But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that both the decrees complained of should be reversed: and it was declared, that five quarters of wheat were yearly due and payable, and of right ought to be paid to the chaplain of Latimers out of the rectory of Chesham Leicester, in such manner as the same were claimed by the appellant in his original bill; but inasmuch as he admitted that he had in fact received 40s. per ann. from the lord of Latimers in satisfaction of one quarter of wheat, parcel of the said five quarters, payable yearly as aforesaid; and as it appeared, that during the five years the appellant was paid his demand, before the stoppage complained of in the bill, he received 40s. a quarter in satisfaction of the said five quarters of wheat yearly, as well for the four quarters as for the one quarter: it was further ORDERED, that the appellant should be paid for the arrears of the remaining four quarters of wheat, after the rate of £8 per ann. from the time that the payment of [602] the said four quarters of wheat was stopped, till the filing of the appellant's original bill in the court of Exchequer, being fifteen years, which was the time for which the appellant demanded satisfaction by this suit; and that the same should be paid to him by the respondent Sir Francis Whichcote, he admitting that he was to indemnify the other respondent, and consenting to stand in his place, and the appellant being contented therewith: and it was also ORDERED, that the respondent Sir Francis Whichcote, should likewise pay the appellant his costs of the suit in equity, to be taxed by the proper officer, deducting the costs of the trial at law, which the appellant was to pay or allow to the said respondent, to be taxed in like manner by the proper officer; and that the said court of Exchequer should cause this order and judgment to be put in due execution accordingly. (Jour. vol. 24. p. 87.)

CASE 15.—CITY OF LONDON,—*Appellants;* THOMAS PERKINS, and Others,—*Respondents* [28th January 1734].

[Mews' Dig. vi. 665. See *Peterborough (Earl of)* v. *Germaine*, 1702, 3 Bro. P. C. 539; *Warwick* v. *Queen's College, Oxford*, L.R. 10 Eq. 125.]

[Depositions of witnesses taken in former causes, relating to the same matter for which a new suit is instituted against another party, ought to be permitted to be read as evidence, upon the hearing of such new cause, although the witnesses themselves are not proved to be dead.]

The appellants have, time out of mind, been entitled unto, and received from all masters of ships bringing cheese of any persons whatever, eastward of London-Bridge, to the port of London, to be sold, a duty of 8d. per ton for all such cheese, in the name of weighage: and in order to collect such duty, the appellants have always appointed officers called yeomen of the waterside, to attend with weights and scales to weigh the cheese, and receive the duty.

But it is usual for the master of the ship, on his arrival in the port of London, to give notice to the officers of the customs, and procure them to transmit an account of the quantity of his cargo of cheese, to the lord mayor; who thereupon directs his warrant in writing to the yeomen of the waterside, to weigh and permit the cargo to be delivered, upon being paid the duty; which the yeomen are ready, and offer to do; yet as the quantity is expressed in such warrant, and that taken from the account given by the master to the officers of the customs, the duty has been usually paid according to the quantity mentioned in the warrant, and the actual weighing omitted, at the request, and for the conveniency of the master, unless the quantity is disputed.

[603] This duty, when paid, is applied to the use of the lord mayor for the time being, for supporting the dignity of his office.

Besides this duty, the appellants are likewise entitled to, and claim by several charters, the office of keeper of the great beam, or common balance, within the city, for the equal weighing of all merchandise between merchant and merchant, usually bought and sold by weight within the said city; the officers for this purpose are appointed by the mayor, aldermen, and commons in common council assembled; and the duties arising upon weighing the said merchandize are applied to the use of the city.

The respondents being great importers of cheese, and masters of ships, and having imported great quantities of cheese eastward of London Bridge, and refusing to pay the

said duty of 8d. per ton, the appellants, in Trinity term 1725, filed their bill in the court of Exchequer for recovery of the same, setting forth a prescriptive right to the sole weighing of cheese of all persons whatsoever, brought by water eastward of London-Bridge; and that time out of mind, the masters of all ships importing the same, ought to pay the said duty of 8d. per ton for the cheese in the name of weighage, the same being allowed to them by their respective owners, and that no ship ought to be unladen before obtaining such warrant from the lord mayor as aforesaid; that this was reasonable to be paid as a recompence for the officers attendance, providing weights and scales, and by reason of the advantage the importers received in and about the port of London, by the care of the appellants, who are conservators of the said port; that this duty had always been paid by the masters of ships, whether freemen or foreigners, or whether the goods imported were freemen's or foreigner's, until the year 1681, when one Richard Garret disputed the same; whereupon a special action on the case was brought by the appellants against him in the court of King's Bench for the said duty; where, on the general issue pleaded, and a full trial had at the King's Bench bar on the merits, a verdict and judgment was given for the plaintiffs; that in the year 1719, the appellants exhibited a bill in the court of Exchequer, against William Pallister, Rich, and others, for a discovery and account of the cheese imported, and to compel payment of the said duty, alledging therein the same prescription as in the present bill: in answer to which, the then defendants insisted, that the goods were freemen's goods, and, as such, not liable to the duty; but on hearing that cause, on the 26th of June 1721, it was decreed, unless cause, that the then defendants should account to the plaintiffs for the said duty: and in Michaelmas term following, the said decree, on hearing counsel on both sides, was made absolute; and the then defendants accounted for, and paid the duty; and in the same Michaelmas term, a like bill was exhibited by the appellants in the said court of Exchequer against Prickett and others, [604] setting forth the same prescription; when the defendants by their answer insisted, that the goods were freemen's goods, and not liable to pay such duty; and, in February 1722, on full evidence, the like decree was made, and the duty accounted for and paid by the then defendants accordingly. Wherefore the appellants prayed, that the respondents might make a discovery of, and come to an account for the cheese so by them imported, and pay the duty for the same, and that the said duty might be confirmed and established.

The respondents by their answer admitted that they were masters of ships, and had imported from Chester large quantities of cheese into the port of London, and had not paid for the same; that the appellants had claimed a right of tronage of all foreigners' goods, but knew not how they were entitled thereto; they also admitted, that the appellants, by charter, were entrusted with the great beam, and with the weighing of foreigners' goods; but insisted, that they were freemen themselves, and that the cheese imported by them was the property of freemen, and therefore exempt from the said duty; and that the said prescriptive right did not extend to freemen masters of ships, importing freemen's goods; that the officers did not attend to weigh such goods, though they admitted they might attend to weigh such foreigners' goods as should be brought to the great beam; but the goods of freemen ought not to be brought to the great beam, nor were liable to pay any duty, but were excepted and excluded out of the several bye-laws and ordinances and acts of common council relating to the payment of such duty.

Issue being joined, and witnesses examined on both sides, the appellants, on the 1st of November 1732, gave the respondents notice, that they intended to move the said court of Exchequer, that they might have an order for liberty to read the depositions of John Green, Joseph Clements, Robert Hughes, and Francis Bancroft, taken in the said cause against Pallister and others; and also the several depositions of Robert Weston, Roger Dawson, Joseph Clements, Robert Hughes, and Francis Bancroft, taken in the said cause against Prickett and others; at the hearing of this cause on behalf of the appellants, all which witnesses were then dead; which motion the court, on the 8th of the same month, refused to grant, notwithstanding the like motion had been granted in the said cause of Prickett and others, the 1st of February 1722, for reading the deposition of the said John Green, then dead, taken in the said cause of Palister and others.

On the 8th of December 1732, this cause came on to be heard; when the appellants, by their counsel, offered to read the several depositions of the witnesses

examined in the said causes against Pallister and others, and Prickett and others; but the court was pleased to disallow the reading such depositions, because the witnesses were not proved to be dead by [605] depositions taken in the present cause, which the appellants were advised was not necessary. However, to avoid any difficulty, in this respect, as far as it was in the power of the appellants, it was offered by their counsel, that they would prove the deaths of the witnesses, whose depositions they intended to read, either by living witnesses, or by affidavits; but the court, after reading the said verdict, and judgment and decrees, and several depositions in the cause, were pleased to direct an issue to be tried the then next Easter term, at the bar of the said court, whether cheese imported into the port of London, eastward of London-Bridge, for sale in ships of which the masters were freemen of the city of London, on account of freemen of London, was liable to pay the duty of 8d. per ton, in the name of weighage, as demanded by the bill.

The appellants apprehending themselves aggrieved by this decree, and by the court's refusing their said motion, brought the present appeal; insisting (D. Ryder, N. Fazakerley), that it was proved in the cause by many witnesses, that they had, time out of mind, enjoyed and received the duty in question, without any distinction whatever between the case of the master being a freeman, or the cheese belonging to freemen, and other cases; and that there were no witnesses examined for the respondents, who contradicted this fact, or even made the question doubtful. That this very point had come in judgment, upon a trial at law, in the most solemn manner, when a verdict was given for the appellants, and had been twice decreed in their favour, upon bills in the court of Exchequer; and those decrees, and that judgment, allowed to be given in evidence at the hearing of the present cause; so that there seemed to be no reason why this question should be sent to law to be tried over again, unless it was, to see whether there should be contradictory decrees subsisting at the same time, and of the same court. That the defence in both the former causes was, that the cheese of freemen ought not to pay the duty, and the prescription was laid in both of them generally, without any distinction; the appellants therefore could not have had a decree, if the right had not been proved to be as general, but had been confined to the case of foreigners. That the duty of the beam insisted on by the respondents, and which the charter and bye-laws proved by them related to, was not the same as the duty in question; but a duty of another kind, claimed by charter, not prescription, applied to other uses, collected by other officers, and in a different manner. That it is not usual for a court of equity to direct an issue, where the proof is clear on one side, and the matter proper for the jurisdiction of the court, and no proof on the other to render the fact doubtful; and especially, when the fact has previously been determined by a jury, and twice adjudged by the same court of equity. But if there could have been any doubt of the fact, upon the proofs in this cause, that doubt would have been cleared by reading [606] the depositions in the former causes; and which, as the decrees in those causes were read, ought to have been likewise read. It was therefore hoped, that the decree would be reversed; and that the respondents would be decreed to account with the appellants for the duty on cheese by them imported, and that the said duty would be confirmed and established.

On the other side it was contended (J. Willes, J. Strange), that the proceedings were regular, and the decree just, and agreeable to the rules of equity. As to the proceedings, it was said, that the court of Exchequer were well warranted in refusing to make any order upon the said motion, because it is not in the power of a court of equity to make that evidence, which is not evidence of itself; and if the appellants, at the hearing of the cause, had shewn that the depositions had been taken in a cause wherein the same point had come in question, and had proved regularly that the witnesses were dead, then the court would undoubtedly have suffered those depositions to be read: but the appellants failed in both these points; for as to the first, the defendants in both the former causes did not appear to be freemen of the city, and therefore the point in question in this cause was not before the court in either of those causes; the only point insisted on there being, that the goods belonged to freemen who were not parties to the suit, but the duty being payable by the masters, the court would not inquire whose property the cheese was, and upon that foundation decreed the account; and as to the latter, the appellants had not proved by their depositions that the witnesses were dead; and though they might offer to prove their deaths by affidavits, or *vivâ voce* at the

hearing, yet it is not usual for a court of equity to suffer any fact to be proved by affidavit, because, in that case, the adverse party has no opportunity of controverting the truth of such fact, by cross-examining the witnesses; and according to the rule observed in courts of equity, no facts are capable of proof by witnesses *vivâ voce* at the hearing, except the execution of deeds. As to the decree it was said, that the duty in question was a demand against the common rights and freedom of every subject of England, a burthen upon trade, and a tax upon a useful commodity; and that it could not be maintained, except upon a reasonable custom, supported by uninterrupted usage. 1st, It was not reasonable with respect to the present case; for though it might be reasonable and just to lay an obligation on foreign merchants who receive the benefit of trading to the port of London, to weigh all their goods at a public just balance kept by the city, in order to preserve an exact justice in commerce between foreigners and citizens; yet by several bye-laws, acts, or ordinances of the city, freemen of the city were exempted from such obligation; and as the goods of freemen were under no obligation to be brought to the city beam, or to be weighed there; and as, in fact, the goods in question were never weighed there but in the scales of the respondents at their own shops, they had therefore no benefit from this pretended **[607]** custom, and ought not to bear any burthen by means of it; and as the appellants were at no trouble or charge about it, they ought not to receive a reward for doing nothing. And 2dly, It was not proved that this duty had been paid by such masters of ships as were freemen, and imported only the goods of freemen; neither had any of the cases upon which trials had been had, or decrees obtained, come up to the present case; for none of the defendants in those cases were freemen, importing only the goods of freemen; and therefore, as it is not usual for courts of equity to establish rights or customs, especially such as are burthensome to the subject, and for which nothing is done without a trial at law by a jury, which is the birthright of every English subject; as the point now in question had never received any judicial determination, either at law or in equity; and as the appellants were better able to support the expence of a trial than the respondents, and must prevail in it, if, on a full examination, the merits and justice of the case would support this custom, it was hoped that the decree would be affirmed.

But after hearing counsel on this appeal, it was DECLARED, that the court of Exchequer ought not to have refused to grant an order for the appellants to have liberty to read the depositions taken in the two former causes at the hearing of this cause, saving all just exceptions: and it was ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the respondents should severally account with and pay to the appellants the said duty of eight-pence per ton for all such cheese as had been imported by the respondents respectively into the port of London, eastward of London-Bridge. And it was further ORDERED, that the court of Exchequer should give proper directions to the deputy remembrancer of the said court for taking the said account. (Jour. vol. 24. p. 448.)

CASE 16.—WILLIAM SELWIN,—*Appellant;* JOHN BROWN,—*Respondent* [25th March 1735].

[Mews' Dig. vi. 1403–4; xv. 664; distinguished in *In re Applebee* [1891] 3 Ch. 430.]

[No parol evidence is admissible to control or take away a plain and express devise; and therefore where a man is indebted to another by bond, and the obligee makes him one of his executors and residuary legatees, without saying anything about this bond debt, it shall constitute part of the residue of his estate; and no parol evidence, however clear and strong, shall be admitted to shew the testator's intention to discharge the party from the bond.]

Forrester, 243. Viner, vol. 8. p. 198. ca. 30. 2 Eq. ab. 464. note at (Q).

John Brown, being seised in fee of a real estate, and possessed of a leasehold house in Bow-street, Covent-garden, and of other personal estate, made his will, dated the 23d of June 1732, and thereby gave annuities to some persons, and **[608]** pecuniary legacies to others, and particularly a legacy of £500 to the respondent; and then the testator devised his manor of Hubbard's-Hall, and other lands in Essex, to the respon-