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The Equity Jurisdiction of the Exchequer

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W. H. BRYSON

Equity Reports and Records in Early-Modern England

I. The Court of Chancery

The municipal law of England is divided into common law and equity. This is so because in the middle ages, the judges of the courts of common law (the Court of Common Pleas and the Court of King's Bench) believed that they could not expand the existing law in order to solve new problems. They thought that they were bound by the established law as found in their own earlier judicial opinions. Furthermore, they felt that it was the function of Parliament to change the law; therefore, it would be an unconstitutional usurpation of the legislative power for the courts to expand the law. Since Parliament in the middle ages was not an efficient instrument for law reform, the common law began to stagnate.

The impasse was broken by the rise of an equity jurisdiction in the Court of Chancery. The Court of Chancery avoided the problems of the common law courts by ordering the parties to litigation to act in a just manner, even though the common law may have allowed them to act in an unjust manner in a particular situation. The Court of Chancery required the parties to act according to good conscience, and thus the court has been called a 'court of conscience.' But the reference to conscience, although it may originally have had some religious connotations, soon became institutionalized and objective. Lord Nottingham, the celebrated Chancellor of the seventeenth century, explained that the reference to conscience was not to the personal conscience of the parties, the Chancellor, or the King, but to the civic conscience of the legal system of England.¹

Thus the Court of Chancery did not declare common law rights or change the common law where it was deficient; it only required the parties to act according to justice and good conscience. Equity was said to act on the person, not on the property in dispute. (*Aequitas agit in personam non*

¹ *Cook v. Fountain*, 3 Swanston 585 at 600, 36 English Reports 984 at 990 (Ch. 1676). Today, it can be said that "Equity is a complex system of established law and is not merely a reflection of the chancellor's sense of what is just or appropriate". *Tiller v. Owen*, 243 Va. 176, 179, 413 S.E.2d 51, 53 (1992).

in rem.) For example, if a certain person in justice and fairness ought to own a certain piece of land, the courts of common law would declare that person to be the owner, but the equity courts would order the person with common law title to make a common law conveyance of the property to that person who ought to own it. Thus the common law ownership was transferred not by the equity court but by the party who had it wrongfully. Thus, there was no conflict with the power of Parliament to legislate and to change the law, nor was there any conflict with the common law courts to declare who had what common law rights.

The Court of Chancery could be resorted to only where there was no complete and adequate remedy for the plaintiff in the courts of common law. The inadequacy of a common law remedy could be one of substantive or procedural law. If the defendant could show that the plaintiff had an adequate remedy in the common law courts, the equity court would dismiss the case on the grounds of lack of jurisdiction. Thus equitable remedies are said to be 'extraordinary' remedies, not in the sense of unusual but in the sense of not the first resort because the ordinary remedies to be looked to first were the remedies available in the courts of common law. In practice, the extraordinary remedies of the courts of equity were frequently resorted to because of the lack of adequate remedies at common law for a wide variety of problems.

Thus, there was no genuine conflict with the older courts of Common Pleas and King's Bench as to the administration of the common law of England.² Equity supplements and completes the common law of the older courts.

II. The Court of Exchequer

In the middle of the sixteenth century, the Court of Exchequer began to give equitable remedies, as well as common law remedies. The Exchequer was a part of the royal treasury department dating back to the middle ages. The medieval Exchequer had a court of law to hear disputes over revenue payments. Also in the middle ages, the Exchequer had a court to hear common law disputes where a debtor of the king was attempting to collect money from another private person so that he could pay his own debts to the king. These two jurisdictions were known as the revenue side and the common law side of the Court of Exchequer. In the sixteenth century, the

² For the Court of Chancery in the early modern period, see *J. A. Guy*, *The Public Career of Sir Thomas More* (1980); *W. J. Jones*, *The Elizabethan Court of Chancery* (1967); *L. A. Knafila*, *Law and Politics in Jacobean England* (1977); *D. E. C. Yale*, *Lord Nottingham's 'Manual of Chancery Practice'* (1965).

Court of Exchequer developed its equity side in order to further the collection of the royal revenues by giving to the debtors and accountants to the crown equitable remedies against their own debtors.

The equitable procedures and remedies of the Court of Exchequer were the same as those of the Court of Chancery. This essay will consider equally the equity records and reports of the Court of Chancery and the Court of Exchequer.³

III. The Minor Courts of Equity

There were several other courts of equity in the sixteenth and seventeenth centuries, but most of them were of limited jurisdiction.

The Court of Requests was a court of equity that was set up to hear the disputes of poor people involving small sums of money. Even though it later came to hear cases where large sums were disputed, it was not a high court and its decrees were not well respected by the other royal courts. It fell into disuse in the 1640s.⁴

Two regional courts were set up in the time of Henry VIII to provide justice conveniently to the inhabitants of the northern and western parts of England and Wales. These were the Council of the North, which sat at York, and the Council of the Marches of Wales, which sat at Ludlow. Both of these courts administered equitable remedies. They fell into disuse when their criminal jurisdictions were abolished by statute in 1641.⁵

Moreover, for disputes involving land lying in Durham, Lancashire, and Cheshire, equitable remedies were available in the Chancery Court of the County Palatine of Durham,⁶ the Court of the County Palatine of Lancashire, the Court of Duchy Chamber of Lancaster,⁷ and the Court of Exchequer of the County Palatine of Chester. These courts were abolished in modern times.

³ For the Court of Exchequer in early modern times, see *W. H. Bryson, The Equity Side of the Exchequer* (1975).

⁴ *I. S. Leadam ed., Select Cases in the Court of Requests* [Selden Society, vol. 12 (1898)], pp. l, li.

⁵ Stat. 16 Car. I, c. 10, ss. 2, 7, *Statutes of the Realm*, vol. 5, pp. 110, 111; *R. R. Reid, The King's Council in the North* (1921), pp. 445 - 449; *C. A. J. Skeel, The Council in the Marches of Wales* (1904), pp. 158 - 165; note also *P. Williams, The Council in the Marches of Wales under Elizabeth I* (1958).

⁶ See: *The Practice of the Court of Chancery of the County Palatine of Durham* (1807).

⁷ *R. Somerville, The Palatinate Courts in Lancashire*, in: *A. Harding, Law-making and Law-makers* (1980), pp. 54 - 63.

In addition, there were several revenue courts that administered common law rights by means of equitable remedies. These were the short-lived Court of Augmentation⁸ and the Court of First Fruits and Tenths and the important Court of Wards and Liveries.⁹ The first two were merged into the Court of Exchequer in 1554, and the latter disappeared in the middle of the seventeenth century when military tenure of land was abolished.

Finally, there was the Court of Star Chamber. This was a court of criminal common law that operated by equity procedure. The result of this unique combination of common law and equity was that criminal defendants were denied the traditional right of trial by jury. By the sixteenth century, trial by jury was a procedure whose flaws in practice were obvious, and many branches of equity jurisdiction were created in order to avoid the vagaries of juries. However, on the criminal side of the common law courts, trial by jury was considered to be a safeguard against overzealous prosecutions and royal tyranny.

The Court of Star Chamber was composed of the members of the Privy Council, who were always the political supporters of the King, and there was no jury. During the reign of Charles I, the Court of Star Chamber became a conspicuous instrument of political and religious oppression, and, when Parliament got the upper hand over the King in 1641, this court was abolished.¹⁰

It is to be noted that the Court of Chancery and the Court of Exchequer never had any criminal jurisdiction, and they had always been careful not to move in that direction. These equity courts would not even enforce civil penalties or civil forfeitures.

IV. The Records of the Courts of Equity

The records of the courts of Chancery and Exchequer have been well preserved since the middle ages. They are now to be found in the Public Record Office in London. The basic records of a suit in equity were written in the vernacular language, which was English from the end of the middle ages onwards. These records are as follows.

The first class of records was the pleadings, which were drafted by the lawyers on behalf of their clients, the parties to the lawsuit. The plaintiff began by filing in court a written 'bill of complaint', in which he set forth

⁸ See generally, *W. C. Richardson*, *History of the Court of Augmentations 1536 - 1554* (1961).

⁹ See generally, *H. E. Bell*, *History and Records of the Court of Wards and Liveries* (1953).

¹⁰ Stat. 16 Car. I, c. 10, s. 1, *Statutes of the Realm*, vol. 5, pp. 110, 111.

his claim against the defendant. The defendant then filed either a 'demurrer' or an 'answer'. A demurrer was the type of pleading used to deny the plaintiff's theory of legal right; an answer was the type of pleading used to deny the truth of the plaintiff's statement of facts. There could be further written pleadings if the parties thought it necessary and the rules of pleading permitted it. The general purpose of the pleadings was to state and to define the dispute between the parties. They are similar in function to the 'positiones' and 'responsiones' of the Romano-canonical practice. The pleadings in the courts of equity are long and full of conflicting allegations of facts. While they may shed light on the dispute between the parties, they do not help much to understand the legal reasons that underlie the final decision of the court. Therefore, no transcriptions of any of them will be published in this work.

The next major set of records in a suit in equity is the evidence. In the equity courts, as opposite to the common law courts, the evidence was presented to the court entirely in a written form. (In the courts of common law, the evidence of the witnesses was presented orally to the jury, and thus the evidence has not been preserved not having been officially written down.) In the courts of equity, the method of collecting the evidence was as follows. The court appointed a commissioner or several commissioners, who were laymen and not formally connected with the court but who lived near the witnesses. The parties to the lawsuit then gave lists of written questions, 'interrogatories', to the commissioners. The commissioners thereupon summoned the witnesses, read the questions to them, took down their answers in writing, the 'depositions', and then sent the interrogatories and the depositions back to the court in Westminster.

When the parties were ready to present their cases to the judges for a decision, the pleadings and the evidence were read aloud in open court and the lawyers presented their arguments. The judges in most cases gave an oral decision then and there, but sometimes they adjourned the matter for private debate among themselves and perhaps to do some legal research. Even an adjourned case resulted in an oral decree in the seventeenth century except in the most rare situation.

After the judge had rendered his judgment, the clerk in court who was representing the prevailing party drafted a written decree for the judge's signature. Since the decree was drawn up by a clerk and not the judge, the reasons for it were not often given. The decrees were then copied into the official decree book of the court. Several sample decrees have been transcribed. The decrees and orders are the only records that were generated by the judges, and they thus correspond to the reports of them that were made by the lawyers in court. Numerous of these equity orders and decrees have been published in *Cecil Monro, Acta Cancellariae* (1847), which covers the

period 1545 to 1625, and in *John Ritchie*, Reports of Cases Decided by Francis Bacon (1932), which covers the period 1617 to 1621.

While much factual information may be found in the written pleadings and in the written evidence, this is all partisan and must be sifted carefully to discover the truth of the case. This, of course, was the job of the judge, but it is equally the burden of the modern legal historian. Because these records are very long and not very useful as compared even to the orders and decrees, no sample pleadings and depositions have been transcribed or published here.

V. Reports of Equity Cases

Even though the official records of the courts of equity only infrequently give the judges' *ratio decidendi*, the judges usually gave their reasons in court orally. The frequency in the seventeenth century of these pronouncements or comments from the bench cannot be known precisely. However, the lawyers and law students present in court sometimes made notes of them. These notes would then be written out later in the form of reports of cases. In the sixteenth and seventeenth centuries, these reports might be very brief notes of legal points or they might be extensive transcripts of the argument of counsel and the speeches of the judges. Some of these reports found their way into print. Of those manuscripts that were not printed, many must have been lost, but some have survived.

The following list of reports gives all of the reports that were limited to equity cases, that have been printed, and that cover the period before 1714. This list gives the names of the reporters or reports, the dates of first publication, and the dates of the equity cases reported.

- Sir George Cary (Carew) (1650) 1557 - 1604
- Choyce Cases in Chancery* (1652) 1557 - 1606
- John Dickens (1803) 1559 - 1798
- Reports in Chancery* (1693 - 1716) 1625 - 1710
- William Nelson (1717) 1625 - 1693
- Hutton Wood (1798 - 1799) 1650 - 1797
- Cases in Chancery* (1735) 1660 - 1698
- Richard Freeman (1742) 1660 - 1706
- Equity Cases Abridged* (1792) 1667 - 1744
- Reports tempore Finch* (1725) 1673 - 1680
- D. E. C. Yale, Lord Nottingham's Chancery Cases* (1957, 1961) 1673 - 1682
- Thomas Vernon (1726 - 1728) 1680 - 1719
- Precedents in Chancery* (1733) 1689 - 1722
- William Peere Williams (1740) 1695 - 1735
- Sir Jeffrey Gilbert (1734) 1705 - 1727

Compared to the printed reports of common law cases, this list is short indeed. However, many of the common law reports include a selection of important equity cases. The most notable of the reports that do are those of Sir Edward Coke, Sir Francis Moore, Sir Thomas Hardres, and John Rayner.

The following cases (reports and records) were chosen for publication in the companion volume to this work.

1.

Attorney General v. Bond (Ex. 1587)

The case of *Attorney General v. Bond* (Ex. 1587) was selected for several reasons. It is one of the earliest reports of an equity case in the Court of Exchequer. There are three reports of the case, only one of which has been previously printed. It is to be noted that these reports are rather short, as indeed are the orders of the court. Note also that the orders of the court contain no preamble giving summaries of the facts and no reasons for the orders.

It is interesting to note that the Lord Treasurer was sitting with the barons of the Exchequer as a judge. Although the Lord Treasurer and the Chancellor of the Exchequer could sit on the Exchequer bench as judges when the court was hearing equity cases, they only infrequently did so, as a matter of practice. Note also that the unsuccessful defendant refused to obey two orders of the court, and the court had to appoint several people to carry out its order.

In this case, James Bond, who had leased a part of the manor of Thorpe from the Queen, had built a dove house there in order to have a plentiful supply of game to hunt. John Wooley (or Wolley) and other inhabitants of the manor complained to the Queen because Bond's birds were eating up their grain, which they considered to be a nuisance. The Attorney General acting on behalf of the Queen sued in the Court of Exchequer for an injunction ordering Bond to abate the nuisance by removing the dove house or stopping up the louvers so that the birds could not get inside to roost safely. The court ruled in favor of the plaintiff, the Attorney General.

The Court of Exchequer had jurisdiction over the case because it involved a royal manor and thus, though indirectly, the rents and revenues of the crown. This was an appropriate case for the equity jurisdiction of the court in that it was a continuing and ongoing nuisance, a tort, and money damages at common law to compensate for past harm would be an inadequate remedy to prevent the future harm of the tenants' crops being eaten

by the defendant's birds. Thus an injunction, an equitable remedy, was needed to do complete justice to the Queen and the inhabitants of her manor lands. As a matter of substantive law, only the lord of a manor (here the Queen) or the parson of the parish church could maintain a dove house within a manor, and James Bond was neither being only a lessee of the lord of the manor.

He was ordered to abate the nuisance by blocking up the building. He refused (or neglected to act) and was found in contempt of court, and the agents of the equity court were ordered to act for him. By this last order, the equity court appears to be acting *in rem*, a questionable practice.

2.

The remainder of the cases were chosen to illustrate some of the steps along the way of the development of the rules of *res judicata*. This was a very serious issue in the first years of the seventeenth century, and it resulted in a clash of personalities and of courts in England at that time.

The original purpose of the courts of equity was to provide a just remedy where the courts of common law failed to give one. Thus where different remedies were available or different results would obtain, the remedy of the courts of equity would, and will, prevail. Thus, for example, if a person is induced through fraud to enter into a contract and that person is then sued in a court of common law in such a procedural manner that the defence of fraud cannot be asserted there, that person can then resort to a court of equity for relief. The court of equity will forbid by means of an injunction the prosecution of the lawsuit in the common law court but allow it in the equity court where the defence of fraud can be asserted and proved. Thus, the suit was removed from the common law court to the equity court at the beginning of the legal proceedings.

However, in the late sixteenth and early seventeenth centuries, defendants were remaining in the common law court and taking their chances with a jury verdict, and then if the jury ruled for the plaintiff, the defendant would get an injunction and remove the case to a court of equity and have a new trial. Not only was this inefficient and wasteful of time and money, but it appeared to give to the courts of equity an appellate review of the common law court's actions. Such an appeal was not a part of the traditional organization of the court system of England. This matter led to a bitter public dispute between Sir Edward Coke, the Chief Justice of the Court of King's Bench, and Thomas Egerton, Lord Ellesmere, the Chancellor of the Court of Chancery. The dispute was temporarily settled in 1616 by King James I himself, who was being advised by Sir Francis Bacon.

Bacon was a great rival of Coke, and he soon succeeded Ellesmere as Chancellor.¹¹

Even though there was an end to the public dispute in 1616, it took perhaps a century for the issue to be worked out properly. The cases published here show that the law was still not settled in 1655.

The issue is not a question of an appeal but is one of *res judicata*. When the dispute between the parties has proceeded to a final judgment, it should not be relitigated, neither in a different court nor in the same court, unless an appellate court reverses that lower court judgment. Thus if a defendant in a common law court elects to proceed to a final judgment in that court, he should not be allowed to relitigate it anywhere. Thus in modern practice, an injunction after a final judgment will be refused at common law or in equity on the grounds of *res judicata*.

Unfortunately, life is not so simple. In the famous case of Richard Glanville in 1616,¹² the original defendant, who had been the victim of fraud, had neither the opportunity to present a defence nor the chance to remove the case to an equity court before final judgment because he had been defrauded into releasing those rights. This presents the distinction between intrinsic and extrinsic fraud. This is a distinction that is understood today but was not in the seventeenth century. Intrinsic fraud, as where a person enters into a contract through deceit, is covered by the doctrine of *res judicata* and cannot be considered in later litigation. On the other hand, extrinsic fraud, as where a defendant is prevented by deceit from going into court to make any defence, is separate from the contract in dispute and is not covered by *res judicata*. Other examples of extrinsic fraud would be deceit as to the period of the statute of limitations, a judge who had been bribed, and a lawyer who deliberately betrayed his client. Other grounds for an injunction after a final judgment are accident, surprise, and breach of trust, which are well established grounds for equity jurisdiction.

The following is a good explanation of the proper balance between finality of judgments and relief from final judgments in cases of injustice. "Where a party has had a day [in a court of common law] in which he could make his defence in the proper form before a verdict and judgment against him, equity will not entertain him and grant relief after such verdict

¹¹ *J. H. Baker*, *The Common Lawyers and the Chancery: 1616*, in: *The Legal Profession and the Common Law* (1986), pp. 205 - 229; *C. M. Gray*, *The Boundaries of the Equitable Function*, *American Journal of Legal History*, vol. 20 (1976), pp. 192 - 226; *J. P. Dawson*, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, *Illinois Law Review*, vol. 36 (1941), pp. 127 - 152.

¹² 1 Rolle's Reports 111, 219, 81 English Reports 365, 444; Croke (Jac.) 343, 79 English Reports 294; 2 Bulstrode 301, 80 English Reports 1139; Moore (K. B.) 838, 72 English Reports 939; Hobart 115, 80 English Reports 264.

and judgment, unless in case of fraud, accident, or surprise, or some adventitious circumstance unmixed with negligence on his part which shall sufficiently account for the omission to seek its intervention before the judgment."¹³

These cases were chosen to demonstrate some of these points.¹⁴ It is also hoped that these reports and decrees will show the development of the English common law through reports of lawsuits.

Ayliffe v. Duke (Ch. 1655)

The Chancery case of *Ayliffe v. Duke* (Ch. 1655) was chosen for inclusion because it is an example of a court of equity granting relief following a final judgment at common law for the same matter. The two reports of the case are very similar and can perhaps be considered different versions of the same report. In this case, the official record of the case gives many more facts and details than the private reports of the case.

In this case, a series of bonds had been given in favor of various members of two families as part of a marriage contract. Later, due to economic hardships that followed the English Civil War, some of these bonds became unenforceable leaving George and Elizabeth Duke destitute. Mrs. Ayliffe agreed to make a large gift to them, Elizabeth Duke being of her kin. Then George Duke's father forced him to give a bond to his brother, John, so that Mrs. Ayliffe's gift would eventually end up in the hands of John rather than those of the intended donees. When Mrs. Ayliffe heard of this attempted fraud, she refused to go through with the gift. George, thereupon, gave the bond to her, and she cancelled it by tearing it up. Then she gave the money to George and Elizabeth.

Four years later after the money had been paid, John Duke sued Mrs. Ayliffe in a court of common law for destroying the bond in which he was the payee. The jury gave a verdict for John, and final judgment was entered by the court. Mrs. Ayliffe then sued in the Court of Chancery for equitable relief against the common law judgment, and the Court of Chancery granted it in order to prevent a double payment and fraud.

Since Mrs. Ayliffe was aware of the fraud before the common law action was begun, she should have removed the common law case into the court of equity by means of a routine common injunction before the verdict. Then she could have asserted her equitable defences against John Duke.

¹³ *Haseltine & Walton v. Brickey*, 16 Grattan 116, 120 (Va. 1860).

¹⁴ Note also *Pickett v. Morris* (Va. 1796), which is printed in the companion to this volume, and the discussion below in 'Virginia Law Reports and Records, 1776 - 1800'.

Perhaps, she could have shown the fraud in evidence at common law. Having failed to do this, the rules of *res judicata*, as understood today, would have prevented her from suing in equity after the common law judgment but this would have allowed a great hardship and fraud to be committed against her.

Morehead v. Douglas (Ex. 1655)

In the Exchequer case of *Morehead v. Douglas* (Ex. 1655), the defendant had secretly obtained a default judgment at common law, and the plaintiff in the present case had not known about the common law case until it was too late to make his defences there. The plaintiff in equity then sued to have relief against the common law judgment on the grounds of fraud.

The defendant thereupon pleaded by means of demurrer that the judgment at common law was final and *res judicata* and the court of equity could not relieve against it. The defendant in equity alleged that there were several acts of Parliament to this effect, but this author could not find any such act.¹⁵

The plaintiff in equity said that there were many precedents of injunctions in equity granting relief against common law judgments. When the Court of Exchequer asked for precedents to be shown, the plaintiff could only show precedents from the Court of Chancery but none from the Exchequer, the barons of the Exchequer said that they were not bound by Chancery cases and dismissed the case.

It is the opinion of this author that, though Chancery cases may not have been binding on the Court of Exchequer, they should have been persuasive, and because of the fraud committed (assuming it could have been proved) upon the plaintiff, he should have been relieved. This assumes that there was no such act of Parliament prohibiting it.

Curtis v. Smallridge (Ch. 1664)

In the case of *Curtis v. Smallridge* (Ch. 1664), Mrs. Smallridge had pawned Mr. Smallridge's property to Curtis. Mr. Smallridge then sued Curtis at common law for the wrongful taking of his property because Mrs. Smallridge, his wife, had no authority to give it to Curtis, as a pledge or otherwise. The common law court held for Mr. Smallridge and awarded damages for the value of the property received by Curtis.

¹⁵ The Act of 21 August 1654, chapters 27 to 30, is not on point, but it may have been the statute referred to.

After this, Curtis discovered that Mrs. Smallridge did have her husband's authority to enter into the transaction and that she gave the money to him. The common law action was thus a fraud upon Curtis. Moreover, Mr. Smallridge ended up with the money loaned and the common law damages for the property that had been pledged as security for the loan.

Curtis thereupon sued in equity. However, the Court of Chancery refused him relief because he could have pleaded Mr. Smallridge's fraud as a bar to the action at common law. The Court of Chancery said that Curtis was not prevented by any accident from having his witnesses present at the common law trial. The other issue was that of after-discovered evidence, but the court ruled against the plaintiff because the evidence was available before the common law trial and it was not discovered or not used through the negligence of the plaintiff.

Robinson v. Bell (Ch. 1690)

In the case of *Robinson v. Bell* (Ch. 1690), Robinson was sued in a court of common law for money received as the executor of a decedent's estate. He instructed his attorney in the common law court, a court official, to enter a special defence, but a general defence was entered through the mistake of the attorney. In addition, Robinson wrote a letter to Bell, the claimant of the estate and plaintiff at common law, saying that he had received money due to the decedent when in fact he had not nor ever would receive the money. Because of these two mistakes, the court of common law ruled for Bell and ordered Robinson to pay her the money. Robinson then sued in a court of equity, and there he was relieved from payment of the common law judgment for the reasons of the two mistakes.

It is the opinion of this writer that the first mistake, that of the attorney, was a true surprise or accident over which Robinson had no control and was a sufficient ground for equitable relief against the final judgment at common law. He would not have been liable for the second mistake and would not have been ordered to pay money that he had not received from the decedent's estate had he pleaded a special defence. However, admitting receiving money which he had not received appears to have been his own negligence, against which a court of equity would not relieve.

This case was included because it was cited in *Pickett v. Morris* (Va. 1796), which is printed in the companion to this volume in 'Virginia Law Reports and Records, 1776 - 1800'. Note also that Sir George Hutchins, one of the Commissioners to hold the Great Seal until a chancellor could be chosen and appointed, cited two earlier Chancery cases. Neither

of them was in print; he may have had personal knowledge of the case of *Cryer v. Goodhand* (Ch. 1673 x 1682).

Crane v. Hill (Ex. 1695)

In the case of *Crane v. Hill* (Ex. 1695), Crane was a creditor of Hill and of Hill's insolvent father. When Hill's father died, Crane and Hill came to an agreement as to the debts owed to Crane. As a part of this agreement, Hill conveyed to Crane the rectory of the parish church of Hales, which included the right to receive tithes, the rent of the glebe lands, and various other income. Afterwards, Hill acquired a precedent and superior right to the rectory, and he sued Crane in an action at common law and recovered the property.

Crane then sued Hill in the equity side of the Court of Exchequer to be relieved against the common law judgment. The equity court granted Crane's petition and required Hill to give up his title and possession. The reason of the equity court was that it was unfair and wrong for Hill to have a double recovery by setting up his new right against his own conveyance of that same right. Hill's common law judgment operated as a fraud upon Crane because of Hill's earlier conveyance to Crane; Crane could not plead this in the common law action of ejectment against him; therefore, relief in equity was granted to him.

This case was chosen for inclusion because the report was compiled by one of the judges who decided the case. Edward Ward began making reports of cases when he was a law student. He continued this practice throughout the rest of his life, as a barrister, Attorney General, and Chief Baron of the Court of Exchequer.

Kent v. Bridgman (Ch. 1704)

In the case of *Kent v. Bridgman* (Ch. 1704), Kent, the sheriff's bailiff or deputy, had levied on property owned by Bridgman's father pursuant to a court order. Bridgman then sued Kent in a common law court alleging falsely that the property taken by Kent was his property and not that of his father. At the trial at common law, Kent proved that the property that he had officially seized was in fact owned by Bridgman's father, the judgment debtor. However, Kent failed to have with him a copy of the court order to prove that the taking was lawful, and for the failure to prove that technical fact, which was never in dispute, the common law judgment was for Bridgman. Kent thereupon resorted to the court of equity, and he was relieved against the final judgment at common law.

The reasoning of the Court of Chancery is not set out in the reports of the case. (Perhaps this report is no more than a later extract from the official decree.) However, one can surmise that the ground for forbidding the enforcement of the common law judgment was that Kent was surprised at having to prove the technical fact that he was acting under court order by producing an official copy of that order. He, no doubt, assumed that that fact could be proved by oral evidence or that it need not be proved at all, and it was an accident and not negligence that he had no witness present in court to prove it.

It is not a very good report. This case was chosen for inclusion because it was cited in *Pickett v. Morris* (Va. 1796), which is printed in the companion to this volume.

In editing these records and reports, modern spelling and punctuation have been used. This is consistent with the rule of *idem sonans*, which is that a word is the spoken word, not the written word.

W. H. BRYSON

Equity Reports and Records in Early-Modern England

1. Attorney General v. James Bond (Ex. 1587)

Only a lord of a manor and the parson can erect a new dove cote within the manor, and if anyone else do so, he will be ordered to remove it.

I

British Library MS. Add. 35943, f. 134v, pl. 1

In leschequer in le case inter John Wolley Armigerum un del privie counsel et Bond un Copiholder in fee deins le mannor del Thorpe in Comitatu Surey fuit agree per totam Curiam que nul fretenant Copiholder ne quecumque que ad special fee deins un mannor ne poit erigere de nova ascun pigeon howse, mes solement le Seignior del mannor ou Rector Ibidem tiel elecon¹ pur ceo que est ground detrement al tenants in respect del increase que consume le greine est bien inquirable in chacun leete.

Translation

In the Exchequer, in the case between John Wooley, Esquire, one of the privy counsel, and Bond, a copyholder in fee within the manor of Thorpe² in the County of Surrey, it was agreed by the whole court that no free tenant, copyholder, nor anyone who had a special fee within a manor could erect any new pigeon house, but only the lord of the manor or the rector of the same [could make] such erection because it is a great detriment to the tenants in respect of the increase [of pigeons] that consume the grain. It is well inquirable in each leet.

¹ *Sic* in MS.

² Victoria County Histories, *Surrey* (1911), vol. 3, p. 438.

II

Cambridge University Library MS. Ee.6.12, f. 32, pl. 3

In Scaccario. Informacion fuit versus lessee per ans del roy de parcell d'un mannor pur erecter un pigeon howse; Et per Manhood, Gent, barrons, Popham Attorney etc. et tous le barre. Erecter d'un pigeon howse est common Nusans. Et pur ceo un injunction fuit enter a luy que ne construera novell dovehowse etc. ve' acc' [?] Et que fuit l'opinion de Mountague Justice et Plowden accordant que null forsque seignour d'un mannor ou parson poit erect dovehouse. Et que fuit tout foits en antient temps enquere en leetes. James Bonds case.

Translation

In the Exchequer, there was an information against a lessee for years of the king of part of a manor for erecting a pigeon house. And [it was said] by Manwood [and] Gent, barons, Popham, attorney [general], and all of the bar [that] the erecting of a pigeon house is a common nuisance. And because an injunction was entered to him that he should not construct a new dove house etc. [...]. And this was the opinion of Justice Mountague³ and Plowden⁴ in accord that no one except the lord of a manor or a parson could erect a dove house. And this was always in former times enquired of in leets. James Bond's case.

III

Moore's Reports 238, 72 English Reports 553

Eodem Termino. En l'Exchequer l'Attorney la Roigne exhibite English information vers James Bond, pur ceo que il ad erect un Pigeon house sur certaine terre que il tient pur ans, le revercion al Roigne, parcel del mannor de Thorp en Comitatu Surrey: de quel mannor la Roigne est seisy en fee. Et Manwood chiefe baron, et Gent Baron, et Popham Attorney la Roigne et tous les apprentices al barre pristeront le ley que le Pigeon house sera rect et accompt pur common nuzance: et pur ceo ils grant injunction a luy que il ne construer, car Manwood dit que nul poit erecter un Dove house de novo, forsque le Seignor del manor et le parson del Eglise, et en ancient ley ceo fuit inquirable en un leet perenter common nuzances.

³ Chief Justice of the Court of King's Bench, 1539 - 1545; Chief Justice of the Court of Common Pleas, 1545 - 1553; he died in 1557.

⁴ Edmund Plowden (1518 - 1585).

Et en temps de cest mocion le Seignor Burghley vient en Court, et il esteant haut Treasurer dit que Monsieur Plowden fuit d'opinion que nul forsque le Seignor del mannor, ou le parson del Eglise poit erecter un Dove house: et auxi il dit que il ad oye Montague Justice issint dire en un grand assembly.

Translation⁵

In the same term⁶ in the Exchequer, the attorney of the queen⁷ exhibited an English information against James Bond because he had erected a pigeon house upon certain land that he held for years [with] the reversion to the queen, part of the manor of Thorpe in the County of Surrey, of which manor the queen is seised in fee. And Chief Baron Manwood and Baron Gent and Popham, attorney of the queen, and all of the lawyers at the bar held the law [to be] that the pigeon house should be reckoned and accounted as a common nuisance. And on account of that, they granted an injunction to him that he not construct [it] because Manwood said that no one can erect a new dove house except the lord of the manor and the parson of the church, and in ancient law, it was enquirable in a [court] leet among the common nuisances.

And at the time of this motion, the Lord Burghley came into court, and he, being high treasurer, said that Mr. Plowden was of the opinion that no one except the lord of the manor or the parson of the church can erect a dove house. And also he said that he had heard Justice Montague so say in a great assembly.

IV

Public Record Office E. 123/13, f. 84v, pl. 3 (4 July 1587)

It is ordered by the court that James Bond, defendant in an English bill at the suit of Mr. Attorney General for the erecting of a dove house in hurt of the inhabitants of the queen's manor of Thorpe, shall, before Barthelomew's Day⁸ next, pull down the louver of the same house and make the house plain and even and fit for an apple loft or garner, [whichever] he will, or else an attachment shall go against him for his contempt, and order shall be given to some of the queen's officers in that county to pull down the same.

⁵ For another translation, see *J. Chitty, A Treatise on the Game Laws*, vol. 2 (1812), p. 831.

⁶ I.e. Pasch. 29 Eliz. (Easter Term 1587).

⁷ I.e. attorney general.

⁸ St. Bartholomew's Day, i.e. August 24.

V

Public Record Office E. 123/13, f. 123v, pl. 3 (14 November 1587)

It is ordered by the court that, if James Bond do not before this day sen-
night reform and pull down the louver of the dove house in question
between the queen's majesty and him according to a former order taken
therein by this court on the fourth day of July last, that then this court will
appoint certain persons to view and reform the same.

VI

Public Record Office E. 123/13, f. 137v, pl. 2 (28 November 1587)

Whereas it was ordered the fourth day of July last past that James Bond
shall pull down the louver of the dove house by him then lately erected
within the queen's majesty's manor of Thorpe in the County of Surrey and
make the house plain and fit for an apple loft or garner or else an attach-
ment should be awarded against him for his contempt and order should be
given to some of the queen's officers to pull down the same forasmuch as
the said James Bond has not performed the same order, it is therefore now
further ordered that a commission shall be awarded out of this court to
Lawrence Slaughtow and Thomas Taylor, esquires, William Prossor,
Edward Cooke, and Richard Sawkyn, gentlemen, or to any four, three, or
two of them to pull down the louver of the same dove house and cause the
same house to be made plain and fit for an apple loft or granary as afore-
said and to certify this court of their proceeding therein on the utas of
St. Hilary next coming.

2. Katherine Ayliffe v. John Duke (Ch. 1655)

*A court of equity will grant relief against a common law judgment in
order to prevent a double payment and fraud.*

I

British Library MS. Hargr. 174, f. 21v, pl. 1⁹

Mrs. Aylofffe tore [up] a bond of £800. [There was] a verdict against her
in an action on the case for the £800, against which her bill was to be

⁹ Another copy of this report is British Library MS. Hargr. 99, f. 59v, pl. 8.

relieved. Her equity was that the bond was but a collateral security and that, if the bond were in being, the obligee ought not in equity to be admitted to recover thereupon etc. and that, though the jury had done well in the verdict for £800 because the bond was for £800, yet she ought to have the same relief against the verdict in equity as she might have had against the bond if it were in being. And upon this she was relieved. And in this case, the bill did not complain of or arraign the verdict but admitted the verdict and sought relief upon the original equity.

II

2 Freeman's Reports 152, 22 English Reports 1124

Mrs. Aylofffe tore a bond of £800; a verdict passed against her for £800 in an action of the case; she prayed relief here, for that the bond was but a collateral security, and that, if the bond were in being, the obligee, in equity, should be barred of his recovery thereon; and therefore, though the jury had done well in their verdict for £800, the bond being for £800, yet she ought to have the same remedy against the verdict in equity as she might have had against the bond if it were in being; and upon this she was relieved. And in this case the bill did not complain of or arraign the verdict but admitted the verdict and sought relief upon the original equity.

III

Public Record Office C.33/203, f. 723 (20 February 1655)

Katherine Ayliffe, the relict of John Ayliffe, Esquire, deceased, plaintiff [versus] John Duke, the elder, John Duke, the younger, and George Duke and his wife, defendants.

Where by an order of the 16th of December last it was ordered that the injunction granted in this cause should continue and stand in force and that the plaintiff should have further time for bringing in the 600 pounds recovered at [common] law till the last day of Hilary term last, upon opening of the matter this present day unto this court by Mr. Attorney General,¹⁰ Mr. Churchill, and Mr. Pierce, being of the defendants' counsel, in the presence of Mr. Chute and Mr. Pecke of counsel with the plaintiff, it was alleged by the said defendants' counsel that the said money was recovered at [common] law in an action of the case and formerly ordered to be brought into court and that if the plaintiff should die, the same would be

¹⁰ Edmund Prideaux (died 1659).

lost and therefore prayed that the said 600 pounds might be brought into court or in default thereof, the said injunction be dissolved. And it being further alleged that the plaintiff had [during] the last vacation examined her witnesses by commission, no commissioner being present nor any witnesses examined for the defendants, it was also prayed that the said commission might be renewed. But the plaintiff's counsel offering for reasons why the said injunction should be continued without bringing the said money into court that by a former order made upon hearing counsel on both sides, the said injunction was continued till the hearing of the cause upon the merits thereof, it appearing even by the answers of the said defendants that there was a practice and collusion among the defendants to defraud the plaintiff, and in default of the plaintiff's bringing in the said money, the defendants were left to prosecute the orders of the court to compel the plaintiffs thereunto and also for that publication was passed and the cause already set down to be heard, this court thereupon and upon long debate of the matter and upon hearing what was alleged on either side thought [it] not fit to dissolve the said injunction but that the same be continued and stand in force till the hearing of the cause but do nevertheless order that the plaintiff do by the general seal [day] give such sureties as Dr. Bennet, one of the masters of this court, shall allow of to abide the order of the court upon hearing of the cause and that in default thereof, the injunction is dissolved and do also order that the said defendants first making affidavit that neither they nor any for them have seen nor will see any of the depositions already taken nor of the plaintiff's interrogatories until they have examined all their witnesses, the defendants may renew the said commission, and publication of such depositions is to pass by Easter, and that the cause do stand to be heard the next term.

IV

Public Record Office C.33/203, f. 992 (21 May 1655)

Katherine Ayliffe, widow, the relict of John Ayliffe, Esquire, deceased, plaintiff [versus] John Duke, the father, Esquire, John Duke, the son, gentleman, and George Duke, the elder, and Elizabeth, his wife, defendants.

Upon hearing and debating of the same matter in question between the said parties this present day in the presence of counsel learned on both sides, the plaintiff's bill being to be relieved against an action at [common] law brought against the plaintiff by John Duke, the son, and a verdict obtained thereupon with 600 pounds damages for [the] cancelling of a bond of 1000 pounds for payment of 500 pounds entered [into] by the defendant George Duke to John Duke, the son, it appearing to this court that Sir

George Ayliffe together with John Ayliffe, Esquire, the plaintiff's late husband, and Edward Hyde, Esquire,¹¹ became bound unto the defendant, John Duke, the father, in a bond of 3000 pounds for payment of 1500 pounds being the [marriage] portion of the defendant Elizabeth, daughter of the said Sir George Ayliffe, with the said George Duke and that although the plaintiff, who is executrix of her said late husband, John Ayliffe, who was executor of the said Sir George, had no assets neither of the estate of the said John Ayliffe nor of the estate of the said Sir George, and the estate of the said Edward Hyde was sold according to [an] Act of Parliament,¹² so as the remainder of the marriage portion being near about 900 pounds unpaid after the decease of the said Sir George, and John Ayliffe became desperate, yet the plaintiff being willing to pay the same so as the said George Duke and Elizabeth might have the benefit thereof but not otherwise, the said John Duke, the father, to induce such payment did by letter of attorney assign the said 3000 pound bond for payment of the residue of the said portion unto the said George to receive the same to the proper use of the said George Duke, which bond and letter of attorney being in the hands of the said George and Elizabeth were showed to the plaintiff the better to move her to make payment of the remainder of the said portion unto the said George. But before the plaintiff engaged for the same, it was discovered to her that the said defendant Duke, the father, had at the time of such assignment of the said bond caused the said George Duke to enter into the said bond of 1000 pounds to the said John, the son, at which she was much offended, and perceiving thereby that her kindness intended to the defendant George and Elizabeth would by that bond be diverted, refused to pay or secure the remainder of the said portion until the said 1000 pound bond were delivered up. And thereupon, the said bond was then delivered by the said John Duke, the father, to the said Elizabeth and by her brought to the plaintiff, who cancelled the same and then gave security for payment of the remainder of the said portion unto the defendant George and accordingly paid the same long since.

Yet four years after, when all the said moneys was [sic] paid, the said action at [common] law is brought against the plaintiff in the name of the defendant John Duke, the younger, for [the] cancelling of the said bond, and the said verdict and damages thereupon given and the said John, the father, produced and sworn as a witness at the trial for the said John, the

¹¹ Edward Hyde (1609 - 1674) married in 1629 Anne, daughter of Sir George Ayliffe; she died six months later. In 1655, Hyde, a royalist, was in exile. With the restoration of the monarchy in 1660, he was made Lord Chancellor and Earl of Clarendon (cf. Dictionary of National Biography).

¹² Act of 1651: C. H. Firth and R. S. Rait, *Acts and Ordinances of the Interregnum, 1642 - 1660*, vol. 2 (1911), p. 520.

son, and it appearing that the said John, the son, was not present at the entering into the said 1000 pound bond nor privy thereunto till afterwards when he was made acquainted therewith, neither had he ever the same bond in his custody, but the same was still kept by the said John, the father, and by him delivered to the said Elizabeth and so brought to the plaintiff and cancelled and security afterwards was given as aforesaid, it also appearing that the said John, the father, had before engaged himself for 2000 pounds to the said John, the son, and intended this 500 pounds to pay part thereof, which never came to him so as such engagement of the father to the said John, his son, is not impaired by anything done by the plaintiff.

But it was insisted upon on the behalf of the defendants that it was an action wherein damages only were recoverable, and they had a verdict at [common] law and that the matter of the plaintiff's bill might have been given in evidence at the trial and that the bond was not delivered up to that end, that it might be cancelled.

This court nevertheless upon reading the proofs and so much of the matter charged as is confessed by the said defendants in the answer and observing the circumstances appearing in this cause upon what occasion and by and from whom this bond is brought and put into the plaintiff's hands and of her entering security after the cancelling thereof for payment of the remainder of the said portion and how, after the same, all was paid and four years elapsed the said action is brought and verdict obtained and fully satisfied of the combination and practice in the bill charged, and conceive the said bond of 1000 pounds so contrived by the father was intended upon the matter to his own use, and the name of John, the son, used only in trust for the father that with that 500 pounds so much of his debt might have been paid, and do hold it unconscionable that the plaintiff, who was moved out of her charity and affection to her husband's sister to make payment of the debt so accounted desperate and who would not have engaged for the same, if the said other bond had not first been cancelled, would by this contrivance amongst the defendants be made liable to such double payment of the same debt by the said action and proceeding which are a part of the said practice when the plaintiff reaped no benefit by [the] cancelling of the said bond, and for that John, the son, if there were any just debt to him, might have relief for the same either against the said George Duke or the said John, the father, but the plaintiff can have no other relief but by this suit, their lordships thereupon declared that the plaintiff ought to have relief in this court and do therefore order and decree that the defendants shall be debarred of and from all further proceeding in the said action and shall seal and execute to the plaintiff a release of the said action and the cause thereof and that the injunction formerly granted in this cause be continued and stand in force and that the recognizance entered into by the

plaintiff to abide the order of this court upon the hearing of this cause be vacated and delivered up.

3. William Morehead v. Margaret Douglas (Ex. 1655)

A person cannot sue in equity where the same matter has been adjudicated at common law.

I

British Library MS. Lansd. 1077, f. 60v, pl. 5

Michaelis 1655. In Scaccario sur demurrer al bil d'estre relieve apres Judgment, Le demurrer fuit allow en Moorewood et Douglas case. Et enconter ceo les presidents del chancery fueront monstre, mes per le chief baron ils ne obligera cest court. Et come avant dit fuit l'opinion de tous les Justices d'Angleterre 29 Elizabethae. Throckmorton et Sir Moyle Finche's case in Cancellaria.

Translation

[In] Michaelmas [term] 1655, in the Exchequer on a demurrer to a bill to be relieved after a judgment [at common law], the demurrer was allowed in Moorewood and Douglas' case. And against this the precedents from the Chancery were shown. But according to the Chief Baron, they do not bind this court. And as before said, it was the opinion of all the justices of England in 29 Eliz. [1586 - 1587] in *Throckmorton and Sir Moyle Finch's Case* in the Court of Chancery.¹³

II

Hardres' Reports 23, 145 English Reports 360

An English bill was preferred to be relieved against a judgment obtained at law upon nihil dicit in debt upon an obligation, the equity of the bill being that the money was paid. To this bill there was a demurrer upon the Statute of 4 Hen. IV,¹⁴ that after judgment the party shall be in rest and

¹³ *E. Coke*, Institutes (1644), vol. 4, p. 86. The proceedings in the related common law case are reported in 1 Anderson 303, 123 English Reports 485; Croke (Eliz.) 221, 78 English Reports 477; Moore (K. B.) 291, 72 English Reports 587; 2 Leonard 134, 74 English Reports 420.

¹⁴ Stat. 4 Hen. IV, chap. 23, Statutes of the Realm, vol. 2, p. 142.

peace unless error or attaint be brought. And the court allowed the demurrer. And *Langham and Limbry's Case* was cited in point, which was ruled in the House of Lords by the advice of all the justices in the last Long Parliament, the matter being 18,000¹ damages given in an action of covenant and judgment [had] thereupon. And the case betwixt *Throgmorton and Sir Moyle Finch*, wherein it was adjudged that after judgment for the mortgagee in ejectment, a court of equity cannot relieve the mortgagor, but he ought to have preferred his bill before judgment. And though the preamble of the Act does not mention courts of equity, yet by construction, the Statute extends to them.

III

Public Record Office E. 125/36, f. 262, pl. 2 (20 November 1655)

Whereas William Morehead in Easter term last did exhibit his English bill into this Court [of Exchequer] against Margaret Douglas, widow, defendant, to be relieved touching a judgment of £500 alleged to be surreptitiously obtained by the said defendant upon a nihil dicit against the said plaintiff in the Court of the Upper Bench the said Morehead alleging that he had no notice of any declaration before he was charged in execution, to which bill the said defendant put in a demurrer thereby setting forth that by divers acts of Parliament¹⁵ after judgment once obtained the parties thereunto ought to be in peace and the same ought not to be again examined in any court of equity, upon reading of which bill and demurrer upon Saturday the 23rd of June in Trinity term last and upon hearing of His Highness' Attorney General¹⁶ on the behalf of the said plaintiff and of Mr. Atkyns on the behalf of the said defendant, it was then ordered by the court that all things should rest as then they were and that the said cause should be continued in the paper of causes and that the court should be attended with precedents where relief has been given upon a bill in equity after a judgment obtained at law which cause being continued in the paper for Saturday the 27th of October this term and neither side then attending, the same was put out of the paper, and upon Friday the 18th of this instant November upon the motion of Mr. Watts of counsel with the said plaintiff offering divers precedents in Chancery, this court did order that the said plaintiff should attend this court with precedents of orders of this court, which last

¹⁵ Perhaps this is a reference to the Act of 21 August 1654, chapters 27 to 30, *C. H. Firth and R. S. Rait, Acts and Ordinances of the Interregnum, 1642 - 1660*, vol. 2 (1911), pp. 955 - 956; this statute restricts injunctions after judgments at common law but it does not absolutely prohibit them.

¹⁶ Edmund Prideaux (died 1659).

mentioned order is not yet drawn up by the said plaintiff nor has he shown any such precedents. Now upon the motion of Mr. Atkyns on the behalf of the said defendant desiring that the said demurrer might be determined, it is thereupon this day ordered by the court that the said cause upon the said bill and demurrer shall be put into the paper of demurrers for Saturday next and the counsel on both sides to attend and in the mean time the said defendant may attend the barons of this court with copies of the said bill and demurrer in case the said plaintiff shall neglect to attend them with the same.

IV

Public Record Office E. 125/36, f. 273, pl. 1 (24 November 1655)

Whereas William Morehead in Easter term last did exhibit his bill into this court against Margaret Douglas, widow, defendant, to be relieved touching a judgment of five hundred pounds alleged to be surreptitiously obtained by the said defendant against the said plaintiff by a nihil dicit in the Court of the Upper Bench the said Morehead alleging that he had no notice of any declaration before he was charged in execution, to which bill the said defendant put in a demurrer thereby setting forth that by divers acts of Parliament after judgment once obtained the parties thereunto ought to be in peace and the same ought not to be again examined in any court of equity, upon [the] reading of which bill and demurrer upon Saturday the 23rd day of June in Trinity term last, it was ordered by the court that the court should be attended with precedents where relief has been given upon a bill in equity after judgment obtained at law, since which time the said plaintiff attending with some precedents in Chancery, this court did direct that the said plaintiff should attend with some precedents of orders of this court, and the said plaintiff failing to show any such precedents, upon Tuesday the 20th of this instant November, upon the motion of Mr. Atkyns on the behalf of the said defendant desiring that the said demurrer might be determined, it was ordered by the court that the said cause should be put into the paper of demurrers for this day and then counsel on both sides to attend and in the mean time the barons were to be attended with copies of the said bill and demurrer as by the said last recited order more at large appears, now upon [the] hearing of His Highness' Attorney General, Mr. Johnson, and Mr. Watts, of counsel with the said plaintiff, and of Mr. Atkyns, of counsel with the said defendant, upon full and deliberate hearing of counsel on both sides and after long debate of the matter, the court is fully satisfied and clearly of [the] opinion that the said demurrer is good and sufficient, and therefore it is this day ordered by the court that the said demurrer shall stand.

4. William Curtis v. Thomas Smallridge (Ch. 1664)

In this case, the plaintiff who had been defrauded by the defendant had no excuse for not raising the matter in an earlier common law action, and the equity court refused to grant a remedy.

I

Public Record Office C.33/219, f. 403 (6 February 1663)

Williamus Curtis, querens v. Thomam Smallridge et Dorotheam uxorem eius et alios defendentes.

Upon examination of the matter this day unto this Court by Master Sandford being of the plaintiff's counsel, it was alleged that the plaintiff by his bill set forth that the defendant, Thomas Smallridge, being acquainted with the plaintiff and being in a very necessitous condition did by himself and the defendant, Dorothy, his wife, or some other by their appointment, order, and direction borrow of the plaintiff and Mary, his wife, several sums of money amounting in the whole to the sum of £112 and for security thereof did deposit as a pledge or pawn in the plaintiff's or his wife's hands several goods and pieces of plate promising to repay the said £112 within three months, which being expired, and the plaintiff calling for his money, the defendant, by combination endeavoring to defeat the plaintiff thereof, did not only refuse to pay the said £112, but the said Thomas Smallridge upon pretense [that] the said plate and goods was [sic] pawned without his consent, privity, or direction has brought an action of trover and conversion against the plaintiff for the said goods and plate and the plaintiff not being provided with witnesses at the trial to prove the pawning of these goods and plate and loan of the said money to the said defendants or to his use, he the said defendant got a verdict against the said plaintiff for £180 damages for the said goods and plate and has entered up judgment thereupon and does threaten to take the plaintiff in execution of the same. Therefore to have a discovery of the fraud and whether the said plate was not pawned by the direction and order of the defendants and the money of the plaintiff lent thereupon disposed of by or to the use of the defendants is the scope of the plaintiff's bill. Whereunto the defendants have answered and though the defendant Thomas does deny his consent in the pawning of the plate or borrowing of the said money, yet the defendant Dorothy by her answers set forth that she did by the persuasions of one Margaret Deane, who was formerly her servant, lend the several goods and parcels of plate to her, the said Deane, for the use of a seaman's wife then in child bed for a month, and at the end of the said month, the said Deane coming to her

with the plaintiff's wife desired the defendant Dorothy's consent to borrow of the said plaintiff's wife £100 upon the said goods and plate which the said Dorothy Smallridge assented unto, and though as she pretends the same was done without her husband's consent, yet it resting wholly upon the proofs to make the said fraud appear which in equity the defendant ought to make good it was prayed that an injunction may be awarded for stay of execution upon the said judgment of £180 so had and obtained upon the said action of trover and conversion as aforesaid until the hearing of the cause, whereupon it is ordered that the plaintiff do by the last day of the term bring the £100 recovered upon the said action unto this Court and upon bringing the same into Court by the time aforesaid, an injunction is awarded for stay of the defendants' proceedings at [common] law against the plaintiff upon the said judgment of £180, and in the meantime, all proceedings at law thereupon against the plaintiff are stayed.

II

1 Chancery Cases 43, 22 English Reports 685

The defendant's wife had pawned her husband's plate to the plaintiff for £110. The defendant in trover for this recovered £115 damages against the plaintiff and [had] judgment for it. A bill was to be relieved against this judgment for that the defendant was privy to the pawning and had the £110. And the proofs being read, it appeared that the defendant had confessed so much, which if it had been proved at the trial, it was agreed the defendant could not have recovered in the trover; and there being no proof now that the defendant at law could not by reason of any accident have [had] his witnesses at the trial, the Court would not on any neglect of his grant a new trial.

And it was insisted upon as a rule, that nothing shall be a ground to direct a new trial to avoid a judgment at law that would not be ground for a bill of review to reverse a decree, and a confession subsequent to a decree [is] no ground for a bill of review. Nor is the want of any evidence or matter which might have been used in the first cause and of which the party had then knowledge any ground for a bill of review; and here is no proof but that the plaintiff might have had the witnesses that were examined here at the trial.

And so this cause was dismissed.

III

1 Equity Cases Abridged 377, 21 English Reports 1114

The defendant's wife had pawned her husband's plate to the plaintiff for £110, for which the defendant in trover had recovered £115 damages against the plaintiff and [had] judgment for it. The plaintiff exhibited his bill to be relieved against the judgment and to have a new trial, suggesting that the defendant was privy to the pawning and received the £110. And the proofs being read, it appeared that the defendant had confessed so much, which, if it had been proved at the trial, it was agreed the defendant could not have recovered on the trover; but there being no proof now that the plaintiff at law could not by reason of any accident, have his witnesses at the trial, the Court would not, on any neglect of his, grant a new trial.

IV

2 Freeman's Reports 178, 22 English Reports 1143

The defendant's wife had pawned her husband's plate, and the husband recovered £1500 [sic] in trover. The plaintiff exhibited his bill here, and it appeared that the pawning was by the husband's consent and he received the money.

Curia: Because it does not appear that by any accident the defendant was hindered of his witnesses at the trial, we will not order a new trial; and [it was] taken for a rule that the court will not set aside a trial at law for any matter which might be made use of at the trial, and here nothing appears but the defendant at the trial might have produced this evidence, and we will not help his negligence. So there can be no bill of review for any matter which might have been made use of in the first cause or for any matter subsequent to the decree, as the plaintiff's confession.

V

Public Record Office C.33/221, f. 499 (26 January 1664)

Williamus Curtis querens [versus] Thomam Smallridge et Dorotheam, uxorem eius, defendentes.

Upon hearing and debating of the matter in question between the said parties this present day in the presence of counsel learned on both sides the scope of the plaintiff's bill being to be relieved against a judgment at

[common] law obtained by the defendant against the plaintiff in the Court of King's Bench for £180 besides costs upon an action of trover and conversion brought by the said defendant for certain goods and plate in the bill particularly mentioned, which the plaintiff by his bill alleges were pawned to him for security of £112 by him lent to the defendant and his wife and that he paid the £112 unto one Anne Downing by the order of the defendant and his wife and that, for want of his witness, the plaintiff could make no good defense at [common] law at the trial but the co[unsel] for the defendants insisted that the defendant Thomas Smallridge denies by his answer that he ever had any acquaintance with the plaintiff or that he ever borrowed any money of him upon any account whatsoever or sent his wife or any other to borrow any of him and denies also that the goods and plate in the bill mentioned or any other were by his consent, privity, or knowledge brought to the plaintiff's house and pawned or that he knows the said Anne Downing or that he ever gave order to the plaintiff or his wife to pay any money to her neither was the £112 or any other sum lent or paid to him or to his use by the plaintiff and says that upon an action brought by him for his said goods and plate which were privately conveyed out of his house he obtained a verdict in Hilary Term 1661 upon full evidence and afterwards judgment thereupon for £194 damages and costs.

And the defendant's wife by her answer denies also that she ever received any money upon the pawn of the said goods or that the same were pawned by her to the plaintiff and says that the same were privately conveyed out of the defendants' house without her husband's consent or knowledge by one Margaret Deane, formerly a servant of the defendants, who pretended to borrow them for the use of a seaman's wife to furnish a room for some time promising that the defendant should have a considerable profit for the use thereof and that the same should be safely returned. But she denies that Deane ever paid her any money for the use thereof.

This Court upon long debate of the matter and reading of the proofs in the cause and hearing of what was alleged on either side saw no cause or ground in equity to make a decree for the plaintiff's relief and does therefore order that the matter of the plaintiff's bill be from thenceforth clearly and absolutely dismissed out of this Court but who this [sic] nevertheless in regard the defendants have received¹⁷ out of court £180 formerly brought in by the plaintiff and the defendants' counsel now proposing to accept the residue of the money recovered at [common] law together with their costs and thereupon to acknowledge satisfaction upon the judgment aforesaid, it is ordered that the plaintiff do pay unto the defendant the sum of £14 besides the residue of the £194 recovered at [common] law and also the said defendants' costs at [common] law in a month next without serving of

¹⁷ See the order of 25 February 1663, PRO C. 33/219, f. 329.

pro[cess] on the plaintiff for that purpose and thereupon the said Smallridge is upon a release of errors from the plaintiff at the plaintiff's charge to acknowledge satisfaction upon record upon the said judgment.

5. Leonard Robinson v. Anne Bell (Ch. 1690)

Where a party's sworn attorney, an officer of a common law court, filed the wrong pleading by mistake, this is an accident which a court of equity will relieve.

Where a person mistakenly admits that he has received money due to a deceased person and a court of common law orders him to pay that money to someone but he never received the money, this is a mistake which a court of equity will relieve.

I

2 Vernon's Reports 146, 23 English Reports 701

[A] bill [was filed] to be relieved against a judgment in an action of debt upon a bond upon *plenement administr[avit]* pleaded. The bill surmised that there were several debts still unsatisfied of a higher nature than the defendant's and that the plaintiff had given directions to his attorney to plead specially, and he had not assets *ultra* what would satisfy those debts, but he by mistake had pleaded generally, *plenement administr[avit]*, and further charged that the now defendant, by her friends, applied to the plaintiff, to know the value of the testator's estate, and of the debts that were owing by him. And he informed them thereof accordingly and at their desire he was prevailed upon, for the now defendant's satisfaction to write a letter to the defendant, and therein to mention the particulars of the said testator's estate. And in the letter so by him written, he mentioned three hundred pounds as due on a mortgage to the said testator. And upon the producing of that letter at the trial, the judge took it as sufficient evidence to prove that the three hundred pounds came to the defendant's hands and directed the jury accordingly; whereas in truth, after such time as the plaintiff wrote that letter, he discovered that it was a bad security, there being three precedent mortgages on the same lands, so that the three hundred pounds is not received but is all standing out at this day, the defendant confessing the letter and that it was given in evidence at the trial at law. And it appearing that there were such precedent mortgages and that the three hundred pounds was still standing out upon that security, the Court thought fit to relieve the plaintiff and granted an injunction to stay proceedings at law and directed an account of assets and on payment of what should appear due to the defendant to acknowledge satisfaction of the judgment.

And the Lord Commissioner Hutchins said he thought the plaintiff was proper in this court for relief upon both points and cited a case in the Lord Bacon's time¹⁸ where upon an action of debt upon a bond of seven hundred pounds brought against one as executor, he pleaded *ne unques executor*; and upon the evidence it appeared that a chimney back or other matter of very small value had come to his hands, and thereupon a verdict passed against him, and the judges came into court and informed the Lord Keeper this was the fact; and the party was relieved in equity. And he also cited the case of *Cryer and Goodhand*, in my Lord Nottingham's time,¹⁹ where in an action of debt brought against the widow of an ale house keeper, who died intestate, she pleaded *ne unques executor*; and all the proof that was against her was that she had taken money for some few pots of ale sold in the house after her husband's death, and upon [the] hearing she was relieved.

II

I Equity Cases Abridged 237, 21 English Reports 1015

But where an executor exhibited a bill to be relieved against a judgment obtained against him and surmised that he gave directions to his attorney to plead specially that he had not assets *ultra* what would satisfy debts of a higher nature but that the attorney pleaded generally *plenement administravit* and, on the issue, a letter which he had been persuaded to write by the importunity of the defendant's friends giving an account of the testator's estate, and in which was an acknowledgment of £300 due to the testator on a mortgage was given in evidence and held sufficient by the Court and jury to charge him, but he proving that this mortgage was worth nothing, there being three precedent mortgages on the same estate, and that he had not notice of it at the writing of the letter, the Court relieved him.

III

Public Record Office C.33/274, f. 744 v (5 July 1690)

Leonardus Robinson, generosus, [et] Leonardus Robinson, mercator, administratores Stephani Robinson, generosi, defuncti, querentes [versus] Annam Bell, viduam et relictam et administratrix Christofori Bell, defuncti, defendentem.

¹⁸ Francis Bacon was Chancellor from 1617 to 1621.

¹⁹ He was Chancellor from 1673 to 1682.

This cause coming this present day to be heard and debated before the Right Honorable the Lord Chancellor etc. in the presence of counsel learned on both sides, the substance of the plaintiffs' bill appeared to be that the said Stephen Robinson, deceased, entered into [a] bond to the said Christopher Bell dated 1 January 28 Carolus II [1677] of £100 penalty for payment of £50 and interest and about February 1682 died intestate possessed of a personal estate of about £432 9^s value and no more and that the plaintiffs took out administration of the same estate and possessed so much thereof as they could come by and exhibited a true inventory of all the intestate's estate and have paid for the intestate's debts justly owing by him on judgments and specialties, funeral charges, [and] charges of administration more than the value of his estate which came to their hands whereby they have fully administered nor does any part of the said estate in the plaintiffs' hands remain unadministered nor on the 4th of April 35 Carolus Secundi [1683] nor at any time since did any of the said estate remain in the plaintiffs' hands unadministered, yet the defendant as executrix or administratrix of her husband sued the bond in the [Court of] Common Pleas against the plaintiffs as administrators, who pleaded *plene administravit*, and that they had no goods in their hands to be administered nor had on the day of [the] purchasing [of] the defendant's original writ or at any time after, and the defendant by her replication pleaded that the plaintiffs on the day of purchasing the said writ, *videlicet* the 4th of April, had goods of the intestate in their hands to the value of the said debt, whereupon issue was joined and tried at [the] York Assizes, and [that] the plaintiffs hoped the defendant would have admitted the plaintiffs' payment of such of the intestate's debts as the defendant knew were really paid, which if she had done, the plaintiffs could not have been charged with assets, and that one Gregory Harthforth, being indebted to the plaintiffs' intestate in about £350, for securing thereof, mortgaged to him certain lands in Lorrwsikes, who did not suspect any prior mortgage or incumbrance, and failure being made in payment of the mortgage money, the intestate entered on the mortgaged premises or part thereof, after which the same were stocked partly with the intestate's and partly with Harthforth's goods and the intestate's goods remaining thereon at his death were inventoried by the plaintiffs among other [of] the intestate's personal estate, but that after the intestate's death, it appeared that the said Gregory Harthforth or some who were before him seised of the mortgaged premises had several encumbrances thereon or the greatest part thereof, *videlicet* three several mortgages, one to Mr. Wrightson, another to Mr. Johnson, another to Mr. Scott for securing £100 and interest to each of the said persons respectively on their respective mortgages, all which with interest were at the intestate's death, and the same or greatest part thereof still are in arrears and unpaid, as the plaintiffs were informed, besides other encumbrances

prior to the intestate's and that the plaintiff never received any part of the mortgage money or interest but possession of the premises being deceived by the said Harthforth and the mortgagees the plaintiffs cannot have possession of the premises unless they will discharge the said mortgages and encumbrances, which are more than the full value of the premises, and that Christopher Bell, the defendant's father-in-law, on the defendant's behalf requesting the plaintiffs to pay the bond the plaintiff Leonard Robinson, gentleman, did afterwards write a letter to the said Christopher or the defendant wherein the plaintiff made a general calculation of what the intestate's estate amounted unto at his death and therein about £350 is mentioned to be owing on the mortgaged premises and the encumbrances thereon, *videlicet* thus to Mr. Johnson £100, to Mr. Wrightson £100, to Mr. Scott £100, and mention is also made what debts of the intestate the plaintiff had paid or given new securities for, by which it appears [that] the plaintiff had no assets to satisfy the defendant's debt but had fully administered for whereas after mention therein is made of the value of the intestate's goods comprised in the inventory and are therein owned to have come to the plaintiffs' hands in another item, mention is made of £350 to be upon [the] Lorrwsikes land, yet the plaintiffs had not received the same or any part thereof, nor can it be intended they should be charged therewith or received as appears by the nature and method of the said calculation and that the plaintiffs had not received the said mortgage moneys or any part thereof appears by their affidavits that yet at the said trial the defendant obtained a verdict against the plaintiffs, whereby it was found they had in their hands assets to £100 value, or some such sum, liable to the defendant's debt whereas had not the plaintiffs been charged with the mortgage moneys as come to their hands, the jury could not have found assets in their hands, and the assets then found were so found merely on mistake and misconstruction of the said letter and the calculation therein and not on any other evidence, and besides the plaintiffs' attorney by mistake and without their order pleaded *plene administravit* generally when [sic] as there are several judgments yet standing out obtained against the intestate for great sums really due, and that before the plaintiffs had notice of the defendants' original though not before the teste they had paid several debts due on specialties of as high a nature as the defendants' debt, all which ought to have been pleaded specially, and that the intestate in his lifetime paid all or the greatest part of the principal and interest secured on the said bond and, therefore, to be relieved in the premises is the scope of the bill, whereto the defendant by answer sets forth the bond and believes the intestate's death and administration granted to the plaintiff of the intestate's estate, as in the bill, and that the plaintiffs possessed the same or so much as would have enabled them to pay the intestate's just debts especially the defendant's if the estate had been rightly applied believes several omissions

and undervaluations in the inventory, and says that her husband died intestate the first of October, 1679, and administration of his estate was granted to the defendant, whereby she became entitled to her personal estate and particularly to the said debt and confessed she brought an action of debt, and such proceedings were thereon as in the bill and that on a fair trial, the jury gave their verdict and found to the value of the said in the plaintiffs' hands, whereupon judgment was entered for the defendant in the [Court of] Common Pleas and costs taxed and says that the plaintiff, Leonard Robinson, sent a letter to the defendant's father-in-law wherein he made a calculation of part of the intestate's estate then to their hands but had omitted [the] other part as [he] believes and that therein among other things there is £350 mentioned to be due upon Lorrrowsikes to the plaintiffs' intestate, and that the defendant having obtained such verdict as aforesaid intends to levy the principal, interest, and costs, and that the plaintiffs' failing to prove their plea, the defendant obtained the said verdict and not merely and only in the misconstruction and mistakes of the said letter and denies any part of the principal or interest due on the bond was ever paid to the defendant's husband or to the defendant since his death save one year's interest due the first of January, 1682, paid the defendant being the last time interest was paid, and says that on payment of principal, interest, and costs, she is willing to deliver up the bond and acknowledge satisfaction on the judgment as the court shall direct.

Whereupon and upon long debate of the matter and hearing what was alleged on both sides and reading of the plaintiffs' letter and the proofs taken in the cause, Their Lordships declared they were fully satisfied [that] the said verdict was obtained upon a mistake and misconstruction of the plaintiff's letter and that therefore the plaintiffs ought to be relieved against the said verdict and do order and decree the same accordingly and that it be referred to Sir John Franklyn, Knight, etc., to take an account of the intestate's personal estate and certify what the same does in the whole amount unto and what part thereof has come to the plaintiffs', the administrators', hands and how they have administered and disposed thereof and what part is yet standing out and what debts the plaintiffs have paid and what remains unpaid and on what securities due in taking of which account the said master is to make unto the said administrators all just and fitting allowances for debts, funerals, costs, charges, and all other necessary expenses and to certify whether the plaintiffs had fully administered all the intestate's estate on the said fourth of April and the administrators are (if the defendant thinks fit) to be examined on interrogatories for the better discovery of the same estate, but as touching the repayment of the £71 paid by the plaintiffs to the defendant upon continuing the injunction till the hearing and now prayed by the plaintiffs counsel to be repaid to the plaintiffs, this Court do reserve their directions touching the same as also

the consideration of costs on either side till after the account [is] taken, and the said master is to be armed with a commission for the examination of witnesses touching the matters to him referred if he shall see cause.

6. William Crane v. John Hill (Ex. 1695)

A court of equity will grant relief against a common law judgment where the plaintiff at common law who had sold a fee simple afterwards took and set up a superior title or precedent encumbrance to evict his own conveyance.

I

Lincoln's Inn MS. Misc. 559, f. 10
(Edward Ward's Reports)²⁰

The case upon the hearing appeared to be thus, the plaintiff Crane was a creditor to the defendant Hill's father and to the defendant for several sums of money, some lent and secured and others for which they were sureties for the said defendant and his father. And the defendant's father having an estate in lands (and amongst others of the rectory of Hales) all of about 300^l per annum but greatly incumbered with mortgages, judgments, and otherwise and himself living in obscure and privileged places,²¹ and the defendant, his eldest son, having little or nothing to live on (though bred at the university) was supplied with some moneys by the plaintiff for his living, for which he gave the plaintiff security by bond and otherwise. And the defendant's father happening to die in Gray's Inn about the 8th of September 1675, his death was made known to the plaintiff but not to the defendant. And before the defendant knew of his father's death, viz. on the 10th of September 1675, the plaintiff and defendant entered into a treaty about the plaintiff's purchasing the defendant's father's estate and the plaintiff's interest therein. And thereupon the 13th of the same September, articles in writing under the hands and seals of the plaintiff and defendant were entered into whereby defendant sold to Crane, the plaintiff, in fee all his father's estates in Norfolk or Suffolk the plaintiff to find defendant board for a certain time and paying some small sums about 20^l and some time after 30^l and after that 40^l per annum for the defendant's life and to discharge the defendant from all engagements to the plaintiff. And upon this there was only 5^s paid immediately. After entering into these articles,

²⁰ Another copy of this report is Georgetown University Law School MS. B88 - 8, p. 257.

²¹ I.e. he had absconded and was hiding from his creditors.

the defendant understood that his father was dead at the time of the articles, and then he considered with himself whether he should perform or stand to the articles or not his father being dead, which he knew not of when he entered into the articles. And an uncle of the defendant's offered to buy the estate of the defendant. But the defendant refused to sell to his uncle, but after notice of his father's death upon consideration went on with the plaintiff though upon some better terms the plaintiff having offered to quit all his pretenses to the articles or bargain, if the defendant would pay plaintiff what he and his father owed him and save him harmless against their debts for which he was engaged.

And thereupon the 13th of the same September, the defendant executed a deed of feoffment to the plaintiff of the whole estate in consideration of the discharge by the plaintiff of a bond of 600^l for payment of 300^l and two other bonds of 100^l apiece from defendant's father to plaintiff and plaintiff's discharge of a book debt of 80^l due from defendant to plaintiff and of the payment of an annuity of 30^l per annum to defendant for five years and of 40^l per annum after for defendant's life to be secured out of the estate, and by that feoffment grants and conveys the whole estate to plaintiff and his heirs.

And one of the liveries that was made was made upon the glebe, tithes, rights, and dues of the church of Hales. And by this conveyance (which indeed was defective), the defendant was to be saved harmless against his father's mortgages. And a month after all this, *viz.* by lease and release of the 12th and 13th of October 1675, the defendant for the consideration of 735^l 15^s owned to be paid by plaintiff to him and also for the consideration that the plaintiff should secure to the defendant the said two annuities of 30^l for five years and of 40^l per annum after for the defendant's life unto the defendant, the defendant conveyed to the plaintiff and his heirs all his said father's estate, and amongst the rest by particular and express words the impropriations of Hales and Heckenham in Hales and all glebe, tithes, etc. thereto belonging, with covenants for further assurance, quiet enjoyment, and freedom from encumbrances against himself and all claiming under him. There was the defendant's receipt proved for the 735^l 15^s, and the two annuities of 30^l and 40^l per annum were secured by the plaintiff to the defendant by and out of all the estate conveyed to him. And this lease and release was executed by the defendant to the plaintiff knowingly and willingly and under the deliberation of a month and dictated and fully understood by the defendant as was proved in the cause and a fine levied at [the] same time which mentions not the rectory of Hales, though the lease and release do. There happened to be mesne encumbrances upon the estate by mortgage and judgments, some whereof were paid off by plaintiff others secured against by him and others compounded, and amongst the rest old

Hill mortgaged part to one Bishop, the benefit of which ought to have come to Roger Cooke, but Crane, the plaintiff, denying the mortgage and insisting upon himself to be a purchaser without notice (though he after came to have the counterpart of the mortgage by him), the plaintiff paid nothing upon that mortgage, though he did upon others, and enjoyed the estate subject to the encumbrances for fifteen or sixteen years and paid the annuities all the time as they became due. Only the defendant in 1682 gave the plaintiff some trouble in Chancery endeavoring to set aside the bargain (but his bill was in truth upon hearing dismissed though that dismissal [was] not drawn up).

And afterwards in or about the year 1692, there was brought to the defendant's solicitor's house enclosed in a paper from an unknown person a lease in writing dated the 4th of May 1587, whereby it was mentioned that Sir Edward Clere leased to the defendant's grandfather John Hill the rectory of Hales with the glebe, etc. and perpetual advowson of the vicarage of Hales for one thousand years rendering 4^s rent yearly to Sir Edward for his life then to Robert his son and the heirs male of Robert, then to the right heirs of Sir Edward. Upon this the defendant Hill takes administration de bonis non etc. of his grandfather and brought his ejectment at law and recovered before Chief Justice Holt, though it no way appeared that ever this rectory was enjoyed by or how it came from the Cleres. And to be relieved against this lease and recovery, the now plaintiff exhibited his English bill.

And the case appearing to be as above, it was by opinion of the chief baron and of Lechmere and Powis, barons, (*dissentiente* Baron Turton) decreed for the plaintiff that this lease should be delivered up and that there should be a perpetual injunction against the said lease and verdict and that upon these reasons.

First, though the articles of the 10th of September were obtained from the defendant when he knew not of his father's death and so probably not so advantageous terms were made for the defendant as he might have made had he then known his father had been dead or possibly he might not have sold at all, yet those articles were ineffectual for the plaintiff to have had any execution in specie thereupon in any court of equity as well upon the frame of them as the manner of obtaining of them and the smallness of the consideration money paid being only 5^s and had the defendant stopped there, the plaintiff had been remediless thereupon, though it appeared that the plaintiff was an honest creditor and security for the defendant and his father and the plaintiff was in that respect the more excusable in gaining those articles in regard it was in proof that he offered to release them upon receiving what was justly due to him for the defendant's and his father's debts and being saved harmless against his securities entered into for them.

Secondly, that when the defendant knew of his father's death and had full consideration of the whole matter, yet he chose to go on with the plaintiff and refused his uncle's offers and thereupon executed the deed of feoffment of the 13th of September in person making thereby something better terms for himself than he had done by the articles.

Thirdly, that if both articles and feoffment had signified nothing, yet when the defendant came to London a month after and gave instruction to counsel to draw the lease and release of the 12th and 13th of October, which were perused by and read to him and he had full knowledge of their effect, and willingly executed the same (as was proved in the cause) and the considerations therein were better to the defendant than the articles and feoffment and levied a fine and took a security for his rent charges and received the same several years without further claim and it not being pretended but that the defendant was of full age and sound mind and under no force or surprise when he did all this and having covenanted for quiet enjoyment, freedom from encumbrances, and further assurance and the defendant having both in the feoffment and lease and release expressly conveyed the rectory of Hales in fee and taken it back *inter alia* for security of his rent charges, it must be understood that the defendant did intend to convey that rectory and did take a consideration for the fee simple of it as in possession, and that having so done it is against conscience for himself to set up another title in himself, though as administrator and so in another right, to evict that estate which he before sold and took money for as a fee simple in possession, and the rather for that it does not appear that the defendant paid one penny for that old stale lease, or that one penny of his grandfather's debts remain unpaid or that ever the Cleres had any title to or possession of the rectory of Hales.

And therefore the court looked upon the plaintiff upon the whole matter to be a purchaser of that rectory with the other estates for a valuable consideration *bona fide* and without notice of that lease and so relievable within the ordinary rules of equity, which never suffers a man that sells a fee simple in possession to take in and set up a precedent incumbrance to evict his own conveyance. And though Hales rectory was not mentioned in the fine, yet it was in the lease and release which passed the inheritance of it well enough to the plaintiff. And by virtue of his covenant for further assurance [he] may be compelled to levy a fine of it when required. And though the plaintiff might do ill to put in such an answer as he did to Roger Cooke's bill, yet thereby the defendant admits that his estate was mortgaged to Bishop and that the mortgage was due and that the plaintiff took the land charged, though he used ill means to defraud Bishop of the debt, which cannot help the defendant in this case nor make his case better.

So it was decreed *ut supra* and that the plaintiff by his own consent should pay the defendant his rent [in] arrears and the future payments as it shall grow due. And the defendant's agent and solicitor upon those terms submitted to the decree and to deliver up the lease.

II

Public Record Office E.126/16, f. 303 (7 December 1695)

Whereas William Crane, Gentleman, did in the Term of St. Hilary which was in the fifth year of the reign of his now majesty King William and the late Queen Mary exhibit his bill into this court against John Hill showing that in the year 1675 the said John Hill and William Hill, his late father, being indebted to him the plaintiff and others by judgments, mortgages, and otherwise to the value of three thousand pounds and upwards and the said William Hill being lately dead and the defendant John, being his son and heir, became thereupon seised in fee of several farms, rectories, and other premises in the several parishes of Hales, Raveningham, Heckingham, Hadstoe, North Cove, Barnaby, Holton, and Halesworth in the counties of Norfolk and Suffolk and did propose to sell the same to him the plaintiff and that the plaintiff should discharge him of the debt he owed the plaintiff and of all debts the plaintiff was bound to him for, which amounted to one thousand pounds and upwards, and take the said estate subject to the debts which were owing by his father charged upon the said lands that the plaintiff did agree to settle on the defendant out of the said lands thirty pounds per annum for the first five years after the sale thereof and forty pounds per annum for so many years as he should live free and clear of all manner of deduction of taxes, that the defendant affirmed he had contracted no debts but what was due to the plaintiff to which the said were or could be liable to be charged, that the defendant by lease and release dated the twelfth and thirteenth days of October 1675 and in consideration of seven hundred thirty-five pounds fifteen shillings paid by him the plaintiff to the defendant, and for that he had secured to the defendant for eighty-nine years from the nine and twentieth of September 1675 an annuity of thirty pounds per annum for five years and afterwards forty pounds per annum payable half yearly for his life the defendant did convey to him and his heirs all his said lands, tenements, rectories, and other premises in the aforesaid parishes, and particularly the impropriation, parsonage, and rectories impropriate of Hales and Heckingham and all glebes, glebe lands, and tithes of what sort soever belonging to the same, further showing that the defendant did covenant that he the plaintiff should peaceably and quietly enjoy the same premises free from encumbrances and that he would make

further assurances and would surrender so much of the premises as was copyhold, that the defendant put him into the possession of the same and the plaintiff by indenture dated the fourteenth of October 1675 demised that part of the premises as was agreed of to the defendant for eighty-nine years determinable upon his death to secure the payment of the annuities, that ever since the release he has enjoyed the premises (except such part thereof as he suffered the mortgagees who have entered thereon to enjoy for their respective moneys lent), that he has constantly paid the annuities and discharged the several encumbrances that were upon the premises out of which the annuity issued, further showing that the defendant lately brought an ejectment for the rectory, glebe, and tithes of Hales and at [the] Norfolk Summer Assizes held at Norwich in 1693 upon an old lease made about one hundred years since by Sir Edward Clere to John Hill, great grandfather to the defendant, to whom the defendant had lately gotten and obtained a verdict against the plaintiff by surprise he being wholly ignorant of the same and in no sort prepared to make a defense to it at that time, that the defendant makes use of the said verdict to obstruct him from receiving the arrears of his tithes, that the defendant threatens to sue out execution on the said verdict and yet insists on the whole annuity and pretends the purchase money has not been paid nor the agreement performed, the plaintiff further showing that he paid one Robert Freeman a debt of forty pounds due unto him upon [a] bond from the defendant and likewise thirty pounds due upon [a] bond to one James Barber which the defendant promised should be repaid unto him out of the annuity, that the defendant absconds and yet receives his annuity by deputies, that the said old lease ought to be set side or the defendant to convey his interest in the same to him, the plaintiff, who has been a purchaser and in possession above eighteen years, that he may be paid out of the said annuity what he has paid to the said Freeman and Barber, and that the old lease may be delivered up or conveyed to him and a perpetual injunction granted him against the said verdict and he quieted in his peaceable enjoyment of the said rectory, glebe, and tithes was the scope of the bill and prayed the process of this court against the defendant, who, being therewith served, appeared and put in his answer and confessed his father, being indebted to several persons, in the year 1675 for protection came to Gray's Inn, made no provision for him though his only son, that he was left in a sad condition, that soon after his father died there seised of an estate (as reported) of four hundred pounds per annum, which descended to him, that he being at the plaintiff's house at the time of his father's death the plaintiff, not taking notice of his death, told him he would propose a way for his living better than ever he did, that he proposed to him to convey all the estate whereof his father was seised to him the plaintiff and that he would pay all his and his father's debts and pay him the annuity, as in the bill, that not hearing of his father's

death and fearing that he might be arrested by some of his creditors and imprisoned and die for want of maintenance did agree to accept of the plaintiff's proposals, that articles were executed between them to that purpose that day, that soon after hearing of his father's death would have receded from the said agreement but was told by some present that his father had so entangled the estate that it was too great for him to contend with, confesses he did levy, assign, and execute a conveyance of his father's freehold estate to the plaintiff, knows not the dates of them, sets forth several judgments the estate is liable to besides other judgments and a mortgage of two hundred and fifty pounds to one Bishop, fears that if the plaintiff should die, the demise made for his annuity would be of little force, denies that the plaintiff has constantly paid him his annuity, says that he having obtained a verdict against the plaintiff for the rectory of Hales, parcel of his father's possession, the plaintiff has ever since withheld the payment of the said annuity, that the plaintiff has exhibited his bill to be relieved against the said verdict and has brought a writ of error, confesses he stood engaged with his two brothers since dead to Freeman and Barber, as in the bill, believes the plaintiff paid those debts, that he took out letters of administration de bonis non of his great grandfather, confesses the lease made by Sir Edward Clere, as in the bill, on which he brought the ejectment, that his great grandfather died intestate in the year 1605, that administration was granted to William Hill, his grandfather, who held the same for several years, that he did in the year 1639 upon [the] marriage between his father and mother settle the said capital messuage and lands with divers other lands upon his, the said defendant's, father and also assigned the said lease of the said rectory lands lying intermixed with other lands, believes the plaintiff did in an answer to a bill at the suit of one Beake and others, creditors of his father, own the said rectory to be a lease, says the said rectory was not put into the fines by him acknowledged, that the said lease was sent in a blank paper to his solicitor, who advised with counsel thereon, who advised the said ejectment, that the administration was taken after the conveyances made by him to the plaintiff, that he sold the plaintiff nothing but what was his father's estate of inheritance as he hopes will appear by the articles, denies the said lease is surrendered or made void, denies that his said grandfather or father did hold the said rectory as a fee simple estate, says that if the said rectory be put in the indenture of release, he hopes the same is not comprised in the same articles of agreement, that he shall not be obliged to make an assurance thereof to the plaintiff, that he had never had anything of the plaintiff for the said estate save five shillings and the annuity and the pretended seven hundred and thirty pounds in the release mentioned that the same was made up of the penalties of bonds wherein he was bound with his brothers, that the bonds were given for clothes, that in equity there is nothing due to the plaintiff, that the plaintiff

arresting his father a little before he came to Gray's Inn for eight hundred pounds and forced him not only to confess judgments but also to convey an estate of thirty pounds per annum for those debts which were owing, confesses he exhibited a bill in [the Court of] Chancery not only to be relieved for the consideration money mentioned in the deed of purchase but also to compel the plaintiff to free the premises demised to him for security of his annuity from encumbrances, admits his bill was dismissed, to which answer, the plaintiff replied. And issue being joined, witnesses were examined. And the depositions being duly published, the Court was on the five and twentieth day of January in the sixth year of his now Majesty and the late Queen Mary [1694] moved by Mr. Thompson of counsel with the said plaintiff that the depositions of witnesses taken in the cause lately depending in the Court of Chancery wherein the now defendant was plaintiff and the now plaintiff was defendant might be made use of at the hearing of this cause, the which this court did then order, now this cause, being put into the paper of causes, came this day to be heard in Serjeant's Inn Hall in Fleet Street before the Right Honorable Sir Edward Ward, Knight, Lord Chief Baron, Sir Nicholas Lechmere, Knight, Sir John Turton, Knight, and Sir Littleton Powys, Knight, the rest of the barons of this court, where upon opening of the plaintiff's bill by Mr. Turner, of counsel with the plaintiff, and of the defendant's answer by Mr. Dodd, of counsel with the defendant, and on hearing Sir Thomas Trevor, Knight, his Majesty's Attorney General, Sir Thomas Jenner, Knight, serjeant at law, Mr. Newport, Mr. Mulsoe, and the said Mr. Turner, on behalf of the plaintiff, and Sir Francis Winnington, Knight, Mr. Ettrick, and the said Mr. Dodd, on behalf of the defendant, and on reading several of the depositions of witnesses taken in the Court of Chancery in the said cause wherein the defendant John Hill was plaintiff and the plaintiff Crane was defendant as also of several depositions of witnesses taken in the said cause in this court and of the articles of agreement made between the plaintiff and defendant dated the tenth day of September 1675 as also the deed of feoffment dated the thirteenth of the said month of September and the lease and release mentioned in the said bill and the fine thereon levied and of the old lease made by Sir Edward Clere to the defendant's great grandfather set forth in the defendant's answer and also of several mortgages made of the premises and copies of several judgments which were encumbrances on the said premises at the time of the plaintiff's purchase, the court declared the plaintiff ought to be relieved against the said old lease and the verdict obtained at law for the said rectory of Hales under the said lease to which the defendant had got administration the said rectory being sold and conveyed as an inheritance by the defendant Hill to the complainant²² and enjoyed as such near twenty years by the said com-

²² I. e., the plaintiff.

plainant under the defendant's own conveyance, it is therefore this day ordered, adjudged, and decreed by this Court that the said old lease dated the fourth of May 1587 from Sir Edward Clere to John Hill be delivered up to the plaintiff and that a perpetual injunction be awarded under the seal of this Court against the said verdict and lease and to quiet the plaintiff in his possession of the said rectory of Hales and the glebe and tithes without costs and the plaintiff is to pay unto the defendant the arrears of his annuity and to pay^e the same as it shall grow due according to the said agreement and to clear the estate secured for the payment thereof from encumbrances.

7. John Kent v. Oliver Bridgman (Ch. 1704)

A court of equity will relieve against a common law judgment that was the result of a party's accidental failure to prove a technical fact that was not in issue.

I

Precedents in Chancery 233, 24 English Reports 113

A. recovers a judgment against the defendant's father, and the plaintiff (the sheriff's bailiff) levied £24 of goods in the possession of the defendant's father; the defendant brought trover against the plaintiff, pretending the goods were his, because the landlord had seized them for rent and sold them to him; but on evidence, the sale was proved fraudulent and that the father was in possession all along and paid taxes for the farm and goods, etc., and therefore the judge gave directions to the jury to find for the defendant at law; but because he had not proved a copy of the judgment, as it was held he ought, for that only reason the jury found against him.

And now he brought this bill for relief, and [there was] a demurrer to it [which] on arguing was overruled. Then by answer he insisted on his property under the bill of sale and [the] recovery at law, where the matter is properly triable, and relied on that without examining any witnesses; but the plaintiff fully proved his case as before and that the judge altered his directions only for want of proof of the judgment and disproved the defendant's answer in some particulars, and a perpetual injunction was granted against the judgment, and the defendant [was ordered] to pay costs; for though it were examinable at law, so it was in equity, and the plaintiff having set out the whole matter and proved it to be true, if it were untrue, the defendant might have disproved it.

II

2 Equity Cases Abridged 159, 22 English Reports 136

A. recovered a judgment against the defendant's father, and plaintiff (the sheriff's officer) levied £20 of goods in the father's possession; the defendant (in equity) brought trover against the plaintiff (in equity) pretending the goods were sold to him by a bill of sale, but on evidence the sale was proved fraudulent; whereupon a verdict was directed to be given for the defendant (at law); but for want of his proving a copy of the judgment, as it was held he ought, the jury, for that reason only, found for the plaintiff.

On a bill brought for relief, the defendant (in equity) by his answer insisted on his property under the bill of sale and recovery at law where the matter is properly triable and relied on that without going to proofs; but the plaintiff (in equity) fully proved his case and that the judge altered his directions only for want of proof of the judgment and disproved the answer in some particulars. A perpetual injunction was granted against the judgment and the defendant [was ordered] to pay costs, for though it was examinable at law, so it was in equity too, and plaintiff having set out the whole matter, and proved it to be true, if it were not so, the defendant might have disproved it.

III

Public Record Office C.33/303, f. 107 (16 December 1704)

[Inter] Johannem Kent, querentem [et] Oliver Bridgman, senior, Oliver Bridgman, junior, Johannem Bridgman, Johannem Oliver, et Nathaniel Stearne, defendentes.

Upon hearing and debating the matter in question between the said parties this present day in the presence of the counsel learned on both sides, the substance of the plaintiff's bill appeared to be that the defendant Bridgman senior, being indebted to one John King in £70 or thereabouts, did about Michaelmas term 1696 suffer the said King to obtain judgment against him for the said £70 and 40 shillings costs, and that about the 2d of June 13 Will. III [1701] a [writ of] fieri facias issued against him for the same directed to the sheriff of Cambridgeshire, who made a warrant to the plaintiff to levy the said debt and costs on the goods of the defendant Bridgman senior, and the plaintiff accordingly levied the same to the value of £24, 15 shillings, five pence, and paid the same to the sheriff before the return of the warrant, notwithstanding which the defendants pretend the said goods were not the goods of the defendant Bridgman senior but of the defendants Bridgman junior and John Bridgman and that they gave a valuable consideration

for the same, and sometimes they pretend them to be the goods of the defendant Oliver and that he bought them of the defendant Stearne, then bailiff of Sir John Copley, and that the same were seized by him for rent due to Sir John though Sir John nor the defendant Stearne did not regularly seize the said goods having not appraised or inventoried the same, but the defendant Bridgman senior, being indebted as aforesaid to the plaintiff and others and being afraid of having his seized, to prevent the same made a pretended seizure of the said goods and by bill of sale sold them to the defendant Oliver although no consideration [was] given, and the defendant Bridgman senior notwithstanding the seizure did continue in his farm and in possession of the said goods and sold the produce of the said farm and sold some part of the cattle, and the defendants did not intermeddle therein until the plaintiff had seized as aforesaid, that under color of the said sale, the defendants Bridgman [junior] and John Bridgman claim the goods although never in possession of them and have commenced an action against the plaintiff for the said goods and cattle and brought the said [action] to trial where, upon a full evidence, the matter appeared as before set forth, and the judge before whom the said cause was tried was fully satisfied therein, but just at the close of the cause, the counsel for the then plaintiff insisted that the [now] plaintiff had only proved the writ of execution and warrant thereon but had not proved the copy of the judgment whereon the said execution was grounded, which the plaintiff could easily have done had he not been advised that there was no need thereof and for that reason only was not prepared therein, and the court adjudging that such proof was necessary, for want of it only a verdict was given against the now plaintiff, and the defendants threaten to take out execution thereon, which is contrary to equity, therefore that the defendants may discover the said bill of sale and whether the defendant Bridgman senior was not in the actual possession of the said goods seized upon by the plaintiff as aforesaid at the time of the plaintiff's seizure thereof and to be relieved against the said verdict at [common] law and that the defendants may pay the plaintiff his costs and to be relieved in the premises is the scope of the bill, whereto the defendants' counsel insisted that the said defendants by their answer set forth that the said defendant Bridgman senior was indebted to one King, and that about Michaelmas term 1696 such judgment was had against him, and that then and several years after him [sic] he rented a farm of Sir John Copley in Cambridgeshire, and being much in arrear of rent, the defendant Stearne, then steward to Sir John, in the year 1698 distrained the goods of the defendant Bridgman senior for £54 rent due to Sir John, and the defendant Bridgman senior says he is advised [that] the goods were regularly distrained by the defendant Stearne for rent and sold to the defendant Oliver for £50, and the defendant Bridgman senior quitted his farm, and soon after the defendant Stearne let it to the defendant John Oliver, who desired the defendant Stearne to take

back part of the goods amounting to £27, nine shillings, which he did, whereupon Oliver paid the rest of the money due for the goods, and the said farm being too great for the defendant Oliver, he soon after did quit the house and a moiety thereof, and then the defendant Stearne did let the same to the defendant Bridgman junior, who entered on the said lands and then being informed that several of the goods before distrained by Stearne and returned by the said John Oliver were in Stearne's hands, the defendants Bridgman junior and John Bridgman the 17th of February 1700 bought the same, and the defendants Oliver Bridgman junior and John Bridgman and the defendant Stearne say that that [sic] the £12 mentioned to be in hand paid was really paid by the defendants Bridgman junior and John Bridgman and the £15, nine shillings, mentioned to be secured was secured and a good part paid by them for Sir John Copley's use, and that an agreement was made and the goods bought and delivered fairly without any fraud whatsoever, and the defendant Bridgman senior says the goods distrained were sold for payment of his rent in arrear, and believes King sued out a fieri facias and that a warrant was made thereupon, as the bill sets forth, and the defendants Bridgman senior, Oliver Bridgman junior, and John Bridgman believe the goods were taken in execution but deny that any of the goods from the time of the distress or since have been or then were Bridgman senior's goods, say they were the sole goods of the defendants Bridgman junior and John Bridgman, know not what the goods taken in execution were valued at, what return was made by the plaintiff or money paid by him or the sheriff, but believe the plaintiff was indemnified therein by King and that he and the plaintiff know that the said goods were the goods of Bridgman junior and John Bridgman and not Bridgman senior, and say the plaintiff unjustly seizing the goods, the defendants Bridgman junior and John Bridgman brought an action of trespass against the plaintiff and obtained a verdict for £13 and hope the same, being fairly obtained, will not be set aside, and believe the defendant Stearne did regularly distrain the goods aforesaid so taken in execution by the plaintiff, and deny that any other sale was made thereof than as aforesaid, and all the said defendants deny that the bill of sale was anyways altered after the executing thereof, whereupon and upon debate of the matter and reading of the defendants' demurrer and the order for [the] overruling of the same and the copy of the judgment together with the proofs taken in the cause and hearing what was insisted on by the counsel on both sides, this court declared that the plaintiff ought to be relieved against the said verdict and does therefore think fit and so order and decree that a perpetual injunction be awarded against the said defendants for stay of their further proceedings at [common] law against the plaintiff touching the matters in question, and it is further ordered that the said defendants do pay unto the plaintiff his costs of this suit, and it is hereby referred to Mr. Keck to tax the same.