enjoyed by the person who shall be entitled to my said house in *Piccadilly*. She then gives to the Duchess of *Portland* an oval box, a snuff-box with a portrait, and several rings and seals; afterwards, by a codicil, dated the 31st of *January* 1779, she devised the house to [468] *Dudley Long*, Esq., and gives her cabinet, by the following description: "My collection, or cabinet of curiosities, consisting of coins, medals, gems, and "Oriental stones and other valuable things (except as before excepted), hanging shelves, "snuff-boxes, bust on the stair-case of Cardinal *Richelieu*, my Florentine cabinet of "Oriental stones in the second rooms, and the japan cabinet in the bed-chamber, "formerly belonging to Lady *Elizabeth Wentworth*, my late aunt, unto Lord *Charles* "*Cavendish* and Lord *Camden*, upon the same trusts as before."—She gave the residue to Lord *Charles Cavendish*, and made him and Lord *Camden* executors.

The question was, whether certain ornaments of her person, *viz.* a diamond solitaire, a pair of ear-rings, a bow-knot, and some pearls, were, or were not, within the bequest. —To shew that they were, they gave evidence that those personal ornaments were shewn as part of her cabinet upon various occasions, that they were included in a book kept by herself, and called an inventory of her cabinet, and insisted they were of the same kind with the things disposed of under the exception.—On the other hand, they read the evidence of persons in the trade as to the different sense of *gems* and jewels, that the latter meant stones set and prepared for wear, the former when kept for curiosity only.

Lord Chancellor [Thurlow] said, he took it, things to pass under the will must be *ejusdem generis* with those expressly devised, that ear-rings and other ornaments of the person are part of the personal estate, not specimens of natural curiosities. Had Mr. *Pitt's* diamond been in the cabinet, in the light of a specimen of natural curiosities, it must have passed to the devisee, and therefore he thought the proper line of distinction was, their being prepared for wear, if not worn; and directed an enquiry to be made with respect to the jewels being worn.

On the Master's report that they were occasionally worn, the cause came on before his Honor, sitting for *Lord Chancellor*, who was of opinion that that circumstance made the difference. Dismissed the bill. (Reg. Lib. 1784, A. fol. 641.)

[469] MOODALAY *against* MORTON. The same *against* The EAST INDIA COMPANY. *Lincoln's Inn Hall, July* 8th, [1785].

[See *Prioleau* v. *United States*, 1866, L. R. 2 Eq. 667.]

Master of the *Rolls* for Lord *Chancellor*.—[S. C. 2 Dick. 652.]—[A demurrer will not lie to a bill merely for a discovery to enable the plaintiff to go to law, *on the ground that the plaintiff had not brought* his action.] Demurrer to a bill against the *East India* Company and their secretary, praying a commission to examine witnesses in *India*, and that the defendants might discover by what authority plaintiff was dispossessed of a lease for supplying *Madras* with tobacco (the plaintiffs *intending to bring an action*), overruled.

This bill was filed against the *East India* Company, and against *Morton* their secretary.—It stated that a cowl, or lease, of the permission to supply the inhabitants of *Madras* with tobacco for ten years, had been granted to the plaintiffs, and signed by *John Smith* (a person properly authorized by the Company), that the plaintiffs, as lessees, covenanted to provide the settlement at a reasonable price, and that tobacco being considered in the *East Indies* as a necessary of life, had been, for time immemorial, supplied to the settlements of the *East India* Company, in this method. The bill further stated, that in 1782 (before the expiration of the ten years), the Company, by their servants in *India*, dispossessed the plaintiffs, and granted another cowl to other persons for the supplying of tobacco; and that the plaintiffs *intend* to bring an action against the *East India* Company, but cannot support the same without the evidence of persons resident in the *East Indies*; the bill, therefore, prayed a commission for the examination of witnesses; and that the Company and their secretary might discover by whom, and under what authority, the second cowl was granted, and, for that purpose, might set forth letters, &c., of their servants in *India*, *&c.*—To this bill the defendants put in a general demurrer.

Mr. *Madocks*, Mr. *Hardinge*, Mr. *Nedham*, and Mr. *Lloyd*, for the plaintiffs. The

court will retain a bill in aid of a legal title; the only objection which can be brought to the prayer of this bill, for a commission to examine witnesses, is, that the action at law is not yet brought, but that objection has been overruled. It is sufficient that a foundation for an action has been laid, by the plaintiffs being dispossessed by the Company's servants. The bill is for the discovery, whether the persons who have done the act are servants of the Company; if they are not, they will be liable in their own persons: but it is impossible to learn, whether they acted by the Company's authority, except in this way.—In a case before Lord *Bathurst*, a bill as filed for a commission to examine witnesses [470] in *India*, to prove an assault committed by Mr. *Verelst*. The action was not commenced, and the defendant demurred; but it was then held, that the circumstance of the action not being actually brought was immaterial, and the reason that the demurrer was allowed, was because the court would not compel a discovery of criminal matter. In *Wych* v. *Meal*, 3 Wms. 310, it was held that the servant of a public Company should not demur to a bill of discovery of papers and orders, as the Company cannot be indicted for perjury, if their answer is false.

His Honor mentioned the case of *Egerton* v. *Mostyn*, where it was held, that before an action brought, a bill for perpetuating the testimony of witnesses could not be supported.

Mr. *Hardinge* replied to this, that in the case of *Egerton* v. *Mostyn* the trespass had been committed by a known defendant, here the bill was to discover by whom the trespass was committed. In *Heathcote* v. *Fleete*, 2 Vern. 422, such a bill was held to be well brought.

Mr. *Attorney-General* [Arden], Mr. *Solicitor-General* [Macdonald], and Mr. *Mitford*, for the defendants. There is no instance of a court of equity granting a commission to examine witnesses in a suit not existing, it is matter of discretion, not of right; a bill to perpetuate the testimony of witnesses cannot be brought until after the action is commenced, unless in cases where an action will not lie, as where it is apprehended that, after all the witnesses are dead, new claims will be made.—Then as to the discovery prayed, it is not a discovery of the parties who have done the injury. The plaintiffs state that *Smith* and others granted them the lease to supply the settlement with tobacco, and that they have been dispossessed, but they do not pretend that they cannot bring an action against the new leases, which, as they are in possession of the old lease, they certainly might do. But, by suggesting that the Company have papers in their possession, by which it will appear the dispossession was by their authority, they call upon the secretary to produce those papers.—In the case cited from *Williams*, it was admitted that the Company, if natural persons, would be obliged to make the discovery, and therefore the party could call upon their servant; but, in this case, it does not appear that the principals had any thing to do with the matter. In another view, this is a matter of great importance to the Company; for the grant of the lease, and the removal of the lessees [471], are incident to their character as a Sovereign Power. It was an exercise of their dominion as such, and no act of sovereignty can be questioned in a bill here, or in a suit at law.

Master of the *Rolls* (see also the report of the judgment, 2 Dickens, 653).—At the outset I thought the cases of a corporation and of an individual were different; but I am glad to have the authority of Lord *Talbot*, that they are not.—In ordinary cases, when an action has been brought, the Court, as auxiliary to the remedy, will grant the commission.—This is constantly done in the *Exchequer* in Insurance cases.—I admit that no suit will lie in this Court against a Sovereign Power, for any thing done in that capacity; but I do not think the *East India* Company is within that rule.—They have rights as a Sovereign Power, they have also duties as individuals; if they enter into bonds in *India*, the sums secured may be recovered here. So in this case, as a private Company, they have entered into a private contract, to which they must be liable.—If the discovery prayed were of a matter which would be *felo de se*, it would be improper to suffer any delay or expence; but here is a *prima facie* ground of action, the Company has put other persons in the way of doing the plaintiffs an injury.—But it is said that no action has been brought.—In addition to the cases cited on this part of the question, I remember one in point, that the commission may be before any action is brought. The discovery may be necessary, before the declaration can be drawn, if the suit be by original (which I believe it must against a corporation); I think, therefore, the plaintiffs are entitled both to the discovery and commission. Mr. *Solicitor* says it would be perilous that the secretary should discover matters prejudicial to the Company; if any

part of the letters called for are so, he need not discover those parts. In a case of *Walpole* and *Ellison* v. *White*, it was so ordered, that the discovery should be only of the parts of the letters which were necessary. (*Note*: The practice is, that the party may seal up such parts of the documents, *as he shall pledge himself, by affidavits*, do not relate to any of the matters in question. See Wilson's Ca. Ch. 222.) Demurrer overruled. (Reg. Lib. 1784, B. fol. 712.)

[472] FONNEREAU *against* POYNTZ. [25 *July.*] *Lincoln's Inn Hall*, 14th *July* 1785.

Testatrix gave £500 stock in long annuities—to *A.*—the same to *B.*—£200 long annuities to *C.*, *the interest thereof to accumulate*, an enquiry admitted into the state of her property, to shew she meant such sums of money, not annuities of this amount.(1)

The testatrix *Jane Malcher*, by will dated 8th of *March* 1783, gave the following bequests: "I give to *Mary Poyntz the sum of* £500 *stock in long annuities*, I give to "*Mary Haye* the sum of £500 *stock in long annuities*; I also give unto Miss *J. L. Bar-* "*bauld* the sum of £200 *stock in long annuities, the interest thereof to accumulate until* "*she shall attain twenty-one, and then the whole* to be transferred to her by my execu- "tors; also I give unto Miss *H. Dawson the sum* of £100 *stock in long annuities*, "*the interest thereof to accumulate until she attains twenty-one, and then the whole to be* "*transferred to her by my executors.*—And all the rest and residue of my estate, and "effects, both real and personal, whatsoever and wheresoever, I give, devise, and "bequeath the same, and all and every part thereof, unto my said two nephews *Martin* "*Fonnereau* and *Thomas Fonnereau*, their heirs, executors, administrators, and assigns "for ever."—The bill was filed by the residuary legatees, that they might be paid the residue of the testatrix's estate, after payment out of it, of the several sums of £500, £500, £200, and £100 to the legatees; and upon the hearing in *Easter* term, 1784, it being then stated that the testatrix had only £120 a-year, long annuities, the question was, whether the legatees should have the respective sums given to them, raised by sale of so much of the stock as would produce the same, or they were entitled, under the will, to annuities of the sums respectively given them, and of course must divide the whole of the testatrix's property, rateably, leaving nothing to the residuary legatees.

Mr. *Scott* for the defendants, argued, that these bequests to the legatees must be bequests of annuities, the subject given not being stock, but an annuity. In *Stafford* v. *Horton*, a few days ago (*post*, p. 482, upon the re-hearing), it was determined that where the first legacy was to one of £100 a-year, long annuities, then a legacy to another of £50 long annuities, and £50 in long annuities to a third person, that the two latter took £50 a-year each.

[473] *Lord Chancellor.* The case is, there is no such fund as is described by the will. Where the words used by a testator are sensible, they must be taken as they stand; if not, the construction must be taken *aliunde*. The question here is whether, the description being inapplicable, the legatee is to take £500 a-year, or £500 is to be laid out for her in that fund. I am perfectly conscious the testatrix meant only to give £500, it appears, by the terms, she could not mean to give £500 a-year. But I doubt whether evidence can be admitted to explain the words, which are very nearly those used in the receipt. If she had expressly given £25 interest, or share in long annuities (the very terms of the receipt), it would have been very clear the legatee must have taken £25 a-year, and the description, here, of stock, is the annuity itself, nothing else; and the sense of the words is describing the quantity of the annuity. But let it be referred to the Master to take an account of the personal estate of the testatrix, and, in particular, how much of it was in the long annuities, and reserve further directions till after the Master's report.

On the 8th *June* 1785, the cause came on for further directions, the Master having reported that the testatrix, at the time of making her will, had only £120 long annuities.

Mr. *Madocks* argued for the plaintiffs, upon the manifest intention of the testatrix. Mr. *Scott*, for the defendants, upon the construction of the words.

Lord Chancellor [Thurlow]. It is perfectly clear, from the *data*, that the testatrix did not mean to give so much *per annum* to the several legatees, for she clearly meant a reserve of part of her fortune for the residuary legatees, to whose family she was under obligations: whereas, by the construction contended for, she has given away ten times as much as she had to give. Had her fortune been sufficient to have satisfied all the