

Case 295.—LORD TENHAM *versus* HERBERT, December 17, 1742.

S. C. 2 Eq. Ab. 164, pl. 31.—The defendant demurred to the plaintiff's bill, brought to establish a right to an oyster fishery, and to be quieted in the possession of it, as being a matter properly triable at law. *Lord Hardwicke declared, that where the right of a fishery is in dispute only between two lords of manors, they can neither come here, till it is first tried at law, and therefore allowed the demurrer.*

The plaintiff brought his bill, in order to establish a right to an oyster fishery, and to be quieted in the possession of it, against the defendant *Herbert*, who claims the piece of ground where this fishery is, as belonging to his manor.

The defendant demurred to this bill, as it is a matter properly triable at law.

*Lord Chancellor.* Undoubtedly there are some cases, in which a man may, by a bill of this kind, come into this court first; and there are [484] others where he ought first to establish his right at law.

It is certain, where a man sets up a general exclusive right and where the persons who controvert it with him are very numerous, and he cannot, by one or two actions at law, quiet that right, he may come into this court first, which is called a *bill of peace*, and the court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant. (This point is established by the cases of *How v. the tenants of Bromesgrove*, 1 Vern. 22. *New Elm Hospital v. Andover*, 1 Vern. 266. *Weekes v. Slake*, 2 Vern. 301. *Arthington v. Fawkes*, 2 Vern. 356. *Brown v. Vermuden*, 1 Cha. Ca. 272. *Mayor of York v. Pilkington*, ante, 1 vol. 282. *City of London v. Perkyns*, 4 Bro. Par. Ca. 157 [2nd ed. 3 Bro. P. C. 602].)

As to the case of the corporation of *York* and Sir *Lionel Pilkington* (ante, 1 vol. 282), the plaintiffs there were in possession of the right of fishing upon the river *Ouse*, for nine miles together, and had constantly exercised that right; and as this large jurisdiction entangled them with different lords of manors, it would have been endless for the corporation to have brought actions at law.

But where a question, about a right of fishery, is only between two lords of manors, *neither of them can come into this court till the right is first tried at law.* (Agreeable to this distinction are the following cases, *Whitchurch v. Hyde*, ante, 391. *Welby v. the Duke of Rutland*, 6 Bro. Par. Ca. 575 [2nd ed. 2 Bro. P. C. 39]. *Parish of St. Luke v. Parish of St. Leonard*, 1 Bro. Cha. Rep. 40. *Weller v. Smeaton*, 1 Bro. Cha. Rep. 572.)

*Lord Tenham* does not charge in this case any possession for the last 38 years, so that this is the nature of an ejectment bill; the plaintiff says, that this piece of ground *aqua cooperta* belongs to him; Mr. *Herbert* insists it belongs to him; so that this may very properly be determined at law, as it is a mere single question, to try the right between two persons; and it is not like the case of the corporation of *York*, who must have gone all round the compass to have come at their right at law.

Therefore the demurrer must be allowed.

Case 296.—BLANCHARD *versus* HILL, December 18, 1742; Last seal after Michaelmas term.

[See *Farina v. Silverlock*, 1855, 1 Kay & J. 514. Doubted, *Hall v. Barrows*, 1863, 32 L. J. Ch. 548.]

The plaintiff moved for an injunction to restrain the defendant from using the *Mogul* stamp on his cards, suggesting the sole right to be in the plaintiff, having appropriated the stamp to himself, conformable to the charter granted to the card-makers' company by King *Charles the First*. *Lord Hardwicke denied the injunction, and said, he knew no instance of restraining one trader from making use of the same mark with another.*

A motion was made on behalf of the plaintiff for an injunction to restrain the defendant from making use of the Great *Mogul* as a stamp upon his cards, to the prejudice of the plaintiff, upon a suggestion, that the plaintiff had the sole right to this

stamp, having appropriated it to himself, conformable to the charter granted to the card-makers' company by King *Charles* the First. (Note: The plaintiff alleged, that he had invented the mark, and it was approved and allowed of to him by the Master, Wardens, and Assistants of the Company of makers of playing cards of the city of *London*. *Reg. Lib. A.* 1742, fol. 28.)

[485] *Lord Chancellor*. I think the intention of the charter is illegal, though, indeed, all the clauses that establish the corporation, and give them power to make by-laws, are legal.

In the first place, the motion is to restrain the defendant from making cards with the same mark, which the plaintiff has appropriated to himself.

And, in this respect, there is no foundation for this court to grant such an injunction.

Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here, to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it.

*Mr. Attorney General* has mentioned a case, where an action at law was brought by a cloth-worker, against another of the same trade, for using the same mark, and a judgment was given that the action would lie. *Poph.* 151. (The case here alluded to seems to be that mentioned by *Doderidge* in *Southern v. How*, *Poph.* 144.)

But it was not the single act of making use of the mark that was sufficient to maintain the action, but doing it with a fraudulent design, to put off bad cloths by this means, or to draw away customers from the other clothier: And there is no difference between a tradesman's putting up the same sign, and making use of the same mark, with another of the same trade.

In the case of monopolies, the rule the court has governed itself by, is, whether there is any act of parliament under which this restriction is founded.

But the court will never establish a right of this kind, claimed under a charter only from the crown, unless there has been an action to try the right at law.

The court would not do it, even in the case of the sole printing of Bibles and Common-prayer-books, till a trial was first had. (*Anon.* 1 *Vern.* 120. *Hills v. University of Oxford*, 1 *Vern.* 275. *Whitchurch v. Hide*, ante, 391, and references.)

If the injunction is to be obtained, it must be upon the charter of the crown.

But then it must be considered upon the intention of the charter, what was the end of directing the marks there.

[486] I take this to be one of those monopolies which were so frequent in King *James* the First's time, and continued through all his reign, but did not last long in his successor's: I observe too, the application for this very charter was in King *James* the First's time, though not completed till the beginning of King *Charles* the First's reign.

In the first place, the design of granting this charter, was to raise a sum of money for the crown.

Here is a clause likewise for prohibiting the importation of cards from foreign parts: could such a clause be supported now? Impossible. It is intirely illegal.

There is another clause that confines the making of cards to *London*, and ten miles about it, which is a plain monopoly, and directly against law.

The duty here, is two shillings a gross upon cards; and the receiver intituled to one half of the duty, under the charter.

There is an authority to the card-makers, to seal their own cards; and every particular maker shall have his own stamp or mark, so that the receiver of the duty may know who is the maker of the cards.

The design of this was, that it might be plain to the receiver, who the cards belonged to, and that the receiver might be enabled yearly to make up his account relating to the duty.

Now as this was illegal, the payment of this duty has been discontinued long since.

This then appears to have been the primary end of these marks.

There is another clause in the charter, that in order every card-maker may know his cards, from another card-maker, each trader shall lodge his mark or stamp with the receiver, *to prevent any fraud upon our loving subjects*.

This is a colourable end, but if any weight was to be laid upon these colourable recitals, it would be establishing every other monopoly.

For all the world knows, that there is a pompous recital in every monopoly, of the great benefit to trade, accruing from such charters of restriction.

[487] There is another thing observable too, that it is impossible to carry this clause

into execution ; for the duty being illegal, and sunk, the receiver sunk with it, so that there is no person to receive the stamps or marks.

An objection has been made, that the defendant, in using this mark, prejudices the plaintiff by taking away his customers.

But there is no more weight in this, than there would be in an objection to one innkeeper, setting up the same sign with another.

There is a fact set out by the defendant in his answer, which is not at all denied by the plaintiff, that the card-makers use quite different marks from what they did formerly ; which shews this charter is grown obsolete, or otherwise all card-makers, if they observed the charter, would adhere to that sort of stamps which are directed under it.

Upon the whole, there are no grounds in this case to grant an injunction against the defendant, till the hearing of the cause. (*Reg. Lib. A.* 1742, fol. 34.)

Case 297.—BENNET *versus* LEE, December 20, 1742.

S. C. ante, 324 ; post, 529.—Lord *Hardwicke* doubted whether an infant son can, before he comes of age, put in a new answer, so as to rehear the cause over again ; for if there should be a decree against him on the second hearing, he may with as much reason put in a third answer, which would occasion infinite vexation.

A petition had been presented on behalf of *Francis Lee*, heir at law to *Sir Francis Lee*, grandfather of *Sir John Lee*, for a bill of review upon a suggestion of new evidence discovered since the decree, in the former cause, and which was not in his power at the time of the decree, and this was supported by affidavits.

The material evidence that is insisted upon is a deed of settlement in 1684, made by the father of *Sir John Lee*, in which all the uses under that settlement are spent, and the reversion in fee is descended upon *Francis Lee* and his brother *Richard Lee*, who is an infant, in gavelkind.

It was argued on the part of *Richard Lee*, that he, being an infant, cannot be precluded by the decree, from varying his defence in the former cause even before he comes of age.

*Lord Chancellor.* The doubt with me is, whether an infant can, before he comes of age, put in a new answer, so as to rehear the cause all over again ; for if there should be a decree against him upon the second hearing, he may with as much reason put in a third answer, and make the proceedings endless, and by this means leave it in the power of a guardian to put in a new answer for him [488] every year, during his minority, and occasion infinite vexation. (*N.B.* In the case of *Richmond & Ux' versus Tayleur*, 1 P. Wms. 735, it was held that an infant aggrieved by a decree is not bound to stay till he is of age, but may apply as soon as he thinks fit to reverse it : and may do this either by bill or review, rehearing, or original bill, alledging specially the errors in the former decree.)

On the side of the plaintiff *Bennet* they set up three recoveries in 1703, 1718, and 1736, which, if they take in the *Kentish* estate claimed by the defendants, is a complete bar to the petition.

Some objections being made to the validity of these recoveries, the cause was ordered to stand over, that the petitioners may have time to look into them.

Case 298.—BAKER *versus* HART, December 22, 1742.

The parties interested in an order for the appointment of a receiver, take upon them to print it with a recital of the material facts in the cause relevant to the order, and disperse it among the tenants : some other parties insisted this was a contempt of the court. Lord *Hardwicke* held it to be no contempt, but said at the same time he did not approve of such a practice.

There was an order made just before the last long vacation, for the appointing a receiver of the rents of an estate in the island of *Sheppy*, belonging to the late admiral *Hosier*.

It being necessary for the Master to inquire into the circumstances of the person proposed for a receiver, and likewise of his sureties, it was impossible to complete it