attention.

The only remaining question is one of multifariousness in respect to parties or causes of action. The mere joinder of too many persons as defendants, when there is no misjoinder of subjects, is not a ground of demurrer by any one of them against whom the complaint sets forth a good cause of suit. A demurrer may be interposed for a defect of parties, but not for the reason merely that too many are brought in.[1] In respect to the joinder of causes of action, the provision of law, so far as material to the question, now is, that "the plaintiff may unite in the same complaint several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of the same transaction or transactions connected with the same subject of the action."[2] The authors of the code, in framing this and most of its other provisions, appear to have had some remote knowledge of what the previous law had been. This provision, as it now stands, was introduced in the amendment of 1852, because the successive codes of 1848, 1849, and 1851, with characteristic perspicacity, had in effect abrogated equity jurisdiction in many important cases, by failing to provide for a union of subjects and parties in one suit indispensable to its exercise. This amendment, therefore, was not designed to introduce any novelty in pleading or practice. Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretations which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose and yet so comprehensive any rules less liberal than those which have long prevailed in courts of equity.

It is only necessary, therefore, to determine whether, in a suit instituted for the purpose of cancelling the invalid certificates of stock in the plaintiffs' corporation, all the claims under these instruments can be united, and all the parties holding them brought in, without rendering the suit obnoxious to the charge of multifariousness, as that term has hitherto been used. The convenience of settling the whole controversy in a single suit is obvious; because the only alternative is, that the corporation would be entitled to institute, and must institute, a separate action against each of the numerous parties claiming under these certificates. No one of the parties would be bound by a decision against any other one; and intolerable expense and delay might be the consequence of such a course.

The rule on this subject has been often considered, both in England and this country, and has become tolerably well settled, although in regard to some of its applications there is a diversity in the adjudged cases. In the case of the Mayor of York *v.* Pilkington,[3] decided by

[1] Code of 1852, § 144. [2] Code of 1855, § 167. [3] 1 Atk. 283.

Lord Hardwicke in 1737, the corporation of York claimed an exclusive right of fishery in the river Ouse for a large tract; and the bill was filed against various persons claiming several and distinct rights in the same fishery, in order to quiet the plaintiffs' title and also for a discovery and account of the fish the defendant had taken. A demurrer to the bill for multifariousness was overruled after being twice argued, the Lord Chancellor observing: "It was no objection that the defendants have separate defences; but the question," he added, "was whether the plaintiffs have a general right to the sole fishery, which extends to all the defendants." Nearly a century later, Lord Eldon referred to this case as standing on the ground that "where the plaintiffs stated themselves to have an exclusive right, it signified nothing what particular rights might be set up against them, because, if they prevailed, the rights of no other person could stand." And he added: "It has long been settled that if any person has a common right against a great many of the king's subjects, inasmuch as he cannot contend against all of the king's subjects, a court of equity will permit him to file a bill against some of them, taking care to bring in so many persons before the Court that their interests shall be such as to lead to a fair and honest support of the public interests." [1] In Whaley *v.* Dawson,[2] Lord Redesdale considered the test to be whether there was a "general right in the plaintiff covering the whole case, although the rights of the defendants may have been distinct." In referring to the Mayor of York *v.* Pilkington, and analogous cases, he observed: "The Court has gone upon the ground of preventing multiplicity of suits, one general right being claimed by the plaintiffs against all the defendants." The same eminent authority, in the treatise on Equity Pleading,[3] says: "The Court will not permit a plaintiff to demand by one bill several matters of different natures against several defendants; but when one general right is claimed by the bill, though the defendants have separate and distinct rights, a demurrer will not hold."

The subject of multifariousness is very elaborately and carefully examined by Mr. Justice Story, in his treatise on Equity Pleading. Adopting the views, and in part the language of Lord Cottenham, in Campbell *v.* Mackay,[4] he lays down the following doctrine: "The result of the principles to be extracted from the cases on this subject seems to be, that where there is a common liability and a common interest, a common liability in the defendants, and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit." [5] He adds: "Indeed, where the interests of the plaintiffs are the same, although the defendants may not have a coextensive common interest, but their interests may be derived under different instruments, if the general objects of the bill will be promoted by their being united in a single suit, the Court will not hesitate to sustain the bill

[1] 1 Jac. & Walk. 369. [2] 2 Sch. & Lef. 370. [3] Mitford, Eq. Pl., by Jeremy, 181.
[4] 1 Mylne & Craig, 623, 624. [5] Sect. 533.

against all of them." In this State, the joinder in one suit of causes of action in some sense distinct from each other, with all the necessary parties for their determination, has always been allowed with great liberality where convenience and the ends of justice have required it. In Brinckerhoff *v.* Brown,[1] it was held that different judgment creditors might unite in one bill for the purpose of reaching the estate of their common debtor, which he had fraudulently conveyed, and that the bill might be filed against persons relative to matters of the same nature, forming a connected series of acts, all intended to defraud and injure the plaintiffs, and in which all the defendants were more or less concerned, though not jointly in each act. In the case of Fellows *v.* Fellows,[2] the bill charged that the several defendants, in combination with each other and with the debtor of the plaintiffs, took from him separate conveyances of his property, without consideration, and in order to defraud the plaintiffs. One of the defendants answered, denying the combination, and demurred to the residue of the bill, because it included distinct matters in many of which he was not concerned. The demurrer was overruled, the Chancellor observing: "If instead of one matter in demand, here are three (the three conveyances in question), they are all of the same nature in respect to the questions they now present. Each of the three defendants holds a portion of the property of John Fellows (the debtor) by a fraud, and by a fraud of the same kind. The right of the complainants is against the whole property, and their right against all portions of it is of one nature. The claims of the three defendants, now holding the property in question, are of one character, each of them holding under a fraudulent transfer." "This, therefore, is not a case of several matters of distinct natures in the sense of the rule upon that subject." The decision was appealed from to the Court for the Correction of Errors, and was there unanimously affirmed, after a very full discussion by counsel and elaborate consideration in the opinions of several members of the Court.

Many other cases might be mentioned, exhibiting varieties in the application of the general rule declared in those which have been cited. But it is unnecessary to refer to them. The rule itself is settled too firmly to be shaken, and it would seem to be decisive of the present question. In this case there is a single interest in the plaintiffs directly opposed to the interests of all the defendants. The common point and centre of the litigation is the stock, property, and franchises of the plaintiff's corporation, in which the defendants claim specific shares and proportions as holders of the false certificates. The rights claimed by the defendants are distinct, because they rest upon separate instruments as the evidence thereof; but they are of precisely the same nature, they turn upon the same question, and they are a cloud upon the same estate. Each certificate is a false muniment of the

[1] 6 John. Ch. 139. [2] 4 Cow. 682.

holder's title to a particular interest in the corporate estate, vested as a unit in the corporation, but equitably belonging to the holder of its actual stock.

Among the grounds of the argument in behalf of the plaintiffs, it was insisted that the suit is maintainable on the principles of a bill of peace, or suit to quiet a title and prevent a multiplicity of actions. A suit in equity to establish a sole right of fishery against several hostile claimants, or by a parish priest to establish a right to tithes against the parishioners, or by the parishioners to establish a *modus*, are examples of a bill of this kind. It will be found, however that there is nothing in the rules which govern the technical bill of peace to justify a misjoinder of subjects or parties in the litigation. But the number of parties and the multiplicity of actual or threatened suits, will sometimes justify a resort to a court of equity when the subject is not at all of an equitable character, and there is no other element of equity jurisdiction. Even in such cases there must be such a unity of interest on the one side or the other, as to bring the litigation within the ordinary rules of equity pleading. This suit, I think, could be sustained as a bill of peace, but the question of misjoinder would be the same. Without referring to the principles of such a bill, we sustain the jurisdiction on the ground that the controversy is of an equitable nature, for the reasons which have been given at large; and we hold that the objection for multifariousness merely is untenable within ordinary and established rules on that subject. If all the invalid certificates were now held by one person, the jurisdiction would attach in order to have them cancelled, and the suit would be against him alone. Being held by various parties, the jurisdiction still depends on the same principles; but all the parties can be united, because there is such a unity in the controversy with all of them as to render it fit and proper, according to settled principles, that they should be joined in a single suit.

The judgment of the Supreme Court must be reversed, and judgment entered overruling the demurrer, with the usual leave to answer.

SELDEN and ROOSEVELT, JJ., did not sit in the case; all the other judges concurring,

Judgment reversed, and the demurrer overruled, with leave to answer.[1]

[1] See N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30. — ED.

CHAPTER III.

BILLS FOR AN ACCOUNT.

DINWIDDIE *v.* BAILEY.

BEFORE LORD ELDON, C., JUNE 10 AND 17, 1801.

[*Reported in* 6 *Vesey*, 136.]

THE bill stated that the plaintiff carried on the business of insurance broker at Manchester, and was employed by the defendants, from time to time, to effect insurances upon ships, goods, wares, and merchandise, and paid divers sums of money on account thereof; and became entitled, as such insurance broker, to divers sums of money for his commission upon effecting such insurances, and otherwise respecting the same, and the money received on account thereof, and for postage of letters, and upon sums of money paid, laid out, and expended on account of the defendants in effecting the insurances, &c.; and that the defendants were also indebted in divers sums of money upon promissory notes indorsed to the plaintiff in the usual course of business.

The bill further stated that the plaintiff received some money from the underwriters in respect of losses upon some ships; but that it hath constantly been the universal custom of persons who carry on the business of insurance brokers at Lloyd's Coffee-House, at Liverpool, and for all other persons who carry on the trade of insurance brokers, in the business which they transact for merchants at Liverpool or in any other part of the county of Lancaster, to be allowed one month from the day upon which the loss upon ships or goods which are insured is ascertained, and the documents respecting such loss found to be satisfactory, to obtain the signatures of the underwriters to the adjustment of the policy, and to apply to such underwriters for payment of their proportions; and at the end of that month, and not before, to accept bills, drawn upon them by the persons for whom they effected such insurances, for the amount of such loss, until the end of four months from the day upon which the loss was ascertained and the documents found satisfactory: and such custom has been always adopted and acted upon by the plaintiff in all his dealings with the defendants; and they have constantly allowed the plaintiff the said space of four months for

the payment of the amount of the losses until the commencement of the action.

The bill then stated losses upon ships under insurances effected by the plaintiff for the defendants: one settled upon the 7th, another upon the 11th of October, 1800; which, according to the said custom, would be payable three months from the 7th and 11th of November; that no account of the said dealing was stated between the plaintiff and defendants, but an action was brought by the defendants in December, in which they held the plaintiff to bail for 1,192*l.* 5*s.* 11*d.*, though the money due in respect of the said losses was not due until February; and the defendants had not drawn upon the plaintiff, and the defendants at the time of the action brought were, and now are, indebted to the plaintiff in a much larger sum on the accounts before mentioned, and also by virtue of three promissory notes: one, dated the 19th of October, 1799, at 12 months after date, for 600*l.*; another, of the same date and for the same time, for 650*l.*; another, dated the 18th of November, 1799, at 15 months after date, for 1,440*l.* 16*s.*, — all indorsed to the plaintiff; and on account a large balance would be found due to the plaintiff. The bill then stated applications for the sums paid for premiums, commission, &c.; that the defendants threaten to proceed to trial, well knowing that the plaintiff cannot obtain adequate justice in the said action without an account, and cannot recover therein the balance due to him from them, as aforesaid; and prayed an account of the sums of money paid by the plaintiff for and on account of the defendants in respect of the insurances effected, also the money due to him for commission, and otherwise respecting the same, and the money received on account thereof, postage of letters, and other sums of money paid, laid out, and expended by him on their account about the same, and also an account of the money due to him in respect of the promissory notes, of the several sums of money he received from the underwriters or others on account of the losses, and all other sums due to them from him; and a decree for payment; offering to pay what shall be due from him; and an injunction to restrain proceedings at law.

The defendants put in a general demurrer to the discovery and relief.

Mr. *Mansfield* and Mr. *Pemberton* in support of the demurrer. This bill seeks a discovery and account, not of money the defendants have received, or with the receipt of which they are acquainted, but of money paid and received by the plaintiff on account of the defendants for premiums of insurances effected by him for them, also of money due to him in respect of promissory notes, also money received by him from underwriters on account of losses, and money due to him for commission, and paid by him for postage of letters or otherwise on their account. With respect to the custom alleged, it is impossible for this Court to decide. All these matters must be tried upon notice of set-off.

THE LORD CHANCELLOR. The fact as to the promissory notes he could

prove without discovery. He states the custom, and that in fact such has been your habit of dealing with him. He does not want discovery for that. What he has paid for premiums of insurance, and what for postage, is rather in his mind than yours. I do not recollect any such bill.

Mr. *Romilly* and Mr. *W. Agar* in support of the bill. The defendants admit the custom by the demurrer, and that all the facts alleged are true. The question therefore is, whether all this account must be gone through before a jury. There have been many bills of this nature, by stewards, for an account between them and their employers, as to receiving rents and paying sums of money. The defendants must make out that the Court will not maintain a bill for an account at the suit of an accounting party. There is one instance in which this question was much discussed, and an opinion given upon it by a very great authority, in a case much more unfavorable to the plaintiff, —Wells *v.* Cooper.[1] The bill was filed by the executor of a builder against a person who had employed him for many years and from time to time paid him money; stating that, upon the account, a balance was due to the testator, and charging that the defendant agreed to account with the executor. The answer admitted that applications had been made; and the defendant had said that if the plaintiff would produce the account he would settle it in an amicable way, but insisted, then, that the plaintiff had no right to such an account, and claimed the same benefit as if he had demurred. Lord Chief Baron Eyre said it was a very unfavorable case, reviving a dormant claim; that, if it was only one matter, it could not be the subject of a bill; but where there had been a series of transactions on the one side, and of payments on the other, he was not satisfied that it was not matter of account. He dismissed the bill, however, upon the ground of the length of time that had elapsed.

This is not a very positive opinion that such a bill may be entertained; but that opinion was expressed, and there is no case or opinion to the contrary. If any doubt arises whether the custom exists, that may be ascertained hereafter by an issue. The plaintiff has a right to a discovery on oath, what commission he was entitled to have from them. He states that, at the time of the action brought, no sum was due from him to the defendants; on the contrary, that a large sum was due from them. Mundy *v.* Mundy[2] bears some analogy to this case. A balance must be taken to be due to the plaintiff: therefore, as it is said there, nothing is left to try at law.

Mr. *Mansfield* in reply. I can easily conceive such a case as that in the Court of Exchequer, mutual transactions between two persons, money paid from time to time, &c., — especially in the case of a builder. But here no account is required from the defendants that can be had. There is no allegation of any money paid or received by them. This is an abuse of the term "account," which supposes something mutual.

[1] In the Court of Exchequer, 1791, MSS. [2] 2 Ves. Jr. 122.

All these charges are payments and business done and money received by the plaintiff. I admit the case where books or papers are wanted, or where there are mutual demands; but what books and papers are sought here, or what mutual demands are there, except as to those promissory notes indorsed by the defendants? The plaintiff can prove the handwriting. If he wanted evidence as to his legal demand for commission, that is not a ground for such a bill as this. He does not suggest the least difficulty in proving what is due to him for commission, or as to the custom, either general, or, as in fact, that upon which they settled. As to the supposed confession of a balance due to the plaintiff, that is, *pro hâc vice*, for the purpose of arguing the demurrer: but that would turn every action into a bill; for the demurrer would be a confession. The case of the steward is clearly a case of mutual accounts.

THE LORD CHANCELLOR. I should feel infinite reluctance in supporting such a bill. It contains rather a statement of facts, the effect of which it is a little difficult to collect. With regard to all these allegations, some of which import that he has received, some, that he has paid, money, he does not go on to allege that, upon the effect of the whole, taken together, they are indebted to him. The only allegation of debt, that I can find, is with regard to the money due upon the promissory notes. With respect to the allegation of a universal custom, if the fact is true, there can be no manner of difficulty in the proof: so that, if an action was brought before the end of the four months, it would be a complete defence to say — according to this general, notorious, custom, very capable of proof — that it was brought too soon. With respect to this particular fact, it does not proceed upon any alleged special agreement, the proof — and therefore the discovery — of which might be necessary to sustain the defence to an action. The bill applies itself, not to a special agreement, but to a fact capable of proof; out of which it might be for a jury to infer that there was a special custom. The allegation is that, taking the whole together, this custom does exist at Lloyd's Coffee-House, at Liverpool, and in every part of Lancashire; and that, conformably to that custom, the plaintiff was constantly allowed four months' credit, which is a fact to be evidenced by some transaction; and the gravamen of the bill is, that the action was brought too soon, the four months not being expired. He alleges further, that these promissory notes form a counter-demand; and, upon the whole, alleges that a considerable sum of money is due to him; and, in the sense in which such words are used, the bill must be taken to be true.

It is clear this case might be disposed of altogether at law. It is another question whether the jurisdiction of this Court might not attach upon it: but it is beyond all doubt it might be disposed of at law; for every fact alleged is a fact with regard to which it is impossible that the plaintiff must not be in possession of proof. He must know what he paid for premiums of insurance; for postage; what was due to him

for commission, which is settled by the law and usage of merchants, unless there is a special agreement; which is not alleged. All these particulars are known to himself. If an action was brought, therefore, he would have had only to prove what is here stated; which would be easy. He has a set-off; the ordinary case of set-off of a sum of money which he says is not only equal to their demand, but gives him a right to sustain himself as a plaintiff for the balance due to him. It is not to be said that, in every case where the defendant owes more to the plaintiff, that is a ground for a bill. There must be mutual demands, forming the ground. The case of dower is always considered a case standing upon its own specialties. So is the case of the steward. The nature of his dealing is that money is paid in confidence, without vouchers; embracing a great variety of accounts with the tenants; and nine times in ten it is impossible that justice can be done to the steward. If I sustain this bill, there never would be an action in the city against a broker without a bill in equity. I hesitate excessively in permitting such a bill; and the strong inclination of my opinion is, that the demurrer ought to be allowed. I feel great sanction for the doubt I entertain from the opinion of Lord Chief Justice Eyre in the case cited: a judge whose habit was not to express doubts where he had a clear opinion. That case is very different, as being the case of an executor upon payments made to his testator, not of the party himself coming for relief. The executor can only go upon conjecture as to the amount of the money paid; and therefore would go to law completely at his peril. There is hardly a case of set-off, in which a bill might not be sustained, if this may.

JUNE 17.

The cause having stood over for the purpose of searching for precedents, Mr. *Agar* said there were numerous cases of accounts sought by a principal against a factor, and one upon the bill of the factor against the principal, — Chapman *v.* Derby;[1] which was disposed of upon another point; but he could not find any case of an insurance broker.

THE LORD CHANCELLOR said it was impossible to sustain the bill without laying down that, wherever a person is entitled to a set-off, he may come into this court.

The demurrer was afterwards allowed.

[1] 2 Vern. 117.

MACKENZIE *v.* JOHNSTON, MEABURN, AND OTHERS.

BEFORE SIR JOHN LEACH, V. C., JUNE 29, 1819.

[*Reported in* 4 *Maddock*, 373.]

THE bill stated that in April, 1817, the plaintiff, then a partner with one Vigurs, since a bankrupt, entered into an agreement with the defendants, Johnston & Meaburn, the owners of a vessel called the Jemima, about to sail for the East Indies, to ship a quantity of earthenware to Bombay, to be there sold by their agents on their account; and that the defendants should advance to the plaintiff and his then partner 275*l.* 1*s.* 6*d.* on the credit of the shipment; and that the money produced by the sale of the goods in India, after deducting the necessary expenses incident to such adventure, and the said sum of 275*l.* 1*s.* 6*d.*, should be paid over to the plaintiff and his partner by the defendants: that the shipment was accordingly made, and was consigned by the defendants, Johnston & Meaburn, to their agents at Bombay: that the partnership of the plaintiff with Vigurs was dissolved on the 30th of September, 1818, but no settlement of accounts ever took place: that a commission issued against Vigurs on the 1st of March, 1819, and assignees (three of the defendants to the bill) were chosen: that Johnston & Meaburn never accounted for the proceeds of the earthenware, and that there is an open and unsettled account subsisting between them relative thereto; and that, upon a fair statement of their receipts and payments in respect of such adventure, a considerable balance is due to the firm of Vigurs & Co. from the defendants, Johnston & Meaburn.

The bill, amongst other things, charged that one of the items on which the defendants, Johnston & Meaburn, claimed to be entitled to a balance in their favor, was a charge of 220*l.* 7*s.* 7*d.* for discount, at 35*l.* per cent, and 3*l.* per cent for breakage, upon the sum at which the goods were alleged to be sold, which claim was contrary to the custom of the trade. The prayer of the bill was for an account.

The defendants, Johnston & Meaburn, put in a general demurrer for want of equity.

Mr. *Treslove*, in support of the demurrer. This is not a case in which a bill will lie; the plaintiff's remedy is at law. He might file a bill for a discovery only, but not a bill for relief. Lord Thurlow says, in Hoare *v.* Contencin,[1] "As to an account, this is only of a repayment of money, and that the money for which the teas sold shall be deducted." In that case the demurrer was allowed. In Dinwiddie *v.* Bailey, Lord Eldon says, "There must be mutual demands to support a bill for an account." In this case there is only one article to account for, viz. the cargo of earthenware; there was no other matter of account between the parties.

[1] 1 Bro. C. C. 27.

This is not like the case of an account sought against a factor or trustee. There was a case before the late Vice-Chancellor [1] where the plaintiff filed a bill against his banker for an account; I demurred to the bill, and the demurrer was allowed.

Mr. *Pepys*, contra. The defendant was a trustee for the plaintiff, which distinguishes this case from those cited. We say that credit has not been given for the goods sold, and are desirous of knowing to whom they were sold, that it may be ascertained what they really sold for.

THE VICE-CHANCELLOR. The defendants here were agents for the sale of the property of the plaintiff, and wherever such a relation exists, a bill will lie for an account. The plaintiff can only learn from the discovery of the defendants how they have acted in the execution of their agency; and it would be most unreasonable that he should pay them for that discovery, if it turned out that they had abused his confidence; yet such must be the case if a bill for relief will not lie.

Demurrer overruled.

KING *v.* ROSSETT AND ANOTHER.

BEFORE ALEXANDER, C. B., NOVEMBER 20, 1827.

[*Reported in* 2 *Younge & Jervis*, 33.]

THE bill in this case, which was filed by the plaintiff, as principal, against the defendants, his agents, in the character of stock-brokers, stated that the plaintiff had employed the defendants in the sale, and afterwards in the repurchase, of the sum of 40,000*l.* Three Per Cent Consolidated Annuities, leaving the entire matter in their hands, and to their discretion. That, in consequence of such employment, they had sold and afterwards re-purchased the said sum of 40,000*l.*, in several parcels, to and from various persons, and had employed the proceeds of the sale in the re-purchase of stock. That the defendants afterwards had sent to the plaintiff an account in writing of such sales and purchases, in which the prices at which the same were respectively effected were stated, and by which the plaintiff was made a debtor to the defendants in the sum of 625*l.*; upon the faith of which, and believing the same to be just and true in every particular, the plaintiff wrote to the defendants, enclosing a cheque for 50*l.*, and promising to pay the balance of 575*l.*, which he owed, by instalments of 60*l.*, before the 6th of each successive month, until the whole sum was liquidated. The plaintiff subsequently discovered the account to be very erroneous and inaccurate, the sales having been effected at a much higher, and the purchases at a much lower, rate than were represented by the account, the result of which was, that the plaintiff was a creditor of the defendants to the amount of 1,000*l.*; notwithstanding which the defendants commenced

[1] Sir Thomas Plumer.

an action at law against the plaintiff for the recovery of the balance of 575*l*. It charged, amongst other things, that the defendants had not delivered to the plaintiff the bank receipts upon the several purchases, which were still in their possession; and prayed a discovery; an account of the true and real prices at which the stock was sold and purchased, the plaintiff offering to pay what should be found to be legally due to the defendants; an injunction to restrain the proceedings at law, and such further and other relief as the circumstances of the case might require.

The defendants put in a general demurrer for want of equity.

Mr. *Chandless*, having opened the bill,

Mr. *Wigram*, in support of the demurrer, contended that no sufficient ground was laid for equitable relief. In Dinwiddie *v.* Bailey, it was held by Lord Chancellor Eldon that a bill by an insurance broker for a discovery and account of money paid and received by him in that capacity, on account of the defendants in that suit, and money due to him for commission, &c., and for promissory notes indorsed to him, was not sustainable, as the case was capable of being disposed of altogether at law. The same rule is applicable to this case. Before a court of equity will interfere, mutual demands must be shown to exist, and a clear case of accounts must be made out. None such exists here, for the allegations in the bill, if they be true, are capable of proof, and may be rendered available to the plaintiff at law. Neither does this case range itself within the exceptions to this rule. Agency merely is not a matter of account, and no reliance can be placed upon the fact of the relation of principal and agent having subsisted between these parties. Hirst *v.* Peirse.[1] The bank receipts, if necessary in the defence to the action, may be obtained at law through the intervention of a judge's order.

Mr. *Chandless*, in support of the bill. This bill is filed by the principal against his agents, which distinguishes it from the cases cited, which were those of agents against their principal: in the one case, a confidence is reposed; in the other, all the circumstances must be within the knowledge of the party. It is a clear rule of equity that an agent is accountable to his principal,[2] and that a bill will lie by the latter against the former for that purpose. Holtscomb *v.* Rivers;[3] Mellish *v.* Edlen;[4] Mackenzie *v.* Johnston. Another objection equally fatal to this demurrer is, that the transactions of the defendants are tainted with fraud; and in cases of fraud a court of equity has a concurrent jurisdiction with the common law. Colt *v.* Wollaston.[5] At all events the demurrer is too extensive; for, under the prayer for general relief, although the plaintiff may not be entitled to the relief specifically prayed, he is to such relief as is consistent with the statement in the bill: Wilkinson *v.* Beal;[6] Allan *v.* Copeland;[7] and, as he can obtain

[1] 4 Price, 339.
[2] Com. Dig. Chan. (2 A.)
[3] 1 Ch. Cas. 127.
[4] 2 id. 11.
[5] 2 P. Wms. 154.
[6] 4 Mad. 408.
[7] 8 Price, 522.

the bank receipts by no other means, the bill is sustainable for that purpose.

Lord Chief Baron Alexander. I can entertain no doubt whatever as to the course which ought to be pursued in this case, and am clearly of opinion that the demurrer should be allowed. The bill is filed by a principal against his agents, and it is said that that fact alone is sufficient to sustain the bill. Undoubtedly, a principal is entitled to an account from his agent, and may apply to a court of equity for that purpose; but, as I conceive, before that court will interfere, a ground for its interposition must be laid, by showing an account which cannot fairly be investigated by a court of law. Unless courts of equity were to put that limit to their interference, no case of this description would ever be tried in a court of law, and wherever a person was entitled to a set-off, a bill might be sustained. But it is objected that the demurrer is too extensive, and covers too much. If a plaintiff asks for relief, and for discovery as ancillary only to that relief, where the Court is of opinion that the ground for the relief fails, he is not entitled to the discovery, and must file another bill for that purpose. Although, under a prayer for general relief, if the specific relief prayed cannot be given, the Court will assist the party, yet the facts, to warrant that assistance, should be clearly and fully stated, so that the defendant may know what is sought by the bill. That is not the case here; for the statement respecting the stock receipts is evidently a mere pretence. I feel no doubt that the demurrer in this particular also should be allowed.

Demurrer allowed with costs, according to the practice of the court.

FOLEY *v.* HILL.

In the House of Lords, July 31 and August 1, 1848.

[*Reported in* 2 *House of Lords Cases*, 28.]

This was an appeal against an order of Lord Chancellor Lyndhurst, by which he reversed a decree of the Vice-Chancellor of England, aud dismissed the appellant's bill.[1]

In, and previously to, the year 1829, the appellant and Sir Edward Scott, owners of collieries in Staffordshire, kept a joint account at the respondents' bank at Stourbridge, in Worcestershire. In April, 1829, a sum of 6,117*l.* 10*s.* was transferred from that account to a separate account then opened for the appellant; and the respondents, in a letter enclosing a receipt for the sum so transferred, agreed to allow 3*l.* per cent interest on it. From 1829 to the end of the year 1834, when the joint account was closed, the appellant's share of the profits of the collieries was from time to time paid by checks, drawn by the colliery

[1] 13 L J. Ch. 182; 1 Ph. 399.

agents against the joint account. These checks were, as the respondents alleged, paid in cash or by bills drawn by them on their London bankers in favor of the appellant, and none of them were entered in his separate account. The only items found in that account were the 6,117*l.* 10*s.* on the credit side, and two sums of 1,700*l.* and 2,000*l.* on the debit side, both being payments made to, or on behalf of, the appellant in 1830. There were also entries, in a separate column, of interest calculated on the sum or balance in the bank, up to Dec. 25, 1831, and not afterwards.

The appellant filed his bill in January, 1838, against the respondents, praying that an account might be taken of the said sum of 6,117*l.* 10*s.*, and all other sums received by the respondents for the plaintiff on his private account since April, 1829, with interest on the same at the rate of 3*l.* per cent per annum; and also an account of all sums properly paid by them for or to the use of the appellant on his said account since that day, and that they might be decreed to pay the appellant, what, upon taking such accounts, should be found due to him.

The defendants at first put in a plea of the Statute of Limitations, supported by an answer; but the plea being overruled,[2] they put in their further answer and claimed the benefit of the statute.

A schedule annexed to the answer set forth the separate account of the appellant from the bank-book, containing the items and entries before mentioned.

The Vice-Chancellor, on the hearing of the cause, decreed for an account as prayed, being of opinion that the respondents were bound in duty to keep the account clear; that they were to be charged according to their duty, the neglect of which could be no excuse; and that the agreement to allow the interest was in effect the same, in answer to the Statute of Limitations, as if the interest had been regularly entered or paid.

Lord Lyndhurst, taking a different view of the case, upon appeal, held, first, that the Statute of Limitations was a sufficient defence; and, secondly, that the account, consisting of only a few simple items, was not a proper subject for a bill in equity, but a case for an action at law for money had and received, and his Lordship reversed the decree, and dismissed the bill.

Mr. *Stuart* and Mr. *G. L. Russell*, for the appellant: The judgment appealed from proceeded partly on the ground that the Statute of Limitations is a bar to the appellant's demand, and partly on the ground that the account prayed for is a simple account of debtor and creditor, and, therefore, not a fit subject for a suit in equity. The question is, What is the nature of the relation between a banker and those who deposit money with him, and who are called his customers? If it could be shown that a banker is in the position of a trustee for those who employ him that he is clothed with a fiduciary character in relation to

[2] 3 Myl. & C. 475.

them, and that there is a personal trust and confidence in him, then the Statute of Limitations would be inapplicable, and the second defence also must be held to fail.

The respondents were not in the relation of mere debtors to the appellant for the money deposited, which, in ordinary cases, is considered to be a loan, and therefore a debt. Carr *v.* Carr,[1] Devaynes *v.* Noble,[2] Sims *v.* Bond,[3] Pott *v.* Glegg.[4] The Chief Baron, in Pott *v.* Glegg, doubted whether in all cases there was not an implied contract between a banker and his customer, as to the money deposited, which distinguishes it from an ordinary case of loan; but he yielded to the opinion of the other judges, that it was a simple loan and debt.

It may be admitted that bankers are debtors, but debtors with various superadded obligations; as, for instance, to repay the money deposited by honoring the depositor's checks (Marzetti *v.* Williams[5]), according to the custom of the trade; and in this case there was an additional obligation by the special contract to pay interest on the deposit.

It was the duty of the respondents to keep the accounts with the appellant clear and intelligible, to calculate the interest on the balances in their hands from time to time, to make proper entries of it in the account, and to preserve all vouchers and other evidence of their transactions with him. These duties and transactions constitute a relation more complex than that of mere debtor and creditor, and an account of them is a fit subject for a bill in equity, not only by reason of the admitted concurrent jurisdiction of courts of equity with courts of law in matters of account, but also because the account here sought is of moneys received by the respondents, the receipt of which is within their own knowledge, and the entries and record of which they were bound to keep.

The right to an account in equity does not depend on the number of items, and it is no answer to a bill for an account and payment of balances to say that they might be recovered in an action at law. Such a doctrine would supersede the long-established equitable jurisdiction in the cases of stewards and agents and factors in relation to their employers and principals. There cannot be a distinction made between those relations and the relation of banker and employer or customer.

The respondents made entries of the interest in this account up to December, 1831, from which time, for the purpose probably of taking advantage of the Statute of Limitations, they abstained, without notice to the appellant, from making any entry of interest in his account, contrary to their custom as bankers, and in violation of their special duty to the appellant. That constitutes a case of a fraudulent breach of duty, of which, although the bill does not contain any such charge, the Court may nevertheless take cognizance, where it finds the respondents broadly stating in their answer that they omitted to make the entries in order to avail themselves of the Statute of Limitations, a defence which was never before allowed in such a case as this. But the respondents

[1] 1 Mer. 541, note. [2] 1 Mer. at p. 568. [3] 5 B. & Ad. 392, 393.
[4] 16 M. & W. 321, 328. [5] 1 B. & Ad. 415.

do, however, admit in their answer several transactions in 1831, 1832, 1833, and 1834, connected with the appellant's account, in receiving checks drawn in his favor, and which they say they paid to the person presenting them, either by cash or by bills on their bankers. Those admissions would take this case out of the statute, if otherwise pleadable. Topham *v.* Braddick,[1] Lady Ormond *v.* Hutchinson,[2] Sterndale *v.* Hankinson.[3]

It is clear that the accounts sought here can best be discovered and examined in a court of equity; and the objection that an action at law is the proper course, not having been suggested in the answer of the respondents, took the appellant by surprise. The case of Dinwiddie *v.* Bailey, cited on that point before the Lord Chancellor, is not applicable, because some of the matters of which the plaintiff there sought discovery were, as Lord Eldon observed,[4] "rather in his own mind than in the defendant's;" and others were capable of proof in an action at law. Courts of equity entertain jurisdiction in various matters in which remedy might be had in the courts of law, as in bills for partition, assignment of dower, &c. Lord Redesdale in his treatise says:[5] "In matters of account, which, though they may be taken before auditors in an action, &c., yet a Court of Equity, by its mode of proceeding, is enabled to investigate more effectually," &c. His Lordship laid down the same doctrine, judicially, in O'Connor *v.* Spaight,[6] and it was adopted by this House in the late case of The Taff Vale Railway Company *v.* Nixon.[7] In The Corporation of Carlisle *v.* Wilson,[8] which was a bill filed for tolls, the Lord Chancellor says: "The principle upon which courts of equity originally entertained suits for an account when the party had a legal title is, that though he might support a suit at law, a court of law either cannot give a remedy, or so complete a remedy as a court of equity, and by degrees courts of equity assumed a concurrent jurisdiction in cases of account." The same principle had been before recognized in Barker *v.* Dacie,[9] and afterwards in Adley *v.* The Whitstable Company,[10] Ryle *v.* Haggie,[11] Frietas *v.* Dos Santos,[12] and in numerous other cases.

Mr. *Bethell*, Mr. *Kenyon Parker*, and Mr. *Craig*, appeared for the respondents, but were not heard.

The Lord Chancellor.[13] My Lords, we do not think it necessary to call upon the learned counsel for the respondents to address your Lordships, the appellant not having succeeded in showing any ground for impeaching the decree which has been made in the Court of Chancery.

The bill in this case — as is usual in cases of this description where bills state matters of account, and where there is concurrent jurisdiction at law and equity — alleges that the account is complicated, and consists of a great variety of items, so that it could not be properly taken at law. If that allegation had been made out, it would have prevented

[1] 1 Taunt. 572.
[2] 13 Ves. 47.
[3] 1 Sim. 393.
[4] 6 Ves. at p. 139.
[5] Mitf. Pl. 120, 123.
[6] 1 Sch. & Lef. at p. 309.
[7] 1 H. L. Cas. at p. 121.
[8] 13 Ves. at p. 278.
[9] 6 Ves. at p. 688.
[10] 17 Ves. at p. 324.
[11] 1 J. & W. at p. 237.
[12] 1 Y. & J. 574.
[13] Lord Cottenham. — Ed.

the necessity of considering any other part of the case. But that allegation has entirely failed of proof; for it appears that the account consisted only of one payment of 6,117*l.* 10*s.* to a private account of the customer, and that against that sum two checks were drawn and paid. That is the whole account in dispute as raised by these pleadings. Therefore there is certainly no such account as would induce a court of equity to maintain jurisdiction as if the question had turned entirely upon an account so complicated, and so long, as to make it inconvenient to have it taken at law.

It has been attempted to support this bill upon other grounds; and one ground is, that the relative situation of the plaintiff and defendants would give a court of equity jurisdiction, independently of the length or the complexity of the accounts; although it is not disputed that the transactions between the parties gave a legal right, it is said a court of equity nevertheless has concurrent jurisdiction, and that is attempted to be supported upon the supposed fiduciary character existing between the banker and his customer.

No case has been produced in which that character has been given to the relation of banker and customer; but it has been attempted to be supported by reference to other cases supposed to be analogous. These are cases where bills have been filed as between principal and agent, or between principal and factor. Now, as between principal and factor, there is no question whatever that that description of case which alone has been referred to in the argument in support of the jurisdiction has always been held to be within the jurisdiction of a court of equity, because the party partakes of the character of a trustee. Partaking of the character of a trustee, the factor — as the trustee for the particular matter in which he is employed as factor — sells the principal's goods, and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place; and the moment the money is received, the money remains the property of the principal. So it is with regard to an agent dealing with any property; he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged; and therefore, in these cases, the courts of equity have assumed jurisdiction.

But the analogy entirely fails, as it appears to me, when you come to consider the relative situation of a banker and his customer; and for that purpose it is quite sufficient to refer to the authorities which have been quoted, and to the nature of the connection between the parties. Money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known

to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.

That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor. Then the analogy between that case and those that have been referred to entirely fails; and the ground upon which those cases have, by analogy to the doctrine of trusteeship, been held to be the subject of the jurisdiction of a court of equity, has no application here, as it appears to me.

If that analogy fails, and we come to the mere contract, then the matter is not brought within the rules of a court of equity as in reference to other matters of contract. I am surprised to find that this very well known analogy and established principle should be matter of doubt or discussion at this time. But as they have been, I will refer to one or two cases in which the rule and doctrine have been most clearly established, and that, although courts of equity will assume jurisdiction in matters of account, it is not because you are entitled to discovery that therefore you are entitled to an account. That is entirely a fallacy. That would, if carried to the extent to which it would be carried according to the argument at the bar, make it appear that every case is matter of equitable jurisdiction, and that where a plaintiff is entitled to a demand, he may come to a court of equity for discovery. But the rule is, that where a case is so complicated, or where, from other circumstances, the remedy at law will not give adequate relief, there the court of equity assumes jurisdiction.

Lord Redesdale's treatise has been referred to. But, however valuable his treatise may be, it is much more satisfactory when we have, from the same eminent judge, his opinion declared in the exercise of his judicial duties. For that purpose I will refer to the case of O'Connor *v.* Spaight, in which Lord Redesdale applies the rule. The subject-matter there was between a landlord and tenant. There the connection gave no original jurisdiction to the courts of equity, but complicated accounts had arisen between the parties, and Lord Redesdale thus expresses himself: "The ground on which I think that this is a proper case for equity is, that the account has become so complicated that a court of law would be incompetent to examine it, upon a trial at *Nisi*

Prius, with all necessary accuracy, and it could appear only from the result of the account that the rent was not due. This is a principle on which courts of equity constantly act, by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law, and until the result of the account the justice of the case cannot appear." Lord Redesdale there puts it upon the ground that it is considered an established principle of the courts of equity that it is on account of the infirmity of the jurisdiction at law, for the purpose of taking an account, that a court of equity assumes jurisdiction.

Again, in the case of The Corporation of Carlisle *v.* Wilson, referred to for another purpose (it was a case for tolls), the language of the Court is this: "The question is, whether, upon the facts stated by this bill, this Court ought to decree an account. The objection is, that the right to take these tolls is, undoubtedly, a merely legal right, that the plaintiffs therefore may have a discovery, and, having obtained that, cannot also have relief, but should use the discovery in an action, which undoubtedly might be brought. The principle upon which courts of equity originally entertained suits for an account where the party had a legal title is, that though he might support a suit at law, a court of law either cannot give a remedy, or cannot give so complete a remedy as a court of equity."

These are principles which those who are conversant with the proceedings of a court of equity imbibe from the earliest period of their legal education. It is a well-known rule. The question is, whether, in the present case, this demand by the plaintiff is brought within that rule? I am assuming, for the present purpose, that there is nothing in the relative situations of banker and customer which gives, *per se*, the right to sue in equity; and that is proved, I apprehend, by the consideration of the question, whether, if there had been no money drawn out at all, and simply a sum of money had been deposited with the banker, — I will not say deposited, but paid to the banker, — on account of the customer, a party could file a bill to get that money back again. The learned counsel judiciously avoided giving an answer to that question. But that tries the principle; because if it is merely a sum of money paid to a factor, or paid to an agent, the party has a right to recall it, — he has a right to deal with the factor or agent in his fiduciary character. But the banker does not hold that fiduciary character, and therefore there is no such original jurisdiction; and if there be no such original jurisdiction growing out of the relative situations of the parties, then, to see if the account is of such a nature that it cannot be taken at law, we are to look to the account itself, and not to the bill; we are to look to the facts as they exist. We find no complicated account at all here. There is merely a sum of money paid in on the one hand, for which there is a receipt, which receipt is the evidence of the party's title, and if there be any sum of money drawn out, it is no part of his title and no part of his case; but it is a part of his case to make that demand, and to show that part of that money had not been repaid.

My Lords, that exhausts the case, with the exception of one argument, which your Lordships have heard, with regard to a supposed contract. Here it is a contract by the banker, who, it is said, so far divested himself of his original character as to give a court of equity jurisdiction over the subject-matter. What is that contract? He agrees to pay 3*l.* per cent for the use of the money. Then it is said, those 3*l.* per cent ought to have been entered in the banker's books; that though there was no transaction between the principal and the banker during the lapse of eight years, the banker ought to have entered in his books the 3*l.* per cent annually or half yearly (it is not very easy to state what the period should be), and that, not having done so, he therefore has been guilty of default. Now, he might have been guilty of default if he had not kept his contract, — that is, if he had either refused to pay the 3*l.* per cent, or had refused to pay the money when demanded. That was the whole of his contract. He had contracted for nothing more. I can see no breach of contract by this banker, who, if it had been demanded at the proper time, we may suppose would have kept his contract, and have paid the 3*l.* per cent. But because in his own books he has not entered up the 3*l.* per cent interest, which might have been a beneficial entry for the customer, it is not to be said that that is a breach of contract or a breach of duty. His duty was to account for the 3*l.* per cent and for the principal. That was all his contract; I do not apprehend that that can possibly make any difference in the question of his liability.

I do not advert to the question on the Statute of Limitations at all, because, if I am right upon this, which is the first question, the Statute of Limitations does not apply. Therefore it is unnecessary to reason upon what the effect might be of that defence being set up, even if there had been a good title in the plaintiff to institute proceedings in equity. The principle upon which my opinion is formed is, that there is nothing to bring the demand within the precincts of a court of equity. Upon that ground I think the decree was right in dismissing the bill.

Note. — Short opinions were also delivered by Lords Brougham, Campbell, and Lyndhurst. — Ed.

Appeal dismissed, with costs.

PHILLIPS *v* PHILLIPS.

Before Turner, V. C., February 19, 1852.

[*Reported in* 9 *Hare*, 471.]

The bill was filed for an account of moneys received by the defendant and his deceased partner on their joint account, on account of the plaintiff; and of the moneys which the defendant and his deceased partner had paid on their joint account, on account of the plaintiff; and for payment of the balance.

The bill stated that, for several years before August, 1847, the defendant and his brother, since deceased, carried on business as jewellers in Cockspur street, and were in the habit, from time to time, of receiving divers sums of money from and on account of the plaintiff, and the sums so received were treated by them as part of their copartnership assets; and the defendant and his partner were also in the habit, from time to time, of advancing and paying out of their copartnership funds divers sums of money to, for, and on account of the plaintiff; and that there was, in fact, a current account between the plaintiff on the one part, and the defendant and his partner on the other part; that the account was balanced in January, 1843, and a certain sum then stated and agreed to be due to the plaintiff thereupon, as appeared by the books of the firm in the possession of the defendant, which he refused to produce or show to the plaintiff; and that, between that time and August, 1847, the defendant and his partner had received upwards of 650*l.* on account of the plaintiff, the particulars of which would appear from the said books. The bill stated that the transactions between the plaintiff and the defendant and his partner were very numerous; and that, amongst other moneys which they had received on account of the plaintiff, were moneys arising from the sale of divers railway shares belonging to the plaintiff, sold by them on his account.

The bill charged that an account ought to be taken of the receipts and payments by the defendant and his partner on account of the plaintiff; and that a large sum of money was in fact due to the plaintiff on the balance of such account.

The defendant demurred for want of equity.

Mr. *J. H. Palmer* for the demurrer. The case of the plaintiff is entirely at law: Dinwiddie *v.* Bailey, Moses *v.* Lewis,[1] Frietas *v.* Dos Santos.[2] The charges of the bill, as to the refusal of the defendant to permit the plaintiff to inspect his books, will not support it. Since the statute 14 & 15 Vict. c. 99, the plaintiff might have obtained inspection in a court of law, if he were entitled to it.

Mr. *Baggallay* for the bill.

The suit is by a principal against his agent, which is always a subject of account. In the case of M'Kenzie *v.* Johnston, it is laid down by Sir John Leach that, wherever the defendant is agent for the sale of the property of the plaintiff, a bill will lie for an account; that the defendant was such agent is averred by the bill. It is said, that, under the late Evidence Act, the plaintiff might obtain the production of books and discovery in the action at law; but the answer to that is, that the plaintiff must frame his action at law, and that he cannot do without first obtaining the inspection of the defendant's books which this Court would give him.

The Vice-Chancellor. I have no doubt that this bill cannot be maintained. I take the rule to be, that a bill of this nature will only lie where it relates to that which is the subject of a mutual account;

[1] 12 Price, 502. [2] 1 Y. & J. 574.

and I understand a mutual account to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account. I take the reason of that distinction to be, that, in the case of proceedings at law, where each of two parties has received and paid on account of the other, what would be to be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments, a position of the case which, to say the least, would be difficult to be dealt with at law. Where one party has merely received and paid moneys on account of the other, it becomes a simple case. The party plaintiff has to prove that the moneys have been received, and the other party has to prove his payments. The question is only as to the receipts on one side and the payments on the other, and it is a mere question of set-off; but it is otherwise where each party has received and paid. Mr. *Baggallay* says, and says truly, that there are cases of the first description which may still come to a court of equity. It is true, that a case of mere receipts and payments may become so complicated, as Lord Cottenham said in the case of the Taff Vale Railway Company,[1] that the account cannot be taken at law, and may become properly the subject of the jurisdiction of a court of equity. But where the account is on one side only, I think a strong case must be shown before this Court will exercise its jurisdiction. If the door of this court be opened to entertain every case in which accounts would not be taken in an action at law, but a court of law would send them to a reference, I do not know where there would remain any protection against suits in equity to parties between whom any account existed.

It was argued that the plaintiff cannot know how to frame his action, until he has seen the account, and until he knows how his case stands. The answer to that is, that his remedy is not to file a bill for relief, but for discovery. The case of Mackenzie *v.* Johnston, which was cited, is the case of an agency account throughout; but the circumstance, that a party may have been agent of the other in the receipt of a certain sum of money, or in one particular matter, does not necessarily render the case one in which a bill in equity may be brought for an account. I am of opinion that this is a case in which a court of law has jurisdiction, and that there is no ground for the interference of this court, which does not apply to every case in which one party has received money on account of another.

Demurrer allowed.

[1] 1 H. L. Cas. 119, 121.

PADWICK *v.* STANLEY.

BEFORE TURNER, V. C., JUNE 7 AND 8, 1852.

[*Reported in* 9 *Hare,* 627.]

A BILL by a solicitor and agent against his client and principal, for an account of moneys and liabilities which the plaintiff stated he had raised, advanced, and incurred for the defendant, by means of bills, notes, and otherwise, and the particulars of which, he alleged, were very complicated; and for a discovery of letters and documents relating to such transactions, which the bill averred that the plaintiff had from time to time written and given up to the defendant, and of divers of which the plaintiff stated he had no copies. The bill sought to have the balance of the account paid, and that the plaintiff might be discharged from such alleged outstanding liabilities. The defendant demurred.

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

Mr. *Rolt* and Mr. *Amphlett*, for the bill.

The cases which were cited in Phillips *v.* Phillips, where the point was the same, were cited in this case, and also O'Mahony *v.* Dickson,[1] Foley *v.* Hill, and Pearce *v.* Creswick.[2]

In the present case it was also argued, that the bill could be supported on the ground that the plaintiff, by being a party to bills and notes on the defendant's account, had become a surety, and was entitled to be exonerated. Antrobus *v.* Davidson,[3] Lee *v.* Rook,[4] and Earl Ranelagh *v.* Hayes.[5]

The VICE-CHANCELLOR expressed the same opinion as in his judgment in Phillips *v.* Phillips, with regard to the right to sue in equity, founded on mutual accounts. On the other points, his Honor said: —

It was sought to support this bill on the right of a surety to be discharged from his liability. I have not the least intention to say any thing which could prejudice such a right; but I conceive that the cases in which such a jurisdiction is exercised by this Court are cases where the creditor has a right to sue the debtor, and refuses to exercise that right. It does not appear, upon this bill, that the creditor has any present right to sue. It is consistent with the statements on the bill, which must be taken most strongly against the pleader, that the bills in respect of which a liability is said to be created, may not yet have arrived at maturity; and that the defendant, therefore, is not in a condition to take any step for the purpose of enforcing his rights in respect of such bills. It was then said that this was a case of principal and agent, and that, if the principal may file a bill against his agent, the agent may file a bill against his principal; but I cannot admit that the rights of principal and agent are correlative. The right

[1] 2 Sch. & Lef. 400. [2] 2 Hare, 286. [3] 3 Mer. 569.
[4] Mos. 318. [5] 1 Vern. 189.

of the principal rests upon the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal. It was lastly said, that the accounts had been given up by the plaintiff to the defendant; but if that case were sufficiently made out, it would give the plaintiff a right to file a bill of discovery, but would not give him a right to relief.

Demurrer allowed, with liberty to amend.

BARRY *v.* STEVENS.

BEFORE SIR JOHN ROMILLY, M. R., JUNE 24 AND 25, 1862.

[*Reported in* 31 *Beavan*, 258.]

THE case came before the Court on general demurrer to the whole bill.

According to the statements of the bill, the plaintiff, having written a work entitled "*A Treatise on the Statutory Jurisdiction of the Court of Chancery*," applied to the defendants, who were law-publishers, to publish it. They declined to do so on their own account, but they offered to publish it if the plaintiff would incur the expense of printing.

The plaintiff and defendants accordingly entered into a written agreement, dated in August, 1860, in the following terms:

"It is hereby agreed that V. & R. Stevens shall publish the said work, and shall account to W. W. Barry, annually (namely, to the 31st day of December in each year), for all copies sold at the wholesale booksellers' price, excepting the copies subscribed for by the trade, which are to be accounted for at 5*l.* per cent less than the wholesale booksellers' price, and twenty-five copies as twenty-four, where so subscribed for, and shall deduct a commission of 10*l.* per centum for their trouble in managing the same, advertising on the wrappers of their reports and in their sheet lists of publications, and for any losses they may sustain in giving credit upon the same, and that the balance of the said account shall be paid over to W. W. Barry on the 1st day of April in each year. The advertising the work to be done by and at the expense of the said W. W. Barry."

The defendants printed and published the work, and in March, 1862, they rendered to the plaintiff an account down to the 31st of December, 1861, the debit side of which amounted to 149*l.* 10*s.* 9*d.*, and the credit side to 24*l.* 7*s.* To recover the balance of this account in favor of the defendants, namely, 125*l.* 3*s.* 9*d.*, the latter brought an action at law, and procured an order from Mr. Baron Bramwell, under the 17 and 18 Vict. c. 125, referring the action to one of the Masters of the Court of Exchequer. Thereupon the plaintiff filed the present bill for an injunction and an account.[1]

[1] The statement of facts has been materially abbreviated. — ED.

Mr. *Selwyn* and Mr. *Beavan*, in support of the demurrer. Admitting, for the sake of argument, every statement in the bill to be true, the plaintiff has shown no right to relief in a court of equity. The whole subject-matter is one of an ordinary nature, which a court of law can best dispose of.

The grounds on which the jurisdiction in such cases can be transferred from law into equity are stated by Lord Redesdale to be "that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *nisi prius*, with all necessary accuracy;" O'Conner *v.* Spaight.[1] The law is also similarly stated by Lord Langdale in Darthez *v.* Clemens,[2] who there says: "If the account can be fairly taken in a court of common law, this Court will not interfere, even in the case of merchants' accounts consisting of mutual dealings."

It will be argued that the case of principal and agent forms an exception, and that in every case where such a relation exists the account may be taken in equity. It is true that there is a *dictum* of Sir John Leach to that effect;[3] but it is evident that such a general proposition cannot, on principle, be maintained, and it is negatived by all the authorities, and on principle. Thus, if a man were to send his horse to "Tattersall's" for sale, the relation of principal and agent would exist, but no one would contend that a bill for an account would lie in such a case. So if one employed an auctioneer as his agent to sell furniture or other property, the proper mode of recovering the money received by the auctioneer would be by action at law and not by bill in equity.

"The circumstance (says Sir George Turner) that a party may have been agent of the other in the receipt of a certain sum of money or in one particular matter does not necessarily render the case one in which a bill in equity may be brought for an account:" Phillips *v.* Phillips; and the same doctrine is stated by Lord St. Leonards in Lavalshaw *v.* Brownrigg.[4]

If an account of one item would not entitle a principal to maintain a bill for an account against his agent, the general proposition cannot be maintained, and the principle would not apply to two or three items; so that the Court must, in each case, determine whether the matter could or not be satisfactorily disposed of at law.

But the authorities are distinctly opposed to any such proposition that, in all cases of principal and agent, relief may be had in equity. Chief Baron Alexander, in King *v.* Rossett, states the rule in these words; "The bill is filed by a principal against his agents, and it is said that that fact alone is sufficient to sustain the bill. Undoubtedly, a principal is entitled to an account from his agent, and may apply to a court of equity for that purpose; but, as I conceive, before that court

[1] 1 Sch. & Lef. 309.
[2] 6 Beav. 168.
[3] Mackenzie *v.* Johnstone, 4 Madd. 353.
[4] 2 De G. M. & G. 459.

will interfere, a ground for its interposition must be laid, by showing an account which cannot fairly be investigated in a court of law."

Lord Cranworth also states the law in nearly the same terms. He says: "In a case in which there is no fraud, not only all the authorities, but all the text-books, show that this Court will not decree an agent to account to his principal, unless the case is one which is not capable of being conveniently inquired into in a court of law:" Navalshaw *v.* Brownrigg;[1] which case was affirmed by Lord St. Leonards.[2]

Dinwiddie *v.* Bailey was also a case of principal and agent, being the case of an insurance broker, and a demurrer was allowed. In Frietas *v.* Dos Santos[3] the bill stated that the parties stood in the relation of principal and agent, and to a bill for an account a demurrer was allowed. King *v.* Rossett was also a case of agency, the defendants being the plaintiffs' stock-brokers; and so was Navalshaw *v.* Brownrigg: yet, in all these cases, the court acted in direct opposition to the supposed general rule.

Here there is no allegation of fraud. The bill states that, if 500 copies only were printed, the credit side of the account is correct. The debit side consists of the presentation copies and those sold, reducing the account to a few items, and the defendants must give credit for all the copies not produced and delivered up. Since the alterations in practice, a court of law is perfectly competent to determine this matter; the parties can now be examined *vivâ voce* or on interrogatories, the production of documents can be enforced, and the matter will be as carefully examined by the Master at law as by the Chief Clerk in equity.

Mr. *Barry*, in support of the bill. The plaintiff does not impute any fraud, and he has carefully avoided any such allegation; but he insists that, having regard to the fiduciary relation existing between him and the defendants, he is entitled to have the accounts taken and the matter inquired into in this court. The defendants are his agents, not only for printing, but for publishing and selling his work. This constitutes the relation of principal and agent, and fixes on the defendants a fiduciary character approaching a trust, and entitles the plaintiff to have the account taken in this court. The principle is broadly stated by Sir John Leach in Mackenzie *v.* Johnstone, who says: "The defendants here were agents for the sale of the property of the plaintiff, and whenever such a relation exists, a bill will lie for an account. The plaintiff can only discover from the defendants how they have acted in the execution of their agency; and it would be most unreasonable that he should pay them for that discovery, if it turned out that they had abused his confidence; yet such must be the case if a bill for relief will not lie." The same doctrine is stated in Kemp *v.* Pryor,[4] that, if a person be an agent, "a bill might be filed against him for an account, upon the principle that he is a mere agent." The case of principal and agent "has always been held to be within the jurisdiction of a court of

[1] 1 Sim. (N. S.) 584.
[2] 2 De G. M. & G. 441.
[3] 1 Yo. & Jer. 574.
[4] 7 Ves. 249.

equity, because the party partakes of the character of a trustee." "So it is with regard to an agent dealing with any property." Foley *v.* Hill. "In certain cases, and where the account is of such a nature that it is thought that justice cannot be done at *nisi prius*, this Court will withdraw the matter from law, and will take the exclusive conduct and decision of the case, although it is a subject of legal jurisdiction, and the demands on both sides are of a legal nature." The South Eastern Railway Company *v.* Brogden.[1]

The authorities may be divided into three classes. First, where the accounts are mutual; secondly, where they are complicated, and thirdly, where the parties stand in a fiduciary relation. The plaintiff rests his right upon the third; and the cases cited which relate to the first and second may be disregarded. It does not follow that, because a principal is entitled to have an account taken in equity as against his agent, the agent has a similar right against his principal; for the right of the principal rests in the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal. Padwick *v.* Stanley. This disposes of the cases, cited, of Dinwiddie *v.* Bailey and Frietas *v.* Dos Santos, where the bills were filed by the agent and not by the principal.

The plaintiff is entitled to have a discovery of the number of copies printed and of how they have been disposed of. He has been prevented getting that discovery at law by the compulsory reference. The circumstance that courts of law can now give discovery does not oust the old jurisdiction of this Court as to discovery. The British Empire Shipping Company *v.* Somes.[2]

There is, at the least, such a probable case for the decision of the Court at the hearing, that the cause ought not to be put out of court summarily, by the allowance of the demurrer. Saunders *v.* Richardson.[3]

[The Master of the Rolls. I have to consider whether the author of a book, entrusting it to a publisher for publication, can sustain a suit for an account of the number of copies printed and sold. He certainly could not file a bill for an account of the costs of publication simply: that must be disposed of in a court of law; but if a publisher refused to give an account of the number of copies published and sold, could a court of law conveniently ascertain the facts?]

Mr. *Selwyn*, in reply. There is no allegation in the bill that more than 500 copies have been printed. The suspicion that more have been printed would amount to the suspicion of a fraud, but that could not be assumed merely for the purpose of changing the jurisdiction.

The Master of the Rolls. After a careful perusal of this bill, I am of opinion that it cannot be supported. It is in fact, as it stands, nothing more than a mere money demand. It asks for an account of the performance of a contract for the printing, publishing, and selling

[1] 3 Mac. & G. 23. [2] 3 Kay & John. 433. [3] 2 Drew. 128.

five hundred copies of a work written by the plaintiff upon certain terms and conditions. The defendants render an account of what they have sold, and of their expenses, and they bring an action for the balance. It is very much to be regretted, undoubtedly (as I assume to be the case from what appears to have taken place before Mr. Baron Bramwell in chambers), that the rules of common law for the discovery and production of documents should be so much more limited than in this court, and should therefore have led to the institution of this suit. But this suit is not confined to mere discovery, for it prays for relief. I am very far from laying down the proposition that an author would not be entitled to come for an account of his work sold by a printer and publisher who withheld that account entirely; but when there is a contract for the sale and publication of five hundred copies of a book, and the account has been rendered for it, and an action has been brought for the balance, and a bill is filed alleging no fraud or misstatement in that account, but merely seeking for the account, then I am of opinion that, upon all the authorities, it is not a case in which the principle (which I should be very sorry to disturb), that a principal is entitled to institute a suit in this court against his agent for an account of his dealings and transactions with him in his character of agent, would apply.

I am of opinion that this principle does not apply where the matter is comprised within certain specified limits, and the account, as it stands, is a mere money account, for which an action can be brought, and which can be perfectly well tried in a court of law.

In fact, it appears to me the account could be taken in exactly the same way before the Master of the Exchequer as it would be before me in chambers or before my Chief Clerk.

I must therefore allow the demurrer.

SMITH *v.* LEVEAUX.

BEFORE LORDS JUSTICES KNIGHT BRUCE AND TURNER, NOVEMBER 9, 1863.

[*Reported in* 2 *De Gex, Jones, and Smith,* 1.]

THIS was an appeal by the defendants from a decree of Vice-Chancellor Wood, directing an account.

The defendants, who carried on business as wine-merchants in copartnership, entered into an arrangement with the plaintiff, that he should travel over a considerable district in England, to solicit orders for Hungarian wines and spirits, on the terms that he was to receive a commission upon all orders obtained by him, or through his connection, and executed by the defendants, for wines and spirits.

No formal agreement was ever drawn up, but the terms on which the plaintiff for some time continued to act as traveller to the defend-

ants were contained in a letter addressed to the plaintiff by a member of the defendants' firm, dated July 23, 1860, which was in part as follows: —

"As regards the commission, I am most anxious that it should be as remunerative as possible, consistently with the successful working out of the business. To keep at our present prices in brandy, port, sherry, &c., I find it will not suit to allow a higher commission than the following, and particularly as I have had to give up a highly profitable portion of our business, so that I might have time to travel exclusively in the Hungarian wine trade. On all business done by yourself, either in London or your district, seven and a half per cent, where our full prices and shipping arrangements are adhered to, and, of course, only on good debts; and an allowance of three and a half per cent on all orders received from your friends first introduced by you, so long as you continue to exert yourself in the working out of the business, and are engaged in the selling of our Hungarian wines and spirits; but of course we could not bind ourselves in perpetuity to such an allowance, as you might cease to represent these interests, and then, of course, the allowance would cease at the same time. Such a contingency I hope, however, is not likely to occur."

The plaintiff replied, accepting these terms. A few weeks afterwards, an agreement was come to, modifying these terms. The precise extent of the modification was in dispute, but, according to the statements of the bill, it did not alter the main features of the agreement, that the plaintiff should receive a commission at seven and a half per cent on orders obtained by himself, and at three and a half per cent upon orders not obtained by himself, but coming from persons originally introduced by him.

In September, 1861, the plaintiff ceased to travel for the defendants, and in January, 1862, filed his bill for an account and payment of what was due to him from the defendants in respect of his commission.

The Vice-Chancellor, Sir William Page Wood, held that the case did not fall within the general rule, that an agent cannot maintain a suit against his principal for an account, inasmuch as here the defendants had agreed to pay the plaintiff three and a half per cent on orders not coming through the plaintiff, but coming from persons originally introduced by him, of which orders he would in general not know any thing. On this ground his Honor considered the bill sustainable, and made a decree for an account.[1]

The defendants, who had by their answer alleged that the bill ought not to have been filed, and that the plaintiff's remedy was at law, appealed from this decree.

Mr. *Willcock* and Mr. *Roxburgh*, in support of the decree. The defendants took upon themselves the duty of keeping accounts; and this created a confidential relation, which gives the plaintiff a title to

[1] 1 Hem. & M. 123.

relief in equity. The amount of the plaintiff's remuneration depends upon accounts of which the plaintiff could not know any thing; the defendants were therefore, in fact, his agents for the purpose of keeping them. The case is one in which it is impossible to obtain any remedy at law without the assistance of a Court of Equity, and is almost identical with that of partnership. The principle laid down in The North Eastern Railway Company *v.* Martin,[1] supports our case.

Mr. *Giffard* and Mr. *Jessel*, for the defendants. The Vice-Chancellor has gone on the principle that an agent may maintain a bill for an account against his principal, wherever discovery from the principal is needed. This, we submit, is not law. Phillips *v.* Phillips; Padwick *v.* Stanley. There is no mutual account here; for that exists only where each party has paid and received on account of the other. Foley *v.* Hill disposes of the argument founded on the fact that it was the duty of the defendants to keep an account; for beyond all question it is the duty of a banker to keep his customer's account: yet that case decides that a bill by the customer for an account will not lie. Padwick *v.* Hurst[2] proceeds on the same principle. There is not alleged to be here any such complication as to bring the case within the exceptional class of cases in which an account has been decreed on that ground. The case here is one of contract, not of trust; and if this decree be sustained, it is difficult to say in what case of contract a bill for an account will not lie. The Vice-Chancellor in fact goes on the principle, that where there is a right to discovery a bill for relief will lie.

Mr. *Willcock*, in reply.

The Lord Justice Knight Bruce. With unaffected deference to the Vice-Chancellor I must say, that, as it seems to me, this bill states a case for an action, but does not state a case entitling the plaintiff to file a bill in equity. It appears to me that the case stated is one merely of legal right, and that there is no account or agency within the rules of Courts of Equity. The bill, in my judgment, is demurrable, and ought now to be dismissed.

The Lord Justice Turner. I should have hesitated before giving an opinion opposed to that of the Vice-Chancellor in this case, had not the course of the Court as to matters of account been more than once under my consideration; but as I have repeatedly considered the subject, I do not think that any advantage would arise from my deferring my judgment.

It has not been, and could not be, contended for the plaintiff that he could have any right to file a bill for an account, except on the ground that it was the duty of the defendant to keep accounts in respect of the orders obtained from his (the plaintiff's) friends and connections. But there is here no contract on the part of the defendant to keep an account of the orders so obtained, assuming that such a contract would entitle this Court to interfere, on which I give no opinion. There is

[1] 2 Phill. 756, 762.

[2] 18 Beav. 575.

here no more than a contract on the part of the defendant to pay a commission on such orders, and if such a contract gives a right to an account in equity, I do not see where the jurisdiction of the Court in matters of account is to stop. If this bill be maintained, it seems to me to follow, as a necessary consequence, that every customer of every banker might maintain a bill against him for an account, which is directly opposed to the principles laid down by the House of Lords in Foley *v.* Hill. There are not in the present case any mutual accounts, nor is it alleged that there is any such complication of accounts as would render the interference of a Court of Equity necessary. With all deference to the Vice-Chancellor, I am of opinion that this bill ought to have been dismissed with costs.

MAKEPEACE *v.* ROGERS.

BEFORE LORDS JUSTICES KNIGHT BRUCE AND TURNER, MAY 25, 1865.

[*Reported in* 4 *De Gex, Jones, and Smith,* 649.]

THIS was an appeal by the defendant, Robert Rogers, from a decision of the Vice-Chancellor, Sir John Stuart, overruling with costs the appellant's demurrer to the bill for want of equity.

The case made by the bill was in effect as follows: —

The respondent, John Makepeace, the plaintiff in the suit, was a landowner and funded proprietor.

The bill, in its second paragraph, alleged, that in 1859 the respondent had appointed the appellant to be the agent and manager of the respondent's real estates at Bracknell in Berkshire, and at Bromley in Kent, and of certain houses in London belonging to the respondent, with authority to receive the respondent's rents of the said estates and houses; and that the respondent had given the appellant a power of attorney to receive the dividends and interest of certain bank stock and other stocks, funds, shares, and securities belonging to the respondent; that the appellant had acted as such agent and manager of the respondent's aforesaid estates and houses, and from time to time received the rents thereof, and from time to time received the dividends and interest of certain bank stock and other stocks, funds, shares, and securities, or of such of the said estates, houses, and other property aforesaid, as from time to time remained unsold, down to the determination of the appellant's employment by the respondent at the end of 1863.

The bill then, charging in effect that the appellant had had almost uncontrolled authority in the management of the respondent's estates, houses, and other property aforesaid, and had by his directions sold certain timber on the estates, and also divers parts of the estates, houses,

and other property themselves, and received the proceeds of sale, but had rendered none but meagre and unsatisfactory accounts of his receipts generally, and refused or omitted to give any better accounts or any vouchers for his expenditure, and alleging (in its 16th paragraph) that the appellant had in his possession or custody, or under his control, divers deeds, probates of wills, books, maps, plans, and other documents and muniments of title belonging to the respondent, which he ought to deliver up to the respondent, prayed 1, an account of the appellant's receipts for or on account or on behalf of the respondent, or which might have been received by the appellant but for his wilful default or neglect; 2, an account of the appellant's payments to the respondent or to his use or on his behalf; 3, payment of the balance to be found due; 4, delivery by the appellant to the respondent of all deeds, probates of wills, books, maps, plans, muniments of title, papers, and documents belonging to the respondent or relating to his estate; 5, payment by the appellant of the costs of the suit; and, 6, general relief.

Mr. *Malins* and Mr. *Boyle*, for the appellant, contended that the respondent had mistaken his remedy, if he had any, and that an attempt to seek it in equity raised a case of first impression. The relation between the parties was not that of trustee and *cestui que trust*, — whence alone the interference of this Court in cases of account was originally derived, — but that of principal and agent; and no misrepresentation or fraud on the part of the appellant was charged. The case, therefore, was one for a court of law, and not for a court of equity. There was no mutuality, or even (what indeed would not have alone sufficed to give jurisdiction to this Court had it in fact existed) complication of account between the parties; while the fact that entries had been made on both sides of the account went no further in the direction of conferring jurisdiction upon this Court. As to the charge as to the possession and prayer for the delivery up of muniments of title, it was not necessary to come into equity for relief in that respect, as a simple summons under the Common Law Procedure Act, 1854, § 50, or an action, according to the nature of the relief required, would have given ample relief at law.

They referred to and commented upon Phillips *v.* Phillips, Dinwiddie *v.* Bailey, Padwick *v.* Stanley, Padwick *v.* Hurst,[1] Shepard *v.* Brown,[2] Hemings *v.* Pugh,[3] Flockton *v.* Peake,[4] Foley *v.* Hill,[5] Smith *v.* Leveaux, Topham *v.* Braddick,[6] King *v.* Rossett, Lord Hardwicke *v.* Vernon,[7] Earl of Salisbury *v.* Cecil,[8] Lord Chedworth *v.* Edwards,[9] Lady Ormond *v.* Hutchinson,[10] Navalshaw *v.* Brownrigg,[11] Wilson *v.* Short,[12] Fluker *v.* Taylor,[13] Barry *v.* Stevens, Massey *v.* Banner,[14] Kennington *v.*

[1] 18 Beav. 575. [2] 4 Giff. 208. [3] Id. 456.
[4] 12 W. R. 562. [5] 1 Ph. 399; 2 H. L. Cas. 28. [6] 1 Taunt. 572.
[7] 4 Ves. 411. [8] 1 Cox. 277. [9] 8 Ves. 46.
[10] 16 Ves. 94. [11] 1 Sim. (N. S.) 573; 2 De G., M. & G. 441.
[12] 6 Hare, 366. [13] 3 Drew. 183. [14] 4 Madd. 413.

Houghton,[1] Lockwood *v.* Abdy,[2] Stephens *v.* Badcock,[3] Henderson *v.* Eason,[4] Gorely *v.* Gorely,[5] Hoare *v.* Contencin,[6] Pearse *v.* Green,[7] O'Connor *v.* Spaight,[8] North Eastern Railway Company *v.* Martin,[9] Taff Vale Railway Company *v.* Nixon,[10] Croskey *v.* European and American Steam Shipping Company,[11] Frietas *v.* Dos Santos,[12] Middleditch *v.* Sharland,[13] Beaumont *v.* Boultbee,[14] Jenkins *v.* Gould,[15] Croskill *v.* Bower,[16] Mosse *v.* Salt,[17] Co. Litt.,[18] 2 Inst.,[19] Fitz. Nat. Brev.,[20] Year Book, 2 Hen. IV.

Mr. *Osborne* and Mr. *Fitzroy Kelly*, for the respondent, were not called upon.

The Lord Justice Knight Bruce said that this was one of the clearest cases that had ever come under his Lordship's notice, and that he was surprised at the demurrer and surprised at the appeal. The bill was filed by a landowner against a person whom he had for some years employed as the agent and manager of his estates, and the allegations of its second paragraph were these: — [His Lordship read the passage in question, and proceeded.] Had there been nothing else in the case than this, the plaintiff would have been entitled to a decree. His Lordship did not think that the Lord Justice, when, as Vice-Chancellor, he had disposed of Phillips *v.* Phillips,[21] had intended to say that a bill in equity for an account would not lie unless there had been receipts and payments on both sides. The existence of a fiduciary relation between the parties, as, for example (as was the case here), that of principal and agent, was sufficient to confer jurisdiction on this Court, and allegations of fraud or special circumstances were unnecessary. No doubt if there had been between the parties a stated and settled account, or an executed release, it might be necessary for the plaintiff to show a special case to induce this Court to grant the relief sought. But no such case arose here. Beyond which the claim set up by the present plaintiff against the defendant, his steward, in the 16th paragraph of the bill, and in respect of which relief was sought by the 4th paragraph of the prayer, extending, as that claim did, not to discovery only, but to delivery up to the plaintiff of the muniments in question, was alone sufficient to entitle him to relief in this Court. The demurrer and the appeal were alike to be reprobated.

The Lord Justice Turner said that this was clearly not a case in which their Lordships could, in justice to the Vice-Chancellor, to themselves, or to the principles of the court, call upon the counsel for the plaintiff. The claim and prayer in the bill as to the documents were alone sufficient to support it, any provisions of the Common Law Procedure Act, 1854, or legal rights enforceable by action, notwithstanding.

[1] 2 Y. & C., C. C. 620.
[2] 14 Sim. 437.
[3] 3 B. & Ad. 354.
[4] 17 Q. B. 701.
[5] 1 H. & N. 144.
[6] 1 Bro. C. C. 27.
[7] 1 J. & W. 135.
[8] 1 Sch. & Lef. 305.
[9] 2 Ph. 758.
[10] 1 H. L. Cas. 111.
[11] 1 J. & H. 108.
[12] 1 Y. & J. 574.
[13] 5 Ves. 87.
[14] 7 Ves. 599.
[15] 3 Russ. 385.
[16] 32 Beav. 86.
[17] 32 Beav. 269.
[18] Page 90 *b*, n. 5; 172 *a*.
[19] Page 389.
[20] Page 119.
[21] 9 Hare, 471.

But it was not necessary to decide the case upon these grounds, for upon the demand for an account it was equally clear. Although it might be that in a simple case a more convenient course would be to apply for relief to a court of common law, still, as between principal and agent, there existed that fiduciary relation which gave jurisdiction to this Court to interfere on behalf of the principal suing his agent as such; and the existence of fraud was not, although the contrary had been contended at the bar, a necessary element to give jurisdiction to this Court to interfere in such a case. Mackenzie *v.* Johnston was in point to the contrary. Phillips *v.* Phillips, in which his Lordship had commented on that case, went upon the footing of the account there in question, being a current account between the parties; and the bill made no case of general agency, alleging only an isolated agency transaction connected with the sale, by the defendant, of some railway shares belonging to the plaintiff. That case had no reference to a case of general account between principal and agent; and if his Lordship's language, in giving judgment in that case, had been in fact such as to give rise to misapprehension, such misapprehension ought to have been dispelled by what he said in the subsequent case of Padwick *v.* Stanley, when adverting to the want of correlation between the rights of a principal and an agent to sue in this Court. In the present case, the Vice-Chancellor's conclusion was perfectly correct, and the appeal must be dismissed with costs.

MOXON *v.* BRIGHT.

BEFORE LORD HATHERLEY, C., JANUARY 29, 1869.

[*Reported in Law Reports, 4 Chancery Appeals*, 292.]

THE plaintiffs in this case were owners of a patent for carpet looms, and in 1862 entered into an agreement with the defendant, Hall, of the firm of Tuer & Hall, that if Messrs. Tuer & Hall would make and exhibit a loom, the plaintiffs would allow them one-tenth of the royalty which the plaintiffs might receive on looms sent on the Continent; and further, that Messrs. Tuer & Hall might make and sell looms on which the royalty should be not more than £20, and Messrs. Tuer & Hall's charges should be not more than £45, making the total charge for the loom £65. By a subsequent agreement, the plaintiffs allowed Messrs. Tuer & Hall the sole right of making the looms at a royalty of £30 per loom. The agreement seemed also to have been varied verbally, and there was some conflict of evidence on the subject; but Messrs. Tuer & Hall had made and sold looms, and had paid considerable sums of money to the plaintiffs. In some cases they appeared to have obtained, with the consent of the plaintiffs, more than £65 for a loom, and to have accounted to the plaintiffs for the surplus, and in one case they

seemed to have acted as agents for the plaintiffs, and to have collected a sum due to the plaintiffs from one Stodhart for royalty on the number of yards of carpet manufactured.

In September, 1865, the plaintiffs filed the bill in this suit against the defendant Hall, the surviving partner of Messrs. Tuer & Hall, praying for an account and payment by him of all sums received by him to the use of the plaintiffs, and of all sums due to the plaintiffs in respect of the sales and licenses, and other property of the plaintiffs in connection therewith. The bill also sought to make other defendants accountable for using the plaintiff's looms.

Hall, by his answer, alleged that he had duly accounted and paid, and set forth his accounts, but submitted that he was not liable to account in this suit. In one affidavit, however, he called himself agent for the plaintiffs.

The Vice-Chancellor Giffard dismissed the bill with costs, without prejudice to an action at law, and without prejudice to a suit in equity by the plaintiffs, founded upon their rights as patentees of their alleged patent.

The plaintiffs appealed.

Mr. *J. H. Palmer*, *Q. C.*, and Mr. *Hastings*, for the plaintiffs. We say that Hall was our agent, and has sent us imperfect accounts; he has supplied goods for us, and must give us discovery and an account. An agent cannot file a bill against his principal without some special ground, but a principal can always file a bill against his agent. Makepeace *v.* Rogers. It is true that if only one article has been sold, a court of equity will not encourage such a suit, but still the principal has a right to an account. Mackenzie *v.* Johnston.

Mr. *Kay*, *Q. C.*, and Mr. *Hadley*, for Hall, contended that the agreement only amounted to a license. Except, perhaps, in one case, Hall did not receive any money for the plaintiffs, and was only bound to pay them a certain sum for each loom sold, so that there was no mutual account, and the plaintiff's remedy, if any, was at law. Phillips *v.* Phillips; Kernot *v.* Potter.[1]

Mr. *Druce*, *Q. C.*, and Mr. *Hemming*, for the other defendants, against whom the plaintiffs also sought an account, were not called upon.

Mr. *J. H. Palmer*, in reply.

Lord Hatherley, L.C., said, that there was no case at all against the other defendants, but as against Hall there was some difficulty in the question. There were numerous cases showing that where the relation of principal and agent had imposed a trust upon the agent, the Court would entertain a bill for an account, and the only difficulty was in determining what constituted this species of trust. It was not every agent who held a fiduciary position as between himself and his principal. Foley *v.* Hill showed that though a banker was the agent of the customer for many purposes, they were not such as would constitute a trust. Nor

[1] 3 D. F. & J. 447.

did the mere circumstance that the principal wanted discovery empower the Court to give him assistance in the way of relief. The case of Smith *v.* Leveaux showed that though you might be entitled to discovery, which you could get either in equity or at law, that did not entitle you to relief; for all depended upon the character of the agency. As between master and servant such an agency did not exist, and the Vice-Chancellor Knight Bruce, in Smith *v.* Leveaux, expressed his opinion that a court of equity ought not to entertain a suit in such a case.

His Lordship then commented on the evidence, and said that the agreement between the plaintiffs and Messrs. Tuer & Hall had varied at different times, but the principal agreement was not that Tuer & Hall should act as agents for the plaintiffs, and collect £20 upon each loom for the plaintiffs, but that Tuer & Hall should take the debt upon themselves, selling the looms for £65, and paying £20 out of it to the plaintiffs, receiving, besides, the commission of 10 per cent. It was true that Messrs. Tuer & Hall were bound to consult the plaintiffs as to the sums charged for the looms, and that Mr. Hall, in one of his affidavits, did say that he acted as agent for the plaintiffs, but his Lordship did not rely much on that, for every one who did any thing for another, was an agent, but was not therefore necessarily accountable in equity, as a banker, for instance. Even where Tuer & Hall obtained more than £20 as royalty, though they were accountable to the plaintiffs for what they had so received, it did not appear that they told the purchasers that they were to pay a royalty to the plaintiffs, but said merely that the charge for the machines would be a certain sum, so much for the machine itself, and so much for the royalty.

Though the terms between the parties were altered from time to time, the sole point in this suit was whether there existed between them an agency in which a fiduciary position was created, and looking at the whole case, though Tuer & Hall might never get more than £45 for a machine, and had to pay over all they received above that sum, this was too slender a foundation for a suit to compel an account. In fact, this would not be a matter of agency, but of special agreement in each case, and the case could not be brought within the principle upon which the Court had directed accounts. In Navalshaw *v.* Brownrigg,[1] Lord St. Leonards said that a single case of agency would not be sufficient, as the matter might be determined at law, and this showed the principle on which the Court acts in these cases. From Stodhart alone they seemed to have collected money due to the plaintiffs, and to have paid it over to them, but that was not sufficient to justify the Court in directing an account. The appeal must be dismissed with costs.

[1] 2 D. M. & G. 441, 459.

CHAPTER IV.

BILLS OF INTERPLEADER.

METCALF *v.* HERVEY.

BEFORE LORD HARDWICKE, C., JUNE 9, 1749.

[*Reported in* 1 *Vesey*, 248.]

DEMURRER to a bill, which was founded on a rumor that there was issue by Lady Hanmer, which issue was suggested to be entitled to the estate in question, and praying that if there was any such person he might interplead with the defendant, and also praying an injunction to stay proceedings in ejectment by defendant, and to any action for mesne profits.

Two causes for demurrer were assigned. First, for the insufficiency of the affidavit annexed to this bill of interpleader, in not saying it was at the plaintiff's own expense, as well as that there was no collusion with the defendant. The second, that no case was stated to entitle to any relief so as to oblige the defendant to put in an answer; that in a bill of interpleader it must be shown that the plaintiffs are in danger of paying rent a second time; and that such bill on demurrer will be taken strongest against the party whose bill it is.

For plaintiffs. This is not a mere bill of interpleader, it praying something further. There is another person to interplead with, although the plaintiffs cannot find him out; like the case of another defendant's being beyond sea. Where it is doubtful whether a person is dead or not, the court has compelled security to be given, if he appear not to be dead. The court has prescribed no particular form of affidavit, but in general that there is no collusion.

THE LORD CHANCELLOR. This is a very particular case; but as it is a general demurrer to the whole bill, if there is any part, either as to the relief or discovery, to which the defendant ought to put in an answer, the demurrer, being entire, ought to be overruled.

As to the first cause of demurrer, there is no such rule of court, the material part of the affidavit being that the plaintiffs should swear that they did not collude with any of the defendants; whereas the requiring to swear it is at their own expense goes further; and such an affidavit would require the denying it, even in cases where a person

may bear the costs of suit without being a maintainer; as a father furnishing the expenses of a suit on a bill by his son.

As to the second cause, the bill is in two lights: First, supposing it an interpleading bill; secondly, supposing it not, whether there is any other ground.

As to its being an interpleading bill, it is of the first impression, not averring that there is any such person as can interplead with the defendant; nor should I be willing to allow new inventions in bringing bills of interpleader, which might be dangerous, as they are formed in some measure as interpleader at law; in which it must be shown to be between persons *in rerum naturâ*. One thing, indeed, occurs, viz., suppose a guardian, having the infant in his custody, conceals, and will not produce him, but sets up a title to himself; and the infant is the person suggested to have right to controvert that title; in such a case, and so charged, I will not say but such a bill might be brought, and to compel the guardian to produce him.

But whether that be the present case or not, the ground I go on is the other part, not only praying to interplead, but for an injunction; which cannot be founded on a bill of interpleader as to the ejectment, as such bill cannot be as to the possession, but must be as to the payment of some demand of money. The question comes to this: whether any person in possession of an estate, as tenant or otherwise, may not bring a bill to discover the title of a person bringing an ejectment against him, to have it set out, and see whether that title be not in some other. I am of opinion he may, to enable him to make a defence in ejectment, even considering him as a wrong-doer against everybody. As to the prayer for an injunction to an action for mesne profits, it appears, from the case, that if there be such a child *in rerum naturâ*, he must be an infant, and then the plaintiffs are in a different light than if he was of full age. None can have an action for mesne profits unless in case of actual entry or possession, for which no pretence exists here; and every person possessing the estate of an infant after his title accrued is considered here as guardian to him.

Then, even supposing the interpleading part of the bill, which I am not willing to allow, to be out of the case, and considering it as a bill for the discovery of the defendant's title to possession of the estate, and to the rents and profits, the plaintiffs are entitled to that discovery, and the defendant having demurred to the whole bill, for discovery as well as relief, it ought to be overruled.

HENDRY *v.* KEY.

BEFORE SIR THOMAS CLARKE, M. R., NOVEMBER 22, 1756.

[*Reported in Dickens*, 291.]

ON the 31st of March, 1754, Elisha Brown died; the next day Francis Brown, his brother, his heir at law and sole next of kin, deposited in the hands of the plaintiff for safe custody 111*l.* and some silver teaspoons, &c. A very short time afterwards the said Francis Brown died intestate. Upon his death, the defendants severally demanded the above particulars, and commenced an action against the plaintiff; the plaintiff thereupon filed his bill of interpleader, and, on obtaining an injunction, paid the 111*l.* into the bank, with the privity of the Accountant-General, subject to the order of the Court.[1]

On the 22d of November, 1756, this cause was heard at the request of the defendant, Key; the plaintiff was ordered his costs of the suit, and at law, out of the cash in the bank; the residue, with the spoons, was ordered to the defendant Key; and the other defendants, who could not support their claim, were ordered to pay the defendant Key his costs, and the costs the plaintiff should be paid under the above direction.

[1] The plaintiff in an interpleading bill must compel the defendants to answer. He must reply, and have a *subpœna* to rejoin, in order that the defendants may examine witnesses. — J. D.

THE giving of the plaintiff his costs was strongly argued against; it was said the bill was for his accommodation, and that there was not an instance in which a plaintiff in an interpleading bill had his costs; but it being said there was a similar decree by Lord Talbot, C., His Honor directed the decree to be suspended until it was searched for; the name of the cause is, Bladwell *v.* Reeves, 6 Aug. entered Reg. Lib. B. 1733, fol. 461.

It should seem that, until the time of Lord Chief Baron Skinner, the Court of Exchequer had not given costs to a plaintiff in an interpleading bill; for such costs being pressed before that court, His Lordship sent to me to know if it had ever been done in this court, and upon sending him the above two cases, and another in Lord Anson *v.* Connor, June 5, 1753, the Court of Exchequer, as I was informed, gave the plaintiff his costs; and Lord Thurlow, C., in June, 1791, in a cause, Dowson *v.* Hardcastle, the bill being brought by a wharfinger with whom some Russian tallow was deposited, and which was claimed by the different defendants, gave costs in the same manner as Sir Thomas Clarke did in the above case of Hendry and Key. In Brymer *v.* Buchanan, the plaintiff, not having conducted himself properly, had not his costs, and it was strongly urged that he should pay costs. — J. D.

ALDRICH *v.* THOMPSON.

BEFORE LORD THURLOW, C., FEBRUARY 22, 1787.

[*Reported in* 2 *Brown's Chancery Cases*, 149.]

THIS was a bill of interpleader, filed by the lessees of Lord Inchiquin against several sets of annuitants who had distrained for rent on the plaintiff's farms, praying that they might interplead among themselves. The rents which had accrued were paid into court.

It was referred to the master to settle the priorities among the annuitants.

The only question was with respect to the plaintiff's costs, whether they should receive them out of the rents paid in, or await the event of the suit, and recover them against the parties who should appear, ultimately, to be wrong in the interpleader.

And for the defendants it was urged that, in a similar case, His Honor had determined that, wherever there were two legal rights, and the parties were ordered to interplead, the plaintiff in interpleader must take his costs against the party who was wrong in the interpleader.

THE LORD CHANCELLOR. The tenants ought at all events to have their costs, and, there being a fund in court, to be sure of them out of that fund. Nothing can be more clear, as the idea of a bill of interpleader presumes in the plaintiff a right paramount the interpleader. The party calling upon others to interplead is in the situation of a stakeholder.

Ordered the plaintiff's costs out of the rents in court.

HODGES *v.* SMITH.

BEFORE SIR LLOYD KENYON, M.R., MAY 23, 1787.

[*Reported in* 1 *Cox*, 357.]

THIS was a bill of interpleader filed by the lessee of some premises in Westminster, praying that the defendants might interplead as to their right to a rent of 80*l.* per annum due from the plaintiff in respect thereof. Both the defendants put in their answers, which were replied to; but at the hearing one of the defendants did not appear. His Honor at first had some doubt of making his final decree under these circumstances; but afterwards, on hearing the appearing defendant's case, he directed the arrears of rent and the accruing rent to be paid to him; and also directed that the plaintiff should retain his costs, and that the costs so retained, and also the appearing defendant's costs, should be paid by the other defendant; and the injunction was made perpetual against him.

BRYMER *v.* BUCHANAN.

BEFORE LORD THURLOW, C., JANUARY 26, 1788.

[*Reported in* 1 *Cox*, 425.]

THIS was a bill of interpleader. A commission issued for the examination of witnesses at Dunkirk on the part of one of the defendants, with notice to the plaintiff only and not to the other defendant. It was now moved, on the part of the other defendant, that the order for the commission might be discharged for irregularity, for that, in a bill of interpleader, the defendants were the only litigating parties, and that they ought to have the same opportunity of cross-examining each other's witnesses as a plaintiff and defendant had in common cases.

Mitford opposed the motion, and insisted that, till a decree was made, an interpleading cause was considered just as any other; till then it does not appear that the defendants are to interplead, nor do they ever interchange copies, as is usual between a plaintiff and defendant.

THE LORD CHANCELLOR said it might not, perhaps, be an inconvenient rule to make, that defendants to a bill of interpleader should give notice to each other of the issuing of a commission; but it had not yet been done, and he therefore could not discharge the order for irregularity.

LANGSTON *v.* BOYLSTON.

BEFORE LORD LOUGHBOROUGH, C., APRIL 18 and 20, 1793.

[*Reported in* 2 *Vesey Junior*, 101.]

IN February, Boylston brought to the house of Langston and Twogood, bankers in London, a paper parcel tied up and sealed, containing certificates of the American loan. He told them it contained property to the amount of 40,000*l.* and upwards; and desired to leave it with them for safe custody. They received it. Soon after, Boylston was arrested under actions brought against him as a partner in the house of Lane and Frazer, who had failed to a great amount. On the 19th of March, being in prison under that process, he sent Lavie, his attorney, to demand the parcel from Langston, who refused to deliver it till he could be advised whether he could with safety do so, assigning as a reason for that refusal the actions brought against Boylston as partner in the house of Lane and Frazer. The next morning the same person again applied, and Langston again refused till he could consult Weston, his attorney, and said he would send for that purpose. Lavie then proposed to him to consult some other person instead of

Weston, as he was the attorney employed against Boylston; and, Langston persisting in his refusal to deliver the parcel without the advice of Weston, Lavie told him, if it was not delivered within an hour, he would arrest him and his partners, and, if they should endeavor to avoid the process, would strike a docket against them. On the same day, soon after this conversation, Langston was served by Weston, acting for the creditors of Lane and Frazer, with six attachments out of the Mayor's Court upon the goods of Boylston in his hands; upon which he finally refused to deliver the parcel to Boylston unless he should be bailed and the attachments should be taken off. Langston was soon after arrested at the suit of Boylston, and was held to bail in an action of trover in the sum of 45,000*l.*; upon which he filed a bill of interpleader against Boylston and the parties who sued out the attachments, praying an injunction to restrain proceedings in the action, and stating these circumstances, which were not denied by the answer, also stating that he was ready to deliver the parcel whenever he could with safety, and offering to bring it into court.

The answer of Boylston denied that he was a partner with Lane and Frazer, and insisted that his claim alone was good; for the attachments could not be made effectual, as they were issued in respect of the debts of Lane and Co. against goods which were the sole property of Boylston. The answer also charged the plaintiffs with collusion with Weston and his clients to make Boylston a bankrupt by keeping him in prison two months; as a proof of which it was alleged that Langston was bailed by the persons who had sued out the attachments; that with this view the plaintiffs refused to deliver the parcel to the persons who should bail Boylston, or to bail him themselves, or to defend the attachments, or let Boylston use their names for that purpose.

On the motion for an injunction, this last allegation of the answer was strongly denied by the plaintiffs, who said they were always ready to permit Boylston to use their names.

Affidavits were offered in support of the motion, but it was insisted for the defendant Boylston that they could not be read.

For the defendant. No affidavit can be read in such a case. That can be done only in cases of waste and irreparable mischief. This is not like an interpleading bill in any respect. It is a motion for an injunction to restrain the defendant from proceeding in trover. The plaintiff can only move for an injunction upon the answer.

THE LORD CHANCELLOR. It is necessary, in all interpleading bills, that the plaintiff should in some way or other establish that he claims no interest. How is that to be done without affidavit?

For the defendant. There is always an affidavit, denying collusion, annexed to the bill.

For the plaintiffs. The rule alluded to does not extend to cases of this kind. Upon bills of this sort, where no interest is claimed by the plaintiff, but there are claims by various defendants, if each of those answers, and makes a good case for himself, upon the answers the court

cannot act on its usual principle; that, where a party is only a stakeholder, upon the fact of his being harassed by suits this court will deliver him from the difficulty by some means of putting the right into a course of trial. The rule alluded to applies only to the case of a common injunction until answer. A bill of interpleader supposes that the defendant may be perfectly right. It is not that sort of case in which his answer is to decide the question. But this is precisely in nature of an injunction to stay waste, being a case in which proceeding in the action is an irreparable mischief to the plaintiffs. This question was agitated in Robinson *v.* Lord Byron, when it was insisted that upon the answer the defendant might dissolve the injunction; but Lord Kenyon, then Master of the Rolls, sitting for the Lord Chancellor, determined that the affidavits might be read. So it was held in Isaac *v.* Humpage, 3 Bro. C. C. 463, Ves. Jr. 427, by Mr. Justice Buller, sitting for the Lord Chancellor. In these cases, in which many defendants are brought, claiming that in which the plaintiff claims no interest, it is the familiar practice to apply in order to have all proceedings at law stopped.

The point was not determined at this time, the Lord Chancellor suggesting that perhaps a sufficient case might appear upon the answer; which was the opinion of the counsel for the plaintiffs.

The Attorney General,[1] for the plaintiffs. The pendency of different claims is perfectly sufficient to call upon the court to make this sort of order. The late Lords Commissioners made an order of the kind upon the same sort of circumstances in Field *v.* Todd. In that case, Dewhurst and Co. in New York employed Hill, as their agent in London, to purchase for them goods of a particular kind, to be sent to New York. Hill was in the habit of sending them to Field, who was a packer; and he received some goods from Hill to be packed on account of Dewhurst and Co. Before they were exported, an account arrived that Dewhurst had stopped payment. Field was then served with an attachment at the suit of Todd, a creditor of Dewhurst and Co., attaching their effects in his hands. Several other attachments were also served; and notice was given by the persons who furnished the goods, who insisted that it was not such a delivery as to prevent them from stopping the goods *in transitu*. In this situation Field filed a bill. The Court ordered the right to be tried in an action, the other parties to be at liberty to attend it, the parties attaching to be at liberty to make good their attachments; and, on the plaintiff's depositing the property or its produce, the Court restrained any action against him. In this case, it is contended in the answer that the attachments are irregular and cannot be made effectual. It is obvious that a person standing in a situation in which there are many claims upon him may succeed in resisting all but one; but the fact that he is called upon without any interest to defend is sufficient. If these attachments are not valid, it is reasonable that Boylston, and not the plaintiffs, should

[1] Sir John Scott. — Ed.

try the validity of them. After the decision in King *v.* Leith, 2 Term Rep. B. R. 141, that an auctioneer, who paid money over to a man in prison, who continued in prison two months, must repay it to his assignee, the plaintiffs could not deliver this parcel to the defendant, who was in prison.

Mr. *Mansfield*, Mr. *Grant*, and Mr. *Cox*, for the defendant Boylston. This is a new application. The circumstances in the answer prove combination, between Langston and the persons who sued out the attachments, to oppress this defendant by preventing him from procuring bail, and to make him liable to the commission of bankruptcy which Weston wants to take out against him; and the act of bankruptcy will be complete in two days. If they cannot establish a partnership between Lane and Boylston, or lay a ground to induce a jury to think they acted *bona fide*, they will be guilty of a foul conspiracy against Boylston. It now appears upon the answer that he is no partner. When application was made for this parcel, which the defendant, on being arrested, wanted in order to enable him to get bail, no claim was made; no attachment was issued; but the plaintiffs refused to deliver it only upon the pretence that an action was brought against him, and a rumor that he was a partner with that house. What right had they then to stop it? There was no suggestion of an act of bankruptcy. It would be extraordinary if a man in prison could not recover money to enable him to pay his debts and get out. This court will interpose where persons claim in different rights, as in Field *v.* Todd; but not in such a case as this. The attachments may be pleaded as a bar to the action. The parties cannot interplead. There is a clear defence against the attachments; but, if not, that would be a clear defence against the action. These things cannot be attached. Choses in action, evidences of a debt from another person or from the state, bonds, bills of exchange, are not subjects of attachment. What pretence could the plaintiffs have for insisting that the defendant should be bailed in all the actions brought against him? Can a person having a debtor's property in his hands insist on his being out of prison, or refuse to deliver it?

The Lord Chancellor. It would be a very rash act in any one to pay money to a man subject to the bankrupt laws, who was in prison at the time.

For the defendant. Then there is a new equity, as no man can pay money to a trader, if he is in prison, nor can he sue to recover it. How does this court gain jurisdiction to stop a debtor in prison from proceeding at law? There is no doubt, in such a case, a man may be compelled to pay, whatever is decided as to voluntary payments to a trader in prison. The consequence of the interference of this court is, that the trader must starve for two months, and inevitably become a bankrupt, as a court of equity will interpose to prevent him from suing his debtor, when the only consequence that can follow is, that if he succeeds in the action, the defendent will have to pay, not only the

money, but the costs also. Will the court interpose in such a case upon that account? That is the only consequence that can follow, if this action is permitted to proceed. Suppose, when arrested, the plaintiffs had restored these goods; no doubt they would have been protected.

THE LORD CHANCELLOR. You argue with great force against the determination in the King's Bench; but it has been determined that a payment by a person totally ignorant of the act of bankruptcy is bad, if after an act of bankruptcy. You desire the action to go on upon this ground, that the plaintiffs either have a defence against the attachments, or, if they fail in that, that they have a defence against the action. That is precisely the case of interpleader. He says he has no concern upon the subject, and ought not to be put to try whether the property ought to be taken out of his hands by action or by attachment.

For the defendant. There can be no doubt that, if a debtor in prison recovers money by course of law, that cannot be again recovered against the person compelled to pay it. Attachment is a legal process to stop the goods. Until that is removed the plaintiffs are safe. If they contest the attachment, and that is overturned, there is an end of it; if it proceeds to condemnation, then it is a bar to the action; but the attachment itself is a complete bar, and therefore this is totally different from the case of interpleader. The necessity of the affidavit on filing the bill, that there is no collusion, proves that the party is not brought into the situation in which he stands by any fault of his own. That is a necessary circumstance: but these plaintiffs are brought into this situation by breach of contract. Bailment is the most sacred of all contracts. As it is a gratuitous contract, the bailee is not brought under a necessity of keeping with more than ordinary care, but he is bound to deliver the moment he is called upon. On the 19th of March the plaintiffs were bound to deliver this property, as they could not have run any risk. A bailee is not to set himself up as an equitable judge between the bailor and all his creditors. The defendant might have demanded it expressly as he was afraid of attachments. Supposing the rumor upon which they refused to deliver was true, that was no ground for their refusal. If he was committed to prison, that ought to have made them the more ready to comply with his demand. They might as well refuse because they heard he was in difficulties. In the case cited the auctioneer acted voluntarily, and would go on, after notice, for the sake of his commission. Either on the 19th or 20th of March the plaintiffs would have been safe in the delivery. If they colluded, they could not have acted in any other way. It is necessary to ground a bill of interpleader, that there should be some controverted claim: then there are contradictory claims: both cannot be well founded: but in this case the property is admitted on all hands to be in the defendant. There is only a legal process, affecting that property in a particular manner. The consequence of that is that it puts it in a way of trial; as the legal process of another may be pleaded, though a mere plea cannot.

THE LORD CHANCELLOR. A claim is a ground of interpleader. The only doubt I entertain is as to the necessity of coming to this court.

I will throw out my opinion now. If I was sitting in a court of law, I would have discharged Langston upon common bail upon bringing into court the parcel; and I would have stayed the action of trover, and have made Boylston get rid of the attachments in the name of Langston before I would let the action of trover go on. Then there is little doubt that I shall not send it now to make an attempt to do that which I think ought to have been done in the court in which the action was brought. As to the conduct of Langston, I have always felt extremely the inconvenience of making the act of bankruptcy relate to the first arrest. But a bolder thing has been done in this case than any step taken by Langston: that is, the arrest of Langston. If in this court I interfere, Langston must come into terms to bring no action, as I think there is a right of action in him.

APRIL 20.

For the defendant. In Fuller *v.* Gibson, 1788, a commission had issued against Gibson and Johnson, which remained unexecuted. Fuller had a large sum of money belonging to them in his hands. They brought an action for it; upon which he filed a bill, stating the facts, and that, if he paid the money to them, he apprehended that he might be called on to pay it over again. The Court refused an injunction, and said the money must be paid; that there was no pretence to stop the action; and that the plaintiff could not be damaged by payment under a judgment. Here the plaintiffs had a plain way pointed out to them to avoid all difficulty. They refused to take that way, and chose to stand still, and would apply to Weston.

THE LORD CHANCELLOR. He was the very person they ought to have applied to. Is there any case in which a bill of interpleader has been brought to a hearing?

For the defendant. Yes, in Lord Thanet *v.* Patterson, 3 Barnard. 247; the Court dismissed the bill, saying there was no ground for the plaintiff's apprehensions.

THE LORD CHANCELLOR. That was in no respect a bill of interpleader. There could be no question that the payment of the fine, assessed upon a copyhold or customary estate, to a lord in possession of the manor, would discharge the tenant. He was the only person to whom it could be paid. If there was another lord, with a title paramount, he might have recovered the fine against the lord, but not against the tenant. The tenant suggests an apprehension of his own, that some one else is entitled to the fine. The bill was very rightly dismissed. If the two lords had both assessed him, which was impossible, that might have brought it to the case.[1]

[1] In that case the bill was also held, upon the form, not to be an interpleading bill, for want of an offer to bring the money into court.

I will not trouble the counsel for the plaintiffs to reply. Upon consideration I think I ought to have had the affidavits read. It struck me, on the opening, that probably the answer would have afforded a sufficient ground to decide upon the case; and I think it has: but an interpleading bill is exactly upon the footing of an injunction to stay waste, and may be supported by specific evidence of the facts, as well as it is in all cases by specific evidence that there is no collusion. I am confirmed in the opinion I threw out the other day by what I know took place in this very case; and, from what I heard, I was in hopes that a stop might have been put to this motion. I did state that, under the circumstances, if the action had been brought in the court in which I sat for several years, I should have had no difficulty to have discharged Langston upon common bail on his bringing this parcel into court, and would have stayed the proceedings in the action until the attachments had been disposed of; he suffering his name to be used, or the party coming in, as he might have done, in order to have got rid of that, and left nothing but the action of trover.

This is precisely the case of an interpleading bill. A party claiming no right in the subject is doubly vexed by having two legal processes in the names of different persons going on against him at the same time. He comes upon the most obvious equity to insist that those persons claiming that to which he makes no claim should settle that contest among themselves, and not with him. It may be said in all cases of interpleader, as it has been said in this case, "Stand the action. If A. proceeds first, and you have a good defence against him, that puts an end to his claim: if not, that is a defence against the claim of B." Here, it is said, Langston may either defend himself against the attachments, or not: if he does, there is an end to the claim of the creditors who have sued out the attachments; if not, and if the goods are condemned, then there is a defence against Boylston. That is precisely the situation in which the plaintiffs ought not to be placed.

As to the circumstances, no stress can be laid upon the allegation that there is collusion on the part of the plaintiffs. They did not collude; and I must take it for granted that they did not. Where the course of the court is that the party must make affidavit that there is no collusion, I cannot presume that to be false; for if it is false, he is liable to a prosecution: much less can I determine it to be false upon a counter-affidavit. But as to the circumstances, the credit of the plaintiffs is unimpeached; and, not having heard a word of the representation they make falsified upon the answer put in, I am clear that the whole proceeding against them was carried on with eagerness and intemperance. Boylston, feeling, perhaps justly, that he was ill-used by those who proceeded against him as a partner with Lane and Co., was inclined to retaliate upon the plaintiffs, who had done nothing harsh against him. It may be injustice in those who arrested Boylston to make him a partner in that house. Lying in prison, he applies to the plaintiffs. It would have been a great exertion of friendship, and very

unusual in a banker, if they, keeping the deposit, had given bail to the amount. It was no injustice to refuse to do so.

The alarm that arose on that determination in the Court of King's Bench was not ill-founded. The counsel have argued against that case; and it is said many inconveniences have arisen from it. I do not presume to say whether it is law or not. I at present think, whatever hardship arises from it, that determination was inevitable; and that the inconvenience arises out of the bankrupt laws, and may possibly require the application of some fit remedy. But as it is known that a person lying two months in prison is subject to the bankrupt laws, and therefore that a payment made in the mean time is bad, it is unjust to expect the bankers to trust him, and take the risk upon themselves without consideration; to decide what? that there is no foundation for his arrest. It is imputed to the plaintiffs that they consulted the attorney for these creditors who held the defendant in prison. It was prudence in them to apply to that attorney to know that they were safe in doing what they could to assist Boylston. The attorney did not give them any information to set their minds at ease, but insisted that his clients were in the right, and immediately took out a process, which did not leave it in the power of the plaintiffs to act as they might have been inclined to do. Then they proceed to what I think a most outrageous and unjustifiable step against the plaintiffs, by arresting them in an action of trover, and holding them to bail in the sum of 45,000*l.*; when they knew nothing more was desired than to deliver this property, if they could with safety. That the defendant converted the property to his own use is the ground of that action; to sustain which they make use of the legal fiction that retaining the property is a conversion. That was a very bold and hazardous measure. If the arrest of Boylston by those creditors was groundless, he has his remedy. If he really is a partner, and engaged in the house of Lane and Frazer, though I may lament it as a private misfortune, I cannot say, there is any injustice towards him. It occurred to me the other day that I might relieve the plaintiffs upon condition; but I now think I have no right to impose any.

It was then stated that on Thursday, April 18, a rule had been granted in the Court of King's Bench, in which the action was brought, to show cause why the proceedings should not be stayed, and the defendants be discharged on common bail.

The plaintiffs in equity then consented that Boylston should be at liberty to defend the attachments in their names; and it was insisted they had always been ready to permit that.

THE LORD CHANCELLOR. Then there is an end of the action of trover of course. I take it that would be exactly the order that would be made in the Court of King's Bench.

DUNGEY *v.* ANGOVE AND OTHERS,

BEFORE LORD THURLOW, C., DECEMBER 12, 1789.

[*Reported in* 3 *Brown's Chancery Cases*, 36.]

THIS was a bill of interpleader filed by a tenant against persons who claimed the premises under different rights, offering, as usual, to bring the money into court to abide the event; and an injunction had been obtained till the coming in of the answer.

Mr. *Simeon* had moved that the bill should be dismissed, the money not having been paid into court, agreeable to the offer contained in the bill.

Mr. *Hollist* objected that the motion was premature, no notice having been given to pay in the money; that the first motion ought to be for payment of the money, and, upon non-payment, they might move to dismiss.

THE LORD CHANCELLOR thought that the motion for dismission was well founded, on the non-payment of the money; and that the injunction, for want of an answer, ought not to have been granted without the plaintiff's bringing the money into court. It stood over, and notice was given of motion to dismiss the injunction on the merits.

Mr. *Hollist*, in support of the injunction, and against the order of dismission, cited two cases: —

Brimer *v.* Buchannon, 28th November, 1780, where, in a bill of interpleader, the defendant being in America, and an injunction being obtained for want of an answer, the same was continued on bringing the money into court.

In Surry *v.* Waltham, 28th February, 1785, the injunction was continued to the hearing, on the plaintiff's paying the rent due into court, and paying future rents within six weeks after they accrued.

THE LORD CHANCELLOR said his opinion was that the money ought to be paid in, in the first instance; because the gist of the suit is that the plaintiff is a stakeholder, that he has the money, and wants to get rid of it. In the first case cited, of the man in America, nothing can be harder than that the plaintiff should prevent his proceeding without bringing the money into court, which he admits to be due from him. It is laid down distinctly, both in the Practical Register, p. 39. and in Equity Abr. tit. Interpleader, that no step can be taken until the money is paid into court.

It stood over again till this day, when THE LORD CHANCELLOR said that, in a pure interpleading bill, the plaintiff never can proceed compulsorily by injunction till he has brought the money into court.

But the defendant waiving this motion to dismiss the bill, the injunction was continued (by consent), on the plaintiff bringing into court the year's rent due at Christmas, 1788, and the three quarters due at

Michaelmas last (it being admitted that the reservation of rent was quarterly), and also all the costs at law, both of the replevin and action of covenant, and undertaking to pay the future rents within six weeks after each rent-day.

SAME CASE.

BEFORE LORD LOUGHBOROUGH, C., JANUARY 24, 27, and 28, 1794.

[*Reported in* 2 *Vesey Junior*, 304.]

IN 1778, Dungey, being in possession of premises belonging to Angove, took a lease from him for twenty-one years. Under that lease he paid rent eight or nine years, till notice of ejectment was served upon him under a title of Hernal, adverse to that of his landlord. This ejectment was non-prossed; but the tenant, on account of it, refused to pay any more rent, and filed a bill of interpleader. The answer of Hernal was taken without oath. The case he set up by his answer was, that though the legal estate was in Angove, yet it appeared, by a decree in another cause, that after certain incumbrances discharged, he would stand as trustee for Garveth, and that Hernal had a *post obit* of Garveth, accompanied with a demise of the land. It appeared, in the course of the cause, that Hernal had sold his claim to Stephenton, who was not a party, but acted as solicitor for the plaintiff. The rent had been paid into court by the tenant. The affidavit, on filing the bill, was not in the usual form, but to this effect: "that the bill annexed is not with the consent, knowledge, or combination of either of the defendants therein mentioned, but merely of this deponent's own free will." Upon the opening, the Lord Chancellor expressed his surprise at this bill, which he said ought to be dismissed with costs upon the face of it, being an interpleading bill, brought by a tenant under a lease against his landlord, because a stranger set up a title adverse to the landlord.

For the plaintiff. The tenant would be liable to an action of trespass for his enjoyment.

THE LORD CHANCELLOR. Then he will bring an action against his landlord upon the covenant in his lease. I can conceive a tenant entitled to bring such a bill, where two persons dispute which is the representative of the lessor; but in this case how monstrous a thing would it be if it was in the power of the tenant to make the landlord, at law the defendant in the ejectment, disclose his title by an interpleading bill. I shall desire, when all the circumstances are stated to be furnished with a ground to believe I am not acting criminally in hearing a bill of interpleader filed by a tenant, admitting he holds under a lease, and calling the lessor into this court to question that title which he has acknowledged by accepting the lease, merely on a

suggestion of a stranger making title. The only case in which a tenant can come into this court upon such interpleading bill is where the lessor has done some act himself to embarrass the tenant, which is the case of a mortgage.

The Solicitor General[1] and *Mr. Shooter*, for the plaintiff. In Field *v.* Todd[2] the plaintiff, who was a packer, did not, upon the bankruptcy of Dewhurst, return the goods to Hill, who had delivered them up to be packed for Dewhurst, which he ought to have done upon the principle now stated. It was held that he need not look to the title, but, being an innocent holder, ought not to be doubly vexed, and that the question ought to be agitated between the parties themselves. The Court has done the same in the case of tenants of estates, even where the tenant occupies by demise of one person, and a claim is made by another. Wood *v.* Kaye, before Lord Thurlow, is not to be distinguished from this. There a house was devised to trustees for the separate use of Mrs. Kaye, with a provision for the rent to be paid to the person to whom she should give a letter of attorney. The trustees not acting, Mr. and Mrs. Kaye entered. In 1783 they executed a lease to Wood for seven years, if she should so long live. In 1787 the trustees, at the instigation of her son, insisted that, as the estate was devised to them, they had a right to receive the rent and apply it to answer repairs on other parts of the estate, and they gave notice to the tenant not to pay. In consequence of his refusal, the lessor proceeded upon the lease, and the tenant filed a bill. It was insisted, as it is now, that a person who had taken a lease from another, could not file such a bill. The Chancellor said it would be the most detrimental thing to the public and to tenants, because nothing can be more material than that tenants shall be safe in the occupation of the estate; that if the landlord has a complete title, he may indemnify them; but that if he does not take care of the defence, the consequence is that the tenant has a right to come into equity. In Surry *v.* Lord Waltham, Feb. 28, 1785, under the will of Mr. Olmius, Lord Waltham conceived himself to be absolutely entitled to an estate in Essex. He had let two farms to Surry. A person claimed under the will, insisting that his wife was the legitimate daughter of the devisor, and threatened an ejectment. Lord Waltham calling for his rent, the tenant filed a bill of interpleader. The injunction was continued to the hearing, the rent being paid into court. Both these cases were cited when this cause came before Lord Thurlow upon the question whether the injunction should be continued; and Lord Thurlow affirmed what he had done, and directed the injunction to be continued, on paying the money into court. The circumstance that the plaintiff had taken by demise from the defendant occurred in both those cases. Aldrich *v.* Thompson was before both Sir Thomas Sewell and Lord Thurlow. It is reported, upon the original hearing, 2 Bro. C. C. 149. Persons having rent-charges distrained upon the tenants. They filed a bill of

[1] Sir John Mitford. — Ed.

[2] Cited, *ante*, p. 130. — Ed.

interpleader. It was insisted that they had no right to do so, whatever right they had to an indemnity. Sir Thomas Sewell thought they could not file the bill, but Lord Thurlow ordered the rent to be brought into court. In Brimer *v.* Buchanan, Nov. 28, 1778, the plaintiff had received several sums of money from government, for corn shipped for the public service. He filed a bill against several persons who set up claims. One claimed in respect of the freight of the corn, which would have been answerable for the freight. It was insisted he had no right to file the bill, for that he was bound to account with those under whose authority he acted. Lord Thurlow thought otherwise; that the money having come actually to his hands from government, though under an authority that ought not to be acted upon, he was liable, and therefore might file the bill.

THE LORD CHANCELLOR. In all these cases the party has a right to the specific money; but the case of a tenant who disavows his landlord is different. He never can be called upon to pay the rent to the other person. While the tenant is bound, by contract, to pay to Angove, Hernal may eject him, and may bring an action for use and occupation, but he never can for the rent. It is a different demand. The parties interpleading must each, in supposition, have a right to the same demand. Here that cannot be set up, for an action for the rent he never can have.

For the plaintiff. It will be in effect the same action.

THE LORD CHANCELLOR. Where there is a demise, an action for use and occupation cannot be brought by the lessor, but it must be upon the deed for the rent. If another person claims, he may bring an action for use and occupation. The case of Wood *v.* Kaye is very right, and directly opposite to this. The title of the trustees was derivative from that of the *cestui que trust*, and was consistent with it. The tenant did not come to disavow the title of the landlord. It was a question between trustees and the *cestui que trust*, with which the tenant had nothing to do. The rights of the trustees and *cestui que trust* stand on the same foundation. So Aldrich *v.* Thompson was a clear case of interpleader, for the annuitants were claiming their rights by contract with a person they had permitted to continue in possession of the estate.

The Attorney General[1] and Mr. *Hollist*, for the defendant Hernal. The parties have acquiesced in treating this as a case of interpleader. The plaintiff is only to bring the parties to a hearing. If a person is seised of an equity of redemption, has made a lease, and give notice not to pay rent to the mortgagee, but to himself, the tenant may file a bill of interpleader, if the landlord refuses to indemnify him. If the mortgage is subsequent to the lease, the tenant is involved in the dispute by the act of the mortgagor. A question may arise, whether the mortgage is paid or not. In another cause it appears that this is a case of that sort. The defendant Angove having submitted to this

[1] Sir John Scott. — ED.

case from time to time, and suffered an injunction to go and be sustained, his conduct has operated in fact to remove the necessity of applying for a receiver in that other cause. This cause never would have had the effect it has, if the other defendant had either demurred or moved to dissolve the injunction. But as the money is in court, the Court will retain it till the report in the other cause. After what has been said I shall only cite 2 Com. Dig. Chancery, (3 T.) and Gilb. For. Rom. 48, where, after stating what bills of interpleader are, he says, "there are other bills of interpleader likewise; as when two persons claim the rent of tenants; there the tenants may prefer an interpleading bill against both of them." &c.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Simeon*, for the defendant Angove. There never was an instance of such a bill. There was a case before Lord Kenyon, when Master of the Rolls, which supports the opinion the Court has already thrown out. A, as attorney for B, was employed to recover a debt. A accepted a bill for B, which, though not intended to be negotiable, was transferred. B, being an uncertificated bankrupt, his assignees claimed the money in the hands of A. A person also claimed as *bonâ fide* holder of the bill without notice. A filed a bill of interpleader. Lord Kenyon dismissed the bill, being of opinion that none but a mere stakeholder could file such a bill; and that when a man had expressly contracted with either of the parties, as, in that case, by the acceptance, he could not. In Metcalf *v.* Hervey, 1 Ves. 248, Lord Hardwicke expressly lays it down that such bill cannot be as to the possession, but must be as to the payment of some demand in money. That is a direct authority that there cannot be a bill of interpleader to stop an ejectment. If any collusion appears in any part of the proceeding, the Court will make no decree. It is plain they are colluding, from the circumstance of taking the answer of Hernal without oath, and from the unusual form of the affidavit. Stephenton, the party really interested, is not before the Court; therefore there is a defect of parties; and in that case the Court may dismiss the bill. The plaintiff could not have been hurt by Hernal, if he had paid rent to Angove. Hernal could not have distrained, or maintained an action for use and occupation. Upon the motion to dissolve the injunction, nothing was said about the right to support this bill upon the merits. It was thought premature. The motion was to dissolve the injunction because the plaintiff had not brought the money into court. The Chancellor was so struck with that circumstance and the circumstances of collusion, of which he was then informed, that he said he thought no man could have an injunction upon a bill of interpleader without bringing the money into court in the first instance: and he thought the bill might be dismissed for want of it, and directed a motion to be made for that purpose. When the other motion was made, it was insisted that, according to the practice, the money might be brought in at any time; and that did finally appear to be the practice. But it was understood that the injunction could not be continued without bringing the money into court.

Reply. The rule cannot be according to the case before Lord Kenyon. I believe the question there was simply, whether the person who brought the bill had not, by his acceptance, made himself liable in a way that made the demand of the innocent holder clear, who must be paid at all events; and any consequence attending the plaintiff he must suffer. But if the question had been agitated between the bankrupt and his assignees, which is precisely this case, the bill would have lain. The attempt to confine interpleader to cases of mere bailment is absurd; for in that case it may be compelled at law. But the cases here are where it cannot be compelled at law, for want of privity between the persons claiming. If a person comes to property by the bailment of two, or if he finds property claimed by two, he need not come into equity. If the bill does not state a sufficient ground of interpleader, that ought to be taken advantage of by demurrer, not at the hearing. The form of the affidavit cannot be taken advantage of at the hearing. By submitting to answer they waive that objection. This often happens in the case of a lost deed; advantage cannot, at the hearing, be taken of the want of the affidavit. Here Angove has submitted to discuss with Hernal the nature of his claim.

The Lord Chancellor. When this cause was first opened, it struck me as a singular and perfectly new attempt. I had imagined that nothing was better known or more firmly established, though the particular authority for the position did not occur to me, than that there was no possibility of filing a bill of interpleader against an ejectment: the particular case has been mentioned, in which Lord Hardwicke held that opinion. That was a bill of interpleader brought with the same sinister purpose as this, to draw out a discovery of some facts relative to the title of the Hanmer estate; and Lord Hardwicke lays it down expressly, though, upon the complicated state of that case, he granted the injunction, that upon the case of ejectment, where possession is the question, there can be no bill of interpleader. The reason is manifest; for, upon the definition of it, a bill of interpleader is, where two persons claim of a third the same debt or the same duty. With regard to the relation of landlord and tenant, the right must be the object of an ejectment. The law has taken such anxious care to settle their rights, arising out of that relation, that the tenant attacked throws himself upon his landlord. He has nothing to do with any claim adverse to his landlord. He puts the landlord in his place. If the landlord does not defend for him, he recovers, upon his lease, a recompense against the landlord. In the case of another person claiming against the title of the landlord, it is clear, unless he derives under the title of the landlord, he cannot claim the same debt. The rent due upon the demise is a different demand from that which some other person may have upon the occupation of the premises. Upon the view I now have of this case, it would be a small matter, upon the justice due to the rights of the country, merely to dismiss the bill; I must make it a subject of particular inquiry. It is as pernicious a practice, and as

dangerous to the landed property of the kingdom, as ever came before the Court. It does not appear whether the tenant gave notice to his landlord. That I shall inquire into. The alarming conseqnence is, that, if the practice is tolerated, a tenant in possession, whose duty it is to stand by and defend the possession for the landlord, becomes the instrument to betray him, and, through the medium of this court, to call upon him to do that which it was the prudence and the justice of the law to prevent, — to make a disclosure of his title attacked adversely; and that to be done through the machinations of his own tenant. Suppose he had given notice to his landlord, and that Angove had become defendant, Hernal could not, in any manner in this court, have made Angove discover his title at law; and the title at law is all the tenant is concerned with. As to the form of the affidavit, I am glad this irregular affidavit has been annexed to the bill, for it has spared the crime of perjury. Stephenton, when this answer without oath comes in, appears to be the real party interested to attack Angove, and have the rent paid into court for a purpose very improper, which I shall state presently. Dungey, instead of applying to the landlord, and acting under his attorney, consults with the attorney interested in the dispute. Hernal's case is that a great while ago he had a *post obit* of Garveth, accompanied with a demise of the land, and sold it to Stephenton for half the value on Garveth's getting into difficulties. The common injunction was obtained. No money was paid in; and Lord Thurlow was strongly of opinion that the bill ought to be dismissed, considering the payment of the stake into court as a condition upon which the bill must rest, where it appeared to be a case of double vexation. A consent was given by Angove to pass from the dismission of the bill, on paying the money into court. I do not blame him. Perhaps his prudence suggested that if he was to get rid of the bill, and endeavor to recover the rent by distress, it might be very doubtful. Perhaps it was occasioned by his distress. Then the answer of Angove comes in. The bill is singular, for it suggests a case. An interpleading bill never does that. Hernal, by his answer, taken as it is without oath, shows this ejectment was a sham ejectment. He states the legal estate to be in Angove, only apprehending that, by some other proceeding in this court, Angove would, after certain incumbrances discharged, stand as a trustee for Garveth. He states, upon his own answer, a flat non-suit to any ejectment he could have brought; and therefore shows the ejectment was a sham.

Now that the case stands before me, the counsel for Hernal have nothing to pray but this; not that I should make any decree, not that I can support any title of Hernal, but simply that, the money having been paid into court, I shall retain it, not to dispose of it in this cause, or to give it in this cause to Hernal, but to abide the event of the report of the Master in another cause, the circumstances of which I cannot know. Up to that extent even, it shows the purpose of the interpleading bill to have been to obtain the rents to be paid over into

court in this cause, instead of applying in that cause for a receiver, the only proper way to take them out of the pocket of Angove into this court. The tenant is not doubly vexed. His own knowledge, or any advice he might have received, could not have suggested any danger from the ejectment. A bill of interpleader will lie where the tenant may be liable to pay the rent to one of two different persons. In the circumstances of that case, both the persons claiming the same rent must claim in privity of tenure and privity of contract; as in the case of mortgagor and mortgagee; trustee and *cestui que trust;* or where the estate is settled to the separate use of a married woman, of which the tenant has notice, and the husband has been in receipt of the rent, and differences arise between them, and she claims the rent. There may be a variety of cases in which the tenant, not disputing the title of the landlord, but affirming that title, the tenure, and the contract, by which the rent is payable, but where it is uncertain to whom it is to be paid, may file a bill of interpleader. In a case before me the other day, where there was a mortgage, the tenant was not bound to settle the account between the mortgagor and mortgagee. If the mortgagor will not indemnify the tenant, he has a right to come here for an indemnity. But there is no one possible purpose for which I can make a decree with regard to this case. The counsel only press, not for a decree, but for a suspensive order to retain the money to answer some purpose to be obtained in that other cause.

The instigator of this bill is doubly vexing. If there is any purchaser under Hernal, that is all in that other cause. Whatever that is, by giving the utmost extent to Hernal's right there, it is to be prosecuted in that cause; and this court, by doing what is desired, would be suffering one cause to hang up, and the business of it to be done *per indirectum* in another cause. That would be such an aggravation of all the harassing with which suits here are too often attended, that the dismission of this bill only will not do, but to do that which appertains to justice, and that which appertains to example, and to vindicate the honor and justice of the court, I must do more. I will direct the Master to inquire into the circumstances of this case; and, having the circumstances before me, it will be fit for me, and I trust I shall have the aid of the bar in it, to consider what is fit to be done. In the meantime I will direct the money to be paid to Angove. I will not yet dismiss the bill; but will direct an inquiry at whose instigation it was filed; and that the Master shall state when and by whom the notice of ejectment was served on the plaintiff; what proceedings were had upon that ejectment; and whether notice of the ejectment was given to Angove; and that the Master shall examine, upon interrogatories, Dungey the plaintiff, Hernal the defendant, and Stephenton; and shall report the several examinations, and all facts and circumstances appearing to him material towards the object of the inquiry directed; and let all farther directions and the consideration of costs be reserved.

On the 5th of August, the report confirming the fraud, the bill was dismissed; the plaintiff and his solicitor were ordered to pay all the expenses of the defendant Angove as between attorney and client; and the solicitor was ordered to show cause why he should not be struck off the roll.

ALDRIDGE *v.* MESNER.

BEFORE LORD ELDON, C., JULY 21 and 31, 1801.

[*Reported in* 6 *Vesey*, 418.]

THE plaintiff filed a bill of interpleader against Mesner and Whitchurch, the former of whom bought a horse from the latter by auction for seventy-nine guineas. The plaintiff was the auctioneer. The horse was warranted sound. He was returned as unsound the day after, by the terms of the sale, the purchaser was to be at liberty to return him, but before the plaintiff had paid over the money. The defendant Whitchurch demurred to the bill, and, both parties bringing actions for the money against the plaintiff, he moved for an injunction. The late Lord Chancellor,[1] being of opinion that the action brought by Mesner against Aldridge would try the merits, made an order, upon that motion, that the action of Mesner should proceed; that Whitchurch should be restrained from proceeding in his action, and should undertake the defence of the other action for Aldridge. That action ended in a nonsuit. The demurrer was not argued.

Mr. *Grimwood*, for the plaintiff, moved that his costs may be paid out of the fund which he had paid into court, without going on with the cause, observing that he was a mere stakeholder, and citing Aldrich *v.* Thompson.

Mr. *Stanley* and Mr. *W. Agar*, for the defendants, insisted that this was not an interpleading bill, and the plaintiff was not a mere stakeholder; that he ought to have paid over the money immediately, when the horse was not returned at the time specified; that he was not entitled to any costs, and the bill ought to be dismissed.

THE LORD CHANCELLOR. Under the circumstances that have taken place, to all substantial purposes the defendant Whitchurch has waived his demurrer. Both the defendants have waived all objection, and decided the cause by submitting to that order. Besides, I am not ready to admit that this is not an interpleading bill, for I have tried actions more than once in which it appeared clearly that the condition to return a horse by a certain day was inserted on purpose, because the defect would not appear till a day or two after that day. The justice of the case is that the plaintiff should have his costs; and he has a lien for them upon the fund.

[1] Lord Loughborough. — ED.

JULY 31.

An order was made, on motion, that Mesner should pay all the costs. THE LORD CHANCELLOR said he considered the bill as in the nature of an interpleading bill at least; and upon an interpleader, if there was no fund in court, costs would be given against the party who occasioned it.

COWTAN *v.* WILLIAMS.

BEFORE LORD ELDON, C., AUGUST 8 and 20, 1803.

[*Reported in* 9 *Vesey*, 107.]

A BILL of interpleader was filed by a lessee of tithes against the lessor, the vicar, and the assignees under an insolvent act, of which he took the benefit subsequent to the lease, both claiming the rent. An action was directed to be brought by the assignees, and to be defended by the vicar, which was tried in the Court of Common Pleas, where it was determined, upon argument, that the profits of the vicarage did not belong to the creditors.

The Attorney General,[1] for the defendant, the vicar, upon the question as to costs, took the objection that a tenant cannot file a bill of interpleader against his landlord, according to Dungey *v.* Angove.

Mr. *Romilly*, for the plaintiff, distinguished this as a case of exception; the question arising upon the act of the landlord subsequent to the lease.

THE LORD CHANCELLOR concurred in that distinction, and mentioned Lord Thomond's case; in which a bill of interpleader was filed by tenants against their landlord and persons claiming annuities, subsequent to the lease; and the bill was supported by Sir Thomas Sewell, the tenant being, by the act of the lessor, entangled in a question which he could never settle.

The decree directed that the costs of the plaintiff, both at law and in equity, and the costs of the defendant, the vicar, in equity, should be taxed; the plaintiff to be at liberty to retain his costs out of the rent in his hands, and to pay the remainder to the vicar; the defendants, the assignees, to pay to the other defendant, the vicar, what should be so retained by the plaintiff, and the costs of that defendant to be taxed.

AUG. 20.

Mr. *Ainge*, for the assignees, with reference to the order as to the costs, observed that this was not the common case; these defendants

[1] Spencer Perceval. — ED.

being trustees for creditors, trying a new question which it was their duty to bring before the court, as to the other defendant at least.

The Lord Chancellor, upon that representation, allowed the assignees their costs, as against the other defendant.

CLARKE *v.* BYNE.

Before Lord Erskine, C., February 23 and March 2, 1807.

[*Reported in* 13 *Vesey*, 383.]

The bill stated that Henry Byne the elder, by indenture dated the 20th of December, 1790, demised a field for twenty-one years to the plaintiffs, at the annual rent of 8*l.*, who paid the rent to him until Michaelmas, 1796, when he ceased to receive or claim the rent; and it was claimed and demanded of the plaintiffs in his own right by Henry Byne the younger, under some deed or agreement between him and Byne the elder, since the plaintiffs' lease, by which deed or agreement, as plaintiffs understand, Byne the elder gave up the rents and profits of the said premises, with others, and Byne the younger was put into the receipt of such rents and profits; and thereupon the plaintiffs, having received no notice to the contrary, or any counter-claim of their rent from Byne the elder, attorned to Byne the younger, and paid him the rent from 1796 to the end of 1802 without interruption.

The bill further stated that in 1802 or the beginning of 1803 the plaintiffs were served with a notice in writing, signed by Edmund Lodge, as trustee for Byne the elder, stating that, by indentures of lease and release, dated the 16th and 17th of September, 1796, executed by Byne the elder and Byne the younger, their estates were vested in trustees, for the purpose of raising certain charges, agreed to be borne equally between them; and that Byne the younger had refused to pay his moiety; and therefore warning the plaintiffs not to pay him the rent; and the plaintiffs finding, upon inquiry of a solicitor, that there had been such conveyance, withheld their rent. An arrear of three years and a half being due, both the Bynes threatening to distrain, and Byne the younger having brought an action, the bill was filed against the Bynes, praying that they may interplead, offering to bring the rent into Court, and praying an injunction.

The defendant, Byne the younger, put in a demurrer, both to the discovery and relief: for cause, 1st, that, according to the bill, neither Byne the elder nor Byne the younger have any title to the rent, and therefore they are not the persons to interplead in respect thereof; 2dly, that, according to the bill, the legal estate is vested in, and the rent ought to be received by, trustees, who are not parties.

Mr. *Bell*, in support of the demurrer. As, in a court of law,

a tenant is not permitted to dispute his landlord's title, so neither is it allowed in equity, even by a bill of interpleader, and for the best reason; many titles perfectly fair and *bona fide* being founded in possession only, no one looking beyond sixty years. The general doctrine is stated by Lord Redesdale,[1] and is very strongly laid down, with reference to this particular point, in Dungey *v.* Angove. The case of Cowtan *v.* Williams is a case of exception; the question being raised by the act of the lessor, which the tenant cannot possibly dispose of; as, where the lessor grants annuities to different persons, all claiming upon the tenant, those are incumbrances, created by the act of the lessor, with which the tenant has nothing to do. This case is not within the exception, being merely the case of a tenant calling upon his landlord, to whom he has attorned and paid rent, to contest the point whether he has such an estate as entitles him to the rent; suggesting that he has no title, upon the information of another person.

The Solicitor General,[2] and Mr. *Giffin Wilson*, for the plaintiff, insisted that this case is precisely within the principle of Cowtan *v.* Williams; a landlord, by an act subsequent to the demise, giving title to another person; the tenant by that act placed in this situation, that both parties may distrain upon him; having no defence at law against the one from whom he accepted the lease, nor against the other to whom he has attorned and paid rent. The difficulty as to the trustees arises also from the act of the landlord. When the answer comes in it will appear whether the trustees have any interest.

THE LORD CHANCELLOR. The doctrine of Dungey *v.* Angove is sound. Certainly a tenant cannot make his landlord interplead with a stranger, setting up a demand. But what is this case? From 1796 to 1802 the rent was never demanded by Byne the elder, the original lessor; and, under a deed, Byne the younger was let into possession and received the rents. This is precisely the case of Cowtan *v.* Williams, upon the very same principle. This tenant does not come to disaffirm the act of his landlord. The attornment was not by fraud, but under a title, derived from Byne the elder to Byne the younger, subsequent to the date of the plaintiff's lease. The title of the trustees is also a title proceeding from Byne the elder, creating additional embarrassment. It may be necessary to amend the bill, either by making the trustees parties, or striking them out altogether; but as between Byne the elder and Byne the younger, this is a complete case of interpleader.

The demurrer must therefore be overruled.

[1] Mitf. 47.

[2] Sir Samuel Romilly. — ED.

ANGELL *v.* HADDEN.

BEFORE LORD ELDON, C., JULY 29 and AUGUST 1, 1808.

[*Reported in* 15 *Vesey*, 244.]

BY indentures, dated June 20, 1788, Charles Cole, in consideration of 665*l.*, purchased from Nehemiah John Reed and Ann, his wife, an annuity of 95*l.* for the term of ninety-nine years, if Ann Reed should so long live; secured by bond, and an assignment of a rent-charge of 600*l.* per annum secured to Ann Reed by her marriage settlement, dated Sept. 13, 1786; by which the said rent-charge, to which she was entitled for her life under the settlement made upon her marriage with her first husband, Benedict Angell, and under his will, subject to a trust term of five hundred years, was assigned to trustees, upon trust, as to one moiety, subject to the appointment of Ann Reed, for her separate use; and as to the other moiety to pay to Nehemiah John Reed, during the joint lives of him and his wife; and, in the event of her surviving him, upon the trusts declared concerning the first moiety.

Several other annuities were afterwards granted by Reed and his wife to different persons, secured also upon the rent-charge of 600*l.* per annum. After the death of Mr. Reed his widow married Benjamin Hadden, and gave notices to the plaintiff, tenant for life of the estates, charged with the rent-charge of 600*l.* per annum, not to pay the several annuities that had been granted by her. The bill therefore was filed, stating that the several annuitants insist that the plaintiff Angell is bound to pay the annuities; that Ann Hadden in her own name and that of M'Farlane, the surviving trustee of the rent-charge, had distrained upon the other plaintiff, Smith, one of the tenants of the premises; charging that the plaintiff Angell is ready and desirous to pay the arrears and annuities, but is unable to do so with safety by reason of the inconsistent claims aforesaid; and pying,ra therefore, that the defendants may interplead, and an injunction against proceeding in the distress.

A motion was made, upon the answers coui3ш in, to dissolve the injunction which had been obtained.

Mr. *Leach*, Mr. *Thomson*, Serjeant *Palmer*, and Mr. *Owen*, for the plaintiff.

Sir *Samuel Romilly*, Mr. *Bell*, Mr. *Wingfield*, and Mr. *Plowden*, for the different defendants.

THE LORD CHANCELLOR. The case of the Duke of Bolton *v.* Williams[1] was not, according to one of the reports at least[2], upon one bill of interpleader, but upon two bills against several persons setting up claims against the estate. The first objection that has been made in this case is that this is a bill of interpleader against a great num-

[1] 3 Bro. C. C. 297, 2 Ves. Jr. 138. [2] 2 Ves. Jr. 138.

ber of persons: but that is no objection. As the terre-tenant has a right to consider the whole charge as one annuity charged upon his estate, the persons entitled to several portions of that charge cannot complain if he applies to this court, representing that he is desirous to pay this entire charge upon his estate, which they have thought proper to split into parts.

The next objection is that here is no suit instituted. That is no objection if the claims are made. Here is no more than one legal right of entry, in the trustees of the term; which M'Farlane has not got in; but I doubt extremely, particularly upon the case of the Duke of Bolton *v.* Williams, whether, where a party has a great variety of claims made upon him, he is, before he makes an attempt in this court to render himself safe, to be called upon to discuss how many of these claims can be sustained: the principle of the relief going to protect him, not only from being compelled to pay, but also from the vexation attending the discussion of all the suits that may be instituted. It was in some degree upon this ground that Lord Thurlow, in the Duke of Bolton *v.* Williams, granted a perpetual injunction against the executors of the annuitants, which did not properly belong to a strict bill of interpleader; for, though he could very well decide, upon that, to whom the arrears were to be paid, yet, as sums on account of the future payments would continually be coming into controversy, unless he had restrained them from proceeding, if they could have maintained any action, which was very doubtful, he could not have given that complete relief which was necessary to deliver the plaintiff from the vexation to which he would have been liable. Lord Rosslyn follows that; holding that the plaintiff had a right to have all the parties to whom she had made assignments brought here together, and was not to be put to try with each of them the question upon his claim. The trustee refused to receive the annuity; and several claims were made upon the Duke of Bolton by persons, several of whom might have sued, using the name of the trustee; and the object of the Duke in coming to this court was, as he might be harassed by all those suits, to have determined for whom Law was a trustee. The reasoning of Lord Rosslyn upon it is in print: that of Lord Thurlow I heard: this being one of the cases decided by his Lordship out of court upon resigning the Great Seal; and the meaning of both was, that, though the Duke, paying the trustee, if he would have received, after notice from persons representing themselves as *cestuis que trust*, that they meant to insist, in equity, that they would intercept that payment and receive it themselves, giving notice of the equity that entitled them to do so, might perhaps have been able to defend himself, yet, if he must discuss that point in two suits, the same principle would justify any number of suits; and the ground of the judgment is that the Duke held the money for the trustee, if he chose to assert his legal title on behalf of others; but, if he would not assert that title, there was a principle of jurisprudence in this court, entitling the Duke to say he had the money ready to be

handed over to any person who had the right to it; and, all these persons making claims, to desire the Court to tell him to whom he ought to pay it. The ground therefore was, not that he might not have been able by great attention and caution to make himself secure; but that he might secure himself by one suit instead of perhaps forty; as one payment ought to discharge him.

Even if I thought otherwise of that case than I do, I could not, upon an interlocutory motion, contradict it. The consequence is that this plaintiff is entitled to come here in order to know to whom he is to pay this annuity and the respective portions of it.

The injunction was continued.

SAME CASE.

BEFORE SIR WILLIAM GRANT, M. R., JULY 7 and 25, 1809.

[*Reported in* 16 *Vesey*, 202.]

THIS cause standing in the paper for hearing, a difficulty arose as to the mode of proceeding upon an interpleading bill; the question between the defendants not being ripe for decision.

THE MASTER OF THE ROLLS suggested a reference to the Master.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Wingfield*, for the defendants, contended against a reference to the Master, or an issue, except by consent; upon which only the Duke of Bolton *v.* Williams[1] could be justified.

JULY 25.

THE MASTER OF THE ROLLS. The result of the inquiry I have made into this subject is, that the Court disposes of the questions arising upon bills of interpleader in various modes, according to the nature of the question, and the manner in which it is brought before the Court. An interpleading bill is considered as putting the defendants to contest their respective claims, just as a bill by an executor or trustee to obtain the direction of the Court upon the adverse claims of the different defendants. If, therefore, at the hearing, the question between the defendants is ripe for decision, the Court decides it; and if it is not ripe for decision, directs an action, or an issue, or a reference to the Master, as may be best suited to the nature of the case. In the Duke of Bolton *v.* Williams the question was ripe for decision, and was decided in favor of one defendant against the other; and that decree was affirmed upon the re-hearing. In May, 1787, Lord Kenyon had made a similar decree at the Rolls, in the case of Hodges *v.* Smith. The bill in that cause was filed by a tenant for the purpose of ascertaining to which of two different claimants he was to pay his rent;

[1] 3 Bro. C. C. 297, 2 Ves. Jr. 138.

one of the defendants established his title by evidence; the other made default at the hearing. Lord Kenyon directed the rent for the future to be paid to the one, and granted a perpetual injunction against the other. That could not be such a decree as is ordinarily made at the prayer of the plaintiff, where the defendant makes default; for the plaintiff in an interpleading bill does not pray any decree in favor of one defendant against another. It must, therefore, have been either a decree prayed by one of the defendants, or such as the Court thought it right to pronounce between them.

In this case, the question not being ripe for decision, the precedent of Aldrich *v.* Thompson[1] seems the proper one to follow. Mrs. Hadden having abandoned all her objections to the annuities, except as to their enrolment, the reference to the Master must be to inquire whether proper memorials of the different annuities had been enrolled, and to state the respective priorities of such of them as are valid.

EAST INDIA COMPANY *v.* EDWARDS.

Before Sir William Grant, M. R., May 20, 1811.

[*Reported in* 18 *Vesey*, 376.]

The bill stated that in the latter end of the year 1799 the defendant, John Edwards, contracted to supply the plaintiffs with fifty sets of leather hose for fire-engines, at certain rates, amounting for the whole to the sum of 1,777*l.* 2*s.* 6*d.*, payable by instalments on the 7th and 29th of September, the 5th of November, and the 21st of December, 1810; that Edwards afterwards, as it is alleged, assigned the contract to Robert Dickenson, and that the leather hose were supplied and delivered to the plaintiffs by Edwards and Dickenson, or one of them.

The bill further stated that, before any of the instalments were due, and before the plaintiffs had heard of the alleged assignment, they, on the request of Edwards, advanced to him 1,000*l.* on account, and he has lately commenced an action at law against the plaintiffs for the sum of 760*l.* 19*s.* 8*d.* remaining due under the contract; that the defendant Dickenson pretends that by indentures dated the 7th of December, 1809, Edwards assigned the contract and all benefit thereof to him, and he performed the contract, and is entitled to receive the said sum of 760*l.* 19*s.* 8*d.*; that Dickenson has given the plaintiffs notice of the said alleged assignment, and has directed them not to pay Edwards; but Edwards pretends that the assignment is, for some reason which he refuses to discover, void, and that he is not bound thereby; and he threatens to proceed in the action; and Dickenson threatens, in case the plaintiffs do not pay him, to institute some suit or suits against them to compel

[1] 2 Bro. C. C. 149.

them to pay the said money to him; and the said defendants wholly dispute each other's right to the said sum; and by means thereof and the other means aforesaid, the plaintiffs are in danger of being doubly harassed respecting the said sum of money, and cannot with safety pay either of them.

The bill prayed that the defendants may set forth to whom the said sum of 760*l.* 19*s.* 8*d.* is due, and that they may interplead, and settle their said demands between themselves, the plaintiffs offering to pay either of them to whom the money shall appear to belong, being indemnified, or to pay it into court; that the defendant Edwards may be restrained from proceeding in the said suit; and that Dickenson may likewise, be restrained from instituting any suit at law against the plaintiffs touching the matters aforesaid.

The defendant Edwards, by his answer, admitted the execution of the assignment, which he set forth; reciting that Edwards, who had received the order, being unable to carry it into execution, it was agreed that Dickenson should employ him as manufacturer, &c.; that Dickenson should provide the materials and pay the workmen; and should, out of the profits to be received from the Company, in the first place, retain the expenses, next 200*l.* in satisfaction of his profit; and that Edwards should take the remainder, if any, &c.; insisting that the assignment, being illegal and usurious, is void, and Dickenson is not entitled to demand any sum of money on account of the said loan either from this defendant or from the plaintiffs; that, even if the assignment was not usurious and void, Dickenson had not performed the agreement by advancing or supplying all the money and materials required; that the plaintiffs have not any equity or case to compel this defendant to interplead with Dickenson, the said contract not being assignable by the regulations of the plaintiffs as a public company; and that, under the circumstances, Dickenson could not recover at law against this defendant or the plaintiffs any part of the said sum of 760*l.* 19*s.* 8*d.* remaining due on account of the contract.

Dickenson having become bankrupt, his assignees were brought before the court by bill of revivor; and a motion was made that the plaintiffs may be at liberty to pay the money into court; that the defendant Edwards may be restrained from proceeding in the action at law against the plaintiffs; and that the defendants, the assignees of Dickenson, may be restrained from instituting any suit at law against the plaintiffs, &c.

Mr. *Cooke*, for the defendant Edwards, objected that this is not a case of interpleader, as no person except Edwards could maintain an action.

Mr. *Wyatt*, in support of the motion, contended that the circumstances of this case fall within the principle of interpleader; as it is now understood that the party shall not be doubly harassed by two suits, according to the Duke of Bolton *v.* Williams,[1] where the legal estate

[1] 3 Bro. C. C. 297, 2 Ves. Jr. 138.

was in one person; yet it was held a case of interpleader; and that was followed in Angell *v.* Hadden.

The Master of the Rolls granted the injunction on the terms of paying the money into court; observing that Edwards had by his act given a color of title to another person; and, until that was disposed of, could not insist on payment to himself.

LOWNDES *v.* CORNFORD.

Before Lord Eldon, C., November 9, 1811.

[*Reported in* 18 *Vesey*, 299.]

A commission of bankruptcy issued in 1810 against Thomas and George Cornford, to whom the plaintiff was indebted to the amount of 38*l.* They brought an action against him, alleging that the commission was invalid, and they intended to dispute it. Being also threatened by the assignees, he filed a bill of interpleader, and moved for an injunction on bringing the money into court. The bankrupts did not appear.

Mr. *Raithby*, in support of the motion, admitted that this was a new case of interpleader.

Sir *Samuel Romilly*, for the assignees, said the Lord Chancellor had given the bankrupts liberty to bring an action, in order to contest the validity of the commission; who, instead of taking that course by trying it with their assignees, chose to try it in their absence indirectly by bringing an action against a debtor for a small sum, who is not willing to enter into such a litigation.

The Lord Chancellor. Though I do not recollect an instance, yet this seems to me a case of interpleader; otherwise consider the situation of the debtor. I never will permit the bankrupts to proceed in this action to affect the commission.

The order was made for the injunction.

SLINGSBY *v.* BOULTON.

Before Lord Eldon, C., February 24, 1813.

[*Reported in* 1 *Vesey and Beames*, 334.]

In 1812, the plaintiff, being sheriff of Yorkshire, received a writ of *fieri facias* upon a judgment obtained by the defendant Boulton against the other defendant, indorsed for 446*l.* The plaintiff levied; but receiving notice and a copy of a settlement of part of the goods, he made no return, but afterwards paid in 329*l.* 2*s.*, being the residue of the levy

after deducting the sum paid to the trustees of the settlement, who brought an action of trover against the plaintiff for the goods in settlement: and the defendant Boulton also claiming, the plaintiff filed a bill of interpleader, offering to bring the money into court, if the Court should be of opinion that under the circumstances he ought to do so, and moved for an injunction.

Mr. *Barber*, for the motion, admitted that this was a bill of interpleader without bringing the money into court, but insisted that under the circumstances of the case it was not necessary.

Mr. *Johnson*, for the defendant, resisted the motion on the ground that the interposition of this Court to compel defendants to interplead could not be obtained when the fund was not deposited.

The Lord Chancellor. Is there any instance of a bill of interpleader by the sheriff? He acts at his peril in selling the goods, and is concluded from stating a case of interpleader, in which the plaintiff always admits a title against himself in all the defendants. A person cannot file a bill of interpleader, who is obliged to put his case upon this, that as to some of the defendants he is a wrongdoer.

No order was made.

STEVENSON *v.* ANDERSON.

Before Lord Eldon, C., March 21 and April 7, 1814.

[*Reported in* 2 *Vesey and Beames*, 407.]

The bill stated that the defendant Anderson, on the 13th of September, 1812, ordered goods from James and John Goodall, his correspondents in Scotland; and, to indemnify them, remitted four bills of exchange, amounting to 166*l.* 16*s.* 5*d.*, accepted by different persons and indorsed by Anderson.

Thomas Dick, of Dundee, in Scotland, claiming as a creditor of Anderson, having instituted proceedings against him for that debt before the Lords of Session in Scotland, served the Goodalls with letters of arrestment upon any property of Anderson in their hands, to the amount of 150*l.* sterling, and attached the bills of exchange in their hands. Anderson wrote to the Goodalls, desiring to have the bills returned to him, and, having also demanded them from the plaintiff, to whom they had been sent for the purpose of procuring payment, on his refusing to deliver them up, commenced an action of trover.

The bill prayed, that Anderson, and the Goodalls and Dick, who were out of the jurisdiction, should interplead as to the said bills of exchange, and an injunction.

The defendant Anderson having put in a demurrer for want of equity, that demurrer came on with a motion to discharge the Vice-Chancellor's order granting an injunction on bringing the bills into court.

Mr. *Hart* and Mr. *Cooke*, for the plaintiff. It is not necessary, in order to sustain a bill of interpleader, that actions should be commenced: it is sufficient that contradictory claims are set up. Langston *v.* Boylston. This, which is also the case of a mere agent, has the peculiarity that two of the defendants reside out of the jurisdiction; but that circumstance affords no distinction, as according to Bourke *v.* Lord Macdonald,[1] followed by Scott *v.* Hough,[2] the process of this court may be served in Scotland. It is true Mr. Erskine, in his Institutes,[3] says that bills of exchange are not attachable by the laws of Scotland; but Mr. Bell[4] shows that this is not to be received absolutely; that bills may be attached in the hands of a person intrusted, as the Goodalls were. Admitting, however, that to be questionable, the plaintiff should not be put to the difficulty of agitating that question; especially as a judgment in Anderson's action of trover would be no answer to an action brought by the Goodalls against the plaintiff in respect of these bills.

Sir *Samuel Romilly* and Mr. *Trower*, in support of the demurrer. This bill of interpleader is of the first impression; by a person having no money in his hands, but holding these bills as an agent to procure payment: instead of which he files this bill, hazarding by the delay the loss of their amount.

Another novelty in this case is that the persons with whom Anderson is called upon to interplead are not within the jurisdiction: which was held a fatal objection by your Lordship in a late case, some of the defendants residing at Hamburg. This, under the pretence of interpleader, is really a bill against Anderson alone; and the object to compel him to involve himself in a litigation in Scotland.

This, in truth, is the suit of the Goodalls; and the Court has a right to the security of their affidavit that they do not collude with the plaintiff, to whom they have handed over these bills.

THE LORD CHANCELLOR observed upon the form of the affidavit, attending a bill of interpleader, in Harrison's Practice, that it seemed to go too far in stating that the bill was filed without the "knowledge" of either of the defendants. His Lordship further observed that he should be sorry to say a bill of interpleader could in no instance be maintained where one defendant only was within the jurisdiction; recollecting, though unable at the moment to refer to instances, that such bills had been sustained for a reasonable time; and the plaintiff, having used due diligence to procure appearance, obtained relief by injunction. The residence of two defendants out of the jurisdiction was not therefore a conclusive answer to the bill.

APRIL 7.

THE LORD CHANCELLOR. I have looked at this record with great care, and every case I can find of interpleader; and, though I doubt

[1] 2 Dick. 587.
[2] 4 Bro. C. C. 213.
[3] B. 3, tit. 6, s. 7, p. 472 (2d ed.).
[4] Bell's Com. 472.

whether there is perfect *bona fides* on the part of the plaintiff, I find it decided that the Court is, in the first instance, concluded by his affidavit that there is no collusion, and will not admit an affidavit to the contrary.

Upon the next consideration, whether the plaintiff has stated a right to come here as to these bills, for which it is said he would be answerable to his principals, residing in Scotland, it is very difficult to maintain that he would not be answerable to them in an action, if they revoked the purpose for which he was employed; but there is enough to make them parties to a bill of interpleader. Next, if Anderson could maintain his action of trover for these bills, and there is great semblance that he might, that makes a double claim, which according to some authorities is sufficient. There is also an attachment in Scotland, which from Bell's last publication is a circumstance raising considerable doubt whether bills under such circumstances are not attachable, notwithstanding what is said in Erksine's Institute: but supposing that attaching creditor was not a party, still there are divers claims, as there are two other parties. The bill is therefore capable of being supported.

It was objected that the Goodalls and the attaching creditor are out of the jurisdiction; and, as there is only one creditor within the jurisdiction, a bill of interpleader cannot be filed. Upon the authorities that proposition cannot be maintained, as a person out of the jurisdiction may threaten and bring an action; and, though he should never come within the jurisdiction, there is a familiar mode of concluding him. The plaintiff is bound to bring all persons into the field to contend together. That rests upon him. I have had occasion to consider that with reference to persons not residing in Scotland, but foreigners; and the opinion I formed upon it without any difficulty, or the aid of a precedent, which I could not find, — though there is precedent enough of willing defendants, — is, that the plaintiff in a bill of interpleader against persons within and without the jurisdiction is bound to bring them all within the jurisdiction in a reasonable time; if he does not, the consequenee is, that the only person within the jurisdiction must have that which is represented to be the subject of competition; and the plaintiff must be indemnified against those who are out of the jurisdiction, when they think proper to come within it, and sue either at law or in this court. If the plaintiff can show that he has used all due diligence to bring persons out of the jurisdiction, to contend with those who are within it, and they will not come, the Court upon that default, and their so abstaining from giving him the opportunity of relieving himself, would, if they afterwards came here and brought an action, order service on their attorney to be good serviee, and enjoin that action for ever; not permitting those who refused the plaintiff that justice to commit that injustice against him.

This motion therefore must be granted, and the demurrer overruled; but the plaintiff must use prompt diligence to get them within the jurisdiction: if he does not, I shall dissolve the injunction.

HYDE *v.* WARREN.

BEFORE LORD ELDON, C., MARCH 2, 1815.

[*Reported in* 19 *Vesey*, 321.]

THE bill stated that in November, 1811, the plaintiff contracted with the defendant Dews for the purchase of an estate in Jamaica for 5,000*l.*, payable by instalments, secured by bills. One of the bills would have been due on the 9th of December, 1815; before which time notice was given to the plaintiff not to pay the amount to the defendants Huntley & Co., or any other person not authorized by Dews, the bill being his sole property. An action was brought against the plaintiff by the defendant Warren upon the bill, which was also claimed by the other defendants. The bill prayed that the defendants may interplead, that the plaintiff may bring the money into court, and an injunction.

The defendant Warren, by his answer, stated that Edward Lowton, being indebted to him 650*l.*, gave a warrant of attorney to enter up judgment for 1,300*l.*, with a defeasance on payment of 650*l.* by instalments; all which being due, judgment was entered up in July, 1810; and in December, 1812, Lowton deposited the bill which is the subject of this suit with Huntley & Co., on Warren's account, as a security for payment of the instalments; and admitted that this defendant has obtained final judgment in his action upon the bill, leaving 468*l.* 3*s.* 8*d.* remaining due to him on the warrant of attorney.

The defendants Huntley & Co., by their answer, admitted that they are agents of Warren, and have no interest.

The defendant Warren, having, upon his answer coming in, obtained an order to dissolve the injunction *nisi*, moved to make that order absolute.

For the plaintiff it was objected that Dews's answer had not come in; who, it was alleged, though not charged by the bill, was in Ireland; and it was contended that upon an interpleading bill, the money being brought into court, one defendant cannot move to dissolve the injunction, upon his answer coming in, until all the answers are in, when the Court will, on application, make the order to interplead.

For the defendant Warren it was urged in reply that he had no means of compelling the other defendant to put in his answer, and that this was not a case of interpleader.

THE LORD CHANCELLOR said that, the money being brought into court, the bill could not be demurred to as not being a bill of interpleader; and one defendant cannot, on his answer coming in, dissolve the injunction in the usual manner; but if there is any delay in the plaintiff in getting in the other answers, the defendant may upon that special ground apply to dissolve, or to have the money paid out to him.

MARTINIUS *v.* HELMUTH.

BEFORE LORD ELDON, C., JANUARY 25, 26, 1815, FEBRUARY 12, 1817.

[*Reported in* 2 *Vesey and Beames*, 412, 2*d ed.*]

THE plaintiffs, factors in London, in August, 1814, received from Ludwig Arendt, of Wismar, notice of an intended consignment to them, for his account, of a cargo of wheat, sixty to sixty-five lasts, from Muller & Co., of Königsberg. In September the plaintiffs received a letter from the defendant Helmuth, at Königsberg, announcing that he was commissioned by Arendt about completing a cargo of wheat, requesting them to effect insurance for said friend; about sixty to sixty-five lasts, value about 1,800*l.* A subsequent letter from Helmuth inclosed a bill of lading of forty-five lasts, stating that the remaining twenty would be shipped in the course of the week, and that he had drawn upon them for 1,000*l.*; requesting them to protect the bills for the account of Arendt, otherwise to refer them to Messrs. Bernoulli, and then deliver them the bill of lading. The plaintiffs effected the insurance accordingly on account of Arendt, giving notice both to him and Helmuth that they had done so, and that they declined accepting the bills, not having heard from Arendt. Afterwards, by Helmuth's direction, in October, they delivered the bill of lading to Bernoulli, as having accepted the bills, but retained the policy. Arendt became insolvent, the ship and cargo were totally lost at sea, and opposite claims to the policy being set up by Helmuth and by Schmidt, the assignee of the estate of Arendt, the bill was filed, praying that they may interplead, and an injunction issue, restraining them from suing the plaintiffs at law, offering to deliver up the policy to either of the defendants who is entitled thereto, on being repaid the 129*l.* advanced by them in effecting it. An injunction having been obtained, the defendant Helmuth moved to dissolve it, the other defendant, Schmidt, who was also resident abroad, not having appeared.

THE LORD CHANCELLOR. I do not recollect a single instance of a bill of interpleader brought to a hearing. The plaintiff in a bill of interpleader states that claims are made upon him by two or more persons; and that expression which has been referred to (2 Ves. Jr. 109, Langston *v.* Boylston), that a bill of interpleader is in the nature of a bill to restrain waste, must have been used, perhaps not with strict propriety, in this sense, that if the plaintiff was not permitted to bring into court the stake claimed from him by different persons, one might recover against him at law and another might recover against him either at law or in equity; as I do not take it that the mere circumstance that one may maintain an action and the other cannot is an objection to a bill of interpleader. I may illustrate this by supposing a bond or policy of

assurance assigned; if it had not got to the hand of the assignee the action would be in the name of the assignor; but if the defendant had notice, though that would not protect him at law, it would in equity require him not to pay the person who recovered against him at law. He does not know the nature of their different claims, but knows only that they are good against him; requiring the protection of a court of equity, as having no interest in the subject in his possession, and being desirous of giving it to the person entitled to it.

These cases, where the defendants or any of them are abroad, are attended with great inconvenience, the plaintiff being bound to go on to make the parties appear and bring them to a hearing, if the case cannot be brought forward upon motion so that the court may see the nature of it.

It is impossible to deny that this bill has been admitted in many instances where some of the defendants were foreigners and residing abroad; that mere circumstance cannot be alleged by one defendant against the plaintiff to the extent that he shall not maintain a bill of interpleader. That defendant may insist on his using every possible effort to bring the other party to a hearing. If those efforts should prove unsuccessful, whenever that case arises the Court will give the fund to that party who the plaintiff admits, as against him, has the right to it; and if the other claimant, having had every opportunity of coming in to assert his right, afterwards thinks proper to sue, he would be restrained on the ground that he had not come in to litigate that question when he might; and I have before said that for that reason I would grant an injunction. In a very late case (Stevenson *v.* Anderson) I required the plaintiff to use every endeavor to bring a claimant residing in Scotland here, stating that if, these endeavors having been made, he would not come, I would grant an injunction.

In this case I am not willing to listen to the objection that a demurrer might be put in, or an answer; as 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 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, against the plaintiff, seeking relief here; desiring this court, therefore, to bring the claimants here to discuss their rights, and then to direct some proceeding that may determine to whom the stake in his possession belongs.

If you are not got to that stage that I can decide upon the absolute right, I must take care to have the money due upon this policy of insurance brought into court. This defendant has a right to have the policy of insurance put in safe custody, or if he pleases, brought into court; and farther, if the plaintiffs will not sue upon the policy of insurance, to ask here for liberty to use their names, or by any other means to get the money into court.

JANUARY 26.

THE LORD CHANCELLOR, saying he could not dissolve the injunction, made an order directing the policy to be brought into court; and that the defendant Helmuth should be at liberty to bring an action upon it in the name of the plaintiffs, indemnifying them and bringing the money into court; the plaintiffs to proceed with all reasonable diligence to get in the answer of Schmidt, with liberty to Helmuth to apply in case of any unreasonable delay.

The defendant Helmuth having under that order brought an action and recovered upon the policy, the plaintiffs moved, as of course upon an interpleading bill, for their costs.

FEBRUARY 12, 1817.

THE LORD CHANCELLOR. The principle of interpleader is that the defendant who improperly raises the double claim must pay the costs of it; and a claim has frequently been made by one person against another out of the jurisdiction, whose answer it is therefore very difficult to procure; and in this instance the plaintiffs state a claim upon them by two persons, each living out of the jurisdiction. This has occurred, particularly as to the cases from Scotland: the plaintiff says a person who is ready to appear claims, and also another who is out of the jurisdiction; and the plaintiff claiming protection against both the question is, what is to be done if the person who is out of the jurisdiction will not make himself amenable. The plaintiff must be put under terms to get him here; otherwise, unless the Court lets the money go out, binding him who does not appear by his non-appearance, as if he had appeared and failed to support his claim, the consequence would be that the plaintiff would suspend for ever the right of the individual who is within the jurisdiction if he has a right to the money. The plaintiff on an interpleading bill is therefore always considered as undertaking to bring both parties before the court; and if he can show that he has used all reasonable diligence for that purpose, the Court will conclude him who will not come. The question then is, who in that case is to pay the costs? whether the plaintiff, who has a double claim made upon him by one party coming in, and by another out of the reach of process refusing to come in, and therefore to be considered as having made a wrongful claim, as the other defendant who has made, as it must be taken, the right claim, and therefore ought to pay no costs.

That is not the subject of a motion of course, but must be by a special application on affidavit, showing what the plaintiff has done to bring that defendant before the court, and certifying his claim, stating precisely the steps taken to get in his answer, and the nature of the claim made by him upon the plaintiff, who cannot throw the costs upon the defendant who has answered by merely waiving his claim against him who stands out. The Court is bound to take care that the defend-

ant who is within the jurisdiction shall not be deprived of his demand forever by the refusal of the other to come in, but must be satisfied that the plaintiff has taken all due pains to bring him within the jurisdiction; and here, in case the plaintiffs did not proceed for that purpose with reasonable diligence, liberty was given to Helmuth to apply. Where the bill is filed in consequence of an action actually brought, not from the fear only of a demand without any attempt actually to enforce it by suit, is it not of necessity that the plaintiff, resorting here for his own protection against a defendant who has been properly suing him at law, must seek that protection at his own expense?

The motion stood over upon a proposal by the defendant not to press for costs, in consideration of being permitted to retain the money in his hands recovered upon the policy.

BURNETT *v.* ANDERSON AND OTHERS.

BEFORE LORD ELDON, C., JUNE 27, 1816.

[*Reported in* 1 *Merivale*, 405.]

THE plaintiff was a wharfinger, and by his bill called upon the defendants to interplead as to certain goods, which, on the 17th of May, had been landed at his wharf in the name of Law. It was alleged that the defendant Anderson claimed as the purchaser from Law in the course of business, Law having, on the 17th of May, given a valuable consideration for the goods to Bogle, French, & Co.

The defendant Callaghan had sold the goods to Bogle, French, & Co., who, on the 17th of May, previously (as it was alleged) to the complete delivery of the goods, had become bankrupt; and Callaghan claimed as an unpaid vendor, entitled to stop *in transitu*.

The defendant Shaw, as the assignee under the commission against Bogle, French, & Co. contended, first, as against Callaghan, that there had been a complete delivery on the 17th, so as to vest the property in the bankrupts and preclude a stoppage *in transitu*; and, as against Anderson, that on the 17th of May, previously to the delivery of the goods to Law, Bogle, French, & Co. had notoriously committed acts of bankruptcy, and had become insolvent; and that the goods in question had been delivered to Law, either after, and with notice of, those circumstances; or by way of fraudulent preference, and in contemplation of bankruptcy.

Anderson had brought an action, and the others threatened it. The plaintiff stated his inability to determine the validity of these oppositely stated claims, either in fact or in law.

The defendant Anderson, by his answer, stated that the plaintiff had delivered the goods in question to the defendant Callaghan, under

an indemnity. A motion was made, upon the above circumstances, to restrain Anderson from proceeding in his action.

Against the motion it was contended that the plaintiff, having parted with the goods, could not comply with the condition upon which alone the Court interposes in cases of this nature, viz. the delivery, in the result, of the subject of dispute to the party entitled; and secondly, that the plaintiff, having taken an indemnity from one of the parties, had provided for himself a remedy against the mischief of conflicting claims. It was at least difficult to say that, as to one of the parties, there was not collusion.

In answer to these objections, the facts were relied on, that the defendant had undertaken, and was prepared, to pay the value of the goods into court; that the goods were of a perishable nature; that this course was most advantageous to all the parties interested; and lastly, that the plaintiff's being indemnified as to one of the litigants was no reason why the Court should not procure him an indemnity as against the others, who were harassing him; the question of collusion being concluded by the affidavit annexed to the bill.

Rose, in support of the motion.

Sir *S. Romilly and Courtenay*, against it.

N. B. Callaghan, one of the defendants, was resident in Ireland; as to which see Stevenson *v.* Anderson.

THE LORD CHANCELLOR refused the motion upon the first point, declaring it to be his opinion that the plaintiff, having parted with the goods, stood no longer in a situation entitling him to put the claimants to an interpleader. It was not enough to say that, in the result of such a proceeding, the party entitled might have the value of his property; he was entitled to it specifically.

SIR CHARLES MORGAN AND OTHERS (TRUSTEES OF THE EQUITABLE INSURANCE COMPANY) *v.* CHARLES MARSACK, AND SIR FRANCIS BOYNTON, BART.

BEFORE LORD ELDON, C., DECEMBER 17, 1816.

[*Reported in* 2 *Merivale*, 107.]

THE bill stated that in February, 1788, John George Parkhurst and Mary his wife (formerly Dame Mary Boynton, widow of Sir Griffith Boynton, Bart.), in consideration of 2,200*l.*, granted to the defendant Marsack an annuity during the life of the wife. That on the 20th of the same month a policy of insurance for the said sum of 2,200*l.* was granted to the defendant Marsack by the Equitable Insurance Company, upon the life of the said Mary Parkhurst. That by indentures of lease and release, dated the 23d and 24th of December, 1793, be-

tween Parkhurst and his wife of the first part, the defendant Marsack and two others, (as trustees appointed by or on the part of the said Mary Parkhurst, and of the several other annuitant creditors of the said Parkhurst and wife) of the second part; and the said several other annuitant creditors of the third part; reciting that considerable arrears were due on the several annuities, and that the annuitants had agreed to accept the respective sums therein mentioned, to be charged and secured as also therein mentioned, in lieu of their annuities; the said Mary Parkhurst appointed, and the said Parkhurst and wife granted and confirmed, to the said trustees and their heirs, certain hereditaments which had been allotted to the wife for dower, upon trust to retain and pay to the several annuitants, parties thereto, their executors, &c., in the first place, interest at 5*l.* per cent upon the principal sums so agreed to be accepted by them, and in the next place the several annual sums therein mentioned for insurance on the said principal sums, with a power for the said Mary Parkhurst at any time during her life to pay off and discharge the whole or any part of such principal sums.

In June, 1815, Mary Parkhurst died, having appointed her son (the other defendant) her executor. Shortly after her death, the defendant Marsack received from the Royal Exchange Assurance office 1,400*l.*, the amount of an insurance made by him with that office, for a part of the principal sum of 3,614*l.* accepted by him under the trust deed; and there was then due to him from the Equitable Assurance Company upon the policy so granted to him as aforesaid, according to the rules of the office, the sum of 5,216*l.*, which the bill charged that the plaintiffs, as trustees of the company, were ready to pay to such person or persons as should be entitled thereto, but that, the defendant Marsack insisting that he was entitled to the whole sum, and Boynton on the contrary insisting that Marsack was entitled only to the extent of the 3,614*l.* and that he, the defendant Boynton, ought to be paid and receive the remainder as executor of Mary Parkhurst, the said defendants, threatened to bring actions against the plaintiffs upon their respective claims, and the plaintiffs were unable to ascertain to which of them the said sum of 5,216*l.* or any part thereof (except the 3,614*l.*) belonged; therefore praying that they might interplead and settle their rights to the said sum; the plaintiffs being ready and willing to pay the same to such of the parties as should appear to be entitled, and in the meantime to pay the same into court; that, upon paying the same into court, the defendant Marsack might deliver up his policy of insurance: and for an injunction against both the defendants from commencing any proceeding at law in respect of the sum so due as aforesaid.

The plaintiffs now moved, upon affidavit, that they might be at liberty to pay the money into court, and for an injunction, and delivery of the policy of insurance, as prayed by the bill.

The motion was supported on the part of the defendant Boynton,

but opposed by the other defendant upon the ground that this was not a proper case of interpleader, both as the plaintiffs had not been actually sued, and as only one of the defendants had a legal right to sue, or was capable of maintaining an action.

In reply it was insisted that the principle upon which the bill of interpleader is founded is to prevent a plaintiff from being doubly harassed by opposite claims; and that an action at law and a suit in equity were not less a double vexation than two actions at law. The following cases were cited: Dungey *v.* Angove,[1] Angell *v.* Hadden,[2] Slingsby *v.* Boulton.[3]

Leach and *Sprangcr*, for the plaintiffs.

Sir *S. Romilly* and *Wingfield*, for the defendant Boynton.

Hart and *Barber*, for the defendant Marsack.

The Lord Chancellor. It is necessary to a bill of interpleader, that the plaintiff should admit a right in each party to sue him; and that right is admitted by the present plaintiff. There are many cases in which bills of interpleader have been entertained, where the demand of one defendant was by virtue of an alleged legal, and of the other, of an alleged equitable right. That circumstance, therefore, constitutes no objection to the application.

In this case a bill had been filed by the defendant Sir Francis Boynton, against the other defendant, for an injunction to restrain him from proceeding at law to recover the 5,216*l.*; and an injunction had been granted, which was afterwards dissolved upon the merits. It was contended that the fate of this injunction had actually determined the rights of the parties, and consequently that there was no ground for interpleader. But The Lord Chancellor overruled this objection also.

It being admitted, however, that there was no question as to the defendant Marsack's right to 2,200*l.*, part of the sum in question, the order made was for payment of the 2,200*l.* to the last-mentioned defendant; and that the plaintiffs should pay 3,016*l.* (the residue of the 5,216*l.*) into court, to be laid out and accumulate, subject to further order. Upon such payment being made, that the defendant be restrained from proceeding at law against the plaintiffs, and in case the plaintiffs should not proceed to compel the defendant Boynton to answer their bill, the other defendant was to be at liberty to apply to the Court as he should be advised.

[1] 2 Ves. Jr. 312. [2] 15 Ves. 244, 16 id. 202. [3] 1 Ves. & B. 354.

LOWE *v.* RICHARDSON.

BEFORE SIR JOHN LEACH, V. C., JUNE 30, 1818.

[*Reported in* 3 *Maddock*, 277, 564.]

THIS was an interpleading bill by the captain of the ship Congress, from Savannah, against the consignee, and also against a person who insisted that the captain ought not to deliver according to the bill of lading, because the consignor had acted with fraud towards him in making the consignment. It appeared that the defendant claiming against the bill of lading had filed a prior bill against the captain and the consignee, and had in that suit obtained an injunction against the captain, to restrain him from delivering the cargo to the consignee.

THE VICE-CHANCELLOR refused the injunction applied for in this cause by the captain, stating that he was already fully protected by the former suit, and that his bill was unnecessary.

THE VICE-CHANCELLOR added that although a captain might file a bill of interpleader where parties claimed adversely at law or in equity under the bill of lading, yet he doubted whether a captain should in any case file a bill of interpleader where the adverse claims were not under the bill of lading, but paramount to it. Delivery according to the bill of lading would fully justify the captain; and those who alleged an equity paramount to the bill of lading and against the consignor should assert it by a suit of their own.[1]

HARLOW *v.* CROWLEY AND OTHERS.

IN THE EXCHEQUER, MICHAELMAS TERM, 1818.

[*Reported in Buck*, 273.]

THE bill in this suit prayed that Crowley, who had been declared a bankrupt, and the two other defendants, Reay and Taylor, his assignees, might interplead, and settle and adjust between themselves their demands against the plaintiff, the plaintiff offering to pay a debt which he had contracted with the bankrupt, to either of them to whom the same should appear of right to belong, and in the meantime to bring the money into court. The bill stated that the plaintiff was indebted to the bankrupt, and would have paid him had it not been for his

[1] In a subsequent case, Morley *v.* Thompson, 29 July, 1819, the Vice-Chancellor, on reconsideration, thought a captain could file such a bill, though the adverse claims were paramount to the bill of lading; as the *right of possession* in chattels may be in one person, and the *right of property* in another.

alleged bankruptcy. That a commission of bankrupt had issued against him, under which Reay and Taylor were chosen his assignees, and since the issuing of the commission the bankrupt had commenced an action at law for the recovery of the debt. That notice of trial of the action was given by the bankrupt, and the plaintiff being advised that it was necessary for his defence to prove the bankruptcy, he was put to a great expense to bring his witnesses to the trial for that purpose, but when the time came, the trial was put off by the bankrupt, who withdrew the record. That the bankrupt had always disputed the validity of his commission, and had presented a petition to the Lord Chancellor to supersede it.

The bankrupt, by his answer, admitted that a commission of bankrupt had issued against him, and that he was found and declared a bankrupt, and that the other defendants were chosen his assignees, but he denied that he was duly found a bankrupt. He admitted that he had brought an action against the plaintiff, but he said that any delay in prosecuting the action was to be attributed to the neglect of his attorneys, and that the record was withdrawn at the trial without his knowledge or consent, and contrary to his wishes, and that he was desirous and intended to proceed in the action. He admitted that he had presented a petition to the Lord Chancellor to supersede his commission, and that he had brought three actions at law touching the commission, in one of which the validity of the commission was intended to have been tried, but the point was not raised; and the other two actions were then depending. He further stated his belief that the assignees insisted that the commission duly issued, and that he was duly declared a bankrupt, but he denied to the best of his belief that the assignees had threatened to proceed at law against the plaintiff, or that they had applied to the plaintiff for the payment of the debt. The plaintiff had obtained an injunction upon the coming in of the bankrupt's answer.

Mr. *Sidebottom* showed cause why the injunction should not be dissolved.

Mr. *Cullen* and Mr. *Koe* appeared for the bankrupt.

THE LORD CHIEF BARON.[1] The commission is in force. The moment you show a valid commission, there is an end of the action. I never heard of a bill of interpleader between a bankrupt and his assignees.

The other barons concurred.

Injunction dissolved.

[1] Richards. — ED.

WARINGTON *v.* WHEATSTONE.

BEFORE LORD ELDON, C., JULY 11 AND AUGUST 7, 1821.

[*Reported in Jacob*, 202.]

IN the year 1807 Anthony Henderson effected an insurance at the office of the Albion Fire and Life Insurance Company for the sum of 3,000*l.* upon the life of Samuel Henderson. Samuel Henderson died in February, 1821, upon which the 3,000*l.* was claimed by Sir F. G. Fowke and Mary Ann his wife, the latter being the personal representative of Anthony Henderson, who had previously died. Another claim to the 3,000*l.* was also made by John Wheatstone, the personal representative of Samuel Henderson. He alleged that the insurance had been effected as a collateral security to Anthony Henderson, with a mortgage made to him by Samuel, and that the mortgage had been paid off by Samuel in his lifetime, by which means he had become entitled to the benefit of the policy. Samuel Henderson had in 1818 filed a bill against Sir F. G. Fowke and his wife, representing that he had discharged the mortgage, and praying an account and a reconveyance and an assignment of the policy. The answers were put in, but no further proceedings had been had in the cause.

Wheatstone, on the 28th of February, 1821, served the Albion Company with a notice of his claim, demanding payment of the 3,000*l.* On the 7th of May, he filed a bill against Sir F. G. Fowke and his wife, and D. R. Warington and W. Rayley, the plaintiffs in this cause, who were the surviving directors of the Albion Company, who had signed the policy in question, praying that he might be declared entitled to receive the 3,000*l.*; and an injunction to restrain Warington and Rayley from paying it to Sir F. G. Fowke and his wife, and to restrain the latter from commencing any proceedings at law for the recovery of it.

Sir F. G. Fowke and his wife, as of Easter Term, commenced an action for the 3,000*l.* due upon the policy against Warington and Rayley, upon which they, on the 5th of June, filed a bill of interpleader against Wheatstone and Sir F. G. Fowke and his wife; and after the time for answering had elapsed they moved before the Vice-Chancellor for liberty to pay the 3,000*l.* into court, and for an injunction against the defendants. The motion having been refused by His Honor, was now renewed before the Lord Chancellor.

Mr. *Hart* and Mr. *E. R. Daniell*, in support of the motion, contended that a party in possession of property subject to conflicting claims might always protect himself by a bill of interpleader, notwithstanding the pendency of a suit commenced by one of the claimants. The Vice-Chancellor, in this case and in Lowe *v.* ——,[1] thought the first suit a

[1] 3 Mad. 277.

sufficient indemnity, and that we might have moved in that suit for an injunction upon paying the fund into court; but in Birch *v.* Corbin[1] a motion for that purpose was refused. In Paris *v.* Gilham[2] and Morgan *v.* Marsack[3] the same point arose, a bill having been filed in each case by one of the claimants; but they were nevertheless held to be cases of interpleader. They also cited Langston *v.* Boylston,[4] Dungey *v.* Angove,[5] and Angell *v.* Hadden,[6] and alluded to the rule laid down by His Honor the Vice-Chancellor, that the injunction in an interpleading bill was only to be granted in the same manner as the common injunction to stay proceedings at law.[7]

Mr. *Heald*, Mr. *Ching*, and Mr. *Purvis*, on the other side. The objection to the present suit is that it is quite unnecessary, as every object that can be desired from it may be obtained in the other suit of Wheatstone *v.* Warington, in which the parties are the same as in this. The Vice-Chancellor considered that Warington and Rayley might have moved in that suit for the injunction that is now their object. But whether they could or could not, that suit furnished a complete indemnity to them; for the plaintiff in that suit may move for them to pay the money into court, and to restrain Fowke and his wife from proceeding in their action; if he neglects to do so, and they in consequence pay the money to Fowke, the plaintiff could not complain of the consequences of his own laches.

The Lord Chancellor. The injunction on an interpleading bill does not, like the common injunction, leave the plaintiff at law at liberty to demand a plea and proceed to judgment, but it stays all proceedings. The plaintiff in an interpleading bill admits that he has no defence, and makes an affidavit that he does not collude with either party; the protection that he has is, that he is relieved from their proceedings against him, whether at law or in equity, as soon as his diligence enables the court to do so. The question here seems to be, whether the protection is to be taken away, because the plaintiff in some other suit may make a motion for payment of the money into court. If a party gives notice of his claim to the money by filing a bill, and it is afterwards paid away pending the suit, I do not know that his not having moved for it to be paid in would be any protection.

It is important certainly to consider these points, for I understand that an opinion is afloat that on an interpleading bill the injunction cannot be moved for till the time for answering is out. I always thought that it was not so, but that the injunction might be moved for at once; indeed there are some cases where the injunction would be quite useless, unless it could be obtained immediately. Some mistake, I believe, arose in a communication that I had on this point with the Vice-Chancellor through Mr. Crofts. I think I then mentioned to him the case of the plaintiff, not knowing that a bill would be necessary,

[1] 1 Cox, 144.
[2] Coop. Ch. Ca. 56.
[3] 2 Mer. 107.
[4] 2 Ves. Jr. 101.
[5] 2 Ves. Jr. 312, 3 Bro. C. C. 36.
[6] 15 Ves. 244, 16 Id. 202.
[7] See Croggon *v.* Symons, 3 Mad. 130.

from not having notice of the demand of one party, till the other had obtained judgment and was about to take out execution.

Here the question is, whether the plaintiffs can have the same protection in another person's suit that they can have in their own. If you do not let them have the carriage of the cause, and the plaintiff in the other does not move for them to pay the money in, I question whether his not doing so would be an answer to him at the hearing, for the pendency of the suit is notice of his demand. If the plaintiffs in this cause could make this motion in the other cause, it must be supported by an affidavit of there being no collusion, otherwise they could not be allowed the same advantages that they would have upon a bill of interpleader; but I do not remember any instance of such a motion.

AUGUST 7.

THE LORD CHANCELLOR made the order for the injunction on payment of the money into court.[1]

MITCHELL *v.* HAYNE.

BEFORE SIR JOHN LEACH, V. C., MAY 28, 1824.

[*Reported in* 2 *Simons & Stuart*, 63.]

THE plaintiff was an auctioneer, and had sold an estate for one of the defendants. The other defendant was the purchaser, and had commenced an action against the plaintiff for the deposit; upon which the plaintiff filed a bill of interpleader against him and the vendor, and prayed for an injunction to restrain the action.

Mr. *Agar* and Mr. *Crombie*, for the plaintiff, now moved for the injunction, and offered to pay the deposit money into court after deducting the duty and commission.

Mr. *Koe*, for the purchaser, opposed the motion.

THE VICE-CHANCELLOR. Interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the

[1] The following is an extract from the order: "That the plaintiffs be at liberty to pay the sum of 3,000*l.*, insured on the life of Samuel Henderson, in the plaintiffs' bill mentioned, into the bank, with the privity of the accountant-general, &c., in trust, in this cause; and it is ordered that an injunction be awarded against the defendants, Sir F. G. Fowke and Dame Mary Ann, his wife, to restrain them from proceeding in the action at law commenced by them against the plaintiffs, as in the plaintiffs' bill mentioned; and it is ordered that all the defendants be restrained, by the injunction of this court, from commencing or prosecuting any other action or actions, suit or suits, or other proceedings, against the plaintiffs, or either of them, to recover the moneys insured by the policy in the bill mentioned; and it is ordered that the said sum, when so paid into the bank, be laid out, &c." See 10 Sim. 480, n. (*d*). — ED.

right to which will be fully settled by interpleader between the defendants. That is not this case. The plaintiff receives a deposit of 87*l.* 18*s.* 9*d.*, and claims against both the defendants to retain 27*l.* 16*s.* 10*d.* for his commission and the auction duty. And, by this motion, the plaintiff calls upon the defendants to interplead for the sum of 60*l.* 1*s.* 11*d.*, which he desires to pay into court. But the bill itself states that the action which is threatened by the defendant, the purchaser, is for the whole deposit of 87*l.* 18*s.* 9*d.*, and not for the sum of 60*l.* 1*s.* 11*d.* only, which is all that the defendant, the vendor, could claim. The plaintiff is not, therefore, an indifferent stakeholder, but has a personal question to maintain with the defendant, the purchaser; and, if he seeks an injunction, must obtain it, not upon the principle of interpleader, but upon an order for time or upon the answer.

WRIGHT *v.* WARD.

BEFORE LORD LYNDHURST, C., DECEMBER 14, 1827.

[*Reported in* 4 *Russell*, 215.]

THE bill was filed by William Wright, the executor of the deceased obligor in a bond. It alleged that William Wright, deceased, executed to Joseph Ward a bond for securing the sum of 500*l.*, with interest; that Joseph Ward, by his last will, bearing date on the 13th of June 1811, bequeathed unto Robert Chapman and Richard Bird the sum of 500*l.*, upon trust to place out the same upon government or other good security, and to pay the interest thence arising unto his wife Jane during her life, and after her decease, upon trust to pay and dispose of such 500*l.* in the manner therein mentioned, and he appointed William Ward and Robert Ward to be his executors; that Joseph Ward's will, soon after his death and upwards of fourteen years ago, was duly proved by his executors; that afterwards William Wright died, having appointed the plaintiff his executor; that all interest on the bond was duly paid up to the time of the death of Joseph Ward; that, after Joseph Ward's death, it was represented and stated to the testator, William Wright, by Joseph Ward's executors, and by Robert Chapman and Richard Bird, that they had arranged and agreed to appropriate the 500*l.*, secured by the bond, as and for the aforesaid legacy of 500*l.*, or to that effect; that, in consequence of such communication, and with the privity and approbation of Robert Chapman, while he lived, and with the privity and approbation, both before and after his death, of Richard Bird, and of Joseph Ward's executors, the interest which, from time to time after Joseph Ward's death, accrued due upon the bond, was by William Wright, in his lifetime, and, after his death, by the plaintiff, paid to Jane Ward, up to the month of April, 1826; that

from that time the interest was due, but the plaintiff was and ever had been ready and willing to pay such interest to Jane Ward, or in any other proper manner, and also to pay the sum of 500*l.* in any proper manner, consistent with the plaintiff's safety; that Robert Chapman had been some time dead; that Robert Ward claimed to be beneficially interested in the legacy of 500*l.* in reversion expectant upon Jane Ward's death; that Robert Ward the younger, and John Ward, a son of William Ward, as well as several children of Robert Ward, claimed reversionary beneficial interests in the 500*l.*, and that William Ward and Robert Ward had lately called upon the plaintiff to pay to them the principal sum of 500*l.* secured by the bond; that Richard Bird, on the contrary, alleging the same to have been well and conclusively appropriated to and in satisfaction of the legacy of 500*l.*, had given the plaintiff notice not to pay the 500*l.* secured by the bond to the executors or either of them; that the executors had commenced an action upon the bond against the plaintiff; and that the plaintiff did not know to whom he could with safety pay the bond, except under the decree of a court of equity.

The prayer was, that the defendants might interplead, and that the action on the bond might be restrained.

Upon an *ex parte* application, supported by the usual affidavit, the money had been paid into court, and the injunction had issued.

Afterwards, the executors, Robert Ward and William Ward, filed a general demurrer for want of equity; and that demurrer was allowed by the Vice-Chancellor.

The plaintiff appealed.

Mr. *Heald* and Mr. *Knight*, in support of the appeal. A clear case of interpleader is stated on this record. The executors of the obligee have a right to sue at law, and the legatees, or their trustees, have a right to proceed in equity; for the executors and trustees have by their own acts appropriated this bond to the payment of the legacy, and have given notice of that appropriation to the debtor; and he has, for upwards of fourteen years, paid the interest to the tenant for life. There has been what is tantamount to an assignment of the debt upon trust to satisfy the legacy; and whatever claim the trustees or legatees might have on the general assets of the testator, if the bond were to prove insufficient for the payment of their demand, they have a right, as between themselves and the executors, to have this bond-debt applied according to the appropriation of it, which has been so long recognized. Though the obligor is not, in express terms, averred to have been an active party in the arrangement which was entered into, yet notice of it was given to him, and he has acted under it. Whatever may be requisite at law, in equity it is not necessary that the debtor should be a party to a contract for the assignment of his debt. "It has been decided in bankruptcy," says Lord Eldon in *Ex parte South*,[1] "that, if a creditor gives an order on his debtor to pay a sum in discharge of

[1] 3 Swanst. 393.

other hand, this doctrine has been brought into doubt by some decisions in the courts of law, who require that the party receiving the order should in some way enter into a contract.[1] That has been the course of their decisions, but is certainly not the doctrine of this Court." If, after the past dealing between the parties, and the notice received from Bird, Wright were to pay the money to the executors, and they were to become insolvent, might not the legatees or their trustee file a bill against him in this court to compel him to pay the money over again? The executors have so acted as to give a third party a title or color of title against the debtor; and the collision of the title of the executors with the title or apparent title thus created by their act gives the debtor a right to be protected by injunction against their legal remedies. Even if the defendant would be safe in paying the debt, when recovered by law, why should he be subjected to the expense of an action, when he is ready to pay his money to the person entitled to it?

The following cases were cited: Row *v.* Dawson,[2] The Duke of Bolton *v.* Williams,[3] Angell *v.* Hadden,[4] Morgan *v.* Marsack,[5] East India Company *v.* Edwards,[6] Warington *v.* Wheatstone.[7]

Mr. *Sugden* and Mr. *Norton*, for the demurrer. In all the cases of interpleader which have been referred to, there was an actual assignment. Here it is not pretended that there has been any assignment; nor is any dealing stated to which an equivalent operation can be ascribed. The averment is merely that the executors of the testator and the trustees of the legacy represented to the debtor that they had arranged and agreed to appropriate the bond debt in payment of the legacy. The plaintiff does not venture to assert that any such appropriation was actually made. In fact, it was impossible that such an appropriation could be made; for the parties to this supposed transaction were not competent to enter into any valid arrangement. The trust, which the will imposed on the trustees, was to lay out the 500*l.* on government or good security: to permit it to remain on mere personal security was a breach of trust, and even if we were to suppose the tenant for life to have acquiesced in what was done, her acquiescence could not bind the infants who have interests in remainder. That which has been done could not be an appropriation, because there has been nothing done which would bind all parties. Here the *cestuis que trust*, if the obligor of the bond were to become insolvent, might file their bill against their own trustees and the executors, and might compel them to replace the money. Even, therefore, if the arrangement stated in the bill were to have any efficacy, it could not give the plaintiff a right to control the executors in their legal remedies for the recovery of the debt. Their duty, in any way of stating the case, is to obtain payment of the money, in order that it may be in-

[1] See Israel *v.* Douglas, 1 H. Bl. 259; Tatlock *v.* Harris, 3 T. R. 180.
[2] 1 Ves. Sr. 332. [3] 4 Bro. C. C. 297. [4] 15 Ves. 244, 16 Ves. 202.
[5] 2 Mer. 107. [6] 18 Ves. 376. [7] Jacob, 202.

vested according to the directions of the will, so as to give effect to the supposed appropriation. If any such appropriation has been made, it must be presumed that the executors are proceeding to enforce payment, with a view to make that appropriation complete. The debtor is not to convert himself into a trustee for the person beneficially interested in the legacy. His duty is to pay to those in whom the testator has reposed confidence; and against them there is not, in the present case, the slightest imputation of insolvency, or any suggestion that they mean to misapply the money. The whole system of the administration of assets will be disturbed, if a debtor may thus come into a court of equity to prevent executors from enforcing payment of a debt due to the estate which they represent, on the suggestion that the executors are trustees for third parties.

It is not enough to say that Bird, the trustee, might file a bill against the executors and the obligor to have the money applied according to the arrangement which is stated. No such bill has been filed, and the debtor may pay with safety to those who have the legal right. Supposing him to pay the money to the executors, could the trustee compel him, in a court of equity, to pay it over again? Unless the trustee could do so, there is no pretext for representing that the transactions stated in this record constitute a case of interpleader.

THE LORD CHANCELLOR. The only question is, whether, according to the facts stated in the bill, the surviving trustee of the legacy could file and sustain a bill against the obligor of the bond; and my opinion is that the facts alleged would be sufficient for that purpose.

A legacy of 500*l.* was left to two trustees for the benefit of certain persons; and there being a debt of exactly that amount, which the executors had a right to claim from the obligor of a bond, an arrangement was entered into between the trustees and executors, by which it was agreed between them that this debt should be appropriated to the discharge of the legacy. The trustees and executors then go to the obligor of the bond, and represent to him that they have entered into this agreement; and, after the communication thus made, he, in the first instance, and then his executor, for a series of years, adopt the arrangement; paying the interest from time to time, not to the executors, but to the *cestui que trust*, with the consent, privity, and approbation both of the executors and of the trustees. Looking at such a transaction as this it is impossible to say that there is no ground for the trustees to file and sustain a bill against the obligor; and if they could sustain such a bill, this bill of interpleader must be allowed.

Nothing turns on the circumstance that there was not any formal assignment or appropriation in writing. If the creditor enters into such an arrangement as is stated here, and acts upon it, the assignment is complete in equity; and as to the question between the

trustee and the *cestui que trust*, it has no substantial bearing on the question. The trustee is, at all events, to have this money in discharge of the legacy.

Order of the Vice-Chancellor reversed, and the demurrer overruled.

SMITH *v.* HAMMOND.

BEFORE SIR LANCELOT SHADWELL, V. C., FEBRUARY 8, 1833.

[*Reported in* 6 *Simons*, 10.]

IN May, 1830, a brig, of which the defendant J. Hammond, who was an American citizen, was the sole owner, was wrongfully captured by a squadron belonging to the Portuguese government; in consequence of which a claim to compensation was made on that government on his behalf. In May, 1831, he executed a power of attorney to the plaintiffs, Duff & Co., who were merchants in Lisbon, authorizing them to receive for him, as his agents, any moneys that might become payable in respect of his claim. In November, 1831, the Portuguese government admitted the claim, and the first of January, 1832, was fixed for the payment of the first instalment on account of it; but Hammond, as he alleged, did not know that his claim had been admitted until March, 1832. In December, 1831, Hammond, in consideration (as he alleged) of the defendant C. Allen having promised to use his influence with the American and Portuguese governments, in procuring the recognition and payment of the claim, executed an irrevocable power of attorney to Allen, who resided at Providence, in America, authorizing him to receive the moneys to be recovered from the Portuguese government; and in January following he executed an instrument in the following words: "Know all men by these presents that I, John Hammond, owner of the brig Ann and cargo, lately seized and condemned by the Portuguese government, having appointed C. Allen, of Providence, to be my agent and attorney for recovering of my claims on that government, do hereby agree to pay to the said C. Allen 10 per cent on all sums which he may recover, until the amount recovered shall equal the sum of $8,000, and upon all sums over the amount of $8,000 so recovered, I agree to pay him 33 per cent, which commission he is to retain out of any sums recovered."

In July, 1832, Hammond received from Duff & Co. a letter dated the 16th of June, 1832, stating that they had received from the Portuguese government 1,480*l.* in respect of his claim, and that they would give orders to the other plaintiffs, Smith, Woodhouse, & Co., their agents in London, to honor his drafts to that amount; and on the 3d of August, Duff & Co. wrote to Smith, Woodhouse, & Co. as follows: "We have authorized Captain John Hammond to draw on you for 1,480*l*,

and have desired him to advise you of his draft, which you will please to honor and debit our account with the amount." On the 5th of September Smith, Woodhouse, & Co. wrote in answer as follows: "We shall follow your instructions and honor Captain J. Hammond's draft on us for 1,480*l.* on your account." On the 17th of August, 1832, Hammond wrote a letter to Smith, Woodhouse, & Co., desiring to be informed whether the 1,480*l.* would carry interest whilst in their hands, and adding that, if it would, he should wish it to remain there for some time; but if not, he should draw for it on the receipt of their answer. On the 1st of October, Smith, Woodhouse, & Co. wrote, in answer, that the 1,480*l.* would remain to the credit of Duff &Co., at interest at four per cent, until they paid Hammond's drafts. On the 30th of the same month Smith, Woodhouse, & Co. received two letters from Hammond, stating that some time ago he had given a power of attorney to Allen, but that Allen had then no power to act, and desiring them not to pay any money to Allen until they heard from him. In November, 1832, Smith, Woodhouse, & Co. were served with a notice, signed by the solicitors of Thomas Wilson & Co., who were Allen's agents in London, stating that, on the 2d of December, 1831, Hammond had made over his claim to the proceeds of the brig to Allen, and requiring them not to pay over the funds in their hands to any other person.

Under these circumstances Smith, Woodhouse, & Co. and Duff & Co. filed a bill against Hammond and Allen, praying that they might interplead and settle their rights to the 1,480*l.*, and that they might be restrained from commencing any action against the plaintiffs to compel payment of that sum.

Hammond, who had arrived in England, appeared to and put in an answer to the bill, stating that it was not his intention that the instruments which he had executed to Allen should authorize Allen to receive the moneys that might become payable to him from the Portuguese government, or give Allen any interest therein otherwise than as his agent; and that on the 5th of October, 1832, he wrote a letter to Allen, whereby he wholly determined and put an end to Allen's powers and authorities under those instruments, and, for more effectually preventing Allen from receiving any moneys by virtue of them, he wrote to Smith, Woodhouse, & Co. the letters which were received by them on the 30th of October.

Allen, being in America, had not appeared to or answered the bill when the motion after mentioned was made; but one of the partners in the firm of Thomas Wilson & Co. made an affidavit, stating that he and his partners had received from Allen the instruments which Hammond had executed, and had forwarded them to their agents in Lisbon, without keeping any copies thereof: that the deponent believed that those instruments amounted to an assignment of the funds to be recovered from the Portuguese government, or certainly to an irrevocable authority to receive the same: that the deponent was led to believe by the papers received from Allen, and forwarded to Lisbon,

that Allen had assisted, through the intervention of the American government, in obtaining the recognition or payment of the claim; and that, if sufficient time was afforded for Allen to put in his answer, he would show the grounds on which he was entitled to receive the 1,480*l.*: that the deponent had instructed Allen's solicitors in the suit to send out to him the necessary documents to enable him to swear to his answer, and to return the same to England without delay: and that the deponent and his copartners had written to and informed Allen of the notice given to Smith, Woodhouse, & Co., and requested him promptly to furnish the means of legally establishing his claim.

Hammond now moved that the injunction which the plaintiffs had obtained might be dissolved and that the 1,480*l.* which the plaintiffs had paid into court might be paid out to him.

Mr. *Pepys*, for the plaintiff.

Mr. *Knight* and Mr. *Stephens*, for the defendant Hammond, contended that the plaintiffs were Hammond's agents, and had no right to file a bill of interpleader in respect of moneys received by them in that character: Nicholson *v.* Knowles;[1] that, as the power of attorney which had been executed to Allen had been revoked, it was clear that no claim could be supported by him.

Mr. *G. Richards*, for the defendant Allen, said that it was clear that Allen had a lien on the fund, which had been created by Hammond; that it resembled the case in which a tenant is entitled to file a bill of interpleader against his landlord; and that, at all events, a reasonable time ought to be allowed for Allen to put in his answer.

THE VICE CHANCELLOR. The proposition in Nicholson *v.* Knowles seems to be laid down rather widely: that case, however, does not apply to the present.

The instruments which Hammond executed to Allen appear to me to amount to an assignment of the fund in question, and I think that the plaintiffs are stakeholders.

The adverse claims must be decided upon in some way or other; and the question is, whether that should be done by referring it to the Master to ascertain whether Allen has any and what claim on the fund, or by letting Hammond bring an action against the plaintiffs, and giving Allen liberty to defend it.

The order pronounced was that it should be referred to the Master to ascertain whether Allen had any and what claim on the fund; that he, being in the situation of a plaintiff and being resident abroad, should give security for costs to the amount of 100*l.*; and that the plaintiff's costs should be paid out of the fund, without prejudice to the question by whom those costs should be ultimately paid.

[1] 5 Madd. 47.

MEUX *v.* BELL.

BEFORE SIR LANCELOT SHADWELL, V. C., JUNE 8, 1833.

[*Reported in* 6 *Simons*, 175.]

THIS was a bill of interpleader, offering to pay the money claimed by the defendants to such of them as the Court should direct. One of the defendants demurred, on the ground that the bill ought to have offered to pay the money into court.

Sir *E. Sugden* and Mr. *Bethell*, in support of the demurrer, said that the money ought to be brought into court, in order that it might be ready to be paid to the defendant who should be found entitled to it. They cited Dungey *v.* Angove;[1] Hyde *v.* Warren;[2] and the following passages from Mitf. Plead.[3] "As the sole ground on which the jurisdiction of the Court in this case is supported is the danger of injury to the plaintiff from the doubtful titles of the defendants, the Court will not permit the proceeding to be used collusively to give an advantage to either party, nor will it permit the plaintiff to delay the payment of money due from him by suggesting a doubt to whom it is due: therefore to a bill of interpleader the plaintiff must annex an affidavit that there is no collusion between him and any of the parties; and, if any money is due from him, he must bring it into court, or at least offer so to do by his bill." "A bill of this nature generally prays an injunction to restrain the proceedings of the claimants in some other court; and, as this may be used to delay the payment of money by the plaintiff, if any is due from him he ought, by his bill, to offer to pay the money due into court. If he does not do so, it is perhaps, in strictness, a ground of demurrer."

Mr. *Jacob*, in support of the bill.

THE VICE-CHANCELLOR. The plaintiff is not about to take any step in the cause, but the question is whether the bill is maintainable. I am not aware that it is incumbent on the plaintiff in a bill of interpleader to offer, by his bill, to pay the money into court; but before he takes any step in the cause it is necessary that he should bring in the money.

Demurrer overruled.

[1] 3 Bro. C. C. 36. [2] 19 Ves. 322. [3] 4th edit. 49, 143.

CRAWSHAY *v.* THORNTON.

BEFORE LORD COTTENHAM, C., APRIL 23, 25, 27, 1836, JANUARY 13, 1837.

[*Reported in* 2 *Mylne & Craig*, 1.]

THIS was a bill of interpleader. The plaintiffs were the persons who, for some years previously to the month of August, 1834, constituted, together with William Crawshay, since deceased, the firm of Richard & William Crawshay & Co., but who now constituted the firm of Richard, William, & George Crawshay & Co. The defendants were Henry Sykes Thornton and Pavel Daniloff Daniloff. The bill stated that the plaintiffs had for some years carried on business as iron merchants in London, in partnership, and that they had and have a bonded yard for foreign iron, and have also acted as wharfingers; and that in and prior to the year 1831 the persons constituting the firm of W. & T. Raikes & Co., of London, were in the habit of depositing foreign iron in the plaintiffs' yard for safe custody. The bill then stated that in the year 1832 certain specified parcels of iron were deposited with the plaintiffs by W. & T. Raikes & Co., and that in the early part of the year 1833 an order in writing was brought to the plaintiffs, signed by W. & T. Raikes & Co., requiring the plaintiffs to weigh and deliver the iron; that the order did not specify the name of the person to whom the iron was to be delivered, but that a verbal message was left that the same "was for Mr. Thornton." The bill then stated that, no application having been made for the delivery of the iron, one of the plaintiffs wrote in pencil, in the book of his firm which contained an account of the iron, the name "Thornton" against each of the parcels mentioned in the order. The bill further stated that in March, 1834, application was made to the plaintiffs, by Henry Sykes Thornton, to know the particulars of the iron which the plaintiffs held on his account; and that one of the plaintiffs, having thereupon ascertained from Richard Mee Raikes, who then carried on the business of the firm of W. & T. Raikes & Co., that H. S. Thornton was the person in whose favor the order for delivery had been given, wrote in the book of the plaintiffs' firm, which contained the particulars of the iron, against the entry of each of the parcels, the following words and figures, viz., "8th March 1834, transferred to H. S. Thornton;" and that the plaintiffs at the same time wrote, or caused to be written, to Thornton, a letter in the following words: —

"GEORGE YARD, 8th March, 1834.

"SIR, — In compliance with your request we annex a note of the landing-weights of the various parcels of *CC ND* iron, transferred into

your name by Messrs. W. & T. Raikes & Co., and now held by us at your disposal.

"We are, &c.,

"RICHARD & W. CRAWSHAY & Co.

"H. S. THORNTON, ESQ."

The bill then stated that R. M. Raikes became bankrupt in October, 1834, but that neither he nor his assignees claimed any interest in the matters in question. The bill then stated that on the 8th of October, 1834, the plaintiffs received from Messrs. Lemmé & Co., merchants, a letter in the following words: —

"To MESSRS. R. & W. CRAWSHAY & Co.

"1 FINSBURY CIRCUS, 1834.

"GENTLEMEN, — You will please to take notice that the whole of the *CC ND* iron, lying at your wharf, is the property of Messrs. P. Daniloff & A. Lubinoff, of St. Petersburg, and that Messrs. W. & T. Raikes & Co. were agents to them for the sale thereof, and had no power to pledge the same. Learning, however, that Messrs. W. & T. Raikes have pledged certain part of the above iron to Messrs. Williams, Deacon, Labouchere, & Co.,[1] and that you have the authority of the latter to hold such iron at their disposal, we beg to inform you that their authority is nugatory, and you are hereby required to treat it as a nullity, and not to part with the possession of any part of such *CC ND* iron, but hold the whole thereof at the disposal of Messrs. P. Daniloff & A. Lubinoff, for whose house we have the honor to be, &c.

"JOHN LOUIS LEMMÉ & Co."

The bill then alleged that Pavel Daniloff Daniloff, being the P. Daniloff mentioned in the letter of Lemmé & Co., carries on business at St. Petersburg under the firm of P. Daniloff & A. Lubinoff, and claims the said iron, and is now resident out of the jurisdiction of the Court. The bill went on to state that in the month of December, 1834, Thornton attended at the plaintiffs' counting-house, and tendered to the plaintiffs their charges in respect of the iron, and demanded the delivery of it; and that, on the 22d of January, 1835, Lemmé, as the agent on behalf of Daniloff, attended at the plaintiffs' counting-house, and delivered to the plaintiffs the following notice in writing: —

"To MESSRS. R. & W. CRAWSHAY & Co.

"GENTLEMEN, — As the agent for and on the behalf of Pavel Daniloff, of St. Petersburg, in the Empire of Russia, trading under the style or firm of P. Daniloff & A. Lubinoff, I hereby demand of you the delivery of the under-mentioned goods, the property of the said Pavel Daniloff Daniloff, viz." [here followed the particulars of the iron], "and I hereby tender you, as such agent of the said Pavel Daniloff Daniloff, the sum of 200*l.*, and such other sum or sums of money as may be due

[1] H. S. Thornton was a partner in this firm.

or owing to you in respect of the said goods; and in the event of your refusing to deliver the same to me, as such agent as aforesaid, I hereby give you notice that I shall forthwith cause an action of trover to be commenced against you for the conversion of the said goods, and shall hold you responsible in respect thereof.

Dated this 22d day of January, 1835.

"Yours, &c.

"JOHN LOUIS LEMMÉ."

The bill stated that Lemmé, at the time of the demand, tendered and offered to pay any further amount of charges of the plaintiffs in respect of the iron, if the same should exceed 200*l.* The bill further stated that on the 1st of January, 1835, Thornton commenced an action of trover against the plaintiffs, to recover the iron, in which action a declaration was delivered on the 24th of January, 1835; and that an action of trover against the plaintiffs for the recovery of the iron was also commenced by Daniloff, on the 23rd of January, 1835.

The bill alleged that the warehouse rent, charges, and expenses on the iron, due to the plaintiffs, amount to the sum of 160*l.* 15*s.* 6*d.*, and that the plaintiffs claim no interest or right in or to the iron, except in respect of their charges, their right to which is admitted by the defendants; and that in manner aforesaid the iron is claimed by Thornton and Daniloff. The bill charged that the plaintiffs do not collude with Daniloff and Thornton or either of them, but are ready to dispose of the iron as the Court may direct; that Daniloff alleges and insists that he claims the iron by a title paramount to the title of Thornton, or the persons under whom Thornton claims the same.

The prayer of the bill was, that Thornton and Daniloff might be decreed to interplead together, and that it might be ascertained to which of them the iron belongs and ought to be delivered over; and that, whatever order the Court might make respecting the iron, proper directions might be given with respect to the lien which the plaintiffs have upon the same, and as to preserving such lien for the plaintiffs; and that in the mean time Thornton and Daniloff might be restrained from prosecuting their actions at law so commenced as aforesaid, and from commencing any other actions or proceedings at law or in equity against the plaintiffs touching the matter aforesaid.

The bill was accompanied by the usual affidavit negativing fraud or collusion, or any other intent than to avoid being molested by the defendants' proceedings at law.

To this bill the defendant Thornton put in a general demurrer, which was allowed by the Vice-Chancellor on the 11th of May, 1835. The plaintiffs now appealed from His Honor's decision.

Mr. *Maule* and Mr. *Richards* for the bill.

Mr. *Jacob*, Mr. *Wigram*, Mr. *Girdlestone*, *Sr.*, and Mr. *G. S. Wilson*, in support of the demurrer.[1]

[1] The arguments of counsel have been omitted. — ED.

JANUARY 13, 1837.

THE LORD CHANCELLOR. This was an appeal from an order of the Vice-Chancellor, allowing a demurrer of the defendant, Henry Sykes Thornton, to the bill, which is a bill of interpleader against this defendant so demurring, and one Pavel Daniloff.

The question, therefore, turns entirely upon this, whether the statement in the bill constitutes such a case against the defendant Thornton as entitles the plaintiffs to the ordinary protection afforded by a bill of interpleader. [His Lordship then stated the allegations and the prayer of the bill.]

The case tendered by every such bill of interpleader ought to be that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest; because, if the plaintiffs have come under any personal obligation, independently of the question of property, so that either of the defendants may recover against them at law, without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiffs; and the injunction, which is of course if the case be a proper subject for interpleader, would deprive a defendant, having such a case beyond the question of property, of part of his legal remedy, with the possibility at least of failing in the contest with his co-defendant; in which case the injunction would deprive him of a legal right, without affording him any equivalent or compensation. Such a case, undoubtedly, would not be a case for interpleader. A party may be induced by the misrepresentation of the apparent owner of property, to enter into personal obligations with respect to it, from which he may be entitled to be released by a court of equity; but such a case could not be a subject for interpleader between the real and pretended owners. In such a case, the plaintiff would be asserting an equity for relief from a personal contract against one of the defendants, with which the other would have nothing to do.

It is familiarly said that there is no interpleader between landlord and tenant, or principal and agent; but it will be found that the reason for this lies deeper than might be inferred from the statement of this rule; and that it is to be considered not so much as an independent rule, as a necessary consequence of the principle of all interpleading. In both these cases, rights and liabilities exist between the parties, independent of the title to the property, or to the debt or duty in question, and which may not depend upon the decision of the question of title. It is true that in this case both the actions are actions of trover; but it was most properly admitted by the counsel for the plaintiffs, that the dealings of the plaintiffs with Mr. Thornton would be evidence for him in his action. Suppose, then, that those acts — the transferring the iron into his name in the plaintiffs' books, and the letter of March 8,

1834 — should be held sufficient to procure for Mr. Thornton a judgment in his action, without inquiring whether Messrs. Raikes had or had not a legal right to exercise dominion over the property as they did, by ordering the transfer of it to Mr. Thornton, how could such a right be the subject of interpleader between Mr. Thornton and Mr. Daniloff?

In such a case there would be no question in common, and therefore nothing to be tried between them; Mr. Daniloff might obtain a verdict upon showing his title to the iron; and Mr. Thornton, upon showing that Messrs. Crawshay had come under a personal liability by their dealings with him, independently of the question of title. This Court cannot take from Mr. Thornton a right he may have obtained against Messrs. Crawshay, without substituting some mode of litigation by which he may enforce all his rights. In the case supposed, this could not be done in any litigation with Mr. Daniloff.

On the part of the plaintiffs, it was contended that this case must be regulated by the rule in cases of bailment. It will be to be considered what that rule is; but that rule, if in favor of the interpleading, would not be decisive, because in the case of simple bailment, there is no personal undertaking, and no liability or right of action beyond that which arises from the legal consequences of the bailment.

Hawes *v.* Watson[1] and other cases show that Mr. Thornton may, from the acts of the plaintiffs themselves, have a right against the plaintiffs, independently of the question whether Daniloff be or be not entitled to the iron. This is a right which cannot be the subject of litigation between the defendants, and what ground can there be for depriving Mr. Thornton of that right by injunction?

Up to a late period there does not appear to be any authority which could raise a doubt as to the rule of this court, with respect to interpleading in cases of bailment.

The interpleader at law was where there was a joint bailment by both claimants.

In equity, it is defined to be where two or more persons claim the same debt or duty.

It is no exception to the rule that a tenant or an agent cannot file a bill of interpleader against his landlord or his principal, that where the landlord or the principal has created a subsequent interest in some other person, the tenant or agent may maintain such a bill; because, in such case, the same debt or duty is claimed, and it is the act of the person entitled to such debt or duty which creates the equity of the party owing it.

In Nickolson *v.* Knowles[2] Sir John Leach acted upon this principle, and refused an injunction in an interpleading suit by a broker, against those by whom he was employed, and another who claimed the property by a paramount title.

In Cooper *v.* De Tastet[3] Sir John Leach acted upon the same rule,

[1] 2 B. & C. 540. [2] 5 Madd. 47. [3] 1 Tamlyn, 177.

and refused to a warehouseman, seeking to compel his principal to interplead with another person who had claimed the property, the benefit of an injunction. In that case, expressions are, by the report, attributed to the learned judge, which it may be difficult to explain. It appears, however, that the judgment was not given from any written note, and he may, perhaps, have been misunderstood. And if the expressions were used, they can only be considered as *dicta*; the facts of the case not requiring any decision upon the point. The learned judge is supposed to have said that the case would be different if the plaintiff had been owner of a bonded warehouse; but no reason is given for the distinction; and the circumstance of the warehouse being one appointed under the act to receive goods on bond does not alter the relative situation of the owner and of the warehouseman.

Two decisions, however, are supposed to have thrown doubt upon this established principle in cases of interpleader, — Pearson *v.* Cardon[1] and Mason *v.* Hamilton.[2] The first, as reported, would certainly seem to create some difficulty; the report attributing to the Vice-Chancellor the expression that admitting that the plaintiffs were agents for one party, yet that there was a claim made by another under a paramount title, and that His Honor was, therefore, of opinion that it was a case of interpleader. In this there must be some mistake; interpleader, as between agent and principal, being admissible only where the adverse claim is under a derivative, and not under a paramount title; and although the case on appeal before Lord Brougham is not reported,[3] I have been furnished with a note of Lord Brougham's judgment, and have the satisfaction to find that his Lordship, in affirming the Vice-Chancellor's order, recognizes the established rule, and anxiously guards himself against being supposed to intend any infringement upon it; and he decided that case entirely upon its own peculiar circumstances, and upon the ground that the adverse claim was derivative and not paramount.

In Mason *v.* Hamilton the principal question was that of costs, the party who had given the notice having withdrawn his claim, though not till after the bill was filed; and as that was the party ordered to pay the costs, it is probable that the attention of the Court was not much directed to the point for which it is now cited; and, even if that were otherwise, the case would be but a slight authority for the present, inasmuch as, although the bailor had directed the bailee, the plaintiff, to transfer the goods into the name of the party whose claim was afterwards acquiesced in, there was not, as in this case, any dealing between the bailee and such party, recognizing his right, and contracting with him upon the footing of it. Besides which, if the Vice-Chancellor did express any such opinion as is there attributed to him, I have the satisfaction of knowing, from the Vice-Chancellor's judgment in this case, that at a subsequent period, when the point was brought distinctly

[1] 4 Sim. 218, 2 Russ. & Mylne, 606. [2] 5 Sim. 19.
[3] The case is now reported, 2 Russ. & Mylne, 606.

before him, he entertained an opinion in conformity with that which I have expressed upon this subject.

I have thought it right to enter thus fully into the case, not from any doubt I at the time entertained about it, but to remove an impression which seems to have been entertained, that those cases were to be considered as affecting the other cases in questions of interpleader.

The appeal must be dismissed with costs.

TOWNLEY *v.* DEARE.

BEFORE LORD LANGDALE, M. R., AUGUST 2, 1839.

[*Reported in* 3 *Beavan*, 213.]

PETER RAINER died in 1837, seised in fee of some chambers in the Albany which had been let by him to the plaintiff. He left two wills, dated respectively in 1836 and 1837, and which were contested in the Ecclesiastical Court. The defendants Deare and Mayhew claimed under the former, and the defendants Elwyn and wife under the latter. In September, 1837, the Ecclesiastical Court decided in favor of the latter, but an appeal from this decision was pending in the Privy Council.

Mr. Elwyn gave notice to the plaintiff not to pay his rent to Deare and Mayhew: the latter, in consequence of the plaintiff's refusal to pay, commenced an action against him for the recovery of the rent.

The plaintiff Townley, on the 15th of January, 1838, filed a bill of interpleader against Deare, Mayhew, and Mr. and Mrs. Elwyn; and upon the usual affidavit he obtained an order to pay 120*l.*, the arrears of rent, into court, and an injunction to restrain the proceedings against him at law. The defendants all appeared, and on the 30th of May, 1838, Deare and Mayhew put in their answer. On the 27th of July, 1839, they gave notice to dismiss for want of prosecution, and on the following day the plaintiff filed a replication.

No answer having been put in by Elwyn and wife, the defendants Deare and Mayhew on the 27th of July, 1839, gave notice of motion to dissolve the injunction with costs, so far as regarded them; and that the 120*l.* cash in court might be paid out to them. The answer of Elwyn and wife was put in on the 30th of July, 1839, and the motion now came on.

Mr. *Pemberton* and Mr. *James Parker*, in support of the motion, contended, that as the plaintiff had evinced very great delay in getting in the answer of Elwyn and wife, the defendants Deare and Mayhew were warranted by the authority of Hyde *v.* Warren in moving to dissolve the injunction, and to have the money paid out to them:

Stevenson *v.* Anderson; and that, at all events, the Court ought now to put the right in a train of inquiry, by directiug an issue at law.[1]

Mr. *Tinney* and Mr. *Young*, for the plaintiff, argued that there had been no collusion or neglect on the part of the plaintiff.

Mr. *Loftus Wigram*, for Elwyn and wife, did not object to the injunction being dissolved, but resisted the payment of the fund in court to the other defendants. He contended that, as the value of the property was small, it would be wholly spent in the trial of an issue, which he therefore opposed.

Mr. *Pemberton*, in reply.

THE MASTER OF THE ROLLS.[2] It is to be observed that, in all cases of interpleader, the plaintiff, to a certain extent, admits the right of each of the defendants as against himself, and he undertakes the duty of bringing the defendants into controversy to ascertain their rights. Not having done this, the plaintiff has been guilty of such negligence as might have deprived him of protection against the party whose right, as against himself, he admits by the fact of filing the bill of interpleader. It appears, however, that, after the notice of motion was given, the answer of the other defendants was put in, and then, for the first time, the parties are really brought into conflict. The circumstance of the remaining answer having been put in, pending the notice of motion, makes a great difference; for, although the defendant was right when he gave the notice of motion, in consequence of the negligence of the plaintiff, yet, when the answers are all put in, another question arises, namely, how can the matter in litigation be best decided? I think, notwithstanding the argument to the contrary, I have known bills of interpleader brought to a hearing, but never without observations falling from the Court as to why the matter had not, in an earlier stage, been put in a train of investigation. However, in this case, both parties have now put in their answers; both claim the money in court; and an application being made to pay the money to the parties making this motion, the question is, whether I have not jurisdiction to put the matter in a course of inquiry; and if so, how can it be best effected? I think I have such jurisdiction, and that the question in this case being, who is entitled to the testator's real estate, it can be properly determined only by means of an issue.

The defendants must therefore proceed to an issue *devisavit vel non;* the Elwyns being plaintiffs, and Deare and Mayhew defendants; and the plaintiff must continue to pay his rent into court. I make no order as to costs on this occasion, but will give liberty to the parties to apply.

[1] The Thames and Medway Canal Company *v.* Nash, 5 Sim. 280. [This was an interpleader suit. The defendants had entered into evidence as against each other. The Vice-Chancellor said that, in interpleading suits, it was not necessary for co-defendants to enter into evidence as against each other, because the court always directed an inquiry to be made, or an action to be brought, upon the answers merely. — ED.]

[2] His Lordship's statement of the case has been omitted. — ED.

It is said that though the right to the personal estate only can be determined by the Ecclesiastical Court, yet, as the real estate is of comparatively small value, the question respecting it will virtually be settled by the same decision; but that can only be so by arrangement.

I recollect a case of Dew *v.* Clarke,[1] in which the father of Mrs. Dew had a large personal estate, but a very small real estate; there was litigation in every court into which it could be carried; the plaintiff, Mrs. Dew, was successful in maintaining that the will was invalid as to the personal estate, but she could not establish her right to the real estate without an action, and to avoid the trial, she gave up her claim to the real estate altogether.[2]

CRAWFORD *v.* FISHER.

BEFORE SIR LANCELOT SHADWELL, V. C., JANUARY 31 and FEBRUARY 1, 1840.

[*Reported in* 10 *Simons*, 479.]

THIS was an interpleading suit respecting a balance, amounting to 496*l.*, in the hands of the plaintiffs. One of the defendants had brought an action against the plaintiffs to recover that sum; and the other defendant had filed a bill in Chancery against them, praying that the necessary accounts might be taken to ascertain the balance, and that the amount to be found due might be paid to him.

The plaintiffs paid the 496*l.* into court, and obtained an injunction, restraining the prosecution of the suit as well as the prosecution of the action.

The defendant who had filed the bill against the plaintiff now moved to discharge the order for the injunction.

Mr. *Knight Bruce*, in support of the motion. Although Lord Eldon decided, in Morgan *v.* Marsack,[3] that legal and equitable claims might be joined in an interpleading suit, yet it is not the rule that a suit in equity is to be stopped by the filing of a bill of interpleader.

Mr. *Wigram* and Mr. *L. Wigram*, for the plaintiffs, said that in Warington *v.* Wheatstone,[4] the injunction granted by Lord Eldon restrained the proceedings in the suit in equity, as well as those in the action at law.

Some doubt having been expressed as to this point, the Vice-Chancellor said that he would direct Reg. Lib. to be searched for the order in Warington *v.* Wheatstone.

[1] 1 Sim. & St. 108, and 5 Russ. 163.

[2] Nov. 14, 1840. The Lord Chancellor refused with costs a motion, by way of appeal, of Elwyn and wife.

[3] 2 Mer. 107.

[4] Jac. 202.

FEBRUARY 1.

On this day the VICE-CHANCELLOR said that he had looked at the order in Warington *v.* Wheatstone in Reg. Lib., and that the order that was made was to grant an injunction to restrain the action at law, and another injunction to restrain the suit in equity.

Motion to dissolve the injunction refused.

JEW *v.* WOOD AND OTHERS.

BEFORE LORD COTTENHAM, C., MARCH 27 and 31, 1841.

[*Reported in Craig & Phillips,* 185.]

THE plaintiff in this cause was the tenant of a house and printing-office at Gloucester, formerly the property of James Wood, deceased, under whom the plaintiff had held the house, at a yearly rent, for several years previous to his death. James Wood died in the month of April, 1836, leaving real and personal estates to a very large amount. Shortly after his death, two testamentary papers were set up, as containing his last will; by the first of which he appointed his friends, Sir Matthew Wood, Bart., John Chadborn, Jacob Osborn, and John S. Surman, to be his executors; and by the second, which bore date two days after the first, and was attested by three witnesses, he declared his wish that his executors should have all his property which he might not dispose of, and that all his estates, real and personal, should go amongst them and their heirs, in equal proportions, subject to his debts and to any legacies which he might thereafter bequeath.

A suit having been instituted in the Ecclesiastical Court, in which the validity of those papers, as regarded the personal estate, was called in question, that Court pronounced its judgment on the 20th of February, 1839, by which it refused probate of the first paper. From that judgment, however, the persons named as executors appealed to the Privy Council. In the meantime the plaintiff had made several payments of rent to them, as devisees of James Wood, the last of such payments being made on the 3d of February, 1838, in satisfaction of the rent due on the 29th of September preceding.

On the 30th of March, 1839, the plaintiff received a written notice, purporting to be given on behalf of certain persons who claimed to be co-heirs of James Wood, and requiring him to pay his rent in future to them. That notice was followed, a few days afterwards, by a counter-notice from the four persons above named, requiring him to pay his rent, as before, to them. Under those circumstances, the plaintiff paid no more rent to any one; and on the 15th of June Sir Matthew Wood and Jacob Osborn caused distresses to be levied on the premises for their respective one-fourth shares of the rent then in arrear. On

the 9th of December, 1840, the plaintiff declared in actions of replevin against those two parties and their respective bailiffs; and the defendants in those actions having respectively avowed and made cognizance, the plaintiff pleaded *non tenuit*, upon which pleas issue was joined. On the 3d of February, 1841, the defendants in those actions gave the plaintiff notice of trial for the ensuing Gloucester assizes, and on the 9th of March following, the bill in this cause was filed against Sir Matthew Wood, Jacob Osborn, John Surman, and the devisees of John Chadborn, who was then dead, and also against the several persons who had claimed to be the coheirs of James Wood, with the husbands of three of them who were married women, alleging that shortly after the death of James Wood, Sir Matthew Wood, Osborn, Surman, and Chadborn called a meeting of his tenants, which was attended by the plaintiff amongst others, and at which they represented that James Wood had made a will by which he had devised all his real estates to them, and appointed them his executors; that upon the faith of that representation the plaintiff paid to them the rent then due for the house and printing-office, and also signed a memorandum, the exact purport of which he was unable to set forth, inasmuch as it had ever since remained in their possession, but which was alleged to be an acknowledgment of their title to the premises as devisees of James Wood, and that his subsequent payment of rent to those persons had been made upon the faith of the same representation, no other person having made any claim upon him in respect of the rent, previously to the notice of the 30th of March, 1839.

The bill then alleged that the coheirs also threatened to take proceedings against the plaintiff for the rent in arrear; and it prayed that the defendants might be decreed to interplead together, and that it might be ascertained, in such manner as the Court should direct, to whom the rent of the house and printing-office belonged and ought to be paid, and that the plaintiff might be at liberty to pay into court the sum of 84*l.*, being the rent which had accrued since the 29th of September, 1837, and the rent which should thereafter become due, which he thereby offered to do, for the benefit of such of the defendants as should appear to be entitled to it, and that upon such payment, the defendants, Sir M. Wood and Jacob Osborn might be restrained, by injunction, from further proceedings in the actions of replevin; and that all the other defendants might, in like manner, be restrained from levying any distress, and from commencing or prosecuting any action or other proceedings at law against the plaintiff, in order to compel payment of the rent which had accrued due for the premises since the 29th of September, 1837, or of the rent which should thereafter accrue due in respect thereof.

The bill was accompanied by the usual affidavit, denying collusion between the plaintiff and the defendants, or any of them.

Sir Matthew Wood, by his answer, set forth the memorandum referred to by the bill, and which was in fact an entry in a book belong-

ing to Jacob Osborn, which entry was signed by the plaintiff, and purported to be a settlement of account between him and Sir M. Wood, Osborn, Surman, and Chadborn, on the 23d of May, 1836, for the rent due from the plaintiff on Lady Day preceding. Sir Matthew Wood then stated his belief that the plaintiff did give credit to the representations made at the meeting, and that no claim or demand of rent had, previously to that occasion, been made upon him by any other person. He then stated that he did not know whether the notice of the 30th of March was the first intimation the plaintiff received that any person other than himself and his codevisees laid claim to the premises; but he said he believed that the plaintiff was aware of the pendency of the suit in the Ecclesiastical Court before he made his last payment of rent, that suit having been commenced in the month of June, 1836.

Before the answer was put in, the plaintiff had obtained an *ex parte* injunction in the terms of the prayer of the bill, upon payment into court of the amount of rent claimed.

The defendant Sir M. Wood, after putting in his answer, moved, before the Master of the Rolls, to dissolve the injunction, but his Lordship refused the motion, and it was now renewed, by way of appeal, before the Lord Chancellor.

Mr. *Turner* and Mr. *Walker*, in support of the motion. A plaintiff in a bill of interpleader is bound to show that there is no question between himself and either of the defendants, collateral to that upon which he calls upon them to interplead. Crawshay *v.* Thornton.[1] The general principle will not now be disputed; but it will be said that the plaintiff, having originally taken possession under James Wood, continued after his death to be tenant to his heirs, and that he has never been tenant to the parties claiming under his will. He has, however, paid rent for two years to those parties, and it is not suggested that he has done so in consequence of any wilful misrepresentation or concealment on their part: on the contrary, he appears to have persisted in paying his rent to them after he must have known that their title was disputed. That circumstance alone distinguishes this case from those cases at law which will be cited on the other side; but even if those cases were not so distinguishable, their authority is considerably shaken by the case of Hall *v.* Butler,[2] which is the latest decision on this subject, and which, if it has not restored the old rule, that a tenant cannot, under any circumstances, be allowed to dispute the title of the person whom he has once recognized as his landlord, is sufficient, at least, to show that the point is one which admits of very nice distinctions, and on which the law is far from being accurately defined. At all events, it is not so clear that what has taken place between the plaintiff and the parties claiming under the will has not created a new tenancy as to justify this Court in depriving the defendant who makes this motion of the opportunity of discussing that question before the tribunal to which it properly belongs. Powis *v.* Smith.[3]

[1] 2 Mylne & Craig, 1. [2] 10 Ad. & E. 204. [3] 5 B. & Ald. 850.

Mr. *Wigram* and Mr. *Chapman Barber*, *contrà*. The argument on the other side proceeds upon a misapprehension of the doctrine laid down in Crawshay *v.* Thornton. It was never meant to be decided in that case that because a stakeholder has acknowledged the title of a person by letter or otherwise, he is estopped from requiring that person to interplead with a third party. The facts of that case were simply these — that the firm of which the plaintiff was a member, having received a deposit of some iron from Raikes, had, by his directions, written a letter to Thornton, informing him that they held the iron at his disposal; after which a paramount claim to the iron was set up by Daniloff. Now the ground of the decision was, not merely that a letter had been written by Crawshay to Thornton, acknowledging his title, but that that letter had given to Thornton the same rights, as against Crawshay, which Raikes had before, and consequently that inasmuch as Crawshay could not have made Raikes, from whom he originally received the iron, interplead with Daniloff, so neither could he make Thornton.

It cannot, however, be doubted but that Crawshay might, notwithstanding the letter, have required Thornton to interplead with Raikes. And if so, neither the case of Crawshay *v.* Thornton, nor that of Hall *v.* Butler, which turned upon the same principle, can furnish any authority against the order now appealed from. It is true that the dealings between the stakeholder and one of the claimants may be of such a nature as to create rights and liabilities between them, which no litigation between those claimants alone could determine, and cases might perhaps be put, in which a court of equity would hesitate to decide upon the effect of such dealings, upon a motion for an injunction, or upon a demurrer to a bill of interpleader; but it does not therefore follow that the mere fact of the stakeholder having dealt with or written to a party gives that party a right to say that he will have the opinion of a court of law as to the legal effect of what had been done or written. Your Lordship has lately decided the contrary in the case of Suart *v.* Welch,[1] which shows that there is no such invariable rule on the subject, and that this Court will not withhold its interposition in such a case, provided it can see clearly, from the facts before it, what the opinion of a court of law would be.

In the present case, the legal effect of what is alleged to have taken place between the plaintiff and the defendants claiming under the will, can admit of no question: because it has been established, by a long series of decisions at law, that although a tenant cannot be allowed to dispute the title of the party from whom he has received possession, yet that mere attornment by a tenant, already in possession of land, to another, on the supposition of his being the owner, is not sufficient to create a tenancy between them, or consequently to preclude the party so attorning from afterwards putting the other to the proof of his title, if an adverse claimant should appear. Rogers *v.* Pitcher,[2]

[1] 4 Mylne & Craig, 305. [2] 6 Taunt. 202.

Fenner *v.* Duplock,[1] Gregory *v.* Doidge,[2] Hopcraft *v.* Keys,[3] Doe *dem.* Plevin *v.* Brown.[4]

The consequence is that the only issue to be tried in this action is an issue of *devisavit vel non*, with which the plaintiff has no concern, and which he has therefore a right to insist shall be tried between the parties really interested in the question.

Mr. *Turner*, in reply.

The Lord Chancellor. This is a bill of interpleader, filed by a person who is a tenant of part of the lands belonging to the late Mr. James Wood, against certain persons who claim under the alleged will of Mr. Wood, and others who claim as heirs-at-law. The question in contest between the codefendants being whether there was a good testamentary disposition of the property of the late Mr. James Wood, it would be quite a regular case for a bill of interpleader, if it were not for certain special circumstances which are stated to have taken place between the tenants of the property and those who claim to be devisees.

Sir Matthew Wood, the party who disputes this being a proper case for interpleader, states that after the death of James Wood, there being papers found which were supposed by the defendant to pass the real estate (and which is a subject still under litigation), a meeting was called of the tenants, which was attended, amongst others, by the present plaintiff. He states that, upon that occasion, the defendant and other persons who claim as devisees represented that they were entitled to these lands, lately the estate of James Wood, under the will made by him as before mentioned; and the defendant says that he believes that the plaintiff did believe such representation to be true. Then the answer states the circumstances under which those tenants signed a paper containing an account of rent, and subsequently paid rent to those who claim as devisees, for a certain length of time after this meeting took place.

These are the circumstances, taken from the answer of the defendant, upon which the question is raised, whether this be or be not a proper case of interpleader. The Master of the Rolls considered it to be so, and restrained certain proceedings which were pending between the parties for the recovery of rent due from the tenant. The Master of the Rolls granted an injunction, as is usual in cases of interpleader, upon the plaintiff paying the rent due into court. It was objected to the order of the Master of the Rolls, that this was not a proper case of interpleader, within the principle laid down in Crawshay *v.* Thornton, because the plaintiff was under liabilities to one of the defendants, Sir M. Wood, beyond those which arose from the title to the property in question, and which no litigation between the codefendants would therefore determine. That was the principle laid down in Crawshay *v.* Thornton, derived from the cases which I found to have established, as I thought, that rule; and no question is raised in this case as to

[1] 2 Bing. 10 [2] 3 Bing. 474. [3] 9 Bing. 613. [4] 7 Ad. & E. 447.

that doctrine. The question is, whether this case falls within it or not.

Now such liability, namely, a liability between the plaintiff and Sir Matthew Wood, independently of the question arising upon the title in contest between the codefendants, is said to arise from the plaintiff's being precluded from disputing the title of Sir M. Wood as his landlord, upon the ground of having paid rent and done other acts, stated to amount to an attornment and acknowledgment of Sir M. Wood as his landlord. The question, therefore. is, whether the facts stated in the pleadings, or rather the answer of Sir M. Wood, show that there is a substantial question to be tried upon that ground between Sir M. Wood and the plaintiff; for the mere fact of such a claim being made, and such a question being raised, cannot avail, unless it appears to the Court that there is a real and substantial question to be tried. In a question of injunction, if it turns upon a matter of law or equity, the Court exercises its discretion to see whether there is really a substantial question to be tried; and if, instead of being a matter of law or equity, it be a matter of fact, it must also exercise a similar discretion.

Now several cases were cited to show that what has taken place between the plaintiff and Sir M. Wood precluded the plaintiff, the tenant, from disputing the title of Sir M. Wood, whatever might be the result of the litigation between Sir M. Wood, claiming as devisee, and the heirs at law, who dispute the will set up on part of the devisees; and I postponed the consideration of this case till to-day that I might have an opportunity of examining those cases.

It appears to me established, by the uniform current of all the cases (for there is not that discrepancy between the cases which was suggested), that the rule of law is, that after the death of the person to whom the occupier became tenant, the tenant may require the person claiming under the original lessor to prove his title under such original lessor; and that although the tenant has paid rent to the person so claiming under the original lessor, he is not precluded from so doing by the payment of rent and other acts, which might, under other circumstances, amount to an attornment.[1] . . .

Upon this review of the cases at law, there appears to me to be no doubt but that the plaintiff, notwithstanding what has passed between him and the defendant, Sir M. Wood, is entitled to show, if he can, that Sir M. Wood is not a devisee of the original lessor, and therefore not entitled to the tenant's rent; for that there is no question between the plaintiff and any of the defendants, except that which is in dispute between the different defendants, and that this is, therefore, a proper case for interpleader.

The motion must be refused, with costs.

[1] His Lordship here commented upon the cases of Rogers *v.* Pitcher, Fenner *v.* Duplock, Gregory *v.* Doidge, Hopcraft *v.* Keys, Doe *d.* Plevin *v.* Brown, and Hall *v.* Butler, cited *supra*. — ED.

MASTERMAN *v.* LEWIN.

BEFORE LORD COTTENHAM, C., JANUARY 11, 1847.

[*Reported in* 2 *Phillips*, 182.]

THE defendant Lewin having brought an action of trover against the plaintiff for certain title-deeds, this bill was filed for an injunction, and to compel Lewin to interplead for them with the other two defendants, John Wild Price and Joseph Price.

The bill stated that the plaintiff, who was a solicitor, had become possessed of the deeds as successor in business to one Herman deceased, who had been one of the trustees under indentures of settlement, dated in the year 1799 (the last of the deeds in question in point of date), by which the estate to which the deeds related, and which then belonged to Anna Maria Price, the mother of the defendant, Joseph Price, had been settled previously to her marriage, to the use of herself and her then intended husband for their successive lives, with remainder to the children of the marriage as tenants in common in fee. That Anna Maria Price had died in 1819, and her husband in 1833, and that they had nine children, all of whom survived them. The bill then stated the claims that had been made to the deeds by the three defendants; Lewin claiming them as purchaser of the estate from the nine children, John Wild Price, as surviving trustee of the settlement, and Joseph Price, on a suggestion that his mother was under age at the date of the settlement, claiming them as her eldest son and heir-at-law. And the bill charged that the plaintiff had offered to deliver the deeds to Lewin, upon having an indemnity against the other claims, but that the offer had been refused.

An injunction was obtained *ex parte* on the filing of the bill.

The defendants, John Wild Price and Lewin, both duly put in their answers, insisting on their respective claims as suggested by the bill. The answer of Lewin, which was filed in February, 1845, set forth the several indentures by which the shares of the nine children, including Joseph, had been conveyed to him upon their successively attaining twenty-one; the last of such indentures being dated in 1841. He further stated that he had been in the receipt of the rents and profits of the several shares from the dates of the conveyances respectively, and he insisted on the conveyance of his share by Joseph, on the Statute of Limitations, and on lapse of time, as a bar to the right of the latter as heir-at-law, if any such existed. He also alleged collusion between the plaintiff and Joseph Price.

At the beginning of July, 1845, Lewin gave notice of a motion to dismiss the bill for want of prosecution, and, a few days afterwards, notice of another motion to dissolve the injunction. Both the motions

came on to be heard before the Vice-Chancellor Knight Bruce on the 13th of July; when, notwithstanding Joseph Price had not answered, and did not appear upon the motion, His Honor made an order, by which, after reciting that J. W. Price, by his counsel, disclaimed, and that the plaintiff undertook to deposit the deeds with the Clerk of Records and Writs, it was referred to the Master to inquire whether Lewin was entitled to the deeds; whether Joseph Price had ever made any and what claim to them; and when and under what circumstances the deeds came into the possession of the plaintiff; with liberty to state special circumstances, and liberty to Joseph Price to attend the inquiries; and it was further ordered that both the motions of Lewin should stand over till after the Master should have made his report.

In October, 1845, Joseph Price put in his answer, insisting on his claim to the deeds on the ground stated in the bill.

On the 30th of June, 1846, the Master made his report, by which, after reciting that he had been attended by Joseph Price as well as by the other parties, he found that Lewin was entitled to the deeds; and that Joseph Price had claimed them before the bill was filed, and had also carried in a state of facts and claim before him, but had not adduced any evidence in support of it.

The report having been confirmed,

The two motions came on again before the Vice-Chancellor, on the 25th of November, 1846, when it was ordered that the plaintiff should pay to the defendant, J. W. Price, 40*s.* costs, in respect of his costs of the suit; and to the defendant Lewin his taxed costs of the two motions, and of the proceedings in the Master's office under the order of the 13th of July, 1845, and of that application and consequent thereon; and that the injunction should be continued, and the documents delivered by the plaintiff to Lewin.

This was an appeal motion on behalf of the plaintiff to discharge both the order of the 13th of July, 1845, and the order of the 25th of November, 1846.

Mr. *Cooper*, for the appeal motion, contended that the first order was irregular, it being contrary to the practice of the Court, in suits of this kind, to put the parties to interplead, or to direct any inquiry into their respective claims, until all the answers had come in. If, upon a motion to dismiss the bill, or to dissolve the injunction, it appeared that the plaintiff had been remiss in getting in the answers, the Court might either grant the motion, or give the plaintiff further time either to compel an answer or to take the bill *pro confesso* against the party in default; but to direct inquiries as to the titles of the several claimants before they had respectively informed the Court what their claims were, was contrary to all principle as well as to established practice. Hyde *v.* Warren,[1] Townley *v.* Deare,[2] Farebrother *v.* Prattent,[3]

[1] 19 Ves. 322. [2] 3 Beav. 213. [3] 5 Price, 303.

Statham *v.* Hall.[1] Had the Court in this case deferred the inquiries until Joseph Price had answered, the expense which had been occasioned might have been spared; for it would have appeared that the only issue to be tried between the parties was, whether Anna Maria Price was of age at the date of the settlement. Independently of this objection, it was insisted that the inquiries themselves were unusual in form, and imperfect; for, while the inquiry as to Lewin was, whether he was entitled to the deeds; as to Joseph Price, it was only whether he had made a claim to them, not whether he was entitled.

As to the second order, he contended that it was inconsistent with itself, for if collusion had been proved, which it was not, the bill ought simply to have been dismissed; whereas the Court in fact ordered the deeds to be delivered to one of the defendants: if, on the other hand, there was no evidence of collusion, where was the ground for making the plaintiff pay the costs? Lewin, by insisting on the Statute of Limitations and other grounds of defence against Joseph Price's claim, shewed that he did not consider it frivolous or without some foundation.

THE LORD CHANCELLOR, on looking at the first order, observed that it did not recite an affidavit of service on Joseph Price, and that that omission made the order irregular without going any further, for it was the very essence of an interpleading suit that the plaintiff was subject to adverse claims by several parties; when an injunction was granted in such a suit, all the defendants were interested in it, and, on a motion to dissolve it, the Court could not proceed in the absence of any of the claimants.

Mr. *Russell* and Mr. *Montague*, for Lewin, said that the first order was in fact an indulgence to the plaintiff, and having been accepted by him as such at the time, to avoid the dismissal of his bill, he ought not now to be heard to complain of it as informal.

[THE LORD CHANCELLOR. If the defendant was entitled to have the bill dismissed, why did he not insist upon it? Instead of that, he chose to take the order now before me, and the only question now is, whether that order is consistent with the practice in interpleading suits.]

If the plaintiff could be heard at all to complain of irregularity in the order, it could only be on the ground that Joseph Price would not be bound by it, or, consequently, by the subsequent proceedings; and, therefore, that the plaintiff would lose the indemnity which it was his object by this suit to obtain. But it was impossible to say that Joseph Price would not be bound by the proceedings, when he had attended the inquiries before the Master, and been an actor in them. As to the substance of the inquiries, they were calculated to settle all matters which were really in dispute between the parties. John Wild Price being out of the way, the only contest was between the other two, and if Lewin was entitled to the deeds, it followed, of course, that Joseph

[1] Turn. & Russ. 30.

Price was not, and *vice versâ*. Had the plaintiff, for his own security or satisfaction, desired an inquiry, whether, in the event of Lewin not being found to be entitled, Joseph Price was entitled, he might have had it; but, from the nature of the case, such an inquiry would obviously have been superfluous. As to the second order, they contended, that that part of it which related to the costs was justified both by the circumstances before adverted to, under which the original order was made, and also by the frivolousness of the claim of Joseph Price, which, coupled with other circumstances stated in the Master's report, warranted at least a strong suspicion that the plaintiff had throughout been colluding with him.

THE LORD CHANCELLOR observed during the argument, that if no authority could be produced for the course adopted in the first order, it was useless to go into the question on the second order as to collusion, and that part of the case was accordingly but little discussed.

At the conclusion of the argument for the respondent,

THE LORD CHANCELLOR said: This is a very unfortunate case, and only one of several instances that have lately come before me, of an attempt to do justice in the particular case by means of a departure from the regular course and practice of the Court. If that course and practice had been followed in this case, the rights of the parties would now have been satisfactorily ascertained, and the contest would have been at an end. The great difficulty which I now feel is, being satisfied that the order of July, 1845, is irregular, how to deal with the litigation without involving the parties in further expense.

The bill states adverse claims of two parties, one claiming under a settlement, the other against it, on the ground that the property devolved upon him as heir-at-law. That is a case in which the plaintiff is entitled to the interference of the Court, upon a bill of interpleader. A bill is accordingly filed. One party puts in an answer, the other does not. The first then moves to dismiss the bill, and then to dissolve the injunction. But the suit was not then in a state in which the Court could dispose of the matter, because one of the defendants not having put in his answer, the Court could not know what his case might be. The proper course in that state of things would have been, either to give the plaintiff further time to get in the answer or take the bill *pro confesso* against the defendant who had not answered, or, if the Court should be of opinion that the plaintiff had not entitled himself to that indulgence, to dismiss the bill. Instead of which, however, without any notice to the defendant who had not answered, the Court refers it to the Master to inquire whether the party who has answered was entitled to the deeds; and as to the other, not whether he was entitled to the deeds, but whether he had made a claim or not. Now that is obviously not the proper form of inquiry in a suit of this nature: for, suppose the Master had found that the defendant Lewin was not entitled, he might perhaps have seen that the other defendant was entitled, but yet he would have no authority under such an order as this to say so.

In these cases, the Court is bound not only to consider the interests of the parties in the suit, but as far as possible to keep the practice of the court intact. By neglecting to do so, it runs the risk of having all the subsequent proceedings set aside by reason of the irregularity of the order on which they are founded. When, by a single departure from the practice, a suit is once involved in a labyrinth of this kind, it is impossible to extricate the parties without great expense.

My object now is to effect that at as little cost as possible: I should say, upon the evidence, that the costs ought to be paid by Joseph Price, because there being an absence of all evidence of collusion, and positive evidence of a claim having been made by Joseph, if he cannot establish that claim, he, being the author of the expense which has been incurred, ought to pay it. But if I were to act upon information irregularly obtained, I should be falling into the same error which has been committed in the court below by the course which has already been taken. I can, therefore, only discharge these orders. It is extremely to be regretted, but I have no option. From what has been done, however, one can pretty well see that the only question will be between the plaintiff and Joseph Price as to the costs; for it is plain that Lewin's title to the deeds will not be contested, and as I cannot order the plaintiff to pay the costs without more evidence of collusion than I have now, I can only throw it out for the consideration of the parties, that if collusion be made out, the plaintiff will have to pay the costs: if not, Joseph will have to pay them: and as I believe he is unable to pay them, I should suggest whether the defendant Lewin would not do well to abandon that part of the order which entitles him to costs as against the plaintiff, instead of forcing the plaintiff to go on with the suit merely for the sake of the costs. Let the order not be drawn up till the parties have considered what shall be done.

The case was not mentioned again.

EAST AND WEST INDIA DOCK COMPANY *v.* LITTLEDALE.

BEFORE SIR JAMES WIGRAM, V. C., JULY 18 AND 25, AUGUST 1, 3, AND 4, NOVEMBER 25, AND DECEMBER 2, 5, 16, 19, AND 22, 1848.

[*Reported in* 7 *Hare*, 57.]

IN December, 1847, the ship "Coromandel," with a cargo consisting partly of six hundred and thirty-nine bales and ten half-bales of cotton, consigned to the order of Syers, Livingstone, & Co., of Bombay, entered the plaintiffs' 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 solicitor of certain Parsee merchants of Bombay, named Dadabboy, Pestonjee, & Mancherjee, 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 claiming, 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, 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, & Mancherjee, 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 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*[1] 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.[2] 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.[3] . . . Messrs. Littledale

[1] Sir John Romilly. — Ed.

[2] 6 East, 21, n.

[3] The learned counsel here quoted from the judgment of Lord Eldon in Martinius *v.* Helmuth, *supra* p. 158. — Ed.

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: Stevenson *v.* Anderson; 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. And, until that time, the Court could not require the defendants actively to interplead, either by defending the action or otherwise.

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 *bonâ 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 25, DECEMBER 2.

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 re-

fused to interfere in the conduct of the cause, 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*.

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.

THE VICE-CHANCELLOR. It has never (according to my recollection) 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, 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 it appears that Lord Eldon's experience did not furnish him with a single instance of a bill of interpleader being brought to a hearing. In this case, however, one set of defendants, the Parsee merchants, insist upon their right to file their answer, and to have the cause prosecuted against them in the regular way. The question is, what order am I now to make? I assume, for the present purpose, that the plaintiffs are entitled to have this case considered *primâ 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 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 16.

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; and Mr. *Lewis*, for the latter defendants, moved for four months' time to answer.

THE 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 consider myself bound to grant, unless the Parsee merchants 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. 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 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 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.

PRUDENTIAL LIFE ASSURANCE COMPANY *v.* THOMAS.

BEFORE LORD JUSTICE ROLT, NOVEMBER 21, 1867.

[*Reported in Law Reports, 3 Chancery Appeals,* 74.]

THIS was a motion in an interpleader suit.

James Black, in 1863, insured his life for £200 in the Consolidated Assurance Company, which was afterwards merged in the Prudential Assurance Company.

By an indenture dated the 16th of June, 1863, James Black purported to assign the policy, and all moneys payable thereon, to F. R. Thomas, and notice of this assignment was given to the company. James Black died in May, 1867, and Thomas claimed the £200 from the company; but before the money was payable, the company received notice from Johanna Black, widow and executrix of James Black, not to pay the money to Thomas, as she disputed the validity of the assignment. Some interviews and some correspondence took place between the secretary of the company and Thomas's solicitor, and Thomas alleged that the secretary promised to pay the money secured by the policy to him, which the company denied.

The money secured by the policy was payable on the 29th of July, 1867, on which day there was an interview between Thomas's solicitor and the secretary, at which Thomas's solicitor agreed to send the solicitor of the company a copy of the deed; but on the 1st of August, 1867, without any further communication, Thomas filed a bill against the company alone, asking payment of the money, and on the 9th of August the company filed this bill against Thomas and Johanna Black, stating shortly the facts above stated, but only mentioning the last interview between the secretary and Thomas's solicitor, and praying for liberty to pay the £200 into court, and that the defendants might be directed to interplead and settle their rights to the £200, and that the proceedings in Thomas's suit might be stayed, and that each of the defendants might be restrained from any other proceeding against the plaintiffs in respect of the £200.

On the 12th of August the Vice-Chancellor Malins granted an *ex parte* injunction restraining Thomas from proceeding in the suit, and it was stated at the bar, and appeared from the judgment of His Honor, that the papers had been sent to him in the vacation, and that he had granted the injunction without hearing counsel. Thomas, on the 14th of November, moved to dissolve the injunction, and the Vice-Chancellor Malins dissolved it accordingly, saying that the company had dealt with Thomas in a manner which amounted to a contract to pay

[1] 2 Sm. & Giff. 141.

him; that the company might have proposed to Thomas to make Mrs. Black a party, and have the question settled in that suit, instead of filing this bill; and that, if the circumstances had been stated in the bill, His Honor would not have granted the injunction.

The company appealed.

Mr. *Osborne*, Q. C., and Mr. *Phear*, for the company. We had no other course than to file this bill, as Thomas had not chosen to make Mrs. Black party to his suit. She is still, at law, the hand to receive the money. East and West India Dock Company *v.* Littledale. We were quite willing to pay Thomas if we could safely do so; but we never agreed to do so. In Diplock *v.* Hammond,[1] the other claimant was made party to the first suit. The object of interpleading is to prevent the innocent holder of money from being vexed by two suits. What is there in Thomas's suit to prevent Mrs. Black from filing her bill? In Warington *v.* Wheatstone, an injunction was granted to restrain a suit in equity to which all were parties, and that is much stronger. So in Sieveking *v.* Behrens.[1] We cannot safely pay the money into court in Thomas's suit.

Mr. *Glasse*, Q. C., and Mr. *Terrell*, for Thomas. You cannot institute a suit to restrain the proceedings in another. If the company in Thomas's suit stated that Mrs. Black made a claim, then Thomas would be obliged to make her a party, and if not, the order of the court for payment of the money would be a protection to the company. The company should have given notice to Thomas that his suit was imperfect. Instead of avoiding multiplicity of suits, here is a multiplicity. One suit in equity cannot be restrained by another, as the defendant in equity may make his case out as well as if he was plaintiff. The motion ought to be entitled in both suits.

Mr. *Crossley*, for Mrs. Black.

Mr. *Osborne*, in reply.

Sir John Rolt, L. J., stated the facts of the case, and said that, in his opinion, the dealings between the company and Thomas did not amount to a contract by the company to pay Thomas, and that the interpleader bill was properly framed, and did not conceal or misrepresent the case. His Lordship continued: —

Then the bill was filed on the 1st of August by Mr. Thomas, and it was an imperfect bill — a bill which he must have known could not settle the question. It did not purport or affect to remove out of the way of the insurance company the difficulty as to the payment of the money. They throughout had said that they were ready to pay, and anxious to pay, and all they wanted was, that they should not be vexed by a double litigation.

They were told positively that if they paid Thomas, the legal hand to receive would hold them responsible for any error. In that state of things Thomas thought it right to file an imperfect bill, which did not

[1] 2 My. & Cr. 581.

remove the difficulty out of the way of the insurance company. As he did not make Mrs. Black a party to that bill, it was quite impossible for the insurance company to pay the money into court in that suit. It does appear to me that the bill filed on the 9th of August by the insurance company is some evidence of their *bona fides*. They did not want to keep the money, and they certainly had no bias towards one claimant or the other. It is sometimes suggested that money is not paid by a stakeholder because he prefers holding it, but this cannot be said of the insurance company, for they were ready to get rid of the money the moment they could do so with safety. They were not able to pay it in, in a suit to which only one of the claimants was a party, and accordingly they filed a short bill, which, I think, raises every question, conceals nothing, and misrepresents nothing, considering what are the facts necessary to be stated in an interpleader bill where the plaintiff proposes to bring into court at once the money which is in dispute, and asks for no order except upon that condition. Of course it would be a most material thing if he concealed a fact which showed that he had contracted with one of the parties; but if he has not concealed a fact of that kind, it does appear to me that it would not be right to encourage the insertion in interpleader bills of long narratives and correspondence for the purpose of shewing that there has been no contract with one of the parties. It appears to me, therefore, that some order for an injunction was right at the time when the Vice-Chancellor granted the injunction.

Then it is said that the order which was made ought not to have been an order to stay the prosecution of the other suit. It is first of all said that the existence of a suit in this court by one of the claimants was a sufficient reason why the court should not have granted the injunction; but I think the case of Warington *v.* Wheatstone is clear upon that point, and is a very distinct authority that there is a reason for coming to this court by way of interpleader, when one claimant insists that she will hold the company responsible if they pay the adverse claimant. One of the claimants was proceeding in equity to enforce payment, and the other was declaring that she would hold the company responsible if they paid that claimant; and it appears to me that that was a reason why the company should force them to interplead. If Thomas had proceeded at law it would not have been in his power to have made Mrs. Black a party to the litigation; but, having determined to come into a court of equity, nothing would have been easier for him than to have made her a party. He knew that she was a person claiming; he knew that the only reason the company alleged for not paying was, that she was making an adverse claim, and therefore a *bonâ fide* litigation by him ought to have included Mrs. Black as a party to his suit. Certainly the existence of that suit did not stand in the way of the plaintiff's filing a bill of interpleader.

Then it was said that the order ought not to have stayed the prosecution of that other suit. At first I was disposed to think that the

course of the court generally is to leave every suit in equity to stand or fall upon its own merits, and not in one suit to grant an injunction to stay or restrain proceedings in another; but the case of Warington *v.* Wheatstone serves to show that an injunction in an interpleader suit may extend to restrain proceedings in equity as well as at law against the stakeholder, as appears from the decree which is given in Seton on Decrees;[1] and the case of Sieveking *v.* Behrens[2] seems to have been to the same effect. I am, therefore, not able to say that the order for the injunction was in any respect wrong, and I think that, Thomas, the plaintiff in the other suit, having chosen to institute that suit, it was right to bring the money into court in a suit to which Mrs. Black was a party, and to restrain all other proceedings in the matter. I think there is nothing inconsistent with the course of practice to say that the injunction should extend, as the Vice-Chancellor originally extended it, to stay proceedings in equity as well as at law, and therefore that his original order was right.

Order of the Vice-Chancellor, dissolving the injunction, discharged. No costs of the appeal. The costs in the court of the Vice-Chancellor Malins to be dealt with by the Vice-Chancellor at the hearing. Liberty to apply in Thomas's suit for the costs of that suit.

[1] Vol. II. p. 962, 3d ed.

[2] 2 My. & Cr. 581.

CHAPTER V.

BILLS TO PREVENT TORTS.

SECTION I. — WASTE.

SKELTON *v.* SKELTON.

BEFORE LORD NOTTINGHAM, C., NOVEMBER 16, 1677.

[*Reported in* 2 *Swanston*, 170.]

THE bill was exhibited against a jointress to stay *maresme* in felling timber, and notwithstanding the defendant's answer, who claimed the inheritance by a deed which the plaintiff controverted, an injunction was obtained until hearing; and now, at the hearing, she proved herself to be a jointress in tail; and it was urged by Mr. Attorney, that the defendant being a jointress within the Statute of 11 Hen. VII., which restrains all power of alienation by fine or discontinuance, she ought likewise to be restrained in equity from committing waste, which is also in disherison of the heir. But this I would by no means allow, that equity should enlarge the restraints or the disabilities introduced by act of Parliament; and as to the granting of injunctions to stay waste, I took a distinction where the tenant hath only *impunitatem*, and where he hath *jus in arboribus*. If the tenant have only a bare indemnity, or exemption from an action if he committed waste, there it is fit he should be restrained by injunction from committing it; but if he have a right in the thing itself, when it is wasted and cut down, there it is no way reasonable that he should be restrained: as, for example, if there be tenant for life, the remainder for life, the reversion in fee; here the tenant for life has no right nor power to fell timber or commit waste; yet if he do so he cannot be punished for it in an action of waste during the life of him in the remainder for life; for that intervening remainder is an impediment to the action; so it is most just to grant an injunction to stay waste; and so it was ruled in the Chancery by advice of judges, P. 41 El. Sir F. Moor, 554, pl. 748;[1] and Eger-

[1] "Easter, 41 Eliz. *Per* Egerton, Keeper of the Great Seal, that he has seen a precedent in the time of Richard II., that where there is tenant for life, remainder for life, remainder over in fee, and therefore waste in the first tenant for life is dispunishable by the common law, yet it has been decreed in Chancery, by the advice of the judges, upon complaint of him in remainder in fee, that the first tenant shall not commit waste, and an injunction granted." — ED.

ton, C., said he had seen a precedent of such an injunction, 5 R. II., and so it had been done before, *temp.* E. VI., Vandemot *v.* Eyr: and with this agrees 16 Jac. B. R., 1 Rol. Abr. 377, pl. 13, *per curiam.*[1] And the reason of this is most convincing; for when such a tenant for life hath cut down the trees, he in the remainder in fee may take them away, notwithstanding the mean remainder for life, or he may have a trover and conversion against the tenant for life, if he remove them; which shows that such tenant for life hath no property in the trees; it were, *ergo*, most absurd to put the reversioner to recover damages for his inheritance in the trees, or to seize them as chattels, when they may better be preserved to him in specie, by granting an injunction to stay the felling of them. And upon the like reason it may seem that tenant after possibility may be restrained by injunction from committing waste, for so if he fell trees the reversioner may have a trover and conversion, as was held 24 Car. I., B. R., Udal *v.* Udal, *per* Rolle *et curiam;*[2] and yet *temp.* E. III., *placita parliamentaria*, Ryley, Appendix, 653, Kirbrok petitions "*quod breve de waste poet giser versus Roger son frere*" (against Maud, the widow of Roger) "tenant in tail, *apres possibilité; Response, ley nest mye uncore ordein en ce cas.*" Probably this was before 21 Edw. III., for in 21 Edw. III. Rot. Parl., n. 46, the Commons petition for a general law, that tenant after possibility might be liable to an action of waste, as being in effect but tenant for life, yet could not obtain it; but this serves only to keep the tenant after possibility in a state of impunity, if he commit waste, not to give him a right to commit it. On the other side, if there be tenant for life, with an express charge to hold without impeachment of waste, he is not to be restrained by injunction, for he hath more than a bare impunity, viz. a right in the trees to fell them; *à fortiori*, in the case in question, no restraint can be put upon a jointress in tail who hath the inheritance; and yet, all this notwithstanding, he that hath a lawful power and liberty to commit waste may be restrained by Chancery from using this power, when the waste which he is about to do is signally *contra bonum publicum.* V. 19 Car. I., B. R., 1 Rol. Abr. 380, T. 3,[3] though a lease for years was made without impeachment of waste by the Bishop of Winchester, yet when the lessee for years, towards the end of his term, was about to cut up all the trees, an injunction was awarded by the advice

[1] If there be lessee for life, remainder for life, the reversion or remainder in fee, and the lessee in possession waste the land, although he is not punishable by the common law during the continuance of the remainder, yet he can be restrained in Chancery, for it is a particular mischief; and though he is not punishable during the continuance of the remainder, yet it is a tort, and is punishable afterwards. Mich. 16 Jac. in Roswell's Case." — Ed

[2] Aleyn, 81, 2 Rol. Abr 119, pl. 3; and see 12 East, 215, n. (*c*). — Ed.

[3] "If a lessee for years without impeachment of waste, about the end of his term, intends to cut down all the timber trees, an injunction lies out of a court of equity upon this matter, to stop the cutting down of the trees, notwithstanding the agreement of the parties, because it is against the public good to destroy the trees, and the suit is to hinder and prevent it, and not to have damages after it is done." — Ed.

of all the judges, *pro bono publico*, and in favor of the church, whereof the King is patron, notwithstanding the agreement of the parties. But in my Lord of Orford's Case, where the Earl was tenant for life without impeachment of waste, the reversion in fee to the co-heirs of the Lady Banning, and the Earl was about to pull down a house near Colchester, no injunction could be obtained, but the co-heirs and Serjeant Peck, who was a purchaser from one of them, were fain to compound with the Earl. So it seems there is some discretionary latitude in these cases; but that which is more remarkable is, that he who hath a power to commit waste may sometimes be restrained from the exercise of that power, when it tends only to a private damage; as, for example, the Lady Evelyn was tenant for life in jointure, remainder to Sir John Evelyn, her eldest son, for life, without impeachment of waste, with several remainders over; the jointress let the land to a tenant at will; Sir John Evelyn enters by consent of the undertenant, and cuts down trees; resolved, though no injunction had lain against Sir John Evelyn if his remainder had fallen into possession, yet now it does; for although the license of tenant at will to enter excuse the entry from being a trespass, yet no possession by such entry can enable him to cut down the trees presently, for the jointress hath right during her life to the shade and the mast; and to reasonable botes; *ideoque* Lord Bridgman, Custos, awarded an injunction during the life of the jointress, 1 Dec., 1670, 22 Car. II. Lord Nottingham's MSS.

"This Court sees no color of cause to give the said plaintiff any relief in this court, and doth therefore think fit and order that the matter of the said plaintiff's bill be from henceforth clearly and absolutely dismissed out of this court; and it is hereby referred to Sir J. F. &c., to tax the said defendants their moderate costs of this suit." Reg. Lib. B. 1677, fol. 33.

ABRAHAM *v.* BUBB.

BEFORE LORD NOTTINGHAM, C., JULY 1, 1679, MAY 27, 1680.

[*Reported in* 2 *Swanston*, 172.]

THE bill supposed the defendant's wife to be tenant in tail after possibility, by the provision of a former husband, and prayed she might be restrained from committing waste; the defendant demurred; yet I ordered him presently to answer *quoad* the house and trees about it, *pro bono publico*;[1] but the next morning I ordered him to answer the

[1] According to the report of this case in 2 Freem. 53, the defendant "having felled some trees in a grove that grew near, and was an ornament to the mansion-house, and having an intent to fell the rest, the plaintiff, to whom the lands did belong in remainder, preferred his bill to restrain her from felling those trees, and to have an injunction to stay the committing of waste." — ED.

whole bill, upon the reason of the case, Skelton *v.* Skelton, because tenant after possibility has only *impunitatem*, not *jus in arboribus*, for he in reversion may have a trover when they are felled.

MAY 27, 1680.

The importunity of the parties being great, I restrained only mischievous waste, which might deface the seat, but gave way that trees marked out by the ancestor for payment of his debts might be felled; yet I continued in the same opinion, that where he in the reversion might have a trover for the trees when felled, there the Court ought to grant an injunction to stay the felling, and that I took to be this case; and I observed that the opinion that tenant after possibility is dispunishable of waste was an addition to Mr. Littleton, and no part of the original text; but, however, it is one thing to have impunity, and another to claim right in the trees; the very act of the party who grants an estate without impeachment of waste has not always been understood to transfer a property in the trees, as may appear by Herlakenden's Case;[1] and so at this day, the usual form of conveyance is, after the words without impeachment of waste, to add a clause, and with full power and authority to do and to commit waste, which shows that this is taken to be somewhat more than the former words do necessarily imply; and the case is put in my Lord Dyer, where an estate without inpeachment of waste was granted upon condition not to commit voluntary waste, and held to be a good condition, and consistent with the grant. If the act of the party be so tenderly construed to prevent waste, the act of the law ought to be bounded with more circumspection. But hereafter, when any such case shall happen again, it may be fit to direct that a trover and conversion be brought for felling some oaks, which shall be admitted to be cut; and as the law shall be judged in a trover, accordingly to grant or deny a perpetual injunction, and in the mean time to stay waste. Lord Nottingham's MSS.

VANE *v.* LORD BARNARD.

BEFORE LORD COWPER, C., JANUARY 24, 1716.

[*Reported in* 2 *Vernon*, 738.]

THE defendant on the marriage of the plaintiff, his eldest son, with the daughter of Morgan Randyll, and 10,000*l.* portion, settled *inter alia* Raby Castle on himself for life, without impeachment of waste, remainder to his son for life, and to his first and other sons in tail male.

The defendant, the Lord Barnard, having taken some displeasure

[1] 4 Rep. 62. — ED.

against his son, got two hundred workmen together, and of a sudden, in a few days, stripped the castle of the lead, iron, glass-doors, and boards, &c., to the value of 3,000*l.*

The Court, upon filing the bill, granted an injunction to stay committing of waste in pulling down the castle; and now, upon the hearing of the cause, decreed, not only the injunction to continue, but that the castle should be repaired, and put into the same condition it was in, in August, 1714; and for that purpose a commission was to issue to ascertain what ought to be repaired, and a Master to see it done, at the expense and charge of the defendant, the Lord Barnard; and decreed the plaintiff his costs.

S. C. *nom.* LORD BARNARD'S CASE.

[*Reported in Precedents in Chancery*, 454.]

Lord Barnard was tenant for life, without impeachment of waste; and this bill was brought against him by those in remainder, for an injunction to stay his committing of waste; and by the proofs in the cause it appeared that he had almost totally defaced the mansion-house by pulling down great part, and was going on entirely to ruin it; whereupon the Court not only granted an injunction against him, to stay his committing further waste, but also ordered a commission to issue to six commissioners, whereof he to have notice, and to appoint three on his part; or, in default thereof, the six commissioners to be named *ex parte*, to take a view and to make a report of the waste committed; and that he should be obliged to rebuild, and put it in the same plight and condition it was at the time of his entry thereon: and it was said that the like injunctions had frequently been granted in this court; and that the clauses of "without impeachment of waste" never were extended to allow the very destruction of the estate itself, but only to excuse from permissive waste; and therefore such a clause would not give leave to fell and cut down the trees which were for the ornament or shelter of a house, much less to destroy or demolish the house; and so it was ruled in my Lord Nottingham's time.[1]

[1] 2 Chan. Cases, 32. ["The Lord Chancellor declared that he would stop pulling down houses, or defacing a seat, by tenant after possibility of issue extinct, or by tenant for life who was dispunishable of waste by express grant or by trust."—Ed.]

BISHOP OF LONDON *v.* WEB.

BEFORE LORD PARKER, C., HILARY TERM, 1718.

[*Reported in* 1 *Peere Williams*, 527.]

BISHOP BONNER in the time of Edward the Sixth, being then Bishop of London, made a long lease of some lands in Ealing in Middlesex, in which there are about twenty years yet to come, and the lease was made without impeachment of waste, and the defendant Web, in whom by several mesne assignments the remainder of this lease was vested, articled with some brickmakers, that they might dig and carry away the soil of twenty acres six feet deep, part of the premises, provided they did not dig above two acres in the year, and levelled those acres before they dug up others.

The Bishop of London, having the inheritance of the premises in right of his bishoprick, brought a bill to enjoin the digging of brick in this manner, alleging that this was carrying away the soil, part of the inheritance, and would in consequence turn the pasture field into a pit or pond; that it was like the case of Vane *v.* Lord Barnard,[1] where Lord Barnard, having upon his marriage settled Raby Castle (the family seat) upon himself for life without waste, remainder to his first, &c. son of that marriage, afterwards, upon some displeasure taken against his son, employed several persons to pull down the castle, upon which the Court granted a perpetual injunction to stop him, and ordered him to amend and repair what he had pulled down; for that he should not destroy the thing itself, which he had expressly settled. So in this case the defendant, in digging all the soil for bricks, was actually destroying the field.

But for the defendant it was said that frequent experience showed that the digging of brick did not destroy the field, there being many fields about the town where brick had been dug, and those fields now used again for pasture; but admitting it was waste, yet there being a power to commit waste, the lessee might do it, as well as open a new mine, and carry away the mineral, without filling it up again.

On the other side it was replied that the privilege of being *sans* waste would not in equity entitle one to pull down an house, or even cut down trees that are for the ornament of the house.

THE LORD CHANCELLOR. Before the statute of Gloucester, waste did lie against lessee for years, and the being without impeachment of waste seems originally intended only to mean that the party should not be punishable by that statute, and not to give a property in the trees or materials of an house pulled down by lessee for years *sans* waste; but

[1] 2 Vern. 738, 1 Salk. 161.

the resolutions having established the law to be otherwise, I will not shake it, much less carry it further.

But I take this to be within the reason of Lord Barnard's Case, where, as he was not permitted to destroy the castle to the prejudice of the remainder-man, so neither shall the lessee in the present case destroy this field, against the bishop who has the reversion in fee, to the ruin of the inheritance of the church.

Let the defendant carry off the brick he has dug, but take an injunction to stop further digging.

WHITFIELD *v.* BEWIT.

BEFORE LORD MACCLESFIELD, C., MICHAELMAS TERM, 1724.

[*Reported in* 2 *Peere Williams*, 240.]

ONE seised in fee of lands in which there were mines, all of them unopened, by deed conveyed those lands and all mines, waters, trees, &c., to trustees and their heirs, to the use of the grantor for life (who soon after died), remainder to the use of A for life, remainder to his first, &c. son in tail male successively, remainder to B for life, remainder to his first, &c. son in tail male successively, remainder to his two sisters C and D and the heirs of their bodies, remainder to the grantor in fee.

A and B had no sons, and C, one of the sisters, died without issue, by which the heir of the grantor, as to one moiety of the premises, had the first estate of inheritance.

A, having cut down timber, sold it, and threatened to open the mines; the heir of the grantor, being seised of one moiety *ut supra* by the death of one of the sisters without issue, brought this bill for an account of the moiety of the timber, and to stay A's opening of any mine.

1st Obj. As to the plaintiff's claim of the moiety of the moneys arising by sale of the timber, in regard the plaintiff comes into equity for the same, it would be more agreeable to the rules of equity that the moneys produced by the timber should be brought into court, and put out for the benefit of the sons as yet unborn and which may be born. That these contingent remainders being *in gremio legis* and under the protection of the law, it would be most reasonable that the moneys should be secured for the use of the sons when there should be any born; but as soon as it became impossible there should be a son, then a moiety to be paid to the plaintiff; and the case would be the same if there were a son *in ventre sa mere;* or the plaintiff might bring trover, and then what reason had he to come into equity?

CURIA. The right to this timber belongs to those who at the time of its being severed from the freehold were seised of the first estate of inheritance, and the property becomes vested in them.

As to the objection that trover will lie at law, it may be very necessary for the party who has the inheritance to bring his bill in this court, because it may be impossible for him to discover the value of the timber, it being in the possession of, and cut down by, the tenant for life. This was the very case of the Duke of Newcastle *v.* Mr. Vane, where at Welbeck (the Duke's seat in Nottinghamshire) great quantities of timber were blown down in a storm; and though there were several tenants for life, remainder to their first and every other son in tail, yet these having no sons born, the timber was decreed to belong to the first remainder-man in tail.

Neither do I think the defendant ought (as he insists) to be allowed out of this timber what money he has laid out in timber for repairs, since it was a wrong thing to cut down and sell the same, and shows *quo animo* it was done, not to repair but to sell.

2dly. It was urged that, the mines being expressly granted by this settlement with the lands, it was as strong a case as if the mines themselves were limited to A for life, and like Saunders's Case in 5 Co. 12, where it is resolved that on a lease made of land together with the mines, if there be no mines open, the lessee may open them; so in this case, there being no mines open, the *cestui que use* for life might open them.

But the Lord Chancellor *contra*. A having only an estate for life subject to waste, he shall no more open a mine than he shall cut down the timber-trees, for both are equally granted by this deed; and the meaning of inserting mines, trees, and water was that all should pass, but as the timber and mines were part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to him.

Of which opinion was Lord Chancellor King on a rehearing.

BEWICK *v.* WHITFIELD.

Before Lord Talbot, C., Easter Term, 1734.

[*Reported in* 3 *Peere Williams*, 267.]

A was tenant for life, remainder to B in tail, as to one moiety, remainder as to the other moiety to C, an infant in tail, remainder over. There was timber upon the premises, greatly decaying; whereupon B, the remainder-man, brought a bill praying that the timber that was decaying might be cut down, and that the plaintiff, the remainder-man in tail, together with the other remainder-man, the infant, might have the money arising by the sale of this timber. On the other hand, the tenant for life insisted to have some share of this money.

THE LORD CHANCELLOR. The timber, while standing, is part of the inheritance; but whenever it is severed, either by the act of God, as by tempest, or by a trespasser and by wrong, it belongs to him who has the first estate of inheritance, whether in fee or in tail, who may bring trover for it; and this was so decreed upon occasion of the great windfall of timber on the Cavendish estate.

2dly. As to the tenant for life, he ought not to have any share of the money arising by the sale of this timber; but since he has a right to what may be sufficient for repairs and botes, care must be taken to leave enough upon the estate for that purpose; and whatever damage is done to the tenant for life on the premises by him held for life, the same ought to be made good to him.

3dly. With regard to the timber plainly decaying, it is for the benefit of the persons entitled to the inheritance that it should be cut down, otherwise it would become of no value; but this shall be done with the approbation of the Master; and trees, though decaying, if for the defence and shelter of the house, or for ornament, shall not be cut down. B, that is the tenant in tail (and of age), of one moiety, is to have a moiety of the clear money subject to such deductions as aforesaid; the other moiety, belonging to the infant, must be put out for the benefit of the infant on government or real securities, to be approved of by the Master.[1]

ANONYMOUS.

BEFORE SIR JOSEPH JEKYLL, M. R., DECEMBER 4, 1729.

[*Reported in Mosely*, 237.]

TENANT for life without impeachment of waste, remainder to his first and every other son in tail, becomes a bankrupt, and a commission is taken out against him, and the commissioners sell his estate to the defendant, against whom the son of the bankrupt, on certificate of his bill being filed, and affidavit, obtains an injunction to stay waste, which, upon coming in of the answer, was to be dissolved *nisi;* and the plain-

[1] The decree directs the Master "to inquire what timber there is standing on the said estates that is in a decaying condition, which is neither a shelter or ornament to the seat, and that such decaying timber as the Master shall direct shall be cut down from off the said estate, and sold by such persons as he shall appoint for that purpose; and out of the money arising by the sale of such timber the costs of all parties to this suit (to be taxed by the said Master) are to be first paid, and the residue of the said money is to be put out at interest on government or other security, in the names of trustees to be approved of by the said Master, for the benefit of the said plaintiff, Robert Bewick, the infant, to be paid him when he comes of age; and the trustees are to declare the trust of the said money, and all parties are at liberty to apply to this court from time to time, as there shall be occasion, for further directions." Reg. Lib. A. 1733, fol. 512.

tiff showed for cause, that he, as tenant in tail, had a right to enjoin any one from committing waste, but the tenant for life himself, and even him, in a court of equity, from pulling down the mansion-house, or cutting down timber ornamental to it, though he has a power by law.

THE MASTER OF THE ROLLS. The injunction must be continued as to pulling down the mansion-house, or cutting down the timber ornamental to it, but dissolved, as to cutting of timber generally; for though there have been great variety of opinions formerly, it is now settled at law, that if a stranger cut down timber, or commit any other waste, it belongs to the tenant for life who is dispunishable of waste, and not to the remainder-man in tail, or in fee.

LORD CASTLEMAIN *v.* LORD CRAVEN.

BEFORE HONORABLE JOHN VERNEY, M. R., MICHAELMAS VACATION, 1733.

[*Reported in* 22 *Viner's Abridgment,* 523, *placitum* 11.]

A, TENANT for life, remainder to trustees to preserve, &c., remainder to C the plaintiff in tail, remainder over, with power for A with consent of trustees to fell timber, and the money arising to be invested in lands, &c. to same uses, &c. A felled timber to the value of 3,000*l.* without consent of trustees, who never intermeddled, and A had suffered some of the houses to go out of repair. C, by bill, prayed an account and injunction. The Master of the Rolls said that the timber may be considered under two denominations, to wit, such as was thriving and not fit to be felled, and such as was unthriving, and what a prudent man and a good husband would fell, &c.; and ordered the Master to take an account, &c., and the value of the former, which was waste, and therefore belongs to the plaintiff, who is next in remainder of the inheritance, is to go to the plaintiff, and the value of the other is to be laid out according to the settlement, &c. But as to repairs, the Court never interposes in case of permissive waste, either to prohibit or give satisfaction, as it does in case of wilful waste; and where the Court, having jurisdiction of the principal, viz., the prohibiting, it does in consequence give relief for waste done, either by way of account, as for timber felled, or by obliging the party to rebuild, &c., as in case of houses, &c., and mentioned Lord Barnard's Case as to Raby Castle, 2 Vern. 738. But as to the repairs, it was objected that the plaintiff here had no remedy at law, by reason of the estate for life to the trustees mean between plaintiff's remainder in tail and defendant's estate for life, and that therefore equity ought to interpose, &c., and that this was a point of consequence. *Sed non allocatur.*

ROLT *v.* LORD SOMERVILLE.

BEFORE LORD HARDWICKE, C., TRINITY TERM, 1737.

[*Reported in* 2 *Equity Cases Abridged*, 759.]

THE case in effect was thus: A very considerable real estate was limited to Mrs. Rolt (who afterwards married the defendant, the Lord Somerville) for life, without impeachment of waste; remainder to the plaintiff Rolt for life, without impeachment of waste, with several remainders over. The defendant, the Lord Somerville, to make the most of this estate during the life of his wife, pulled down several houses and out-buildings upon the estate, and sold the same, and also took up lead water-pipes that were laid for the conveyance of water to the capital messuage, and disposed thereof, and he also cut down several groves of trees that were planted for the shelter or ornament of the capital messuage. Upon this a bill was brought by the plaintiff to compel the defendant to account for the money raised by the particulars before mentioned, and to put the estate in the same plight and condition that it was before. To this the defendant demurred, and thereby insisted that this waste was committed by tenant for life, without impeachment of waste, and therefore he was not liable to be called to an account for what he had done either in law or equity; and if he was, yet the plaintiff could not call him to an account, because he was not a remainder-man of the inheritance.

THE LORD CHANCELLOR. Though an action of waste will not lie at law for what is done to houses, or plantations for ornament or convenience, by tenant for life without impeachment of waste, yet this Court hath set up a superior equity, and will restrain the doing such things on the estate. In Lord Barnard's Case the Court restrained him from going on, and ordered the estate to be put in the same condition. In Sir Blundel Charleton's Case the Master of the Rolls decreed that no trees should be cut down that were for the ornament of the park; but Lord Chancellor King reversed that, and extended it only to trees that were planted in rows. My only doubt is, as to the trees that have been cut down, for if this bill had been brought before such trees had been cut down as were for the ornament or shelter of the estate, this Court would have interposed; but here the mischief is done, and it is impossible to restore it to the same condition as to the plantations, and therefore it can lie in satisfaction only; and I cannot say the plaintiff is entitled to a satisfaction for the timber which is a damage to the inheritance, yet as to the pulling down the houses and buildings, and laying the lead pipes, they may be restored, or put in as good condition again. In the case of my Lord Barnard there were directions for an

issue at law to charge his assets with the value of the damages, he not having performed the decree in his lifetime.

The demurrer was allowed as to satisfaction on account of the timber, but overruled as to the rest.[1]

USBORNE v. USBORNE.

March 7, 1740.

[*Reported in Dickens*, 75.]

The order of this date states that the plaintiff, under an assignment, was entitled to a mortgage term of five hundred years of two farms and premises, for securing 630*l.* and interest from the defendant Usborne, subject to redemption; that Usborne had sold the timber standing and growing on the mortgaged premises to the defendant Bathurst; that he had entered on the mortgaged premises, and cut down several trees, and threatened to cut down more, by means whereof the mortgage security would be lessened. It was therefore ordered that an injunction should be awarded to stay the defendants, &c., from committing any waste or spoil on the premises, &c., until answer and further order.

Note. — A similar order in Hopkins *v.* Monk, A. D. 1742, and in Uvedale *v.* Uvedale, March 7, 1740; and by Lord Thurlow, C., in Gross *v.* Chilton, April 25, 1782, after a doubt and consideration, thinking it was the mortgagee's fault in permitting the mortgagor to continue in possession.

BRADLY v. STRATCHY.

Before Lord Hardwicke, C., March 19, 1740.

[*Reported in Barnardiston, Chancery*, 399.]

The plaintiff was patron of a church, and the defendant was parson of it. The defendant had committed waste upon the glebe.

Thereupon the present bill was brought by the plaintiff against the defendant, in order to have an injunction to restrain the defendant from committing any further waste upon it; and an affidavit was made, setting forth that he had committed this waste. Last night an application was made in order to have an injunction.

The Lord Chancellor at that time thought that this was not such a case wherein the Court could interpose by granting an injunction, and

[1] I have been informed that this cause of Rolt and Lord Somerville was afterwards referred to two friends, and amicably settled.

inclined to think likewise that the affidavit was hardly sufficient. His Lordship said now, that he had considered of this case again, and he was fully satisfied that the injunction ought to be granted. He said that when this matter came before the Court he thought at that time that a bill could not be brought by the patron against the parson in a case of this nature, and that the proper remedy was for a bill to be brought in the name of the Attorney General, at the relation either of the patron or of some other person. But now he was convinced that a bill of this kind might well be brought by the patron. It appears by Richard Liford's Case in 11 Rep. 49, that the patron may have a prohibition in the courts of common law in a case of this nature. So if a prebendary commits waste in his prebend, it appears in the same case that the patron may have a prohibition. In the same case it is taken notice of that the Bishop of Durham committed waste in his bishopric, upon which occasion redress was applied for to the Parliament holden at Carlisle. The answer that the Parliament made was, "Let him be forbidden by writ out of the Chancery that neither he nor his servants commit waste in the premises."

His Lordship said that that resolution of the Parliament was agreeable to the reason of the cases before mentioned, namely, that as in the former cases where private persons are patrons, the remedy for them is by prohibition; so in cases of bishoprics, where the king is patron, there ought to be the like remedy by obtaining a prohibition out of Chancery. In 2 Rol. Abr. 813 there are three or four instances wherein prohibitions have been granted in the case of waste committed by ecclesiastical persons. A prohibition was the ordinary remedy for waste at the common law, and on that ground it is that injunctions of that kind are granted in this court; for these reasons his Lordship said that, with regard to the nature of the case, it is extremely certain that the patron may have an injunction. The only remaining doubt relates to the affidavit; and his Lordship's opinion was that that was certain enough, by reason of the reference that it has to the bill.

And so his Lordship was pleased to order accordingly.

PACKINGTON'S CASE.

BEFORE LORD HARDWICKE, C., MAY 9, 1744.

[*Reported in* 3 *Atkyns*, 215.]

SIR HERBERT PACKINGTON, tenant for life, without impeachment of waste, of an estate at Westwood, in Worcestershire, being out of the kingdom, his agent was made defendant to a bill brought to stay waste by Mr. Packington, son of Sir Herbert, and first tenant in tail, and has put in an answer.

The motion now was for an injunction to stay Sir Herbert Packington's agent from cutting down trees in the park at Westwood, which are either an ornament or shelter to the mansion-house.

THE LORD CHANCELLOR. It might be for the interest of private families if the common law had not given so large a power to tenant for life without impeachment of waste, equal to a tenant in fee; but the common law thought it for the interest of the public, as timber might thereby circulate for shipping and other uses.

But this Court has restrained their power greatly, in comparison of what it was formerly. The first case came before Lord Cowper, of Vane *v.* Lord Barnard, 2 Vern. 738, where the defendant was restrained from pulling down Raby Castle. The Court has gone further, and has restrained such tenant for life from cutting down timber, either for ornament or shelter of the house; and further still in the case of Charlton *v.* Charlton, in extending it to the case of a park. There was, indeed, a difference of opinion between Lord Chancellor King and the Master of the Rolls, but only in part, for Lord King continued the injunction as to trees for ornament or shelter, but dissolved it as to straggling trees. It is very proper for the Court to preserve trees that are a shelter to the mansion-house.

In the present case only three oaks have been cut down, and if there was no intention to commit further waste it would be material, but this appears to be but the beginning of waste; for Sir Herbert Packington's letter has been read in 1741, whilst he was abroad, in which he says, if his son will not join with him in cutting off the entail, he will give orders for cutting down all the ornamental timber trees.

The question is whether these are grounds for an injunction to stay waste. The first objection is that these trees grow in a wood, and have arisen naturally and by accident, and not from planting. But I do not think this will hold, because, whether trees grow naturally or were planted, if they serve as an ornament or shelter, it amounts to the same thing; and it is very probable the situation of the house was chosen for the sake of cutting ridings and vistas through the woods; and I can mention two of this kind of my own acquaintance, Hampstead, a seat of Lord Craven's, and another in Essex.

I will restrain the defendant, therefore, from cutting down trees in lines or avenues, or ridings in the park; and likewise, from cutting down trees that are not of a proper growth to be cut.

Upon a suggestion that this might create disputes as to what were of proper growth, and that very little young timber grows in this park, his Lordship left out the last part of the order; and as to the other, granted the injunction.[1]

[1] His Lordship granted the injunction "to restrain Sir H. Packington, his agents, servants, and workmen from cutting down timber trees growing in Westwood Park aforesaid, which were for the shelter or ornament of the said mansion-house there; and also any timber trees which were planted or grew in any lines, avenues, or ridings, for the ornament of the said park, until the said Sir H. Packington shall fully answer the plaintiff's bill." Reg. Lib. B. 1744, fol. 825.

PACKINGTON *v.* PACKINGTON.

BEFORE LORD HARDWICKE, C., AUGUST 3, 1745.

[*Reported in Dickens*, 101.]

UPON showing cause for continuing the injunction, which had been granted to stay the defendant, who was tenant for life without impeachment of or for waste, from cutting down trees which were planted, or were standing or growing, in vistas or for shelter or ornament, &c., the plaintiff was going to read affidavits; but Lord Hardwicke, C., said it was unnecessary, for that the plaintiff being the eldest son of the defendant, and the first in remainder after his death, under the defendant's marriage settlement, the defendant, in stating his own rights, must show the plaintiff's, and for that, instead of denying the acts sworn to have been done by him, he admitted them, and insisted on a right under his settlement; but notwithstanding the defendant by his answer says, that although he had threatened to cut down, &c., it was not his intention, and that he did not mean to cut down any more, yet having uttered those threats, and having done what he ought not, it behoved the Court to prevent his doing further waste or spoil, and therefore the Court continued the injunction.

His Lordship, in the course of his reasoning, put these questions: On showing cause to continue an injunction to stay waste, is the plaintiff confined, as in an injunction to stay proceedings at law, to make out his case from the answer only; and may the plaintiff strengthen his case by affidavits?

His Lordship said the plaintiff might read the answer to show his right, and might also read affidavits to make out the waste.

PERROT *v.* PERROT.

BEFORE LORD HARDWICKE, C., JUNE 30, 1744.

[*Reported in* 3 *Atkyns*, 94.]

THERE was a limitation in a settlement to the defendant for life, to trustees to preserve contingent remainders, to his first and every other son in tail, remainder to plaintiff for life,[1] with remainder to his first and every son in tail, reversion in fee to the defendant. The first tenant for life[2] cuts down timber; the plaintiff, who is the second tenant for life, brings his bill for an injunction to stay waste.

1 Remainder to trustees to preserve contingent remainders.

2 Before he had any son born.

Mr. *Attorney General*,[1] for the plaintiff, showed cause why the injunction for restraining the defendant from committing any further waste should not be dissolved.

It was insisted by Mr. *Solicitor General*,[2] for the defendant, that the timber which he has cut down is decayed trees, and will be the worse for standing, and it is of service to the public that they should be cut down; and that it is very notorious that timber, especially oak, when it is come to perfection, decays much faster in the next twenty years than it improves in goodness the twenty years immediately preceding. That, as the defendant has exercised this power in such a restrained manner, and confined himself merely to decayed timber, which grows worse every day, this Court will not interpose, especially as the plaintiff is not entitled to come into this court, as he has not the immediate remainder, and besides has no remedy at law.

The Lord Chancellor. The question here does not concern the interest of the public, unless it had been in the case of the king's forests and chases; for this is merely a private interest between the parties; and it is by accident that no action at law can be maintained against the defendant, because no person can bring it but who has the immediate remainder. Consider, too, in how many cases this Court has interposed to prevent waste. Suppose here the trustees to preserve contingent remainders had brought a bill against the defendant to stay waste for the benefit of the contingent remainders. I am of opinion they might have supported it; but here it is the second tenant for life who has done it, and though he has no right to the timber, yet if the defendant, the first tenant for life, should die without sons, the plaintiff will have an interest in the mast and shade of the timber. The case of Welbeck Park, which has been mentioned, was a very particular one, because there, by the accident of a tempest, the timber was thrown down, and was merely the act of God. But this is not the present case, for here a bare tenant for life takes upon him to cut down timber, and it is not pretended that they are pollards only: and though the defendant's counsel have attempted to make a distinction between cutting down young timber trees that are not come to their full growth and decayed timber, I know of no such distinction, either in law or equity. Therefore, upon the authority of those cases, which have been very numerous in this court, of interposing to stay waste in the tenant for life, where no action can be maintained against him at law, as the plaintiff has not the immediate remainder, the injunction must be continued till the hearing.

[1] Sir Dudley Ryder. — Ed. [2] Hon. William Murray. — Ed.

ROBINSON *v.* LYTTON.

BEFORE LORD HARDWICKE, C., DECEMBER 12, 1744.

[*Reported in* 3 *Atkyns*, 209.]

THE father of the plaintiffs and defendant, by his will, devised to the defendant, his son, John Robinson Lytton, the lands upon which the question arises, to him and his heirs for ever, and in case he should not live to twenty-one, and die without issue, he gave the lands to his daughters (who are the plaintiffs) with several remainders over; then he goes on and says, "My will is, in case my son shall not attain twenty-one, my estate shall be sold and the money divided among my daughters for an augmentation of their fortunes," and gave to his daughters 10,000*l.* besides. The estate which came to the son by settlement was between three and four thousand pounds a year.

The son, who wants about three quarters of a year of coming of age, intends cutting down three thousand pounds worth of timber off the estate.

The bill is brought by the daughters amicably[1] for an injunction to stay waste, and in order to have the opinion of the Court on this point, whether the defendant had a right to cut down the timber.

THE LORD CHANCELLOR. If the defendant has a legal right, and there are no equitable circumstances to restrain him, I shall not do it. But though he may have a legal right, yet, if there are equitable circumstances, he may be restrained, and it is not proper for me to give a liberty in doubtful cases.

As to the intention of the testator, he certainly had not the least thought that the son, before his age of twenty-one, should fell all the timber upon the estate.

The inheritance is constituted of the land and timber upon it, and that is devised to be sold for the benefit of his daughters.

The intent was to give the value of the estate at the time it was devised.

A person having meadow ground might as well make it arable.

What is the will? The clauses must be construed as if they were in one and the same clause. Suppose the last clause had been first, the defendant would have been considered as a trustee of the inheritance for the benefit of the daughters; and that is the point I shall ground the injunction upon to stay waste.

This Court has gone greater lengths to stay waste than the courts of law have in giving actions or granting prohibitions against it; as where there is tenant for life, remainder for life, remainder in fee; so where there is tenant for life subject to waste, remainder for life

[1] Compare 1 Ves. 526. — ED.

dispunishable for waste, remainder in fee, the Court will not suffer an agreement between the two tenants for life to commit waste, to take place against the remainder-man, before the time comes when the second tenant for life's power commences. So, in mortgages and securities, where the mortgagor has been in possession, it is always granted, because the whole estate is a security; but the Court does it more strongly where there is a trust.

The clause in this will amounts to as much as if he had said, "I give my estate to my son and his heirs, till twenty-one, to receive the profits, then to increase my daughters' portions;" and here there could be no doubt but the Court would have done it.

There are at this day three sorts of estate in lands; the legal estate, that is the fee or freehold. Secondly, the use, which by the statute draws the legal estate after it. Thirdly, the beneficial interest. How does it stand upon this devise? There is an undoubted estate in fee. in the defendant, and he may receive the profits till twenty-one. This amounts to a devise of the beneficial interest to him for that time, and it would be very extraordinary to suffer him to take away a great part of the inheritance of the estate, which was directed to be sold, not for strangers, but for the benefit of the daughters for their portions. The father is to judge of the provision for his children. After giving the daughters 10,000*l.*, he then directs this shall go in augmentation. There have been several cases put which have never been determined, as that of a child *en ventre sa mere*, but always said *arguendo*, and I should make no scruple in such a case to grant an injunction. Suppose the case of an executory devise, as in Gore *v.* Gore,[1] I should doubt whether the heir-at-law ought not to be restrained from committing waste in the meantime.[2] I am therefore of opinion the injunction ought to be made perpetual. It is pursuing the intention of the testator, and preserving the value of the estates intended to go to his daughters.

SAME CASE.

[*Reported in* 8 *Viner's Abridgment*, 475, *placitum* 16.]

A MAN devised to the now defendant by the name of his youngest son, John, and his heirs, all his estates in W.; and in case his son should not live to attain the age of twenty-one, leaving no issue lawfully begotten, he devised the estates to the plaintiff, Elizabeth, his eldest daughter, and the heirs male of her body, with like limitations over to his other daughters; and in case his son should attain the age of twenty-one years, then he devised the estate to be sold, and the

[1] 2 P. Wms. 28. [2] See Stansfield *v.* Habergham, 10 Ves. 273. — ED.

money arising from such sale he devised amongst all his daughters as an augmentation to their fortunes. There was a great deal of timber upon the estate, which John, the son, was cutting down; and now they moved for an injunction to stay him.

The Solicitor-General,[1] for the injunction, said there were many cases where this Court would grant such injunctions in favor of persons not entitled to an action of waste at law, as where there is tenant for life, remainder for life, reversion in fee; so for an infant *en ventre sa mere;* and cited Freeman's Reports, Trin. Term, 1680.

The Lord Chancellor was of opinion that he ought to grant an injunction; he said he thought he was to be considered as a trustee of the inheritance for the benefit of the daughters, and that it was the intention of the testator, he thought, to give him the beneficial interest, but that it would be strange if he was to take away under such a devise the greater part, perhaps, of the estate.

He said, though there had been no case determined where this Court had granted an injunction to stay waste for an infant *en ventre sa mere*, yet he should not scruple to do it if such a case should happen, and he should be inclined to restrain an heir-at-law in case of an executory devise. *Injunction granted, and made perpetual.*

Note, the particular reason upon which he founded his judgment he declared to be because he looked upon the devisee, John, as a trustee by the intention of the testator.

JESUS COLLEGE *v.* BLOOM.

Before Lord Hardwicke, C., November 4, 1745.

[*Reported in Ambler*, 54.]

This bill was brought by the Master and Fellows of Jesus College, in Oxford, for an account of timber cut down on the premises by them let to the defendant, and for an account of some stones which he had carried off the land.

The Lord Chancellor. This is the most extraordinary bill that ever was brought in this court, and I hope never to see one of the like nature again.

On this bill there arise two questions: First, whether bills are to be maintained in this court merely for timber cut down after the term is gone out of the tenant by assignment? or, whether such bills can only be brought for an account of such waste done, without at the same time praying an injunction? And I am of opinion that they cannot. Waste is a loss for which there is a proper remedy by action; in a court of law

[1] Hon. William Murray. — Ed.

the party is not necessitated to bring an action of waste, but he may bring trover; those are the remedies, and therefore there is no ground of equity to come into this court, for satisfaction of damages is not the proper ground for the Court to admit of these sort of bills, but the staying of waste; because the Court presumes when a man has done waste he may commit the same again, and therefore will suffer the lessor or reversioner, when he brings his bill for an injunction to stay waste, to pray at the same time an account of the waste done; for though a Court of law may give damages, yet it cannot prevent further waste: and it is upon this ground, to prevent multiplicity of suits, that this Court will decree an account of waste done at the same time with an injunction; just like the case of a bill brought for discovery of assets, an account may be prayed at the same time; and though originally the bill was only brought for a discovery of assets, yet, to prevent multiplicity of suits, the Court will direct an account to be taken.

If the Court were to allow of these sort of bills, it would create infinite vexation; there is not one precedent to warrant it. The cases cited do not come up to the present. Bewick *v.* Whitfield. It does not appear in that case that an injunction to stay waste generally was not prayed; if it was, that brings it within the common case. As to the case of the Bishop of Winchester *v.* Knight,[1] I am at a loss to know upon what grounds the Court went. The book says because it was a demand against an executor; but I doubt greatly as to this, for it is far from being a general rule of this Court to entertain a bill against an executor for a tort committed by his testator. The more probable reason for decreeing an account in that case seems to be because it was the case of mines; and the Court always distinguishes between digging of mines and cutting of timber, because the digging of mines is a sort of trade; and there are many Cases where this court will relieve and decree an account of ore taken, when in any other tort or wrong done it has refused relief. If this be the reason of the determination in that case, as I really think it is, it stands quite different from the present. I am therefore of opinion, upon this first head, that this bill brought by Jesus College, to have satisfaction for timber cut down after an assignment of the lease, when the proper remedy is at law, ought to be dismissed.[2]

[1] 1 P. Wms. 406.

[2] The remainder of the case, which relates only to a question of costs, is omitted. — Ed.

ATTORNEY-GENERAL *v.* BURROWS.

BEFORE LORD HARDWICKE, C., MAY 6, 1747.

[*Reported in Dickens*, 128.]

THE defendant's denying he had committed waste since the filing of the bill, Lord Hardwicke, C., said was not an inducement to refuse an injunction; for as he admitted he had done waste, he might do further waste.

Suppose it had been the first time a doubt had arisen respecting the admission of proof in support of an injunction to stay waste, it is submitted whether the defendant, by taking notice of the affidavits upon which the injunction was founded, and saying they were almost wholly untrue, doth not call upon the Court to inquire what those affidavits are. The Court is concerned; for if untrue the Court was imposed upon, and misled to grant the injunction: if true, the same reason will hold for continuing as there was for granting the injunction; and further, the defendant, by saying that part of the affidavits was untrue, is in effect admitting the other parts to be true; and that part may be such as to warrant the injunction. J. D.

ASTON *v.* ASTON.

BEFORE LORD HARDWICKE, C., JUNE 27, 1749.

[*Reported in* 1 *Vesey*, 264.]

SIR THOMAS ASTON, in the same settlement in which he makes himself tenant for life without impeachment of waste, with full liberty to commit waste, settles a jointure upon his wife for life without impeachment of waste.

On settling another part, he creates a term on a trust to secure a rent-charge of 300*l.* per annum to his wife, as a further part of her jointure, and afterwards, out of the rents and profits thereof, to raise money from time to time, to reimburse her expenses in sustaining and repairing her jointure estate.

After his death, she, having this charge on the estate of her son, lets this annuity, together with the interest of 3,100*l.* given her by her husband's will, run in arrear for three years. Upon her son's marriage she gave up the said arrear due, and also 2,000*l.* which he owed her, because he could not otherwise make a jointure within the settlement. She saw him but twice afterwards: he goes abroad, and there is an arrear of eight years during his life.

Upon his dying without issue the estate came to his sister Catherine, who brought this bill against her mother, Lady Aston, to enjoin her

from committing further spoil and destruction upon her jointure estate, and for satisfaction for the damage already done thereby; suggesting that she had cut down even such timber as was not fit for repairs, as young saplings, &c., not leaving a twig on the estate; and also to be quieted in the enjoyment of the lands free from the arrear incurred in her brother's life.

THE LORD CHANCELLOR. The questions before the Court are of that nature as depend more on the latitude of discretion of a court of equity than many other cases; and therefore more difficult for a judge to satisfy himself in the determination he is to give, which is to arise on the circumstances of the case, than in other cases where he might be guided by particular rules. Yet the Court must go by some rule, and not make such a determination relating to property, especially real property, as may be attended with inconvenience and uncertainty.

As to the first question, of the waste, consider it as it may in general concern [illegible] for life without impeachment of waste under a settlement; for though this is a particular case, the consideration of the general will give light therein.

It is usual in marriage-settlements to make the father tenant for life without impeachment of waste, and sometimes the words, "with full liberty to commit waste," are added, as here, to the husband's estate. But then it is most usual to insert restrictions, as except in houses, &c. So in making grandfather tenant for life in voluntary settlements and devises; so of father, owner of the estate, and making the settlement. This, therefore, may concern all such persons, and the question is, what a court of equity would do if it arose against persons in those circumstances? At common law that clause, "without impeachment of waste," only exempted tenant for life from the penalty of the statute, the recovery of treble value and place wasted; not giving the property of the thing wasted: but in Lewis Bowles's Case [1] it was determined that these words also gave the property; the necessary consequence of which was that in general, unless on particular circumstances, he was not to be restrained in equity, for that would be to determine that he should not make use of that property the law allowed him. But afterwards several instances were considered, in which this very large power might be exercised contrary to conscience, and in an unreasonable manner, by tenant for life; as where his act was to the destruction of the thing settled, which was the ground of Lord Barnard's Case, the strongest that could happen; yet that was not an original case, without precedent or judicial opinion to support it, as appears from a case, 5 Jac. 1 (before Lewis Bowles's case), which probably occurred then; though the determination there did not operate on it. If tenant for life without impeachment of waste pulled down farm-houses, in general I should no more scruple restraining him than I should from pulling down the mansion-house (unless where he pulled down two to make into one in order to bear the burthen but of one), it tending

[1] 11 Co. 79.

equally to the destruction of the thing settled. If, therefore, he should grub up a wood settled, so as to destroy the wood absolutely, I should restrain him; which is the meaning of the words in that case (5 Jac. 1), viz., such voluntary, malicious, intended waste; and in Abraham *v.* Bubb,[1] Pas. 1680 (said to be in a manuscript of Lord Nottingham's collection, which, I believe, I have also seen) it is termed extravagant and humorsome waste. So in 2 C. C. 32, where the Lord Chancellor declares he would stop the pulling down houses in the case of tenant in tail *apres* possibility, &c., which is carrying it a good way, as he has power to commit waste, because the inheritance once was in him; and also in the case of tenant for life by express grant. So in Cooke *v.* Whaley.[2] Since Lord Barnard's Case I have gone farther, and restrained the taking down trees for ornament and shelter to the house: as in the case of Packington *v.* Layton[3] and other cases; but a little farther still in Sir Francis Charlton's Case, who was restrained from cutting down timber growing in an avenue and planted walk in a park; but it depended on the same principle; and though there was a lane between the house and park, yet it was of the same kind with Packington's Case, where the house stood in the park; they being planted to answer the house, and for its ornament and shelter. But there is no case of tenant for life without impeachment of waste where it has gone farther. What is insisted on for the plaintiff is true in general, that law or equity does not depend on the particular cases, but on the general reason running through them; and therefore if a new case happens, not the same in specie, but essentially within them, the same rule ought to govern. It is therefore inferred that the Court ought in general to grant an injunction against tenant for life without impeachment of waste, for cutting down any timber not full grown or proper for building; or any, the doing of which might be a spoil or prejudice to the estate for the future. Something of that kind might be wished for; but it is in general difficult to attain, and inconvenient to do it. Nor does it fall within the reasoning of the case mentioned. Was the Court to take such large strides, resort must always be to a court of equity; for no certain rule can be laid down, as it cannot be taken from the value of the trees, which will differ according to the sort and circumstances; nor from the purchase of estates; and some timber may be fit for one kind of building, not for others. But the reasoning of the cases of pulling down farm or mansion houses, or trees for ornament or shelter, does not come up to this; for the consequence of cutting down timber, perhaps too young, does not tend to the destruction of the thing settled, although it tends to its prejudice for a time, for timber will grow again in a few years; not so of houses. Nor will young trees planted in avenues pulled down serve for the purpose as before; for, having been put there for the convenient enjoyment of the house, they are considered as appurtenant thereto, and can no more

[1] 2 Freem. 55, 2 Show. 69. [2] 1 Eq. Cas. Abr. 400. [3] 3 Atk. 216.

be destroyed by such tenant for life than the house itself. But it would be very dangerous for the Court to use such a latitude as to extend this to the taking away the profits of the estate by tenant for life to the prejudice of the remainder-man, which his estate for life without impeachment of waste gives him liberty to do.

This on the general question relating to tenant for life without impeachment of waste under a settlement.

Next, consider how it stands on the circumstances, which are very special, and which differ it from the case of a father making a settlement on a son. But it is all in his own handwriting, who does not appear to have been bred a lawyer; and though a counsel was said to be employed, there is no evidence thereof. It is natural to conclude that from the variety of expressions in the additional words to the clause, wherein he makes himself tenant for life, he thought there was some difference. Besides, the term for her reimbursement is extraordinary, and absurd to suppose he meant to leave her at liberty to cut down and strip the estate of every stick of timber (which are the natural botes for repairs), and then to come by this term to be reimbursed her expenses in buying timber for repairs, it being contrary to the plain intent, which was, that she should be tenant for life without impeachment of waste to prevent trouble in little matters; but still that the timber growing on the estate, and the natural fund for it, should be applied for that, but that she should be reimbursed out of this term what she should pay out of her own pocket. Therefore, as the defendant has cut down timber on this estate without applying it to repairs, she shall have no benefit of this term till she has reimbursed to the estate what she has so unreasonably cut away; and as to the future, the evidence being that she has left no timber fit even for repair of farm-houses, I will restrain her by the decree from cutting any more timber off the estate without leave of the Court.[1]

FARRANT *v.* LOVEL.

BEFORE LORD HARDWICKE, C., FEBRUARY 12, 1750.

[*Reported in* 3 *Atkyns*, 723.]

A BILL was brought by a ground landlord to stay waste in an underlessee, who held by lease from the original lessee.

THE LORD CHANCELLOR. A certificate being produced of the waste, I am of opinion the plaintiff has the same equity as in other cases of injunctions. As where there is tenant for life, remainder for life, remainder in fee, yet the Court, on a bill brought by the remainder-

[1] The remainder of the case, not relating to the subject of waste, is omitted. — ED.

man in fee to stay waste in the first tenant for life, will, notwithstanding the intermediate estate for life, upon a certificate of the waste, grant an injunction. So, where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the Court, on a bill brought by the mortgagor to stay waste, and a certificate thereof, will grant an injunction. So, likewise, where there is only a mortgage for a term of years, and the mortgagor commits waste, the Court, on a bill by the mortgagee to stay waste, will grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance.

For these reasons his Lordship granted an injunction to stay waste.

PIERS *v.* PIERS.

BEFORE LORD HARDWICKE, C., JULY 23, 1750.

[*Reported in* 1 *Vesey*, 521.]

THE plaintiff brought an original bill against his father, tenant for life without impeachment of waste, to have £1,000 raised and settled according to agreement; and also a supplemental bill for waste committed at a house in Wells by the father's pulling up a deal floor and removing it to his house at Bradley (which was said to be like pulling down a mansion-house, as the case of Raby Castle); his removing some young oaks; turning meadow into plough-land, and the contrary.

THE LORD CHANCELLOR. It is very unfortunate such an expense should be created between a father and son. The clause, without impeachment of waste, is generally put in to prevent disputes of this kind: but if it was to be so made use of, that a son should have it in his power to call a father into a court of equity for every alteration he makes in a walk or an avenue, though he removes the trees to another part, and so of the house, it would be such a fund for disputes between a father and son, there would be no end of it; and it would be better for the public that Raby Castle had been pulled down than that precedent had been made. It is not an immaterial circumstance for the defendant that an injunction was never applied for, which is always done on such a bill as this; which must be maintained on the head of destruction and spoliation. Besides, this floor was placed, and the trees planted, by the father himself: therefore, if no more in the case, I would dismiss the supplemental bill with costs to be taxed.[1]

[1] So much of the judgment as relates to the original bill has been omitted. — ED.

O'BRIEN *v.* O'BRIEN.

BEFORE LORD HARDWICKE, C., MAY 21, 1751.

[*Reported in Ambler*, 107.]

BY indenture, dated 12th March, 1730, between the defendant Henry O'Brien and Margery, his wife, of the first part; Henry Stainer and Edward Hogan, of the second part; Richard Connell and Pool Hickman, Esqrs., of the third part; Francis Burton and Robert Hickman, Esqrs., of the fourth part; and William Stainer, of the fifth part; in consideration of a marriage thentofore had between the defendant Henry O'Brien and Margery, his wife; and in performance of certain articles, dated the 30th of October, 1730, the manors, &c. of Blatherwicke, in the county of Northampton, and Tixover, in the county of Rutland, were, amongst other estates, conveyed to trustees, to the use of the said defendant, Henry O'Brien, for life, without impeachment of waste; remainder to the first and other sons of the marriage between him and the said Margery in tail; remainder to the first and other sons of the said Henry, or any after-taken wife in tail male; remainder to the plaintiff Donatus O'Brien, the father, for life, without impeachment of waste; remainder to his first and other sons in tail male, with other remainders over. Henry O'Brien, the first tenant for life, having conveyed his life estate to the defendant, Sir Edward O'Brien, and he threatening to cut down all the trees and timber growing on the estates in England, the plaintiffs filed their bill against the defendants, praying an injunction to stay the defendants from committing any waste on the estate: stating the above settlement; that Henry had no issue by the said Margery, and that they had been long separated; that great part of the timber trees growing on the said estates were standing and growing in a walled-in park called Blatherwicke Park, and stood near the capital seat of the family and other houses upon the said estate, and either served for the shelter thereof or were set in rows, walks, vistas, avenues, or clumps, and were great ornaments thereto; great part whereof were of a late growth, being planted about twenty-five years before, and many thousands of them were young saplings, greatly beneficial to the estate, but of very small value if cut down, not being worth above 2*s.* 6*d.* a-piece, one with another.

Upon an affidavit of the above facts, Mr. *Solicitor-General*,[1] Mr. *Wilbraham*, and Mr. *Waller*, this day moved that an injunction might be awarded to stay the defendants from committing any waste or spoil on the premises.

His Lordship ordered that an injunction should be awarded to stay the defendants, &c., from cutting down any timber trees, or other trees

[1] Hon. William Murray. — ED.

growing on the said estate which were planted or growing there for ornament or shelter of the mansion-house, or that grew in vistas, planted walks, or lines for the ornament of the park, part of the premises in question; and also from cutting down any saplings growing on any other part of the estate in question, not proper to be felled, until answer and other order to the contrary.

KNIGHT *v.* MOSELY.

BEFORE LORD HARDWICKE, C., JULY, 1753.

[*Reported in Ambler, Blunt's edition*, 176.]

BILL by patron against rector, to stay waste in digging stones, &c., on the glebe, other than what is necessary for repairing and improving the rectory; and for an account of what had been dug and sold, to be paid to plaintiff or such person as is entitled thereto. Demurrer as to the account, and also as to staying the digging of stones other than, &c., and by way of answer set out, that the quarries were opened before.

THE LORD CHANCELLOR.[1] The parson has a fee simple qualified and under restrictions, in right of the church; but he cannot do everything that a private owner of an inheritance can. He cannot commit waste, nor open mines, but may work those already opened. Even a bishop cannot. Talbot, Bishop of Durham, applied to Parliament to enable him to open mines, but rejected. Parsons may fell timber or dig stone to repair; and they have been indulged in selling such timber or stone

[1] As the judgment in this case seems very imperfect, the editor has subjoined the following note of what the Lord Chancellor said, as given in Mr. Hargrave's MSS.:

"THE LORD CHANCELLOR. The demurrer cannot be supported by the averment of any matter of fact. The material part of the demurrer is to that part which seeks to restrain the parson from getting stone out of the glebe, except for the use of the rectory. I cannot take the answer into consideration.

"The rule is, that a parson has a fee simple qualified in right of the church in the possessions of the church, and he is to defend for himself and his successors the inheritance of the church, but he has not the same right as a private owner. He cannot commit waste, nor fell trees, nor work new mines, but he may work such as are open. Bishops cannot do (*ita* in the MSS.). I remember a case of an application to Parliament by Bishop Talbot, to enable him to open new mines in the bishopric, and it was rejected. They may fell trees for repairs, and dig stone to be applied for the benefit of the rectory.

"In Rol. Abr. there is a prohibition of waste to restrain bishops, in the case of the Crown, and the Attorney-General may by information prevent a devastation. If the demurrer had been only to the account, it would have been right, for the patron can take no profit of the living, and there is no instance of his taking and laying it out for the benefit and increase of the rectory: but the demurrer covers too much, and must be overruled for the whole, for it is not like a plea, which is a defence, and may be good for part, and bad for part." Harg. MSS. numb. 472, p. 69.

where the money has been applied in repairs. Injunction has been granted even against bishops to restrain from felling large quantities of timber, at the instance of the Attorney-General on the behalf of the Crown, the patron of bishoprics.

If the demurrer had only gone to the account, it had been good, for the patron cannot have any profit from the living; but it is too general as to staying the digging of stone, &c. And though the answer sets out that the quarry was open before, yet the demurrer cannot have aid from the answer. But it is bad as to that part; and being so, it must be overruled as to the whole; for a demurrer cannot be good in part, and bad in part, as a plea may.

CHAMBERLAYNE *v.* DUMMER.

BEFORE LORD THURLOW, C., JUNE 19, 1782.

[*Reported in* 1 *Brown's Chancery Cases, Belt's Edition*, 166.]

THOMAS DUMMER, ESQ., made his will, by which he devised his freehold and copyhold estates at Cranbury, in the county of Hants, and elsewhere, to the defendant Harriet Dummer, his wife, for and during her natural life, remainder to Charlotte Holland (an elderly lady) for life, remainder to the plaintiff in fee. This will was made a considerable time before his death; but, about a fortnight before his decease, he made two codicils to his will, one of which only was now in question. A clause of this codicil was to this effect: "Whereas, by my will, my wife cannot cut any timber, now my will and mind is, that she may, during so long time as she shall continue my widow, cut timber for her own use and benefit, at seasonable times in the year." Mrs. Dummer, under the power given by this codicil, made contracts for and began to fell timber. The plaintiff filed his bill, and applied to his Honor, the Master of the Rolls,[1] for an injunction to stay the cutting of ornamental timber, or such as served for shelter to any of the mansion-houses, and also of young wood not come to maturity. His Honor, *ex parte*, and unattended by counsel, made an order in Hilary Vacation, 1782, to stay the cutting of any timber whatsoever, until answer and further order. And 18th April, 1782, Mr. *Arden* and Mr. *Serjeant Rooke* moved to discharge his Honor's order, as going farther than the plaintiff's application, and preventing her cutting what she was undoubtedly entitled under the will to cut. The order was supported by Mr. *Attorney-General*,[2] Mr. *Mansfield*, and Mr. *Hollist*. Mr. *Attorney-General* contended that Mrs. Dummer, being by this codicil made tenant for life without impeachment of waste, could not cut down ornamental timber, such as protected buildings, or such as by standing longer would pay

[1] Sir Thomas Sewell. — ED. [2] Lloyd Kenyon, Esq. — ED.

good interest for so doing. Mr. *Mansfield* objected, that several of the trees marked, if cut down, would expose the young saplings to the cold winds. Mr. *Hollist*, that she should cut only what was fully mature, and would suffer by standing, and that nothing was timber under five solid feet; he also contended that under the devise she could not cut for sale, but for her own use upon the estate. The Lord Chancellor utterly rejected the idea that she was to cut for her own use on the estate or for estovers only, and thought that she was entitled not merely to cut timber which would suffer by standing, but everything which could fairly be called timber, although she should not cut such sticks as would only make paling, &c. His Lordship recommended to the parties to accommodate what should be cut under this idea, being willing to save to the defendant the season for cutting timber; but if they could not settle the matter, said he must be attended with affidavits to settle the terms of the injunction. Mrs. Dummer afterwards put in her answer, and admitted cutting trees in the lawns and pleasure grounds at Cranbury, but alleged that it was for the purpose of widening the way to the house, to prevent damps, and improve the place. She admitted also the cutting trees placed in rows at Woolston and Badsley, but that they were such as she did not consider as ornamental; she alleged that oak trees of six inches girth, and sixteen feet in length, or containing four feet of solid measure, were deemed timber trees, and that she had cut down none so small; that ash of five inches girth, and elm of seven, were also esteemed timber, and that she had cut none under those sizes.

Upon motion to discharge the order for the injunction, 19th June, 1782, the Lord Chancellor was of opinion, upon consideration of the case, and of the authorities cited, viz. Packington *v.* Packington, 3 Atk. 215; Aston *v.* Aston, 1 Vesey, 264; Leighton *v.* Leighton, 22d March, 1747–8;[1] Obrien *v.* Obrien, 20th May, 1751; and Lord Castlemain *v.* Lord Craven, 7th December, 1733, 2 Eq. Cas. Abr. 758, 22 Vin. 523, that the injunction should issue nearly in the terms of that of Obrien *v.* Obrien, viz. defendant to be restrained from cutting trees which were saplings, and not proper to be cut as timber.

His Lordship directed: "That the order, dated 28 March (then) last, be discharged; and that an injunction be awarded to restrain the defendant Harriet Dummer, her servants, workmen, and agents, from cutting down any timber and other trees growing on the estate in question, which are [were] planted or growing there for the protection or shelter of the several mansion-houses belonging to the said estates, or for the ornament of the said houses, or which grow in lines, walks, vistas, or otherwise for the ornament of the said houses, or of the gardens, or parks, or

[1] Leighton *v.* Leighton was a bill by the eldest son, tenant in tail, expectant on the death of the father, tenant for life, to restrain him from committing waste by cutting down timber, especially such as was ornamental to the house. The Court, upon affidavit and certificate of the bill filed, granted an injunction to restrain the defendant from committing waste upon such part of the estate whereof he was subject to impeachment of waste, and, as to the mansion-house, out-houses, gardens, and orchards, timber growing for ornament and shelter to the house, to restrain him from committing waste therein till answer or further order.

pleasure-grounds thereunto belonging; and it is further ordered that the injunction do also extend to restrain the said defendant, her servants, workmen, or agents, from cutting down any timber or other trees, except at seasonable times and in a husbandlike manner; and also from cutting down saplings and young trees not fit to be cut as and for the purposes of timber, until the hearing of this cause, or the further order of the Court." Reg. Lib. A. 1781, fol. 452.

GOODWYN *v.* SPRAY.

BEFORE LORD THURLOW, C., FEBRUARY 21, 1786.

[*Reported in Dickens*, 667.]

JOSEPH STANLEY, seised in fee of real estates, died intestate, leaving the plaintiff and the defendant his co-heirs at law, to whom the estate descended as tenants in common, in undivided moieties. The defendant got into possession by virtue of an ejectment, and, having cut down some timber, and threatening to cut down the rest, the plaintiff filed his bill for an injunction to stay waste; and, accordingly, on the 21st of February, 1786, moved by Mr. Brown for an injunction, on the usual affidavit, and his Lordship granted the motion, but before the Court rose, having a doubt whether there could be an injunction to stay a tenant in common from doing what he pleased with his own property, directed me to suspend the order. Mr. Brown, on the 22d, again mentioned it, when the Lord Chancellor was clear in opinion he could not stop the defendant, and the only remedy the plaintiff had was to get a partition, and directed the order not to be drawn up.

MOGG *v.* MOGG.

BEFORE LORD THURLOW, C., MARCH 13, 1786.

[*Reported in Dickens*, 670.]

THE plaintiff was a trustee of certain estates, and in whom the legal estate was vested. The defendant hath not any right, but persuaded the tenants to cut down timber.

Bill for an injunction to stay waste; and this day the plaintiff moved for an injunction accordingly, upon filing the bill. It was mentioned on the 11th, but the Lord Chancellor desired Mr. *Madocks* to see if he could find an instance where a stranger comes upon lands as a trespasser, and cuts down timber or commits waste, in which this Court hath granted an injunction to stay him, saying he was liable to an action by which he might be stayed.

On this day, the 13th, Mr. *Madocks* said he had recollected a case before Lord Camden, C., in which the plaintiff was lord of a manor in Oxfordshire, upon which the defendants claimed a right to estovers, and under that right they cut down timber in one day to the value of 400*l.*; the plaintiff filed his bill for an injunction to stay waste and obtained one; upon its being served, their attorney advised the defendants to desist from cutting down any more timber, but advised other tenants of the manor to cut down timber; upon which Lord Camden granted an injunction to stay waste against persons not parties, and Mr. *Madocks* argued this as a case in point.

The Lord Chancellor said it did not apply, for in that case there was a right to something in the defendants, though perhaps they carried it beyond what such right went to; and that until such right was determined it was very proper to stay them from doing an act which, if it turned out they had no right to do, would be irreparable: but in the present case the defendant had no interest, he was a mere trespasser; and being such, an action of trespass would lie against him; and therefore his Lordship would not grant the motion.

COUNTESS OF STRATHMORE *v.* BOWES.

Before Sir Lloyd Kenyon, M. R., Trinity Term, 1786.

[*Reported in* 2 *Brown's Chancery Cases*, 88, *and in* 1 *Cox*, 263.]

Mr. Mansfield moved for an injunction to restrain the defendant from committing waste by cutting down timber in the avenues, &c., of the estate of the late Mr. Bowes, at Gibside.

By the settlement on the marriage of the late Earl of Strathmore with Miss Bowes, he was made tenant for life without impeachment of waste, except voluntary waste in houses, remainder to Lady Strathmore (then Miss Bowes) in like manner, remainder over to the present Earl, &c. After the death of Lord Strathmore, the defendant intermarried with Lady Strathmore, and, being seised in her right (but living separate from her) had committed great waste in cutting timber and marking other timber to be cut; among the rest young saplings, not usually cut in the course of cutting timber.

The injunction moved for was to restrain him from cutting timber or doing any waste in the rides or avenues to the house, or cutting timber that was of shade or ornament to the house, and trees unfit to cut as timber.

The defendants insisted they had neither cut nor marked any saplings, or improper timber, or any trees near the house, but in rides through the woods, a mile from the house.

His Honor granted the injunction, saying, it ought to include every-

thing useful or ornamental to the house. A ride through a wood is more constitutive to the beauty of a place. He thought himself bound to grant an injunction as to the ornamental trees, though they should not be planted trees, but trees growing naturally. He therefore directed the injunction to be in the terms of Mrs. Dummer's, and to extend to cutting young saplings and trees not fit to cut as timber.

JULY 11.

On the last day of the term, the answer in the mean time being put in, by which the defendant swore that he had not cut, nor intended so to do, any timber or ornamental trees, or any saplings, although the woods received injury from some of them not being weeded out, and the plaintiff not having excepted to the answer, the defendant moved to dissolve the injunction in the first instance without obtaining any order *nisi*.

His Honor, on hearing the answer read, thought the plaintiff could not sustain the injunction, and intimated that he should take the answer to be true *pro hac vice*, and also to be a full one, not being excepted to.

Mansfield, for plaintiff, insisted that the time for excepting to the answer had not yet expired, but that in cases of this nature when the injunction is obtained before answer, the defendant being at liberty to move to dissolve the injunction in the first instance on the coming in of the answer, without any order *nisi*, the practice was that the answer was merely to be read as an affidavit; and Mr. Dickens the register said that if the injunction should be dissolved, yet on exceptions being allowed to the answer, the injunction would be revived. Mansfield offered to read the affidavits again in opposition to the answer; but his Honor, doubting of the regularity of this, ordered the motion to stand over from the last day of Term to this day, being the First Seal, that precedents might be looked into.

It was now mentioned again, and Mr. Mansfield and Bicknell mentioned several precedents for reading the affidavits. They were taken by Bicknell from the register books, Gibbs *v.* Cole, 3 Wms. 255. "Order for injunction 27th of April, 1734. Order *nisi* to dissolve the injunction on coming in of the answer, 1st of May, 1734. Order for continuing the injunction upon, *inter alia*, the affidavit of John Barlock, sworn 30th of April, and filed 1st of May, 1734."

Ryder *v.* Bentham, 1 Vesey, 543. "July, 1750, bill filed. On the 2d, 3d, and 5th of August, affidavits to obtain injunction filed. On the 6th of August, answer filed. On the 8th of August, affidavits of Jennings and three others sworn and filed. On same day the motion was heard, and the order made for the trial at law and an injunction. The above affidavits, and particularly that of Jennings and others, were read all through; but Jennings's was made on behalf of the defendant." Attorney-General *v.* Bentham. On the 3d of July, 1755, order for injunction on reading the bill and affidavits."

His Honor, however, said, that although he thought the affidavits ought

to be read, both on the precedents cited and on the reason of the thing, yet as it so materially concerned the practice of the court, he would not decide it until he had an opportunity of consulting the Lord Chancellor.

Whereupon the defendant, in order to avoid this delay, consented to the reading the affidavits, and they were accordingly read on both sides, and his Honor was of opinion that the affidavits on the part of the defendant were so much stronger than those on the part of the plaintiff, that, independent of the answer, the injunction ought to be dissolved.

SAME CASE.

[*Reported in Dickens*, 673.]

JULY 5, 1786.

APPLICATION by Mr. *Attorney-General*[1] and Mr. *Price* this day, on behalf of the defendant, upon the coming in of his answer, to dissolve an injunction which had been granted to stay him, his servants, workmen, and agents, from cutting down, &c., until answer and further order; and upon reading the defendant's answer, which in part denied the facts sworn to, the Master of the Rolls dissolved the injunction.

Having asked the plaintiff's solicitor how it happened that he omitted to read the affidavits upon which the injunction was granted, he mentioned it to Mr. Mansfield, his counsel, and Mr. Mansfield having intimated it to his Honor, his Honor spoke to me, and upon my telling him I understood it was the rule for the Court to permit plaintiffs to read affidavits in support of an injunction to stay waste, and that I had a faint recollection of cases upon that head, his Honor directed the order not to be drawn, and the motion to stand over till the First Seal; and in the mean time desired I would lay before him such cases as I should meet with, and what should occur to me upon the subject.

The following is a copy of what I submitted to his Honor: —

On application to continue or dissolve an injunction, either of course or special, I have always understood it to be the rule, that though affidavits are not permitted to be read to support the plaintiff's equity, that is, his right to come into this court when denied by the defendant's answer; yet in injunctions to stay waste, or in the nature of waste, when the waste sworn to, and upon which the injunction is grounded, is denied, the Court will admit proof by affidavit in support of the facts, and the following are the reasons it is submitted for such permission: —

When applications for injunctions to stay waste, or what is in the nature of waste (which are specially moved, and upon affidavit), are made, the Court expects such affidavits to be clear and positive as to

[1] Richard Pepper Arden, Esq. — ED.

the acts done, &c., and not to speak from hearsay and belief; and it frequently happens that, the affidavits not being satisfactory, the Court refuses the motion, and tells the plaintiff to get a fresh affidavit and to speak with more precision.

Therefore an order so granted is founded either on truth or falsehood; and it is not a defendant's denying by his answer the acts sworn to that makes them less true. Suppose five or six persons were to swear positively to acts of waste, &c., and a defendant was by his answer to deny the whole or part; it then would rest with the Court to consider to whom the most credit is to be given. How is that to be known but by considering the swearing of each? And upon a defendant's application to dissolve an injunction to stay waste, will the Court dissolve it without knowing what they dissolve? And how is that to be known without reading the injunction, or the order granting it (which are always read, or supposed to be read), and if read, the Court cannot but see upon what it is founded, for the injunction recites the order *in hæc verba*, which runs thus: "Upon opening of the matter by Mr. ——, of counsel with the plaintiff, it was alleged that it appears by the affidavit of —— (first as to the plaintiff's title), that the defendant hath done, or caused to be done, &c." And should the Court dissolve the injunction, without knowing upon what it was founded, merely upon the answer of the defendant, it will do that blindfold which may be the means of irreparable damage; and if a defendant hath committed the least waste, though not to the extent sworn to, the Court will be cautious to prevent his doing further injury. See the cases of Packington *v.* Packington, Dickens, 101; and Attorney-General *v.* Burrow, Dickens, 128.

That the answer is attended to, so far only as it goes to the denial of the plaintiff's right or equity, it may not be improper to refer your Honor to the common and usual language of an order to dissolve an injunction unless cause; which is the most usual for a defendant to apply for on putting in his answer, and which if the defendant had done instead of the mode he hath taken, please to attend to what he would have said: "Whereas the plaintiff hath obtained an injunction to stay the defendant, his servants, workmen, and agents, from committing, &c., until answer and further order, now upon motion this day made by Mr. A., of counsel with the defendant, it was alleged that the defendant hath since put in a full and perfect answer to the plaintiff's bill, and thereby denied the whole equity thereof (that is, the plaintiff's right to come into this Court, not the acts sworn to have been committed); and therefore it was prayed that the said injunction may be dissolved, which is ordered accordingly, unless cause."

That the admitting of affidavits to be read in support of injunctions to stay waste upon application is not novel will appear from the following cases, and the dictum of Lord Hardwicke: —

Mount *v.* Fenner, 4th of August, 1732. The bill was for an injunction to stay the printing of the Common Prayer Book; and an injunc-

tion was granted upon affidavit of the title, till answer and further order; the defendant put in his answer, and upon his application to dissolve the injunction, which was moved specially, affidavits were going to be read, but it being suggested that the defendant had put in a plea which went to the plaintiff's title, the Court saved the notice until the plea was argued; the plea was argued the above day, and allowed; and in consequence thereof, there being an end of the plaintiff's equity, the defendant moved immediately to dissolve the injunction, which was granted.

On the 11th of July, 1786, Mr. *Attorney-General* again moved to dissolve the injunction, when his Honor said that, as the deciding of the question would establish the practice in future, he would save the motion until the Third Seal, and in the meantime would consult the Lord Chancellor. The plaintiff inadvertently consenting that the defendant should read affidavits in support of his answer (never before heard of), if he would consent the plaintiff should read his, with which the defendant immediately closed, by consent, and so it is noted, affidavits on each side were read, and, the defendant's affidavit being the strongest, the injunction was dissolved.

HAMILTON *v.* WORSEFOLD.

BEFORE LORD THURLOW, C., NOVEMBER, 1786.

[*Reported in* 10 *Vesey*, 290, *note.*]

THE bill stated that the plaintiff was seised in fee; that his title had but recently accrued, and the tenants had not yet paid him any rent; that the defendant Worsefold pretended to have some claim to the estate, and had given notice to the tenants to pay their rent to him; that he had entered upon the estate with the permission of the other defendants, the tenants, and had cut timber, and threatened to cut more. The bill therefore prayed that Worsefold may be restrained from committing waste, and that the tenants may be restrained from permitting it.

THE LORD CHANCELLOR, upon the motion for the injunction, at first had some difficulty about granting it, Worsefold being a mere trespasser; but at length his Lordship granted the injunction against both Worsefold and the tenants. Register's Book, A. 1786, fol. 1.

MORTIMER v. COTTRELL.

BEFORE LORD THURLOW, C., DECEMBER 16, 1789.

[*Reported in* 2 *Cox*, 205.]

THE defendant had for some time acted under a power from the plaintiff as the receiver of several rents of houses belonging to the plaintiff, and had also been authorized by the plaintiff to dig earth in an adjoining brick-field to a certain depth from the surface. The defendant having dug beyond the limit, the plaintiff revoked all powers of attorney made to the defendant, and required him to desist from digging any further; but the defendant continuing to dig, the plaintiff filed this bill, praying that the defendant might be restrained by injunction from digging further on the premises. And the *Solicitor-General*[1] now moved for an injunction on certificate of the bill filed and affidavit of the fact, and urged that as this ground was intended for building, and as it would be rendered unfit for the foundation of a house if the ground was dug deeper from the surface than the limited depth, this was one of that species of irreparable mischiefs which this Court would prevent by injunction.

But the Lord Chancellor said the defendant was a mere stranger; that he had been guilty of a forcible entry, and that there was no case where this Court would interfere by injunction when the party was a mere stranger, and might be turned out of possession immediately.

MARQUIS OF DOWNSHIRE v. LADY SANDYS.

BEFORE LORD ELDON, C., MAY 13, 22, 1801.

[*Reported in* 6 *Vesey*, 107.]

UNDER indentures of settlement, dated the 2d of August, 1798, Lady Sandys was seised of the manor of Ombersley, and the mansion-house, called Ombersley Court, and other hereditaments in the county of Worcester, as tenant for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the Marquis of Downshire for life, and, after payment of the sums to be raised by the terms after created, without impeachment of waste; with a similar remainder to the Marchioness of Downshire, and remainders over, subject to the said terms, to Lord Hilsborough for life, without impeachment of waste, and to his first and other sons, and other remainders over.

[1] Sir John Scott. — ED.

The trust of the terms was to raise money to discharge mortgages, and 3,000*l.* for the executors of Lady Sandys; and the deed contained a proviso, that till the said sums should be paid, it should be lawful for the trustees at such time or times after the decease of Lady Sandys, and in such manner as they thought proper to enter into and upon all or any part or parts of the manors, &c., by the said indenture limited in strict settlement, and to fell and cut down such timber and other trees as should from time to time be wanted for building and other necessary purposes therein mentioned; and also to fell, cut down, and sell any timber or other trees, which were at the time of the said indenture standing or growing, and which should from time to time thereafter stand or grow, upon the manors, &c., thereby limited in strict settlement, or any part or parts thereof; provided, that such falls of timber or other trees be made in due course, and at proper times of the year for felling such timber or other trees; and so that the same do not in any wise injure the beauty of the said capital messuage or mansion-house, called Ombersley Court.

In this cause an injunction was obtained to restrain the defendant from cutting down or felling any trees or timber standing or growing for ornament, shade, or shelter, of the mansion-house and buildings at Ombersley Court, or any other houses or buildings on the settled estates, or which grow for ornament in any of the vistas, avenues, walks, pleasure-grounds, or plantations, belonging to Ombersley Court, or to any part of the estates, hereditaments, and premises, late belonging to Edwin Lord Sandys deceased, settled and conveyed by the indenture of settlement to the use of the plaintiffs, and from cutting down or felling saplings growing on any part of the said estates not proper to be felled.

This injunction was continued till answer; and afterwards, in November, 1799, upon a motion to dissolve the injunction, an order was pronounced, continuing it to the hearing; but it was varied by leaving out the word "shade."

A motion was made for a sequestration against the defendant for breach of the injunction by felling trees on Lineal Common in the parish and manor of Ombersley, part of the settled estate. The affidavits in support of the motion stated that the trees felled were fir trees; which were planted with order and regularity in rows and clumps for ornament to the said common; and which were highly ornamental, not only to the common, but to the surrounding country, from the manner and very elevated situation in which they were planted. They represented the distance of the nearest plantation from the mansion-house to be two miles.

The affidavits in opposition to the motion stated that Lineal Common is about three miles from the mansion-house and grounds of Ombersley Court; and is separated therefrom by land of other persons, not the property of the defendant, as tenant for life; and is not even in sight from the said mansion-house or any part of the grounds; and the com-

mon is open and unenclosed; upon which the copyholders have a right of common, which they enjoy; that the trees that were on the common were not planted for the ornament of, and were not an ornament to, any part of the estate; and though the trees were planted in clumps and rows, none of them were planted in vistas, avenues, and walks.

The farther affidavits, filed in reply, stated that the common may be seen from many parts of the grounds; and that parts of the estate are contiguous to the common.

Mr. *Mansfield*, Mr. *Trower*, and Mr. *Thomson*, in support of the motion — Mr. *Richards*, Mr. *Sutton*, Mr. *Romilly*, and Mr. *Stratford*, against it.

The Lord Chancellor. When this Court took upon itself to depart from the rule of law as to waste, and interpose its restraining power, upon what is called equitable waste, beyond the rule of law, one duty at least was imposed upon the Court, — to define with precision and accuracy in what cases the Court would interpose, and to take great care that, in the terms of its injunctions, a language should be adopted that might be clearly understood by the parties whose rights were to be bound at such a peril as that of disobeying an injunction of this Court. But the Court has in all times upon this subject adopted lauguage exceedingly difficult to be understood. In arguing cases of this sort I have been asked from this place what I meant by "thriving timber, timber-like trees, and ornamental timber;" and I have not been able to give any further answer than by referring to the language of the Court in former instances.

Upon this question I cannot admit the argument that my mind is to be influenced in any degree by the propriety of the injunction. If it goes beyond the terms in which other injunctions have been granted, or the reach of the principle, and I think this injunction does not, the true line of conduct would have been to have applied to the Court to alter the terms of the injunction, and not to have risked a disobedience to it. A party disobeying an injunction is not at liberty to shelter himself by saying the Court was wrong in granting the injunction in such terms. The case stands before me upon this dry question; whether the defendant is within the meaning of this injunction prohibited from cutting the trees upon Lineal Common. By the terms used in this injunction I understand trees very distinguishable from trees to which the word "ornamental" only can be applied. Many trees may be ornamental, and yet not within the meaning of the words in a process of this kind, "standing or growing for ornament." It is difficult to comprehend these trees under the words "vistas, avenues," &c. The parties certainly have been always left by the language of the Court at great hazard to determine what is or is not timber growing for ornament. In Chambrlayne *v.* Dummer, the case of Mr. Johnes and his mother, and a great variety of others, persons of taste upon this subject have

[1] Johnes *v.* Johnes, Hilary, 1797.

differed; and the taste of Mr. Brown has been set up against the taste of former systems. The principle upon which the Court has gone seems to be, that, if the testator or the author of the interest by deed had gratified his own taste by planting for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and upon the competition between those parties the Court should see that the tenant for life was right, and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them; and it is not competent to them to substitute another species of ornament for that which the testator designed. The question which is the most fit method of clothing an estate with timber for the purpose of ornament cannot be safely trusted to the Court. The principle has been extended from ornament of the house to out-houses and grounds, then to plantations, vistas, avennes, to all the rides about the estate for ten miles round. If that principle has been rightly applied, it is very difficult in argument to say it cannot be applied to a common as well as in field lands; and that the contiguity or remoteness, if *de facto* it was planted for ornament, can alter the principle upon which the rule of the Court is to be applied. As to its being, not part of the estate, but the property of the lord, with common rights, suppose a manor-house at one side of the extremity of a very large estate; and a common is on the east side of the house, and upon that common the lord has planted ornamental trees in the same form as in the in-field lands upon the west side of the house: those trees being admitted to have been planted for ornament, will the injunction be confined to the west side, and not extended to the common? If contiguity, which exists in the case I now put, is necessary, can it be said that if there is a very small slip of land, a single field, and the owner of the estate has been exerting all the providence of his life in endeavoring to purchase that slip, and, in the hope of succeeding, has planted the common, that circumstance will alter the rule of the Court, and prevent the injunction from going to the plantation, admitted to be planted for ornament? Is contiguity necessary for the whole of the land, or for a small part? Will the greater or less degree of remoteness alter it? I am of opinion it will not. I agree, the facts of contiguity, remoteness, &c., are very fit to be considered when the fact whether the common was planted for ornament is under discussion; but if the true conclusion is that it was for ornament, why is not that common to be considered as much a part of this estate to be protected as any other part of the estate?

My construction, therefore, of this order is, that it will embrace trees or timber planted upon the common in question as part of the estate; and I think the injunction ought to go thus far; for it is evident the views of the author of the ornament of this estate will be wholly disappointed if the protection is not afforded in the extent of this injunction. Looking at all the estates in the north of England, where the country is not in so high a state of cultivation, and in part of Nottinghamshire, can any man decline saying that these clumps of firs upon the sur-

rounding and adjoining commons, severed in many instances, the lands being divided in ownership, ought not to be protected? If the in-field lands and plantations are protected is it not fit also to protect that which is scattered round, and is really part of the same plan of improvement? It is impossible that a principle for general application can depend upon the circumstance whether a little slip of land connects the estate with the common, or is interposed between them; or whether the common is in sight. Suppose it is situated on a different side of a hill from the house; if the system of plantation for the ornament of the estate embraced the whole circuit of the hill, will it be said that is not to be protected because it is on the other side of the hill? So, if it is at the distance of two miles: it is a very material circumstance upon the question of the fact, whether it was planted for ornament or not; but if it could be seen from the grounds, or if it was the ride of the family for pleasure, that is evidence that it was planted for ornament; and the distance is only a circumstance of fact, material as evidence to decide the fact, whether the trees are growing for ornament or not.

Upon the affidavits, the expression "afford ornament" is equivocal, whether they were planted for ornament, or whether the effect is ornament. That affidavit alone would be much too loose for granting the process of injunction. But the next affidavit states that they were planted in this manner for ornament; and adds that they were highly ornamental, not only to the common, but to the surrounding country. That I must lay out of the question, for there is no instance of arguing that an injunction is to be granted upon that ground, that the trees are ornamental, not to the estate upon which they grow, but to the surrounding country. These affidavits, which go to the fact that these trees were planted for ornament to the common, grounded on the notion that the common is part of the estate within the meaning of the injunction, are met by an affidavit; which proves that this Court decides at great hazard as to facts upon written depositions, for the facts are not fairly stated by it. The original affidavits, which were confined to the question of ornament to the common, left the matter exceedingly short, whether the trees could be seen from the grounds, forming part of the estate, which might or might not be connected, not by contiguity but by approach. They would have laid a material fact before the Court by stating to what extent and in what degree the common could be seen from the estate, and was ornamental to it. The farther affidavits disclose the fact that the common may be seen from many parts of the grounds, and is, with these plantations, a very ornamental object; that there are estates, part of this estate, contiguous to the common; and, upon the argument I find it is not distinguishable from two other heaths, planted in this way; as to which an injunction has been granted. Upon what ground am I to refuse this injunction but the simple fact that this common was at a considerable distance, and that single affidavit, contradicted by a great number of others, asserting that these trees were planted for ornament; and if so, I shall not in-

quire whether they are ornamental; which is not an inquiry for me. I must hold, therefore, that this injunction has been violated. If my mind could by the affidavits be brought into doubt whether these trees were really planted for ornament or not, I should be disposed to relieve myself from deciding such a question by directing an issue; taking care that if, in the result of such a direction, the defendant should be prejudiced by not being permitted to cut in the meantime, the plaintiff should undertake to pay the value if the decision should be against him; but, attending to the value of the property, and the contrast between the affidavits, and the circumstance that it is impossible to conceive why these trees were planted unless for ornament, without attending to the question whether they are more or less ornamental, I think the preponderance of evidence is in the plaintiff's favor; and the single affidavit in opposition to it is too short even to obtain an issue. The value of the trees cut must therefore be accounted for by the defendant; or the process of sequestration must go; unless you can bring that fact into more doubt.

MAY 22.

After this decision a motion was made on the part of the defendant to discharge all the orders upon a new and distinct ground; viz., the particular expression of the deed of August, 1798, in the proviso contained in the power to the trustees to fell timber; which, it was contended, showed that the protection was intended by the parties to be confined to the trees, the fall of which would injure the beauty of the mansion-house; and that intention being expressly stated by the parties, the injunction ought not to go beyond it.

The case was argued upon this ground: the plaintiffs insisting that the intention of the parties could not have been so restrained; and that the mansion-house was particularly mentioned only as the principal part of the estate.

THE LORD CHANCELLOR. With regard to the conduct of the parties at the time they entered into this agreement I do not say a word; having endeavored to cultivate a habit not to weigh the motives which induced parties to enter into a contract when I am to decide upon the legal effect of that contract. The question is a dry question of law, whether these parties, either in a strict sense claiming under Lord Sandys, or those under whom he claimed, or in an accurate sense, though not so strict a sense, claiming under him, that is, holding the estate between them according to some limitation under him, can be said by this deed to have imposed upon the Court the necessity of declaring that in this contract the words "without impeachment of waste" cannot admit of the construction given to them by this injunction as it now stands. In deciding that question the difficulty I have is of this sort, that I am obliged to impute to parties in the construction of this deed an intention to use terms according to their legal import; though I am perfectly satisfied none of the parties understood the terms of the deed; and I doubt whether even those whose business it was to frame the

deed correctly understood the effect of it. This at least is clear: that Lady Sandys claiming an estate for life without impeachment of waste, upon the deed in general, must be understood upon the deed to claim that estate with such powers as the law of the land, administered in a court of law, subject to such restraints to which that law is subject, as administered in a court of equity, gives her, as to felling timber; and neither party can allege surprise in finding their legal rights affected by those restraints. With respect to the question whether there is context enough in this deed to authorize me to say the defendant can do those acts which in general a tenant for life expressly without impeachment of waste is not entitled to do, because some other persons are authorized after her death to cut timber under the particular terms specified in the power of the trustees, I do not know that it is a necessary inference that one party shall have a power to-day because another party has a power capable of being exercised to-morrow. The whole must be taken together. The consideration upon which the plaintiff may be taken to give this power to the defendant may be this very condition, that the power in this general language, *ultra* what a tenant for life without impeachment of waste has, shall not be exercised against him until the death of that tenant for life. I cannot weigh the consideration; but I am not at liberty to say it is of no value. It is not to be denied that the terms "without impeachment of waste," as applied to trustees of a term for special purposes, have a very different sense from that of the same words annexed to a tenancy for life; and in the ordinary case I do not apprehend the Court would have permitted the trustees to execute their trust by cutting timber, merely because they were trustees without impeachment of waste; though they might at law. This Court would say that, having a discretion, they must act in their trust as the Court itself would act. There is no pretence, therefore, to say that limitation would in the ordinary case enable them to cut timber, much less that species of timber which a tenant for life unquestionably might have cut. But whatever may be the extent of that power, it is a power vested in trustees; and it is a new argument that because powers larger in terms are given to trustees, it necessarily follows that persons who are not trustees are to have rights as extensive, though given in less liberal terms. The principal object of the trust was to make the estate of Lord and Lady Downshire exonerate the inheritance from those debts. I am very far from being sure that this Court would allow them unnecessarily to execute their powers, even when the right to exercise them arises, otherwise than this Court thinks a provident execution, and far from admitting that it would be in the breast of the trustees at the instance of the plaintiff to cut ornamental timber and leave the other. The Court would, I think, direct them to cut that which was not ornamental. But there is more in this; for it is absolutely in the discretion of the trustees as to the times and manner of cutting. They stand between the takers of the inheritance and the tenants for life. I do not say if a provident and husband-like mode

of treating the estate was proposed they would not have a right to call upon the trustees: but the Court would at least hear them upon the point whether they were discreetly called upon under this contract; and it would be very strong to say that, because these trustees, to accelerate the payment, have this large power after the death of the defendant, therefore she has the same power in her life, to whose discretion that power is not entrusted. The question results to this: whether I am reasonably sure that, because this power is given to the trustees after the death of the defendant, the parties, using language with respect to her power, which has now by authority had this restrictive sense put upon meant all, which in clear and ample language they have described in the powers given after her death. I cannot so enlarge the expression as to the power given to the defendant; and therefore I cannot vary the injunction upon this special ground.

Motion refused.

DRURY *v.* MOLINS.

BEFORE LORD ELDON, C., JULY 20, 1801.

[*Reported in* 6 *Vesey*, 328.]

MR. *Ainge* moved for an injunction to restrain a tenant from committing waste by ploughing up pasture land. The lease contained no express covenant not to convert pasture to arable; but there was a covenant to manage pasture in a husbandlike manner.

THE LORD CHANCELLOR said he thought that equivalent; and granted the injunction till answer and farther order.

DAVIES *v.* LEO.

BEFORE LORD ELDON, C., MARCH 11, 18, AND 20, 1802.

[*Reported in* 6 *Vesey*, 784.]

MR. *Whishaw*, for the plaintiff, moved for an injunction to restrain the defendant from cutting any timber or other trees on the estates in the bill mentioned, planted or growing for ornament or shelter of the mansion-house, park, and grounds, and any saplings, &c.

The affidavit of the plaintiff stated that he had been informed that Lætitia Leo, the late wife of the defendant, Daniel Leo, of Lannech, in the County of Denbigh, was at her marriage seised in fee simple of real estates in that county; which, by a settlement previous to her marriage,

were limited for the use of Lætitia Leo for life; remainder to the defendant for life; remainder to the issue of the marriage therein mentioned; and, in default of such issue, remainder to such person or persons as Lætitia Leo should by deed or will, notwithstanding coverture, direct or appoint; and, in default of such appointment, with certain limitations over in favor of certain persons therein named and their issue, and (amongst others) of the deponent, her first cousin, and his issue in manner therein mentioned; with an ultimate limitation to the right heirs of Lætitia Leo. The marriage took effect; and Lætitia Leo, having a power reserved to her of executing a will as aforesaid, did (as the deponent believes it is alleged by the defendant Daniel Leo), make and publish some writing or instrument purporting to be her last will and testament; which, as it is alleged by Daniel Leo, was duly executed, whereby she limited and appointed the estates after the death of Daniel Leo in default of issue of the marriage unto and to the use of the defendant, Henry Leo, with remainder to his lawful issue in tail general; and, in default of such issue, with remainder to the issue of Daniel Leo by any subsequent marriage in tail general; and, in default of such issue, remainder to the deponent for life; remainder to his issue in tail general, and divers remainders over.

The affidavit farther stated that Lætitia Leo died in December, 1801, without having revoked or altered her said alleged will, leaving her husband, and leaving no brother, but leaving the defendant, Mary Puleston, her only sister and heiress at law, surviving; that there has been no issue of the marriage; that Daniel Leo is unmarried; and that Henry Leo is an infant and unmarried; and the deponent believes he has either under the said settlement or the said will and instrument a contingent interest expectant on the deaths of Daniel Leo and Henry Leo without issue: but never having been able to procure a sight of the said instrument he cannot at present state his claim more particularly; that Daniel Leo has ever since the death of his wife been in possession; and the deponent has been informed, and believes, the said defendant has in his custody or power the said settlement and the said will or instrument: but he has not proved the will; and he has not produced the said will or instrument, or furnished the deponent with any particulars respecting the same, whereby he is prevented from stating them more particularly.

The affidavit then suggested the intention to commit waste; and that the defendant had surveyed, valued, and marked, trees, for sale; and advertised.

The plaintiff, by a farther affidavit, stated that Lætitia Leo did, as the deponent believes, make and publish some instrument, &c. (following the former affidavit); and that he grounds his belief upon the following information; that a few days after the death of the testatrix the Rev. William Davies Shipley, whom the deponent believes to have been one of the trustees in the said marriage settlement and will, communicated the contents of the will to the Rev. Samuel Strong by

letter, with permission to make the same known to the deponent; which letter was forwarded to the deponent in London, and was to the following effect: that by virtue of a power reserved in the said marriage settlement, Lætitia Leo had made a will, whereby she limited and appointed according to the limitations stated in the former affidavit; and upon receipt of that letter the deponent applied for an official copy of the will to Hughes, the Secretary of the Bishop of St. Asaph, who informed him the will had never been proved; but that, as far as his memory served, he would state to the deponent the provisions of the said will, he himself having made a codicil thereto in 1796, and that the letter was to the same effect, except that he, Hughes, did not well recollect whether the said estates, in default of issue of Daniel Leo by a subsequent marriage, were not limited to John Davies, uncle of the deponent, and his issue, as tenants in common, previous to the limitation to the deponent and his issue.

The motion was originally made upon the first of these affidavits.

Mr. *Whishaw* in support of the motion. The Master of the Rolls doubted whether this sort of interest was sufficient to entitle the plaintiff to an injunction of this sort; but the practice has been to grant injunctions upon very general allegation of interest, to prevent irreparable damage, till answer or farther order. The plaintiff is the second tenant for life in remainder; there being no tenant in tail *in esse*. Where the inheritance is to be affected, the general practice is to make all the tenants for life parties to a suit for any charge upon the estate. The Court will also attend to their interest for the purpose of protecting the estate from waste. An injunction is granted in favor of the person entitled in reversion or remainder generally; and formerly even without affidavits.[1] That, however, is now overruled. The first tenant for life is entitled to it (Roswell's Case);[2] and, according to what is said in the note in Peere Williams, the heiress at law is made a party to this bill. The principle extends to the second tenant for life. Perrot *v.* Perrot.

The Lord Chancellor. There is no positive affidavit that the will was made under which the plaintiff is next tenant for life to the defendant Leo. This is a mere hypothetical title, upon the plaintiff's information and belief, that a settlement was executed under which Leo is tenant for life, and the plaintiff remainder-man for life; leaving it in that way. There is no instance of an injunction in such a case. Suppose Leo was an old gentleman with five daughters, and, having this right, intended, by the exercise of it, to provide for them, and upon such an affidavit, merely to belief, he is restrained for a year, and dies within that year! An affidavit to information and belief is nothing in this sort of case. It must be irreparable mischief to a person who swears to his title. I cannot grant the injunction unless a positive affidavit is produced.

[1] Prac. Reg. 243, 244.
[2] 3 P. Will. 268, n. 1; Roll. Ab. 377; 3 Atk. 210.

Upon the other point I have no doubt a tenant for life may have an injunction, particularly as to ornamental timber; for that is not so much upon his interest as his enjoyment.

MARCH 18.

The motion was renewed upon the farther affidavit, above stated.

MARCH 20.

THE LORD CHANCELLOR. I dare not grant an injunction in this case. The bill states a title sufficiently, if it was duly verified. But the affidavits disclose the case no farther than that it may or may not be true; and I am of opinion the Court ought not to grant an injunction unless there is positive evidence of actual title. If those letters are true, they can swear to the truth of them.

Motion refused.

WILLIAMS *v.* WILLIAMS.

BEFORE LORD ELDON, C., DECEMBER 10, 12, 19, 1808.

[*Reported in* 15 *Vesey*, 419.]

THE bill stated that by indentures of lease and release, previous to the marriage of Daniel Williams and Catherine Prosser, dated the 7th and 8th of October, 1777, in consideration of a Portion of £1,000, &c., Daniel Williams conveyed to trustees and their heirs a dwelling-house, called Little Wonastow, and several parcels of land, arable, meadow, pasture, wood, and underwood, thereunto belonging, and other premises, to hold to the said trustees and their heirs to the use of Daniel Williams and his heirs, until the marriage, and, after the solemnization thereof, to the use of Daniel Williams and his assigns for his life without impeachment of waste; with remainder to the use of the trustees and their heirs during the life of the said Daniel Williams, upon trust to preserve the contingent remainders; but to suffer the said Daniel Williams and his assigns during his life to receive the rents, issues, and profits of the said hereditaments and premises, for his and their own use and benefit; with remainder to the use of Catherine Prosser and her assigns for her life for her jointure and in bar of dower; and, after the several deceases of Daniel and Catherine Williams, with remainder to the use of the first son of the said Daniel and Catherine Prosser, and the heirs male of the body of such first son; and, in default of such issue, to the use of the second, third, fourth, fifth, sixth, and every other, son and sons, severally, successively, and in remainder, and of the several and respective heirs male of the body and bodies of all and every such son and sons; and, in default of such

issue, in the same manner to the use of the first and other daughters, and the several and respective heirs male of their bodies; and, in default of such issue, to the use of the heirs of the bodies of the said Daniel Williams and Catherine Prosser; and, in default of such issue, to the use of the right heirs of Daniel Williams for ever.

The settlement contained a proviso that it should be lawful for Daniel Williams during his life, and after his decease for Catherine Prosser during her life, to make leases, not exceeding twenty-one years, in possession and not in reversion; so as no such leases by any express words therein contained should be made dispunishable of waste.

Daniel Williams by his will, dated the 5th of February, 1803, devised, from and after the decease of Catherine Williams all his estates which were settled by him upon his said wife for her life, previous to their marriage, unto his nephews, their heirs and assigns for ever, as tenants in common.

Daniel Williams died in 1804 without issue; leaving his widow surviving him, and his eldest nephew, one of the devisees, his heir at law.

The bill was filed by the two nephews and devisees of Daniel Williams against his widow; stating that she, claiming to be entitled on the provision of her husband, under the settlement, to an estate in tail after possibility of issue extinct, entered upon the settled estates, and cut timber. The bill prayed an account of the timber cut, and a perpetual injunction.

The defendant put in a demurrer, and a motion was made for an injunction.

Sir *Samuel Romilly*, and Mr. *Bell*, in support of the demurrer, contended, first, that the defendant was tenant in tail after possibility of issue extinct: secondly, that she was entitled to cut timber. The case was argued for the plaintiffs by Mr. *Hart* and Mr. *Phillimore*. The principal authorities cited were Herlackenden's Case,[1] Lewis Bowles's Case,[2] Abraham *v.* Bubb,[3] and Garth *v.* Cotton.[4] It was stated that the distinction between a jointress and any other tenant in tail after possibility of issue extinct is not noticed except in the case of Cook *v.* Winford,[5] which case is not to be found in the register's book, and would not now be followed: the reason assigned, that tenant in tail *ex provisione viri*, within the statute,[6] being restrained from parting with the inheritance, cannot therefore fell timber, which is part of it, applying equally to tenant for life without impeachment of waste; and another account of the same case[7] states the injunction to have been "against wilful waste in the site of the house and against pulling down houses." It was also observed that some passages in the older cases are not intelligible: for instance, the third point[8] in Lewis Bowles's Case.

[1] 4 Co. 62.
[2] 11 Co. 79. See Co. Lit. 28.
[3] 2 Show. Rep. 69; 2 Freem. 53; 2 Eq. Ca. Ab. 757.
[4] 1 Dick. 183; 3 Atk. 751; 1 Ves. 524, 546.
[5] 1 Eq. Ca. Ab. 221.
[6] Stat. 11 Hen. VII. c. 20.
[7] Cooke *v.* Whaley, 1 Eq. Ca. Ab. 400.
[8] 11 Co. 80, 81.

The Lord Chancellor, agreeing that the passages referred to in Lewis Bowles's Case were expressed in terms very singular and not easily understood, remarked the distinction between the limitations in that case and in this: there the husband and wife, having an estate tail in possession, subject to open and let in the remainders, upon the birth of issue, might before the birth of issue have cut timber; and were answerable to no one: they might have barred the contingent estates: but in this case, a trust to preserve contingent remainders being interposed, the estate for life is not merged: the trustees might collect the produce of the timber cut for the son: the widow, never having been tenant in tail in possession, has become tenant in tail after possibility of issue extinct in remainder; and the two characters are so distinct that, as it is laid down, if tenant in tail in possession, having brought an action, becomes tenant in tail after possibility of issue extinct, the action is gone.

Sir *Samuel Romilly*, in reply, admitting the distinction pointed out by the Lord Chancellor between the limitations, observed that the decision in Lewis Bowles's Case appeared to proceed upon a different ground; that at the time of severance the wife had an estate for life; with an immediate remainder to herself in tail after possibility of issue extinct; which estates were considered as incapable of uniting, — a situation, resembling that of this defendant; and it is difficult to support a distinction upon the circumstance that the wife at a former period had a greater estate, during which the severance did not take place. In Williams *v.* Day,[1] the Lord Chancellor declared that he would stop pulling down houses, or defacing a seat, by tenant after possibility of issue extinct; or by tenant for life, who was dispunishable of waste, by express grant, or by trust.

The implication from that is, that such tenant is not restrained from waste of any other description.

December 19.

The Lord Chancellor. The question that has been agitated in this case is, whether, taking the defendant to be a tenant in tail after possibility of issue extinct, she is dispunishable of waste; and, if so, whether she would be entitled to the property in the trees, which she proposed to cut. The case was argued with reference to Lewis Bowles's Case,[2] Bowles *v.* Berrie,[3] which is the same case; and several others, applying to persons answering that description of tenant in tail after possibility of issue extinct. The situations of such persons may be extremely various: first, a woman may be tenant in tail after possibility of issue extinct of an estate, which was her own, or the estate of her ancestors, in possession: she may also be such tenant of an estate, that was, not her own, but the estate of a stranger, settled upon her and her husband and the heirs of their bodies: or she may be such ten-

[1] 2 Ch. Ca. 32; *supra*, p. 211, note. [2] 11 Co. 79. [3] 1 Rol. Rep. 177.

ant of an estate, as it is called, *ex provisione viri: i. e.* of some estate, settled by her husband, or some ancestor or relation of his; and there is no doubt, under the statute of jointures,[1] an estate tail may be created subject to the restrictions as to alienation there mentioned. But a person may not only, being tenant in tail in all these various ways of an estate in possession, become tenant in tail after possibility of issue extinct; but may also be tenant in tail after possibility of issue extinct of a remainder or reversion. Lord Coke, I think, says so expressly.[2]

In discussing this case it is to be considered which of these characters belongs to the defendant; and what are the incidents and privileges belonging to the estate, which she has. In Lewis Bowles's Case the limitation was to the husband and wife for their joint lives; and both of them, as the joint estate was so expressed, were unimpeachable of waste; with remainder to the male issue of the marriage; under which limitation the issue were purchasers; and there is a limitation to the heirs of the body of the husband and wife, with remainder over; and it was held that, until issue born, they were tenants in tail in possession, though the limitation to them was expressly for their lives without impeachment of waste: yet they had an estate tail, with all its incidents, until severance by the birth of issue; upon which event, having been tenants in tail before, they became tenants for life without impeachment of waste; with remainder to their issue male, &c. Therefore by virtue not only of those words "without impeachment, &c." but also by virtue of the incidents to the estate tail in possession, there being no trustees to preserve, &c. they might have barred all the remainders behind; and had all the rights of tenant in tail in possession.

There is not one of the cases that were cited or have occurred to me, where the reasoning was applied to this point, whether tenant in tail after possibility of issue extinct was dispunishable of waste; and, if so, had the property in the trees, in which the party had not been tenant in tail in possession. There are cases where, both with reference to a gift in frank-marriage and an estate tail, created upon other occasions, it was held that a person might be tenant in tail after possibility of issue extinct of a reversion or remainder: but the question of the rights of such tenant did not come into discussion, except as it might be affected by the reasoning in the case of tenants in tail after possibility of issue extinct, who had once been tenants in tail in possession. This defendant never was so: the limitation being to her husband for life; then to trustees to preserve contingent remainders, which keeps separate the estates of the husband and wife, even if there were not separate limitations; then to the wife for life; and, the estate of the trustees supporting the limitation to the issue, the joint limitation to the heirs of the bodies of the husband and wife would not unite with the separate estates, limited to the husband and wife. Therefore, after

[1] Stat. 11 Hen. VII. c. 20; 27 Hen. VIII. c. 10. [2] 11 Co. 81.

the execution of this deed, if the husband had cut timber, it would not have been in right of any estate vested in him and his wife, or any estate of inheritance in him, but by his title to consider himself dispunishable of waste; and upon Herlackenden's Case,[1] Lewis Bowles's Case,[2] and all the authorities, I take it to be settled law that, where there is tenant for life without impeachment of waste, being dispunishable, he has also the property in the trees severed.

It is obvious that the intention of this settlement could not be that the wife should have the power of cutting timber. The inference from the estate for life, given to the husband, expressly without impeachment of waste, and the estate for life to her for her jointure, in bar of dower, without those words, is, that it would be a surprise upon the grantor, if the circumstance of the limitation to her, as one of the donees in tail, would give her that power which evidently she was not intended to have: if, however, that power is an incident to her estate as tenant in tail after possibility of issue extinct, it must take place. The question, therefore, upon that is, whether this defendant is in the situation of the widow in Lewis Bowles's Case: supposing that case to establish that the widow in such circumstances is not only dispunishable of waste, but has the same right and property in the timber as a tenant for life unimpeachable for waste by express contract.

I use the expression "supposing that case to establish that;" as in the case of Abraham *v.* Bubb that is controverted; and the court is made to say, as the reason of the distinction, that "in the case of tenant in tail after possibility of issue extinct, that is the provision of the law only; and though in some cases *fortior est dispositio legis quam hominis*, yet that shall not be to encumber estates."

The reasoning of Lewis Bowles's Case both in Coke and in Roll throws great doubt upon the question whether, supposing the tenant in tail after possibility of issue extinct, having been once tenant in tail in possession with the other donee, would be entitled to what this defendant claims, the same law applies to the case where the wife surviving never had any estate except an estate tail in remainder. The proposition appears singular, that, being tenant for life, impeachable by express limitation, with remainder to herself, as surviving donee in tail, and remainders over, the life estate not merged in the other,[3] which, though different in quality, is not larger, by virtue of that other interest, differing, not in quantity but in quality, if she cuts timber, it shall be her property. That is not the necessary inference from those cases.

Upon the question whether, if dispunishable by the provision of the law, she has equally with tenant for life without impeachment of waste by settlement an interest and property in the timber, I think she has the same interest as if she was so entitled by the provision of a settle-

[1] 4 Co. 62. [2] 11 Co. 79.
[3] Colson *v.* Colson, 2 Atk. 246, 247; cited 1 Ves. 147.

ment; and, whatever may be the doctrine upon Herlackenden's Case,[1] Lewis Bowles's case and others, notwithstanding the controversy in Lord Nottingham's time, being dispunishable, she has, as a consequence, the property in the trees; and I cannot imagine how that is doubted in Abraham *v.* Bubb. It is very singular that there should be argument here, that such a tenant, &c. should be restrained from committing malicious waste, by cutting ornamental timber, &c., if it was understood to be the law that she could not commit waste of any kind. These cases therefore prove that, if dispunishable of waste, she would have the property in the trees cut. But upon what is laid down in Lewis Bowles's Case, and more strongly in Roll, upon the effect of what she could once do by virtue of the inheritance that was once in her, and therefore what she might continue to do, it is not a necessary consequence that a person in the situation of this tenant in tail shall have the same privileges and rights, if they are put as the effect of circumstances, that do not belong to her character.

Lord Coke in Lewis Bowles's Case, states[2] first, that the estate for life would not merge; secondly, that "the wife should have the privilege of tenant in tail after possibility for the inheritance which was once in her;" that she might be tenant in tail after possibility of a remainder as well as of a possession; and, if the tenant for life surrenders, she is tenant in tail after possibility in possession. He proceeds to state that it was observed that tenant in special tail at the common law had a limited fee-simple; and when their estate was changed by the statute *de donis conditionalibus*, yet there was not any change of their interest in doing of waste: so, when by the death of one donee without issue the estate is changed, yet "*the power*" to commit waste, "*and to convert it to his own use*" (strong and remarkable words), is not altered, or changed, for the inheritance which was once in him.

The meaning is, that, as they had once the power of committing waste, and of converting the timber to their own use (which expression seems to admit that the property in the trees cut would go along with the power to commit waste), so, when by the death of one of these donees the estate tail was altered, yet that power should not be altered: nevertheless putting the future existence of that power, as the present existence of it, upon the estate tail in possession.

Lord Coke afterwards, citing Littleton,[3] puts this case. Feoffment upon condition that the feoffee shall give lands to the feoffor and to the wife of the feoffor; to have and to hold to them and the heirs of their two bodies begotten; the remainder to the right heirs of the feoffor; the husband dies, leaving the wife, before any estate tail made to them: then ought the feoffee to make an estate to the wife as near the intent of the condition as he can: viz. for her life without impeach-

[1] 4 Co. 62. See Fol. 63, where it is said, that, if tenant in tail after possibility of issue extinct fells trees, the lessor shall have them.

[2] 11 Co. 81.

[3] Lit. Sec. 352; 11 Co. 83.

ment of waste: remainder to the heirs of the body of her husband upon her begotten: remainder to the right heirs of the husband; and the reason given is, that, if the feoffment had been made according to the condition, she would have had the inheritance; and to it would be annexed the power of committing waste; and Lord Coke states this case as directly proving that tenant for life without impeachment of waste has as great a power to do waste, and to convert the property at his own pleasure, as tenant in tail had. These two passages point to my distinction; and also show that, where there is the power, there is also the beneficial interest in the exercise of that power.

The report of the case in Roll has much more the appearance of conversation than judgment; and I confess I do not understand several parts of it. There are, however, many passages, pointing to the same distinction; that[1] tenant in tail after possibility of issue extinct is not punishable for waste on account of the estate of inheritance which was once in him; referring to the Year-Book of Henry IV.;[2] and again, that he is dispunishable "for the fee, which was once in him;" citing the Year-Book of Henry VI.;[3] that he shall not have aid, nor be punishable in waste, by virtue of the livery upon the estate tail. Then Littleton says there can be no tenant after possibility except one of the donees, parties to the livery, at which time he had full power of disposition of the trees; referring to Doctor and Student.[4]

From this I collect that the distinction I have stated is upon a question of this nature most material. The expression in the Year-Book of Henry VI. "and he is dispunishable by reason of the fee; which was once in him," seems to me to be explained by this; that according to the old doctrine of the law the tenant in tail was tenant in fee: but those words could not in any sense apply to a mere tenant in tail in remainder; who could not be represented as having the fee in him in the sense there intended. It is impossible to maintain that, when this estate in remainder was created, the persons claiming under that remainder could, taking all the limitations together, have full power to dispose of the trees.

These authorities suggested to me the necessity of looking at the farther cases; and there is not one in which tenant in tail after possibility of issue extinct is said to be dispunishable of waste, where that tenant had not once been tenant in tail with the other donee in possession. The reasoning assigned to prove that such person is dispunishable seems to have a strong connection with the fact that such person was once tenant in tail in possession with the other donee. If such tenant is dispunishable, I collect that at law she would have power, not only to commit waste, but also to convert to her own use the property wasted. If she had that power at law, I do not see why she should be restrained in equity. Courts of equity have actually restrained

[1] 1 Roll. Rep. 184.
[2] 11 Hen. IV. 15.
[3] 10 Hen. VI. 1.
[4] Doct. and Stud. Dial. 2, ch. 1, 114, Ed. 15.

only malicious waste; and, if it had been conceived that she could not commit ordinary waste, such a judge as Lord Hardwicke, as able a lawyer as ever sat in this place, would scarcely have cited all those authorities in the case of Garth *v.* Cotton to prove that she could not commit malicious waste.

But my difficulty is, what is at law the situation of a person claiming in remainder after the death of the joint donee in such a settlement as this; and I cannot go the length of holding that she should be at liberty to cut timber, until this subject shall either have been farther considered at law in a case, or again argued before me, with the assistance of two of the judges. I am satisfied that this case is not governed by anything that has been decided.

A case was sent to the court of King's Bench: the demurrer standing over; and the defendant undertaking not to cut timber.

The Lord Chancellor, observing that it was extremely difficult upon the cases to say whether the defendant was tenant in tail after possibility of issue extinct, many passages being unintelligible, and that one very material consideration for the court of law would be, whether the estate for life was merged, or not,[1] directed that she should not be described as tenant in tail after possibility of issue extinct; but that the limitations should be stated: the question to be, whether she has a right to cut timber.[2]

ALLARD *v.* JONES.

Before Lord Eldon, C., April 12, 1809.

[*Reported in* 15 *Vesey*, 605.]

Upon a motion for an injunction against cutting ornamental timber, and young trees not fit to be cut; the defendant having, the day before the motion was made, entered an appearance, the fact that he had appeared was suggested as an objection by a gentleman at the bar (*amicus curiæ*).

Sir *Samuel Romilly* and Mr. *Heald*, in support of the motion, contended that the appearance could not prevent the motion for an injunction against waste.

[1] Colson *v.* Colson, 2 Atk. 246, 247. Stated by Lord Hardwicke, 1 Ves. 147, in Bagshaw *v.* Spencer.

[2] For a report of the case sent to the Court of King's Bench, see Williams *v.* Williams, 12 East, 209. — Ed.

THE LORD CHANCELLOR granted the injunction, observing that, if a person, about to commit waste, and against whom a bill was filed, could, by appearing the evening before the motion, prevent it, he would get two days for cutting the timber; perhaps it might be different where he had appeared long enough to have enabled the plaintiff to give notice.

DAY *v.* MERRY.

BEFORE SIR W. GRANT, M. R., JANUARY 15, 1810.

[*Reported in* 16 *Vesey*, 375.]

A MOTION was made upon the bill of the remainder-man in fee against the tenant for life, without impeachment of waste, to restrain the defendant from cutting ornamental timber upon the principle of equitable waste.

Sir *Samuel Romilly*, in support of the motion, admitting that it was new, as far as it applied to trees planted for the purpose of excluding objects from view, contended that they were within the principle upon which those injunctions had been granted.

The order was made accordingly.

MARQUIS OF LANSDOWNE AND OTHERS *v.* MARCHIONESS DOWAGER OF LANSDOWNE.

BEFORE SIR THOMAS PLUMER, V. C., NOVEMBER, 7, 17, 1815.

[*Reported in* 1 *Maddock*, 116.]

DURING the years 1805, 1806, 1807, and 1808, John Henry, the then Marquis of Lansdowne, being tenant for life, without impeachment of waste, of the lands and premises hereinafter referred to, under deeds of settlement, dated respectively, May 16 and May 17, 1794, cut down large quantities of timber trees and other ornamental trees, standing and growing near the mansion-house at Bowood Park, and also divers young trees and saplings which were growing for timber on land of which said Marquis was tenant for life as aforesaid; a large part of which he sold and received the proceeds thereof; and in particular he cut down a large avenue of elm and ash trees leading towards and up to said mansion-house, on the northeast front thereof, and all the trees on the pleasure ground and lawn thereto belonging; and also divers oak, ash, and other tellers and saplings upon other land of which he was tenant for life as aforesaid; which were standing and

growing for timber, and were in a thriving and improving condition, and would have become good timber trees if they had been permitted to stand and grow, but which were then so small as not to be measured as timber, according to the usage of timber-merchants, and were not fit to be cut down.

In consequence of such waste, the trustees for preserving the contingent remainders limited by said settlement, in February, 1809, filed their bill against the said Marquis (to which bill the now Marquis of Lansdowne, by his then name of Lord Henry Petty, was also made defendant), stating the foregoing facts, and praying for an account of said trees and of the value thereof, and that the said then Marquis might be decreed to pay to the plaintiffs in said bill, or to the accountant-general of the court, what should be found due from him on taking such account, for the benefit of the person who might become entitled thereto; and that the said then Marquis might be enjoined from cutting any timber or other trees growing upon the said premises, which were growing there for the shelter of the mansion-houses or for their ornament, or which were growing in lines, walks, or vistas for the ornament of the lawns and pleasure grounds, and from cutting down saplings and trees not fit for the purposes of timber, and from cutting down timber trees at unseasonable times and in an unhusbandlike manner.

Upon the filing of said bill together with affidavits in support thereof, an injunction was granted pursuant to the prayer of the bill. The said then Marquis afterwards put in his answer to said bill, filed counter-affidavits, and made a motion to dissolve said injunction; but before any order was made on said motion, or any further proceeding had in the suit, and on the 14th of November, 1809, the said Marquis died, and thereby the suit abated.

After his death the present bill was filed, stating the former proceedings, that, upon the death of said late Marquis, the plaintiff, the now Marquis of Lansdowne, succeeded him as tenant for life of said land and premises; that the defendant was administratrix of said late Marquis with his will annexed; that, after the issuing and serving of said injunction, the said late Marquis cut down divers other trees which were standing and growing on the pleasure grounds adjoining or belonging to said mansion-house at Bowood, and which had been planted and carefully preserved for ornament before the death of the father of the said late Marquis; and which were within view of said mansion-house or in the immediate vicinity thereof, and were in a growing and thriving state and unfit to be cut down; that the said late Marquis sold part of said trees and received the proceeds thereof, or the same had since his death been received by the said defendant; and that the remainder of said trees, and also divers of the trees and saplings so cut down as aforesaid before the issuing of said injunction, were then lying on the ground at Bowood; and the plaintiffs insisted that the moneys received by said late Marquis from the sale of said trees ought to be repaid out of his assets.

The bill also stated that said late Marquis did not during his life keep in repair the mansion-house called Lansdowne House, or said mansion-house at Bowood, or the buildings belonging to said mansion-houses, but suffered the same to become very much out of repair; and that the plaintiff, the now Marquis, was obliged to lay out large sums of money in the necessary repairs of such mansion-houses and buildings, and he insisted that said moneys ought to be repaid to him out of the assets of the said late Marquis. The bill further stated that the plaintiff, William Thomas Petty, commonly called Earl of Wycombe, was the eldest son of the said now Marquis, and as such was entitled to the first estate of inheritance in said land and premises; that the plaintiffs Sir Thomas Baring and James Abercromby were the trustees for preserving the contingent remainders limited by said settlement, they having respectively succeeded Sir Francis Baring and John Eardley Wilmot, the trustees originally appointed for that purpose. The bill also stated that the defendant had received the personal estate and effects of said late Marquis to an amount more than sufficient to satisfy all his just debts, including what is due from his estate in respect of the several matters aforesaid. The bill prayed that the defendant might answer the same, and that said suit and proceedings so abated as aforesaid might be revived, &c.; and that the account prayed by said original bill might be taken; and that an account might be taken of all the ornamental trees so cut down as aforesaid by said late Marquis after the issuing of said injunction, and that the value of such part thereof as was sold by said late Marquis might be ascertained, or that an account might be taken of the moneys received by him in respect thereof; and that an account might also be taken of the dilapidations permitted by said late Marquis in and about said mansion-houses and buildings, and of the sums of money necessarily paid and expended by said now Marquis in repairing the same; and that said defendant might be decreed to pay what should be found due upon taking said accounts; and in case said defendant should not admit assets of said late Marquis sufficient to pay what might be so found due, then that an account might be taken of the personal estate and effects of said late Marquis, and that the same might be applied in a due course of administration, and that thereout the sums which should be found due as aforesaid might be paid; and that what should be found due in respect of said repairs might be paid to the said now Marquis; and that what should be found due in respect of said trees might be paid into court and laid out for the benefit of the plaintiffs, the said now Marquis and the said William Thomas Petty (commonly called Earl of Wycombe), according to their respective interests therein; and that an account might also be taken of all sums of money received by said defendant in respect of the sale of any of said trees, and that she might be decreed personally to pay into court what should be found due from her upon taking that account, and that the same might be laid out in the manner before stated; and that proper directions might be given for the sale of said

trees so cut down as aforesaid and then lying on the ground, and for the disposal of the proceeds thereof.

To so much of said bill as sought to recover on account of trees cut down after the issuing of said injunction, and on account of the dilapidations permitted by said late Marquis in said mansion-houses, the defendant demurred generally.[1]

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

The principal question raised by the demurrer to this supplemental bill is, whether the representatives of the late Marquis of Lansdowne are bound to make good, out of his assets, the claims made by the plaintiffs in respect of equitable waste committed by the Marquis in his lifetime, subsequent to the issuing of an injunction to restrain him from committing such waste?

It is a rule at law and in equity, that a personal wrong dies with the party. In Jesus College *v.* Bloom, Lord Hardwicke was of opinion he ought not to entertain a bill for a satisfaction for waste after the estate of the tenant that cut down timber was determined by assignment or otherwise; and he expressly states that an account in respect of waste is only given when a bill is filed for an injunction, and waste has already been committed. The relief given in Pulteney *v.* Warren,[2] was grounded on the particular circumstances of that case; and the Lord Chancellor there recognizes the doctrine of Lord Hardwicke, that a bill does not lie for an account of waste where there is not a ground for an injunction to restrain waste.[3]

The dilapidations of Lansdowne House cannot be the subject of an account after the death of the Marquis. The case of an incumbent is an excepted case. In Lord Castlemain *v.* Lord Craven, it was held that the court never interposes in cases of permissive waste. Another ground of demurrer is, that the supplemental bill interrogates to matters interrogated to in the original bill, and answered by the defendant to that bill.

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

In Garth *v.* Cotton, the judgment in which case is given in Dickens, Lord Hardwicke states the grounds on which he decided Jesus College *v.* Bloom, and says, "It is true that the general run of the cases is of bills for an injunction, because that is a preventive suit, and the most remedial to the party; but that affords no conclusive argument that a bill for such an account cannot be maintained without praying an injunction."[4] In Lee *v.* Alston[5] relief was given, though no injunction prayed. Supposing it were true that a bill will not lie for an account of waste unless where an injunction is prayed; yet here, by the original bill, an account and an injunction was prayed; and if the late

[1] The statement of the pleadings has been much abbreviated. A small portion of the case, not relating to the subject of waste, has also been omitted. — Ed.

[2] 6 Ves. 73.

[3] 6 Ves. p. 89.

[4] 1 Dick. p. 211.

[5] 1 Bro. C. C. 194.

Marquis were alive, the court by its decree would have obliged him to account, not only for the waste committed previous to the injunction, but also in respect of the waste committed afterwards, in breach of the injunction, upon the same principle upon which the court acts in tithe cases, where the account is carried on to the time of the decree. It would be monstrous to say that, though a party shall account for waste committed before the injunction, he shall not account for waste done in breach of the injunction. In Bishop of Winchester *v.* Knight,[1] the Chancellor says, "It would be a reproach to equity to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy." It may be considered as a general rule, that where a bill would lie against a party when alive, it lies against his representatives after his death; and in such cases, the rule "*Actio personalis moritur cum persona*" does not apply. From Hambly *v.* Trott,[2] it is clear that in a case of legal waste the representatives are liable, and the maxim alluded to does not avail; and in analogy to the doctrine at law, a court of equity will make the representatives account for equitable waste, there being no remedy at law.

As to the objection that the supplemental bill contains interrogatories as to matters inquired of by the former bill, and answered, it must be admitted that this defendant has a right to insist on grounds of defence to the original bill, not made use of by the late Marquis; so, the plaintiffs on the other hand, may interrogate as to matters before inquired of by the original bill; especially where, as in the present case, the defendant died so soon after he had put in his answer, that there was not time to take exceptions.

With regard to the dilapidations, the court will either order the house to be repaired, as in Vane *v.* Lord Barnard, or give the plaintiffs a compensation. Supposing, however, this part of the bill cannot be sustained, yet as the demurrer extends not only to this part of the bill, but also to the account of waste committed after the injunction granted, if it is bad as to the latter, it is bad as to the former; for a demurrer cannot be good in part and bad in part; but if not altogether good, it must be overruled. Where part only of a bill is demurrable, the demurrer must be confined to that part; and if too general, it is bad.

Mr. *Leach*, in reply: —

This is a case involving points of great importance. It would be to legislate in a court of equity, if the acknowledged maxim of the law, *Actio personalis moritur cum persona*, is here to be overturned. Garth *v.* Cotton was a case of fraud, and on that ground relief was given. Bishop of Winchester *v.* Knight was a case as to ore dug, which is a sort of trade, and consideration was had there, of the tenure of the estate; the digging of the ore, being by one who held customary lands of the bishop, was considered as a breach of trust.

[1] 1 P. Wms. 407. [2] Cowp. 371.

If the late Marquis had been tenant for life, impeachable for waste, and legal waste had been committed by him, no action could have been sustained against his representatives, because there was no person *in esse*, or, at least, appeared, who had an estate of inheritance: so here, when this equitable waste was committed, there was no owner of the inheritance *in esse*, Lord Wycombe being born since; and yet it is said, as to this equitable waste, the representatives of the Marquis are liable; though had it been a case of legal waste, they would not have been liable. The doctrine in Hambly and Trott was not new; it was agreeable to the old authorities. In the case there put, the action against the representatives was held to lie. There, the waste might, by agreement, have been made good, but here, there were no parties who could affirm the waste — it was a wrong, incapable of being made right. The infant tenant in tail was not born when this waste was committed, and yet now claims a compensation as if he had been owner of the inheritance when the waste was committed. It is said we have admitted that the representatives of the late Marquis are compellable to account for the waste committed before the injunction; and there is no distinction between the waste committed before and after the injunction. I think not; and that the demurrer might have been extended to an account of all the waste committed by the Marquis, whether before or after the injunction; but because the demurrer does not extend as far as it might, it is not therefore bad so far as it does extend.

THE VICE-CHANCELLOR. Upon this demurrer two points are to be considered: 1st. How the case stood as to the deceased Marquis? 2dly. How the case stands as to his representatives? The late Marquis was tenant for life, without impeachment of waste, and as such had a right at law to cut timber on the estate, and had a property in the trees but having abused that power by cutting ornamental trees, and trees not ripe for cutting, a court of equity says he shall not do these things with impunity, but interposes to restrain the legal right; and equity not only restrains him from doing further waste, but directs an account of the waste done, and will not suffer the individual to pocket the produce of the wrong, but directs the money produced by such waste to be laid up for the benefit of those who succeed to the estate.

A bill was filed against the late Marquis, by Wilmot and Baring, the trustees to preserve contingent remainders, and not by a person having the next estate of inheritance; no such person appearing; but there were contingent remainders, and the present Marquis, the next tenant for life, was entitled to the timber cut, or the substitute for it. The late Marquis did not demur to that bill. Many of the objections taken to this supplemental bill would have applied to the bill filed against the late Marquis. They obtained an injunction, and thereby their competency to sustain the suit was sanctioned; and Garth and Cotton, certainly, was a conclusive authority in support of that suit. The injunction would not have been granted if the trustees had no right to file

such a bill. What is said in Jesus College and Bloom, as to not entering a bill after the estate of the tenant for life is determined, applies only to cases where legal waste has been committed, and where the party is liable at law in respect of the waste committed; but here it was equitable waste, as to which a court of law gives no remedy. Lord Hardwicke, in that case, says, "the party ought to be sent to law;" which shows he was alluding to legal waste. The party had for such waste a remedy under the statute of Marlbridge, or might have brought an action of trover; but the court never sends a party to law in cases of equitable waste; they being exclusively of equitable cognizance. As against the late Marquis, therefore, a bill might have been filed, though no injunction were prayed. This court will not permit a man to commit equitable waste, and retain the produce of the injury, which is recoverable in no other court. Relief is given for the benefit of those who come after. The case, therefore, of Jesus College and Bloom is distinguishable from the present. In Garth and Cotton, Lord Hardwicke, alluding to his decision in that case, says, "It affords no conclusive argument that a bill for an account of waste cannot be maintained without praying an injunction."[1] The Marquis died, after having sold, and converted to his use the money produced by his wrongful act; and upon general principles, independent of decision, the assets ought to be liable to pay in respect of his conduct, such assets having been augmented by it.

It has been urged that if the Marquis had committed legal waste. and died, his representatives would not have been answerable, it being a maxim, *Actio personalis moritur cum persona*, and that the same doctrine applies, by analogy, to case of equitable waste. Let us see in what manner this maxim has been interpreted even at law. In Hambly *v.* Trott,[2] Lord Mansfield says "when the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labor, or property, of another, or a promise of the testator, express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or arises *ex delicto*, supposed to be by force, and against the King's peace, there the action dies, as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a watercourse, escape against the sheriff, and many other cases of the like kind. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating, or imprisoning a man, &c. there, the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees; but for the benefit arising to his

[1] 1 Dick. p. 211. [2] Cowp. 376.

testator for the value or sale of the trees, he shall. So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged."

This I take to be a just exposition of the qualifications under which the maxim *actio personalis moritur cum persona* is received at law; and if equity is to decide in analogy to a court of law, the question in the present case will be, whether, by the equitable waste committed by the late Marquis, he derived any benefit; or whether it was a naked injury, by which his estate was not benefited? It is clear it was benefited; and as at law, if legal waste be committed, and the party dies, an action for money had and received lies against his representative, so upon the same principle, in cases of equitable waste, the party must, through his representatives, refund in respect of the wrong he has done. "It would," says Lord Cowper, in Bishop of Winchester *v.* Knight,[1] "be a reproach to equity to say, where a man has taken my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy." It has been argued that, as when legal waste is committed, and there are no persons in being, or appearing, who could authorize it, or bring an action in respect of the waste, the wrong is without remedy; so here, there being no persons *in esse*, or appearing, when the waste was committed, who could authorize it, a bill will not lie in respect of such waste: but it signifies not, whether such person were *in esse* or not, for waste of this description could not be authorized; — such destruction cannot be authorized; — the court says it shall not be done. The produce of the waste is laid up for the benefit of the contingent remainder-men. To adopt such an analogy to the law, in a case where relief is given against the law, would be singular.

Upon these grounds I think the supplemental bill for an account by the new trustees, the tenant for life, and tenant of the inheritance, was properly brought. The trustees were the proper persons to file the bill against the late Marquis, and the present plaintiffs were the proper persons to file the supplemental bill, though one of the plaintiffs was not *in esse* when the first bill was filed, inasmuch as the money produced by the waste is not to be pocketed, but to be laid up for the benefit of those who in succession will take the estate.

I think the demurrer objectionable on other grounds, but I decide this case upon the broad principle that where equitable waste has been committed, which never could have been authorized, the court has jurisdiction to make the representatives of the party committing such waste accountable. *Demurrer overruled.*

[1] 1 P. Wms. 407.

SAME CASE.

BEFORE SIR THOMAS PLUMER, M. R., JUNE 28, 1820.

[*Reported in* 1 *Jacob & Walker*, 522.]

THIS cause now came on to be heard. An account was directed of the equitable waste committed by the late Marquis. The only question that remained was that of the account prayed by the bill of the dilapidations permitted in and about the mansion-houses.

Mr. *Shadwell* and Mr. *Clayton* for the plaintiffs.

In the case of Parteriche *v.* Powlet,[1] it is laid down by Lord Hardwicke that a tenant for life without impeachment of waste must keep in repair the houses of the tenants, and he was accordingly charged with the expenses; the doubt there seems to have been whether the obligation to repair extended to the houses of the tenants, to which the same considerations do not apply as to the mansion. If, then, this obligation exist, the only remedy to enforce it is in equity. In Caldwell *v.* Baylis [2] an injunction was granted against permissive waste, and in a late case of Lord Ormond *v.* Kinnersley,[3] the Vice-Chancellor held that an account of waste might be decreed on the principle of considering the tenant for life as holding subject to an implied trust to exercise his rights without injury to the remainder-man; this principle applies to permissive as well as to voluntary waste, and would entitle the plaintiff to an account of both.

Mr. *Heald* and Mr. *Ellison* for the defendants.

There is no instance of such an account. In Caldwell *v.* Baylis the defendant had expressly promised to repair, and that case, therefore, turned on different grounds. The cases of Lord Castlemain *v.* Lord Craven, and Turner *v.* Busk,[4] are express authorities that there is no remedy in equity against permissive waste.

THE MASTER OF THE ROLLS expressed himself to be satisfied that no account of the dilapidations could be decreed, observing that, with respect to incumbents, the law was otherwise, and, accordingly, suits against their representatives were very common; but no instances of such suits by remainder-men had occurred.

[1] 2 Atk. 383.
[2] 2 Mer. 408.
[3] May 6, 1820.
[4] 22 Vin. Ab. 523, tit. Waste.

SMYTHE *v.* SMYTHE.

BEFORE LORD ELDON, C., MARCH 31, APRIL 1, AND MAY 28, 1818.

[*Reported in* 1 *Swanston*, 252; 2 *Swanston*, 251.]

THE bill, filed on the 9th of February, stated that the defendant was tenant for life of certain estates, subject to impeachment of waste during a term of thirty years; and after that period without impeachment of waste; that the term having expired in January last, the defendant marked and advertised for sale all the oak, ash, and elm trees (with few exceptions) on the estates; and, charging that the trees afforded shelter and ornament, and were necessary to the pleasurable enjoyment of the estate, and were for that purpose planted and suffered to grow, prayed an injunction against felling any timber or trees, growing or planted for the ornament of the mansion-house, or for ornament in the grounds and plantations, or saplings unfit to be cut.

The answer having been filed on the 26th of February, insisting on a right to cut timber, but denying the fact or intention of cutting ornamental trees, the plaintiff on this day moved for an injunction to restrain the defendant from cutting any timber or other trees unfit to be cut in a due and fair course of husbandry.

The *Solicitor General* and Mr. *Rose*, for the motion.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Dowdeswell*, for the defendant.

The plaintiff having in support of the motion offered affidavits subsequent to the answer, tending to prove the fact of equitable waste, the defendant objected to their being read; insisting that, although an injunction obtained on affidavits filed before the answer may be sustained on affidavits filed subsequently, an injunction cannot be originally granted on such affidavits.

THE LORD CHANCELLOR. I recollect no former case in which this question has arisen. The allegations in the bill are general: if the plaintiff at once supports them by the statement of particular facts on affidavit, the defendant possesses an opportunity of explaining or denying those facts in his answer; but if the plaintiff reserves his affidavits till the answer is filed, he deals not altogether fairly with the defendant, who is entitled before the answer to be apprized of the points on which the plaintiff rests his case. I shall pause before I extend to cases, in which no previous injunction has been obtained, the rule of practice which authorizes the admission of affidavits for continuing an injunction to stay waste against the answer. Affidavits of acts of waste committed since the filing of the bill are entitled to a distinct consideration.

APRIL 1.

THE LORD CHANCELLOR. On diligent inquiry I find no instance in which the Court has permitted the plaintiff to support a motion for an

injunction, by affidavits filed after the answer. The Countess of Strathmore *v.* Bowes is the most material case; but all the reasons there given for receiving the affidavits tendered are founded on the fact that the injunction had been originally granted on affidavit. The affidavits are inadmissible.

Motion refused.

MAY 28.

THE supplemental bill in this cause, filed on the 15th of April, 1818, stated that, since the defendant put in his answer to the original bill, he had marked for cutting a large quantity of timberlike trees, unfit to be cut as timber, or in a due course of cutting; and prayed that the defendant might be restrained from felling or cutting any timber or other trees on the estates in question, unfit to be cut or felled in a due course of cutting or felling, or not come to maturity and fit to be cut as timber.

The answer of the defendant denied that he had marked any trees which were unfit to be cut as timber, or in due course of cutting.

On this day the plaintiff moved for an injunction to restrain the defendant from cutting any timber or other trees or saplings standing on the lands mentioned in the pleadings, that are unfit to be cut or felled in a due and fair course of husbandry.

The affidavits in support of the motion (filed before the answer to the supplemental bill) stated that the defendant had marked for cutting every tree, however young, that could be sold; that if some of the oak trees marked should be cut, great waste would be committed, and irreparable loss ensue, and the saplings left would perish. According to the affidavits in reply, a very small proportion of the oak trees marked to be felled measured less than nine cubical feet, and no injury would ensue to the saplings or trees left, by felling those marked.

The *Solicitor General* and Mr. *Rose*, in support of the motion, cited the Marquess of Downshire *v.* Lady Sandys,[1] and Lord Tamworth *v.* Lord Ferrers.[2]

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Dowdeswell*, against the motion.

THE LORD CHANCELLOR. A tenant for life, without impeachment of waste, is clearly not compellable to cut timber in such way as a tenant in fee would think most advantageous, but is entitled to cut down anything that is timber. This motion requires an affidavit, pledging the deponent, that the trees about to be cut are not fit for timber. It is settled that a tree which a tenant in fee, acting in a husbandlike manner, would not cut, may be cut by a tenant for life, unimpeachable of waste, provided that it is fit for the purpose of timber. A tenant for life, unimpeachable of waste, might cut down all these trees, without question, at law; and to subject him, in this court, to the rules which a tenant in fee might observe, for the purpose of husbandlike cultivation, would deprive him of almost all his legal

[1] 6 Ves. 107. [2] 6 Ves. 419.

rights. If the trees are so far advanced as to become timber, the tenant may cut them down, though they are in a state to thrive, and though cutting them down would injure the saplings. It is not sufficient to state that this is thriving wood; it must be thriving wood not fit for the purposes of timber. I cannot determine whether a tree, measuring less thau nine cubic feet, is, or is not fit for purposes of timber. If the plaintiff files an affidavit, stating that trees measuring less than nine cubic feet are not fit for purposes of timber, that must be met. In the cases referred to, the injunction restrained the tenant for life from cutting trees unfit to be cut as timber.

Injunction refused.

BETWEEN HIS MAJESTY'S ATTORNEY-GENERAL, AT THE RELATION OF THE HONORABLE GEORGE SPENCER CHURCHILL (COMMONLY CALLED THE MARQUIS OF BLANDFORD), AND THE HONORABLE GEORGE JAMES WELBORE ELLIS AGAR, INFORMANT AND PLAINTIFF; AND THE MOST NOBLE GEORGE DUKE OF MARLBOROUGH, DEFENDANT.

BEFORE SIR JOHN LEACH, V. C., DECEMBER, 18, 19, 1818.

[*Reported in* 3 *Maddock*, 498.]

THE information and bill stated that the defendant, under letters patent from the Crown, bearing date the 5th day of May, in the 4th year of Queen Anne, and under the limitations contained in the act of 5 Anne, c. 3, was seised of the honor and manor of Woodstock and Hundred of Wootton, in the County of Oxford (including Blenheim House and Park), to him and the heirs male of his body, and that the relator, George Spencer Churchill (commonly called the Marquis of Blandford), was the defendant's eldest son and heir male apparent of his body; that by said act the said estate so vested in the defendant was rendered inalienable, either by fine, recovery, or any other act or acts to be done or suffered by said defendant; that the defendant had lately cut down several of the trees in Blenheim Park and the woods, plantations, and grounds adjoining thereto, which were of great ornament to said mansion-house, park, and grounds, or which otherwise afforded shelter to said mansion-house, and divers trees in lines, avenues, ridings, and clumps, or in the said park and grounds, which were planted and greatly calculated for the ornament of said park and grounds; that he had also cut down in the said park, plantations, woods, and grounds, divers other trees of an improper growth and not fit to be cut for timber, &c. The bill prayed for an injunction and account. The defendant demurred.[1]

[1] The statement of the pleadings has been much abbreviated. Such parts of the case as related merely to the construction of the statutes referred to have been omitted.—ED.

On the filing of the bill, and affidavits in support thereof, an injunction was granted by the Lord Chancellor.

Mr. *Bell*, Mr. *Heald*, Mr. *Wray*, and Mr. *Hampson*, in support of the demurrer.

. . . . . .

By the act of 3 and 4 Anne, c. 6, the Queen was enabled to make a grant in fee to the Duke, which she did; and thereby he became absolute owner of the fee, and might have disposed of it as he pleased. By the act of 5 Anne, c. 3, the Duke, at the instance of the Queen and by his own desire, is made tenant for life of the land previously granted in fee, without impeachment of waste, with a remainder in tail, the lands being settled by this act so as to go with the honors, but still the reversion remained in the Duke under the grant made to him in fee by the letters patent. This case, therefore, is not within the 34 and 35 Hen. VIII., c. 20, which only applies to tenancies in tail granted by the Crown, as to which the reversion is in the Crown. No reversion being in the Crown, it does not appear on what ground the Attorney-General comes here, there being no right of the Crown to protect.

The present Duke is tenant in tail under this second act; and the question is, whether, as such, he has not a right, if he pleases, to cut timber on this estate; or whether there are any words in the act to restrain him?

When the case was before the Lord Chancellor he granted the injunction, but said he did not remember any case expressly in point.

By the common law any tenant, even tenant for life or for years, might commit waste, except in three cases: 1, Guardian in chivalry; 2, Tenant in dower; and 3, Tenant by the curtesy. Then came the statutes of Marlbridge, 52 Hen. III., c. 23, and of Gloucester, 6 Edw. I., c. 5, whereby it was provided that a writ of waste should lie against any farmer or others that held lands for life or for years. The statute of Marlbridge only gave single damages; that of Gloucester treble, and a forfeiture of the place wasted.

By express words a tenant for life might be made without impeachment of waste; and courts of law held that the tenant for life, under such words, might do what waste he pleased. Upon this, courts of equity interfered; and on the ground that a tenant for life could not have been intended under those words to have a power to commit destructive waste, by which the interests of those in remainder would be in a great measure destroyed. Lord Barnard's Case was not, as hath been supposed, the first case in which courts of equity so interfered. In Abraham *v.* Bubb, long prior, Lord Nottingham speaks of such interference as very common. There are, however, but few cases in the books[1] until Chamberlayne *v.* Dummer: subsequent to that the cases are numerous; but in Piers *v.* Piers, Lord Hardwicke said, "if a

[1] There were some cases not reported in the House of Lords: — Lord Blancy *v.* Mahon, Dom. Proc. 27 March, 1723; Parker *v.* Lord Stawell and others, Dom. Proc. March, 1728.

son should have it in his power to call his father into a court of equity for every alteration he makes in a walk or an avenue, though he removes the trees to another part, and so of the house, it would be an endless fund of disputes between them; and it would be better for the public that Raby Castle had been pulled down than that that precedent had been made." The first interference of the court was in cases of tenants for life, without impeachment of waste; afterwards a question arose whether a tenant in tail, after possibility of issue extinct, was restrainable from committing waste? In Lewis Bowles's Case one of the resolutions was that such tenant in tail should not be punished for waste;[1] but subsequent cases seem to have determined that such tenant cannot commit what is called equitable waste; though Lord Hardwicke said, in Aston *v.* Aston, "that was carrying it a good way." In Williams *v.* Williams the question was agitated, Whether a tenant in tail after, &c., could commit waste, &c.? The case went to law, and it was there determined[2] she might cut timber, and apply the produce as her own property; but in that case no question arose whether she could commit equitable waste. No authority, however, can be adduced to show that a tenant in tail has ever been enjoined from committing equitable waste. He has a clear common-law right to commit waste; and even in those cases where an estate tail is granted by the Crown, and the reversion remains in the Crown, as to which the statute 34 and 35 Henry VIII., c. 20, enacts that a recovery by a tenant in tail of lands granted for public services, shall have no effect, still the tenant in tail may, it is apprehended, commit waste, that statute not having limited the powers of a tenant in tail, except as to barring the reversion in the Crown. The acts only restrain the Duke from alienation; in all other respects he is tenant in tail. Tenants in special tail, by the common law, had a limited fee simple, and when alienation was prevented by the statute *de donis*, yet there was not any change in their right to commit waste.

In Lord Glenorchy *v.* Bosville,[3] Lord Talbot said, "a tenant in tail may commit waste in houses, as well as in all parts of the estate, notwithstanding any restraint to the contrary; and no instance can be shown where a tenant in tail has been restrained from committing waste by the injunction of this Court." He also observed that "an injunction was refused in Mr. Saville's case, of Yorkshire, who being an infant, and tenant in tail in possession, and in a very bad state of health, and not likely to live to full age, cut down, by his guardian, a great quantity of timber just before his death, to a very great value; the remainder-man applied here for an injunction to restrain him, but could not prevail."

Is the timber on this estate to remain forever unalienable? Such a construction would counteract two well known principles of law; one, that a tenant in tail has an absolute dominion over the estate; the other, that property ought not to be inalienable. If timber becomes

[1] 11 Rep. 80; S. C., *nom.* Bowles *v.* Berry, 1 Roll. 177. [2] 12 East. 209.

[3] For. 16, S. C. MS. But no notice taken of what was said as above, respecting Mr. Saville's Case.

unsightly,[1] or is decaying, or there is an offensive drain or a stable, which is a nuisance, is the Duke to be prevented from removing it? Are all tenants in tail, with reversion in the Crown, to be in this condition? Is the estate to be incapable of improvements? Is it to be said, that if all the family agree to cut the timber, that they are to be prevented doing so, and by a remote heir? The case of the Countess of Shrewsbury *v.* Earl of Shrewsbury,[2] does not apply; the question there was, Whether, on paying off an incumbrance, he should be considered as a tenant for life, as to the paying off the incumbrance, or tenant in tail, the reversion of the estate being expressly reserved to the Crown; that was only a question of *intention;* and though in paying off that incumbrance he was considered as acting with the views of a tenant for life, the estate being inalienable, yet that is not a decision that to *all* purposes he was to be considered as a tenant for life. There is nothing in the act expressly restraining the Duke from cutting ornamental timber; an alienation of the estate is all that is restrained; he is left with all the rights of a tenant in tail. It will be said, perhaps, that the Duke may cut timber so as to improve the estate; but that would be to introduce a new doctrine as to waste; the doctrine of the Court, where it has interfered to prevent equitable waste, has been, that trees planted for ornament, however bad the taste, must be preserved.[3] It is fit we should adhere to the old course of law; by departing from it we may see what we shall gain, but not what we shall lose.

The *Solicitor-General*[4] and Mr. *Sidebottom*, *contra.*

The question in this case is of great importance, not only to the individuals concerned, but to the public. The question is, whether the present, or any future Duke of Marlborough can destroy property which was given as a perpetual monument of British gratitude for the then unparalleled services of the first Duke? The demurrer must be taken to admit that the Duke has cut down, and intends to cut down, timber planted for shelter and ornament. We do not insist that he

[1] In Lord Mahon *v.* Lord Stanhope, before the late Master of the Rolls (Sir William Grant), 9th March, 1808, MS., where the bill, amongst other matters, prayed an account of equitable waste which had been committed, and an injunction against further waste, His Honor said, "As the Court cannot determine what is ornamental timber, it being merely a matter of taste, they therefore say, that what was planted for ornament must be considered as ornamental. That the defendant has cut down some trees of this description is apparent, but it was by no means clear that they were cut down under circumstances which could be considered waste in the eye of this Court. For if a tempest had produced gaps in a piece of ornamental planting, by which unequal and discordant breaks and divisions were occasioned, it would be going too far to hold that cutting a few trees to produce an uniform and consistent, instead of an unpleasant and disjointed appearance, should be construed waste."

[2] 3 Bro. C. C. 120; S. C. 1 Ves. jun. 227.

[3] In —— *v.* Copley, 1806, MS., where the defendant, by his answer, stated he had cut down trees for the improvement of the estate, Lord Erskine granted an injunction against cutting down ornamental timber, and trees planted in the situations of others cut down, *but without prejudice to the thinning of trees for the sake of ornament.*

[4] Sir John S. Copley.—ED.

ought to be prevented cutting down any timber, but only such as was planted for shelter and ornament. The Crown has a right to interfere. The same principle which is to warrant the cutting down of ornamental timber would justify the demolition of the house. The estate emanated from the Crown; it was given for public services, and on public grounds; and it is interested in seeing the gift is not abused. If the two acts, the act of the 3 and 4 Anne, c. 6, and the act of the 5 Anne, c. 3, are to be taken together, it must be considered as an estate settled by the Crown, the reversion of which is in the Crown. Even where there is no reversion in the Crown, as in the case of a bishopric, the Attorney-General, on behalf of the Crown, may interfere to prevent the bishop from committing waste. Suppose collusion between all the parties interested in this estate, might not the Crown interfere to protect it? The plaintiff, the Marquis of Blandford, is the next in succession; Mr. Welbore Ellis Agar, it is true, has a more remote interest; but they are entitled (certainly the Marquis is entitled) to file such a bill as this.

This estate was originally granted to the Duke of Marlborough in fee, but afterwards it was thought proper that the estate should always accompany the title, and for that purpose the 5 Anne, c. 3, was passed. It is an estate peculiarly limited by Parliament, and cannot, strictly speaking, be termed an estate tail.

. . . Suppose, however, for the sake of argument, that this estate is properly termed an estate tail, or a qualified estate tail; still there being an express clause to prevent alienation, it is a case in which, according to the principle upon which other cases have been decided, this Court will interfere to prevent the destruction of ornamental timber and of the house.

What the common-law doctrine is as to waste, is scarcely necessary to be considered, since this is an application founded upon the equitable doctrines of this Court. By the common law a tenant in tail, after possibility, &c., might have committed what waste he pleased; but Lord Hardwicke in Aston *v.* Aston, mentions Abraham and Bubb, and classing it with the case of tenant for life without impeachment of waste, observes that "extravagant and humorsome waste" was in that case restrained. He mentions also Williams *v.* Day, where Lord Nottingham declares he would stop the pulling down houses in the case of tenant in tail *apres* possibility, &c., which Lord Hardwicke observes is carrying it a good way. There is a subsequent case, Anon,[1] where the Master of the Rolls granted such an injunction. In Garth *v.* Cotton, also, Lord Hardwicke cites as law the determination in Abraham and Bubb.[2] A tenant for life without impeachment of waste, and a tenant in tail after, &c., are both put in the same class with respect to relief in equity against waste, and why? Because each has a limited estate; each is without a power of alienation; and it is unreasonable and against conscience that they should destroy the estate, and exercise an

[1] 2 Freem. 278 [2] 2 Dick. 209.

absolute power, as if they were, or could become, owners in fee. In Cooke *v.* Winford,[1] on a motion to stay a jointress, tenant in tail, after possibility, &c., from committing waste; the Court held that she, being a jointress, within the 11th Hen. VII., ought to be restrained, being part of the inheritance, which, by the statute, she is restrained from aliening, and therefore granted an injunction against wilful waste. In Williams *v.* Williams it is stated, *arguendo*, in support of the demurrer, that this case of Cooke *v.* Winford is not to be found in the Registrar's Book, probably because, as it appears on a search since made, the real title of the cause was Cookes *v.* Whateley, *alias* Winford. The minutes of the order have been found,[2] and it appears an injunction was granted to restrain wilful waste in the houses. The case of the Countess of Shrewsbury *v.* Earl of Shrewsbury, which was cited when the Lord Chancellor granted the present injunction, and which his Lordship thought analogous in principle, has a material bearing upon the present question. It is a rule that if a tenant in fee or in tail pays off an incumbrance it is presumed the estate was meant to be discharged; but if a tenant for life pays off an incumbrance the presumption is otherwise, and the *onus* lays upon them who contend the estate was meant to be discharged to show that it was so meant. But in the case alluded to, as Lord Shrewsbury was tenant in tail by grant from the Crown, but expressly restrained from alienation, Lord Thurlow thought he ought

[1] 1 Eq. Cas. Abr. 221, pl. 2. [On a motion to stay a jointress, tenant in tail after possibility, &c., from committing waste, the Court held that she, being a jointress within the 11 Hen. VII., ought to be restrained, being part of the inheritance, which by the statute she is restrained from aliening, and therefore granted an injunction against wilful waste. Hilary, 1701.— Ed.]. S. C. *nom.* Cooke *v.* Whaley, 1 Eq. Cas. Abr. 400, pl. 5. [On a motion for an injunction to stay a jointress, tenant in tail after possibility, &c., from committing waste, it was urged that she, being a jointress within the 11th of Hen. VII., ought in equity to be restrained from cutting timber, that being part of the inheritance which by the statute she is restrained from aliening; and the court granted an injunction against wilful waste in the site of the house, and pulling down houses. — Ed.]

[2] The following is a copy of the minutes:

"Jovis, 5 Feb., 1701.

Lord Keeper, Sir *William Child*, Mr. *Gery*, Mr. *Rogers*.

Sir *Thomas Powis* prays an injunction to stay waistes.

An affidavit read.

Vernon p' questioner.

Dobbins p' defendant. — We are in tenant in tail after possibility of issue extinct, and it hath been adjudged in this court that they could not be constrayned.

11 Hen. VII.

Pooley p' defendant. — We are tenant in tail after possibility, &c., and they would have this court doe what they refused to doe.

Wright for defendant.

Sir *Thomas Powis* p' questioner. Doe hope this court will interpose, that they shall not commit waiste, and that this cause shall be heard

Vernon, the question doth not come up to the precedents cited by the defendant.

The articles read.

Cur. — Take an injunction to stay any willfull waistes in defacing the scite of the mansion-house, but noe other injunction.

Cur. — Take an injunction to stay any willfull waistes in any of the houses."

to apply the same rule to a tenant in tail so restricted, paying off an incumbrance, as was applied to a tenant for life. So in Robinson *v.* Litton, an infant tenant in tail was, at the instance of contingent remainder-men, enjoined from cutting down timber. The legal restraint there, owing to infancy, was thought to afford a sufficient ground to interpose by injunction on behalf of those in remainder. It has been said that if timber planted for ornament cannot be cut it must stand for ever; but what is the consequence if it may be cut? The estate might be laid waste, the house destroyed, and this great national monument of British valor and British gratitude annihilated!

THE VICE-CHANCELLOR. This is a case of very considerable importance not only from the very high degree of interest which must necessarily attach to the case in itself, but because its decision involves some of those principles upon which a very important branch of the jurisdiction of this court depends.

[*His Honor* here stated the substance of the information and bill, and of the demurrer.]

It is admitted by the counsel who support this information that the defendant, the Duke of Marlborough, has, as incident to his estate, a right to cut down all timber other than timber planted for ornament or shelter; but it is contended that under the special provisions of the 5 Anne, c. 3, the Duke has not an estate tail, and is for that reason within the principle of those cases in which courts of equity interfere to restrain the cutting of timber planted for ornament or shelter; or that, if the Duke of Marlborough can be considered as having an estate tail, yet being restrained by the provisions of the statute from defeating the succession of those to whom the estate is limited after him, and the reversion being in the Crown, he is therefore within the same principle of equitable restraint as to the cutting of timber planted for ornament or shelter.

That an ordinary tenant in tail may, at his pleasure, cut down all timber for whatever purposes planted, admits of no question, and it is hardly necessary to advert to the origin of that particular species of tenure. It grew out of the ancient conveyances to a man, and to the heirs of his body. Under such a conveyance, it was held at common law that until issue born he had not the absolute property in the estate, it being limited by the grant not to his general heir, but to the heirs of his body; but that the moment issue was born, the condition being performed, the estate became absolutely his property, and he could dispose of it in the same manner as if he had held it in fee simple. The legislature, however, thought fit to interfere, and by the statute of Westminster the second (commonly called the statute *De Donis*, 13 Edward I., c. 1), it was declared that the will of the donor or grantor should be observed, and that an estate so granted to a man and the heirs of his body should descend to the issue, and that he should not have power to alienate the estate. In the construction of that act of Parliament it was held that a tenant in tail remained with the same

unqualified and absolute ownership of his estate as he had before that statute, with the single exception of the restraint on alienation. In that restraint of alienation was included alienation by lease; leases being considered, according to the construction of that statute, as partial alienations; but by the subsequent statute of the 32 Henry VIII., c. 28, a tenant in tail is permitted to make certain leases mentioned in that statute. With the exception, therefore, of alienation including leases, unless according to the statute, a tenant in tail is at this day to be considered as much the absolute owner of the estate as a tenant in fee simple, and, as such, may do what he pleases with the buildings and timber on the estate. Such being the law, it is to be considered what this act of Parliament has done in settling this estate upon the issue of the first Duke of Marlborough. . . . My opinion is that the issue of the Duke of Marlborough were, by the statute, successively made tenants in tail of this property; and that they have all the legal rights and incidents which belong to an estate of this character, except where such rights and incidents are specially qualified by the provisions of the statute; and that there being no qualification with respect to the right of cutting timber, they are as much the legal owners of the timber upon this property as if they were tenants in fee simple. It remains to be considered whether there is a principle of jurisdiction in a court of equity to restrain the legal incidents of an estate tail, with respect to timber, either because the estate tail cannot be barred, or because the reversion is in the Crown? Abstractedly considered, it would seem to be a singular proposition to state that if a tenant in tail, without the power of barring the successor, has by law a right to deal as he pleases with the building and the timber upon his estate, that a court of equity can assume a jurisdiction to alter the law and deprive the tenant in tail of the legal incidents of his estate; that if the law makes a tenant in tail absolute owner of the timber, a court of equity, which is bound to follow the law, is to make a new law, and to say that a tenant in tail shall not be the absolute owner of the timber. But whatever objection there might be, abstractedly considered, to such a principle, yet if in a long course of proceeding, evinced by precedents and records, and sanctioned, as it were, by common consent, such a jurisdiction has, in this particular case, been exercised by successive judges, I agree that it is now too late to inquire into the origin of that jurisdiction. It is pressed upon the court that there is a course of precedents which necessarily establish a jurisdiction to that extent. It is not, however, alleged that such a jurisdiction has ever been actually exercised in the particular case of a tenant in tail, whose estate is not barrable, but that it has been exercised in analogous cases. The great body of authorities relate to the case of tenant for life without impeachment of waste; but it is to be observed that the ownership of the timber is not a legal incident to the estate of tenant for life. He takes his interest in the timber by the provision of the grantor; and courts of equity seem to have interfered upon the construction and intention of the grant — to have considered that the

grantor meant to confer a full power of temporary enjoyment, without the power of destroying or altering the character of that property, which he had limited over in succession to others. In the case of Robinson *v.* Lytton, Lord Hardwicke expressly grounded his interference upon the intention of the testator, and upon the circumstance that the heir was a trustee for other persons, and the injunction was not confined to equitable waste. The case of a bishop bears no application, for there a court of law will interfere by prohibition. Knight *v.* Mosely was not a case of equitable waste. The case of a tenant in tail, after possibility of issue extinct, is, however, urged as being altogether in point; and there is, certainly, authority that such a tenant in tail has been considered within the principle of equitable waste. The common case of a tenant in tail after possibility of issue is extinct, is where the estate is descendible to the issue of the wife alone: until the death of the wife without issue this estate has all the legal incidents of other estates tail; but upon the death of the wife without issue the estate has no longer a descendible quality, and the husband's interest is, in effect, limited to his life. His estate becomes ranked in the law amongst estates for life; and he may make exchange with a mere tenant for life. In Lewis Bowles's Case, however, it was held at law that as he had, before the death of his wife, an estate tail, and was once owner of the timber, that notwithstanding the death of his wife, and the change in the quality of his estate, he should still continue unimpeachable of waste. In a court of law, therefore, a tenant in tail after possibility of issue extinct, is, in effect, a tenant for life without impeachment of waste; and courts of equity have, in the question of equitable waste, confounded him with other tenants for life without impeachment of waste, and have not entered into the distinction that he is unimpeachable of waste, not by the provision of a grantor, but as a legal incident to his estate. If, however, this question as to the tenant in tail after possibility of issue extinct, is now to be considered as the settled doctrine of the court, it is not in point to the present case: the Duke of Marlborough is not at law tenant for life without impeachment of waste. The case of tenant in tail, without the power of barring his issue, is common to every case where the reversion is in the Crown; and no instance can be stated in which a court of equity has ever interfered against such a tenant in tail, upon the principle of equitable waste. I cannot feel myself at liberty, therefore, to extend this jurisdiction of a court of equity beyond the limits of all former precedent. The argument of inconvenience has been very strongly pressed upon me; it has been said that the necessary consequence of such a determination must be, that this monument of national gratitude will be at the mercy of every successive individual who may happen to have the possession of it. There is some inconvenience, however, and something like absurdity, on the other side. If this Court is in all time to protect all trees planted here for ornament or shelter, then the taste of the first proprietor, with respect to the gardens and the house, is for ever to remain impressed

upon this property, how little suited soever it may be to the altered notions of succeeding ages, with regard either to beauty or convenience. Arguments of inconvenience are sometimes of great value upon the question of intention. If there be in any deed or instrument equivocal expressions, and great inconvenience must necessarily follow from one construction, it is strong to show that such construction is not according to the true intention of the grantor. But where there is no equivocal expression in the instrument, and the words used admit only of one meaning, arguments of inconvenience prove only want of foresight in the grantor; but because he wanted foresight courts of justice cannot make a new instrument for him; they must act upon the instrument as it is made. It is said that the Duke may demolish the mansion of Blenheim, and reduce this noble possession to a desert. It is true he may; but he enjoys this estate under a grant from the legislature, and we can only look into that grant to see whether or not the legislature meant to leave him at liberty to do so. If we find, upon looking into the act, that the legislature meant to repose a confidence in the successive possessors of this property, that they would deal with it as became their high rank and situation, a court of equity cannot repeal the law, and recall that confidence which the legislature have given. The legislature have calculated upon that feeling which belongs to all great and good minds; they have considered that the successive possessors of this splendid property would always deal with it according to the sentiments which belong to persons in their exalted stations of life; that their pride and honor would always lead them to maintain this magnificent monument of national gratitude; and it is not to be believed that any member of this noble family will ever act, with respect to this property, upon other principles.

Demurrer allowed.

Original Bill.

MARQUIS AND MARCHIONESS OF ORMONDE *v.* KYNERSLEY.

Bill of Revivor and Supplement.

MARQUIS OF ORMONDE *v.* KYNERSLEY AND OTHERS.

Before Sir John Leach, V. C., April 29, 1820.

[*Reported in* 5 *Maddock*, 369.]

This bill was filed by the remainder-man against the executor of the deceased tenant for life, whose estate had been unimpeachable of waste, for an account of the produce of ornamental timber which had been cut by the tenant for life.

The plaintiff early in 1808 had filed his bill against the tenant for life himself for the same purposes, and had obtained an injunction. The tenant for life put in his answer to that bill on the 1st June, 1808, and by consent an order was made on the 31st July, 1808, referring it to the Master to inquire as to the ornamental and other timber which had been cut by the tenant for life.

This order was never acted upon; and the tenant for life lived till April, 1815, without any further proceeding being had in the cause.

The present bill was not supplemental to that suit, but to a subsequent original bill. The case was much argued. I was not present at the argument, but am informed that it was first contended that such a bill could not be filed, and the following cases were cited; viz., Bishop of Winchester *v.* Knight;[1] Garth *v.* Cotton;[2] Hambly *v.* Trott;[3] Lee *v.* Alston;[4] Marquis of Lansdowne *v.* Marchioness Dowager of Lansdowne. And secondly, that as no timber had been cut since the injunction in 1808, and the plaintiff had not proceeded in the former cause, he must be taken to have waived his claim in that respect.

Mr. *Bell*, Mr. *Benyon* and Sir *G. Hampson*, for the plaintiff.

Mr. *Heald* and ——— for the defendants.

The Vice-Chancellor held that though there was much ground for the latter defence, yet as it was not made by the answer, he could not notice it. Upon the general point, whether such a bill could be maintained, *His Honor* stated — That the restraint upon the legal owner as to equitable waste was to be considered as founded on a breach of that trust and confidence which the devisor reposed in the tenant for life, that he would use his legal estate only for the purpose of fair enjoyment. — That it was a trust implied in equity from the subsequent limitations, and from the presumed intention of the testator that he meant an equal benefit to all in succession. — That in all cases the assets of a testator were answerable for a profit made by breach of trust: and an account was decreed according to the prayer of the bill.[5]

COFFIN *v.* COFFIN.

Before Sir John Leach, V. C., March 8, 1821.

[*Reported in* 6 *Maddock*, 17.]

This was a motion to dissolve an injunction granted to restrain the cutting of trees planted or left standing for ornament or shelter, and also saplings and immature trees.

[1] 1 P. Wms. 406. [2] 1 Dick. 183; S. C. 8 Atk. 751, and 1 Ves. 524, 546.
[3] Cowp. 376. [4] 1 Bro. C. C. 194.
[5] For a statement of the further proceedings in this suit, see 15 Beav. 10, n. — Ed.

It was objected that there was no complaint in the bill as to saplings or immature trees, and therefore that the injunction was at all events too extensive.

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

SAME CASE.

Before Lord Eldon, C., April, 14, 1821.

[*Reported in Jacob*, 70.]

The defendant J. P. Coffin was tenant for life, without impeachment of waste, of a mansion-house and estate, situate on the coast of Devonshire. The plaintiffs were R. P. Coffin the elder, who was tenant for life in remainder, and his son R. P. Coffin the younger, who was tenant in tail-male in remainder expectant on the death of R. P. Coffin the elder. The defendant J. P. Coffin had assigned his life interest to one Rowe (who was also a defendant) in trust for his creditors, and Rowe was about to fell timber. He had given the plaintiffs a notice to that effect; and, as was stated, had pointed out some ornamental timber around the house, as part of what was intended to be cut. The bill, stating these facts, prayed an injunction; and on the 6th of December 1820, an injunction was obtained upon motion *ex parte* before the Vice-chancellor, restraining the defendants from any waste, spoil, or destruction, in or about the mansion-house; and from cutting down any timber or other trees growing upon the estate, which were planted or left growing there for the protection or shelter of the mansion-house, or which grew in lines, avenues, walks, vistas, or otherwise, for the shelter or ornament of the said house, or of the gardens, orchards, or pleasure-grounds thereunto belonging, or which in any manner protected the same from the effects of the sea; and also from cutting down any timber or other trees, except at seasonable times and in a husband-like manner, and likewise from cutting saplings and young trees, not fit to be cut for the purposes of timber.[1]

Affidavits were filed on the part of the defendants, denying any intention of felling the ornamental timber; other affidavits were filed on the part of the plaintiffs, for the purpose of showing what part of the timber was of that description; and the defendants now moved to dis-

[1] Reg. Lib. A. 1820, fo. 115.

solve the injunction. A similar motion had previously been made before the Vice-chancellor.[1]

Mr. *Trower* and Mr. *Raithby*, for the defendants.

Mr. *Horne* and Mr. *Parker*, for the plaintiffs.

THE LORD CHANCELLOR. The court does not protect timber because it is ornamental, but it protects it if it was planted for ornament, whether it is or is not ornamental. And, therefore, most of the affidavits which have been filed do not apply, showing only that these trees are ornamental; it must be shown that they were planted or left standing for the purpose of ornament. I see that in a case before Lord Hardwicke, of which I have a note, he confined it in that manner,[2] and he even carried it so far as to restrain a man from cutting down trees that he had planted himself.

The court grants injunctions against waste when it is done only in a slight degree, or when threatened. The injunction here went too far: nothing was done by the defendants but sending the notice; which, if Rowe really pointed out the ornamental timber, admits the construction put upon it, of an intention to cut it down. But supposing that to be made out, was it right to grant an injunction as to the other kinds of waste? It may be said that if he commits one act of waste he may be suspected of being about to commit others. But we ought to be careful about this, for with respect to growing timber, the court does not expect a tenant for life to let it grow so long as a tenant in fee might find it his interest to do. And the court never grants injunctions on the principle that they will do no harm to the defendant, if he does not intend to commit the act in question: but if there be no ground for the injunction, it will not support it.

In one respect the injunction certainly goes too far. I mean in what it says about protecting the premises from the effects of the sea. I cannot understand how that came to be inserted.

The parties afterwards, at the suggestion of his Lordship, agreed upon a reference to determine what part of the timber was fit to be cut.

[1] 6 Mad. 17.

[2] One of the first cases in which the principle of equitable waste was applied to timber was Lawley *v.* Lawley, in 1717. The injunction was in terms similar to those used in Packington's Case, 3 Atk. 215, restraining the defendants from cutting down or felling any trees on the premises, that were for the ornament or shelter of the said capital messuage. Reg. Lib. B. 1717, fo. 41. A commission afterwards went, by consent, to determine which of the trees were proper to be cut down, and which to be preserved for the ornament or shelter of the house. Reg. Lib. B. 1717, fo. 178. On its return, the injunction was continued during the defendant's life, as to the trees certified not to be fit for cutting. Reg. Lib. B. 1717, fo. 386.

WOMBWELL *v.* BELASYSE.

BEFORE LORD ELDON, C., APRIL 22, 23, 1825.

[*Reported in* 6 *Vesey* (*2d edition*), 110 *a, note.*]

THE LORD CHANCELLOR. The doctrine of the court is extremely well settled. If the object in planting timber, or in leaving timber standing, is ornament, whether that object is effected, whether the effect is truly ornamental, or the most absurd exhibition that ever was produced, this court will protect that timber; and the protection is not confined to trees planted, or left standing, as ornamental to a house or park: nor does it depend on the distance from the mansion; but I do not recollect that it has gone to this extent, that, if a ride is made through a wood, in which wood the proprietor has been in the habit of cutting timber for the use and repair of the mansion, that ride shall protect the whole wood from being cut at the time of making the ride, and in all future times: as, if the purposes of that ride can be as well consulted by leaving a tenth part of the wood standing, it would be most absurd to require that the whole should be left. Neither do I recollect any issue ever directed upon this; and in directing an issue attention must be had to the interests of all parties; that, if the injunction restrains the legal right to cut timber, security shall be given, that in case of the death of him, whose enjoyment of that legal right may have been restrained improperly, his estate shall, to the extent of the benefit he would have derived from the exercise of that right, be reimbursed by those who restrained him. I think, also, that two issues would be necessary; not only whether the timber was planted, or left standing, for ornament, but also, how far, consistently with that object, trees might be cut; as I cannot hold that the effect of making a ride through a wood is to be, that an axe shall not be laid to the root of a tree in that wood; which would be carrying this doctrine to an extent to which it has never yet gone.

In framing the issue another thing also must be attended to; by whom the trees were planted or left standing for ornament: as, if they had been planted by tenant for life without impeachment of waste, unless afterwards left standing with that view by some person having the inheritance, they would not be entitled to this protection.

APRIL 23.

THE LORD CHANCELLOR. This is an application to discharge an order of the Vice-chancellor, directing an issue to try whether certain trees in a wood, called Prestwood, part of the Newburgh estate, were planted or left standing for ornament to the mansion-house, park, grounds, &c., an order formed upon the equitable doctrine of this court, with reference to waste. I do not apprehend that there are any particular circumstances requiring attention: but the question turns sim-

ply upon this; whether Lady Charlotte Belasyse, being now tenant for life without impeachment of waste, can, consistently with that equitable doctrine, exercise the legal right she unquestionably has. First, I may state, as established doctrine, that the question is not, whether the timber is, or is not, ornamental: but the fact to be determined is that it was planted for ornament; or, if not originally planted for ornament, was, as we express it, left standing for ornament by some person having the absolute power of disposition. If such a proprietor had even the bad taste to plant or leave standing, a couple of yew trees cut in the shape of peacocks on the road side, I do not shrink from what I laid down in The Marquis of Downshire *v.* Lady Sandys, that they must be protected, until some person, having the same absolute power of disposition, with more correct taste, comes into possession; and this doctrine applies in the same manner to a pleasant ride, although at the distance of two miles from the mansion-house; but I do not agree that a mere tenant for life, coming into possession, can vary the estate. That can be done only by some person having the absolute dominion over it.

A farther subject of consideration is, how far this protection can be applied to an avenue or ride through a wood, which had previously supplied timber for the purpose both of repairs and sale; how far the act of making that ride is to be considered as a consecration of the wood to this purpose of ornament. It seems to me rather a strong proposition, that, if tenant in tail or in fee, whose predecessors had supplied all the exigencies of the estate and all their own exigencies by an appropriation of the timber and sale of part of it, forms a ride or avenue, all the withered arms and branches must remain for ever in that state, which one of the affidavits, on which this injunction has been granted, and this issue directed, represents as most ornamental on a Yorkshire estate. I have known instances on an application for an injunction of an inquiry directed before the Master to ascertain whether trees were planted or left standing for ornament: a course which I can easily conceive may lead to a great length of unnecessary proceeding, and prove extremely prejudicial. A tenant for life without impeachment of waste has the right by law to cut timber, and apply the produce to his own use; and if this court restrains the exercise of that legal right without making the party, at whose instance the injunction is granted, give ample security to insure justice being done, in case it should turn out, that the restraint ought not to have been imposed, it may happen, that after the death of that tenant for life his estate may lose the value of that timber which he had a legal right to cut. In a case of this sort it is extremely difficult to ascertain whether this timber was planted or left standing for ornament by a person having such an interest in the estate that his will was to control those who were to take after him; and, when the affidavits leave the question excessively doubtful, the court cannot possibly send it to a farther inquiry, unless the person calling for it will give such security that, if it shall appear that this lady had the right to cut, and ought not to have been restrained, she, or those who take after her, shall be reimbursed the whole value.

Although I do not recollect an instance of sending such a question to a jury, I think there may be cases in which that course ought to be taken; admitting both a more speedy and a better decision than in the Master's office: but it would be extremely dangerous to send it to a jury without very special directions, not only for ample security, but also confining the issue to these questions; whether the timber was planted or left standing for ornament, and by whom; and what estate that person had: otherwise we shall be left just where we were, with a verdict upon evidence such as these affidavits afford amounting to no more than that, which no man can doubt, that these woods are ornamental to this estate. Another inquiry must be added (for this does appear to me to go considerably beyond what has been the doctrine of this court), whether the act of cutting rides through a wood, certainly a circumstance of evidence, that the wood was in some measure appropriated, and intended to be appropriated, to the purpose of ornament, is inconsistent with cutting a great part of that wood, leaving sufficient to answer that purpose of ornament; and upon this the acts of the owner, who made those rides, will be extremely material; as, if that owner, after those rides were made, had been in the habit of cutting in that wood for the purpose of repairs and sale, it cannot be represented as his intention that, not a sufficient part, but the whole wood, should be consecrated to that purpose of ornament, so that a court of equity must say it shall stand until it shall be entirely decayed.

Let the plaintiff go before the Master, and give such security as will in the Master's judgment secure to the defendants the value of all the trees which the defendant shall be prevented from cutting by the injunction of this court, in case it shall finally turn out in the judgment of this court that they ought not to have been enjoined in equity; and let the Master proceed *de die in diem*. Declare that in the issue hereinafter directed it is intended by this court that the jury shall try and determine, not whether the timber in question, or any part of it, is ornamental, but whether the timber in Prestwood, or any part thereof, ornamental or not, was planted or left standing for ornament or the purpose of shelter by any former owner of the estate: 2dly, whether consistently with the purposes, for which such trees were planted or left standing, if planted or left standing for ornament or shelter, any and what part thereof may be cut for the purposes of repairs or sale; and let the jury, in case they shall find that such wood, or any part thereof, was planted or left standing for ornament or shelter by any former owner, indorse upon the *Postea* what estate and interest in the lands such former owner had.

I do not confine the directions to the mansion-house; declaring my opinion that consistently with this doctrine, which, I admit, has taken great liberties with the rights of mankind, I must abide by what has been laid down in such cases; and therefore not only the mansion-house, but these rides and shelter to the park also, must be protected.

DUKE OF ST. ALBANS *v.* SKIPWITH.

BEFORE LORD LANGDALE, M. R., MARCH 14 AND 17, 1845.

[*Reported in* 8 *Beavan*, 354.]

THE plaintiff in this cause was the owner of the advowson and the patron of the rectory of Pickworth, of which the defendant was the rector and incumbent.

To the rectory there was belonging a glebe of somewhat more than twenty acres, including three closes of meadow land called the eight acre, the five acre, and the three acre closes.

Upon the closes called eight acre and five acre closes, there were marks of the plough; but the defendant, expressing his belief that they had been ploughed up and in tillage within the last seventy years, nevertheless admitted that he had not been able to find any person who could positively state whether those two closes were or was ever ploughed.

The plaintiff filed this bill, alleging that the three closes were ancient meadow or pasture; that they had always or for many years past been exclusively used as meadow land, and that to convert them into tillage would be detrimental to the value of the rectory, as well as to the enjoyment of the rectory house as a residence, and upon affidavits, showing that the defendant was beginning to plough up part of the meadow land, obtained an *ex parte* injunction to prevent him from doing so.

The defendant, in his answer, stated that the grass on the eight acre and five acre closes was greatly intermixed with moss and weeds, and that he was desirous of ploughing up those two closes for the purpose of thoroughly cleansing and cultivating them; and when sufficiently cleaned and prepared in due course of husbandry, to have the same laid down again in grass seeds of such an improved quality and nature as the present advanced state of agricultural science, in connection with experience, had shown to be best suited to the soil. He also said that he had consulted very experienced agriculturists upon the point, and that it was their opinion also that it would be beneficial to the two closes to be ploughed up, cleaned, and cultivated, and afterwards laid down in grass again, as contemplated by the defendant. And he stated for himself, that if he were permitted to carry his intentions into effect, the condition and state of the two closes would be greatly improved; and that he believed that the permanent value of the rectory, in a pecuniary view, would be greatly increased, and would not, as a residence, be in the least degree deteriorated in value.

Upon this answer the defendant moved that the injunction might be dissolved.

Mr. *Kindersley* and Mr. *Glasse*, in support of the motion to dissolve, argued that a parson, having, for some purposes, a fee simple vested in

him, was in a different position from a mere lessee or tenant for life, and that there was no instance in which an injunction like the present had been granted. That if a parson could, in no instance, plough up meadow land, the soil would forever be fettered with one species of cultivation, however detrimental to the land, and to all persons who might afterwards become interested therein. In the Countess of Rutland's Case,[1] a prohibition was moved to prevent a parson digging new mines of coal in his glebe, and from felling trees, "but the court held that it lay not for mines, for if so, no mines in any glebe should be now opened."

Again, that it did not appear that these were ancient meadows, which was the point to be first established;[2] and that even if they were, then, considering their present worn-out state, that which was intended to be done would be a benefit, and not a waste to the glebe. They also referred to Bird *v.* Relph.[3]

Mr. *Turner* and Mr. *Amphlett*, for the plaintiff.

It has been settled "that the patron of a living may have an injunction against the incumbent to stay waste." Knight *v.* Mosely[4] and the authorities establish that to plough up ancient meadow is waste, and therefore the plaintiff is entitled to retain the injunction. The incumbent having but a life interest, it is but reasonable that the successors should be protected.

The land has not been in tillage for seventy years, it therefore must be presumed that they are ancient meadows, unless the defendant makes out the contrary. If any doubt exists, the injunction ought to be continued until the fact has been determined.

Mr. *Kindersley*, in reply.

THE MASTER OF THE ROLLS. The matter seems trifling in the present instance, but it involves a question of great importance. I will therefore read the papers before deciding.

MARCH 17.

THE MASTER OF THE ROLLS. Upon the evidence I am of opinion that there is nothing to show that converting the two closes in question into tillage would be in any way detrimental to the enjoyment of the rectory house as a residence; but the plaintiff contends that, the defendant being unable to show that the closes have been in tillage for seventy years, it ought to be presumed that they are ancient meadow: that the defendant, as rector and incumbent, has no right to alter the character of the land, or the course of cultivation, for any purpose whatever: that it is clearly waste to convert ancient meadow into arable land, and that this court has authority, at the instance of the patron, to prevent such waste by the incumbent.

There is no doubt but that the conversion of ancient meadow into arable has, in very many cases, been considered as waste, and is always

[1] 1 Levintz, 107.
[2] Goring *v.* Goring, 8 Swan. 661.
[3] 4 B. & Ad. 826; 35 Edw. I. s. 2.
[4] Ambler, 176; Martin *v.* Coggar, 1 Hog. 120.

prima facie considered as waste, both in this court and at law; and in the case of Simmons *v.* Norton,[1] upon a writ of waste brought by a reversioner against a tenant for years, and a plea of the general issue, it was held that no evidence could be given to show that the act was done to meliorate the land.

Converting meadow into pasture has been held waste, on the ground that it alters the course of husbandry, the nature and character of the land, and also that it alters the evidence of title.

As between lessor and lessee, there are covenants expressed and implied respecting the course of husbandry; and as between tenant for life and reversioner or remainder-man, it is just to take care that the temporary owner should transmit it unaltered to the successor who is entitled so to receive it; and there are cases in which it has been generally held that the conversion of pasture into arable land is waste.

But even in the case between reversioner and tenant for years, Chief Justice *Tindal*, after stating two grounds for considering the act as waste, says, "The law, therefore, considers the conversion of pasture into arable as *prima facie* injurious to the landlord on these two grounds at least:" he adds, "I do not say that that which is *prima facie* waste may not be altered in its character, if, under peculiar circumstances, it should appear to have been done for the melioration of the land; but if that be so, it must be expressly stated on the record."

It cannot, therefore, be decided, as a general proposition without any exception, that the conversion of ancient meadow into pasture is to be treated as waste; and it is to be considered whether it ought to be so in the present case.

By the law as admitted between the lessor and lessee, or between tenant for life and reversioner, very valuable improvements in agriculture may be prevented, during the temporary possession of a tenant, or a succession of tenants for years or life. The time, however, comes when the fetters imposed by the contract or relation between the parties may be released; but if you apply the same law to the case of a parson's glebe, the course of husbandry and cultivation must remain the same in all time. What is once arable or pasture must always continue so; and no rector or vicar must employ any part of his glebe in any other manner than he found it employed, unless he can prove that it had been otherwise employed within some limited antecedent time. In a close which he cannot prove to have been employed otherwise than as meadow, he is not to plough, nor to make an orchard, nor to plant a bed of potatoes, however convenient and useful it might be for the parsonage that he should do so. He must do nothing which, as between landlord and lessee for years, the law has considered to be waste. No authority has been cited for so general a proposition, nor even upon the particular question whether the court ought to restrain the particular act now complained of; and the only case of which I am aware, in which the

[1] 7 Bing. 648.

court has interfered to stay the conversion of glebe meadow into pasture, is the case of Hoskins *v.* Featherstone,[1] where the bill was filed, not against the incumbent, but against the widow of an incumbent, who was doing the acts complained of during a vacancy.

Lord *Coke*[2] says that "a parson or vicar, for the benefit of the church and his successor, is, in some cases, esteemed in law to have a fee simple qualified; but to do anything to the prejudice of his successor, in many cases, the law adjudgeth him to have, in effect, but an estate for life;" and if, on the one hand, it be clear that the parson or vicar is not entitled to use his glebe as an absolute owner may do, and that this court will, at the instance of the patron, restrain him from doing various acts of waste or destruction, yet it seems, on the other hand, to be equally clear that he is not to be considered merely as lessee for years, or as tenant for life under a will or settlement.

And considering his position, the question is, whether the act of ploughing up meadow infested with moss and weeds, for the purpose of laying it down again in grass when properly cleansed, is an act which, in such a case as this, the court will restrain as waste? Finding no authority upon the subject, thinking that the cases between landlord and tenant or between tenant for life and reversioner do not apply, and thinking that a law to prevent the amelioration of glebe lands, by such means, would probably be very injurious to the persons who are, successively, from time to time, to enjoy the possession of such lands, it appears to me that this injunction ought to be dissolved.

LUSHINGTON *v.* BOLDERO.

BEFORE SIR JOHN ROMILLY, M. R., NOVEMBER 24, 1851.

[*Reported in* 15 *Beavan*, 1.]

IN 1785 the testator devised Aspeden Hall and other estates to Charles Boldero for life, without impeachment of waste, with remainder to his first and other sons in tail, with similar limitations to William Boldero for life, without impeachment of waste, with remainder to his first and other sons in tail, with remainder to Henry Lushington for life, without impeachment of waste, with remainder to his first and other sons in tail, with divers remainders over.

In 1812, Charles Boldero and Henry Lushington, and their partners, became bankrupt, and the assignees under their joint commission having proceeded to commit equitable waste by felling ornamental timber, this bill was, in 1813, filed by the eldest son of Henry Lushington, who was then and was now the first tenant in tail *in esse*. The plaintiff

[1] 2 Bro. C. C. 552. [2] Co. Litt. 341 a.

established his claim,[1] and the assignees were ordered to pay into court 6,379*l.* 4*s.*, the value of the timber and interest, to an account, intituled, "the account of timber felled by the defendants, the assignees of the estate of Messrs. Boldero, Lushington, & Co., bankrupts." This was done; and it was directed to accumulate, and be subject to the further order of the court. By accumulation, the fund in court now exceeded 26,000*l.*

William Boldero died "several years since," without having been married. In 1850 Charles Boldero being still living, and ninety-five years of age, but having no issue, the plaintiff, the first tenant in tail *in esse*, presented his petition for payment to him of the fund in court. The case came before Lord Langdale on the 4th of November, 1850, when his lordship thought that the case could not be decided until it had been ascertained that Charles Boldero, who was living, should have no issue, and his lordship therefore ordered the petition to stand over until after the death of Charles Boldero.

Charles Boldero died in August, 1851, and the application for payment was now again renewed.

Mr. *Lloyd* and Mr. *Tripp*, in support of the petition.

The petitioner is entitled to the whole fund. In the case of legal waste committed by the tenant for life, the law is clearly settled, that the timber cut, or its produce, belongs to the owner of the first vested estate of inheritance: Lewis Bowles' case;[2] Whitfield *v.* Bewit;[3] Bewick *v.* Whitfield.[4] The owner of the first existing estate of inheritance takes it, although there are intermediate remainders that may arise: Lee *v.* Alston;[5] and it does not abide the event of the intermediate tenants for life having issue, who may become tenants in tail: Dare *v.* Hopkins[6]. In that view, the petitioner, the first tenant in tail, would be entitled to the whole fund. But if such be the rule as to legal waste, it must, by analogy, prevail in the case of equitable waste.

Again, parties cannot derive any benefit from their wrongful act; the assignees, therefore, who represent both Charles Boldero and Henry Lushington, can claim nothing derived from their wrongful waste. In Williams *v.* Duke of Bolton,[7] the duke was tenant for life, with intervening tenancies for life, and remainders, with remainder to the duke in fee. He improperly cut timber; and it was held that he could take no benefit, although the only estate of inheritance was at the time vested in him. The produce was considered realty, and made subject to the trusts of the settlement: Powlett *v.* Duchess of Bolton;[8] because there was no vested estate of inheritance other than that of the duke existing at the time. So in Garth *v.* Cotton,[9] A was tenant for one hundred years if he should so long live, with remainder to his first and

[1] See Lushington *v.* Boldero, 6 Mad. 149; and G. Cooper, 216.
[2] 11 Co. 79.
[3] 2 P. W. 240.
[4] 3 P. W. 267.
[5] 3 Bro. C. C. 38, and 1 Ves. Jun. 82.
[6] 2 Cox, 110.
[7] 1 Cox, 72, and 3 P. W. (6th ed.), p. 267, n. (1).
[8] 3 Ves. 374.
[9] 3 Atk. 751, and 1 Ves. Sen. 524, 546.

other sons in tail, with remainder to B in fee; and, before birth of issue of A, A and B concurred in committing waste. A son being afterwards born to A, he was held entitled to the produce to the exclusion of B.

Where the tenant for life has no power to cut timber, and it is decaying, the court will authorize its being felled, Delapole *v.* Delapole,[1] and invest the produce so as to devolve like the estate, giving the income to the tenant for life: Wickham *v.* Wickham;[2] Tooker *v.* Annesley;[3] Waldo *v.* Waldo.[4] But then the act is lawful; and even in such a case, the first tenant for life without impeachment of waste is entitled to the *corpus:* Waldo *v.* Waldo;[5] Phillips *v.* Barlow.[6] They also cited Tullit *v.* Tullit.[7]

Mr. *R. Palmer* and Mr. *Goldsmid*, *contra.*

The assignees are entitled to the income during the life of the bankrupts. The rule in cases of waste, giving the timber severed to the owner of the first estate of inheritance, is applicable only to legal waste, which proceeds on the doctrine of forfeiture. The rule has never been applied to equitable waste, where at law the tenant for life without impeachment of waste has a clear right to cut even ornamental timber. The principle of equity is not forfeiture, but to restore to the inheritance, for the benefit of all persons interested, that portion which, in equity, has been improperly abstracted, and then to give to the person in succession the enjoyment of that which represents it. As to the argument that no person can take advantage of his own wrong, it is to be observed that the assignees represented both Charles Boldero and Henry Lushington; and it is necessary to separate these two characters, for it was as representing Charles Boldero alone, the existing tenant for life, that they took possession of the property, and in that character alone the equitable waste was committed. The estate of Henry Lushington ought not, therefore, to suffer from the act of the assignees of Charles Boldero; and, consequently, the interest for life of Henry Lushington was either accelerated, or his assignees are now entitled to the income of the accumulated fund. Where a tenant for life concurs in a breach of trust, he is entitled to the income for life when the fund has been replaced.

It is quite inconsistent with the judgment of Lord Cottenham, in the Duke of Leeds *v.* The Earl of Amherst,[8] to hold that the first tenant in tail is entitled to the fund.[9] He there said that the tenant in tail's right, until his father's death, "was a mere contingency; if he had died before his father, it was gone; and it was only on the death of his father that he became absolutely entitled, as tenant in tail, to the proceeds of that part of the estate which had been improperly converted

[1] 17 Ves. 150.
[2] 19 Ves. 419; G. Cooper, 288.
[3] 5 Simons, 238.
[4] 7 Simons, 261.
[5] 12 Simons, 107.
[6] 14 Simons, 263.
[7] Ambler, 370, 1 Dick. 322.
[8] 2 Phillips, p. 125, and s. c. 14 Simons, 357.
[9] See Wellesley *v.* Wellesley, 6 Simons, 497.

into money by the tenant for life." They also cited Mildmay *v.* Mildmay.[1]

THE MASTER OF THE ROLLS. I shall first consider what would have been the effect if Charles Boldero had himself done this act. He was tenant for life without impeachment of waste, and having cut ornamental timber, the court compelled him to pay into court the amount for which the timber was sold; and, omitting all questions respecting intermediate life estates, the question now is, whether he or the reversioner was entitled to the income of that fund. The equitable doctrine applicable to this and other similar cases is this: that no person shall obtain any advantage by his own wrong. But it is manifest that the tenant for life may obtain very considerable advantage from his own wrong, if he were to cut down timber and obtain the interest of the fund; his income for life would be thereby increased beyond what it would have been if the timber had not been cut.

It has been observed that in all the reported cases the rule has been applied to the *corpus* of the fund; but that, I think, ought not to vary my judgment, because it depends upon this equitable and just principle, that no man shall obtain a benefit by his own wrongful act; the authorities, therefore, which lay down the principle in cases of *corpus* only are equally applicable to any species of interest to be derived by a wrongful act.

It is then said that this is a case in which the court does not impose a forfeiture, but only requires restitution; and that to deprive the tenant for life of the income, it would be to inflict a penalty upon him, inasmuch as he would have had the enjoyment and advantage of the shade and mast of the timber if it had not been cut. But this he deprives himself of by his own wrongful act, and for this reason the court refuses to give him any substitution or remuneration. It is also material to bear in mind that if the timber had not been cut, it would have increased in value for the benefit of the reversioner, but that has been rendered impossible by the tenant for life having improperly cut it. If, therefore, it is impossible for the court to ascertain what portion of the interest ought to be attributed to the estate of the reversioner, and what portion to the enjoyment of the tenant for life, it is the tenant for life who has himself put the court into that situation, and made it incapable of arriving at a just conclusion. It is not a case in which the court can act on the principle of restitution. The case put, by way of analogy, of a tenant for life selling out the fund, and being compelled to restore it, is inapplicable, because the tenant for life cannot in this case restore the subject-matter.

There may be a great number of cases in which the timber would become of great value when the reversion fell in; and it is impossible for the court to ascertain what portion of it would have been enjoyed by the reversioner if the wrongful act had not been committed. Un-

[1] 4 Bro. C. C. 76.

doubtedly the tenant for life does in some cases directly gain an advantage, but it is not by reason of his own act. Thus, where by the act of God a large quantity of timber is blown down by a storm, the produce is laid out in the purchase of stock, and the interest of the fund is paid to the successive tenants for life. So, upon the same principle, when timber is decaying, and it cannot benefit the reversioner to allow it to remain standing, the court, having ascertained that it is for the benefit of all parties, orders the timber to be cut down, and the produce to be invested, and the interest of the fund to be paid to the tenants for life in succession.

When, however, the tenant for life has committed the wrongful act which produces the fund, the court will not allow him to gain any benefit from it; but the reversioner takes the benefit arising from an accretion of the fund, in lieu of the accretion of the timber.

Can I look at this case in any different point of view, because the assignees, and not the tenant for life, have done the wrongful act? The assignees stand for these purposes exactly in the same situation as the tenants for life; they are bound by the same equities, and are exactly in the same position, and the same observations apply to both. Nor am I able to separate, or to distinguish the case of Sir Henry Lushington from that of Charles Boldero; because, if the two tenants for life had concurred together, and had agreed between themselves that the one in possession should cut the timber, and that they should divide the produce in certain proportions, the court would have prevented either of them from gaining any benefit from the wrongful act which they concurred in performing. Here they are the assignees of both; and I am unable to find any principle which says that the assignees must not stand exactly in the same situation as the tenants for life would stand, and be bound by exactly the same equities. If Charles Boldero had died immediately afterwards, and Sir Henry Lushington had survived for a very long period, and the income of the proceeds of the timber had been applied during that period in payment of the joint creditors, they would have obtained a great benefit from the wrongful act of the assignees. I must hold them in exactly the same position as if the wrongful act had been committed by Sir Henry Lushington alone. I cannot separate the characters of the assignees; they are assignees for the joint creditors and of the joint estates; and I consider that I must treat the case exactly in the same way as if the two tenants for life, one only being in possession, had concurred in the wrongful act of cutting the timber.

It was suggested that I should suppose the possible case of the commission having been superseded; and I was asked whether the tenant for life, Sir Henry Lushington, who is perfectly innocent in the matter, ought to be prejudiced by the wrongful act committed by his assignees. It would be hard if it were to be so; but I do not consider that question at present, because it does not arise before me. But if the question did arise, it is manifest that the remark would apply just as much to

the case of Mr. Charles Boldero's estate as to that of Sir Henry Lushington; nor can I find anything whatever in the fiduciary character of the assignees, who, in matters of this description, stand in exactly the same position as the tenants for life, to prevent their being held liable precisely in the same manner as the tenants for life themselves. They have themselves done this wrongful act; and neither they nor the persons for whom they are trustees can gain any advantage by reason of it.

I am of opinion therefore, that, upon the petition, I must make an order according to the prayer.

The assignees appealed to the Lords Justices, but a compromise was, after argument, effected.

DUKE OF MARLBOROUGH *v.* ST. JOHN.

BEFORE SIR JAMES PARKER, V. C., JANUARY 12, 1852.

[*Reported in* 5 *De Gex & Smale*, 174.]

THE plaintiff was seised of the advowson of the parish church of Bladon-cum-Woodstock, in Oxfordshire. The defendant was the rector of the parish, and had been presented to the living by the plaintiff in the year 1847.

The glebe lands belonging to the rectory consisted of a farm of 170 acrés of arable and pasture land, with the rectory house and certain buildings thereon. The timber on the glebe was of considerable value. The defendant cut timber on the glebe farms in 1848; and on the receipt of a notice from the plaintiff's agent not to fell such timber, he represented that he was cutting the timber merely for the purpose of the repairs of the rectory buildings. The defendant, in 1849 and the spring of 1850, cut down twenty-three elm-trees, and four oaks, and two ash-trees, all flourishing timber; and in reply to inquiries why he cut the timber, he stated that he was cutting the timber for the necessary repairs of the farm buildings; and he received a notice from the plaintiff's solicitor not to cut any more timber without the previous assignment by the plaintiff.

In November, 1851, the defendant cut down a flourishing elm-tree of large size and great value, not necessary for the repairs of the rectory buildings, and without the plaintiff's consent; and upon inquiries then instituted the plaintiff ascertained that the defendant had cut another elm-tree and four ash-trees, all in a flourishing condition.

The plaintiff thereupon filed his bill, setting forth the above facts, and charging that the defendant intended to cut down and to sell more timber; and prayed that the defendant might be restrained by injunction from cutting or felling any timber or other trees growing on the glebe

lands or other lands of or belonging to the rectory, save only such trees as might be required for the repairs necessary to be done upon the buildings or lands of the rectory, and as might be assigned for that purpose, either by the agents of the plaintiff, or in such other manner as the court should direct; and also from mutilating or injuriously lopping any of the trees growing upon the rectory lands; and from selling any of the timber which had been theretofore cut upon the lands; and from applying any part of such timber otherwise than in the repairs of the rectory buildings aforesaid; and from committing any other act of waste upon or to the said rectory; and for an account of the moneys received by the defendant by means of any such act of waste. The case now came on upon a motion for an injunction to restrain the defendant in the terms of the prayer of the bill.

The affidavits in support of the motion set out the facts above stated, and that the trees cut down in 1848, 1849, 1850, and 1851, were 120 in number, being by very many more than sufficient for all the repairs of the rectory buildings; and that, in November, 1851, no timber for repairs of the buildings was necessary; that some of the timber felled was removed off the glebe lands, and sold to the carpenter, who employed other timber more suitable for the repairs; and that other parts of the timber were sold by auction in August, 1850, as the property of a carpenter in the parish, according to a catalogue, in forty-two lots.

By the affidavits on behalf of the defendant, the felling of the timber and its sale were admitted; but it was proved that the buildings and glebe farm were in a bad state as to repairs and cultivation; that the defendant had thoroughly repaired the buildings, and improved the cultivation of the farm by under-draining; that, as to part of the timber felled, it being in a state unsuitable for the necessary repairs, it was exchanged with the carpenter for timber proper for the purpose; that the total produce of the sale of the timber and bark was 62*l.*; that the carpenter who sold the timber received the 62*l.*, and that his charges for repairs exceeded the 62*l.* by a sum of 26*l.* 15*s.* 1*d.*, which the defendant had paid to him. And the defendant deposed that he had expended on the rectory buildings and in farm improvements, beyond the produce of the sales of the timber, the sum of 150*l.* at least, besides a very considerable outlay in under-draining the lands.

It was alleged in the affidavits for the defendant, that the trees remaining growing on the rectory lands were numerous and amply sufficient for future repairs. But this was denied on the part of the plaintiff.

Mr. *Bacon* and Mr. *Cairns* in support of the motion.

Upon this case, as it stands admitted by the affidavits, it appears that the defendant, who is only tenant for life, has cut and sold timber from off the glebe; and this is waste by the venditlon, even if he repurchased the same timber, and used it in the repairs, or if he expended the proceeds in the repairs.[1] Now, the patron is the proper person to

[1] Co. Litt. 53 b.

apply to this court to restrain such waste: Knight *v.* Mosely.[1] The defendant will probably urge that in that case the Lord Chancellor said, "Parsons may fell timber or dig stone to repair; and they have been indulged in selling such timber or stone, where the money has been applied in repairs." But it is highly probable that the report inaccurately sets forth what the Lord Chancellor said. Mr. Blunt, in his edition of Ambler, says that the language here attributed to Lord Hardwicke is not contained in Mr. Hargreave's note of the judgment. In Wither *v.* The Dean of Winchester,[2] Lord Eldon, in referring to that case, says, "There, too, Lord Hardwicke expressly declares (if his words are rightly reported), that parsons may, &c." In the Attorney-General *v.* Geary,[3] trustees held estates for the benefit of a college, which were scattered at a considerable distance from each other, and they were not restrained by the court from cutting timber in one part of the country, and selling it for the repairs of estates in another part of the country, so long only as they cut no more timber on the whole property than the repairs on all the property required; but this is the utmost limit of indulgence that has ever been extended to an ecclesiastical corporation. The form of the injunction, which is now asked, is founded on that granted in the case of The Bishop of Winchester *v.* Wolgar,[4] in the year 1629.

Mr. *Willcock* and Mr. *Bird* for the defendant.

The plaintiff proceeds on the assumption that the rector is but a tenant for life; he is, however, in fact the tenant in fee simple, although his estate may be qualified, and under restrictions, in right of the church: Knight *v.* Mosely.[5] That case establishes the right of the patron to come into this court against the rector for an account; but it expressly decides that, if he asks by his bill to stay waste, the bill will be too general; it follows, therefore, that an injunction cannot be obtained by the patron to stay waste by the rector. Wither *v.* The Dean of Winchester,[6] clearly shows that the right of ecclesiastical persons, with regard to the timber on the estate, enables them to sell it, provided they apply the proceeds for the maintenance and upholding of the church: Herring *v.* The Dean of St. Paul's.[7] It is true, that the defendant has cut and sold some of the timber from off the glebe; but he has applied the proceeds and a much larger amount in improving the rectory buildings and the glebe. It is clear the patron has no title to the timber on the estate of the rectory, and that no person except the rector has any estate therein; if, therefore, the rector has not the power to cut the timber, no one has, and it must go to decay; and so if the rector has not the power to open mines, no one has, and the mines must remain forever unopened. These are consequences which test the present question.

Mr. *Bacon* in reply.

[1] Amb. 176.
[2] 3 Mer. 421, 427.
[3] 3 Mer. 513.
[4] 3 Swanst. 493, n. (*a*).
[5] Amb. 176
[6] 3 Mer. 421.
[7] 3 Swanst. 492, 509.

JANUARY 26.

THE VICE CHANCELLOR. This is an application by the plaintiff, who is the patron of the rectory of Bladon-cum-Woodstock, seeking to restrain the defendant, who is the rector, from cutting timber on the glebe lands. The defendant, on several occasions, has cut down and has sold timber growing on the glebe; but he says that the money expended by him on necessary repairs of the rectory buildings exceeds the produce of timber sold; and it is insisted on his behalf, that he was entitled to sell timber to defray the expenses of such repairs; and authorities have been cited in support of this proposition.

An ordinary tenant for life may take timber for repairs, but if he sells timber, it is waste. Lord Coke says,[1] "The tenant cutteth downe trees for reparations, and selleth them, and after buyeth them againe, and employs them about necessary reparations, yet it is waste by the vendition." He certainly cannot sell timber to defray the general expenses of repairs. It is not of course disputed that a rector is under restrictions as to waste; and I know of no principle of law on which he can claim more extensive privileges as to committing waste than an ordinary tenant for life. We find in Littleton, s. 644, "The parson, or vicar, that is seised, &c., as in right of his church, hath no right of the fee simple in the tenements, but the right of the fee simple abideth in another person." Lord Coke, in his commentary on this section, noticing that the rector has some rights that do not belong to a tenant for life, says, "Upon consideration of all our bookes, I observe this diversitie: that a parson or vicar, for the benefit of the church and of his successor, is in some cases esteemed in law to have a fee simple qualified; but to doe any thing to the prejudice of his successor, in many cases, the law adjudgeth him to have in effect but an estate for life." There are authorities to shew that a prohibition of waste, which was the ancient remedy against tenants for life, lay, if it does not still lie, at the suit of the patron against a rector, to prevent waste in the glebe: Com. Dig. "Wast," (A.); 22 Vin. Abr. "Waste," (A.).

It has been objected that the powers of a rector or vicar cannot be thus limited; because, if they are, the timber, beyond what is wanted for repairs, may go to decay, and mines may remain forever unopened; but it is to be observed that, at common law, the parson, with consent of the patron and ordinary, had unlimited power of alienation, and might no doubt dispose of timber and open mines, the patron and ordinary taking care of the interests of the church; and at this day, this court would have no difficulty, on a proper application, in directing the timber to be cut, and the produce to be applied for the benefit of the living.

In support of the defendant's view of his rights, the cases of Knight *v.* Mosely,[2] before Lord Hardwicke, and Wither *v.* The Dean and Chapter of Winchester,[3] were relied on: in the latter of these cases, the extent

[1] Co. Litt. 53, b. [2] Amb. 176. [3] 3 Mer. 421.

to which the Dean and Chapter of Winchester were entitled to cut timber for repairs came into question. A dean and chapter have an estate in fee simple, and at common law they had an unlimited power of alienation: and on whatever grounds the restrictions under which they lie as to waste may depend, their privileges in this respect certainly cannot be less than those of a rector. In the case before Lord Eldon, the Dean and Chapter of Winchester stated that timber was wanted for the repairs of the cathedral to so considerable an amount that the whole of the timber then growing on the premises in question would be insufficient for the purpose of supplying them. The Dean and Chapter, therefore, as Lord Eldon observes, had an undoubted right to cut the timber, as it was all wanted for repairs; and the question to which he adverts as a point of some controversy, is whether an ecclesiastical body, having cut timber for repairs, is bound specifically to apply such timber towards the actual repairs for which it was wanted; and he intimates his opinion that an ecclesiastical body is not compelled to apply the identical timber by removing it from a distant part of the country. The right of an ecclesiastical person to sell timber and apply the produce in repairs generally, without regard to the quantity of timber wanted for the repairs, was not in question in that case; and I do not understand Lord Eldon as expressing any opinion upon it. With reference to the question before him, he adverts to what Lord Hardwicke is reported to have said in the case in Ambler, with an intimation of some doubt as to whether his words are rightly reported.

In that case Lord Hardwicke is reported to have said, "Parsons may fell timber or dig stone to repair; and they have been indulged in selling such timber or stone, where the money has been applied in repairs." It appears from Mr. Blunt's edition, that the latter part of this passage is not contained in Mr. Hargreave's note of the judgment. The passage is ambiguous, and may mean no more than that parsons have been indulged to the extent contended for by the Dean and Chapter in the case before Lord Eldon. But however this may be, the report in Ambler is too imperfect, and too doubtful, to give the weight of Lord Hardwicke's authority to the proposition that a rector or vicar may cut and sell timber to any extent, in order to provide a fund for general repairs. A few years before, Lord Hardwicke, in the case of Strachy *v.* Francis,[1] treated a rector as entitled to precisely the same privileges, as to timber, as an ordinary tenant for life.

The greater part of the timber cut by the defendant was cut in the years 1849, 1850, and 1851. Part of this was sold, and of part no account is given by the defendant. Shortly before the filing of the bill, some trees were cut which are now lying on the glebe lands; and there is some dispute as to whether they were cut by the defendant's authority. Considering the admitted fact, that timber on the former occasion was cut by the defendant under circumstances which I think amount to

[1] 2 Atk. 217.

waste, and the claim of right made by the defendant, I am of opinion that the plaintiff is entitled to the injunction sought by him. If the defendant had cut and sold timber merely for the purpose of providing other timber more suitable for repairs, the court would not have interfered upon this motion.

The order will be to restrain the defendant from cutting or felling, or causing to be cut or felled, any timber or other trees growing on the glebe lands, or on other the lands belonging to the rectory, except such trees as may be required for the repairs necessary to be done upon the buildings or lands of the rectory, and from selling or disposing of any of the timber or other trees which have been heretofore cut upon the lands, and now remaining unsold.

CAMPBELL *v.* ALLGOOD.

BEFORE SIR JOHN ROMILLY, M. R., DECEMBER 8 AND 12, 1853.

[*Reported in* 17 *Beavan*, 623.]

GEORGE HARTLEY, by his will, devised to Robert Lancelot Allgood, Thomas Charge, and John Brook (since deceased), their heirs and assigns, all his real estate, upon trust to apply the same in aid of his personal estate (if insufficient) to pay his debts and the legacies thereby given; and after paying two annuities thereout, upon trust to pay one third of the surplus rents and profits of his real estate to his sister, Mary Campbell (the plaintiff), for her life, for her separate use, &c.

The testator died in 1841, possessed, among others, of the Middleton Lodge estate, consisting of a mansion and 144 acres of land, &c. After the testator's death, the plaintiff occupied Middleton Lodge as tenant to the trustees down to August, 1848, when the trustees let it to Edmund Backhouse, who still occupied it.

At the testator's death, there were several ornamental trees growing upon the premises, which sheltered the house and walks, and hid the offices. The trustees had recently cut down several trees, particularly some beech-trees and a large horse-chestnut, which sheltered the windows of the mansion-house and servants' hall, and which had been much prized by the testator; and they threatened, as alleged, to cut down more. The fact first came to the knowledge of the plaintiff on the 5th of November, 1853, and on the 19th of the same month she filed a bill, on behalf of herself and all other parties interested under the will of George Hartley, to restrain the trustees from cutting down the trees. The plaintiff then applied for and obtained an *ex parte* injunction, which the defendants did not seek to dissolve. The defendants having put in their answer, the cause came on for hearing, and the plaintiff now sought to have a perpetual injunction against the defendants.

The defendants by their answer, stated that the plaintiff had herself, while in occupation, cut down nine trees without any communication with them; that the kitchens and outbuildings were sufficiently protected, by evergreens of large growth, from being seen by or exposed to the view of parties walking in the gardens and grounds; that the trees cut down tended to a great, but to a needless and injurious extent, to prevent the kitchens and outbuildings being seen; that they had cut trees, but that they had had little effect in hiding the offices, which were low and concealed by the evergreens, and they denied that the beech-trees formed an avenue to the offices. As to the chestnut and beech-trees, that three of the beech-trees and the horse-chestnut stood at small distances from the house, and the chestnut spread over and blocked up the windows of the study, the housekeeper's rooms and servants' hall, and the bedrooms above, and rendered them dark and damp, and the droppings from them on the roof, and the exclusion of sun and air, did great injury to the roof and walls; the timbers of the roof were decayed, the walls were damp and covered with fungi, and the paper was dropping off. That the trees overtopped the eastern wing, and overhung a portion of the roof, and acted as fans on the chimneys, and occasioned down blasts and the chimneys to smoke. That they had consulted a plumber, who advised them to cut down the trees, and they accordingly cut down the chestnut and three beech-trees, but refused to cut down another at Mr. Backhouse's request, because they thought it was ornamental, and did not appear injurious to the mansion-house. A good deal of evidence was gone into as to the situation of the premises, the size, breadth, &c., of the trees, their contiguity to the house, and the like.

Mr. *R. Palmer* and Mr. *C. C. Barber*, for the plaintiff, contended that the trustees had no right to cut down the trees, or to exercise any discretion.

Mr. *Lloyd* and Mr. *Babington*, for the defendants, the surviving trustees, said that the plaintiff had herself cut down trees and had no right to complain. That the trustees had exercised a wise discretion in cutting down these few trees for the benefit of the mansion and to keep a good tenant, and that they had refused to cut down other trees because they thought them ornamental. They cited Marker *v.* Marker.[1]

Mr. *Faber*, for *Backhouse*. There is no evidence of Backhouse ever having cut, or threatened to cut, any trees on the property. He is a mere tenant, and ought not to have been mixed up in a dispute between his landlords and their *cestuis que trust*. The bill ought, therefore, to be dismissed, as against him, with costs.

Mr. *R. Palmer*, in reply, contended, that the trustees had no right to exercise any discretion. He complained that the same evidence had been taken twice in the cause; once on behalf of the trustees, and

[1] 9 Hare, 1.

secondly on the part of Backhouse, and argued that this was an useless and unnecessary expense, which ought to be borne by the defendants.

The following cases were cited: Burges *v.* Lamb;[1] Coffin *v.* Coffin;[2] Morris *v.* Morris;[3] Drewry on Injunctions.[4]

THE MASTER OF THE ROLLS. The question is, first, whether these trees are ornamental; and if they are, then whether, although ornamental, they are so prejudicial to the dwelling-house as to render it proper that they should be cut. The difficulty, in all these cases, is on the question of fact, for there is so much difference of opinion as to the beauty and value of timber, that persons may very conscientiously come to an opposite conclusion.

In the first place I am of opinion that they were ornamental, and the real and only question is, whether they were so prejudicial to the mansion-house that they ought to be cut. Though I think there is some slight discrepancy in the description of them in the affidavits, the evidence may be reconciled. The trees cut are, one horse-chestnut, which I think overhangs the roof of the house, and three beech-trees; and the state of the case was this: Backhouse was in treaty to take the house, but he refused to become tenant unless the trees were cut; and, after an inspection, the trustees, in accordance with his wishes, and to obtain a tenant, cut these trees. There is nothing like wanton destruction on the part of the trustees, who acted *bona fide;* nor were the trees cut for profit, for their value was only 13*l.* They were cut on the 15th or 16th of September, and the 13th of October, 1852, but the plaintiff did not hear of it until the 5th of November. She then sent a person to ascertain the fact, and on the 19th of November filed the bill, and obtained an injunction on the 20th. One material ingredient in this case is, that no application has ever been made to dissolve the injunction, and the question now raised at the hearing might equally well have been discussed on a motion as at the hearing of the cause.

Upon the result of the evidence, I think that these trees did form a shelter to and hide that part of the house which, as it contained the offices, probably was the most unsightly. I am of opinion also that the horse-chestnut tree was to some extent prejudicial to the healthiness of the house, but I am not satisfied that such was the case with respect to the beech-trees. The burthen of proof lies on the trustees, to satisfy me that they were prejudicial, for they had no authority to cut trees which were ornamental, and conducive to the beauty of the house. I think they ought to have applied, either to the persons interested in the property for their assent, or to the court for its authority for cutting these trees; and as they have not satisfied me that it was absolutely necessary for the well-being, salubrity, and comfort of the residence, that these trees should be cut, I think I must grant an injunction. I am confirmed in this by the fact that the tenant has applied to the

[1] 16 Ves. 180. [2] Jac. 70. [3] 15 Sim. 505. [4] Page 144.

trustee to have another tree cut, and it is said that there are more trees and evergreens which ought to be cut. When that application was made does not appear. The answer says, "lately;" and as I must take this most strongly against the pleader, I must assume it to have been after the bill had been filed, and when they were prevented complying by the existing injunction. Finding, therefore, that there are other trees which the tenant is desirous to have cut, and which some persons think it desirable should be cut, and that the parties interested are desirous to preserve, I think that the plaintiff had reason to be alarmed, and that there were sufficient grounds to entitle her to apply to this Court for an injunction.

I see no case against Backhouse, the tenant, who has neither cut nor shown any intention to cut trees. Though he thinks that the absence of the trees would be a great improvement, still there is no evidence to show that he intends to cut any trees; on the contrary, his application has properly been made to the trustees, his landlords, to cut. The bill must be dismissed with costs, as against Backhouse, because the only thing sought against him by the bill is an injunction, which, on the evidence, the plaintiff is not entitled to. I disapprove of the same evidence being given twice over, once for each defendant; but as the bill prays an injunction against Backhouse, he might reasonably have been advised that he could not safely come to a hearing without evidence, although I think he might have rested on the simple fact that he had neither cut nor threatened to cut trees. Though I think the trustees must pay the plaintiff's costs, still I cannot allow her to add Backhouse's costs to her own.

Mr. *Lloyd* asked, that the costs might come out of the estate, as the trustees had acted *bona fide;* which not being opposed,

THE MASTER OF THE ROLLS said, I think so. There is evidence that the plaintiff herself, when in possession, cut down several trees on the estate.

GENT *v.* HARRISON.

BEFORE SIR W. PAGE WOOD, V. C., NOV. 18, 19, AND 21, 1859.

[*Reported in Johnson,* 517.]

GEORGE GENT, by his will, dated the 8th of July, 1808, devised certain real estate to the use of George William Gent for life, with remainder to trustees to preserve, with remainder to his first and other sons in tail male, with remainder to John Gould Gent for life, with remainder to the said trustees to preserve, with remainder to his first and other sons in tail male, with remainder to John Gent for life, with remainder to the said trustees to preserve, with remainder to his first

and other sons in tail male, with remainder to the plaintiff George Gent for his life without impeachment of waste, with remainder to the said trustees to preserve, with remainder to his first and other sons in tail male, with remainder to William Gent in fee.

By certain codicils the testator revoked the ultimate devise in fee, and declared that the remainder of his real estates should go as the law might direct.

The testator died in 1838, and George William Gent entered and continued in possession of the devised estate until the 17th of March, 1855, when he died without having had any issue male. John Gould Gent then entered, and continued in possession until the 26th of May, 1856, when he died, without having had any issue male. John Gent had previously died without having had any issue male. The plaintiff then entered, and had since continued in possession, and had never had any issue male. The bill alleged that the plaintiff had been unable to discover the testator's heir. In the year 1820 George William Gent cut a quantity of timber, and invested the greater part of the proceeds of the sale of it in the names of the trustees to preserve; and this fund consisted, at the date of the bill, of a debenture for 5,000*l.* of the North-Western Railway Company. The rest of the proceeds, amounting to 739*l.* 14*s.* 6*d.*, were retained by the said George William Gent.

The trustees paid the income of the fund so invested to George William Gent, John Gould Gent, and the plaintiff, during their successive occupations.

In 1848 George William Gent cut other timber, which he sold; and it was agreed that the amount so received and appropriated should be taken to be 1,000*l.*, and the date of receipt Midsummer, 1854.

In 1856 John Gould Gent cut and sold other timber, and received the proceeds; and it was agreed that the amount should be taken to be 900*l.*, received on the 2d of January, 1856.

The said sums of 1,000*l.* and 900*l.* were paid by the executors of George William Gent and John Gould Gent respectively to the trustee who held the other fund.

The plaintiff, by his bill, claimed to have all the capital which had arisen from the sales of timber, and to be paid by the executors of George William Gent and John Gould Gent the amounts received by their respective testators as income of the fund in which the proceeds of the timber were invested. There was some conflict of evidence as to whether the timber was properly or improperly cut.

Mr. *Rolt*, Q. C., Mr. *Shapter*, Q. C., and Mr. *Busk*, for the plaintiff. The income of timber money does not belong to a tenant for life impeachable who cuts it wrongfully; for he cannot be allowed to profit by his own wrongful act. The plaintiff, being tenant for life without impeachment, is entitled to all the timber, and the capital of the proceeds of timber; and the previous tenant for life, not being entitled to any income, the back income must form part of the general fund which comes to the plaintiff.

They cited Phillips *v.* Barlow,[1] Pigot *v.* Bullock,[2] Pyne *v.* Dor,[3] Williams *v.* Williams,[4] Doctor & Student,[5] Skelton *v.* Skelton,[6] Aspinwall *v.* Leigh,[7] Lewis Bowles's Case,[8] Tooker *v.* Annesley,[9] Lushington *v.* Boldero,[10] Williams *v.* Duke of Bolton,[11] Whitfield *v.* Bewit,[12] Lee *v.* Alston,[13] Herlakenden's Case.[14]

The VICE-CHANCELLOR. Do you claim income from 1820?

Mr. *Rolt*. Yes. We were not bound to file a bill until we got into possession. Duke of Newcastle *v.* Vane.[15]

Mr. *Willcock*, Q. C., for the representatives of George William Gent. Either the timber was rightfully or wrongfully cut. If rightfully, it is settled that the income goes to the tenant for life for the time being, though in that event the first tenant without impeachment might, on coming into possession, be entitled to take the whole fund, just as he might have cut the whole timber. Tooker *v.* Annesley shows that, when the timber is cut by order of the court, a tenant for life impeachable is entitled to the income. Waldo *v.* Waldo[16] is an authority to the same effect; and Lewis Bowles's Case shows that tenant for life sans waste can only cut during his tenancy. But if the timber was cut wrongfully, the plaintiff is not the person entitled either to capital or income. In that case, the timber, when cut, and the capital derived from it, belong to the first estate of inheritance; and there is no estate of inheritance before the court.

When the timber was first felled the person to bring trover for it was not the plaintiff, but the person entitled to the first estate of inheritance. Bewit *v.* Whitfield proves this; and Williams *v.* Duke of Bolton proceeds on the same ground. Garth *v.* Cotton,[17] Duke of Leeds *v.* Amherst.[18]

The plaintiff has no right to come into equity. The foundation of the equity, as regards waste, is the injunction to stay the mischief. Here neither injunction nor account is asked. Jesus College *v.* Bloome,[19] Pulteney *v.* Warren,[20] Grieson *v.* Eyre,[21] Parrott *v.* Palmer.[22]

It is a mere legal claim, if anything, and is barred by time. Until 1833, when the Stat. 3 & 4 Will. IV. c. 42, was passed, no interest was recoverable in an action of debt.

Mr. *Speed*, for the representatives of John Gould Gent, supported the same views. He cited Co. Litt. 219 b.; Rolt *v.* Somerville,[23] Mildmay *v.* Mildmay.[24]

Mr. *Chapman* for the trustee.

Mr. *Rolt* in reply. Before the Statute of Marlebridge, tenant for life was not impeachable for waste. Since the statute the tenant for life

[1] 14 Sim. 263.
[2] 1 Ves. 479.
[3] 1 T. R. 55.
[4] 12 East, 209; 15 Ves. 419.
[5] Page 114.
[6] 2 Swanst. 170, n.
[7] 2 Vern. 218.
[8] 11 Rep. 79.
[9] 5 Sim. 235.
[10] 13 Beav. 418; s. c. 15 Beav. 1.
[11] 3 P. Wms. 267.
[12] 2 P. Wms. 240.
[13] 1 B. C. C. 194; 3 B. C. C. 37.
[14] 4 Rep. 62.
[15] 2 P. Wms. 241.
[16] 12 Sim. 107.
[17] 1 Wh. & Tud. 603.
[18] 2 Ph. 117.
[19] 3 Atk. 262.
[20] 6 Ves. 89.
[21] 9 Ves. 346.
[22] 3 My. & K. 640.
[23] 2 Eq. Cas. 758.
[24] 4 B. C. C. 76.

sans waste is not merely exonerated from liability for waste, but has a property in timber cut, and is in the same position as tenant in fee. Evelin's Case.[1]

It was once a question whether tenant in tail after possibility was in as good a position as tenant for life, and that was the point settled in Williams v. Williams.

The Vice-Chancellor. Then you say that tenant for life sans waste in remainder could bring trover, notwithstanding intermediate estates, which might prevent his estate from ever coming into possession?

Mr. *Rolt*. Yes; because tenant in fee in remainder can do so. 2 Co. Inst.,[2] Abraham v. Bubb,[3] Fleming v. Bishop of Carlisle,[4] Garth v. Cotton.

The Vice-Chancellor. According to your argument you could have brought trover immediately after the timber was cut?

Mr. *Rolt*. Yes.

The Vice-Chancellor. If your right is legal, you ought to have brought trover when the timber was cut, or at any rate when your estate fell into possession; and you have no equity unless you can put it on the footing of a trust.

Mr. *Rolt*. There was a trust of the money when it came into the trustee's hands. When tenant for life has rendered an account of the timber cut, the statute is no bar. Hony v. Hony.[5]

Vice-Chancellor Sir W. Page Wood. The plaintiff would be put in very considerable difficulty if this were treated otherwise than as a proper cutting, followed by the investment of the proceeds for the purposes of the trust. The authorities seem to go to the full extent that, where timber is properly cut for the benefit of the estate (as the Vice-Chancellor of England says in the case of Waldo v. Waldo), either by the act of the court, or out of court by the act of trustees which the court has adopted, there it is treated as so much of the estate. Thus, in a much earlier case, Mildmay v. Mildmay, before Lord Thurlow, the court preferred not treating the proceeds as money, because that would change the character of the fund, but directed them to be invested in land; the effect being that the tenant for life, although impeachable for waste, would obtain the benefit of the money when so invested. Therefore where the timber is properly cut, the purchase-money of the timber follows the land, and the tenant for life, although impeachable for waste, receives the income during his life; and when you reach the first tenant for life unimpeachable for waste, as in the case of Phillips v. Barlow, he takes the capital. There would therefore be no difficulty if the plaintiff in this case had treated the timber as having been properly cut, and the fund as being his from the date of his coming into possession of the estate; but he seeks the past interest on this ground (and it is only on this ground that he can seek it), that, when the tenant for life, by his

[1] 2 Freem. 55. [2] Cap. 24, 144. [3] 2 Freem. 53. [4] 1 Dick. 209.
[5] 1 S. & S. 568.

own wrong, creates the fund, as in The Duke of Leeds *v.* Lord Amherst, and some other cases, the tenant for life shall not be allowed to avail himself of his own wrong, and to receive the interest from a fund which would never have existed but for his own wrongful act. But the cases which were cited have been cases of equitable waste, where, the whole matter having to be administered in equity, the legal right which might spring from such a wrongful act could never have arisen. In the case of legal waste, you have only to consider the legal consequences of the wrongful act as to which trover may be brought. There is no account asked for in this bill, for the whole amount is ascertained and settled, which was one of the points that arose in the last-cited case of Hony *v.* Hony. No account is asked of what timber has been cut, what it has been sold for, and the like. No account has been rendered; but the tenant for life, who has now come into possession unimpeachable for waste, comes into court with this simple case. He says: "I find the exact value of the timber cut; I ask for that value; I ask to have it paid to me; I ask to have the back interest paid on that; I do not ask for anything else; and I, being legal tenant for life unimpeachable for waste, say this is my money." In that state of things, if he has any right at all, it is plainly a legal right, treating the original act as a wrong. There is nothing which the Court of Chancery is called upon to do, and therefore he should be left to his remedy at law. But who may have the legal right is, I think, a matter of great doubt. I am by no means satisfied at present that when the timber was cut, assuming the cutting to have been a wrongful act from the first moment, it did not belong to the first person having an estate of inheritance. The limitations are to the tenants for life, with contingent remainders to their issue, and then a remainder to the tenant for life unimpeachable for waste, and remainders in tail to his issue. All the authorities are uniform in this respect, — that, where there has been an improper fall of timber on the estate by a person having a limited interest, the first owner of the inheritance is the person who has a right to bring trover, passing over all the intermediate estates. It certainly does not appear that there was, in any of these cases, an intervening tenant for life unimpeachable; but there were contingent remainders that might come into esse and defeat the estate of inheritance vested in the heir or the person taking in remainder, as the case might be. The reason of the thing was this, that there must be the property in somebody when the wrongful act is done. The court will not allow the tenant impeachable for waste to avail himself of his own wrong; and the law therefore vests the timber wrongfully cut in the person having the first legal estate of inheritance. The answer made by Mr. *Rolt* is, "that the tenant for life, although in remainder, if he is unimpeachable for waste, as in Lewis Bowles's Case, has not merely an immunity from liability for waste, but the actual property in the timber. But how has he the property? The doctrine laid down in the 7th resolution in Lewis Bowles's Case is this: The clause without impeachment of waste gives a power

to the lessee which will produce an interest in him, if he executes his power during the pendency of his estate. That is to say, if he ever comes into possession of the estate, and ever exercises his power of cutting the timber thereupon, the timber belongs to him; and the reason of its belonging to him, which is fully argued out, is this: It is said, if it had been without impeachment of waste by any writ of waste, then, by old authority, the action only would be discharged, and the lessor, after the fall of the timber, might nevertheless seize it; but when it is without impeachment of waste altogether, then the effect is, that the tenant for life cannot be interfered with in any manner in respect of that waste; and as soon, therefore, as he has exercised his power thereupon, the timber at once becomes his own property. But how does that prove that when the trees are felled by the wrongful act of some one preceding him, before his property has arisen thereupon, the property is in him? To say the least, that is a doubtful proposition; and that point I am asked to decide not having the heir before me. The question is, whether such a point as that ought to be decided without the presence of the heir, and against the heir. I think the answer is plain, that, without hearing the heir upon it, I can come to no such conclusion. And further than that I see no reason to go. There seems to be considerable reason for a contention by the heir that his position is just the same in respect of a person having a possible power, which may arise, if ever his estate arises, as it is in respect of the contingent interests of unborn issue, in favor of whom the law does not interfere to prevent the heir's right accruing at once, so as to enable him to bring trover immediately after the timber is cut. But there are further difficulties in the plaintiff's way, if he chooses to treat this as a tort. In the first place, of course the tort arose when the act was committed; and, if the plaintiff had a remedy by an action of trover, I apprehend the action should have been brought some twenty years ago, when the act took place. That is the first difficulty. But, secondly, suppose the plaintiff has any right of action now of any kind, his remedy is clearly at law. He is the legal owner, and if he chooses to proceed at law by an action of trover, there is his remedy. In what respect does he want the aid of this court? He asks for no injunction; he asks for no account; he asks nothing which he has not got at law. Why should he come here to insist on his right? It is put in this way: It is said a person commits a wrong, and hands over the fund which has resulted as the produce of his wrong to another, and says, "Take care of that. I have injured somebody or other, and I ask you to hold the proceeds for anybody who may be interested in them." I apprehend, even supposing the form of action might be varied, and that it might be an action for money had and received to plaintiff's use, the remedy would still be at law. It is not for me to determine the question, whether it should be an action of trover, or an action for money had and received. Still, taking it either way, what does the plaintiff come here for? In truth, it is only by treating the cutting as rightful, as an

act which the Court would recognize, that the plaintiff can have any ground for coming to this Court. On that view, considering that the trustees were applied to in the first instance, there might be ground for directing an inquiry whether this cutting ought to be regarded as an act of the trustees, which the Court would recognize, as it did in Waldo *v.* Waldo. If that were so, the plaintiff would be entitled to the whole of the money produced; but he would be clearly wrong in asking for the intermediate interest. If, on the other hand, he says: "You, the trustee, having received this sum of money as the proceeds of a wrongful act, ought to have held it for all the persons interested; you should not have paid any income to the wrong-doer himself, but you should have held it for me," — that contention entirely fails; because, if the act was wrongful, the remedy is at law, and not here. If he chooses to treat the timber as rightfully cut, then the tenant for life was entitled to interest, and all the plaintiff can get is the principal, his title to which does not seem to be disputed. What seems right for me to do is this: either to dismiss the bill altogether, if the plaintiff insists on treating the cuttings as wrongful acts from the commencement, in which case I ought to dismiss it with costs; or else, if the plaintiff is content to treat the cuttings as rightful, then to make a decree for the payment to him of the capital derived from the proceeds of that timber. But I cannot do this unless the plaintiff waives any inquiry as to whether the cutting was rightful or not.

Mr. *Rolt* having consented to waive any inquiry, and to treat the timber as rightfully cut, the minutes of decree were as follows: —

Dismiss the bill, with costs, as against the representatives of George William Gent and John Gould Gent; and, the plaintiff not asking any inquiry whether any of the timber was wrongfully cut, the funds in the hands of the trustee to be transferred to the plaintiff; the trustee's costs to come out of the fund.

TURNER *v.* WRIGHT.

BEFORE SIR W. PAGE WOOD, V. C., MARCH 28, 1860.

[*Reported in Johnson,* 740.]

E. WRIGHT, of Brattleby House, in the county of Lincoln, being entitled in fee simple to an estate and mansion-house at Brattleby and an estate in North Kelsey, by his will, dated Sept. 3, 1853, charged his said mansion-house and estate in Brattleby and North Kelsey with the payment to his sister Mary Wright, during her life, of a rent-charge of 300*l.*, and, subject thereto, devised all his said mansion-house and estate in Brattleby and North Kelsey aforesaid, with the appurtenances, to the use of his brother, the defendant, the Rev. W. Wright, in fee; but in case he should die without leaving issue living at the time of his

decease, then the testator devised his said mansion-house and estates, with the appurtenances, to the use of his said sister and her assigns during her life, without impeachment of waste, with remainder to the use of the plaintiff, Samuel Wright Turner, in fee; but if he should die without leaving issue male living at the time of his decease, then the testator devised his said mansion-house and estates to the use of the eldest son of the Rev. Dr. Parkinson, in fee; but in case such eldest son should die before he should become entitled to the possession or to the receipt of the rents and profits of the said testator's said estate thereinbefore devised, the said testator devised his said mansion-house and estates to the use of the second son of the said Dr. Parkinson, in fee; and the testator thereby provided that the plaintiff should, within one year after becoming entitled to the possession or to the receipt of the rents and profits of the said estates, take the name and arms of the testator or forfeit his interest in the said estate.

The testator died on Aug. 9, 1857, and Mary Wright had since died. The defendant, William Wright, entered into possession of the estates, and had had no issue up to the date of the bill. The defendant had cut some and marked for cutting other timber on the Brattleby and North Kelsey estates, and had advertised a sale thereof. Some portion of the timber so cut and marked on the Brattleby estate was alleged to be ornamental and other portion immature. The plaintiff filed this bill praying an injunction to restrain the cutting of any timber, or at any rate of any ornamental or immature timber, and for an account of the timber already cut.

Mr. *Rolt*, Q. C., Sir *H. Cairns*, Q. C., and Mr. *Kay*, for the plaintiff. The defendant has no right to cut any timber. The foundation of the doctrine as to waste is the intention of the testator, and it is clear on this will that the estate in its integrity was meant to go to the successive takers. The power of committing legal waste is expressly given to the tenant for life, and not being given to the defendant, he is not entitled to cut timber, whether ornamental or not. If a gift of personalty had been made in similar terms, the person entitled in reversion would have a right to have the fund secured, and so here the plaintiff may have the estate secured by an injunction against waste. It is not generally possible to destroy the whole value of an estate in real property, though in the case of houses, and especially of chambers on an upper floor, it would be so. But a partial destruction will be restrained on the same principle. The defendant claims, by virtue of the quality of his estate in fee, the right to commit any kind of waste; but it is clear that he could not pull down the mansion-house, because that would be to destroy the thing which, in certain events, is given over. Cutting timber is equally *pro tanto* a destruction of the inheritance; for timber is not part of the profits, but of the inheritance. Bewick *v.* Whitfield,[1] Garth *v.* Cotton,[2] Lewis Bowles's Case.[3]

[1] 3 P. Wms. 267. [2] 1 Wh. & T. Lead. Cas. 451. [3] 11 Rep. 79.

[THE VICE-CHANCELLOR. Lord Redesdale says the contrary in Wright *v.* Atkyns.]

Lord Redesdale's statement is opposed to all the old authorities. Robinson *v.* Litton[1] is an express authority that tenant in fee, subject to an executory devise over, may be restrained from committing waste; and this was approved by Lord Eldon in Stansfield *v.* Habergham.[2]

The only authority which seems adverse is Wright *v.* Atkyns,[3] reported on appeal before the House of Lords in Sugden's Law of Real Property;[4] but the power given to Mrs. Atkyns in that case, of conferring estates on other persons which would entitle them to cut timber, was the reason why she was held not to be impeachable herself. The analogy of spiritual corporations applies, who may be restrained from committing waste, though they have estates of inheritance. Vin. Abr. A, "Waste," Bishop of Winchester *v.* Wolgar,[5] Acland *v.* Atwell,[6] Wither *v.* Dean and Chapter of Winchester,[7] Herring *v.* Dean and Chapter of St. Paul's,[8] Duke of Marlborough *v.* St. John.[9]

The right to a prohibition was at common law, and before the Statute of Marlebridge it was wrong in tenant for life to commit waste, though the remedy was deficient; and tenant in dower could always be prevented from committing waste. Another analogy is furnished by the case of tenant in tail after possibility, who cannot cut timber. Abraham *v.* Bubb.[10]

When a testator expressly gives an estate for life, sans waste, making the tenant for life the very owner of the timber, the Court restrains equitable waste, because it sees that the intention is that such waste should not be committed. So, by analogy, where it sees, as here, an intention that no waste should be committed, it will restrain even legal waste.

[THE VICE-CHANCELLOR said that he had no doubt the defendant had rights as extensive as those of a tenant for life without impeachment of waste, but called upon the defendant's counsel on the question as to equitable waste.]

Mr. *Daniel*, Q. C., and Mr. *Speed*, for the defendant. The intention of the testator is shown by the estate he gives. By making the defendant tenant in fee, he meant to give him all the rights incident to the fee simple, except so far as he limited them by the contingent executory devise over. The power of disposition only is qualified by the gift over, and the nature of the defendant's dominion over and enjoyment of the estate is unaffected by it.

A tenant in tail has the right to commit waste, and this is not merely because he can bar the entail, for the same was held where the power of barring the entail was taken away by statute. Peirs *v.* Peirs,[11] Attorney-General *v.* Duke of Marlborough.[12]

[1] 3 Atk. 209.
[2] 10 Ves, 273.
[3] 17 Ves. 255; 19 Ves. 299; 1 V. & B. 313; Tur. & R. 143, 147.
[4] Page 376.
[5] 3 Swanst. 493, n.
[6] 3 Swanst. 499, n.
[7] 3 Mer. 421.
[8] 3 Swanst. 492.
[9] 5 De G. & Sm. 174.
[10] 2 Swanst. 172, n.; 2 Sho. 69.
[11] 1 Ves. 521.
[12] 3 Madd. 498.

As to Robinson *v.* Litton, it appears by the note in Atkyns that no decree for a perpetual injunction is to be found in the Registrar's book.

[The Vice-Chancellor. The case was much discussed in Garth *v.* Cotton, and you must take it as a clear decision on the point by Lord Hardwicke from which he never wavered.]

The real ground of that decision was that, under the terms of the will, the son was in certain events a trustee. The report in Atkyns does not state the will correctly. In 6 Cruise, 427,[1] and in Viner, Dev.,

[1] [The following is the report in Cruise: "Robinson Lytton devised all his estates out of settlement to the defendant, his only son, and to his heirs and assigns for ever. And in case his said son should not live to attain the age of twenty-one years, leaving no issue by him lawfully begotten, then and in such case he gave his said estate to his first and every other daughter in tail. And he further directed that, in case his said son should attain the age of twenty-one, his estates in London, Sussex, &c., should be sold; and the moneys arising from such sales he gave to all his daughters, the plaintiffs, in equal proportions, as an addition to their fortunes; and in case one or more of his said daughters should die, then her share to go to the survivors.

"The testator died in 1782, and the defendant, his son, being still under age, and going to cut down timber, the plaintiffs brought their bill for an injunction to stay the defendant from felling timber, as contrary to their father's will, who intended them the whole benefit of the estates in question, in case his son should attain twenty one.

"For the defendant it was insisted that by the express words of the will he had the fee in him, which could be devested only upon a contingency that might never happen; and that the Court would not restrain a person having the inheritance, from committing waste. That it was unreasonable to put a man in a worse state, with regard to his own interest, because after his own interest determined, he had one for a third person, and cited Savil *v.* Savil.

"Lord Hardwicke. If the defendant has a legal right to cut down timber, and there be no equitable circumstances in the case, he ought not to be restrained from the exercise of this right; but if there be any such, he ought. I did not think fit to determine the matter upon a petition, but thought it proper for a bill. As to the testator's intent, he never meant that his son should, before he attained twenty-one, fell all the timber on these estates, which were devised to be sold for the increasing his daughters' portions; and it might happen that the value of the timber when felled would equal or perhaps exceed that of the land; and his meaning must have been to give it of the same value it was at his death, which must be the same timber that was on it at that time. Suppose the greatest part of this estate were meadow ground, and the defendant was going to plough it, by which he would greatly increase his present profits, but reduce the value of the land, by turning it into arable, would not the Court in such case grant an injunction? Certainly it would. The testator has given his son these estates only for a time, during which, in supposition of law, no waste will be committed, — that is, till the defendant attains twenty-one. For what guardian could cut down timber, and by that means turn part of the inheritance into personal estate? and this is a very material circumstance with regard to the testator's intent. The next consideration is, what are the words of this will which, putting the two clauses together, amount to a gift of all his estates which he had power over, to his son for ever; and that, in case his son shall attain twenty-one, then that the estates shall be sold, and the moneys arising therefrom he gives to his daughters, by way of augmentation of their portions. Upon which it was said, by the plaintiff's counsel, that the defendant is to be considered as a trustee of the inheritance, for the benefit of his sisters; and I am of opinion he is so, taking the profits to his own use until he attains twenty-one. This Court has gone greater

475, the trust for sale is stated to arise if the son attains twenty-one, instead of in the opposite event, as stated in Atkyns. The judgment shows that Cruise's report is correct, and that the ground of decision was that the son was a trustee of the inheritance.

[THE VICE-CHANCELLOR. That would explain Lord Redesdale's observations in Wright *v.* Atkyns, that Lord Hardwicke seems to have considered it a chattel interest; but if Atkyns's report is wrong, it is strange that it should have been relied on without remark in the case of Garth *v.* Cotton, before the same judge, not very long afterwards.]

There is no jurisdiction to restrain a tenant in fee, unless he is in some event a trustee, from committing any kind of waste.

Mr. *Rolt*, in reply. Even if the report of Robinson *v.* Litton in Cruise be the correct one, there are three events, — namely, the son attaining twenty-one; dying under twenty-one, leaving issue; and dying under twenty-one without issue; and in the last of these the estate in fee became absolute in him. Nevertheless he was restrained;

lengths in granting injunctions to stay waste than the courts of law have in granting prohibitions against waste, — as where there has been an interposing estate for life, remainder in fee, in which case no action of waste lies during the continuance of the mesne remainder, 1 Inst. 54. And injunctions have been granted to the remainder-man, notwithstanding the interposing estate for life. So where there has been tenant for life, remainder for life, without impeachment of waste, remainder in fee, the Court has restrained the remainder-man for life, during the continuance of the first estate for life, because of the possibility of his dying before the first tenant for life. The like in mortgages, where a mortgagor has been in possession, the Court has restrained him from cutting down timber, without inquiring whether the estate itself was sufficient to answer. Now this is much stronger in the case of a trustee; and here it is the same as if he had said, 'I give this estate to my son and his heirs, to the intent he may receive the profits till twenty-one, and after twenty-one then to be sold for my daughters' portions.' In which case the Court would certainly have restrained the defendant.

"There are three kinds of interest taken notice of in this Court, — the legal estate at common law; the use, which now, by 27 Hen. VIII., draws the legal estate to it; and the beneficial interest. Now how does it stand upon this devise? The legal interest is in the defendant; and as to the beneficial interest, that belongs to him till twenty-one, and then the whole is a trust for the benefit of other persons. If he does not attain twenty-one, and leaves no issue, the estates go according to the several remainders limited thereon. If he does, they are to be sold for augmentation of the daughters' fortunes. It would therefore be unreasonable to suffer him to take away a considerable part of the value of estates intended for daughters' portions; nor will the Court enter into the value of these portions, nor of the proportion they bear to the son's estate, the father being the proper judge of the division of his property in his family.

"Several cases have been put upon waste, which have never been determined; only the Court *arguendo* has said it would do so or so, — as that of an infant in *ventre sa mere*, where the estate descends in the mean time to the next heir. It has been said several times that the Court would grant an injunction to restrain the heir from waste, and I should certainly do it. So in such executory devises as must take place within a reasonable compass, as in Gore *v.* Gore, where the freehold descends in the mean time, I doubt whether such an heir should be permitted to commit waste, and think he ought to be restrained. This injunction, therefore, must be made perpetual, there being no other way to preserve the benefit which the testator intended his daughters, but without costs on either side." — ED.]

and the same principle will apply in any case where the estate is on any contingency to go over to others.

VICE-CHANCELLOR SIR W. PAGE WOOD. The question as to equitable waste is of some nicety. As to the rest of the case I have felt no doubt. The contention has been carried as high as this, that a person who takes a fee simple, subject in certain events to an executory devise over, is not entitled to cut any timber whatever. The argument in support of this contest was founded on this principle, that the gift over necessarily involved an intention that the whole estate should go over as it existed in the testator's hands. The will describes the subject of the disposition as a mansion-house, lands, and other particulars; and it is said that, upon the terms of this instrument as well as upon general principle, it must be held that the estate was to go over, in the event contemplated, unimpaired. In support of this view it was said that, in Robinson *v.* Litton, Lord Hardwicke had restrained a tenant in fee from cutting timber before he attained twenty-one, and that, in the case of Stansfield *v.* Habergham, Lord Eldon not only recognized this doctrine, as he certainly did, but asserted as a general principle that the court would interfere even upon a legal executory devise. The particular case before him did not call for the expression of any opinion on that point; and the observation relied on can therefore only be taken as a dictum worthy of that attention which everything falling from such an authority commands.

Wright *v.* Atkyns is not in itself of a conclusive character. If you assume the principle of Robinson *v.* Litton to be that a tenant in fee, subject to an executory devise over may, upon the presumed intention, be restrained from committing waste, Wright *v.* Atkyns would not be at variance with it.

Mrs. Atkyns took subject to a direction in the will, by which the testator expressed his confidence that she would dispose of the property at her death in favor of his family. In the first instance Sir W. Grant held that she took only a life interest, and that subject thereto there was a trust for the heir. An injunction against waste followed as a necessary consequence of that decision. Lord Eldon upheld the decision, both as to the construction and the injunction. The House of Lords reversed the decree so far as it limited Mrs. Atkyns's interest to a life estate, but pronounced no decision as to any future question touching the construction of the will, and also reversed the order for the injunction so far as it was founded on the dictum that Mrs. Atkyns was only tenant for life.

The case came again before Lord Eldon. It could not be decided until Mrs. Atkyns's death who would be the persons interested in the estate, and Lord Eldon thought the whole matter involved in so much doubt that he made an order for the protection of the property in the mean time. On a second appeal, the House of Lords reversed that order of Lord Eldon's, and held that Mrs. Atkyns had the ordinary rights of a tenant in fee simple. No question of equitable waste arose. There is one sentence of Lord Eldon's judgment, as stated in the short note in

Lord St. Leonards's book, pp. 383, 384, which explains how the case came to be determined against his decision without any distinct opposition on his part. The observation I refer to is at the conclusion of the judgment: "And yet, if she can give it to a tenant for life, sans waste, is she to take a less interest? It depends upon intention only."

Lord Redesdale expressly puts the case on this ground. After discussing the various views suggested, he asks,[1] "Can any one have a doubt of the testator's intention in giving her the fee to give her all the rights and enjoyments during her life of a tenant in fee? Under subsequent words the persons are to take by her devise. They take out of her fee simple, which fee simple is only controlled by the condition. They say she is to devise the property as it is. Then she is to devise more than she takes, for they say she takes no interest in the timber. She is to give to them by her will more than she takes by herself."

What I apprehend he meant by this is, that it would be unreasonable to assume that, being endowed with a power of disposition of this kind, she should not have the same power during her life which she could confer on her appointees after her death. And this seems to have struck Lord Eldon as distinguishing that case from a gift of the fee with an executory devise over. When such a gift over takes effect, it does so altogether dehors the tenant in fee, as if there had been no estate in him. Mrs. Atkyns, on the other hand, was intrusted with a power of distribution among the members of a class on whom she could confer the same estate which she held herself. That seems to distinguish Wright *v.* Atkyns; and therefore, so far as that case is concerned, it is open for the plaintiff to contend for the right which he asserts.

It is unnecessary for me to express any opinion as to the general point, whether a legal tenant in fee, subject to an executory devise over, can in any case be restrained from committing legal waste. It is sufficient to say that, when you examine Robinson *v.* Litton, it is extremely difficult to ascertain what the will was, and upon what ground the case was decided.

The strongest evidence in favor of the report in Atkyns is the passage in the argument in Garth *v.* Cotton,[2] where before Lord Hardwicke himself it was assumed that the case was as reported in Atkyns; and Lord St. Leonards puts it the same way in the report which he gives of his own argument in Wright *v.* Atkyns.[3] But I think the true version must be that given in Cruise. If the devisee died before twenty-one, leaving issue, it was to go to the issue; if he attained twenty-one, it was to be sold; if he died under twenty-one without issue, the fee was to be his own absolutely. Assuming this to have been the effect of the will, we can understand Lord Redesdale's observation in Wright *v.* Atkyns,[4] that Lord Hardwicke seemed to regard the interest in Robinson *v.* Litton as a chattel interest, at least as to certain parts of the property; for it does not appear that the whole was to be sold.

[1] P. 387. [2] P. 454. [3] P. 380. [4] P. 387.

It is not very easy to see on what principle the Court could interfere against the heir, looking to the fact that the ground of the equity is that the intention of the testator ought to be observed so far as regards all that is taken under the will. And I apprehend that it is very difficult to make out any special equity against the heir as regards anything which is not taken out of him by the testator.

However, there is the decision in Robinson *v.* Litton, supported by Lord Eldon in Stansfield *v.* Habergham. But in this case, looking at the intention, I think it clear that the testator could not have meant this plaintiff to take the estate exactly in its original state, with all the timber standing upon it. It might have been easier for Mary, who came in in immediate succession after William, than for the plaintiff to raise the question. The limitations are first to William in fee, subject to a devise over, in the event of his dying without leaving issue, to his sister Mary for life, without impeachment of waste, with remainder to the plaintiff in fee, with further executory limitations over. It is clear, therefore, that the testator meant the estate before it came to the plaintiff to be in the hands of a person who could cut ordinary timber, and who would be restrained only from committing equitable waste. Seeing this limitation, how can I possibly find on the face of this will any equity on which to interfere with any cutting of timber (not being equitable waste), at the instance of the plaintiff, whose interest was expressly postponed to an estate in another person, which carried with it this very privilege of cutting ordinary timber in priority to any rights of the plaintiff.

I can discover, therefore, no symptom of the alleged intention to preserve the estate, timber and all, intact for the plaintiff, in the event of his succeeding to it, in a will which expressly confers on a person who takes in priority to the plaintiff the right of cutting timber, which it is sought to restrain in the original taker.

Consequently, there is nothing to justify me in interfering with the right to commit mere legal waste. There is much force in Lord St. Leonards's observation upon Robinson *v.* Litton,[1] that there is no instance to be found in the books in which an adult owner in fee has been restrained from cutting timber. Lord Hardwicke did certainly rely much on the improbability of timber being cut during the tenancy of an infant. But with respect to equitable waste the question is very different. Putting aside all the authorities upon malicious waste, which is not in question here, it is clear from the name and arms clause and other particulars that the testator considered himself as dealing with the capital mansion-house of the family. It would be a monstrous construction to hold that, because the fee was given, it would be competent for the first taker to pull down the mansion-house. Then the whole question of equitable waste is so closely connected with the preservation of the mansion, that it is not going too far to say, upon the construction of the whole will, that by the mansion-house and the appurtenances

[1] Law of Real Property, p. 380.

the testator intended to comprise everything of an ornamental character with reference to the mansion-house. I cannot better express my view upon this part of the case than by reading a passage from the judgment of Lord Justice Turner, in Micklethwait *v.* Micklethwait:[1] "When the Court is called upon to interfere in cases of this description it is bound, I think, in the first place, to consider whether there are any special circumstances to affect the conscience of the tenant for life; for, in the absence of such special circumstances, it cannot be unconscientious in him to avail himself of the power which the testator has vested in him. We have, then, to consider what are the special circumstances which the Court will regard as affecting the conscience of a tenant for life; and I apprehend that what is principally to be regarded, is the intention of the settlor or devisor. If by his disposition, or by his acts, he has indicated an intention that there should be a continuous enjoyment in succession of that which he himself has enjoyed, in the state in which he has himself enjoyed it, it must surely be against conscience, that a tenant for life claiming under his disposition should by the exercise of a legal power defeat that intention. We have here, I think, the clue by which the difficulty in this case may be solved: 'If a devisor or settlor occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house, and it cannot be presumed that he meant it to be deprived of that ornament which he himself enjoyed.'"

This reasoning obviously applies to every case of an estate limited so as to go in a course of succession; and the passage seems to me so pertinent that I cannot possibly use words more apt to express my view of the present case. The testator devised this estate to go in succession to different classes of owners, and the case is therefore within the principle on which the doctrine of equitable waste depends. The tenant for life, sans waste, is as much owner of the timber as the tenant in fee. Their legal rights in this respect are identical. Then the principle of equitable interference is, that if the estate is to go in succession, equitable waste ought to be restrained; and for this purpose it is quite immaterial whether the succession is effected by creating life estates or estates in fee subject to executory devises. Mr. Daniel put the case thus: that the testator, by creating a tenancy in fee, indicated an intention to confer ownership in a sense different from the ownership of a mere tenant for life, and was willing to trust to the taste and proper feeling of the successive owners in fee not to use their power for the destruction of anything essential to the estate. But I apprehend that was not the testator's intention. There is not the slightest intimation to be found of an intention that any one should exercise the power of committing equitable waste.

[1] 3 Jur. N. S. 1283.

In the abstract the criterion of taste amounts to nothing, and therefore the taste of the testator is always taken as the only possible criterion of what is ornamental timber; and if the power contended for exists, whole avenues of trees might be destroyed by a tenant, not from any desire to injure the estate or the mansion-house, but because he objected to avenues altogether.

It was said that to restrain this tenant in fee would be to place him in a worse position than a tenant in tail. But the answer is, that he is in a worse position by the nature of his estate. The tenant in tail (even if it be special tail) can suffer a recovery and make the estate his own; therefore the Court will not interfere with his rights of ownership. The Duke of Marlborough's Case was cited in answer to this view, as showing that the Court abstained from interfering with a tenant in tail even where he had no power of barring the entail. But I apprehend that that case went simply upon this principle, that the tenant, having all his issue in him, and therefore having an indefinite estate so far as that issue extended, his ownership could not be interfered with except by act of Parliament. The law would not allow his absolute dominion to be curtailed. For this reason a statute was passed which might tie up the estate for centuries; and it would have been a monstrous proposition to say that, in consequence of that, the ordinary powers over the estate were to be taken away from that time. Accordingly, it was held that the rights of the successive tenants must follow the ordinary rules, except so far as those rules were modified by this singular act of Parliament. My opinion, therefore, is shortly this: The testator created a tenancy in fee, with an executory devise over, and also a tenancy for life sans waste. There is no intention intimated to give to the tenant in fee any larger rights in respect of timber than to the tenant for life. At law their rights would be the same, and there is no reason to be derived from any intention discoverable in the will why they should not be identical in equity.

Declare that defendant, W. Wright, is entitled to fell all such timber on the devised estates as is mature and fit to be cut, except such as is planted or left standing by way of ornament or shelter, with reference to the occupation of the mansion-house at Brattleby; but that he is not entitled to cut any unripe timber or any timber planted or left standing for shelter and ornament as aforesaid.

Inquiry as to any timber for shelter or ornament as aforesaid cut or marked for cutting. Injunction pending inquiry, to restrain the cutting of the timber marked, on the plaintiff's undertaking to answer damages.

SAME CASE ON APPEAL.

BEFORE LORD CAMPBELL, C., JULY 4, 7, AND 21, 1860.

[*Reported in* 2 *De Gex, Fisher, & Jones,* 235.]

Mr. *Rolt*, Sir *Hugh Cairns*, and Mr. *Kay*, for the plaintiff. It is agreed on both sides that the evidence is sufficient to show an intention to cut down ornamental timber. That raises the question both of legal and equitable waste; and as the case is reopened, though the appeal is not that of the plaintiff, we ask for an injunction to the full extent of the prayer of the bill. The question is, whether the defendant is to be considered as absolute owner of the devised premises in fee, having a right to pull down the mansion-house and cut down timber as he pleases; in fact, not only whether he is unimpeachable for waste, but whether he is at liberty to do as he likes as to waste. The authorities, we submit, establish that the defendant is impeachable for waste ordinary as well as equitable. The only error in the Vice-Chancellor's decree is, that it stops short of restraining all waste. As to equitable waste, the case of Wright *v.* Atkyns[1] is in accordance with the decree; but Robinson *v.* Litton,[2] approved of by Lord Eldon in Stansfield *v.* Habergham,[3] is an express authority in favor of our claim in its entirety. The case under consideration is different from that of tenant for life unimpeachable of waste. There equitable waste is restrained, but not other waste, for reasons grounded on the incidents of a life estate, and the rules of this Court as to such incidents. But here the question is merely of the intention of the testator: Micklethwait *v.* Micklethwait;[4] and upon the construction of this will it is submitted that an intention is to be implied that the estate in its integrity was to go to its successive takers, and that no timber whatever was to be cut by the defendant pending the contingency on the happening of which the estate is to go over. The estate given to the defendant, though not a fee simple, may be dealt with by the defendant as if it were a fee, subject always to the contingency of its being defeated on the happening of a contingent event. If that event comes to pass, then the property in its integrity is to pass to others in succession; but that could not take place if the defendant's interest were unimpeachable of waste. Had the property given consisted of a single house, or a set of chambers in an upper floor, it could not have been contended that the defendant by removing, or concurring in the removal of, the house, might leave to his successor, on the contingent event happening, a mere *tabula rasa* of soil, or an upper layer of air. A tenant in tail general or special is not to be restrained from committing waste, inasmuch as by executing a disentail-

[1] 17 Ves. 255; Sugden, Law of Property, 376.
[2] 3 Atk. 209.
[3] 10 Ves. 273.
[4] 1 De G. & J. 504.

ing deed he may make the estate his own; but when upon the failure of issue inheritable under the entail his estate becomes an estate tail after possibility of issue extinct, he becomes impeachable of waste, this Court interposing in favor of the intention. The same reasons apply as a ground for the restriction of legal waste as of equitable waste, and we submit that the injunction should extend to the restraint of all waste.

Mr. *Daniel* and Mr. *Speed*, for the defendant. The authorities upon the doctrine of waste are divisible into two classes: first, as it affects the owner of an estate of inheritance; secondly, as it affects the owner of an estate which could not by possibility extend beyond his life. It is to those two classes of cases alone that the doctrine of equitable waste is ever applied, and the Court is not disposed to extend the doctrine, but considers it as already extended too far. The only instance in which the doctrine is applied as against the owner of the inheritance, is where the estate of inheritance is held upon a trust. Where the Court is satisfied of the existence of a trust, it will restrain the trustee from committing waste of any kind for his own benefit; but where there is no trust, the Court leaves the owner of the inheritance in undisturbed enjoyment of all his rights as tenant in fee simple, without any restraint as to waste of any description. The authorities which have been cited are all cases of trust, and therefore in our favor rather than against us. The decision appealed from is the first instance of an injunction being granted under similar circumstances. The right to restrain the owner of the inheritance from cutting down timber is not maintainable, and for this reason, that an estate of inheritance includes as one of its incidents the right to do the acts which in the owner of a limited interest only would be equitable waste. Savil's Case.[1] An estate in fee simple, though followed by an executory devise over on a contingency, is, to all intents and purposes, a fee simple, and attended with the same incidents as a right to curtesy or dower. Hargrave's Collectanea Juridica.[2] There is no reason why the incident of a right to commit waste should be excepted. The intention of the testator is to guide the court in the exercise of its jurisdiction, and in this will the testator seems to have been well advised as to the distinction between legal interests to which the control of a court of equity is an incident, and legal interests to which it is not incident. It is true that the lands are to be held and enjoyed by the devisees in succession, but that is no reason for qualifying or altering the rights incident to the successive estates. In all cases where the doctrine of equitable waste has been applied as against an owner in his own right, his estate has been an estate for life either by force of the limitation or by the happening of a particular event. Thus in the case of a tenant in tail after possibility of issue extinct, it is applied because by the failure of inheritable issue the estate tail has in effect been converted into a life interest. Williams *v.* Williams,[3]

[1] Mosely, 224. [2] Vol. 1, p. 332. [3] 15 Ves. 419.

Vane *v.* Lord Barnard,[1] Burges *v.* Lamb.[2] The evidence shows that the timber has been cut and marked under the advice of a surveyor, as timber which may be felled in due course of husbandry. There is no destructive or malicious cutting; and where that is so, it has not been the habit of the Court to grant an injunction, even as against a tenant for life: Aston *v.* Aston,[3] Piers *v.* Piers,[4] Halliwell *v.* Phillips;[5] and still less as against the owner of a larger interest. Hole *v.* Thomas,[6] Twort *v.* Twort,[7] Attorney-General *v.* Duke of Marlborough.[8]

Mr. *Rolt*, in reply. There is no distinction, as to restraining waste, between equitable waste and malicious waste. The motive does not form an element of the question. It is said that the doctrine is not to be extended, but that means not extended to a different class of cases from those in which it is already applied, viz., wherever the party sought to be restrained is not the owner of an absolute indefeasible estate in fee, or of an estate of inheritance capable of being at once converted into a fee-simple.

Judgment reserved.

JULY 21.

THE LORD CHANCELLOR. In this case the plaintiff, by his bill, prayed an injunction "to restrain the cutting of any timber, or at any rate of any ornamental timber," growing upon the lands devised in fee to the defendant, subject to an executory devise over to the plaintiff.

The decree of the Vice-Chancellor declared, "that the defendant is entitled to fell all such timber on the devised estates as is mature and fit to be cut, except such as has been planted or left standing by way of ornament or shelter with reference to the occupation of the mansion-house on the said devised estates; but that he is not entitled to fell any unripe timber or any timber planted or left standing for ornament or shelter as aforesaid."

The result of the decision is, that the defendant is dispunishable of legal, but not of equitable, waste. After great consideration, I agree with the Vice-Chancellor on both questions.

As to the first, my opinion is clear and decided. The defendant is tenant in fee simple, with all the incidents of such an estate, although there be executory devises over in case he should die without leaving issue living at the time of his decease. Not making any unconscientious use of the powers belonging to him as tenant in fee simple, why should he not reasonably exercise these powers? Is there anything unconscientious or unreasonable in his cutting down timber mature and fit to be cut, and not such as has been planted or left standing by way of ornament or shelter? If we are to regard the intention of the testator in such limitations, can the intention be supposed to be, that the first

[1] 2 Vern. 738; Prec. in Ch. 454; Gilbert's Eq. Rep. 127; 1 Salk. 161; 1 Eq. Ca. Ab. 399.
[2] 16 Ves. 174.
[3] 1 Ves. 264.
[4] 1 Ves. 521.
[5] 4 Jur. N. S. 607.
[6] 7 Ves. 589.
[7] 16 Ves. 128.
[8] 3 Madd. 498.

taker, who is made tenant in fee, should during the whole of his life, although he should have numerous children and grandchildren, not be entitled to cut down a tree upon the property, unless for his botes? In this case, the presumed intention of the testator is strengthened by the first executory devise over, which is for life and sans waste. He could not have intended that the first taker, to whom he gave a fee, should be more restricted in the management of the property than the devisee over, to whom he gave only a life estate. Having given the first taker a fee, he probably thought it quite unnecessary expressly to make him dispunishable of waste.

So that equitable waste is not committed, the bountiful intention of the testator in favor of the devisees over will be completely fulfilled; for, on the happening of the contingencies limited, the property will come to them in the same condition in which it would have been if the testator, being a prudent man, had himself survived and had managed and enjoyed it till the time when the events happen upon which they are entitled to enter.

The *onus* seems to lie upon the plaintiff to show, by authority, that tenant in fee simple, subject to an executory devise over, is not entitled to cut timber. It is admitted that no express decision to this effect is to be found in the books, and that no instance has ever yet occurred of an adult devisee in fee with an executory devise over being restrained.

The plaintiff's counsel relied on *dicta* to be found in the reports of three cases, Robinson *v.* Litton,[1] Stansfield *v.* Habergham,[2] and Wright *v.* Atkyns.[3] According to Vesey, Jr., a very careful and accurate reporter, Lord Eldon did say, in Stansfield *v.* Habergham:[2] "I should by dissolving this injunction contradict what has been understood to be the doctrine of this Court; that, where there is an executory devise over, even of a legal estate, this Court will not permit the timber to be cut down." But this doctrine is not to be found in any text writer, and it has never been acted upon. In Wright *v.* Atkyns,[3] the power of the widow to cut down timber was only questioned upon the supposition that she took no more in equity than an estate for life. In Robinson *v.* Litton,[1] Lord Hardwicke was influenced by the consideration that the tenant in fee simple with an executory devise over was the infant heir of the testator, and was about to cut down timber improvidently. The limitation was as stated by Cruise;[4] and the infant, though seised of the legal estate in fee, was entitled to the rents and profits only until he attained twenty-one, *i. e.*, for a chattel interest. After that he was to become trustee for his sisters; and, even according to the report in Atkyns, the circumstance of the infant being a trustee for the benefit of his sisters was mainly relied upon in granting the injunction.[5]

Therefore, as to legal waste, I think there is no authority to outweigh

[1] 3 Atk. 209; Cru. Dig. tit. xvi. c. 7, § 26.
[2] 10 Ves. 273.
[3] 17 Ves. 255; 19 Ves. 299; 1 Ves. & Bea. 313; Turn. & Russ. 143.
[4] 6 Cruise, 428, 429.
[5] 3 Atk. 209.

the considerations which, upon principle, lead strongly to the conclusion that, so far, the injunction ought to be dissolved.

Had there been a charge in the bill, supported by evidence, that the cutting down of the ornamental and immature timber was malicious, I should have entertained no doubt that this court ought to interfere by injunction. Tenant in fee simple, subject to an executory devise over, of a mansion surrounded by timber for shelter and ornament, cannot say that the property is his own; so that out of spite to the devisee over, he may blow up the mansion with gunpowder and make a bonfire of all the timber. The famous Raby Castle Case[1] shows that such things may not be done by tenant for life sans waste, and tenant in fee with an executory devise over, actuated by malice, would not have greater liberty to destroy.

The waste which intervenes between what is denominated legal waste and what is denominated malicious waste, viz., equitable waste, may admit of a different consideration. But equitable waste is that which a prudent man would not do in the management of his own property. This court may interfere where a man unconscientiously exercises a legal right to the prejudice of another; and an act may in some sense be regarded as unconscientious if it be contrary to the dictates of prudence and reason, although the actor, from his peculiar frame of mind, does the act without any malicious motive. The prevention of acts amounting to equitable waste may well be considered as in furtherance of the intention of the testator, who, no doubt, wished that the property should come to the devisee over in the condition in which he, the testator, left it at his death; the first taker having had the reasonable enjoyment of it, and having managed it as a man of ordinary prudence would manage such property were it absolutely his own. In the present case, the devise being by the testator of "all his said mansion-house and estate at Brattleby and North Kelsey, with the appurtenances," there would be great difficulty in distinguishing for this purpose between the mansion-house and the ornamental timber. Indeed, Mr. Daniel contended that, in the absence of malice, this court could not interfere to protect the mansion-house. I put to him hypothetically, in the course of his able argument, the supposition that a mediæval castle is devised to A in fee, subject to an executory devise over to B in fee, and that A from a sincere dislike of turrets and moats, and a genuine love of roses and lilies and gravel walks, and believing that B and all other sensible men must have the same taste, declares that he means to throw down all the buildings and to convert the site of the castle into a flower-garden, and begins with setting men to strip the lead from the roof of the donjon tower. A bill being filed by B for an injunction, would this court interfere? Mr. Daniel answered: "A, acting *bona fide* — No." Nevertheless I cannot help thinking that in spite of A's *bona fides*, what A contemplated would be in the nature of a destruction of the subject

[1] Vane *v.* Lord Barnard, 2 Vern. 738.

devised, and would certainly be in contravention of the intention of the devisor, so that B would be entitled to an injunction. It may be said that this is an extreme case, but it is by an extreme case that the soundness of a principle is to be tested. The presence or absence of a bad motive will not alone enable us to draw any satisfactory line between what is to be considered malicious and what is to be considered equitable waste, and no line to regulate the interposition of a court of equity by injunction can well be drawn other than the recognized and well established line between legal and equitable waste. The application of this to the facts of particular cases may sometimes be attended with difficulty; but the principle on which the line is to be traced is known and invariable.

I am willing, with Vice-Chancellor Page Wood, to accept the clue by which Lord Justice Turner, in Micklethwait *v.* Micklethwait,[1] proposed to solve the difficulty: "If a devisor or settlor occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed." However, I cannot go so far as the Vice-Chancellor, who is reported to have added, "This reasoning obviously applies to every case of an estate limited so as to go in a course of succession." "The tenant for life, sans waste, is as much owner of the timber as the tenant in fee. Their legal rights in this respect are identical."[2] Where an estate tail is created with successive estates tail in remainder, the estate entailed is "limited to go in a course of succession," but a tenant in tail is dispunishable of equitable as well as legal waste, because he may at any time bar the entail, and give himself a pure and absolute fee simple. Again, a tenant for life sans waste can hardly be said to be as much owner of the timber as the tenant in fee; for although the tenant for life (avoiding equitable waste) may fell and dispose of the timber in his lifetime, were he to sell growing trees they would go to the remainderman or reversioner, if not severed from the soil in his lifetime; whereas the tenant in fee might by sale or conveyance give the purchaser an absolute and permanent interest in the trees against all the world. Nevertheless I think that the rights and liabilities of tenaut for life sans waste may be taken as a measure of the rights and liabilities of devisee in fee, subject to an executory devise over.

The only analogy at all unfavorable to this view of the case is that of tenant in tail, with the reversion in the Crown, and tenant in tail under an act of Parliament which precludes the barring of the entail. Such tenants in tail are considered dispunishable of waste; this being an incident of tenancy in tail, probably arising from the power which

[1] 1 De G. & J. 504, 524. [2] Turner *v.* Wright, John. 740–751.

generally subsists of barring the entail, and it not having been thought fit to make an exception in respect of those rare cases in which the power of barring the entail is withheld. But in the Marlborough Case,[1] although the Court would not interfere on the mere ground that the tenant in tail was prohibited by statute from barring the entail; yet, having regard to the enactment "that Blenheim House should in all times descend and be enjoyed with the honors and dignities of the family," it was held that the Court ought to interfere not only to prevent the destruction of the house, but also to protect the timber essential to the shelter and ornament of the house.[2]

There is an analogy which entirely accords with the distinction made by the Vice-Chancellor in this decree between legal and equitable waste, viz., the case of "tenant in tail after possibility of issue extinct," who is dispunishable of legal waste in respect of the estate of inheritance which was once in him, but may be restrained by injunction from committing equitable waste, this being an abuse of his legal power.

For these reasons I think that the decree of the Vice-Chancellor, as he pronounced it, should in all respects be affirmed, and that the appeal must be dismissed with costs.

HOLDEN v. WEEKES.

BEFORE SIR W. PAGE WOOD, V. C., NOVEMBER 7, 9, AND 23, 1860.

[*Reported in* 1 *Johnson & Hemming*, 278.]

THE plaintiff Holden was the patron of the rectory of Ashton-upon-Trent, of which the defendant Weekes was incumbent.

The glebe of the living contained beds of gypsum, which had never been opened; and on the 25th of March, 1851, an agreement was made between Holden and Weekes that the latter should open said beds, or let the same at an annual rent, and apply the net proceeds of the sale of the produce thereof or the said annual rent as follows, namely, one third thereof to the erection on the glebe of such buildings as should be deemed necessary, and any surplus of such one third in any other way that might be mutually agreed upon between the patron and said incumbent, or pay over the same to trustees to be agreed upon, who should invest the same in government or real securities, and pay the income thereof to said incumbent for his own use and benefit; and that the said incumbent should receive the remaining two thirds of said moneys to his own use and benefit. The agreement concluded with a proviso that it should continue in force only so long as said Weekes remained rector.[3]

[1] 3 Madd. 498. [2] 3 Madd. 549.

[3] In the original report the agreement is set out *verbatim*. — ED.

Shortly after the date of this agreement, Weekes granted a license to the defendant Pegg to open and work the gypsum at certain royalties and rents; and pits were opened and worked by Pegg.

The bill alleged that the plaintiff had subsequently discovered that the agreement between him and Weekes was illegal, and prayed a declaration that the said agreement, and the license which it purported to contain to work the gypsum, were null and void, and not binding on the plaintiff; that the agreement might be delivered up to be cancelled; for an account and an injunction.

It appeared in evidence, that there had been some communication with the ordinary, but his concurrence was not proved.

On the occasion of an interlocutory motion, the defendant Pegg had given an undertaking to account in respect of his workings.

Mr. *W. M. James*, Q. C., and Mr. *Druce*, for the plaintiff.

The incumbent of a living has no power of committing waste at all, though he may have the patron's concurrence, nor can it be done even with the concurrence of both patron and ordinary.

Before the restraining statutes, an incumbent, with the consent of patron and ordinary, could alienate the glebe, and *à fortiori* could commit waste, which is only a partial alienation: Knight *v.* Moseley,[1] Duke of Marlborough *v.* St. John,[2] Bartlett *v.* Phillips.[3]

But the restraining statutes, 13 Eliz. c. 10, 13 Eliz. c. 20, 14 Eliz. c. 11, 14 Eliz. c. 14, have been held to extend to prohibit waste; and mines cannot be opened by an incumbent though with the consent of the patron and ordinary: Dean and Chapter of Worcester's Case.[4]

The argument against this view always is, that the power must reside in some one, because otherwise the mines would remain useless for ever, but it has not prevailed; and now the difficulty has been got over for the future by the legislature, by giving power to open mines under the sanction of the Ecclesiastical Commissioners: 5 & 6 Vict. c. 108, s. 14; 21 & 22 Vict. c. 57. Even in cases within the exception of the restraining statutes, the lease must be by deed at the ordinary rents, and there can be no ordinary rents of mines which have never before been opened: Co. Litt.,[5] Doe *v.* Collinge,[6] Bishop of Hereford *v.* Scory.[7] This license, therefore, would be bad, even if the consent of the ordinary had been obtained.

It is also settled by authority that the patron is the person, and the only person, who can take proceedings to prevent waste.

The plaintiff signed the agreement, not knowing it to be illegal, and is not estopped from disputing it, which it is his duty to do.

Mr. *Little* (Mr. *Rolt*, Q. C., with him), for the defendant Weekes. At common law, either a previous license or a subsequent confirmation made an alienation good; and we have here the consent of the patron, which may be supplemented at some future time by that of the ordinary,

[1] 1 Amb. 175. [2] 5 De G. & Sm. 174. [3] 4 De G. & J. 414.
[4] 6 Rep. 37 a. [5] Pages 43 a, 44 a, 45 a. [6] 7 C. B. 939.
[7] Cro. Eliz. 874.

if what has passed does not amount to concurrence on his part: Co. Litt.,[1] 4 Bacon's Abr.,[2] Countess of Rutland's Case.[3]

Then the restraining statutes do not make this license void, because they were passed for the protection of future incumbents, to whom we do no wrong by working the mines, because it is conceded that the only person who can complain is the patron, and he is a consenting party. The case of Bartlett *v.* Phillips assumes the right of committing waste with the consent of patron and ordinary. Lastly, the modern statutes expressly reserve and recognize existing powers and authorities: 5 & 6 Vict. c. 108, s. 8. In any case the patron cannot, in the face of the agreement, ask for an account of past profits.

[They also cited Jefferson *v.* Bishop of Durham,[4] Wither *v.* Dean of Winchester,[5] Marshall *v.* Collett,[6] Pullen *v.* Ready,[7] Duke of Devonshire *v.* Eglin.[8]]

Mr. *Daniel*, Q. C., and Mr. *Hetherington*, for the defendant Pegg.

Mr. *James* replied.

November 23.

Vice-Chancellor Sir W. Page Wood. The bill in this case is filed by the patron of the advowson of Ashton-upon-Trent in the county of Derby, in order to have it declared that a certain agreement, entered into by him as patron with the incumbent of the living, purporting to authorize the incumbent, Mr. Weekes, to work, during his incumbency, certain mines or quarries of gypsum in the glebe, which up to that time had not been opened, may be declared void and cancelled. It also asks for an account of profits and an injunction to restrain future working. The defendant Pegg is made a party to the suit in respect of a certain agreement, which he has entered into with Mr. Weekes, for the working of these mines at an annual rent.

From the first, I have not felt the least doubt that the working, as at present going on, and as it has hitherto gone on, was an unlawful working. I think there can be no question whatever, that the working of these mines, on the license of the patron alone, without the sanction of the ordinary, was unlawful, though at present I do not say whether even the sanction of the ordinary would suffice.

I am sorry to say that, after the fullest inquiry, I cannot find that the point has ever been determined, whether or not such workings can be justified by the concurrence of the ordinary with the patron in granting a license of this description; but it is plain on the evidence, that no such concurrence on the part of the ordinary has been obtained as could give force, if any concurrence can give force, to an agreement of this kind. Therefore at the hearing I had not the slightest doubt that the existing state of things could not be continued.

But what I was most desirous of looking into was this: seeing that

[1] Page 341 a. [2] Page 760. [3] 1 Lev. 107. [4] 1 Bos. & Pull. 105.
[5] 3 Mer. 421. [6] 1 Y. & C., Exch. 232. [7] 2 Atk. 587. [8] 14 Beav. 530.

it was obviously for the benefit of the living that the works should be continued, if that could lawfully be done, and having regard to the provisions the legislature has made for the purpose of enabling mines held by the owners of property in right of their church to be worked for the benefit of those who may be properly described as interested in it, I have had to consider what was best to be done in the present state of things, and whether the suit could not be made available to sanction some sort of application to the proper authority, whatever that proper authority may be, for continuing the working of this gypsum.

As regards the authorities upon the right of the incumbent, with the consent of the patron and ordinary, to open new mines, the law is really in this state that there is no decision on the subject.

The observations dropped by V. C. Parker (whose assistance I should have been glad to have had on such a point), in Duke of Marlborough *v.* St. John, simply amount to this. He says that, up to the time of the restraining statutes, the incumbent, with the consent of the patron and ordinary, could make a complete alienation of the living, and therefore, *à fortiori*, could do such acts as were complained of with regard to waste in the felling of timber; and he added that this Court, if a proper case were made out, would concur in making arrangements for felling timber. The observation was confined to the case of timber; but the same principle would go a considerable way to sanction the opening of mines, because, in either the one case or the other, it is an alienation of the inheritance.

The earliest authority on the subject is the case of the Dean and Chapter of Worcester, where it was held by the Court that the making of a lease, without impeachment of waste, by an ecclesiastical body, was within the equity of the restraining Statutes of Elizabeth.

Then came, in the time of Charles II., the Earl of Rutland's Case, reported in Levinz and Siderfin, but in a meagre and unsatisfactory way in both, and in one of these reports a query is appended. There a prohibition being moved for against the opening of mines, the Court doubted about the prohibition, because, they said, if so, the mines could never be opened at all. That is all that occurred.

In looking through all the subsequent authorities, I do not find anything more than this, that it is clear beyond dispute that the incumbent cannot open mines without the concurrence of the patron and ordinary; and it is also clear, and beyond dispute, that the patron is the proper person to institute a suit with reference to the opening of mines (as was decided in Knight *v.* Moseley), and that he is the only person who can properly interfere, unless it be the ordinary, to prevent any collusion between the patron and the incumbent.

As regards the case before the Lords Justices of Bartlett *v.* Phillips, I do not find it treated there as a concluded point, that it was not in the power of the patron and ordinary to sanction a mining lease. On the contrary, I should say that Lord Justice Knight Bruce very carefully guards himself against any such inference. The question was, whether

any such concurrence could be presumed to have taken place, — not simply whether it could be presumed to have taken place anterior to the restraining statutes, but whether it could be presumed to have taken place at all, — and Lord Justice Knight Bruce says this: "The present vicar's claim is not supported by any grant, instrument, or documentary evidence existing or proved to have existed, nor has any consent or acquiescence on the part of the present or any former patron, or the present or any former ordinary, been shown;" clearly indicating, therefore, that he had not made up his mind that such a consent would not be of importance, if proved. But he says it was not proved, and there the case is left. These are all the authorities which I can find on the subject.

Mr. Little, in his very able argument, called my attention to the provisions in the statutes which have empowered the Ecclesiastical Commissioners to make grants upon certain terms and provisions therein mentioned, and by which it was expressly enacted that the statutes should not prejudice any power under any existing right or authority, or words to that effect; at all events indicating a doubt (to say no more) on the part of the legislature, whether there were not other ways and means of effectuating such grants. What seems, therefore, to me proper to be done in this case, is to make this suit available, if it can be done, for the purpose of obtaining a proper authority for doing that which cannot be done without proper authority.

The relief prayed is, that the instrument itself, the license, may be declared to be null and void, and not binding on the plaintiff; that the agreement may be delivered up to be cancelled; that an account may be taken; and for an injunction. As regards the account, Knight *v.* Moseley seems to have determined that you cannot have any back account, that is to say, that the patron has no right to come here to have the past proceeds invested for the good of the living; that he has no interest in that respect, and can only come here for prohibition. At the same time, from what has occurred since, I apprehend the court holds jurisdiction over funds brought into Court after the filing of the bill. Therefore there will be no back account, except to the extent covered by Pegg's undertaking; but, as I have liberty to deal with the fund brought, or to be brought, into court, I think that what I ought to do is to appropriate it in such a manner that it may be dealt with for the benefit of the living, as was done in Bartlett *v.* Phillips. What I propose to do is, not to make any declaration as to whether the license is null and void, nor to direct it to be delivered up to be cancelled, because I do not know how the matter may be hereafter dealt with, if proper sanction can be obtained. It is not likely that the bishop's sanction will be given to the license in its existing form, but I leave all those questions entirely open. All I propose to do at present is, simply to declare that the workings of the defendant Weekes, and of Pegg as his lessee, under and in pursuance of this license, were not lawful, and to leave the other questions open.

MINUTE OF DECREE.

Declare that the working of the defendant Pegg, under or in pursuance of the license or agreement of the 25th of March, 1851, was not lawful.

The agreement between Weekes and Pegg to be delivered up.

Account of workings of Pegg under the agreement, — just allowances.

Declare that what shall be found due from Pegg ought to be laid out for the permanent benefit or improvement of the rectory, subject to any directions which may hereafter be given with respect to costs.

The Court being of opinion that the workings of the mines and beds of gypsum, if duly authorized, would be beneficial to the rectory, — inquire what steps would be proper to be taken for enabling the defendant Weekes, with the concurrence of the plaintiff and all other necessary parties, to carry on such working. Liberty for the defendant Pegg in the mean time to continue the working, upon his undertaking to account.

Adjourn further consideration. Liberty to apply.

BATEMAN *v.* HOTCHKIN.[1]

BEFORE SIR JOHN ROMILLY, M. R., NOVEMBER 8, 1862.

[*Reported in* 31 *Beavan*, 486.]

A QUESTION arose as to the right of a tenant for life impeachable for waste to a fund derived partly from wood blown down by a storm.

The question was brought before the Master of the Rolls in Chambers, who gave the following opinion in writing: —

"That in the case of waste committed by a tenant for life by cutting timber, the produce of the sale of it is part of the inheritance, and as the tenant for life can gain no advantage by his own wrongful act, the produce is invested and accumulated for the benefit of the first estate of inheritance.

"In the case of timber blown down by a storm, there is no waste, because it is the act of God, but the produce of the sale of it belongs to the inheritance, that is, the money must be invested in consols, and the interest paid to the tenant for life."

Mr. *Speed*, for the plaintiff, contended that timber "whenever it is severed by the act of God, as by tempest, or by a trespasser and by wrong, it belongs to him who has the first estate of inheritance:" Lewis Bowles's Case,[2] Whitfield *v.* Bewit,[3] Lushington *v.* Boldero.[4]

Mr. *C. Hall*, for the tenant for life, claimed the benefit of all the windfalls. He argued that there was a question as to what part of the fund arose from wood which a tenant for life impeachable for waste was entitled to cut. That what was timber depended on local custom, and that a tenant for life was entitled to thinnings and to timber cut periodically or planted, as fir, for the protection of young timber. He cited

[1] S. C., 10 Beav. 426. [2] 11 Co. Rep. 88. [3] 2 P. Wms. 240. [4] 15 Beav. 1.

Phillipps *v.* Smith,[1] Barret *v.* Barret,[2] The King *v.* The Inhabitants of Ferrybridge,[3] Pidgeley *v.* Rawling,[4] and see Gordon *v.* Woodford.[5]

THE MASTER OF THE ROLLS. I am of opinion that the tenant for life is entitled to have the benefit of the sale of all such trees felled by the wind as he would be entitled to cut himself, and to all fair and proper thinnings, and to all coppices cut periodically in the nature of crops.

There must be an inquiry to ascertain what part of the fund is derived from timber or cuttings within that description.

SEAGRAM *v.* KNIGHT.

BEFORE LORD ROMILLY, M. R., FEBRUARY 8, 11, AND 14, 1867.

[*Reported in Law Reports,* 3 *Equity Cases,* 398.]

TIMOTHY LACY, who died in May, 1830, devised freehold lands to W. F. Seagram for life, with remainder to his son, W. Lye Seagram, in fee.

In 1831, W. F. Seagram cut down and sold timber on the devised estate to the amount of 520*l.*, W. Lye Seagram being at that time under age, and living with his father. W. Lye Seagram came of age in 1834, and lived with and was maintained by his father until 1843, when he married. In 1837, W. F. Seagram, who was a surgeon, in partnership with another person, paid his partner 750*l.* to withdraw from the business, and took W. Lye Seagram into partnership with him without any premium. In 1842, 1843, and in March, 1844, W. F. Seagram cut down and sold timber on the devised estate. On the 1st of April, 1844, W. Lye Seagram died intestate, leaving the plaintiff his only son and heir, and W. F. Seagram took out administration to his estate during the plaintiff's minority. W. F. Seagram cut and sold some more timber after the death of W. Lye Seagram. In November, 1864, W. F. Seagram died. In March, 1865, the plaintiff came of age, and in March, 1866, having taken out administration to his father's estate, he filed the bill in this suit against the executor of W. F. Seagram for an account of all moneys received by W. F. Seagram in respect of timber cut on the devised estate during the life and since the death of W. Lye Seagram, and for payment to the plaintiff of such moneys, with interest from the death of W. F. Seagram.

The defendant, before putting in his answer, offered to account for and pay to the plaintiff the produce of the timber cut after the death of W. Lye Seagram, with interest from the death of W. F. Seagram, and

[1] 14 Mee. & Wel. 589. [2] Hetley, 34. [3] 1 Barn. & Cres. 375, 387.
[4] 2 Coll. 275. [5] 27 Beav. 603.

the costs of the suit up to the date of the offer, but the plaintiff declined the offer.

The answer admitted that all the timber cut by W. F. Seagram was ripe for felling when so cut, and such as the Court, if applied to for that purpose, would have ordered to be cut. It also stated that during the time W. Lye Seagram was in partnership with his father they frequently settled accounts together, and he never made any claim in respect of timber or moneys received from the sale thereof, and submitted that it must be presumed that an arrangement had been made between him and his father as to the application of the proceeds of the timber. It also claimed the benefit of the Statute of Limitations.

The testator's books contained entries of the receipt of the moneys arising from the sale of the timber from time to time, among the receipts of rent and other money derived from the devised estate.

Mr. *Selwyn*, Q. C., and Mr. *Wickens*, for the plaintiff. The cutting of timber which is ripe for cutting, and such as the Court would direct to be cut upon an application by the tenant for life, is proper, and the proceeds form part of the settled estate, and the tenant for life, though impeachable for waste, is entitled to the income: Gent *v.* Harrison,[1] Bagot *v.* Bagot;[2] consequently the right of the remainder-man to the capital of such proceeds does not accrue until the death of the tenant for life: Harcourt *v.* White.[3] If W. F. Seagram had invested the proceeds of the timber for the benefit of the estate, as he ought to have done, the fund would have been affected with a trust which could not have been destroyed by any subsequent act on his part, and his estate cannot derive any advantage from his omission to make such investment. The right, therefore, of the plaintiff, as representative of his father, is not barred by the Statute of Limitations. Neither can the Court presume that the plaintiff's father acquiesced or waived his right to this money. There can be no acquiescence or waiver without the fullest knowledge of the right waived; but here the principal cutting of timber took place during the infancy of the plaintiff's father, and there is no evidence that he knew either that W. F. Seagram was impeachable for waste, or that the money had not been invested. It would be a most mischievous doctrine, tending to injure the peace of families, if this Court were to hold that when a father, tenant for life, impeachable for waste, cuts timber, though the cutting is for the benefit of the estate, if the son entitled in remainder does not immediately institute a suit to have the timber money secured, he must be taken to have given up the *corpus* as well as the income to his father.

Mr. *Southgate*, Q. C., and Mr. *W. W. Cooper*, for the defendant. The cutting of the timber by W. F. Seagram was a tortious act, and his son, as remainder-man in fee, could immediately have brought trover, or sued for an account: Whitfield *v.* Bewit,[4] Bewick *v.* Whitfield,[5]

[1] Joh. 517. [2] 32 Beav. 509. [3] 28 Beav. 308.
[4] 2 P. Wms. 240. [5] 3 P. Wms. 267.

Perrot *v.* Perrot,[1] Bateman *v.* Hotchkin.[2] A tenant for life, impeachable for waste, cannot cut timber properly, although the Court would, upon a proper application, have ordered it to be cut. If W. F. Seagram had invested the money, and declared himself a trustee of it for the benefit of the successive owners of the estate, lapse of time would not have destroyed the plaintiff's right: Phillipo *v.* Munnings;[3] but it appears from his books that he always treated the money as his own. The right therefore which the plaintiff now seeks to enforce, accrued, as to the timber cut in 1831, upon his father attaining twenty-one, and as to that cut in 1842, 1843, and 1844, at the time of the cutting, and is barred by statute. In Bagot *v.* Bagot[4] the remainder-man was an infant when the bill was filed. In Gent *v.* Harrison[5] it was held that, if the cutting had been wrongful, the bill must have been dismissed. The plaintiff is also barred by his father's acquiescence; this Court will not entertain stale demands: Harcourt *v.* White;[6] and after this lapse of time it must be presumed that W. Lye Seagram, who was living with his father in 1831, and who lived with him free of expense for nine years after he attained twenty-one, and was admitted into a profitable business at his father's expense, and frequently settled accounts with him, but never made any claim on account of the timber, knew and acquiesced in the receipt of the proceeds by W. F. Seagram for his own benefit. The right of the plaintiff is only to have an account of the timber cut after his father's death, and as this was offered before answer, he must pay the costs subsequent to that offer.

Mr. *Selwyn* in reply. In many of the cases the whole question in dispute has been whether the cutting of timber by a tenant for life, impeachable for waste, was in the particular case proper or wrongful. The Court will treat as properly done that which it would have ordered to be done; the burden, no doubt, is upon the person who has done the act of showing that it would have been so ordered; in this case that is admitted by the answer. That being so, W. F. Seagram, who was accountable for the money, was also entitled to the income, and during his life the statute did not run: Burrell *v.* Earl of Egremont.[7] As to acquiescence, the more reasonable presumption is, that W. Lye Seagram, knowing his father to be a solvent person, agreed to leave the money in his hands during his life rather than incur the expense of a suit to have it secured.

FEBRUARY 14.

LORD ROMILLY, M. R. This is a suit instituted by a grandson against his grandfather's legal personal representative, to obtain payment out of his grandfather's estate of the money obtained by him during his lifetime by felling timber when he was tenant for life, impeachable for waste.

[1] 3 Atk. 94. [2] 31 Beav. 486. [3] 2 My. & Cr. 309. [4] 32 Beav. 509.
[5] Joh. 517. [6] 28 Beav. 303. [7] 7 Beav. 205.

His Lordship then stated the facts, and continued: The question is, whether after this lapse of time the plaintiff can require the grandfather's executor to account for the money which he received. If there is any trust, he unquestionably can; if there is no trust, if it was a wrongful act by the grandfather, then the Statute of Limitations will have run, and will have barred the right of the plaintiff.

The manner in which the plaintiff seeks to make out the trust is this: he says, at maturity timber may properly be cut by the tenant for life, although he is impeachable for waste, with this condition, that the produce must be invested upon the same trust as that upon which the estate was held, and that the tenant for life is entitled to take the interest of the money. Unless the cutting is sanctioned by the Court of Chancery, I am disposed to think that it is a wrongful act; it is difficult to ascertain whether the timber had arrived at maturity or not; the tenant for life makes himself the sole judge of that — he does it without authority. If he had done it with authority, or if he had invested the produce of the timber, and treated it as a trust fund, in which case a trust would have arisen, then I entertain no doubt that he would have constituted himself a trustee for the persons entitled to the estate, and that no time would have been any bar to the right of recovery against him. But it appears from his books that he did not do so; he treated the money as his own, and dealt with it as if he were the absolute owner of it, as he did with the other produce of his estate.

Now it is to be observed in this case that the estate is limited, after the estate for life, to the plaintiff's father in fee. If it had been limited to him in tail a very different question would have arisen, because then he could not have disposed of his interest in remainder after the estate for life without executing a disentailing deed, which he did not do; but as it was, the plaintiff's father, being tenant in fee, was the absolute owner of the capital of this money, subject to the life estate of the plaintiff's grandfather therein. I think, therefore, I must treat this exactly as if the plaintiff's father were now asking for the money. The plaintiff can only claim through his father; but if the father were plaintiff, the question would be, "Why is it you have come so late, and what proof do you offer of being ignorant of the fact of this timber being cut, and of the wrongful act of your father; and why did you wait till after the death of your father?" And what makes it much more strong is, that they had been living together as partners until within a short time of the death of the plaintiff's father; and this is money which may have been taken into account, and the question may have been settled between them. The only persons who could answer these questions are now dead; every presumption, therefore, in my opinion, must be made in favor of time in such a case. On the part of the plaintiff personally, unquestionably there is no *laches;* but if he can only claim through his father, he must stand exactly in the same position as if the father were here making the claim.

I think that time must be considered to have run from the period

when the plaintiff's father attained the age of twenty-one years, and that the claim is barred by the statute. I am also of opinion that, even if the statute had no application to this case, on the ground of the lapse of time, and of the necessity of making every reasonable presumption in favor of the estate of the grandfather, I must consider that this claim, whatever it is, was settled between the grandfather and the father during their lifetime, and that the plaintiff cannot now make any claim for an account against his estate for timber which was cut before his father's death. He is entitled to an account of the money received for timber cut since the 1st of April, 1844; and if the parties cannot agree upon the amount of it, I shall direct an account to be taken of what the amount is, and direct payment accordingly. But as this was offered before the answer was put in, I accede to the argument that the plaintiff should pay the costs from the time when the offer was made, up to and including the hearing. The bill must be dismissed so far as it seeks an account of the moneys received in the lifetime of W. Lye Seagram.

SAME CASE ON APPEAL.

BEFORE LORD CHELMSFORD, C., JULY 10 AND 13, 1867.

[*Reported in Law Reports,* 2 *Chancery Appeals,* 628.]

Mr. SELWYN, Q. C., and Mr. *Wickens*, for the plaintiff. The Statute of Limitations does not apply in this case until the death of the tenant for life, as he did merely what the Court would have directed him to do in cutting the timber, and he properly kept the proceeds until his death, when the remainder-man became entitled to them. Whether he actually invested them, or did not, makes no difference, for the money would follow the inheritance: Gent *v.* Harrison;[1] and if the tenant for life did what was right in cutting the timber he would be entitled to the income for his life: Bagot *v.* Bagot.[2] A suit does not make a thing right or wrong, and can never be necessary in such a case except for the protection of the tenant for life. The only right the remainder-man has, is to see the money properly invested, and he is not obliged to apply until the death of the tenant for life.

But assuming that the tenant for life was not entitled to the income, then the Statute of Limitations has not run, because the father became administrator to his son, and the same hand therefore was to pay and to receive: Burrell *v.* Earl of Egremont,[3] Wynn *v.* Styan.[4] If he had either invested the money, or declared himself trustee, the statute would not have run, and what advantage can he derive from not having done that which he ought to have done? He was the trustee, as he had the

[1] Joh. 517. [2] 32 Beav. 509. [3] 7 Beav. 205. [4] 2 Ph. 303.

legal estate and no trustees were interposed. If it is held that the statute runs in this case, it is a clear encouragement to a tenant for life to cut timber without applying to the Court, as he has then an opportunity of saying that the timber was wrongfully cut, and that he claims the benefit of the statute.

Mr. *Southgate*, Q. C. (Mr. *W. W. Cooper* with him), for the defendant. The only case where the Court has given a subsequent sanction to the cutting of timber is Waldo *v.* Waldo,[1] and there it was cut by a trustee. Of course the Court sanctions proper acts done by a trustee, but here we are dealing with legal estates. The Court will only sanction the cutting of timber where it is decaying, or injurious to other timber : Hussey *v.* Hussey ;[2] and will in no other case give the income to the tenant for life: Perrot *v.* Perrot,[3] Whitfield *v.* Bewit,[4] Bewick *v.* Whitfield,[5] Wickham *v.* Wickham,[6] Lushington *v.* Boldero.[7] It is true that the text-books treat the tenant for life as entitled to the income, but the only case is Tooker *v.* Annesley.[8]

The Lord Chancellor stopped Mr. Southgate, and said that he had been considering the case, and would hear the reply.

Mr. *Selwyn*, in reply. In Ferrand *v.* Wilson,[9] Vice-Chancellor Wood says he has repeatedly ordered timber to be cut, and there is no difference between decaying timber and timber fit to be cut, and the tenant for life is, in chancery, always considered to be entitled to the income, and therefore the statute does not run in his favor.

Lord Chelmsford, L. C. The question to be determined in this case is, whether the plaintiff is entitled to institute a suit against the personal representative of his grandfather to obtain payment out of his estate of the amount received by him for timber which he cut down and sold during the time that he was tenant for life impeachable for waste. [His Lordship then stated the facts of the case.]

It is contended on the part of the plaintiff that the tenant for life having merely done what the Court, upon application, would have sanctioned, the case must be considered as if everything had been done under the authority of the Court, and as if the money produced by the sale of the timber had been invested and the interest received by the tenant for life, the right of the reversioner to the principal not accruing till the death of the tenant for life.

There can be no doubt, as the counsel for the plaintiff said, that what a trustee would be ordered by the Court to do is valid if done by him without the previous authority of the Court. But I do not see how that rule of equity can apply to a case where the act when done was wrongful, and where the tenant for life had no right to assume, when he did it, that the Court, if applied to, would have sanctioned it. I am strongly of opinion that if an application had been made to the Court it would

[1] 12 Sim. 107. [2] 5 Madd. 44. [3] 3 Atk. 94.
[4] 2 P. Wms. 240. [5] 3 Ibid. 267. [6] 19 Ves. 419.
[7] 15 Beav. 1 ; see Craig on Trees, p. 124.
[8] 5 Sim. 235. [9] 4 Hare, 344.

not, under the circumstances, have allowed this timber to be cut. It is said, indeed, that "it was ripe for felling when so cut," but not that it was necessary to be cut, either on account of decay or because of overcrowding. And the remainder-man in fee being at the time of the first cutting under age, I do not think that the Court would have been justified in ordering the timber to be cut upon the application of the tenant for life, merely because it was ripe for cutting. In Hussey *v.* Hussey[1] it was said by Sir John Leach, that where there is a tenant for life impeachable for waste, the Court can only authorize the cutting of such timber as is decaying, or which it is beneficial to cut by reason that it injures the growth of other trees. This was Lord Talbot's opinion, in the case of Bewick *v.* Whitfield,[2] where he said: "With regard to the timber plainly decaying, it is for the benefit of the persons entitled to the inheritance that it should be cut down, otherwise it would become of no value." If the tenant for life in this case had applied to the Court for leave to cut the timber, he must have shown that it would be for the benefit of the person in remainder that the timber should be cut, and therefore it is incorrect to assume, as is done both in the bill and answer, that nothing more being stated than that the timber was ripe for felling, the Court, if applied to for that purpose, would have ordered it to be cut.

It was said that where there is a tenant for life impeachable for waste, he is entitled for his life to the interest of the money produced from the sale of timber cut down and sold under the authority of the Court. And Vice-Chancellor Wood, in the case of Gent *v.* Harrison,[3] expressed a similar opinion where the timber was rightfully cut. The case of Waldo *v.* Waldo[4] hardly reaches to the full extent of the proposition, because there the tenant for life had an interest in the timber beyond her right in it while standing, being entitled to cut it down for repairs. Of this right she was deprived, although it appeared that there remained standing on the estate timber amply sufficient for future repairs. But whatever may be the course adopted by the Court where a tenant for life impeachable for waste obtains its leave to cut down timber, I entertain no doubt that if he takes upon himself to cut and sell timber without authority, he does it at his peril, and he can never be permitted to derive any advantage from his wrongful act. There is abundant authority for this, but I need only mention the case of Williams *v.* Duke of Bolton.[5]

The act of the tenant for life being, therefore, a tortious act, the remainder-man might either have brought an action of trover for the trees which became his property from the moment they were felled, or an action for money had and received for the produce of the sale. He might also have instituted a suit in equity; for, as Lord Macclesfield said, in Whitfield *v.* Bewit,[6] it may be very necessary for the party who

[1] 5 Madd. 44.
[2] 3 P. Wms. 267.
[3] Joh. 517; see also Craig on Trees, p. 146.
[4] 12 Sim. 107.
[5] 3 P. Wms. 268 n.
[6] 2 Ibid. 240.

has the inheritance to bring his bill in this Court, because it may be impossible for him to discover the value of the timber, it being in the possession of, and cut down by, the tenant for life. But if the Statute of Limitations had run against his remedy at law, it would be too late to institute a suit in equity for an account of moneys received in respect of timber cut and sold.

At the time of the first cutting, in 1831, William Lye Seagram was under age, but he attained his majority in 1834. From that time the statute began to run, and in respect of the first cuttings, the remedy of William Lye Seagram was barred at his death in 1844.

The next cutting, which took place during the life of William Lye Seagram, was in 1842; of course, as in the former instance, the act being wrongful, the statute began to run immediately. But on the death of William Lye Seagram, his father, the tenant for life, took out administration, and became the person entitled to receive as well as liable to pay for the wrong done to the remainder-man. It occurred to me, at this part of the case, to express a doubt whether the Statute of Limitations, having once begun to run, could ever be stopped. But upon examination of the authorities, I am disposed to think that my suggestion was not well founded. It appears from Nedham's Case,[1] and Wankford *v.* Wankford,[2] that where administration of the goods of a creditor is committed to a debtor, this being by act of law, is not an extinction of the debt, but a suspension of the remedy. As, therefore, during the life of William Frowd Seagram, there could be no action brought, the running of the statute was stopped until his death in 1864, and the bill was filed on the 26th March, 1866. As far as the case rests upon the statute, I think that the plaintiff is entitled to an account of the timber cut in 1842, and in the two following years, during the lifetime of William Lye Seagram. If it had been necessary to consider the case apart from the statute, it might, in my opinion, be fairly presumed, from length of time, that the parties had either settled accounts, or that the plaintiff's father had waived his claim in respect of the timber cut in 1831. But I do not see my way clearly to such a presumption as to the cuttings in 1842, 1843, and March, 1844. The plaintiff's right to an account of the timber cut during these periods not being barred by the Statute of Limitations, and there being no sufficient grounds to raise the presumption of a settlement of his claim, I think that the decree of the Master of the Rolls must be varied so as to make the account embrace the years 1842, 1843, and March, 1844; and that in all other respects it must be affirmed.

Mr. *Southgate*, and Mr. *W. W. Cooper*, called his Lordship's attention to Rhodes *v.* Smethurst,[3] as to the suspension of the time of running of the statute, and to Tullet *v.* Tullet,[4] as showing that the heir, and not the administrator, would be entitled to the money; and that therefore the question did not arise.

[1] 8 Rep. 135 a. [2] 1 Salk. 299. [3] 4 M. & W. 42.
[4] 1 Amb. 370; 1 Dick. 322; see also Craig on Trees, pp. 84, 110.

THE LORD CHANCELLOR said that in Rhodes *v.* Smethurst the creditor, not the debtor, was the executor, and that as the remainder-man might have brought trover, his administrator, and not his heir, must be entitled to the money.

SOWERBY *v.* FRYER.

BEFORE SIR W. M. JAMES, V. C., JUNE 8 AND 26, 1869.

[*Reported in Law Reports,* 8 *Equity Cases,* 417.]

THIS bill was filed on the 14th of December, 1868, by Thomas Benn Sowerby, the owner of the next presentation, in a certain event, to the vicarage and parish church of Eltham, Kent, against the Rev. Charles Gulliver Fryer, of the age of sixty and upwards, the vicar of Eltham.

By a deed dated the 26th day of July, 1860, the rights of presentation to the above vicarage and parish church which should happen after the execution of the deed, if and so often as the vicarage and parish church should become vacant during the life of a lady named Helen Elizabeth Fryer, aged about forty-eight at the filing of the bill, were vested in the plaintiff.

The bill stated that the vicarage of Eltham comprised gardens and pleasure grounds, and a piece of meadow land containing about 4A. 3R.; that shortly before the filing of the bill the defendant had, without obtaining the consent of any other person, caused to be cut down the greater part of the timber and other trees and underwood in the garden, pleasure grounds, and premises belonging to the vicarage, and had offered the same for sale; that the market value of such timber was about 300*l.*, and its value, when standing, as an ornament, shelter, and protection to the garden and pleasure grounds much more; that the defendant refused to account; that the plaintiff was unable to state the amount of the proceeds of sale; that the defendant threatened and intended, without consent of any other person, to cut the rest of the timber, trees, and underwood; and that the value of the plaintiff's right to the next presentation had been seriously prejudiced and diminished; and prayed as follows: —

"That an account may be taken of all the timber and other trees and underwood cut down by, or by order or permission of, the defendant in or upon the garden, pleasure grounds, and other lands belonging to the said vicarage of Eltham, and of the value thereof, and of the moneys arising from the sale thereof; and that the defendant may be ordered to pay what may be found to be due from him on taking such account.

"That the defendant, his agents, servants, and workmen may be restrained by injunction of this honorable Court from selling any timber and other trees and underwood heretofore cut down, or to be cut down,

by him or them in or upon the said garden, pleasure grounds, and lands, and now remaining unsold, and may also be restrained by the like injunction from hereafter felling, cutting, or lopping any timber, trees, or underwood standing or growing on the same premises (except such trees as may be required for the repairs necessary to be done in or upon the buildings or lands of the said vicarage), and from committing any other waste, spoil, or destruction on the said lands, buildings, and premises, or any other part thereof.

"That proper damages may be ordered to be paid by the defendant to the plaintiff for the injury done to him by reason of the wrongful acts aforesaid; and that proper directions may be given for assessing such damages;" and for all necessary declarations, inquiries, and accounts, and costs against the defendant.

From the evidence in support of the motion for an injunction, it appeared that twenty trees had been cut. They had not been sold.

On the 17th of December the motion for an injunction was ordered to stand over on the defendant's undertaking, and leave was given to amend the bill without prejudice to the notice of motion; and on the 11th of January the motion was ordered to stand to the hearing of the cause, the defendant continuing his undertaking.

On the 12th of January the defendant filed a voluntary answer, in which he said, that about half of the meadow in question, being the portion nearest to the house, did not belong to the vicarage in July, 1860, when the plaintiff purchased his contingent right to the next presentation, and was acquired in November, 1861, in exchange for an outlying portion of glebe; that there was no underwood on any part of the lands; that the trees as they stood made the vicarage-house damp and unhealthy, were required for necessary and proper repairs, and injured the meadow and younger trees; and that the trees cut down would not realize 100*l.* Defendant said he intended to apply so much of the timber as was suitable *in specie*, and the proceeds of the sale of the rest in repairs of the house, buildings, and premises. He further said that no remonstrance or communication of any sort was made to him on behalf of the plaintiff until a copy of the bill was served on him. He said that no portion of the timber had been removed, but that he intended to sell some portions for the purposes before stated. He had at various times, during his tenure of the vicarage, cut and lopped trees on the premises, but only according to what he believed to be the custom of the country, and the right and custom of the vicars holding the living.

The bill was amended in February by stating the title to the advowson, and adding as co-defendants, Sir Edward Henry Page Turner, the equitable owner of the advowson for an estate in tail male expectant on the death of Helen E. Fryer without male issue, and Albert Glennie Perring, in whom was vested the legal estate in the advowson.

The cause now came on upon motion for decree.

The evidence as to the amount of damage was irreconcilable. Plain-

tiff's witnesses estimated the damage to his right of presentation at 350*l.*; the defendant Fryer's witnesses said that the outside value of the timber was 150*l.*; and that its removal had increased the healthiness and comfort of the house as a residence.

Plaintiff's evidence also went to show that the vicarage-house had been neglected and was greatly out of repair, the defendant having been the incumbent for upwards of twenty years; also that the timber was ornamental timber.

The defendant's evidence, on the other hand, was that much more repairs were required than the value of this timber would amount to; and that there was, upon this property, especially upon the outbuildings, which were of no value at all, and which he, the defendant Fryer, might be obliged to keep up, a good deal of woodwork, for which about one third of this timber might be required.

Mr. *Kay*, Q. C., and Mr. *Osborne Morgan*, for the plaintiff. The defendant has no right (without the proper consent) to cut any timber, and *à fortiori* not ornamental timber. A vicar has no better right than an ordinary tenant for life: Duke of Marlborough *v.* St. John.[1]

No doubt a vicar may cut timber for necessary woodwork repairs to the vicarage-house, buildings, and premises; but not for the purpose of making a general repairing fund: Duke of Marlborough *v.* St. John.[2]

THE VICE-CHANCELLOR asked whether the plaintiff could sustain his prayer for an account.

Mr. *Kay*. In this instance, as a matter of fact, no sale has taken place.

Mr. *Karslake*, Q. C., and Mr. *Higgins*, for the defendant Fryer. The answer to the bill is, that whatever we have done we did completely, before the filing of the bill; and that we did all we have done with the knowledge of the plaintiff.

The plaintiff's interest is not sufficient to sustain the suit. He has no more than a contingent right to the next presentation, the contingency being the occurrence of the vacancy in Miss Fryer's lifetime.

As to the account, it is clear the plaintiff is not entitled: Knight *v.* Mosely,[3] Holden *v.* Weekes.[4]

For the rest, what the defendant says is, that he never intended to cut except so far as was required for necessary and proper repairs. The only question is, whether, a particular kind of repairs being necessary, and some of the timber being unsuitable, such part of the timber may not be sold and the proceeds applied to the particular repairs. This we say is borne out by the remarks of Lord Eldon, in Wither *v.* Dean and Chapter of Winchester,[5] on Knight *v.* Mosely,[6] where Lord Hardwicke is reported to have said, "Parsons may fell timber and dig stone to repair; and they have been indulged in selling such timber or stone where the money has been applied in repairs." [They also cited Kerr on injunctions.[7]]

[1] 5 De G. & Sm. 174. [2] Ibid. 181. [3] Amb. 176. [4] 1 J. & H. 278.
[5] 3 Mer. 421, 426. [6] Amb. 176. [7] Page 265.

In Bartlett *v.* Phillips,[1] where it was held that a vicar had wrongfully worked mines, the moneys arising from such working were ordered to be laid out for the permanent benefit and improvement of the vicarage; and this is precisely the object to which the defendant proposes to dedicate the proceeds of this timber.

The whole suit, therefore, is unnecessary and misconceived, and the bill should be dismissed.

[They referred to Stratchy *v.* Francis,[2] S. C. Bradley *v.* Stratchy,[3] Jefferson *v.* Bishop of Durham,[4] Marriott *v.* Tarpley.[5]]

Sir *W. M. James*, V. C. In this case the plaintiff is, in my judgment, clearly entitled to the interposition of the Court.

The question is, whether the defendant is legally justified in doing the acts complained of. If he be not justified in so doing, the plaintiff, as the immediate owner of the advowson, is the proper person to apply to this Court for an injunction to prevent mischief which he is, to a certain extent, still in a position to prevent.

The defendant is, and has been for upwards of twenty years, the vicar of Eltham. During those twenty years it has been his duty to keep the vicarage-house and premises in repair. It is alleged that he has allowed the vicarage-house, and especially the woodwork of it, to fall into a disgraceful state of dilapidation. Then he has cut down a number, the whole, in fact, of one row of an avenue, of elm-trees.

The plaintiff says the defendant has no right to cut timber. As a general rule, that is true; a vicar or rector has no right to cut timber, except for a certain limited purpose, namely, that it may be applied specifically to woodwork repairs which are about to be done; and perhaps, having a right to cut down timber for that purpose, he may also procure an equivalent amount of other timber by disposing of the first on the spot where he cuts it, and getting some other timber at a more convenient place. Lord Eldon's remark in Wither *v.* Dean and Chapter of Winchester[6] seems to go to this, — that it would be absurd to make a man who has cut down timber on an estate drag that self-same timber the whole distance to the spot — it may be half a dozen or ten miles off — where it is wanted.[7] It will come to the same thing whether he uses the specific timber he has cut upon the woodwork repairs, or whether he sells it and buys other timber of equal value to be applied to the same purposes.

But it is quite clear that a vicar is not entitled to cut timber from the glebe for the purpose of forming a fund to repair dilapidations which he ought never to have allowed to occur, and to relieve his own estate from liability for the amount of those dilapidations when his successor comes in.

In this instance it is not pretended that the amount of timber which

[1] 4 De G. & J. 414. [2] 2 Atk. 217. [3] Barn. Ch. 309.
[4] 1 B. & P. 105. [5] 9 Sim. 279. [6] 3 Mer. 421, 426.
[7] In Wither *v.* Dean and Chapter of Winchester, the timber proposed to be cut was eighteen miles distant from the cathedral church.

has been cut by this defendant was ever meant or intended to be applied to woodwork repairs; and it is in evidence that a much larger sum is wanted for repairs than the value of this timber will amount to.

Then the plaintiff, finding the defendant cutting down timber in violation of the law, comes here for an injunction to restrain him from cutting down more. The defendant may say, "In my own breast I have determined not to cut down a single tree more; therefore you are premature in coming to this Court for an injunction." But when a man has committed a wrong, there is nothing to show that he will not commit a further wrong. The plaintiff has been in time to prevent further waste, and to stop the sale of the timber.

Now it is laid down in the cases of Knight *v.* Mosely,[1] and Holden *v.* Weekes,[2] that a patron cannot file a bill for an account. I confess that doctrine has always seemed to me to be utterly unintelligible. I never could understand why a vicar who has wrongfully cut timber should not be called to account for the proceeds after he has turned it into money, in order that they may be invested for the benefit of the advowson; it being conceded that the patron is entitled to the specific timber.

Here, however, I can grant the plaintiff relief without violating any decision, or supposed decision, of that kind, for this timber, though cut, has not been sold.

There will be, therefore, a perpetual injunction as prayed by the bill; and the defendant must pay the costs of the suit, the plaintiff paying the costs of the defendants other than the vicar, and recovering them over against the first defendant. The timber must be sold, and the proceeds brought into court, with liberty generally to apply, and liberty to the defendant to apply in Chambers as to the proceeds of such part of the timber as would have been applicable to woodwork repairs "actually about to be done to the property."

JUNE 26.

The matter was mentioned again to-day, and the following order made: —

The defendant Fryer waiving such liberty to apply in Chambers as above mentioned, he is to be at liberty to purchase the timber as it lies, at such marketable price as Mr. Clutton, or some valuer to be agreed upon by the parties, shall name; with liberty to apply at Chambers as to the costs of such valuation.

[1] Amb. 176. [2] 1 J. & H. 278.

BIRCH-WOLFE *v.* BIRCH.

BEFORE SIR W. M. JAMES, V. C., MARCH 15, 1870.

[*Reported in Law Reports, 9 Equity Cases,* 683.]

JOHN BIRCH, by his will, dated the 8th of December, 1823, devised the residue of his real estate, comprising hereditaments called the Woodhall Estate, situate in the counties of Essex and Herts, to trustees and their heirs, to the use of Richard Birch and his assigns for life, remainder to the use of trustees during the life of Richard Birch to preserve contingent remainders, remainders to the first and other sons of Richard Birch successively in tail male; with remainders to uses in like terms in favor of the Rev. William Birch, brother of Richard, Thomas Birch, another brother of Richard, and John Lewis Wolfe, successively, and their first and other sons in tail male, remainder to the right heirs of the testator. It was provided that persons taking the estates in possession under the will should take the name of Wolfe; and the will also contained this proviso: —

"Provided also, and I do hereby further declare, that it shall be lawful for the said Richard Birch, and the several other persons who shall become beneficially entitled to my said estates under the limitations aforesaid, as and when they shall respectively come into the possession thereof from time to time, to fell and convert such timber and woods growing thereon (except the ornamental timber and trees in and about my mansion of Woodhall) as may be necessary for the repairs of the said estates."

The testator died in 1827, leaving Richard Birch his heir-at-law.

Richard Birch, on the testator's death, entered into possession and receipt of the rents and profits as tenant for life, and took and used the name and arms of Wolfe. By his will he devised the residue of his real estate, which included the reversion in fee, and of his personal estate, to his brother William, whom he appointed his executor.

Richard Birch-Wolfe died, without having had issue, in March, 1859. Upon his death the Rev. William Birch entered into possession and receipt of the rents and profits as tenant for life, and took and used the name and arms of Wolfe. By his will he appointed the Rev. John Hodgson (since deceased) and the Rev. Henry Mildred Birch his executors; and gave and devised the residue of his property, real and personal, to Hodgson and H. M. Birch upon trust, as soon as conveniently might be after his decease, to sell and convert the same and invest the proceeds, and stand possessed of the investments and income upon trusts for the benefit of his widow, Marianne Birch-Wolfe, for life, and after her decease (subject to a contingent legacy bequeathed by a

codicil), as to one moiety for her appointees, and as to the other moiety for Louisa Gwilt, spinster.

William Birch-Wolfe died, without having had issue, in September, 1864. Upon his death, Thomas Birch entered into possession and receipt of the rents and profits, and took and used the name and arms of Wolfe. He had had no issue up to the present time.

This bill was filed on the 6th of May, 1869, by Thomas Birch-Wolfe against the Rev. Henry Mildred Birch and John Lewis Wolfe, stating that when the plaintiff entered into possession the mansion-house and many of the outbuildings were out of repair; that each of the tenants for life, Richard and William Birch-Wolfe, felled a large quantity of timber, and wrongfully and improperly sold the same, and applied the proceeds of sale to his own use; and prayed for a declaration that Richard Birch-Wolfe and William Birch-Wolfe respectively were liable to account for the proceeds of all timber and other trees on the devised estates which were felled by them respectively, or by their respective orders, and which were not used for repairs; and that their respective estates were accountable for such proceeds, with compound interest thereon, from the respective times of the sums having been received; that the amount of such proceeds and interest might be ascertained, and for that purpose accounts taken; and that such amount might be paid out of the estate, personal and real, of William Birch-Wolfe; and, unless the defendant Henry M. Birch should admit assets, for administration of William Birch-Wolfe's estate; that such amount as abovementioned might be paid into court in the cause, and that so much thereof as should be in excess of the amount computed up to the decease of William Birch-Wolfe might be paid to the plaintiff, that the residue might be laid out under the direction of the Court in the purchase of land, and that such land might be settled to the uses of the testator John Wolfe's will; and that in the mean time the money might be invested in stock, and the interest paid to the petitioners, or to the person for the time being entitled in possession to the estates.

The defendant, the Rev. H. M. Birch, stated in his answer that, soon after the death of William Birch-Wolfe, a claim was made by the plaintiff against his estate for dilapidations of the mansion-house and outbuildings, and that he, the defendant, having been advised that the claim was valid as to such dilapidations and want of repair as had occurred within six months before the death, paid to the plaintiff 210*l.*, the amount at which such dilapidations and want of repairs were valued.

He submitted the question of whether Richard and William Birch-Wolfe were not entitled to fell the timber and sell the same, and apply the proceeds in repairs, or, at all events, in the purchase of timber to be used in repairs.

To the best of his information and belief he denied that Richard Birch-Wolfe had ever felled any timber on the Woodhall estate.

He said he had been informed and believed that, within two years or

thereabouts of his death, William Birch-Wolfe caused timber and other trees to be felled on the estate, and that such timber and trees were sold by his order by auction and private contract in the month of June, 1864; that after his death the auctioneers accounted to the defendant and his co-executor in respect of such sales, and paid them the net proceeds after deducting expenses, such proceeds consisting of two sums of 392*l.* 6*s.* 4*d.* and 109*l.* 3*s.* for timber, and 72*l.* for bark. He believed the expenses of William Birch-Wolfe in felling such timber were considerable, but defendant had never been able to ascertain the exact amount of them. The above sums had been invested, and the income paid to Marianne Birch-Wolfe.

Defendant further claimed the benefit of the 3 & 4 Will. IV., c. 27, and all the other Statutes of Limitation.

The results of the evidence are given in his Honor's judgment. It appeared that a considerable quantity of wood had been cut by the first tenant for life, but of this a large portion consisted of thinnings of fir plantations. It was contended that these thinnings were timber; but no custom was alleged, and His Honor, in the course of the discussion, held that they clearly were not timber.

Mr. *Kay*, Q. C., and Mr. *Charles Hall*, for the plaintiff. The following are authorities which show that such a bill as this may be filed by a tenant for life.

In Duke of Leeds *v.* Earl Amherst,[1] acts of equitable waste were committed by a tenant for life; and tenant in tail in remainder, two years after the death of the tenant for life, brought a suit in respect of them. It was shown that he was aware of the acts of waste twelve years previously, he having attained twenty-one nine years before that. Vice-Chancellor Shadwell held[2] that length of time was no bar. It was true, he observed, that the claim arose at the moment when the acts were committed; but at that time the Duke was an infant. Directly he attained full age, he might have filed the bill, but was not obliged to do so. Until the death of the tenant for life, the claim did not arise in such a state as that it could be barred by length of time. This was affirmed on appeal,[3] Lord Cottenham, C., observing that the 2d, 3d, 4th, and 5th sections of the 3 & 4 Will. IV., c. 27, all applied more or less to the subject, and that they all gave to the tenant in tail his remedy from the time at which his estate vested in possession. In this, which was a case of equitable waste, equity would follow the law. Garth *v.* Cotton[4] was a case of equitable waste by collusion between tenant for life and remainder-man. The act was in 1714; the plaintiff, a son of the tenant for life, was born in 1724; in 1727 the tenant for life died; in 1745 the plaintiff, being tenant in tail in possession, attained twenty-one, and suffered a recovery to the use of himself and his heirs, and in 1748 filed the bill. His remedy was held to have first accrued in 1745.

[1] 14 Sim. 357.
[2] 14 Sim. 365.
[3] 2 Ph. 117.
[4] 1 Ves. Sen. 524, 546; 1 Dick. 183.

In the present case the tenant for life impeachable of waste was himself the wrong-doer. This circumstance formed the distinction in Williams *v.* Duke of Bolton;[1] which was followed by Powlett *v.* Duchess of Bolton;[2] and the right of the owner of the first estate of inheritance to come into equity for an account is established by Whitfield *v.* Bewit,[3] Lee *v.* Alston,[4] and Bagot *v.* Bagot.[5]

Here we have collusion, as in Garth *v.* Cotton; and, at all events, when the remedy is only an equitable remedy, the statute does not begin to run until the right of the plaintiff falls into possession: Duke of Leeds *v.* Earl Amherst.[6]

Had the plaintiff been a tenant for life in remainder only, instead of in possession, he would have been entitled to file this bill, founded on his right to the waste and shade: Perrot *v.* Perrot,[7] Powlett *v.* Duchess of Bolton,[8] and Davis *v.* Leo.[9]

Mr. *Goren*, for the defendant John Lewis Wolfe, supported the plaintiff's case.

Mr. *Chitty* (Mr. *Morgan*, Q. C., with him), for the defendant H. M. Birch: —

The suit is vexatious; the demand being so trifling in amount as to be beneath the notice of the Court. [Upon this point the evidence was gone into.]

Amount of injury is an important element in these cases. Where a son brought a bill against his father, who was tenant for life without impeachment of waste, for pulling up a deal floor, the Court said there must be actual spoliation to support such a bill: Peirs *v.* Peirs.[10]

In Phillipps *v.* Smith[11] it is laid down that cuttings even of timber, which are not prejudicial to the inheritance, are not waste.

Pidgeley *v.* Rawling[12] shows, if any authority be necessary, that thinnings of fir plantations belong to the tenant for life.

In Bateman *v.* Hotchkin,[13] Lord Romilly considered that a tenant for life impeachable for waste would be entitled to such part, if any, of the windfall of timber "as he would be entitled to cut himself," meaning such part as was proper and advantageous to the inheritance for him to have cut.

The power given in the will does not enlarge the ordinary legal rights of tenant for life, unless it be held to enable him to fell timber, and "convert," *i.e.*, sell it for repairs: Sowerby *v.* Fryer.[14]

There is no express authority for the filing of such a bill as this by a tenant for life. There is nothing in the cases to show that (the waste not being equitable waste) he will not be left to his legal remedy. The case of Duke of Leeds *v.* Earl Amherst[15] was one of equitable waste.

[1] 1 Cox, 72.
[2] 3 Ves. 374.
[3] 2 P. Wms 240.
[4] 1 Bro. C. C. 194; 3 Bro. C. C. 37; 1 Ves. 78.
[5] 32 Beav. 509.
[6] 14 Sim. 357; 2 Ph. 117.
[7] 3 Atk. 94.
[8] 3 Ves. 374.
[9] 6 Ves. 784.
[10] 1 Ves. Sen. 522.
[11] 14 M. & W. 589, 594.
[12] 2 Coll. 275.
[13] 31 Beav. 486.
[14] Law Rep. 8 Eq. 417.
[15] 14 Sim. 357; 2 Ph. 117.

In Garth *v.* Cotton[1] the cuttings were large, amounting to actual spoil, and the suit was by a tenant in tail. In Williams *v.* Duke of Bolton[2] a very short time had elapsed since the cuttings, and the bill was a bill by trustees.

[The Vice-Chancellor. If trustees to preserve contingent remainders, who are only trustees for the life of the tenant for life, may file a bill, why should not the tenant for life himself? I do not assent to the doctrine that trustees to preserve are trustees to preserve the inheritance.]

Mr. *Chitty*. In Lee *v.* Alston the plaintiff was tenant in fee [or in tail[3]]; in Bagot *v.* Bagot[4] the plaintiff was tenant in tail.

As to the statute, the case is the same as that of Seagram *v.* Knight,[5] where the waste was legal waste, but the remedy was in equity only.

[Lushington *v.* Boldero[6] and the cases of Rolt *v.* Lord Somerville[7] and Ormonde *v.* Kynnersley,[8] cited by Mr. Beavan in the note,[9] and Gent *v.* Harrison,[10] Craig on Trees and Woods,[11] were also referred to.]

Mr. *Kay*, in reply.

Sir W. M. James, V. C. In this case the plaintiff files his bill as tenant for life under a settlement which has limited all the estates by way of legal use. He was legal tenant for life in remainder after certain other persons who were tenants for life before him, with remainder to their issue, which issue never came into existence.

He complains of a wrong done to the estate, and therefore to himself as tenant for life, by two successive tenants for life; there being at that time nobody entitled to bring an action in respect of the wrong, because the tenant for life in each case was himself entitled to the first estate of inheritance.

The case is based entirely upon the authority of Williams *v.* Duke of Bolton,[12] following Garth *v.* Cotton.[13] Garth *v.* Cotton was this: the law being that the first person entitled to an immediate estate of inheritance is the only person who can recover, and that he is entitled to recover, for his own benefit, the value of all timber cut improperly by a tenant impeachable for waste; where by fraudulent collusion and wrong-doing between the tenant for life and the owner of the inheritance in remainder, such timber is cut, the Court, by its general jurisdiction to repress fraud, will interfere, notwithstanding it is a legal wrong, and there should have been a legal remedy entitling the remainder-man to the value of the timber, and say, "We will not allow this fraud; we will bring the money, the value of the timber, into Court, there to be im-

[1] 1 Ves. Sen. 524, 546; 1 Dick. 183.
[2] 1 Cox, 72.
[3] 3 Bro. C. C. 37.
[4] 32 Beav. 509.
[5] Law Rep. 2 Ch. 628.
[6] 15 Beav. 1.
[7] 2 Eq. Cas. Ab. 759.
[8] 7 L. J. (Ch.) o. s. 150; 8 Ibid. 67.
[9] 15 Beav. 9.
[10] Joh. 517.
[11] Pages 127–140.
[12] 1 Cox, 72.
[13] 1 Ves. Sen. 524, 546; 1 Dick. 183.

pounded and held for the benefit of the estate, and all persons interested in it." That case proceeded upon the ground of actual collusion and fraud.

Then the case presented itself in a new phase in Williams *v.* Duke of Bolton. In that case there was, and there could be, no actual collusion, fraud, or conspiracy, because the tenant for life and the actual immediate owner of the inheritance in remainder were one and the same person.

Now it was said, "You must apply to that case exactly the same rule which was applied in Garth *v.* Cotton; that is to say, you must hold that the man in his character of remainder-man is colluding with himself in his character of tenant for life, and you must treat him accordingly. You have only to apply that principle to this case."

I am asked to apply that principle to the case before me; and I quite agree that as far as that principle is applicable it ought to be so applied. But then, in order to apply that case, it is necessary I should be satisfied that the facts do amount to a case of actual fraud and collusion; that is to say, supposing there had not been that union of character between the tenant for life and the remainder-man, but that there had been two distinct persons, and that what has been done by the tenant for life in possession had been done with the full knowledge, acquiescence, and assent of the tenant in remainder; I must be satisfied that that would have been, as between those two persons, an act of fraud and collusion with which this Court would interfere.

Now it does not appear to me, dealing with what took place in the lifetime of the first tenant for life, that the facts come up to that, or anything like that case. When all the facts and circumstances come to be known, they amount to this: that during a period from the year 1838 to the year 1854, that is to say, during a period of sixteen years, there were cuttings which would, after making deductions in the account for cuttings of wood which clearly was not timber, amount to considerably less than 1,000*l.*, being cuttings on an average of something more than 50*l.* or 60*l.* a year. That is not very considerable. Then there is this evidence, that during this period the same man who was making these cuttings of timber (which, having regard to the evidence before me as to the nature of the estate, and that it is absolutely crowded with timber at this time, appear to me to be of the most trivial character, though one or two of the earlier ones were rather larger) was himself laying out very considerable sums of money in repairs, improvements, and in additions to the buildings, and even in timber repairs to this extent that he is alleged to have kept two carpenters in constant employment during almost the whole period. Regard being had to that, it would in my judgment be monstrous to say that a tenant in remainder, allowing a tenant for life to cut down timber in consideration and upon condition of the tenant for life doing these things for the benefit of the estate, was guilty of any fraudulent collusion which would induce this court to extend this somewhat extraordinary jurisdiction to him; and if there would

have been no ground for the interference of the Court in the case which I have supposed of tenant for life and tenant in remainder, I cannot put the case higher when it is the same individual who is doing the same thing in his double character with regard to the estate.

I am of opinion, therefore, that it is not fitting that this Court should interfere upon what appears to me to be a trifling ground of complaint, if any ground of complaint there be, with respect to all that took place during the lifetime of the first tenant for life.

I may add, with respect to that part of the case, I think that the claim, if any claim there were against his estate, is barred by the Statute of Limitations. The tenant for life died a great many years ago, in 1859; and this claim of course was a claim against the assets of that tenant for life, and at the death of that tenant for life the claim against his estate became a present and immediate claim against his executors. It was a claim on behalf of all the owners of the estate — all the persons entitled to the successive limitations of the estate.

I know of no principle why that claim ought not to have been made within the period allowed by law for making a simple demand, that is to say, within six years, on the ground of his having received proceeds which he ought to account for. I do not see that the Statute of Limitations would not apply to that demand.

With respect to the second tenant for life, it appears to me that the same principles (except that of the Statute of Limitations, upon which I have decided with respect to the first tenant for life) apply to all the earlier circumstances which took place in the lifetime of that tenant for life. It appears to be the fact that he also has been making repairs to a considerable extent. He has paid a sum of 210*l.* towards dilapidations which existed at his death, and with regard to which, as far as I can make out, he was under no legal liability whatever.

I think, therefore, that as to all which was received in his lifetime, the bill fails in exactly the same way as it fails against the last tenant for life.

But there happens to be an amount not altogether inconsiderable, which has been received by the executors since his death, in respect of timber which was cut, and which was not applied towards repairs on the estate. The sums are 392*l.* 6*s.* 4*d.*, 109*l.* 3*s.*, and 72*l.*, mentioned in the answer. I do not think I can direct an account of the expenses of barking or felling the timber; there seems to be no means of proving that.

Mr. *Chitty* said that it was, he believed, a fact, though not proved in the cause, that the defendant had paid for expenses incurred by William Birch-Wolfe for repairs in his lifetime sums which would equal the above.

THE VICE-CHANCELLOR. The defendant can have an inquiry as to that, if he desires it.

There will be a direction to take an account of the net value of all timber-trees felled by William Birch-Wolfe, and then an inquiry whether

any and what sums of money were properly laid out and expended by him or his representatives in respect of the repairs of the settled estates during the whole of his life.

Mr. *Chitty* asked whether, if the parties could agree upon a sum, the decree might go in that form.

THE VICE-CHANCELLOR. Yes. The bill will be dismissed with costs so far as it seeks any relief against the representatives of the first tenant for life; and as a large portion of the bill has failed, there will be no costs on either side up to the hearing.

Mr. *Chitty* said that there was no provision in the decree in the event of the defendant showing a balance.

THE VICE-CHANCELLOR. If you have been laying out your money improvidently, you must take the consequences.

Mr. *Chitty*. In that event, we shall have succeeded on the whole suit.

THE VICE-CHANCELLOR. I think, on the whole, I will not give any costs up to the hearing.

There will be liberty to apply as to the balance, if any, which is due.

HIGGINBOTHAM *v.* HAWKINS.

BEFORE SIR W. M. JAMES AND SIR G. MELLISH, LORDS JUSTICES, JULY 18 AND 19, 1872.

[*Reported in Law Reports, 7 Chancery Appeals,* 676.]

MARY HIGGINBOTHAM, by her will, devised certain lands at Alresford, in the county of Essex, to the use of Harriet Higginbotham and her assigns during her life without impeachment of waste except voluntary waste in cutting down any timber other than such timber as might be required for the repairing of the buildings; with remainder as to one moiety to the use of Elizabeth Jones and her assigns during her life without impeachment of waste except as aforesaid, with remainder to the use of G. Higginbotham and W. Higginbotham as tenants in common in fee; and as to the other moiety to the use of trustees during the life of Ann Becket without impeachment of waste except as aforesaid; with remainder to the use of the eldest daughter of Ann Becket in fee.

Mary Higginbotham died in 1856, and Harriet Higginbotham, the first tenant for life, died in September, 1865, leaving as her executrix Elizabeth Jones, who was the second tenant for life of one moiety.

On the 27th of August, 1870, G. Higginbotham and W. Higginbotham, the remainder-men in fee of one moiety, filed their original bill against Elizabeth Jones, as tenant for life of one moiety, and the other persons interested in the estate, alleging that trees had been felled and sold by Elizabeth Jones and the trustees of Ann Becket, and that other

acts of waste were threatened, and praying for an injunction, and for an account of timber cut.

On the 2d of March, 1871, the plaintiffs amended their bill, introducing charges against Elizabeth Jones, as executrix, in respect of timber cut in the lifetime of Harriet Higginbotham, and praying further that an account might be taken of what had come to the hands of Harriet Higginbotham, and of Elizabeth Jones, as well as executrix of Harriet Higginbotham as in her own right, and for payment of what might be so found due to the plaintiffs.

Several defences were made to this suit, the defendants contending that no waste according to the will had been committed; and Elizabeth Jones contending that there was no right in equity against her as executrix of Harriet Higginbotham; and that if there was, still any claim against the estate of Harriet Higginbotham was barred by the Statute of Limitations, no timber having been shown to have been cut in her lifetime within six years of the bill being amended as against her representative, and, moreover, it being shown that the remaindermen were at the time aware that the timber was cut, and complained about it.

THE VICE-CHANCELLOR (BACON) was of opinion that waste had been committed, and granted an injunction and an account of all timber cut since the death of the testator.[1]

Elizabeth Jones appealed.

[1] 1872. March 19.

Sir *James Bacon*, V. C., said he had no doubt that the plaintiffs were entitled to a decree, as the case of waste had been made out. His Honor then said: —

Now it has been argued that there can be no remedy against the estate of the late Harriet Higginbotham, and the Statute of Limitations has been relied upon as an answer to the plaintiffs' claim in that and in other respects. Harriet Higginbotham died less than six years before the filing of the bill; the statute, therefore, in no sense could be an objection to the claim which is made against her estate, the charge being that she, while she was tenant for life, had despoiled the estate by converting a part of the inheritance to her own use, and so much therefore her estate is liable to make good to the persons interested in the inheritance. As to that I have not heard any answer, except that it was suggested by Mr. *Fischer* that Gent *v.* Harrison (Joh. 517) was an authority to show that the remedy, if any, was a remedy at law, and that there could be no claim made in this Court upon any equitable grounds. Now the case of Gent *v.* Harrison is by no means an authority for that proposition. In that case the tenant who had come into possession of the estate complained that, by the wrongful act of the former tenant for life, the estate had been turned into money, and had been invested, that the proceeds of the investment had been received by the then tenant for life, and that the money so received was the plaintiffs'. The answer to that was that he might bring an aetion for money had and received. How could the plaintiffs here bring any such action? They have no right to the income of any fund, for the timber has been taken from the estate; nor is there any analogy that I can see between Gent *v.* Harrison and the present case. I am of opinion that the estate of Harriet Higginbotham is liable for all that she had done in her lifetime by means of the wrongful cutting, selling, and dealing with the timber.

His Honor then said that the plaintiffs were entitled to an account of all the timber cut. If the defendant had any case for allowance to be made to her for what she had done to the benefit of the estate, she could show that on the inquiry. It was

Mr. *Fischer*, Q. C., and Mr. *Key*, for the appellant.

The right of the reversioner to recover the value of timber cut is a legal right, and has in this case been barred by the lapse of time, which began to run, not from the death of the tenant for life, but from the cutting of the timber: Garth *v.* Cotton,[1] Gent *v.* Harrison.[2] At all events the plaintiffs have no remedy in equity against the estate of Harriet Higginbotham; the only equity in these cases is the right to an injunction to which the right to an account is attached, and that fails when the tenant for life is dead: Jesus College *v.* Bloome,[3] Seagram *v.* Knight.[4] No doubt the present tenant for life is also the executrix of the deceased tenant, but that is an accident.

THEIR LORDSHIPS were of opinion that waste had been committed, and only called upon the respondents as to the waste committed during the life of the former tenant for life.

Mr. *Eddis*, Q.C., and Mr. *Marten*, for the plaintiffs. We have a right to follow the money into any hands in which we may find it, and to restore that which has been taken from the estate. Elizabeth Jones is properly brought before the Court, and must account. In Duke of Leeds *v.* Earl Amherst,[5] the right was held to have accrued at the death of the tenant for life.

Mr. *Kay*, Q. C., Mr. *Rodwell*, and Mr. *Field*, for other defendants.

SIR W. M. JAMES, L. J. In this case the bill was filed by the reversioners under a will, and prayed for an injunction and for an account of timber felled. The injunction was granted, as it appeared that there was legal waste committed by felling trees beyond what was authorized by the will. But what was principally argued before us was with respect to the timber cut during the lifetime of the preceding tenant for life.

Now the mere fact that the present tenant for life was also the executrix cannot make any difference; and to so much of the suit as seeks an account of what was received by the preceding tenant for life there appear to be two answers. In the first place, it is clearly established that a bill will not lie for an account of timber felled any more than for any other money demand, except when the account is asked as incident to an injunction, and that where the plaintiff has no right to an injunction he has no right to an account, and his remedy is at law alone. In this case the account prayed against the estate of the deceased tenant for life is not incident to the injunction against the present tenant for life.

The second answer is, that the claim is barred by the statute. Beyond all question it appears that there was an immediate right of action. Legal waste had been committed, and the right of action accrued when

said that the amount of timber cut was very small, and ought not to have been the subject of a suit. But that did not at present appear, and the case must come on again for further consideration.

[1] 1 Wh. & T. L. C. (3d ed.) 628, 660. [2] Joh. 517. [3] 3 Atk. 262.
[4] Law Rep. 2 Ch. 628. [5] 2 Ph. 117.

the wrong was committed, at which time the reversioners might have brought their action for money had and received.

Therefore, in my opinion, the bill has entirely failed so far as regards the account against the estate of Harriet Higginbotham or her executrix in regard to what was done in her lifetime.

As to what was received by Miss Jones after the death of Harriet Higginbotham, she is answerable, and she appears to have received all the money. The plaintiffs are entitled to half of what Miss Jones has so received, and the other half belongs to the family of Mrs. Becket. The sums are very small, and the Lord Justice and I are of opinion that we have materials enough to fix the amounts without putting the parties to any further expense. [His Lordship then stated the amounts.] As the suit has partially failed, there will be no costs.

Sir G. Mellish, L. J., concurred.

RICHARD WHEELER DOHERTY, Appellant, *v.* JAMES CLAGSTON ALLMAN and W. C. DOWDEN, Respondents.

In the House of Lords, March 29, and April 1 and 2, 1878.

[*Reported in* 3 *Appeal Cases*, 709.]

Appeal against an order of the Court of Appeal in Ireland, which had reversed a decree of the Vice-Chancellor of Ireland, made on the 4th of July, 1876, in a cause in which Mr. Doherty was the plaintiff, and the two respondents were defendants.[1]

The plaintiff had filed a bill as landlord and reversioner against the defendants as assignees of the lessee to restrain them from committing waste by converting the premises, which were demised for a term of 999 years, from corn-stores into a row of dwelling-houses.[2]

The Lord Chancellor (Lord Cairns). The question in this case arises upon two leases which are now vested in the respondents. One of them is dated in the year 1798, and is for the long term of 999 years; the other was granted in 1824, and is for the term of 988 years; the first being at the rent of 10*l.*, and the second at a rent of 32*l.* 19*s.* The reversion to both these leases is vested in the present appellant.

The property demised is thus described. [His Lordship read the description of the premises contained in each lease, and also the words of the covenant in each.]

There is not in either of these leases any power of entry for breach of covenant, but there is a power that if rent was not duly paid and no

[1] Irish Reports, 10 Equity, 362, 460.

[2] The statement of the case has been much abbreviated, and the arguments of counsel have been omitted; and only so much of the judgments has been given as relates to the question of waste. — Ed.

sufficient distress found on the premises to satisfy the arrears, it should be lawful to the lessor to re-enter and re-possess himself of his former estate.

That is the substance of the two leases. The property demised, so far as it consisted of buildings, was in the form of stores, and, as we understand, stores for storing corn. It is stated in evidence, and does not appear to be a matter of controversy between the parties, that since the date of these leases a considerable change has occurred with reference to the demand for buildings of this description in the neighborhood of Bandon; and it is stated, and does not appear to be seriously controverted, that in the town of Bandon, which seems to lie at a lower level than where these stores are built, there is now a considerable — perhaps an exuberant — supply of store buildings, access to which, or facility of carriage, is greater than to this higher ground, and that, therefore, there is serious difficulty in obtaining a tenant for this property used as stores. Under these circumstances the respondent has had specifications prepared, which appear to be prepared in a careful, proper, and business-like way, and he has had a contract made in accordance with those specifications, by which the external walls of this building are to be retained, and those external walls where one part of the building is of a lower height than the rest are to be raised, so that the building may be of a uniform height; internal changes are to be made, internal party walls are to be introduced, the flooring is to be altered in its level, and six dwelling-houses are to be made out of this which now is one long store. Your Lordships have before you a photograph of the building as it now appears, and an elevation of the building as it is proposed to be has also been put in evidence; and certainly it does appear a strange thing to any spectator that it should ever come to be a matter of grave dispute between two rational men as to whether that which was proposed to be done is not almost as great an improvement as could be effected. However, so it is, and with that state of things your Lordships have to deal.

The appellant objects to this being done. The owner of the reversion subject to this long term of years objects to that which the holder of the lease proposes to do. He objects upon two grounds. He says, first, that what is proposed to be done is waste; and, secondly, that it is a breach of contract. I will invert the two grounds, because undoubtedly if there is a breach of the contract, that is a higher and a stronger ground upon which to appeal to a court of equity. If there should be no ground for interposing by reason of a breach of contract, there may still, however, be ground for interposing on the ground of waste, which I will consider afterwards. . . .

Then with regard to the question of waste: there is no doubt that the Court of Chancery exercises a jurisdiction in restraining waste, and where waste is committed in requiring an account of the waste for the purpose of recompensing the person who has suffered; but I apprehend it is perfectly clear that the Court of Chancery, acting in that case in

advance of the common-law right, will, in the first place, consider whether there is, or is not, any substantial damage which would accrue, and which is sought to be prevented, and will make that inquiry. In the present case it appears to me to be extremely doubtful whether any jury could be found, who, after this work shall be executed in the way that is proposed, would say that any damage had been done by the work to the inheritance. And I doubt, farther, whether it must not be taken as clear from the evidence here that any jury, or any tribunal judging upon the question of fact, would not say that, if there be technically what in the eye of the common law is called waste, still it is that ameliorating waste which has been spoken of in several of the cases cited at the Bar. That which is done, if it be technically waste — and here again I will assume in favor of the appellant that it is technically, according to the common law, waste — yet it seems to me to be that ameliorating waste which so far from doing injury to the inheritance, improves the inheritance. Now, there again the course which the Court of Chancery ought undoubtedly to adopt would be to leave those who think they can obtain damages at common law to try what damages they can so obtain. Certainly, I think here again, the Court of Chancery would be doing very great injury to the one side for the purpose of securing to the other that slightest possible sum which would at common law be considered the full equivalent to which he was entitled. My Lords, this was the view, in substance, taken by the Lord Chancellor of Ireland and the Lord Justice of the Court of Appeal, who in this respect differed from the Vice-Chancellor. I must say that I entirely concur with the decision at which they arrived, and therefore I would advise your Lordships, and move your Lordships, to dismiss this appeal with costs.

Lord O'Hagan. My Lords, I am of the same opinion. I have given much attention to the case in the course of the argument, which was certainly very ably conducted from beginning to end, and I have no reason to doubt that your Lordships ought to concur with the view of my noble and learned friend on the woolsack. The first consideration in the case is, I think, this,— and it is one which has not been and could not be disputed at the Bar,— that the jurisdiction as to injunctions in cases like the present is a jurisdiction to be exercised according to the discretion of the court of equity. Lord St. Leonards, in the case to which reference has been made, speaks of the true mode of exercising that discretion, manifestly assuming that the discretion exists, and ought to be exercised; and that being so, the question is not whether it should be exercised wildly, indiscreetly, and capriciously, as has been suggested in the course of the argument,— at all events against such an exercise a very proper protest has been made, — it must be exercised according to settled principles and according to the order and practice of courts of equity.

Now we have, I think, established for the purposes of this decision the principles in this case by which we ought to abide. In the case of

Mollineux v. Powell,[1] which contains perhaps the clearest dictum we have upon the matter, two conditions as to the exercise of jurisdiction in cases of waste have been very clearly pointed out, and one at least of those conditions is expressly recognized afterwards in the Irish case of Coppinger v. Gubbins.[2] Those conditions are that the waste with which a court of equity, or your Lordships acting as a court of equity, ought to interfere, should be not ameliorating waste, nor trivial waste. It must be waste of an injurious character — it must be waste of not only an injurious character, but of a substantially injurious character, and if the waste be really ameliorating waste — that is, a proceeding which results in benefit and not in injury — the court of equity, and your Lordships acting as a court of equity, ought not to interfere to prevent it. I think that is perfectly well established. On the other hand, if the waste be so small as to be indifferent to the one party or the other, — if it be, as has been said by a great authority in our law, such a thing as twelvepence worth of waste, a court of equity, and your Lordships acting as a court of equity, ought not to interfere on account of the triviality of the matter. Now, in my view of the case, those principles decide the question so far as this portion of it is concerned; for it appears to me that we have here established to the full satisfaction of your Lordships, by a series of authorities to which I shall not refer, that the waste, to be of any sort of effect with a view to an injunction, must be a waste resulting in substantial damage. Your Lordships are the judges not only of the propriety of exercising your discretion, but of the facts by which the exercise of that discretion ought to be regulated. Now with reference in the first place to the materiality of the waste, we have in the analogy of proceedings in the courts of law a very important guide for the exercise of our equitable jurisdiction. It is established not only in the case of the Governors of the Harrow School v. Alderton,[3] before Lord Eldon, but in every case, that if there be a trial at law, and if the result of such trial is that the jury is compelled to give nominal damages, such as three farthings in that case, the verdict will be entered, not for the man who obtained the nominal damages, but for the defendant in the case. It is rather an extraordinary jurisdiction, no doubt, — it is an equitable jurisdiction, exercised by a court of law, — but it seems to be quite established and quite recognized, and being so I think it is impossible to say that when we come to exercise our jurisdiction, which is a discretionary jurisdiction, we should act upon any other principle, or to say that if we see that the damage has not really been substantial and important, we should do that in a court of equity according to our discretion, which even in the strictness of a court of common law is not done because of the reason given.

I think that the judgment in the court below in the first instance went very much upon the view that the waste here had the effect of destroy-

[1] 3 P. Wms. 268, n. (F). [2] 3 J. & Lat. 411. [3] 2 B. & P. 86.

ing the evidence of title. A great deal was said also at the Bar upon that subject, and a great deal certainly was said by the learned judge who pronounced the original judgment in this case. Now I cannot myself see that there is anything at all in that. I do not think that in the particular circumstances of this case there is any interference with the evidence of title. You may do what you please with this particular building (according to the plans and views of the parties connected with it), and yet not destroy any evidence of title at all. The building is to be modified,— is to be improved,— but it is to remain where it was, it is to be of the same proportions, it is to have the same position, it is to have the same surroundings; and I cannot see how what is proposed to be done would injure or affect the appellant's evidence of title. Independently of that, I think we must take this into account, that, owing to the circumstances in which property is now situated in this country, in Scotland, and in Ireland, evidence of title of this kind is not at all of the same importance as it was in other times and other circumstances. When you have an ordnance survey, when you have a registry of deeds, when you have a system of conveyancing, the value as evidence of title, of a place of this sort retaining its particular position, is very sensibly diminished. At all events, I see no reason upon that ground to hold that there has been any diminution of the evidence of title of which the lessor of these premises can properly complain.

We have heard much comment, on the one side and the other, with reference to the length of the term in this case. I do not rely upon that as the only circumstance in the case on which the judgment of the Court of Appeal should be sustained; but when, in a case of this sort, we are asked to exercise our discretionary jurisdiction, it surely is material to see that the interest of the individual who is only to come into possession of the premises at the end of 900 years is infinitesimally small compared with the interest of the man who is the tenant, and who, with his successors, is to hold the premises all that time, upon whom the effect of our exercise of this jurisdiction would be to tie up his hands, to destroy their property, and to inflict great damage upon them during the course of these many centuries that are yet to come. I think, that being so, we have only to say this in addition, that it is scarcely a matter of possible controversy here whether or no this change is a beneficial change. We have most conclusive evidence that the change will be beneficial. We have the most clear evidence that, as the matter stands, this old dilapidated store has become useless, I presume, to any human being. Circumstances have changed; the necessity for a store of that kind has ceased, and the result has been that the store, if it be allowed to continue in its present condition — because the parties are compelled to leave it in its present condition — till the end of this term of 999 years, the whole premises will be utterly valueless; whereas, upon the other side, if you substitute for this store the houses which are contemplated, you double, you treble the security of the landlord, and give him, or whoever may live at the end of the term of 999 years, certainly not

an injured property but an improved one. Therefore, inasmuch as the waste, if waste there be, is ameliorating waste, and the injury to the property produced by the waste is not merely trivial but absolutely non-existent, it appears to me that upon that ground the judgment of the Court below may very fairly be maintained.

Now there was one case, I think it is the only case, referred to by the very able and learned judge who had this matter first before him, the case before Lord Romilly to which reference has been made from time to time, Smyth *v.* Carter,[1] which would be very strong authority if we are to take it as expressing, in the words that are used, the full opinion of that learned Lord, and an opinion reached with reference to facts which have analogy to the facts before your Lordships. But in the first place, that was a mere *obiter dictum* of Lord Romilly. It was in an interlocutory proceeding. It was without any sort of argument; and the case has, I think, no application to the case before your Lordships, and for this important reason, that in that case the observations may have been applied to the limited interest of a tenant from year to year, whereas we have to deal here with the interest of a tenant for 900 years. The circumstances are wholly different, the conditions are wholly unlike, and, therefore, the authority does not, in my opinion, apply at all to the case before us.

But beyond all that, if the latter words of the dictum, that the landlord has a right to exercise his own judgment and caprice as to whether there shall be any change, were to be taken in their literal sense, and as applicable to this case, the effect would be to make the landlord absolute arbiter of the fortune, good or ill, of his tenant with reference to these premises for a period of 900 years. Now, my Lords, I for one should be prepared to exercise the jurisdiction of this House, and say that this is not and cannot be the law. Upon this ground I think that the judgment may now well be sustained. . . .

On the whole, I fully concur with my noble and learned friend, that, if there be damage in the case, a court of law can deal with that question, and I am quite clear that, our jurisdiction being discretionary, our discretion ought to be exercised in refusing the injunction.

Lord Blackburn. My Lords, I am of the same opinion. . . .

Now as to the question of waste, I think that is even still clearer.

The old writ of waste is gone, and we have nothing to do with it now, but an action in the nature of waste still exists in the courts of common law. It is perfectly clear that in an action of waste you cannot recover nominal damages only, you must get real damages. The jurors must not find for you unless they think there is substantial and real damage. Now, as to what constitutes real damage, it is clear that in a case where jurymen found three farthings they found no damages at all; and in the case of Doe *d.* Grubb *v.* Lord Burlington,[2] where it was a question whether it was waste so as to forfeit a copyhold, the probabili-

[1] 18 Beav. 78.

[2] 5 B. & Ad. 517.

ties are that the pulling down of a barn there was not waste, because it was a taking down of an old structure which had become practically useless, and the act was not an injury to the inheritance at all. But even supposing there was an injury, and that there was something for which there might be damages recovered, is it obligatory upon a Court of Chancery to grant an injunction to prevent it under all circumstances? I think not. I think it goes on much the same principles as have been mentioned before. I find in that case of Greene *v.* Cole [1] it is laid down that the court of equity would not interfere and grant an injunction to restrain waste where the damages are trivial. Lord Eldon, in the Governors of Harrow School *v.* Alderton,[2] mentioned the practice which the courts of law have established, that they would not enter judgment for the defendant where the damages were very small. Blackstone says [3] twelvepence, but what the value of that twelvepence was you must go back to the days of King Richard to ascertain. I suppose it would be a larger sum than now, but still a small sum. I do not know whether stronger words could be used than those of Lord Eldon as to what was or was not trivial. That was his view of the matter. In the case Mr. Kay was referring to,[4] the jury found it was improving waste, but it was held to be waste "notwithstanding the melioration, by reason of the alteration of the nature of the thing, and the evidence thereof," and the jury gave a verdict accordingly with 100 marks damages, and the Lord Chancellor seems to have entertained the suggestion that he might relieve the defendant from that verdict. What the Lord Chancellor did was at the defendant's instance, who had these damages awarded against him. The report is rather unintelligible, but it is evident that the Lord Chancellor, so far from thinking that the court of equity would be bound to grant its aid to enforce proceedings for waste where the property was actually improved, though its nature was altered, entertained serious doubt whether he would give relief in such a case. But when you come to the later cases, I think they are all uniform, that if the waste be something that would improve or would only trivially affect the inheritance, the Court will not interfere. Lord Chancellor Sugden, in the case in Ireland [5] which has been cited, explains that point, I think, very clearly. In the particular case where the waste was, he did grant the injunction — and that is intelligible enough — where from inadvertence in granting a long lease, a lease renewable for ever, mines or something of that sort which were not known or thought of were not included in the lease, and where the landlord could not enter upon the mines because he did not reserve the power, the only thing to be done under the circumstances was for the lessor and lessee to make an agreement as to how they should divide the profits of the mines. That was obviously

[1] 2 Wms. Saund. 252. [2] 2 B. & P. 86. [3] 3 Com. 228.
[4] Greene *v.* Cole, 2 Wms. Saund. 252, s. 259, n.; Cole *v.* Green, 1 Lev. 109, see p. 111.
[5] Coppinger *v.* Gubbins, 3 J. & Lat. 397.

the right course to take. Now in such a case as that, where the tenant chooses to take upon himself to carry away the minerals bodily, it seems but right he should not be allowed to do that, and that there should be an injunction to prevent it. That was exactly the case before Lord Chancellor Sugden. It was not, however, a case of a mine of copper ore, but was a turbary from which the lessee was cutting the peats and selling them at the rate of 300*l.* or 400*l.* a year, and deriving a large revenue from their sale. It was quite plain that the lessor was entitled to say, "You have no right whatever to cut and carry away this turf of mine without my consent, and my consent you must pay for,—you must make a bargain," and that, I take it, was the ground upon which Lord Chancellor Sugden's decision rested. I have no occasion to say whether that was right or wrong, but it was intelligible, and very different from the present case. Here the whole story shows that if there be waste, and I think it very doubtful that a jury would say there had been a real substantial damage even to the value of a shilling, the mischief that would accrue to the tenant from forbidding him to make this alteration would be so very great, and the mischief which could possibly, upon any reasonable contemplation of the matter, accrue to the plaintiff, the lessor, would be so very small and remote, that I think that upon that ground the Court was quite right in saying that their discretionary power to restrain should not be exercised.

I will only say one word about the alteration of evidence of title. I can perfectly understand that five or six hundred years ago that was an extremely serious matter, that where the evidence of title depended entirely upon the memory of witnesses, to change a meadow into a wood or a wood into a meadow would have been a serious matter as far as regards the evidence of title. After a few years it might be very difficult to trace which had been which. But now-a-days, when there are ordnance surveys, and where, as in Ireland, there is a court especially dealing with the titles to estates, giving titles, and where the property is marked out on a map, which map can be identified with the ordnance map,—and these maps it may well be supposed will continue to exist and may be referred to, to the end of the term,—any damage in regard to evidence of title is quite wild and chimerical, or is at least merely nominal. I think, if it is put in that way, it would scarcely be gravely said that a court of equity should grant an injunction or that the Court should act upon the rules of a former time and grant an injunction, because of a theoretical absurdity such as a supposed injury to title. I think, therefore, upon the whole, that the decision of the Court of Appeal was perfectly right, and should be affirmed with costs.

Lord Gordon entirely concurred.

Order of the Court of Appeal in Ireland affirmed, and appeal dismissed with costs.

BAKER *v.* SEBRIGHT.

BEFORE SIR GEORGE JESSEL, M. R., NOVEMBER 24, 1879.

[*Reported in* 13 *Chancery Division*, 179.]

SIR THOMAS GAGE SAUNDERS SEBRIGHT, by his will, dated in 1851, devised his real estate, including his "Beechwood estate" in Hertfordshire, to trustees in fee, in trust for his son, the defendant Sir John Gage Saunders Sebright, and his assigns for his life, without impeachment of waste; and after his decease in trust for his first and other sons successively in tail male, with remainders over.

The testator died in 1864, whereupon the defendant Sir John G. S. Sebright became, under the provisions of the will, equitable tenant for life in possession of the Beechwood estate. At that time there was standing on the estate a large quantity of very valuable timber, of which part was "ornamental," and part had been planted or left for ornament and shelter.

Since he had come into possession of the estate the defendant had cut a considerable amount of timber thereon, and sold the same for sums amounting to upwards of 21,000*l.*, which, after deducting the cost of cutting, he had applied to his own use.

The plaintiffs, the present trustees of the will, alleged that some of the timber so cut and sold by the defendant was ornamental timber, and timber planted or left for ornament or shelter, which he, as tenant for life, was not entitled to cut; and they accordingly filed the bill in this action praying (1) that, so far as might be necessary, the trusts of the will, so far as the same related to the timber formerly standing and then standing on the Beechwood estate, might be carried into execution by and under the direction of the Court; (2) a declaration as to the extent of the rights of the defendant Sir John G. S. Sebright, as equitable tenant for life without impeachment of waste under the will, to cut timber on the Beechwood estate; (3) an account of the ornamental timber and of the trees planted or left standing for ornament or shelter upon the Beechwood estate (if any) which had been felled or sold by or under the direction of the said defendant, and also an account of the moneys produced by the sale thereof; (4) that the said defendant might be ordered to pay to the plaintiffs or into Court for investment such sum (if any) as upon the result of the accounts aforesaid ought to be so paid, and that all proper directions might be given as to the investment and application of the fund; and consequential relief.

Sir John G. S. Sebright's eldest and only son, an infant, was made co-defendant with his father.

The defendant Sir John G. S. Sebright, by his answer, admitted that the greater part, if not the whole, of the trees felled by him came within

the description of ornamental timber, but stated that it had become absolutely necessary to fell them for the purpose of thinning out, and for the preservation and improvement of other trees of a more ornamental character; also that many of the trees so felled had stood in such close proximity to the mansion-house and other buildings on the estate as to be injurious to the health of their inmates. He further stated that he had acted throughout for the permanent advantage of the estate and under the advice of surveyors and woodmen of experience; and he submitted that under the circumstances, and having regard to the care and precautions which have been taken before any of the timber was cut, and to the fact that he was tenant for life without impeachment of waste, he was entitled to cut all the timber which had been so cut by him. He moreover submitted to account if the Court should be of opinion that he had exceeded his rights as such tenant for life.

By the decree, dated the 20th of November, 1876, made on the trial of the action, it was declared that the defendant Sir John G. S. Sebright, as equitable tenant for life without impeachment of waste, was entitled to cut all such trees on the Beechwood estate as were fit to be cut, except trees planted or left standing by any predecessor in title of the said estate for ornament, protection, or shelter: and, the defendant undertaking not to cut any of the trees on the Beechwood estate so planted or left standing, an inquiry was directed in the following form: "An inquiry whether any and what trees planted or left standing by any predecessor in title of the Beechwood estate or any part thereof for ornament, protection, or shelter, had been cut by the defendant Sir John G. S. Sebright, and under what circumstances the same were cut, and particularly whether any and which of such trees injured or impeded the growth of any other trees adjoining or near thereto which were of so much importance for the purposes of ornament, protection, or shelter, as that the removal of the trees so cut was essential for such purposes of ornament, protection, or shelter; and whether any and which of such trees cut by the defendant Sir John G. S. Sebright were prejudicial to the health of the inmates of the mansion-house, or the inmates of any other building on the estate, or interfered with the comfortable enjoyment of the mansion-house or any other building on the estate." And an account was directed of the value of any trees improperly cut.

In answer to the first inquiry, the chief clerk certified as to the number and description of trees cut by the defendant Sir John G. S. Sebright: and that "all the trees so cut were injurious to or impeded the growth of other trees adjoining or near thereto which were of so much importance for the purposes of ornament, protection, or shelter as that the removal of the trees so cut was essential for such purposes of ornament, protection, or shelter;" also that no trees planted or left standing by any predecessor in title of the Beechwood estate or any part thereof for protection or shelter had been cut by the defendant.

The evidence on the inquiry consisted principally of an affidavit by

the agent and surveyor of the estate under whose advice the timber in question had been cut. The affidavit detailed the circumstances under which the timber had been cut, and corroborated the statements in the defendant's answer.

The action now came on upon further consideration, the question being whether the defendant Sir John G. S. Sebright had, in cutting ornamental timber, been acting within his rights as an equitable tenant for life unimpeachable for waste, and was therefore entitled to retain the proceeds of such timber for his own use.

Chitty, Q. C., and *Bush*, for the plaintiffs.

Davey, Q. C., and *Walter Morshead*, for the defendant Sir John G. S. Sebright. We have been unable to find any direct authority on the point, either in the notes to Garth *v.* Cotton[1] or elsewhere; but, on principle, we submit that if ornamental timber is cut by a tenant for life unimpeachable for waste, *bona fide* for thinning, and for the preservation and improvement of the remaining ornamental timber, as in the present instance, that does not constitute equitable waste, and he is therefore not accountable for the profits: Lord Mahon *v.* Lord Stanhope;[2] for he is only doing what the Court itself would order to be done: Lushington *v.* Boldero,[3] Ford *v.* Tynte.[4] So long, then, as the tenant for life cuts rightfully his legal rights will remain undisturbed. The whole foundation of the doctrine of equitable waste is an unconscientious or malicious use of the legal power: thus if a tenant for life unimpeachable for waste is committing acts destructive to the inheritance, or of wanton or malicious mischief, the Court holds that his legal power to commit waste is being used unconscientiously, and will interfere to restrain him: Micklethwait *v.* Micklethwait,[5] Vane *v.* Lord Barnard,[6] Rolt *v.* Somerville.[7]

[JESSEL, M. R. It is singular that there does seem to be no express decision on the present point.]

Bush. The point is touched upon by Mr. Giffard in his arguments in Ford *v.* Tynte.[8]

[JESSEL, M. R. I see that Mr. Yool, in his work on Waste, says:[9] "Ornamental timber may also be cut rightfully;" and then he says,[10] "As the equitable restraint upon a tenant for life without impeachment of waste is only to prevent him from making an unconscientious use of his legal power, there seems to be ground for contending that the property in all timber rightfully cut, whether ornamental or not, vests in him in equity as well as at law."[11]]

The authorities go to show that so long as the tenant for life does not abuse his legal right, a court of equity will not interfere with its exer-

[1] 1 Wh. & Tud. L. C. 5th ed. p. 751.
[2] 3 Madd. 523, n.
[3] 6 Madd. 149.
[4] 2 D. J. & S. 127, 129.
[5] 1 De G. & J. 504, 524.
[6] 2 Vern. 738.
[7] 2 Eq. Cas. Abr. 759.
[8] 2 D. J. & S. 129, 130.
[9] Page 49.
[10] Page 50.
[11] See Lord Lovat *v.* Duchess of Leeds, 2 Dr. & Sm. 75, 76, 79.

cise. Where ornamental timber has been wrongfully cut by a tenant for life without impeachment of waste, it has been held that the proceeds belong to the first owner of the inheritance: Butler *v.* Kynnersley,[1] Rolt *v.* Somerville.[2]

[JESSEL, M. R. I see that Mr. Yool remarks in his work on Waste,[3] that in other cases it had been held that the proceeds follow the uses of the settlement.]

Chitty, Q. C. In Lowndes *v.* Norton[4] the proceeds were held to belong to the next tenant for life unimpeachable for waste. But in Honywood *v.* Honywood[5] your Lordship held that where timber is cut in the course of proper management the proceeds should be invested and the income given to the successive tenants for life until there is an absolute estate of inheritance.

But if the tenant for life who has wrongfully cut timber claims the proceeds in the character of the next owner of the inheritance, as where he has the ultimate remainder in fee subject to intervening contingent estates, he is not entitled to any benefit in the money, as he would be thereby taking advantage of his own wrong: Williams *v.* Duke of Bolton.[6]

A. Rumsey, for the defendant, the infant remainder-man.

JESSEL, M. R. I wished this point to be discussed, and I regret it has not been argued more hostilely than it has been, because the point is one of some importance, and does not appear to have been the subject of direct decision.

An equitable tenant for life unimpeachable for waste cut ornamental timber, and he alleged that he cut it, not only properly, but beneficially for the ornamental timber which remained; and accordingly an inquiry was directed in this form. [His Lordship read it, and continued.] I need not trouble myself about the last part of the inquiry, because the first part of it has been answered in favor of the tenant for life; that is, in effect, that the trees which he did cut injured or impeded the growth of other trees which were of essential importance for ornament or shelter: in other words, he did that which the Court directed to be done in the cases of Lushington *v.* Boldero[7] and Ford *v.* Tynte.[8] It seems that the trees cut were of considerable value, and of a value very much in excess of the cost of cutting; that is admitted; and consequently there was a considerable sum arising from the proceeds of the sale of the timber cut which went into the pocket of the tenant for life.

The question I have now to decide on further consideration is, whether the equitable tenant for life unimpeachable for waste is entitled to retain the proceeds of the timber so cut for his own use. If he is not, a second question arises which otherwise it is not necessary to discuss.

The point, as I said before, does not appear to have been directly

[1] 7 L. J. (Ch.) 150; 8 L. J. (Ch.) 67.
[2] 2 Eq. Cas. Abr. 759.
[3] Pages 45, 48.
[4] 6 Ch. D. 139.
[5] Law Rep. 18 Eq. 306.
[6] 1 Cox, 72; 3 P. Wms. 268, n.
[7] 6 Madd. 149.
[8] 2 D. J. & S. 127, 129.

decided; but, from the cases I am about to refer to, it seems to have been indirectly decided or assumed in favor of the tenant for life; and in deciding it, apparently for the first time, I have no hesitation in saying that, looking at the principles which have been laid down by the Court of Chancery as, so to say, the ground of its interference with the tenant for life in respect of what is commonly called "ornamental timber," that is, timber planted for ornament or shelter, it is impossible to hold that this tenant for life ought to be interfered with at all; that is to say, his rights, such as they would have been had the timber not been ornamental, remain unaffected by what has occurred.

The way to look at the matter is this: courts of equity restrained a legal tenant for life unimpeachable for waste from committing some kinds of waste which are called equitable waste. Why? Because it was considered that, though he had legal powers, he was not using them fairly — he was abusing them so as to destroy the subject of the settlement. That was the only ground, as it was said. Sometimes he was making an unconscientious use of his powers; and in fact the first case on the subject, the case of Lord Barnard,[1] who, to spite the remainderman, took off the roof of Raby Castle, was a very striking case of the unconscientious use of those powers.

It does appear to me that the ground stated for the Court's interference quite represents the true view of the matter. The court of equity did interfere by injunction to restrain the act of the tenant for life, because it was an unconscientious use of his powers; and therefore, unless the court of equity would restrain a tenant for life from doing the act, it ought not to deprive him of the proceeds of doing it, if what he was doing was not wrongful. The legal result of his act would follow in the same way as if no such doctrine as equitable waste were known: in other words, in the case put, he rightfully cuts the timber; and really it comes to that point. Now if he rightfully cuts the timber, it must be plain that that cannot be called an unconscientious use of his powers, because he is doing that which not only the Court itself would allow, but by established rule will now direct to be done; and it seems to me impossible to say, when he has done that which was necessary, so to speak, in order to preserve the remaining timber for the purpose for which it was planted, that what he has done was improperly done. That does not necessarily refer to decaying timber that may be ornamental, and which the Court may order to be cut on the balance of convenience, since it orders it when the tenant for life is impeachable for waste, in the ordinary course of management, and then the proceeds are invested for the benefit of the estate. It may be prudent to cut timber which is decaying, when to do so is beneficial for all parties, and when the Court has them all before it, although there is no absolute right to cut it, because it is ornamental timber. As we all know, there are oaks and other trees which will decay for centuries and still be ornamental. Therefore what I am saying does not necessarily apply to

[1] 2 Vern. 738.

decaying timber, but it does apply to a case where the timber cut is impeding the growth of what I will call more ornamental timber; there cutting is the right thing to do.

Now on looking at the authorities (I do not think it is necessary to cite many of them) this seems very plain. I will first take the passage in the carefully considered judgment of Lord Justice Turner in Micklethwait *v.* Micklethwait,[1] where he says:[2] "This doctrine of equitable waste, although far too well settled in this Court to be now in any way disturbed, is (it is to be observed) an encroachment upon a legal right." I do not much admire that term "encroachment," because almost all the doctrines of equity were interferences with a legal right, and that term is rather a term of opprobrium when it ought to be a term of praise. The interference of courts of equity with legal rights was for the improvement of the law and the furtherance of justice, and therefore to say that a doctrine of equity is an "encroachment" on a legal right is simply to censure the whole doctrine of equity.

Then his Lordship says: "At law a tenant for life without impeachment of waste has the absolute power and dominion over the timber upon the estate, but this Court controls him in the exercise of that power, and it does so, as I apprehend, upon this ground, that it will not permit an unconscientious use to be made of a legal power. It regards such an unconscientious use of the legal power as an abuse, and not as a use of it. When, therefore, the Court is called upon to interfere in cases of this description, it is bound, I think, in the first place, to consider whether there are any special circumstances to affect the conscience of the tenant for life, for in the absence of special circumstances it cannot be unconscientious in him to avail himself of the power which the testator has vested in him."

It really comes back to this, that the court of equity considers that where the testator gives these powers to the tenant for life, he intends them to be used fairly. He is not to take the roofs off the houses to spite the remainder-man, and not to cut down ornamental timber so as to destroy the amenity or beauty of the estate; but beyond that the court of equity does not interfere when he is doing what the settlor himself would have done with a view to preserve the beauty of the estate, though he obtains a profit. He is not acting unconscientiously.

I think the same result appears, although not quite so clearly, from the case of Ford *v.* Tynte.[3] In the first place, let us recollect what the case was. It was an appeal by the remainder-men from the order of Vice-Chancellor Wood, authorizing the receiver to cut certain timber which was said to be ornamental timber. The order was appealed from on the ground that the directions were not in the right form. It was said that they were too wide, and the Appeal Court was of that opinion, and varied Vice-Chancellor Wood's order. Now how does the counsel for the remainder-men put it? Mr. Giffard's argument is this: "We say that if a group of trees is planted or left standing for ornament or

[1] 1 De G. & J. 504. [2] 1 De G. & J. 524. [3] 2 D. J. & S. 127.

shelter, none of the trees can be felled by a tenant for life except those the felling of which will improve others of them." That is, he can fell those. That is the argument of the counsel for the remainder-men; and then cases are cited, winding up with Lushington *v.* Boldero,[1] which gives the proper form of inquiry.

Then the counsel for the plaintiff, representing the tenant for life, said the remainder-men came too late; and they took another point, that there was no satisfactory evidence that the trees were ornamental. Then Mr. Giffard says in reply, "Those trees only ought to be cut the removal of which will be beneficial to other ornamental trees, and the reference ought to have been in such terms as to secure this." So he puts it that what the Court will cut, the tenant for life may cut. That is what it comes to.

In delivering judgment, Lord Justice Turner, after going into the matter at considerable length, and saying he thought there must be a further inquiry,[2] says: "There is not, so far as I can find, any settled form of inquiry applicable to all cases of this description, nor do I think that there can be; for the question to what extent ornamental timber may be cut, must, as I apprehend, depend upon the circumstances of each particular case, and the proper inquiry to be directed must vary accordingly." Then he goes into the case before Lord Eldon, and makes a special form of inquiry very much in the shape of the inquiry in the case before me.

Now, looking at those two decisions of Lord Justice Turner, there can be no doubt whatever as to his opinion that the tenant for life could properly cut that which the Court itself would direct to be cut; that is, the Court would not do anything wrong. The very notion of preserving ornamental timber was the creation of the court of equity; and therefore in directing some portions of the timber to be cut down to save the rest, the Court was not contravening its own rules, but carrying them out, the intention of the testator being that, not all the ornamental timber, but as much of it as possible, should be preserved, consistently with allowing the natural growth of the trees, and so far as they would not destroy one another. No court of equity or any other court could control the operations of nature, and therefore the Court could not say that the whole of the ornamental timber should be preserved when the trees were growing so thickly as to destroy one another; but what it could do, and what it does do, is to preserve it as far as possible.

If the tenant for life has done the same thing, and has only cut such of the ornamental trees as impeded the growth of the others, and such as were, as between the trees cut and those left standing, the most proper to be cut, how can I say he has acted unconscientiously or improperly? It seems to me I could not have granted an injunction against his doing this if he had shown that what he intended to do was exactly what he has done; and that being so he is entitled to the proceeds.

I wish to guard myself against it being supposed that if the remain-

[1] 6 Madd. 149. [2] 2 D. J. & S. 133.

der-men had come to the Court before the tenant for life had cut any ornamental timber, I should not have granted an injunction. That raises a totally different question. Before the tenant for life cuts ornamental timber, it may be that the remainder-man has a right to the protection of the court of equity to prevent his doing it improperly. The tenant for life may say, I do not intend to cut anything but what can properly be cut; but the remainder-man can say, If you once cut down any of these ornamental trees I cannot put them up again: it may be an irremediable mischief; and, on the ground that the Court interferes to prevent irremediable mischief, it may be that when a tenant for life begins to cut ornamental timber, the Court will only allow him to cut under its direction and supervision, as in other cases of administration. It is not a question merely of his intending to do right; for, however good his intentions, the Court would see, in carrying out the trusts of the will or settlement, that right was done.

I am not saying that I should not interfere with a tenant for life who professed his intention of doing what was right, unless I was absolutely sure that he would do nothing else. I only say this because it might be thought, from the observations I have made, that the mere granting of the injunction would be a conclusive test as to his right to the proceeds. There may be cases where an injunction might be granted in which timber might be afterwards cut, and the tenant for life entitled to the proceeds even of timber so cut.

There will be a declaration that Sir John Sebright is entitled to retain the proceeds of the timber cut.