If so, they thought fit that the agreement should not be inserted in the instrument. If the insertion would make it usurious, no plaintiff could come here and state that as the reason of its not being inserted:—but he says it was under the idea that it might be so, and that that idea was the reason of the surprise.—Suppose one to grant for life, for the purpose of making a qualification for parliament, to be redeemable upon payment of a certain sum, but it was thought such a grant would be elusory, and not admitted as a qualification; it would be extraordinary, if a court of equity should be called upon to call that a surprise. The consequence would be, that the allegation must be that they had avoided inserting a part of the agreement, not that the agreement was intended to be in the deed. If the bill **[95]** afforded a proper allegation, it would then be time enough to consider the evidence. But another head of fraud is set up, that he did not mean to treat with his son. I should be very sorry to lay it down that a man treating with a third person, in trust for a second, whom he had refused to deal with, could therefore set it aside. (See *Harding* v. *Cox*, note (1) to *Philips* v. D. *Bucks*, 1 Vern. 227; *O'Herlihy* v. *Hedges*, 1 Scho. and Lefr. 123; and in *Featherstonhaugh* v. *Fenwick*, 17 Ves. 313; also Mr. *Sugden's* observations L. Vend. and P. 191, note; and *per M. R.* in *Bonnet* v. *Sadler*, 14 Ves. 528.) No case has gone so far.(1) *Philips* v. the Duke of *Bucks*, 1 Vern. 227, was upon a difference of price. (See Mr. *Raithby's* notes on that case.) Certainly here is no fraud stated on the face of the bill. The bill does not go to destroy, but to affirm, and reform the contract. I have no idea of this being notice to the assignees of the annuities, that the annuity was to be redeemable. It is argued several ways, that they had notice personally of the transaction—that they had notice by their agent—and that it was necessary for them to apply to Lord *Irnham*. This might have place, if the matter remained in *fieri* and they were bringing a bill against Lord *Irnham*, but here it has no place, for the deed was brought to them by which Lord *Irnham* had granted absolutely. I am not able to conceive that they were obliged to recur to Lord *Irnham*, any more than if it had been a dormant equity. Bill dismissed. (No Entry.) (See also the case of Lord *Portmore* v. *Morris*, 2 Bro. C. C. 210.)

(1) *Sed vide* the case of *Eyre* v. *Popham*, where *Popham* had, from *Eyre* having been guilty of a breach of a former contract, expressly refused to treat with him, a third person treated with *Popham*, in fact in trust for *Eyre*, and an agreement having been entered into, *Eyre* filed his bill for a specific performance. Bill dismissed by Lord *Bathurst*, *Mich.* 14 Geo. 3 [1773]. (*Note*: Mr. *Brown* has mis-stated this case. *It was not decided on any such ground*, although the circumstance stated was a feature in the case. See it reported in Lofft's Rep. from p. 786 to 814; and Sugd. Vend. and P. 121, note.)

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[96] TRINITY TERM, 21 GEO. 3, 1781.

ROBERT Lord Bishop of LONDON *against* FYTCHE. [13 *June* 1781.]

[Accuracy questioned, *Kerr* v. *Rew*, 1840, 5 My. & Cr. 163.]

Upon *quare impedit* brought against the plaintiff, he filed the present bill to discover whether the clerk presented to him by defendant had not given a general bond of resignation, in order to set up that bond as a defence at law for having refused him institution. (See Cunningham's Law of Simony, and 1 East's Rep. 487. *Et vide per* Lord *Eldon*, C., in Lord *Kircudbright's* case, 8 Ves. 61.) To this bill defendant demurred: 1st, on account of the legality of such bond; 2d, that the discovery was immaterial. Demurrer over-ruled.

Bill filed by the bishop, as ordinary, against the defendant the patron, and the clerk presented by him, to be instituted to the living of *Woodham Walter* in *Essex*. The patron, 2d *Jan.* 1781, presented *John Eyre* to the bishop, who understanding the clerk had given a bond to resign upon demand, refused, on that account, to admit him, conceiving the bond simoniacal. Upon a *quare impedit* being brought, the bishop filed this bill for a discovery, whether such bond, or some, and what other security had been given by the clerk to the patron for resignation, in order to make use of it

for his defence at law. To this bill the defendants demurred, on the ground that a discovery might make the defendants liable to penalties.

Mr. *Solicitor General* [James Mansfield]. The ground of demurrer is, that if the facts stated are true, they do not give the bishop a right to the discovery; or that such bond was no objection against the clerk being admitted. No such question has ever been agitated in a *quare impedit*, although there have been some actions on bonds, *Hesketh* v. *Gray*, 2 Burn's Eccl. Law, 341. The mischiefs arising from these bonds being taken are obvious, *Durston* v. *Sands*, 1 Vern. 411, and 2 Ch. Ca. 186. The Court will enjoin where they are made an ill use of. If the cases were out of the question, I should think the bonds were illegal. (*Note*: Lord *Eldon*, C., said, that *if it were not for the cases he should hold them illegal*; for which his Lordship gives very strong reasons. See 8 Ves. 61.) This suit is brought to have that point considered. It is unnecessary to determine more at present than that the question is proper to be considered. The cases are *Hesketh* v. *Gray*, *Peel* v. the Earl of *Carlisle*, Stra. 227. *Peele* v. *Capel*, Stra. 534.

Mr. *Madocks* (same side). This is a bill of discovery only, not praying any relief. It is contended there is no equity in [97] the bill. *Hesketh* v. *Gray*, and all the other cases, were between the patron and clerk, this is between the patron and ordinary. It is said *Hesketh* v. *Gray* came back from the court of law, and that Lord *Hardwicke* relieved against the bond. The question is perfectly new, whether the giving of such a bond will justify the ordinary in refusing the clerk. When an action is brought which depends on the title to land, the defendant has a right to come here for a discovery of the plaintiff's right, 1 Vesey, 248.—So here the bishop, having a *quare impedit* brought against him, has a right to such discovery as may enable him to make a defence to the action. Though a general bond, as between patron and clerk has been determined to be legal, it does not follow that it is not a good objection against admitting the clerk.

Mr. *Kenyon* (for the defendants). In *Peel* v. Lord *Carlisle* the Court would not permit the legality of the bonds to be argued, they having been adjudged to be legal. The most recent case on the subject is above 30 years old. The bonds being legal between patron and clerk, must be so between the ordinary and patron. The discovery sought is of facts totally immaterial: if the bonds are legal, it is totally immaterial; if not, though the demurrer had not set forth that it will make them liable to penalties, it is sufficient to set that forth *ore tenus*. It will do under the act 31 Eliz. c. 6, § 6.

Mr *Solicitor General* (in reply). They are not subject to any penalties by the act. *Swain* v. *Carter*, Comberb. 394.

Lord Chancellor [Thurlow]. Two objections are made to the discovery sought. First, That it will subject the defendants to penalties as a simoniacal contract. It is very clear, that if any plaintiff, for any purpose, demands a discovery which leads to a legal accusation, he is not entitled to it. If the plea can be supported, from the evidence to be discovered, I must not enforce the demurrer. If there were no cases, I should think it clear that a mere bond of resignation could not be criminal—unless it were for profit or benefit to the patron. Many cases have been determined, that the bonds were good. (*Note*: Lord *Eldon*, C., said, that *if it were not for the cases he should hold them illegal*; for which his Lordship gives very strong reasons. See 8 Ves. 61.) The effect of the determination is, that they not only are not simoniacal, but that they are not against the policy of justice. The second objection is that the discovery is immaterial. This is the first instance of a [98] demurrer for immateriality. If a demurrer was to a bill where the matter was obviously frivolous, the Court might interfere. Here one of the cases treats the matter as too well settled to be argued. It was argued and determined the same way. It is said there is a difference between this and when it is between patron and clerk. I cannot bring my mind to this argument. The bishop has never been compelled to accept the resignation. The question, as decided, carries this along with it, that where the bond has been applied to a bad purpose the Court would restrain; but this is a different question, whether a man, who ought to be independent of every control but the court Christian, shall subject himself by contract to any but his ordinary. In specie, it has never been decided that the bishop is compellable to admit the clerk, but it has been decided that the contract is not illegal. This is not stated as the ground of the present opinion. It is not too much to say, that where a man comes for a discovery of evidence material to his

defence, the party shall not protect himself against the discovery, unless he can shew himself liable to penalties, which I think he has not sufficiently done here. There is no instance of the Court having refused a discovery because it was inconvenient to the party making it, for the plaintiff pays the costs of the application, and whether it is material or not, is chiefly for him to judge. I am of opinion they ought to make the discovery, and it will remain with another court to determine how far it is material. Demurrer over-ruled.

The principal question in the cause coming on in the Court of *C. B. Hil.* 1782, it was determined there in favour of the plaintiff (at law) *Fytche, that general bonds of resignation are legal, and are not a justification to the bishop in refusing to admit the clerk.* A writ of error was immediately brought in *B. R.* where the judgment of the court of *C. B.* was affirmed. A writ of error was then brought in parliament, where, after long debate the judgment was reversed, 30th *May* 1783.—See a very full report of what passed in the House of Lords, in Mr. Cunningham's Law of Simony. (Reg. Lib. 1780, A. fol. 506.) (And see 1 East's Rep. 487. Nevertheless, *as to the principle*, see the just observations of Lord *Eldon*, C., 8 Ves. 61.)

[99] CASSON *against* DADE, Clerk. [26 *June* 1781.]

Will attested by the witnesses where the testatrix could see them through the windows of her carriage and of the attorney's office, well attested. (See *Shires* v. *Glasscock*, 1 Ld. Ra. 507; and *Longford* v. *Eyre*, 1 P. W. 749.)

Honora Jenkins having a power, though covert, to make a writing in the nature of a will, ordered the will to be prepared, and went to her attorney's office to execute it. Being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her: after having seen the execution, they returned into the office to attest it, and the carriage was accidentally put back to the window of the office, through which, it was sworn by a person in the carriage, the testatrix might see what passed; immediately after the attestation, the witnesses took the will to her, and one of them delivered it to her, telling her they had attested it; upon which she folded it up and put it into her pocket.—The *Lord Chancellor* inclined very strongly to think the will well executed, and the case of *Shires* v. *Glasscock*, 2 Salk. 688 [1 Lord Raym. 507], 1 Eq. Abr. 403, was relied upon to that purpose. Mr. *Arden* pressed much for an issue; but, finding *Lord Chancellor's* opinion very decisive against him, declined it. (Reg. Lib. 1780, A. fol. 604.)

HASSEL and Another, Assignees of JACKSON, a Bankrupt, *against* SIMPSON. [1781].

[See S. C. 1 Doug. 89 (n.); *Harrison* v. *Cohen*, 1875, 32 L. T. 720.]

[Vide S. C. Cooke B. L. p. 99 [88].]—A conveyance *of all a trader's goods* (he being solvent at the time, and continuing so for 3 years after), held by *L. C.* not an act of bankruptcy, and a new trial ordered, the jury on the first having found him a bankrupt. On the new trial, and a case reserved and argued in B. R. determined to be an act of bankruptcy. (See *Tappenden* v. *Burges*, 4 East's Rep. 230; and *Newton* v. *Chantler*, 7 East, 138; and see the principal case in Cooke's B. L. 99 (6th edit.) and [88] former edit. *Et vide ibid.* 100, and [89] &c. &c.)

Jackson (a trader, afterwards a bankrupt) made a conveyance to *Simpson* of a copyhold tenement, *all his goods, chattels and personal estate*, to indemnify the defendant, as surety for him. It had been sent to law, on an issue to try whether this was an act of bankruptcy. At the trial the judge directed the jury that it was.—It appeared upon the report, that *Jackson* continued in credit three years after the conveyance, and it was not stated that he was indebted to any other creditor at the time. The jury found that it was an act of bankruptcy.

Upon a petition for a new trial, Mr. *Madocks* cited *Ryal* v. *Rowles*, 1 Vesey, 348. It is not insisted upon here, on the ground of his continuing in possession, 1 Jac. 1, c. 15. —*Worsley* v. *Demattos*, 1 Bur. 467.—*Twyne's* case, 3 Co. Rep. 80. There the possession was fraudulent. This act was not upon the eve, or in contemplation of bankruptcy.—It was done as a contract of indemnity, not a security for a former debt; and the person continued in credit three years.

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