A

TREATISE

ON

The Law

OF

INJUNCTIONS.

BY

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Timber directed to be felled.

CHAPTER XI.

Injunctions to stay Purprestures and Nuisances.

Distinct between estates infants lunatic

THE jurisdiction of Courts of Equity in cases of Purpresture and Nuisance, though not very frequently exercised, is undoubted. It is founded on the right to restrain the exercise or the erection of that, from which irreparable damage to individuals, or great public injury, would ensue (*a*).

Purpresture, or more properly *Pourpresture*, is derived from the French word *pourprise*, and, according to Lord Coke, signifies a close or enclosure, that is, when one encroacheth, or makes that several to himself which ought to be common to many (*b*). It is laid down by all the old writers, that it might be committed either against the king, the lord of the fee, or any other subject (*c*); but in its common acceptation, it is at present understood to mean any encroachment upon the king, either upon part of the demesne lands, or in the highways, rivers, harbours, or streets (*d*).

The remedy for this species of injury is either by Information of intrusion at common law, or by In-

(*a*) 3 Atk. 751. Redes. Tr. 117.

(*b*) 2 Inst. 38.

(*c*) Skene *verbo, Pourpresture,* and see the references in Mr. Beames's note to Glanville, lib. 9. c. 11. p. 239.

(*d*) 2 Inst. 38. 272. Spelm. Gloss. Purpresture, Hale de Portibus Maris. Harg. Law Tr. 84.

formation at the suit of the Attorney General in equity. In case of a judgment upon an information of intrusion, the erection complained of, whether it were a nuisance or not, was abated: but upon a decree upon an information in equity, if it appeared to be a purpresture, without being at the same time a nuisance, the court might direct an inquiry whether it was most beneficial to the crown to abate the purpresture, or to suffer the erections to remain, and be arrented (*a*). But where the purpresture was also a nuisance, this could not be done, for the crown cannot sanction a nuisance: it has no right to use its title to the soil as a nuisance, nor to place upon that soil what will be a nuisance to the crown's subjects, nor give such right to its assignee (*b*). There are accordingly several early cases in the Exchequer, some of which are noticed by Lord Hale in his treatise *de Portibus Maris*, in which purprestures, which were also nuisances, had been committed, and decrees were made upon the application either of the attorney general, or the grantees of the crown, to abate them (*c*). Upon these authorities the Court of Exchequer proceeded in the year 1795, where the defendants had erected certain

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(*a*) 2 Anst. 606. Redes. Tr. 117. There is an incorrectness in Callis's reading on the Statute of Sewers, 174. where he states a purpresture to be that species of offence done to the king immediately, or his possessions, which if done to a subject would be a nuisance.

(*b*) Ib. 2 Wils. Ch. Rep. 101. Rex v. Earl Grosvenor, 2 Stark. N. P. C. 511.

(*c*) Attorney General v. Philpot, 8 Car. 1. cit. Anst. 607. City of Bristol v. Morgan, Hale de Portibus Maris, Harg. Law Tracts, 81. Town of Newcastle v. Johnson, ib.

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buildings between high and low water mark in Portsmouth Harbour, so as both to prevent the boats and vessels from sailing over the spot, or mooring there; and also to endanger the further damage of the harbour, by preventing the free current of the water to carry off the mud. A bill was filed, praying that the defendant might be restrained from making any further erections, and that those might be abated, and a decree was made accordingly (*a*). The same thing was also done with regard to Bristol Harbour (*b*); and an injunction was lately granted, *ex parte* on affidavits, to restrain a purprestur and nuisance upon the river Thames (*c*).

Upon the same principle is the case mentioned by Lord Hardwicke, of an information by the attorney general to restrain the stopping up a highway behind the Royal Exchange (*d*).

Public Nuisance.

The jurisdiction in these cases might have been supported on the ground of *Public Nuisance*, even though the acts complained of had not at the same time been purprestures: the interposition in cases merely of public nuisance being by no means a modern branch of equitable jurisdiction (*e*). There

(*a*) Attorney General *v.* Richards, 2 Anst. 603.

(*b*) Bristol Harbour case, cit. 18 Ves. 214. Attorney General *v.* Forbes, Redes. Tr. 117.

(*c*) Attorney General *v.* Johnson, 1 Wils. Ch. Rep. 87. See the case upon the trial Rex *v.* Earl Grosvenor, 2 Stark, N. P. C. 511.

(*d*) Amb. 104.

(*e*) A prohibition lay at common law to restrain a public nuisance. 1 Mod. 76. Jacob Hall's case, ib. S. C. 1 Ventr. 169. Rex *v.* Betterton, 5 Mod. 143. Skin. 625. The Court of King's Bench, however, in a recent case, refused to interpose in this

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is a precedent for this in the time of Queen Elizabeth, which appears to have escaped observation. An information was filed by the Attorney general in the Exchequer to restrain the erection of a pigeon-house (*a*) by a lessee for years of parcel of a manor, of which the reversion was in the queen: the whole court being of opinion that a pigeon-house was a common nuisance, an injunction was granted to restrain the building of it (*b*). Though the foundation of this determination must be admitted to be erroneous, it is, nevertheless, of importance, as a proof of the antiquity of this jurisdiction. In a modern case before Lord Rosslyn, where a defendant had taken several old houses, which were empty, as temporary warehouses for stowing sugar, which he was intro-

mode, referring the party complaining to the ordinary remedy by indictment, as it saw no peculiar circumstances to call for this special interference. Rex *v.* Justices of Dorset, 15 East, 594.

(*a*) It was laid down in this case, that none but the lord of the manor and parson of the church could erect a dove-house, *de novo;* and that by the old law the erection of a dove-house was inquirable at the leet as a common nuisance. Lord Burleigh (who was at that time Lord High Treasurer) had come into court during the motion, and having observed that Plowden was of that opinion, and that he had heard Montague, C. J. say the same, the injunction was decreed of course. Mr. Barrington, in his observations upon the statute for view of frank pledge, justly considers this doctrine erroneous; and the authorities collected in Viner, tit. Nuisance, which are very ancient and numerous, are all to the contrary. Hawkins says that a tenant building a dove-house without the lord's licence, may possibly be liable to an action on the case, which opinion seems countenanced by the extract given by Mr. Barrington from the Grand Coutumier: *nul ne peut batir colombier a pied sans congé de son seigneur.*

(*b*) Eliz, Bond's case, Mo. 238.

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ducing in such quantities that two of the houses had actually fallen, and others were in the most imminent danger: Lord Rosslyn granted an injunction upon petition and affidavit (*a*).

The author has not been able to find a precedent in which the court has actually interfered to restrain the carrying on of a noxious trade, destructive to the health and comfort of the neighbourhood. In the late case, however, of the Attorney general *v.* Cleaver (*b*), which was a bill filed for this purpose, not the least doubt seems to have been raised as to the jurisdiction. The court refused to interpose for other reasons *before the trial*, and the cause was compromised before the question could be again discussed.

Only to such nuisances as are so at law.

Bills to restrain nuisances must extend to such only as are nuisances at law: the fears of mankind, however reasonable, will not create a nuisance (*c*). An injunction has accordingly been refused in one case to restrain the building of a house to inoculate for the small pox (*d*); and in another, to restrain the burning of bricks near the habitations of men (*e*).

Determinations at law.

The greater part of those acts which are indictable as common nuisances cannot, from their nature, be cognizable in a court of equity. It may, however, be found useful to notice the determinations at law upon such of them, as may by possibility form the

(*a*) Mayor of London *v.* Bolt, 5 Ves. 129.

(*b*) 18 Ves.

(*c*) 3 Atk. 751.

(*d*) Barnes *v.* Baker, Amb. 158. 3 Atk. 751.

(*e*) Duke of Grafton *v.* Hilliard, cit. 18 Ves. 219. Attorney General *v.* Foundling Hospital, 4 Bro. C. C. 164. 2 Ves. jun. 42.

subject of consideration in a court of equity upon a suit for an injunction. A brew-house, glass-house, lime-kiln, dye-house, smelting-house, tan-pit, chandler's-shop, or swine-sty, if set up in such inconvenient parts of the town as that they incommode the neighbourhood, are common nuisances: so also steeping stinking skins in water, and laying them in the highway (*a*); and in general every thing that causes not only an unwholesome smell, but that renders the enjoyment of life and property uncomfortable, is a nuisance (*b*). It appears to have been ruled, that setting up a noxious manufacture in a neighbourhood in which other offensive trades have long been borne with, unless the inconvenience to the public be greatly increased, is not a nuisance (*c*); and also that a person cannot be indicted for continuing a noxious trade, which has been carried on at the same place for nearly fifty years (*d*). But this has been since overruled, and it appears that no length of time can legalise a public nuisance, although it may supply an answer to the action of a private individual (*e*).

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The erecting or keeping powder-mills and magazines near a town, is also a nuisance for which an

Nuisances to the highway.

(*a*) 5 Bac. Ab. tit. Nuisance. 1 Hawk. P. C. c. 75. s. 10. 2 Russ. on Crimes, 428, 429.

(*b*) Rex v. Pappineau, Stra. 686. Rex v. White, Burr. 333.

(*c*) Rex v. B. Neville, Peake, N.P.C. 91. cit. 2 Russ. on Crimes, 430.

(*d*) Rex v. S. Neville, ib.

(*e*) Weld v. Hornby, 7 East. 199. Rex v. Cross, 3 Campb. 227. 2 Russ. on Crimes, 430.

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indictment will lie (*a*). Another common species of nuisance is by obstruction to highways and bridges, as by digging a ditch, or making a hedge or gate across a highway, or by suffering adjoining ditches to become foul, boughs or trees to hang over, a house adjoining the road or a bridge (*b*) to become ruinous (*c*), or by the unauthorised occupation of the street by waggons or stage coaches (*d*).

Rivers.

All obstructions in public rivers by which the current is weakened, or the placing timber, or other bulky materials, by which the navigation is impeded, are nuisances (*e*).

Harbours.

Lord Hale, in the treatise already referred to, notices the several nuisances which may be committed to ports as follows: tilting or choaking up the port by sinking vessels (*f*), or throwing out filth or trash; decays of wharfs, keys or piers; leaving anchors without buoys; building new wiers or enhancing old; the straitening of the port by building too far into the water (*g*); impeding the mooring

(*a*) Rex *v.* Taylor, 2 Stra. 1167. 2 Russ. on Crimes, 430.

(*b*) Rex *v.* Watson, 2 Lord Raym. 856.

(*c*) 2 Russ. on Crimes, 461.

(*d*) Rex *v.* Russell, 6 East. 427. Rex *v.* Cross, cit. sup. Rex *v.* Jones, 3 Camb. 230.

(*e*) Rex *v.* Leech, 6 Mod. 145. 5 Bac. Ab. Nuis. A. 2 Russ. on Crimes, 491.

(*f*) But where a vessel has been sunk by accident or misfortune, an indictment cannot be maintained against the owner for not removing it. Rex *v.* Watts, 2 Esp. N. P. C. 675.

(*g*) This is not *ipso facto* a nuisance, unless it be a damage to the port and navigation: in these cases therefore it is a question of fact to be found by a jury whether the building be a nuisance

of ships in the ground adjacent, if it hath been antiently used without paying any thing for it; if it be a new port, Lord Hale says the mooring must be permitted upon reasonable amends. Also the towing or hauling of vessels up or down a river or creek to or from a port town; and the suffering a port or public passage to be filted or stopped, is a nuisance in those who are bound to repair it.

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The Commissioners of Sewers, in the exercise of their duty to repair sea banks and walls, survey rivers, public streams, ditches, &c. have authority to inquire of all nuisances and offences committed by the stopping of rivers, erecting mills, not repairing banks and bridges, &c. (*a*). This, however, like all inferior jurisdictions, is subject to the discretionary coercion of the Court of King's Bench (*b*). It seems also that a species of cognizance has been taken of this subject in equity. In a cause in the duchy court of Lancaster, reported in Callis (*c*), the defendants had by their answer set forth an ordinance or decree of commissioners, founded upon a verdict, directing a wear upon the river Wye to be overthrown, and the timber thereof removed; the court, however, was of opinion, that the wear being an ancient wear by prescription and custom, it ought not to have been

Commissioners of Sewers.

or not. Where the building is below the highwater mark, it is a purpresture, but not necessarily a nuisance.

(*a*) 3 Bl. Com. 73.

(*b*) Ib. 74. The modern determinations upon this subject are, Yeaw *v.* Holland, Bl. Rep. 717. Dore *v.* Gray, 2 T. R. 358. Rex *v.* Somersetshire Commissioners of Sewers, 8 T. R. 312. 7 East. 70. 9 East. 109. Masters *v.* Scroggs, 3 M. & S. 447.

(*c*) Hall *v.* Mason, Callis, 262. Ed. 1685.

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overthrown by the decree; and that the verdict was defective in not stating *quanto*, nor *in quâ parte*, the wear was enhanced above the ancient size. In a recent case, however, the Court of Chancery refused to interpose, by injunction upon motion, to restrain commissioners of sewers from removing a float or tumbling bay upon a river, although such removal was stated to be irreparable mischief (*a*). Lord Eldon observed, that without entering into the question whether there might or might not be cases in which a court of equity would interfere, he thought, upon the answer and affidavits, that after the opportunity which the plaintiff had had of taking a much shorter course, by applying to the King's Bench for a *certiorari*, it ought not to interfere in the present case.

Whether an information necessary in cases of public nuisance.

The usual, and perhaps the more correct mode of proceeding in equity in cases of public nuisance, is by information at the suit of the Attorney General (*b*). But it is apprehended that this is by no means absolutely necessary, for, as at law, a party may have a private satisfaction by civil suit for that which is a public nuisance (*c*); so in equity, if there is a special grievance arising out of the common cause of injury which presses more upon particular

(*a*) Kerrison *v.* Sparrow, Coop. 305. 19 Ves. 449. There is another case which has not been alluded to, where a demurrer to a bill to be relieved against an order of commissioners was overruled. Box *v.* Allen, 1 Dick. 49.

(*b*) Amb. 158. 3 Atk. 751. Redes. Tr. 117.

(*c*) Rex *v.* Dewsnap, 16 East. 196. Callis mentions from the books several cases of assizes of nuisance, *tam querenti quam populo*, in which, *for the people*, the offender was ordered to reform the nuisance; to the king he was fined, and the plaintiff, for his own private wrong, recovered his damages, 268, 269.

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individuals, than upon others not so immediately within the influence of it, it should seem that they would be entitled to the interference of a court of equity for the protection of their private rights. Accordingly no less than three of the above applications, on grounds of public nuisance, were at the suit of private individuals (*a*); and though Lord Hardwicke in one of them noticed the irregularity, it does not appear to have formed a serious objection. In the late case of the Attorney General *v.* Johnson, the application was by information and bill.

Private nuisances.

In the case of Coulson *v.* White (*b*), Lord Hardwicke observed, that every common trespass is not a foundation for an injunction, where it is only contingent and temporary; but that if it continues so long as to become a nuisance, the court interferes, and will grant an injunction. Under this head may be noticed an early case in Cary, where the defendant was restrained till the hearing from pulling down a party wall which stood between his house and that of the plaintiff (*c*). The ordinary instance of this jurisdiction is, where the court interposes to restrain a party from building so near the plaintiff's house as to darken his windows (*d*). An injunction will

(*a*) Barnes *v.* Baker. Mayor of London *v.* Bolt. Duke of Grafton *v.* Hilliard, cit. sup.

(*b*) 3 Atk. 21.

(*c*) Bush *v.* Field, Cary, 129. Vide also Manly *v.* Hammet, 2 Dick. 488.

(*d*) Cherrington *v.* Abney, 2 Vern. 646. Duke of Beaufort's case, 2 Bro. C. C. 65. Bateman *v.* Johnson, Fitz. 106. Ryder *v.* Bentham, 1 Ves. 453. Morris *v.* Lord Berkley's lessees, 2 Ves. 453. Attorney General *v.* Bentham, 1 Dick. 277. Attorney General *v.* Nichol, 16 Ves. 338. Lord King *v.* Bishop of Ely, Trin. Vac. 1819.

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not, it seems, be granted in these cases, unless the windows in question are ancient lights (*a*), and the act is in violation of some agreement either express or implied: nor is every diminution in the value of the premises a ground for the court to interpose, nor every species of mischief upon which an action upon the case might be maintained. The foundation of the jurisdiction is that sort of material injury to the comfort of the existence of those who dwell in the neighbouring house, which requires, upon equitable principles, the application of a power to prevent, as well as remedy, the evil (*b*). The diversion of water-courses, or the pulling down banks, and exposing the plaintiff to inundation, are also nuisances against which a court of equity has interposed (*c*).

Determinations at law.

The following are some of the most important determinations at law upon private nuisances of that nature, which are most likely to come under the consideration of a court of equity: actions on the case for stopping ancient lights, or lights not ancient, where it is in violation of some covenant, either express or implied, are extremely numerous (*d*).

Presumptions after twenty years' enjoyment.

The enjoyment of lights with the defendant's acquiescence (*e*), is such decisive presumption of a

(*a*) Fishmongers' Company *v.* East India Company, 1 Dick. 163.

(*b*) 1 Dick. 164. 16 Ves. 342.

(*c*) Martin *v.* Stiles, Mose. 145. Robinson *v.* Lord Byron, 1 Bro. C. C. 588. 2 Cox, 4. 2 Dick. 703. Lane *v.* Newdigate, 10 Ves. 194. Chalk *v.* Wyatt, 3 Meriv. 688.

(*d*) See the old cases referred to, Com. Dig. Tit. Action on the case for nuisance.

(*e*) Daniel *v.* North, 11 East. 372.

right by grant or otherwise, that unless contradicted or explained, a jury are always directed to find in favour of it (*a*). It seems also that a parol licence to put up an obstruction to lights, cannot be recalled at pleasure, after it has been executed at the party's expense (*b*). If an ancient window be raised and enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light and air to any part of the space occupied by the ancient window, although a greater portion of light and air be admitted through the unobstructed part of the enlarged window, than was anciently enjoyed (*c*). If an ancient window has been completely shut up with brick and mortar above twenty years, it loses its privilege (*d*); and if a building, after having been used for twenty years as a malt-house, is converted into a dwelling-house, it is entitled in its new state only to the same degree of light, which it possessed in its former state (*e*). So where an old house is pulled down, and a new one built, the lights in the new house must be in the same place, of the same dimensions, and not more in number than in the old house (*f*). *Of Injunctions to stay Nuisances.*

The following cases are also noticed by Lord C. B. Comyns, as nuisances upon which an action may be maintained: building a house so near another's that the rain falls upon it; fixing a spout so near *Various nuisances.*

(*a*) Lewis *v.* Price, 2 Serjt. Wms. Saunders, 175. Dougal *v.* Wilson, ib. Darwin *v.* Upton, ib.

(*b*) Winter *v.* Brockwell, 8 East. 308.

(*c*) Chandler *v.* Thompson, 3 Campb. 80.

(*d*) Lawrence *v.* Obee, ib. 514.

(*e*) Martin *v.* Goble, 1 Campb. 322.

(*f*) Cherrington *v.* Abney, 2 Vern. 646.

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another's house, that the rain falls down and injures the foundations of it; digging a pit so near another's land that it fall into it; obstructing water in various ways; erecting any thing offensive, as a swine-sty, lime-kiln, dye-house, tallow-furnace, privy, brew-house, tan-pit, smelting-house, smith's forge, &c. so near another's house as to injure it materially.

Ferry or market.

It is also a species of nuisance to erect a ferry or market, so near as to prejudice an ancient ferry or market (*a*). In a case before Lord Hardwicke, an injunction was moved for, before answer, to restrain the defendants from using ferry-boats to the prejudice of the plaintiffs, whose right to the sole use of the ferry had been established by a decree: Lord Hardwicke was of opinion that the record was a sufficient foundation to grant an injunction before answer; but as it was not shown to his satisfaction upon the affidavits, that the plaintiff had kept up a sufficient number of ferry-boats to carry passengers, the motion was refused (*b*); but in a case where the right had not been established, Lord Hardwicke, with great clearness, refused to interpose to stay the use of a market or ferry (*c*). In the case of Churchman *v.* Tunstal, where a bill was filed by the tenant of an ancient ferry to suppress a new one, and to obtain an injunction against renewing it, the court dismissed the bill (*d*). This determination, which was during the usurpation, proceeded in a great measure upon the claim being

(*a*) Com. Dig. ub. sup. Yard *v.* Ford, 2 Saund. 171.
(*b*) Anon. 1 Ves. 476.
(*c*) Anon. 2 Ves. 414.
(*d*) Hard. 162.

considered as a monopoly, the plaintiff being a lessee of the crown: another bill was filed for the same matter after the Restoration, when Hale was C. B., upon which the court decreed that the new ferry should be suppressed (*a*). *Of Injunctions to stay Nuisances.*

Where the court is satisfied that the matter complained of is not a nuisance, the injunction is immediately refused or dissolved. It has also been said, that there is no instance of the court holding it a nuisance, and therefore enjoining it *without trial* (*b*). This proposition, however, it is submitted, is laid down too extensively; for though some orders of Lord Jeffries, who, *on petition*, restrained persons from proceeding in buildings which would intercept the prospect from Gray's Inn Gardens, may not be considered as authorities (*c*), yet in all the cases cited from Lord Hale, and in the modern decisions in the Exchequer, which, although purprestures, were also nuisances, the decrees were made without any trial. Lord Hale also, in another part of the treatise, in enumerating the various nuisances which may be committed to harbours, notices but one in which a trial is necessary, and this not on the ground of any want of jurisdiction in the court to restrain a nuisance in general without a previous verdict, but because in that particular case, (viz. the straitening a port or harbour by building too far into the water), it is a question of fact, whether the matter complained of is or is not a nuisance; for, as he observes, in many cases it is an advantage to the port to keep Whether the court will enjoin without trial.

(*a*) Minute Book, 1662, fol. 181. cit. 2 Anst. 608.

(*b*) 18 Ves. 220.

(*c*) 2 Ves. 454.

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the sea-water from diffusing at large. As the matter complained of is therefore not *ipso facto* a nuisance, but may be so, according to circumstances, it becomes necessary to ascertain those circumstances by verdict; but where it is in itself a nuisance, the court (if there is sufficient evidence of its existence) is competent to restrain it without a verdict. There is a similar distinction noticed in the argument in Yard *v.* Ford, in Saunders; and in a passage from Fitz-Herbert's *Natura Brevium* there cited. It is there said, that if a market be on the same day, it shall be intended a nuisance; but if it be on another day, it shall not be so intended, and therefore *it shall be put in issue* whether it be a nuisance or not (*a*).

The above case, from Moore, of the Pigeon-house, is also another instance in which the court restrained without a previous trial.

In what cases the court will enjoin till trial.

Whatever may be the actual jurisdiction upon this point, it is, however, certain that courts of equity are at present extremely unwilling to interpose without a trial at law; a question therefore has always arisen in these cases, whether the court will grant or continue an injunction *till the trial.* Where the alleged nuisance consists in the exercise of a manufacture, the court, upon the same principle upon which it feels so much reluctance to restrain the working of mines and collieries, would require the fact of its being a nuisance to be first clearly established at law: accordingly, in the above-noticed case of the Attorney General *v.* Cleaver, the court

(*a*) Saund. 174.

refused to interfere, partly because there had been laches in the relators, and partly on account of the inconvenience of stopping a large trading concern, in which capital to a great amount had been embarked. In the Attorney General *v.* Doughty, Lord Hardwicke refused to interfere, before answer, to stay buildings which would intercept the prospect from Gray's Inn Gardens; and the same has been done in other cases (*a*). Where a party has been guilty of great laches and connivance, in suffering another to erect a nuisance; the court has not only refused to interpose against the erection of that nuisance, but has also granted injunctions to restrain actions brought at law for the nuisance; for as every continuance of a nuisance is a fresh nuisance, the plaintiff would be perpetually liable to actions, which would be hard, after having been encouraged by the party himself (*b*).

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In a *plain case of nuisance*, however, as observed by Lord Hardwicke, the court will interfere upon affidavit, certificate, and notice, and will not suffer the nuisance to go on, to the prejudice of the party in the mean time (*c*); and we have seen, that in a pressing case, Lord Rosslyn even interfered upon petition. The result of all the cases seems to be, that though the court is in general averse to interfering before a trial, yet if a case of nuisance is clearly made out upon affidavit, it will nevertheless be granted or continued until such trial shall have

(*a*) Bateman v. Johnson, Fitzg. 106. Ryder v. Bentham, supr.

(*b*) Anon. 2 Eq. Ab. 522. Short v. Taylor, cit. ib.

(*c*) 2 Ves. 453. 2 Dick. 488.

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been had. In the case already noticed of the Attorney General *v.* Johnson, Lord Eldon refused to dissolve the injunction before the trial, although there were affidavits on the part of the defendants, stating that the act complained of was beneficial to the navigation.

Where court has interposed before trial, it will take care that there is no delay.

The court, in those instances in which it refused to enjoin, will, however, take care that no delay shall take place in proceeding to trial (*a*). There is a singular note in Vesey (*b*), of a motion for liberty to re-erect a nuisance, and to be quieted in the enjoyment of it until the hearing. Lord Hardwicke said that he had known several of these motions, but hardly ever knew one granted, by giving express liberty to re-erect a thing pulled down: that if a house was built on what was insisted to be the highway, and that was pulled down, the court would certainly not give liberty to re-erect that building. His lordship said, that he could not grant the injunction; but the utmost he could do was to put it in a speedy method of trial.

No objection to granting the injunction, that an action has been commenced at law.

It is no objection to the granting an injunction, that the plaintiff has commenced an action at law; in one instance where this was the case, it was offered to discontinue the action if necessary, to entitle the parties to the injunction, but Lord Eldon held it immaterial (*c*).

(*a*) Attorney General *v.* Cleaver, sup.

(*b*) Anon. 2 Ves. 193. S. C. 3 Atk. 726. nom. Birch *v.* Holt.

(*c*) Attorney General *v.* Nichol, 3 Meriv. 687.

Setting up Terms.

is a title in conscience equal to that of the claimant, and the court will not restrain the possessor from using any advantage he may be able to gain to defend his possession (*a*).

Never done upon motion.

This species of relief, it is said, is never granted upon motion prior to the decree (*b*), as it would be deciding the whole equity of the case before the decree. The principle of a bill of this nature is, that the court directs the mode of proceeding at law under the decree; and therefore it cannot be right, that previous to the decree, an ejectment is to go at the hazard of proceeding in the very manner which the court would have prohibited (*c*).

Perpetual injunctions.

Where the court is of opinion, at the hearing, that the plaintiff has established a case which entitles him to an injunction; or if a bill praying an injunction is taken *pro confesso*, a perpetual injunction will be decreed (*d*). This injunction is final, and it is not necessary to revive upon the death of either of the parties, in order to keep it on foot; if so, as observed by Lord Bathurst, it would, in effect, be decreeing a perpetual suit (*e*).

(*a*) Redes. Tr. 109.

(*b*) Hylton *v.* Morgan, 6 Ves. 293. Byrne *v.* Byrne, 2 Sch. & Lef. 537.

(*c*) 6 Ves. 294.

(*d*) Gilb. For. Rom. 194. Harrison, Ch. Pr. 551. Knight *v.* Adamson, 2 Freem. 106. Pigeon *v.* Loveday, cit. ib.

(*e*) Askew *v.* Townsend, 2 Dick. 471. cit. in Morgan *v.* Scudamore, 2 Ves. jun. 316. Yeomans *v.* Kilvington, 1 Dick. 371.

Perpetual Injunctions.

After decree for performance of trusts.

Where there has been a decree for the performance of trusts, it has been held a ground for a bill for a perpetual injunction to restrain the party setting up a legal estate against that decree (*a*); thus in the case of Acherley *v.* Vernon, after a decree, that trustees should convey certain fee-farm rents, which was affirmed by the House of Lords, a perpetual injunction was decreed to restrain the defendant from proceeding for them at law (*b*). And in the case upon the will of the Duke of Buckingham, the duchess being proceeding in the Ecclesiastical Court, after a decree for the execution of the trusts, a perpetual injunction was decreed (*c*).

The case of Selby *v.* Selby, before Lord Thurlow, is also an instance of the application of this doctrine. Upon a bill by a devisee to establish the will, the defendant made default at the hearing; the bill was retained for a twelvemonth, with liberty for other defendants to bring actions, and further directions reserved; and the order was to be binding on the defendant, unless he showed cause to the contrary; which he not doing, the same was made absolute. The other defendants having failed in their actions, and the cause being heard upon the equity reserved, the will was decreed to be established, and the trusts executed, and this decree was enrolled. The defendant having afterwards brought an ejectment, the plaintiff in the former cause filed a bill against him, stating these facts, and praying a perpetual injunction,

(*a*) Askew *v.* Poulterers' Company, 2 Ves. 90.
(*b*) 2 Eq. Ab. 527.
(*c*) Ibid.

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which Lord Thurlow decreed, observing, that the court will not permit any person to impede the execution of a decree, so long as the decree remains unappealed from (*a*).

Upon the sentence of a foreign court of competent jurisdiction.

So upon the principle that the sentence of a foreign court, of competent jurisdiction, is conclusive; a perpetual injunction was decreed by Lord King, against an action brought against a person who having accepted a bill of exchange drawn upon him at Leghorn, had instituted a suit there, and, according to the law there, had had his acceptance vacated (*b*).

Whether the court will bind the inheritance upon one verdict only.

It is generally said that the court will not bind the inheritance upon one verdict only (*c*); Lord Northington, however, in the case of the Earl of Darlington *v.* Bowes (*d*), expressed great disapprobation of this rule, and inquired if there was any instance of a decree upon one verdict only, observing,

(*a*) Selby *v.* Selby, 2 Dick. 678.

(*b*) Burrows *v.* Jemineau, Sel. Ca. Ch. 69. S. C. 2 Stra. 733. Mose. 1. 2 Eq. Ab. 524. Vide, generally upon this subject, Ashcomb's case, 1 Ch. Ca. 232. Bluet *v.* Bampfield, ib. 237. Newland *v.* Horseman, 2 Ch. Ca. 74. 1 Vern. 21. Dupleix *v.* De Roven, 2 Vern. 540. Otto Lewis's case, 1 Ves. 298, and the cases at law collected, Phillips on Evidence.

(*c*) Edwin *v.* Thomas, 2 Vern. 75. Leighton *v.* Leighton, 1 P. W. 674. 1 Stra. 404. 4 Bro. P. C. Ed. Toml. 378. Lord Fauconberg *v.* Pierce, Amb. 210. Lord Sherborne *v.* Naper, cit. 4 Ves. 206. 2 Ridg. P. C. 224. Bates *v.* Graves, 2 Ves. jun. 287. Even a court of law will regard the circumstance of the inheritance being to be bound for ever: and in a case of a doubtful and obscure nature, where the property is of great value, has granted a new trial on payment of costs, although it has not thought the verdict wrong. Swinnerton *v.* Marquis of Stafford, 3 Taunt. 91.

(*d*) 1 Eden, 270.

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that he thought there were some old ones, and that if any could be found, he would certainly refuse the application before him for a new trial; but as none were produced, the order was made (*a*). There is a case before Lord Clarendon, in which a decree was made upon one verdict, and though it was disapproved of by Lord Keeper North (*b*), yet there is a note in Viner which supports it (*c*). There is also a subsequent case of very considerable importance, in which the same thing was done, though it may perhaps be accounted for from the extreme iniquity of the defence. An issue *devisavit vel non* was directed to be tried at the bar of the Court of King's Bench, when a verdict was found in favour of the will (*d*). Upon the hearing the cause upon the equity reserved, the will was decreed to be established, and the trusts to be executed, which were executed accordingly. The heir at law having afterwards made his will and died, his devisee brought an ejectment; upon which the devisees under the first will filed a

(*a*) There is a passage in Lord Thurlow's observations, in Robinson *v.* Lord Byron, 2 Cox, 6. which seems to import that there is a difference between the effect of a verdict upon an action brought by the direction of the court, and an issue sent out of it: the author cannot find that the distinction has ever been attended to in practice.

(*b*) Fitton *v.* Lord Macclesfield, 1 Vern. 292.

(*c*) Wilson *v.* Story, 14 Vin. Ab. 431.

(*d*) An account of this remarkable case will be found 1 Bl. Rep. 365. the three subscribing witnesses to the will, the two surviving ones to a codicil, and a dozen servants of the testator, all swore to his insanity; all the witnesses, being nineteen in number, appeared to be grossly and wilfully perjured: the testamentary witnesses were afterwards convicted of perjury.

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bill for an injunction to restrain him from proceeding at law, and a perpetual injunction was decreed upon the hearing (*a*).

Perpetual injunctions after repeated trials at law.

Perpetual injunctions have also been decreed upon mere legal titles, to restrain repeated and vexatious litigation. In many cases, as has been observed by Lord Redesdale, the courts of ordinary jurisdiction admit, at least for a certain time, of repeated attempts to litigate the same question; to put an end to the oppression occasioned by the abuse of this privilege, the courts of equity have assumed a jurisdiction. Thus actions of ejectment have become the usual mode of trying titles at the common law, and judgments in those actions not being in any degree conclusive, the courts of equity have interfered, and after repeated trials and satisfactory determinations of questions, have granted perpetual injunctions to restrain further litigation (*b*).

(*a*) Lowe *v.* Jolliffe, 1 Dick. 383.

(*b*) Redesd. Tr. 116. Lord Ellesmere used to call ejectments pickpurse actions, in which he that had the last angel prevailed. Hollard *v.* Battel, Pract. in Chancery unfolded, 32. Courts of law have themselves endeavoured to put some stop to the vexation produced by repeated ejectments, and will accordingly stay proceedings in a second ejectment till the costs of a prior ejectment for the trial of the same title, or of an action for mesne profits, have been paid. Roberts *v.* Cook, 4 Mod. 379. Lord Coningsby's case, Stra. 547. Doe *v.* Hatherley, ib. 1152. Doe *v.* Chambers, Bl. Rep. 1180. Doe *v.* Holdfast, 6 T. R. 228. Keene *v.* Angel, ib. 740. Doe *v.* Roe, 8 T. R. 645. Doe *v.* Roe, 4 East. 585. Doe *v.* Stevenson, 2 B. & P. 22. and the cases there cited. This rule, however, will not be extended so as to include *damages* in the action for the mesne profits. Doe *v.* Barclay, 15 East. 233. nor

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The leading case upon this subject is that of the Earl of Bath *v.* Sherwin (*a*), where, after five verdicts in favour of the plaintiff, a bill was filed for a perpetual injunction. Lord Cowper, though satisfied of the vexatious nature of the defendant's litigation, yet being unwilling to interpose in a case where the title was purely legal, refused to decree an injunction, but recommended it to the plaintiff as a case proper for the House of Lords; and on an appeal a perpetual injunction was decreed (*b*). Upon this authority a perpetual injunction was also decreed in the Exchequer, in the case of Barefoot *v.* Fry, where the defendant had brought five ejectments, and had been nonsuited upon full evidence in three of them, and had verdicts against him in the other two; he had also brought bills in Chancery and the Exchequer, which had both been dismissed (*c*).

Injunction against bankrupt vexatiously disputing his commission.

Though a court of equity will not compel a bankrupt to give validity to the commission against him by any positive act, yet where he has repeatedly questioned it, and thwarted his assignees in its progress, the court will, in due time, when his conduct appears vexatious, restrain him from further disputing it (*d*).

In a case before Lord Ellesmere, where it appeared that eight actions were instituted for the

the taxed costs of a suit in equity brought for the same premises. Doe *v.* Winch, 3 B. & A. 602.

(*a*) Pr. Can. 261. Gilb. Eq. Rep. 2.

(*b*) 1 Bro. P. C. 266. Ed. Toml. Vol. IV. p. 373.

(*c*) Bunb. 158.

(*d*) Thorpe *v.* Goodall, 17 Ves. 393.

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same cause, he stayed them all by injunction, saying that it was barretry (*a*).

Bills to prevent multiplicity of suits.

In all cases in which there is one general right to

(*a*) Duncombe *v.* Rendall, Practice in Chancery unfolded, 31. Many of the injunctions granted by Lord Ellesmere are extremely curious, and show how little value is to be set upon precedents in equity at this early period. Thus in the case of Ramsey *v.* Woodcock, Choice Cases in Chancery, 174, it appeared that Queen Elizabeth had granted a protection to certain persons against their creditors, upon paying a certain composition, and by that protection her majesty willed "that an injunction should be granted out of this court against all such as should implead the said persons, and not content themselves with the aforesaid rate;" and an injunction was accordingly granted at the suit of some of the creditors who had accepted the composition, against others who were suing at law. In another case, an injunction was granted at the suit of an innkeeper, to restrain an action brought by a carrier, for money taken out of his pack while in his house, Clarke *v.* Colibere, ib. 172. In another case he granted an injunction to restrain an action, merely on the ground that churches and hospitals were not fairly dealt with in the country, Warwick Hospital *v.* Fielding, Practice in Chancery unfolded, 31; and it is said in the same book, that he ordinarily granted injunctions to stay suits upon the stat. E. 6. for treble damages for not setting out tithes, but *permitting them to sue how they will otherwise* for their tithes. There is a curious case in Cary (which might perhaps have been more properly noticed in a former part of this treatise), in which the court refused to restrain an action brought by the defendant for words spoken by the plaintiff against him, it being alleged that the plaintiff was drunk when he uttered the words, Kendrick *v.* Hopkins, Cary, 133. In a case in Tothill, a parson is said to have been prohibited, upon decree, from preaching, Town of Yarmouth *v.* Dean of Norwich, 66; in another, an injunction was granted against the issue in tail, to restrain the reversal of a fine, Arundell *v.* Arundell, ib. 115. There is another head of injunction, upon which the cases are extremely numerous, viz. injunctions to restrain proceedings in the King's Bench, where the king's fine had not been paid, Cary, 110. 121. Choice Ca. in Cha. 111. 130.

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be established against a great number of persons, a court of equity will interpose, in order to prevent multiplicity of suits; and instead of suffering the parties to be harassed by a number of separate actions, each of which would only determine the particular right in question, between the plaintiff and the defendant to it, it will at once determine the rights by a decree, having previously, if necessary, directed issues for its information (*a*). A bill of this nature may be brought by a parson for tithes against his parishioners; by parishioners to establish a modus; by a lord against tenants for encroachments, or by tenants against the lord for disturbance (*b*). The jurisdiction has also been entertained to establish toll due by custom (*c*).

Upon this principle in two early cases, where a lord of a manor had enclosed under the statute of Merton, injunctions were granted to restrain the

(*a*) 2 Atk. 484. Redes. Tr. 118, 119.

(*b*) How *v.* Tenants of Broomsgrove, 1 Vern. 22. Ewelme Hospital *v.* Andover, ib. 266. Powlet *v.* Ingrey, ib. 308. Brown *v.* Vermuden, 1 Ch. Ca. 272. Rudge *v.* Hopkins, 2 Eq. Ab. 170. Mayor of York *v.* Pilkington, 1 Atk. 282. Conyers *v.* Lord Abergavenny, ib. 285. Poore *v.* Clark, 2 Atk. 515.

(*c*) Currier *v.* Cryer, Hard. 21. Green *v.* Robinson, ib. 174. City of London *v.* Pallister, cit. Bunb. 101. Ibid. *v.* Perkins, 3 Bro. P. C. Ed. Toml. 602. Corporation of Carlisle *v.* Wilson, 13 Ves. 276. Duke of Norfolk *v.* Myers, 4 Mad. Rep. 83. Marshall *v.* Walmesley, Lady Petre *v.* Clarkson, Earl of Warrington *v.* Mosely, cit. ib. Though this is now fully settled, yet there are many precedents in which courts of equity have refused to interpose. Disney *v.* Robertson, Bunb. 41. Bond *v.* City of Exeter, ib. Mayor of Boston *v.* Jackson, ib. 101. Harding *v.* Ainge, ib. Vide also Fines *v.* Cobb, 2 Vern. 116.

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tenants from throwing down the enclosures (*a*). Lord Eldon has recognised the authority of these cases, considering it established that a lord of a manor may file a bill, stating that he has approved under the statute, and left sufficient common of pasture; that by the operation of the statute the inclosure has become his exclusive soil. Upon such a bill, however, the prayer must be, not in the nature of waste, for an injunction, but for the establishment of the exclusive right under the statute, and to have that right declared: accordingly in the case before him, where an injunction had been obtained on affidavit, against cutting and pasturing cattle in a wood, the plaintiff praying the injunction as tenant in fee, or as lord of the manor inclosing under the statute; the defendants denying the former title, and as to the latter claiming common of pasture and estovers, and stating that after the enclosure sufficient common of pasture would not be left, the injunction was under the circumstances dissolved upon the answer (*b*).

Upon the principle of preventing multiplicity of suits, a bill will lie to settle a general fine to be paid by all the copyhold tenants of a manor (*c*).

Such bill will not lie where the right is disputed between two persons only.

A bill of this sort, however, cannot be maintained where a right is disputed between *two persons only*, and the decree sought cannot conclude any one

(*a*) Weeks *v.* Staker, 2 Vern. 305. Arthington *v.* Fawkes, ib. 356.

(*b*) Hanson *v.* Gardiner, 7 Ves. 305.

(*c*) Middleton *v.* Jackson, 1 Ch. Rep. 18. Popham *v.* Lancaster, ib. 51. Cowper *v.* Clerk, 3 P. W. 157.

except the defendants (*a*). Accordingly in the above noticed case of Cowper *v.* Clerk, a bill by a single copyholder to be relieved against an excessive fine was dismissed with costs, as determinable at law. Thus in one of the leading cases upon this subject, a bill by a lord of a manor to establish his legal title to the manor, and for a perpetual injunction to restrain the defendant from appointing a steward or gamekeeper for the said manor, and from setting up any further claim thereto, was dismissed with costs, and that decree was affirmed upon appeal by the House of Lords (*b*). *Perpetual Injunctions.*

We may here notice, though not exactly belonging to the subject, yet not entirely foreign from it, the doctrine upon the subject of bills for settling boundaries, and of bills for the recovery of quit rents. As to the former, it is settled that the mere confusion of boundaries is not a sufficient ground for the court to interpose, the jurisdiction must be superinduced by some equitable circum- *Bills for settling boundaries and recovery of quit rents.*

(*a*) Disney *v.* Robertson, sup. City of London *v.* Ainsley, 1 Anst. 158. Whitchurch *v.* Hide, 2 Atk. 391. Lord Teynham *v.* Webb, ib. 483. Weller *v.* Smeaton, 1 Bro. C. C. 572. 1 Cox, 102. There are some old cases upon this subject to the contrary, where the court acted upon the great length of possession in the plaintiff, but they are not law at present. Bush *v.* Western, Pr. Ch. 530. Finch *v.* Resbridge, 2 Vern. 390. Where a person was in possession of a fishery, he was allowed to file a bill to perpetuate testimony and establish his right, though he had not recovered in affirmance of it at law. Duke of Dorset *v.* Girdler, Pr. Ch. 531. But where the plaintiff has been interrupted and dispossessed, and therefore has a remedy at law, a bill of this nature will not lie. Wynn *v.* Hatty, cit. ib.

(*b*) Welby *v.* Duke of Rutland, 3 Bro. P. C. Ed. Toml. 39.

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stance (*a*). In the cases of quit rents, relief has been given where the remedies at law have either been lost or become very deficient (*b*).

Where the lands of several are subject to a rentcharge, grantee restrained from suing one alone.

There are several ancient cases upon the subject of rentcharges, which proceeded upon the equity which the plaintiff had to contribution, viz. where the lands of several being liable to a rentcharge, and the person entitled to it was suing one alone, the court has restrained him without making the rest parties (*c*).

(*a*) Wake *v.* Conyers, 2 Cox, 260. 1 Eden, 331. St. Luke's *v.* St. Leonard's, 1 Bro. C. C. 40. Atkins *v.* Hatton, 3 Anst. 387. Rous *v.* Barker, 3 Bro. P. C. Ed. Toml. 660. Loker *v.* Rolle, 3 Ves. 4. Duke of Leeds *v.* Earl of Strafford, 4 Ves. 180. The Attorney General *v.* Fullarton, 2 V. & B. 263. Spear *v.* Crawter, 2 Meriv. 410.

(*b*) Vide Holder *v.* Chambury, 3 P. W. 256. and the cases there cited. Bouverie *v.* Prentice, 1 Bro. C. C. 200. Duke of Leeds *v.* New Radnor, 2 Bro. C. C. 340. 518.

(*c*) Cary 38. Dolman *v.* Vavasor, ib. 132. The Queen *v.* Colborne, ib. 159.