2015

Thomas Bold's Chancery Reports

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(1717-1719)

Lincoln's Inn MS. Hill 73

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INTRODUCTION

Thomas Bold was born in 1695, the son of William Bold of St. Bride's Parish, London. He entered Westminster School in 1708 and Christ Church, Oxford, on 23 June 1713. Bold received his B.A. in 1718 and an M.A. in 1721. He was admitted as a law student at the Middle Temple on 15 June 1711 and called to the bar on 31 May 1717. He was admitted *ad eundem* at Lincoln's Inn on 23 November 1717.[1]

Lincoln's Inn MS. Hill 73 is a short manuscript is a long notebook signed by Thomas Bold. The text is in the same handwriting as the signature. The cases date from 1717 to 1719 and are from the Court of Chancery except for *Gregg v. Raymond* (K.B. c. 1719), Case No. 58, at p. 114 of the manuscript, and three common law cases from 1719, *Copden v. Vancittern* (1719), *Wright v. Pope* (1719), and *Anonymous* (1719), at the end of the book, reversing. These Chancery reports are well reported though rather brief.

This manuscript was sold by Thomas Osborne (d. 1767), a bookseller at Gray's Inn Gateway, London, to George Hill (1716-1808), King's Serjeant. It was bought by Lincoln's Inn in 1808.[2]

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[1] G. F. R. Barker and A. H. Stenning, *The Record of Old Westminster* (1928), vol. 1, p. 101; J. Foster, *Alumni Oxonienses* (1891), part 1, vol. 1, p. 145; H. A. C. Sturgess, *Register of Admission to the . . . Middle Temple* (1949), vol. 1, p. 269; *Records . . . of Lincoln's Inn, Admissions* (1896), vol. 1, p. 380.

[2] J. H. Baker, *English Legal Manuscripts*, vol. 2, pp. 80-84 (1978).

TABLE OF CASES REPORTED

[These references are to case numbers, not page numbers.]

THOMAS BOLD'S CHANCERY REPORTS

1

Anonymous
(Ch. 1717)

Expenses that are contracted for are payable only for the duration of the contract.

31 July 1717. Sir Joseph Jekyll; Rolls.

The plaintiff was sent to Bilbao by the defendant as master of a ship to carry it safe to Spain to lade and unlade as he thought fit upon the allowance of £6 *per mensem* for himself and 30s. for his man. The ship was taken by a Spanish privateer and adjudged a good prize at Bilbao, upon which the plaintiff appeals to the superior court of admiralty at Madrid and stays in Spain twenty-four months, for which he demanded reasonable costs, the allowances agreed to by the defendant. But it appearing that he was only master of the ship and not the agent or factor to the part owners (the office of the master being only to convoy, to lade, and unlade, etc.) that he acted without the privity of the owners, the allowance was only made to the time of the capture, otherwise the charge of the plaintiff staying at Spain had been more than the loss of the ship.

2

Anonymous
(Ch. c. 1717)

A contract to pay a proportion of the costs of defending a lawsuit is valid and enforceable.

The vicar of Lampeter, being informed that he had a right to receive the small tithes of apples, pears, etc. in kind, demanded them of the parish. They, thinking it an innovation, refuse and enter into articles that whosoever the vicar should make defendant in the cause

should represent the whole parish and that the whole parish would acquiesce in the judgment given and bear an equal share of the charge of any suit or suits, action or actions, commenced in any ecclesiastical or other court. The vicar recovered against the defendant, who became plaintiff in this suit, and the whole parish.

But the defendant in this cause and one who died insolvent did according to their articles in writing bear their proportion of the charge. The defendant pretended that he knew of no such articles as obliged to bear any share of the charge in any but the ecclesiastical [court].

The Master [was ordered] to compute his share and costs for the present suit.

3

Anonymous
(Ch. c. 1717)

Unless a will specifies otherwise, interest on general legacies does not accrue until there is a demand for payment.

If general legacies are left and the legatees demur and make no demand of them, they shall only have interest from the time of their exhibiting their bill by way of demand. But where it is specified by the will that they shall bear interest from the death of the testator, though the will lie dormant twelve years etc., interest must be allowed for that term.

4

Anonymous
(Ch. c. 1717)

Where an estate tail is devised subject to debts and legacies payable out of the profits and the value of the estate is very small, a court of equity can order the estate to be sold in order to pay the debts and legacies.

When an estate tail is left subject to debts and legacies and children's fortunes to be raised out of the rents and profits of the

estate so that the estate should not be sold, but yet, if the profits of the estate are so small that it would be many years before the legacies and portions could be satisfied, Baron PRICE was of opinion the estate ought to be sold to discharge them. Otherwise, how could those portions [be paid] which were to be paid when the children came to the age of twenty-one or marriage when perhaps, by the mesne profits of the estate, they would be raised within treble that time?

5

Anonymous
(Ch. c. 1717)

In this case, a surety was held liable for a bond debt, the principal debtor being insolvent and the debt being unpaid.

[Upon a] judgment upon a bond in 1696 [that was] sued execution in 1715, the surety for the bond prayed to be relieved against the plaintiff and to have a perpetual injunction to stay execution upon that judgment for that it charged but could not produce the bond cancelled but, if it had been produced, satisfaction of the judgment ought to be acknowledged upon record.

An injunction was upon the hearing denied, it plainly appearing the debtor was insolvent and the surety had been in the Fleet [Prison] etc. in a very low condition, far from being able to satisfy the judgment until within a very little time before the taking out of execution.

6

Anonymous
(Ch. c. 1717)

A court will not order specific performance of an oral lease.

In a suit involving land, the reversioner in fee as well as the devisee for life must be a party.

The plaintiff prayed that the defendant might be compelled to perform the articles of an indenture by [which] a lease for twenty-one years was granted to the plaintiff. The agreement was reduced into

writing but never was signed and sealed by either party. By virtue of the parol lease, the plaintiff entered and held the same about the term of seven years during the life of the lessor, upon whose death, the devisee of the lessor, taking the farm etc. in Whitchurch, Oxfordshire, to be underlet, demanded an advancement of the rent to £50 from £43, to which the plaintiff at first agreed, by which it appears he waived his right of twenty-one years to come. It is in direct opposition to the Statute of Frauds and Perjuries,[1] for if this should be allowed because the tenant entered, no parol lease but what might elude the Statute, which was made in order to prevent the very mischief for which the plaintiff deserves to be relieved. [. . .] the bringing of evidence to declare what agreement was made between the parties. The defendant had a verdict at law before.

The plaintiff was ordered by the Master of the Rolls [JEKYLL] to deliver possession to the defendant [and] to be allowed for what he had laid out towards next years crop. The defendant was only a devisee for life, but they should have made the reversioner of the fee party to the suit. If there had been any lasting improvements made, the devisee for life ought not alone to allow for it, but he in reversion.

7

Anonymous
(Ch. 1718)

A court of equity will not grant relief against a final judgment at common law unless new facts are alleged so as to make out a new case.

An executor can retain assets to satisfy debts owed to him by the decedent's estate.

17 May 1718. LORD PARKER, Chancellor.

A bill was dismissed for that, after having gone through the whole course of law, the plaintiff comes into Chancery for relief in the same thing that he had recovered at law without setting forth any new matter in his bill in equity. The case was a mother raises £400 for the advancement of her son, [*blank*] O'Hara, but takes a bond from

[1] Stat. 29 Car. II, c. 3 (*SR*, V, 839-842).

him to secure to her the interest of the said sum during her life at the rate of £24 *per annum*. The son buys a commission and, being very much straitened in his circumstances through great misfortunes, was supplied with necessaries by an uncle and aunt, his mother refusing to do anything for him, and with several sums of money to a very large account. The son, being sensible of the kindness his uncle had done him, was very uneasy until he was secured his money. And, being in a condition not like to live long, he frequently desired his uncle to sell his said commission and satisfy his just debt. And he made a will and left his aunt some acknowledgment for her care and tenderness to him and made his uncle executor. The uncle, before the death of the son, sold the commission. And the question was whether the said money, there never having been any account stated between them, should be reckoned as a payment of the debt of the uncle or whether it should be assets in his hands and liable to other debts.

MY LORD [PARKER] decreed it should be reckoned a fair payment and not assets. And he said further that, if the son had recovered and after he had empowered his uncle to sell the commission to pay himself and the commission, by virtue of such power, had been sold and he had repented of it and would not agree to such payment, the uncle would have been very proper for relief in equity.

But as to what was said in relation to the mother's debt, her not having called upon her son for the interest during his life, that, therefore, it should be esteemed a gift, MY LORD was quite of another opinion, for she was entitled to call for it when she would, either of her son or any representative of him. And though it might be so far intentionally a gift in the mother as only to keep her son by such bond hanging over him in a due obedience, yet it not appearing so by any words of the mother or any other plain circumstances, it was decreed to be a debt remaining upon the estate of the son and to be satisfied out of the assets.

There was an objection made that the uncle had paid himself out of the money he received some debts after the death of the said son as the apothecary's bill etc., which he ought to be upon the foot with other creditors.

But MY LORD said that those debts were raised upon the credit of the uncle and he stood bound for them and that, therefore, he ought to pay himself those as well as any other debts.

8

Marks v. Marks
(Part 1)
(Ch. 1718)

An executory devise, a possibility, and a condition in a devisee can pass to the devisee's heirs and personal representatives.

The testator made to Daniel and his heir provided always nevertheless subject to the payment of £500 [. . .] his brother Nathaniel at his age of twenty-one. Nathaniel dies before he attained the age of twenty-one.

[Where] an estate [is] made to a man and his heirs, if the feoffee dies without heirs, it reverts to the donor. (N.B. Tom L-atham's Case.)

An executory devise that depends upon the performances of some act in the father, nothing can descend to the son without the father's performing that act. (N.B. [. . .] Case.)

A devise to Ann, his wife, for life, remainder to Daniel Marks and his heirs subject to this condition that, if Nathaniel pay the sum of £500 [. . .] three months after the death of Ann to Daniel, his executors, and administrators if the estate should remain to Nathaniel, his heirs, and assigns forever. This is a condition precedent to be performed by the devisee, Daniel, himself and the estate to arise from the performance of such acts, and, nothing being vested in the father, nothing can descend to the heir at law.[1]

[1] For later proceedings in this case, see below, Case No. 53.

9

Pave v. Fisher
(Ch. c. 1718)

A devise over of a testator's personal estate after a devise for life is good.

Charles Pave etc., plaintiffs; John Fisher etc., defendants.

The bill was brought to have a trust performed and to have an account, to which end it set forth that [*blank*] did borrow £400 and £200 of Mr. Freeman and [*blank*] of Bristol, for the securing of which several sums with interest, the testator did by indenture subject his real estate and, by his last will, did confirm and ratify the said deed. And he devised his lands to two persons in trust that they should sell the same and, after the two debts above mentioned and other just debts were satisfied, they should pay the remainder to his wife. And such of his personal [estate] (all which he before gave his wife for life and made her sole executrix) that his wife should leave behind her at the time of her death, he did devise over to [*blank*].

My LORD CHANCELLOR said that, in that case, if money had been out upon security and the wife had changed the security, yet he thought the devisee of the husband would be entitled to it after the death of the wife.

He decreed an account to be taken of the rents and profits of the estate received by the trustees and that the same should be sold and the two debts specially mentioned and other the just debts of the testator should be satisfied. And he gave leave for any creditor to go before the Master to make out his just debt and the remainder to be paid to the wife, the trustees to have their costs out of the trust estate and to have all just allowances.

10

Mayor and Town of Arundel v. Wilde
(Ch. c. 1718)

A court of equity will take jurisdiction of a case in order to prevent a multiplicity of litigation.

The bill was exhibited to have an account, and it set forth that the said Town of Arundel was entitled to a toll of 2d. for every load of plank and likewise 2d. for every load of timber that was brought through the River Arundel or the sea and landed at the said Town of Arundel and that the defendants had brought 600 or a very great number of loads within a short time and that they might set forth what number of loads they had brought. And to have an account stated for the same was the bill.

The defendant expressly denied by his answer that he had brought above twenty-seven loads.

MY LORD decreed that there was no foundation of equity in the bill, that they had never been at law, where their remedy lay to try the right of this corporation to such toll, and that he would not order any account for such a sum as 40s. 2d. And so he dismissed the bill with costs.

MY LORD said, indeed, if the Mayor and Town had had several suits at law and recovered and still others refused to pay the said toll and combined together to defraud the said Town of such toll, to have the said toll settled in Chancery and to avoid multiplicity of suits, there might be some equity.

Sir Robert Raymond desired that the bill might be retained (as he said it often had been done) for a year upon condition that the plaintiffs try the cause at law within that time.

11

Bradburn v. Woodcock
(Ch. 1718-1719)

In this case, a suspicious gift was enforced but a suspicious debt was not.

The bill was to be relieved against a promissory note given by the plaintiff to the defendant and likewise to have the sum of £300 restored to the said plaintiff, to which end it set forth that the plaintiff did make his address to one Mary Hawkins, a young lady (but of age), who had £260 *per annum* in land and £1100 in money in her own hands and, being favored by the young lady, he desired Mr. Woodcock, the defendant, the curate of the parish, to marry them the same night the father of the said Mary was buried, which indecency he scrupled at. He desired them to defer it for a short time, but, at the desire of the plaintiff, went to the said Mary, who had a great confidence in him and advised her seriously not to deceive and break her promise with the plaintiff, but however the parties being very pressing to have the ceremony over, the defendant absolutely refused to perform it unless the plaintiff would indemnify him from any costs or charges he may be put to for doing the same in the ecclesiastical courts etc. as he pretended, upon which the plaintiff gave him a note of £500 for value received payable upon demand. But, at last, he refused to marry them without (as the plaintiff declared, but denied by the defendant) the sum of £300 paid down to him, which he procured the plaintiff from one Mr. Brome in the town, but Mr. Brome not having above £200 said to the defendant 'there is a debt owing by you to me, if you will pay me that, I will endeavor to furnish you with the other £100 the next morning', which accordingly the defendant did. And the plaintiff did give the said sums of £200 and £100 to the said defendant. And to have that restored as unjustly detained was the end of the bill, it being only a deposit, as the plaintiff set forth, in the defendant's hands.

The defendant, by his answer, said he was ready to deliver up the promissory note of £500 but that, as for the £300, it was an absolute gift of the said plaintiff for the service he had done in forwarding the said match.

It did not appear there was any contract or agreement or that the said defendant made the said match but, having a great influence over the lady, it was for his assistance, MY LORD deferred giving judgment.

Mr. *Mead* cited an anonymous case from Mr. Pooly's reports, where a man that was courting a woman in the Strand gave the maid £50 and a note for £100 more and, after the marriage, brought his bill and recovered both with costs.

After being attended with precedents, he decreed a perpetual injunction against the note but no relief for the money paid, as told by Bridger, the solicitor in the cause.

[Other reports of this case: Gilbert Rep. 147, 25 E.R. 103, Lincoln's Inn MS. Misc. 384, p. 28, pl. 2, Lincoln's Inn MS. Misc. 384, p. 187, pl. 1.]

12

Note
(Ch. c. 1718)

The bankruptcy of a plaintiff does not cause an abatement of a lawsuit.

A bill is not abated by the death of one of the executors nor by the plaintiff's becoming bankrupt, for the assignees may make use of the bankrupt's name and recover.

13

Anonymous
(Ch. 1718)

A person who receives money to invest for the payor must account to the person who paid the money.

Trinity term, June 14.

The plaintiff's bill [was] to call the defendant to an account for monies put into his hands by the plaintiff and which he was to allow the plaintiff at the rate of £4 per cent. The defendant pleads that he

had remitted £167 to the plaintiff's brother and that the money he had in his hands was for a security to indemnify him in his dealings with his brother. The defendant had £800 or more money of the plaintiff in his hands but then refused to trust the brother anymore when he had so much money in his hands, which, had he thought the plaintiff's money was a security for any such debt, he would not have stopped.

The defendant was ordered to be examined upon interrogatories upon bringing the sum of £167, the sum in question, into court. Costs were reserved until after the examination.

14

Warner v. Jenkins
(Ch. 1718)

A defendant can be required to make discovery of his own gross negligence.

A banker who receives stolen negotiable instruments through his own gross negligence must return them to the rightful owner.

16 June.

The plaintiff had lost some Exchequer orders, and he immediately sends to all the goldsmiths in London, among the rest, to the defendant, as he truly believed, which was as much as any honest man in such a case could swear unless some accident which at that time happened might fix it in his memory. And he put it into the News and ordered a reward to any that should bring it again to be paid at Barker's Coffee House, which the defendant confessed by his answer, was the house he most used. These orders came to the defendant's hands etc.

MY LORD [PARKER] ordered the orders to be assigned to the plaintiff, the defendant to be accountable for the interest which had been made upon them and to be examined upon interrogatories as to that point.

[Other reports of this case: Lincoln's Inn MS. Misc. 380, pt. 3, p. 188.]

15

Anonymous
(Ch. c. 1718)

A legacy to a wife that is not vested at the time of her husband's bankruptcy is not liable to his creditors.

The plaintiff was wife to one who, soon after the marriage, became bankrupt. She had a legacy left her to be paid at the age of twenty and, if she died before, then to etc. She brought her bill to be relieved against her husband and the assignees of the estate of the bankrupt, who demanded it. The husband broke and the certificate from the commissioners was signed before she was the age of twenty so that there was no right vested in her and so consequently [it was] not liable to the assignees.

16

Spence v. Allen
(Ch. 1718)

A witness can be re-examined after the publication of the depositions where the interrogatories are objected to as leading but the error of the leading questions was de minimis.

[The question was] whether the witness might be re-examined after publication passed. Harding and Coxeter [was] against it.

MY LORD [PARKER] ordered that the plaintiff should re-examine his witness as to those points in the interrogatories which were called leading and that he should not lose the benefit of examining them for the small blunder in his counsel.

[Other reports of this case: Precedents in Chancery 493, 24 E.R. 221, Gilbert Rep. 150, 25 E.R. 105, 1 Eq. Cas. Abr. 232, 21 E.R. 1012, Lincoln's Inn MS. Misc. 10, p. 265, Lincoln's Inn MS. Misc. 384, p. 39, pl. 1.]

17

Anonymous
(Ch. c. 1718)

A judgment creditor who has several judgments can execute only one of them on the debtor's land, but a mortgagee who has a judgment against his mortgagor can be satisfied for both out of his debtor's lands.

LORD CHANCELLOR: A man cannot tack three judgments together so as to hold the land until he is satisfied the whole because his legal estate is gone as soon as one judgment is satisfied. But a mortgagee that has a judgment shall protect his judgment by his mortgage and be satisfied both before he relinquishes the land.

18

Anonymous
(Ch. c. 1718)

The question in this case was whether a debtor can redeem a mortgage without also satisfying a judgment debt to the mortgagor.

[Upon] a judgment upon a term of years, the term was sold before a [writ of] *fieri facias* was sued out upon the judgment. A bill to redeem the first mortgage [was filed] without satisfying the judgment which the first mortgagee had got into his hands.

19

Anonymous
(Ch. c. 1718)

A person who has an interest in the outcome of the lawsuit cannot testify as a witness.

In an execution sued and goods taken, if any[one] comes and lays a title to them and produces a bargain and sale, the man against

whom execution sued shall not be allowed as a witness to prove it for a valuable consideration and protect his own goods.

20

Anonymous
(Ch. c. 1718)

Jointures and dower rights are encumbrances on land.
Jointresses and doweresses are purchasers.

In an appeal to the Lord Chancellor is only that he would not make a decree as his own which he has not heard.

Jointress and doweress [are] the same as an encumbrancer and a purchaser.

A general encumbrancer, as a woman in dower, must stand to receive such lands as by law they are entitled to s[. . .] a purchaser and jointress etc.

21

Sparks v. Palgrave
(Ch. 1718)

When a plaintiff-donee agrees to forebear to sue, he then becomes a purchaser.

If a person pays the consideration money for the benefit of another, that other person is a purchaser for a valuable consideration.

Where a verdict to recover lands is general and the lands cannot be found, a commission to set out the lands or lands of the like value will be granted by a court of equity.

Upon a marriage portion, deeds [were] drawn to provide for the issue of that marriage with a further provision for any children by a second wife in case of failure of issue of the first and, though the money given was a consideration for the first issue not for the second, but it is a sufficient consideration to raise a use to persons of the name and family.

Lord Chancellor [LORD PARKER]: If one man pay the consideration money for the benefit of another, that other person is a purchaser for a valuable consideration.

[Other reports of this case: Lincoln's Inn MS. Misc. 380, pt. 3, p. 193, pl. 2.]

22

Nuce v. Nugent
(Ch. 1718)

Only parties and their privies can file bills of revivor, but others may bring original bills in the nature of a bill of revivor.

A devisee or purchaser cannot revive [a suit] but privies only, as heirs, executors, and administrators.

[Other reports of this case: Lincoln's Inn MS. Misc. 380, pt. 3, p. 195.]

23

Sloan v. Cheny
(Ch. c. 1718)

Only parties and their privies can file bills of revivor, but others may bring original bills in the nature of a bill of revivor.

This [was] confirmed in a case before Lord King at his house 16 November 1725 upon a demurrer.[1] A devisee of part of the real estate was executor; so, as to the arrears, he was privy but not to the estate. He was obliged to alter the bill in the nature of a bill of revivor as devisee.

And Serjeant *Glyde* cited a case of an executor, who was likewise a mortgagee, and, by the opinion of Mr. *Vernon*, they were

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[1] *Huet v. Lord Say and Seal* (Ch. 1725), Lincoln's Inn MS. Misc.12, p. 183, Select Cases *tempore* King 53, 25 E.R. 219.

forced to revive as executors and have a bill in the nature of revivor as mortgagee.

24

Willis v. Lucas
(Ch. 1718)

In this case, a person was held to have a devise of an estate by necessary implication.

Parol evidence cannot be used to explain a will concerning land.

John Lucas had three sons, John, [*blank*], and Samuel. The testator devises his lands to his youngest son, Samuel, and subjects it to the annuities and after the death of the said Samuel and his then wife, then to the heirs of James, they likewise paying the annuities. The wife of Samuel insists she is entitled to an estate for life by implication upon the words of the will after her husband's death, his being now dead.

Cr. 75; Gardner v. Shelden;[1] the bill [was] brought by the four daughters and co-heirs of John, the son and heir of John, the testator, to call the defendant, the wife of Samuel, to account for the rents and profits of the said estate, being not entitled to any estate by implication.

Chesshyre: The difference between an estate given to one for life and to remain to another after the death of [*blank*], who would be entitled to take by descent and when to one, who is a stranger and not as heir at law, there is no necessary implication that the stranger should take. It must be a necessary implication that includes the heir at law.

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[1] *Horton v. Horton* (1605), Croke Jac. 74, 79 E.R. 63; *Gardner v. Sheldon* (1671), Vaughan 259, 124 E.R. 1064, 1 Freeman 11, 89 E.R. 9, 2 Keble 781, 84 E.R. 494, 1 Eq. Cas. Abr. 197, 21 E.R. 986.

The heir at law by the express words of the will is not to take during the life of the wife; therefore, it seems a necessary implication that the wife should have it until the heirs can take and not that it should descend to the heirs at law, who are expressly excluded until after the death of the wife.

Williams: The eldest son, the heir is by the will to have an annuity of £10, which implies he is not to have the lands but only that £10 *per annum*, and, therefore, if it is given [*blank*].

Reading v. Royston, Salkeld, vol. 1, 242;[1] a man had two daughters, seised in fee, devised his [land] to one of his daughters and her heirs; the question was whether she was in by descent in one moiety and by purchase in the other. It was held that she was in by descent in no part because they both made but one heir and consequently what descends must descend to both.

Whitcomb v. Whitcomb;[2] a man [had] two daughters by his first [wife] and a son by his second wife; he makes his will but says nothing of his lands, by which the son inherited and was seised and died soon after.

N.B. There was a devise of an annuity of £10 *per annum* to John, the heir for life.

Vernon: The annuities are charged to be paid by Samuel and his heirs only, and, therefore, if the implication should take place, the annuity would not be secured to the devisees.

Lord Chancellor [LORD PARKER]: If the plaintiff has a right, setting [?] aside the mortgage, which was satisfied [. . .] that was set up by the defendant by which he was prevented from pursuing his right at law, that ought not to be procured [?] that the title upon the construction of the will might be tried, a matter of law, it being by the words 'the heirs of Samuel' are obliged to pay the annuities even whether he has the estate or no by the £10 *per annum* for life to John,

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[1] *Reading v. Royston* (1703), 1 Salkeld 242, 91 E.R. 214, also 1 Comyns 123, 92 E.R. 994, 2 Lord Raymond 829, 92 E.R. 54, Precedents in Chancery 222, 24 E.R. 108, 2 Eq. Cas. Abr. 333, 22 E.R. 284.

[2] *Whitcombe v. Whitcombe* (1709), Precedents in Chancery 280, 24 E.R. 135.

the heir, exclude the heir in point of time. There are no exclusive words of the heir in the cases mentioned.

The case referred to before, Cr. 2, 75, Horton v. Horton, in [an action of] replevin upon a demurrer, the case [was] A. made a lease for years of the lands in question upon condition that he should not alien to any besides his children, the lessee devises part of the term to [*blank*], his son, after the death of his wife and made two strangers his executors; the lessor entered for a breach of the condition.

But, upon arguing, [it was] found for the defendant.

Query if the lessee ought not to have made his sons his executors to have performed the condition.

[Other reports of this case: 10 Modern 416, 88 E.R. 788, 1 Peere Williams 472, 24 E.R. 478, 2 Eq. Cas. Abr. 343, 363, 22 E.R. 293, 309, Lincoln's Inn MS. Misc. 384, p. 38.]

25

Bagnall v. Henton
(Ch. 1718)

A devise to several persons to share and share alike creates a tenancy in common.

Bagwell v. Heaton.

A devise [was given] to the grandchildren of the testator by two daughters, five by one of his daughters and two by another, of £200 apiece to be paid to the grandsons at the age of twenty-one, and the granddaughters at twenty-one or day of marriage, and, if any of them died before he or they attained such age as is limited, that share was to survive to the rest of them, share and share alike. One of them died in the life of the testator. Godolphin, *Legacies*, 3, 100 sect.; 2 Roll's Abr. 301. And the residue of his estate he bequeathed to his four daughters, their heirs, executors, administrators, etc. equally to be divided between them, share and share alike, which makes them tenants in common.

The defendants Edens, the grandchildren of Ely, ask the £200, which was given to one of the grandchildren and [who] died.

A case was mentioned by *Sir Robert Raymond* as in Lord Cowper's time; a devise of £500 apiece to his children equally to be divided and that it should survive.

The Lord Chancellor [LORD PARKER] decreed that the legacy which was given to the granddaughter who died in the life of the testator and which was to survive was to be paid to the surviving children as agreeable to the testator's intention in the same manner as if the granddaughter had died after the death of the testator. As to the residue devised to the said daughters, he desired to be attended with precedents [and] adjourned.

Mr. *Vernon*: Billingsby v. Shower; a devise of the residue of the estate [was made] to two executors; one of them dies before any division was made. It was adjudged that is was a joint devise and should survive to the other executor. But, afterward, it was reversed. And several cases have followed in confirmation of the last judgment that the executor of the executor shall have it.

Lord Chancellor [LORD PARKER]: As to the residue devised to the four daughters, three-fourths [was] ordered to be paid immediately to those who were entitled. As to the other part, jud[gment was] adjourned, all parties to have costs out of the estate.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 40.]

26

Proctor v. Johnson
(Ch. c. 1718)

An account can be ordered to be taken of a decedent's estate.

Upon a devise of £100 to her daughter to be paid at twenty-one or the day of marriage, but, if she die before that age, £50 of it to the plaintiff, the LORD CHANCELLOR decreed an account to be taken of the assets of Jane Hanfield.

27

Anonymous
(Ch. c. 1718)

The payment of a decedent's debts will be marshalled so that all of the debts will be paid.

A bill was brought to charge the real estate of the testator with debts of simple contracts, there being a large personal estate.

[It was] decreed that, where there are debts that will charge the lands, as all specialties and others that will fall only on the personal estate, that the real estate shall repay back to the personal estate so much of that money as the personal estate has paid in discharge of those debts which would affect the real estate [so] that all the testator's debts might be paid.

28

Anonymous
(Ch. c. 1718)

Where a lessee makes repairs, they are considered to have been made for his own benefit and not for the benefit of the lessor.

A lessee for years has a mortgage of the inheritances and lays out £700 in repairs before his term is expired; it shall be construed the repairs of the lessee for [. . .] and not of the mortgagee in possession, and he shall be redeemed without any allowance made for such repairs.

29

Butler v. Duncomb
(Ch. 1718-1719)

In this case, the marriage portion in issue was not payable according to the terms of the settlement until a later date even though the woman had married and reached the age of twenty-one.

21 July. Lord Chancellor.

Vernon: Case [. . .] Stanniford v. Stanniford; Lady Garrard v. Garrard.[1] A term vested in trustees for raising portions expectant upon an estate for life may be sold during the life of the tenant for life, being to be paid the children at the age of twenty-one or marriage after they have attained such age.

N.B. Lord Chancellor [LORD PARKER]: All remainders vest immediately that do not depend upon a contingency.

The marriage settlements [are] to the husband and wife and the issue male and, in failure of issue male, to trustees to raise fortunes for daughters.

Mead: Though the term is a vested remainder, yet the trust of the wife is contingent because, if there was issue male, there had been no use made of it.

Lutwyche, for the defendant: The term does not commence until the death of the father and mother. The words of the settlement [. . .] after the commencement of the term to be sold, mortgaged, etc. for the fortunes of younger daughters.

Stanniford v. Stanniford; an estate [was] limited to the husband for life and after to the wife for life and, in case the husband and wife died without issue male and left a daughter, then a term vested for raising such fortunes for daughters. It was decreed that the reversion should be sold in the life of the jointress.

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[1] *Staniforth v. Staniforth* (1703-1719), 2 Vernon 460, 23 E.R. 895, 1 Eq. Cas. Abr. 337, 21 E.R. 1086; *Gerrard v. Gerrard* (1704), 2 Vernon 458, 23 E.R. 894, 2 Freeman 271, 22 E.R. 1204, 1 Eq. Cas. Abr. 337, 21 E.R. 1086.

Cotton v. Cotton;[1] an estate was limited to the lady for a jointure and then a term to raise fortunes for the younger children which were eight (the words next after the commencement of the term the first payment to be made at such a feast); the court could not assist them against such words though there was no provision for their maintenance. Hellier v. Jones.[2]

Sir Robert Raymond: The term is undoubtedly vested in the trustees immediately, but the execution of the trust is not to be enforced until after the commencement of the term (which words can have no other construction but commencement in possession or computation of time). Corbet v. Maidwell, Salkeld.[3]

Williams: A daughter though first born was decreed to be a younger child and only in opposition to a son.

Lord Chancellor [LORD PARKER]: There being no maintenance for the issue during the life of the father and mother is upon the natural supposition of the father and mother providing for their issue.

The reversioner, who was by the settlement to pay £3000 if the trustees can raise this fortune during the life of the jointress and interest charged for such sum may be forced to pay or at least been charged with even more than the testator could bear, which depends upon the length of the particular estate precedent lasting.

He was of opinion that, without the words 'from and after the commencement of the term', it might have been raised before the term commenced but by these words 'from and after' is express limitation that it shall not vest until that commencement, and very natural it is to suppose the words were put in to prevent the inconveniences that would have attended the want of them, which was (as is before mentioned) the overcharging the inheritance beyond what it could possibly bear.

Adjourned [and] attend with precedents.

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[1] *Cotton v. Cotton* (1718), Lincoln's Inn MS. Misc. 384, p. 26, Lincoln's Inn MS. Misc. 10, p. 261.

[2] *Hellier v. Jones* (1689), 1 Eq. Cas. Abr. 337, 21 E.R. 1085.

[3] *Corbett v. Maidwell* (1709-1710), 1 Salkeld 159, 91 E.R. 147, also 3 Chancery Reports 190, 21 E.R. 764, 2 Vernon 640, 655, 23 E.R. 1019, 1027, 1 Eq. Cas. Abr. 337, 21 E.R. 1086

MY LORD [PARKER] observed in the cases cited that there were no express terms limited that the term should commence from.

[Other reports of this case: 2 Vernon 760, 23 E.R. 1096, 1 Peere Williams 448, 24 E.R. 466, 10 Modern 433, 88 E.R. 797, 1 Eq. Cas. Abr. 339, 21 E.R. 1088, 2 Eq. Cas. Abr. 674, 22 E.R. 566, Lincoln's Inn MS. Misc. 384, p. 43, pl. 2, British Library MS. Hargrave 77, f. 5v, pl. 1, Lincoln's Inn MS. Misc. 11, p. 122, Lincoln's Inn MS. Misc. 384, p. 174, Lincoln's Inn MS. Misc. 11, p. 132.]

30

Vincent v. Farnandez
(Ch. 1718)

A Jewish father has a duty to support his Protestant children, and this duty includes making provisions for them by a will and, if he fails to do so, the court will order provisions to be made for them out of his estate.

1 August 1718.

Upon the death of a Jew father, a daughter, who, in the lifetime of the father, turned Protestant, sued to have a maintenance allotted to her by the Chancellor according to the Statute of Anne, c. 30,[1] which enacts that, if any Jewish parent, to compel such child to change his religion, refuse such child fitting maintenance, the Lord Chancellor etc. may make such order for the maintenance of the child as he etc. think fit.

The father had made a will and left his estate, which was computed at £40,000 to the Portuguese Jews at Amsterdam in charity and, by his will, ordered the money to be paid within three months after his death. The executors alleged that they had paid it away as the will ordered. The testator died in June 1718.

My Lord [LORD PARKER] was of an opinion that that was no sufficient authority to remit the estate immediately for fear of debts and that, if upon this Act, she is entitled to a maintenance, he declared

[1] Stat. 1 Ann., c. 24 (*SR*, VIII, 74).

he took it to be a debt upon the estate, that the words of the Act were very large and ought to be construed for the benefit of the child.

He advised the executors to come to some composition.

Judgment was adjourned.

[Other reports of this case: 1 Peere Williams 524, 24 E.R. 499, 2 Eq. Cas. Abr. 513, 22 E.R. 433, Lincoln's Inn MS. Misc. 384, p. 46, pl. 1, Lincoln's Inn MS. Misc. 11, p. 40.]

31

Cope v. Cope
(Ch. 1718)

An administrator of a decedent's estate should make an account to the heir and the decedent's creditors and not to the executor of an after discovered will.

Where a bond given to a decedent cannot be found after his death, there is a presumption that the debt was paid or forgiven.

A bill for an attachment lies to garnish money that is owed to the plaintiff and that is in the hands of a third party.

Administration of a decedent's estate can be granted pendente lite *where the will is in dispute.*

A recital in one record of another record is not proof of the record.

16 October 1718. Temple Hall.

N.B. An attachment bill is only proper when money is in a person's hand who cannot himself pay the demand but must pay it to another, as an executor perhaps, who ought to pay that debt. Then, it is very proper by a bill to attach the money in that person's hands that the money may lie in his hands and that it may be applied in satisfaction of his demand.

N.B. Administration is granted often by the ecclesiastical court *pendente lite* where a will is in dispute as well as *durante minore aetate*, for, in the first case, there is no one that can take upon him the executorship until the dispute is settled, and, in the last, no one of sufficient discretion to understand it.

N.B. A recital in one record of another is no proof of the record, for a record ought to be made up of itself.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 72, Lincoln's Inn MS. Misc. 11, p. 1, British Library MS. Hargrave 81, f. 79.]

32

Shales v. Barrington
(Ch. 1718)

Parol evidence is not sufficient to settle or convey any estate nor to destroy an estate fairly settled by deeds and conveyed.

Even where a devise is made of an estate for the payment of debts, the decedent's personal estate should be first used to pay his debts.

A devise of a personal estate means such estate as the devisor shall die possessed of.

28 October.

A bill was brought by Shales, who had married a sister of Sir Charles Barrington, to establish some deeds executed by Sir Charles during his life as also his last will. And John Barrington brings a cross-bill to set aside those deeds and the last will as obtained by surprise, circumvention, etc. and that the estate ought to go as by a former settlement upon the heirs male, which was Sir John Barrington. But by those deeds and by the will, Sir Charles gives his estate to his sister, Mrs. Shales, during her life and to her male heirs taking upon them the name of Barrington. There was by Charles' will a trust of a term raised to pay the debts and legacies, and the residuum of his personal estate he gave to Sir John Barrington, the plaintiff in the cross-bill.

But, upon the most clear and undeniable proof, the deeds and will were established.

N.B. The evidence for the defendant in the original bill was only parol evidence as to what they had heard Sir Charles say and, therefore, as by the Statute of Frauds and Perjuries,[1] no parol evidence is sufficient to settle or convey any estate; so no parol

[1] Stat. 29 Car. II, c. 3 (*SR*, V, 839-842).

evidence ought to be held sufficient to destroy an estate fairly settled by deeds and conveyed.

The counsel for Sir John Barrington insisted then that the term that was raised for the payment of debts and legacies should be so applied and that the personal estate, the residue of which was given to Sir John Barrington, should come in aid of the deficiency of the said term; otherwise, that it was a void devise.

But it was held by the Lord Chancellor [LORD PARKER] that, where a devise is made of an estate for the payment of debts, that the constant construction has been that the personal estate ought, for, unless it would be to the damage of creditors by simple contract or to specific legatees, where the intent of the testator is plain and direct, but never to make a residuum only of the personal estate, that such a one might take who had no specific legacy. Sir Charles might have paid most of those debts before he died, perhaps, had he lived sometime longer and, though a devise of land can only extend to such land as the devisor was possessed of at the time of the devise, a devise of a personal estate has a future view and shall mean such estate as the devisor dies possessed of and so, by that means, there might possibly have been a residuum.

Mr. *Vernon* mentioned Lady Gainsborough's Case,[1] where the real estate was made subject to debts and those debts particularly named and even the funeral charges mentioned as such a debt as he designed should fall upon the real estate and the lady was made executrix. But the proof of the intention of the testator was what guided this cause which was Mr. Webb, who said that it was the intent of the testator that all the personal estate should be at My Lady's disposal and that he said by making her executrix and charging his real estate with his wife's [?] debts without giving a particular devise of it would be sufficient.

The counsel for Mr. Shales insisted to have their costs considering the very unnecessary charges they had been put to in the plaintiff's cross-bill examination etc.

But the Lord Chancellor [LORD PARKER] would not give costs, for, though he was not heir at law, he was in the place of an heir at

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[1] *Countess of Gainsborough v. Earl of Gainsborough* (1692), 2 Vernon 252, 23 E.R. 764, 2 Freeman 188, 22 E.R. 1152, 1 Eq. Cas. Abr. 230, 21 E.R. 1010.

law disinherited and, though he thought they had carried it on a little too far considering the weakness, he thought it would be a little too hard to decree him to pay costs. And he said it was absolutely necessary to bring the cross-bill, for Sir John had a specific legacy and [. . .] his children and though the plaintiff in the original bill did in the same bill confess the said legacies, yet that was no security to the legatee for supposing the plaintiff in the original bill had got his bill dismissed which he might have done upon paying the defendant's costs.

An account was ordered of the personal estate and the term to assist if there should be a deficiency in the personal estate.

[Other reports of this case: 1 Peere Williams 481, 24 E.R. 481, 2 Eq. Cas. Abr. 237, 22 E.R. 202.]

33

Calmady v. Calmady
(Ch. 1718)

If a testator gives a younger son more than the others, the distribution of the surplus of the estate must be equal without respect to the inequality of the will, and there will be no hotchpot.

An advantage given in the lifetime of a father is not within the Statute of Distributions.

A legacy to younger children is construed to include posthumous children.

In this case, a necklace was ordered to be taken apart so that some of the specific jewels could pass by a specific bequest separately from the others.

31 October 1718.

The plaintiff, administrator *cum testamento annexo* to his father, his older brother, Josias, dying, brought his bill against the widow [. . .] Kelmady to have an account of the personal estate of her husband. And the widow's cross-bill was to have her jointure established, which the defendant to the cross-bill said was of assart lands.

One question was whether some money that the wife had saved during the coverture out of the allowance of her husband should be

liable to distribution. She had £50 *per annum* by a deed for separate use and the profit of the dairy etc. which then was spent in the family.

The second question was, in the will a diamond croisade, was desired to go to the heir male of the estate as an heirloom but, afterwards, before the death of the testator, he turned it into a diamond necklace and presented it to the plaintiff, his then wife, and whether this shall go to the wife or by the devise though it was altered and given to her by the heir male.

N.B. The diamond cost a great deal more than the croisade sold for. It was given originally with the design that the son should, it being a jewel that had continued in the family some time, give it to his wife whenever he married, the testator being then a widower but the testator marrying his now widow thought fit to present it to his own wife.

If a jointure estate be evicted from a widow, she is empowered by the Statute 27 Hen. VIII[1] to enter upon any estate in fee or in tail her husband was possessed of and is not to take a recompense out of the personal estate.

That Statute of Distributions of Intestate's Estates[2] does not extend to this case where legacies are specifically devised to some of the children by will and the distribution has always been equal [?] without regard to such legacy, for that Statute only says what has been given by the father in his lifetime for the advancement of any child or children shall be brought and put into hotchpot so as to make all the younger children equal. But I suppose they are not obliged to do it unless it be to their advantage. If a man has married a lady whose father gave her a considerable fortune, he is not obliged at the death of the father to bring that fortune in order to provide for the younger children. It would be a little hard in the present case where there are several children and one had a portion of £3500 given with her in marriage in her father's life[time] if she should be obliged, being expressly within the words of the Statute of an advancement in the life of the father to put that into hotchpot and the rest of her sisters carry off each £1500 apiece by virtue of a specific legacy which would not be liable to such hotchpot. It prevents the intention of the

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[1] Stat. 27 Hen. VIII, c. 10, s. 5 (*SR*, III, 541).

[2] Stat. 22 & 23 Car. II, c. 10 (*SR*, V, 719-720).

Act, which was to make the younger children's fortune equal [if] devised to him as an heirloom.

[Other reports of this case: 11 Viner, Abr. 181, 2 Eq. Cas. Abr. 628, 22 E.R. 528, Lincoln's Inn MS. Misc. 380, pt. 3, p. 234, Lincoln's Inn MS. Misc. 384, p. 75, pl. 1.]

34

Anonymous
(Ch. 1718)

Exceptions cannot be taken to the credibility of witnesses until after publication is passed.

6 November 1718.

Lord Chancellor [LORD PARKER]: Exceptions cannot properly be taken to the credit of witnesses until after publication is passed, for, though the witnesses are known to the parties to be [. . .] of very ill reputation, he does not know until he sees the depositions whether their evidence relates materially to him or no.

35

Boswell v. Perry and Parsons
(Ch. 1718)

A person interested in the outcome of a lawsuit is not competent to testify as a witness. However, in this case, the witnesses that were objected to were not interested.

Where a person takes someone else's property, such as building materials, he must pay for them.

The plaintiff made a contract with the trustees enabled by the [*blank*] of Queen Anne, for the stopping of Dagenham Breach,[1] which was that he should have £16,000 paid at several times, which was £6000 when the breach was stopped for a month and the water

[1] Stat. 13 Ann., c. 20 (*SR*, IX, 968-971).

did not overrun the works and the rest when the walls were completed and a certificate made of it by the trustees. But the plaintiff failing in his project, he received nothing from the trustees, but he brings his bill to be allowed for his materials etc. and wood, which [was used by] the defendant Perry, who was employed by the trustees to carry on this work.

The bill against Parsons was to make him stand to his agreement, which he had made with the plaintiff to stand to a quarter part of the profit and loss.

An objection was raised by the defendants' counsel against reading one [*blank*] for a witness, he being, as they alleged, one concerned in interest (and therefore, indeed, ought to have been a party to the bill) and that he was to swear to his own benefit and in order to throw a greater load upon the defendant Parsons, for that person and some others who were to be read as witnesses had a sort of a parol promise that they should go such a share and Parsons was to go a third part if they quitted their pretensions to any share, otherwise Parsons was to go but a sixth share. So they thought it not right for those gentlemen to be witnesses that they might throw off their shares and by that means lay a third share upon Parsons.

But MY LORD [PARKER] was of opinion as that, as such a parol promise was not sufficient to have entitled those gentlemen to have come in for a share in the profit if such project had succeeded, they could not by such be loaded with the damage and that they were not concerned in interest and, therefore, the account might go on without them. And he ordered their depositions to be read.

He ordered an account between the plaintiff and Perry for what materials he had and made use of of the plaintiff, and Parsons [was ordered] to stand the share of the charge according to his agreement with Boswell.

36

Anonymous
(Ch. 1718)

Firebote does not extend to lead mines or iron works.

Lord Chancellor [LORD PARKER]: Firebote only extends to such a fire as is necessary for the house, such as it was at the time of the

lease. And [he said] that, if a man lease ground and lead mines or iron works and grants to the tenant firebote, it shall not extend to the working of the mines, or, if a man enlarges his house with abundance of rooms and fires, it shall not extend to such enlargement.

37

Anonymous
(Ch. 1718)

A legatee can sue for his legacy without joining the other legatees as parties.

If there were initially sufficient assets in a decedent's estate to pay all debts and legacies and one legatee was paid his legacy, the subsequent insolvency of the executor will not require that legatee to refund any part of his legacy.

15 November 1718.

Two infants were residuary legatees of the testator's personal estate, which was given to the executor in trust for them. One sues in the proper court, the spiritual one, to have an account of the estate and that she might have her moiety of the residue. The spiritual court ordered the executor to give in an account of the testator's estate upon pain of excommunication, which is all the penalty they can inflict. The executor brought in the accounts, the moiety of which amounted to the sum in question, which was declared by the spiritual court to belong to the plaintiff before them.

But before they gave a sentence, the executor brought a bill in Chancery to stay proceedings in that court and that he might have his account taken there and be discharged of his trust.

The injunction was granted upon the executor's bringing in that money, which was by the spiritual court declared to belong to the petitioner, before the master, which was done. And now, the petitioner desired that it might be paid out to her, which was opposed by the other infant because the executor was insolvent, but was for having that money which was declared to belong to the other to go as the residue of the estate and to be divided between them and so both to bear a proportion of the loss by the executor's being insolvent.

But the Master of the Rolls [JEKYLL] was of opinion that the money which the petitioner was suing for in a legal manner and the

sum ascertained that belonged to her in the spiritual court and the injunction confirming that sum to her, it must be paid her and that the injunction can never be taken to be in aid of the laches of the other infant, who was not a party to the proceedings in the spiritual court, and, that one single legatee may sue there or in this court without making the other legatees parties and that any legatee may sue for this legacy though there are infants that are legatees and is not obliged to be put off until they are at age and, if there are sufficient assets acknowledged by the executor and the legatee is paid such legacy, the after insolvency of the executor shall not oblige him to refund assets [that] were at the time of the suit in the spiritual court allowed by the executor.

N.B. At that rate, a man [would] be put off forever of his legacy if there are infants legatees very young perhaps and they die near their age and leave infants [. . .] estates personal to infants.

38

Browse v. Welman
(Ch. 1718)

A mistake in a decree should be corrected on a petition to rehear, and not by an original bill.

19 October.

The bill [was] to have the will of Thomas Barton performed. The plaintiff had a legacy of 20s. per week. The defendants answer that they had paid debts due on specialties, mortgages, etc. to £170 12s. more than the testator's personal estate amounted to. The plaintiff desired that those debts which would affect the real estate should be paid out of it so that the intent of the testator might be fulfilled and the legacy paid out of the personal [estate] or that the plaintiff might be decreed to be paid out of the real estate.

The plaintiff had had a hearing of this cause before and an account of the personal estate only directed to be taken. And now, he says he is informed that the real estate ought to be affected and, therefore, brings this bill, an original bill, in aid of the former decree, saying that the decree was wrong, whereas they should have petitioned by a petition signed by two counsel to have had it re-heard, which is the only method to have any mistake in a decree settled.

And, therefore, the Lord Chancellor [LORD PARKER] dismissed this second original bill and left the plaintiff to pursue the common method of rehearing.

N.B. No bill or action can be brought without joining all the executors though some have renounced.

A motion [was] made to tax [the] attorneys at law's bill, the plaintiff being ready to pay what should be reported due.

39

Wilson v. Fielding
(Ch. 1718)

Where a decedent's personal estate is insufficient to pay his creditors, the heir must refund any inheritance he received.

The personal assets of a decedent's estate, though only to be come at in equity, shall be applied as legal assets ought to be with respect to the debts as they stood at the death of the testator.

A court of equity will not to assist an executor to give a preference to one creditor of the decedent before another.

21 November 1718.

Equitable assets [are] not to go equally to the creditors. Where indeed lands are given to pay debts, all debts are then equal. If there were assets in trust for the testator, they are personal assets (as if a man has an Exchequer note taken in trust) and liable to the creditors, and it is not the testator's putting them in trust that shall defeat their having a satisfaction of their debts.

The plaintiff in this case was a creditor of an equal degree at the time of the testator's death but had got judgment against the executor.

But the Lord Chancellor [LORD PARKER] said that, if this judgment was to have the preference, it is really decreeing that the executor (and so in all cases) may pay which creditor he pleases, which consequence would be very fatal.

It is a constant rule in equity that, where debts that bind the real estate are paid out of the personal estate, the heir is obliged to refund so much as those debts have exhausted out of the personal or so much as is wanting to satisfy the debts of a lower nature. But where the heir at law is decreed to refund, My Lord [PARKER] said it was certainly

right in equity to have it distributed among the several creditors and not to have any creditor run away with the whole assets. And so he decreed that an account should be taken of the debts of the several creditors and the money to be distributed among them.

[Other reports of this case: 2 Vernon 763, 23 E.R. 1098, 10 Modern 426, 88 E.R. 792, 1 Eq. Cas. Abr. 143, 21 E.R. 944, Lincoln's Inn MS. Misc. 384, p. 86, pl. 2, Lincoln's Inn MS. Misc. 380, pt. 3, p. 232, Lincoln's Inn MS. Misc. 11, p. 73.]

40

Anonymous
(Ch. 1718)

Where a surety agrees to be liable for a lesser sum than the principal debtor's debt, he is liable to pay what remains unpaid up to that agreed sum.

Lord Chancellor [LORD PARKER]: Where a man gives a bond for payment of £100, part of a sum of money secured by another security, the meaning of that bond must be not that, if the parties who are bound by the first security do not pay £100, that then the second security will pay £100, but that, if the first security does not pay the whole, that then the second security will pay the rest so far as £100 will go.

41

Note
(Ch. 1718)

A devise or gift of household goods includes plate regularly used in the family.

N.B. Plate that is used constantly in the family will pass by the name of household goods.

42

Anonymous v. Maxwell
(Ch. 1719)

A defendant in a court of equity who is beyond the jurisdiction of the court must put in his answer by a commission.

19 February 1718[/19].

A man, prisoner at Tunis, to which place no English ships go directly but by the way of Leghorn or Genoa, by the affidavits proved, had brought his action for seaman's wages and recovered, upon which a bill in equity was preferred for a discovery. And an injunction [was] craved for want of Maxwell, who was the defendant in equity, having put in his answer from Tunis, notwithstanding the difficulty of getting a commission returned from Tunis.

His Honor [JEKYLL] could not break the rules of the court though he thought it a very hard case, for the defendant was in slavery and the wages [were] the only means of his redemption, and he put one to get Maxwell's answer.

[Other reports of this case: 1 Peere Williams 523, 24 E.R. 499.]

43

Note
(Ch. 1719)

An executor of a will, after probate of the will, can recover the testator's debts.

N.B. Probate only empowers an executor to recover debts, for he is liable to all debts before.

44

Eubank v. Noyes
(Ch. 1719)

Interest on unpaid legacies is payable after one year after the testator's death.

Easter term 1719.

[The question as to] legacies [was] whether they should have interest upon a rehearing. They were charged upon the real and personal estate by the will to mortgage or sell and, in one [of the] legacies the time when it should be paid.

It did not appear from the will but if the testator thought there might be a residuum of his personal estate, for, by the words of the will, the residuum of the real estate after payment of debts and legacies was to be conveyed to [*blank*] Symonds and likewise the personal estate.

Interest was allowed to the legatees where no time was fixed for the payment [. . .] from a year after the death of the testator to the other legatees.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 165, pl. 2.]

45

Gould v. Rutland
(Ch. 1719)

If a married woman make a warrant of attorney, it is void as a deed, but, if she has a separate power, a court of equity will enforce it.

22 April.

A bill was brought by the plaintiff as administrator to his wife for some East India bonds amounting to £700, which was put out by the wife during her life into one [. . .], a defendant's hand in trust for Rutland and her niece. It was alleged by them that this money was part of her separate maintenance, which was but £100 *per annum*.

It was decreed for the niece against Sir [*blank*] Gould.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 167, pl. 2.]

46

Davison's Case
(Ch. 1719)

Where a solicitor commits malpractice, he will not be charged for the expense resulting therefrom, nor can he charge his client for it.

[As to] Davison, a solicitor, a motion [was] made that he might pay the charges of an irregularity in practice, which was so reported by the master, and costs taxed.

But My Lord [PARKER] ordered that the solicitor should not pay the charges of it but should not be allowed anything for his own trouble, as attendance etc.

47

Anonymous
(Ch. 1719)

A contract to settle lands is performed by allowing lands to descend.

7 May.

Mr. *Vernon*: If a man covenants to settle lands and suffers lands of equal value to descend, it has been allowed in equity [to be] a performance of the covenant.

48

Anonymous
(Ch. 1719)

The next friend of an infant pauper plaintiff is liable for the court costs of a groundless suit.

8 May.

An infant pauper sued by his *prochein ami*, and, at the hearing of the cause, the *prochein ami* was ordered to pay costs, there being no ground for the suit.

49

Beckley v. Newland
(Ch. 1719)

In this case, the defendants were proper parties, being the distributees of the decedent's estate that was in issue.

Articles were made between Sir George Newland and Beckley, who had married two nieces of one Sturges, that whatever legacies etc. should be given by will or codicil to either of them should be equally divided.

Mr. Sturges, by Sir George's influence, gave his estate among the children of Sir George but the rents and profits of them to Sir George, his executors, administrators, and assigns during the minority of Sir George [. . .] towards the maintenance and education of them. The estate was about £1000 *per annum*.

A bill [was exhibited] to discover what had been laid out for their education and how much had been laid out in the repairing and beautifying any part of the estate. (The defendants were the sons of Sir George, and his wife [was] another defendant.)

A demurrer [was filed] for that the plaintiff had nothing to do with asking the defendants any of these questions, that they are not concerned in interest and, therefore, only proper to be examined as witnesses.

But that was answered, for Sir George Newland's dying intestate, his estate was come to the defendant's hands according to the Statute of Distributions[1] so that, if the surplus of this estate (the profits of which was devised to Sir George during the infancy of his youngest son) is taken as a beneficial devise or legacy, it will take so much out of the hands of the several defendants who have [been] distributed the estate of Sir George, who died intestate, and which will be assets to charge them and so diminish the personal estate of Sir George.

The demurrer was overruled, and they were ordered to answer.

[Other reports of this case: 2 Peere Williams 182, 24 E.R. 691, 2 Eq. Cas. Abr. 22, 22 E.R. 18.]

50

Lord Coningsby v. Higgins
(Ch. 1719)

A defendant cannot be required to make a discovery of his own criminal maintenance of an action and thus incriminate himself.

24 April 1719.

A bill was brought by Lord Coningsby[2] against the defendants to discover the right and title of the plaintiff to heriots and likewise to [. . .] what fraudulent conveyances have been made to deceive the lord of the manor. [. . .] refused to pay a heriot to the plaintiff. Lord Coningsby's agent seized an ox as a heriot, for which the defendant Rod, an attorney, brought his action in the Exchequer,[3] towards the carrying on of which suit the defendant advanced several sums of

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[1] Stat. 22 & 23 Car. II, c. 10 (*SR*, V, 719-720).

[2] A. E. Stokes, `Coningsby, Thomas, first earl of Coningsby (1657-1729)', *Oxford Dictionary of National Biography*, vol. 12, pp. 949-954.

[3] Note *Rodd v. Lord Coningsby* (Ex. 1723), Exch. Cases *tempore* Geo. I, vol. 2, p. 583.

money and subscribed for more by the instigation of the defendant Rod, the attorney.

The defendants demurred as to this part which requires a discovery of what combination [and] contrivance the defendant Rod and the rest made in order to carry on the suit because it was criminal and would particularly be against Rod, the attorney, maintenance.

No one can demur upon his answer. A demurrer must be certain and specific what it is the defendants demur to. The defendants answer part of the bill and generally, at last, say, as to all that they have not answered, they did demur, which general demurrer Mr. *Vernon* said was never allowed, that, when a man has, as to part of the bill, given a very evasive answer, he should demur to the rest so that it cannot be referred as insufficient because that is a direct bar, *viz*. the demurrer, to the rest so that the plaintiff can have no discovery until after the demurrer be overruled.

The defendants to this bill did not appear to be tenants of the manor who might lawfully so far unite against the lord as to try the title of My Lord to heriots. Some of the defendants were not concerned in right but were charged to have got money subscriptions etc. in order to support those suits, which would be criminal and direct maintenance.

Upon assigning a cause of demurrer, a man may assign another cause at the arguing of the demurrer than is particularly mentioned in it, but will pay costs; indeed, if the cause assigned in the demurrer is not allowed, as Mr. *Mead* said and Mr. *Talbot*, but the Lord Chancellor [LORD PARKER] [held] *contra*. The demurrer was overruled.

The Lord Chancellor [LORD PARKER] said it would have been proper to have made a plea. The defendants may plead that, if they been charged as strangers, having no interest, had united etc., they could not be obliged to set it forth because that would be a direct maintenance and so a good bar to a discovery from them.

51

Anonymous
(Ch. 1718)

A bill can be dismissed for want of prosecution after a replication has been filed.

[On the] second seal [day] after Michaelmas term 1718, a bill was dismissed for want of prosecution after a replication had been filed, but [the court] discontinued any proceedings for above those terms after upon an affidavit of notice.

The Master of the Rolls [JEKYLL] said he thought it very proper a time should be fixed. And he said it was very proper.

And Mr. Register said it was often granted.

52

Anonymous
(Ch. 1718)

The parties to a mortgage have six months to redeem or to accept a redemption.

A special receiver must put up an indemnity bond.

18 December 1718. Master of the Rolls, last seal.

A mortgagee cannot be obliged at an hour's warning to take his money, but [he] has six months allowed to accept it as the mortgagor has to pay it. Upon a motion, this was to oblige the mortgagee to accept immediately, which was denied because it would not have been granted even upon the hearing and, therefore, they could not ask more upon a motion as they could get by a decree.

The Master of the Rolls [JEKYLL] said that the court never appointed a receiver of an infant's estate without a security taken from them to answer the rents.

But Mr. *Vernon* said that he believed that the court had appointed sometimes a receiver not by the power of the court but at the request of the executors, as in this case, which was upon Mr. Bromley's estate of Cambridge, which was in Barbados. There were

executors appointed by Mr. Bromley, who, during his life, had put his estate of Barbados under four trustees, who the executors desired might be empowered by the court to act under the same trusts, it being absolutely necessary that the estate should be put into somebody's hands in January, and this motion was [made] 18 of December; otherwise, it would be to the prodigious damage of the infant's estate.

53

Marks v. Marks
(Part 2)
(Ch. 1718)

J.S. devises to A. and his heirs proviso, if B., within three months after his death, pay £500 to A, his heir, administrator, or assigns to the use of C., the tenant for life, then B. to have the estate.[1] B. dies during the life of C. Query if the heir of B. shall pay the money and direct the estate of A. B. survived the divisor but died in the life of the jointress, tenant for life; upon the death of the jointress, the heir of B. offered to pay the £500 within the three months.

The Master of the Rolls [JEKYLL] [gave] his opinion for a trial at law to determine whether the right of entry, upon the offering the payment by the heir, would entitle him at law. C.L., sect. 334; C.L., fol. 219b.[2]

This is no condition but an executory devise. In the case of a condition, the heir has a right antecedent, and [it] only re-vests the old estate, whereas, by the executory devise, the heir is to create an estate. The father had such a future interest, as though not vested in the father, shall descend to the heir. Welden's Case, Plowden. The future interest of a term shall go to the executors and [there is] no reason

[1] For earlier opinions in this case, see above, Case No. 8.

[2] E. Coke, *First Institute* (1628), ff. 206, 219.

why the future interest of an inheritance shall not go to the heir. Littleton, sec. 643; Lampet's Case.[1]

By the Statute *de Donis*,[2] the donor had only a possibility of reverter, but that should revert to the heir, and he should be in by descent though nothing could vest in his ancestor. C.L. 378b; Hob. 130.[3] Lampet's Case settles the doctrine of releasing future interests, which he conceived a standard. Roll's Ab., 420, 469.[4] The answer to the defendant's objection, C.L., sect. 334, that the plaintiff's father had an election. But the election is always construed in favor of the payor. Floyd and Carew allowed twelve months [to be] a reasonable time for the payment of money upon a future devise, and so the objection that it would tend to a perpetuity, it being limited to be paid three months after the death of the tenant for life and so no end; it might be more etc. 1 Chan. Rep. 89.[5]

Lord Chancellor [LORD PARKER]: [In] consideration of the proviso at common law, C.L., sect. 347, when the condition of payment of money vests in the ancestor immediately and descends to his heir, but [it is] not assignable by the ancestor to a third person.

Upon the Statute of Wills and Uses,[6] executory devises and uses have always been allowed of. A man may give an estate to a man and his heirs upon a condition if it is not too remote. It is the right of

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[1] T. Littleton, *Tenures*; *Lampet's Case* (1612), 10 Coke Rep. 46b, 77 E.R. 994, *sub nom. Lampit v. Starkey*, 2 Brownlow & Goldesborough 172, 123 E.R. 880.

[2] Stat. 13 Edw. I, Westminster II, c. 1 (*SR*, I, 71).

[3] E. Coke, *First Institute* (1628), f. 378; *Oates v. Frith* (1614), Hobart 130, 80 E.R. 280.

[4] *Springe v. Caesar* (1636-1637), 1 Rolle, Abr., *Condition*, pl. F, 1, p. 420, pl. D, 1, p. 469, W. Jones 389, 82 E.R. 204, *sub nom. Cooper v. Edgar* (1624), Winch 103, 124 E.R. 87..

[5] *Wallis v. Crimes* (1667), 1 Chancery Cases 89, 22 E.R. 708, also 1 Eq. Cas. Abr. 107, 21 E.R. 916.

[6] Stat. 32 Hen. VIII, c. 1 (*SR*, III, 744-746).

the condition and [is] descendible to his heir, being such as, had the devisor not assigned to the third persons, it had from him descended to his heir so that the [. . .] that the advantage of a condition could be assigned is and has been for a long time destroyed.

The heir of a mortgagee is only a trustee for the executors.

This case seems exactly in the nature of a mortgage, and the redemption is given to the [. . .].

Whether the benefit of the advantage of the condition was lost by B. dying before he could pay the money and, therefore, not vesting in the ancestor, could not descend to his heirs, [he was] of opinion that it was not personal to the ancestor and consequently may be performed by his heir and that heir, who stands in the place of the ancestor to take the estate if the ancestor had paid, shall stand in his place to pay the money in order to take it.

A decree for the plaintiff is in the nature of a redemption to pay the £500 and to be put in possession.

[Other reports of this case: Precedents in Chancery 486, 24 E.R. 218, 10 Modern 419, 88 E.R. 789, 1 Strange 129, 93 E.R. 429, 1 Eq. Cas. Abr. 107, 21 E.R. 915, 2 Eq. Cas. Abr. 335, 364, 22 E.R. 285, 309, Lincoln's Inn MS. Misc. 384, pp. 27, 56, 82, Lincoln's Inn MS. Misc. 11, p. 125, Lincoln's Inn MS. Misc. 380, pt. 3, p. 209, British Library MS. Add. 36651, f. 91, pl. 2.]

54

Perryman v. Perryman
(Ch. 1718)

The Statute of Limitations applies to suits in equity.

The defendant pleads the Statute of Limitations.[1] The case was upon an agreement made by the defendant's testator with the plaintiff, who married his daughter, which was that the plaintiff should have £500 upon the marriage, and a usual settlement [was] made and £100 more at the birth of the first child, but, if she died within a year without issue, he was to pay back £100 out of the £500, upon which

[1] Stat. 21 Jac. I, c. 16, s. 3 (*SR*, IV, 1222-1223).

two bonds were mutually given, one that the plaintiff to pay £100 if the wife died within a year without issue, the other that the defendant was to pay £100 more upon the birth of the first child. The wife died within two months after the marriage and no settlement [was] made. The agreement with the defendant's testator was never sealed. It was no specialty though signed, not being under hand and seal.

The agreement was made 1701, and the defendant lived until 1704, and no action was brought until after his death, 1716.

Mr. *Williams*, for the plaintiff, said the Statute of Limitations is no plea because the cause of action is not yet accrued and, therefore, not within the Statute, for, though the promise was made 1701, it was upon the execution of the settlement, which, as yet, is not executed and, consequently, (Lord Warrington v. Booth, House of Lords[1]) no cause of action accrued, but the plaintiff was always ready to execute such agreement and that the agreement was prepared by Mr. Reeve, counsel, and engrossed and was delivered to the father of the plaintiff's wife during the life of the wife, who, being ill at that time, the father delayed the execution until to avoid. (Lord Hollis's Case, Ventris.[2])

Chesshyre, in answer to Mead, [said] that, though the bill was proper to a discovery, it being against an executor to discover assets (that if they had any demand at law, they might know whether there was sufficient assets in the executors to satisfy the demands), yet the court will not likewise grant a relief so as to make the bills convertible a bill for relief and for discovery.

The Statute of Limitations is no plea against a fraud.

Lord Chancellor [LORD PARKER]: The plaintiff could not have executed the settlement, the wife dying so soon after. The Statute is as good a plea to a bill in equity as to a suit in law of things of the same nature. He allowed the plea.

N.B. [It is a] very good covenant in a deed where two persons are executors or trustees each to be bound only for his own acts or receipts etc.

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[1] *Earl of Warrington v. Booth* (1714), 4 Brown P.C. 163, 2 E.R. 111, British Library MS. Hargrave 80, f. 175.

[2] *Lord Hollis's Case* (1680), 2 Ventris 345, 86 E.R. 477.

55

Anonymous
(Ch. 1718)

Where a defendant pleads and then answers, the answer supersedes the plea.

18 October 1718. Serjeants' Inn Hall. Lord Chancellor. Demurrers and Pleas.

N.B. Where a man first pleads and after, in the end, answers the bill, his answer overrules the plea.

56

Davison v. Milton
(Ch. 1718)

A contract in consideration of marriage is enforceable even though it was made after the marriage took place if the general negotiations took place before the marriage.

The defendant demurred to the plaintiff's demand, which was to compel the defendant to execute articles which were minuted and signed on one part, which was to allow 50s. per week to the plaintiff and his wife during their living together. But this agreement was subsequent to the marriage and, therefore, was objected as no consideration, which, had it been before, would have been an undoubted one. The defendant had drawn in the plaintiff to marry his daughter, who was represented by the defendant himself, who was father to the plaintiff's wife, as [having] great a fortune, but, at least soon after the marriage, the father talked of giving £2500 to the plaintiff as a fortune but, after alleging it would be an inconvenience to pay down so much money out of trade, agreed to pay 50s. per week, which agreement was so far executed as that he paid it for a long time.

This agreement was not within the Statute of Frauds and Perjuries,[1] for that Act says only where the party that is to be charged has set his hand. Here, the defendant has signed the minutes and the objection that the other side was not obliged by the agreement by not having signed it that is by the plaintiff's suing to have them put in execution. The consideration of this agreement, though subsequent to the marriage in point of time, [was] a very sufficient consideration. And, therefore, the demurrer was overruled and the articles ordered to be carried into execution.

57

Aulston v. Greenway
(Ch. 1718)

The jury are the judges of the credibility of a witness.

18 June 1718; exceptions. Sir <Robert> Oliver Aulston v. Greenway.

First exception, which [was] brought to enquire into the consideration to a mortgage, which was since a decree made in this cause, [was] to the Master's second report, for that the Master has allowed £400 which was to be paid to one Colonel Russell for a gratuity to him for getting him, Robert [Aulston], made a baronet in 1696, a man very weak and in poor circumstances and there does no time appear that the money was paid or, if it was, was a very unreasonable gratuity, but it does not by any proof appear when it was paid. Foulks, a defendant, confesses that £160 was paid for fees of making Sir Oliver a baronet in 1696. Foulks had a mortgage from Sir Oliver for £1500. It is very possible that might be given as a security for the sum of £400 if ever it was paid.

Colonel Russell, upon his examination, says that he did receive £400 of the defendant Foulks agreed to be paid to him for procuring a warrant for creating the complainant a baronet from King William and that Greenway was no ways privy to the said agreement.

Foulks, in his examination, swore he paid among other things £40 to one Wells, who positively denies any such payment.

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[1] Stat. 29 Car. II, c. 3 (*SR*, V, 839-842).

Foulks, it appears by Sir Richard Hoare's books, did receive £800 and that he did pay part of it over, but it does not appear that it was for the use of the plaintiff or by his order or to any person the plaintiff dealt with.

N.B. If a man examines a witness which he might except to as interested, he, by that, allows him a witness, but, if, by anything afterwards, the witness appears to have sworn anything that is false, he, by that means, may be disallowed afterwards.

The jury are to try the credit of a witness for, until then, a man's oath is evidence and not a man's saying he will not believe him etc.

Foulks charges the plaintiff with £9 paid to Aubrey for wood and coals, and Awbrey, upon examination, swears he never received but £2 19s. 00d. A trial was ordered at law whether the several sums so sworn to be paid by Foulks were so paid to the plaintiff or to his use by an issue between the plaintiff and the defendant to be settled by the Master, costs reserved.

Second exception, for that the Master has charged the plaintiff with the sums of £70 and £100 demanded by Gimbert, a broker in Long Lane, for [*blank*] and interest for the same, whereas they were only debts of a simple contract, but, by the decree, the mortgage of Gimbert is ordered to be a security for such debt. [It was] overruled as an exception to the decree.

Third exception, for that the Master has allowed the sums of £300 and £350, whereas there was only proof of part of the same sums paid. Heather and Southern, examined, [were] proof [of] the plaintiff's due execution of the endorsement of a sum of £350 as money lent by Greenway and Gimbert. The deposit of £5 [is] to remain until after the trial of this issue at the sittings after term.

58

Gregg v. Raymond
(K.B. c. 1719)

In this case, the criminal accused was denied bail before his trial.

Raymond, master of a ship in the return from the East Indies, [was] indicted for the murder of Gregg, a passenger taken in for England, by forcing him overboard so that he was drowned.

The court was moved to grant bail for Gregg's appearance, because he [Raymond] was to be tried by a special commission, the fact being committed in the broad sea, so that it might be a long time before he would be tried. The court has a discretionary power to allow bail upon an information for murder. Mohun's Case.[1] But, upon hearing counsel on both sides, the affidavits upon which the information was grounded being many and full and those on the defendant's part few and not at all answering the others, the defendant was recommitted.

N.B. He had been in custody but a small time.

59

Anonymous
(Ch. 1719)

The inhabitancy of paupers determines their settlement for the purposes of the poor laws.

A motion [was made] to quash an order of the Sessions which ordered that several persons, seafaring men, living constantly on shipboard in the Thames but in the daytime in the parish of St. Mary Colechurch did serve [. . .]. The Statute[2] is not only binding, but [also] inhabitancy. Service of forty days is a good settlement. These persons served three months.

The judgment [in] eyre [was] that inhabitancy makes the settlement.

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[1] *Rex v. Mohun* (1693-1699), Holt K.B. 84, 479, 90 E.R. 945, 1164, 1 Salkeld 104, 91 E.R. 96, Skinner 683, 90 E.R. 304, 5 State Trials 179 (F. Hargrave, ed., 1777).

[2] Stat. 3 Will. & Mar., c. 11 (*SR*, VI, 314-315).

60

Notes
(Ch. 1719)

A judgment debtor may re-enter upon his land where the debt has been satisfied under a writ of elegit, *but not under a writ of extent*.

A *reddidendum* is a writ upon the bail piece when the parties hand over to the court at the return day.

Signing an interlocutory judgment, a plea is entered under the first letter of the plaintiff's name instead of the defendant's, upon which the plaintiff signs the judgment for want of a plea regularly entered.

The defendant may enter upon a [writ of] *elegit* when the debt is satisfied (though it be otherwise in [writs of] extent).

61

Anonymous
(Ch. 1719)

The king may be a plaintiff in actions sued by original writs but not in criminal actions.

Where an action is brought against a man and his alleged wife, if the man dies, the action continues against the woman.

10 July.

A motion [was made] to make a rule of *nisi prius* a rule of this court fifteen days between the *teste* of the first *scire facias* to the return of the second inclusive one and the other exclusive.

Mr. *Symonds*: If there be one, there must be fifteen days, if [. . .], it must be sworn and eight days notice for trial inclusive is not sufficient.

Chesshyre: 1 Sid. 210; 2 Keble 168;[1] following the words of the writ is a sufficient answer; where the suggestion in the *mandamus* is *debito modo electus*, the return ought to be *non fuit electus*.

Chesshyre: A *mandamus* to proceed to the chief clerk of a town in Warwick [?]; 1 Inst. 325;[2] the king may be plaintiff in actions sued by original [writs] but not in criminal actions; therefore, the Statute of 3 Hen. VIII, c. 30, which extends only to cases where there are plaintiff and defendant, the king shall come within the design.

Pengelly: Where the action is brought against a man and wife [and] the woman says she is not married, if the man dies, the action continues against the woman. The plea is in abatement of the writ against the wife; otherwise, if the man should confess, the woman would be without a remedy.

62

Rex v. Town of Morpeth
(Ch. 1719)

The question in this case was whether a writ of mandamus *lies to reinstate a schoolmaster at a school founded by a royal grant.*

Rex v. Bailiff and Burgesses of Morpeth, Northumberland.

Lutwyche: A [writ of] *mandamus* [went] to restore the under schoolmaster of Morpeth. The bailiff and burgesses had turned him out. In the return of the writ to show cause, they have shown no cause. It is an improper return.

First objection: It ought to have shown the very cause why they turned [him] out.

Answer: By the Act of Parliament 1 Geo., for taking the oaths,[3] the office is *ipso facto* void and that declares the cause.

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[1] *Hereford's Case* (1664), 1 Siderfin 209, 82 E.R. 1061; *Rex v. Patrick* (1667), 1 Keble 610, 83 E.R. 1141, 2 Keble 65, 164, 84 E.R. 42, 103.

[2] E. Coke, *First Institute* (1628), f. 325.

[3] Stat. 1 Geo. I, stat. 1, c. 3.

Second objection: It does not appear he was schoolmastering from the publishing of the Act of Parliament and the first of Michaelmas term.

Answer: It appears he [*blank*].

All writs of *mandamus* lie for offices of a public nature that respect public justice.

Michaelmas 2d of the queen [1703], Vaughan, the prover of guns. A [writ of] *mandamus* [was] given for the restoring the Register of the ecclesiastical court against the opinion of Chief Justice Holt. 1 Siderfin 169.[1]

If he has a freehold in the school, he has an assize or an action of the case. 1 Siderfin 40.[2]

A school founded by Edward VI and the head schoolmaster by the letters patent as [. . .] and not the [. . .] servant but is of a very public nature.

They ought to say he did not take the oaths appointed to be taken in England or in that case and not only the oaths appointed to be taken by the Act of Parliament because the oaths to be taken by Scotchmen are appointed by the same Act.

A peremptory *mandamus* was not granted in Siderfin, not granted to an usher, but it was of a grammar school erected not by letters patent of the king and a free school.

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[1] *Vaughan v. Company of Gun Makers* (1703), 6 Modern 82, 87 E.R. 839, 2 Lord Raymond 989, 92 E.R. 159; perhaps *Anonymous* (1694), Comberbach 264, 90 E.R. 468; *Rex v. Middleton* (1663), 1 Siderfin 169, 82 E.R. 1037, also 1 Keble 625, 629, 83 E.R. 1149, 1152.

[2] *Stamp's Case* (1661), 1 Siderfin 40, 82 E.R. 957.

63

Copden v. Vancittern
(1719)

A laborer can sue in contract for his work.

Sittings 4 May 1719, *coram* Lord King.

An action of the case [was brought] upon several promises for work done as a bricklayer for the defendant at his country house, the whole £688 7s. 7d. [. . .] the day bill.

Mr. Pasmore [was] appointed by the plaintiff to go to measure to that; Mr. Michell and Mr. Holt, two measurers sent by Mr. Vancittern, who agreed all to the quantum only, and [they] signed each other's bill.

The whole bill without deduction and [. . .] the day bill £582.

By the direction of Mr. Copden, he looked over the bill, and he made a deduction of £43 6s. 2d., which made the whole £539 11s. without the day work. He was a joiner.

Mr. Birch, one of the measurers who signed likewise the bill of admeasurement. The bill demanded was £582. He abates £122 2s. 7d., which makes the sum left. He was a plasterer. He says that he has allowed more than actually is allowed besides the deduction.

Mr. James, a bricklayer, agreed in the admeasurement. [He] says [he] seldom measures the returns for ornaments in town, but [it is] common in the country.

The day bill [was] £86 4s. and another £19 05s.

The plaintiff [was] owed £350.

And [it was] brought into court.

Mr. Holt, a witness for the plaintiff, but called here for the defendant. He allows a gaining [?] price for the workmen and deducts £122.

Mr. Waplehall, upon his oath, deducts £122.

Mr. Smith deducts £100.

Mr. Gouldshild 110.

Mr. Lop 100.

The plaintiff's demand with the deduction allowed by the plaintiff's wintesses £295 01s. 05d., the whole demand without such deductions £338 7s. 7d.

The verdict [was] £276 7s. 7d. for the plaintiff.
Deducted £20.

64

Wright v. Pope
(1719)

An officer of the peace can sue for an assault done to him in the execution of his office.

An action of trespass [was brought] for an assault upon the plaintiff [Thomas Wright], who was a Constable with his staff in his hands. Murder having been called out at the Hanover Coffee House, [he] went in their as a peace officer and, upon his coming, the Captain [Pope] stabbed him in [. . .] having broken the sword in the [. . .] abusing the family. Wright, the Constable, never offering to anything [?] to him but in the due execution of his office.

[There was a] verdict for the plaintiff [and] £50 damages.

65

Anonymous
(1719)

If a lessor enter in the middle of a quarter, he is entitled to have the rent for that quarter.

Where the defendant joins the issue, it lies upon him to prove it. An action of debt for rent was brought against A., who pleaded that the lessor entered in the middle of the quarter and did oust him, upon which issue is joined.

At the trial, no defense [was] made for A. So judgment was had by default.

N.B., if a landlord enter in the middle of a quarter, he shall not have rent for that quarter, for then, he would have the house etc. and the rent too, which is unreasonable.

SUBJECT INDEX

[These references are to case numbers, not page numbers.]