BROWNSWORD *v.* EDWARDS, *March* 20, 1750–1.

[See *Doe dem. Harris* v. *Howell*, 1829, 10 Barn. & Cress. 195; *Mortimer* v. *Hartley*, 1851, 6 Exch. 60,—3 De G. & Sm. 332. Discussed, *Grey* v. *Pearson*, 1857, 6 H. L. C. 61. See *In re Sanders' Trusts*, 1866, L. R. 1 Eq. 680; *Finlason* v. *Tatloch*, 1870, L. R. 9 Eq. 259. Considered, *Reed* v. *Braithwaite*, 1871, L. R. 11 Eq. 514.]

Plea allowed to discovery of a marriage which would subject one of the parties to punishment (1) in the Ecclesiastical Court; the other being dead. What averments are proper to support a plea. (Averments are necessary to exclude intendments, which would be made against the pleader; for the court will always intend the matters charged against the pleader, unless fully denied. 2 Atk. 241; Gilb. 185. See further in *Bayley* v. *Adams*, 6 Ves. 586, &c., and see particularly, Beames on Pleas in Equity, 23, 25, 27, 28.) Demurrer.—Questions even of title, construction of wills, &c., determined on demurrer, if *quite clear* on the face of the bill, that the determination must be on the same matters in the more protracted way at last. (If a plea is filed to bill which is demurrable on face of it, the plea will be over-ruled. *Billing* v. *Flight*, 1 Madd. 230.) Question as to an equitable estate tail.—[Supplement, 334.]

Francis Brownsword devised the premises to two persons and their heirs to receive the rents and profits, until that little boy, commonly called *John Brownsword*, should attain twenty-one, which would be 14 *October* 1746, in trust in the mean time and from time to time to place the same out at interest for the improvement of the estate; and if he should live to attain the said age of twenty-one, or have issue, then to the said *John Brownsword* and the heirs of his body: but if the said *John Brownsword* should happen to die before the age of twenty-one, and without issue, then in the same manner he devised it to the same persons in trust, till that little girl, commonly called *Sarah Brownsword*, should attain the age of twenty-one, which would be at such a time: but if she should happen to die, *&c.*, exactly in the same words as the former devise, then to the other collateral branches of his family: and for want of such issue to his own right heirs for ever.

John Brownsword attained twenty-one, and died without issue, having devised all his estate real and personal to his wife the present plaintiff, who charged in her bill, that the son described in the will was the legitimate son of the testator by the defendant *Anne Edwards*; on which the relief was prayed, that the said defendant might discover, whether she was lawfully married to the testator, at what time, in whose presence, and where, and whether she had not issue thereby.

To this discovery *Anne Edwards* put in a plea, that she was not bound to answer on this ground; she averred by her plea, that testator was before married to her own sister, by whom he had children, who survived him; and consequently, if she was married to him afterward, it would be an incestuous marriage, contrary to law, and subject her to the penalties and punishments the law inflicts on such a crime.

It was argued, that this plea must be taken to be true, this being a criminal matter; for ever since the *Statute H.* 8, one cannot legally marry his wife's sister after death of his first wife; then she [244] would be liable to prosecution in ecclesiastical court for incest, which is of ecclesiastical conusance. It is as much a crime as any made so by the common law; and that it is a grievous one, appears indisputably from one of the canon laws inflicting a penance, which in the eye of the law is looked on as a corporal punishment; and when sued in ecclesiastical court, her answer in the court confessing it, would convict her. That she would be liable, *Hicks* v. *Harris*, Carth. 271, 2 Sal. 548, 4 Mod. 182, nor is a suit of that kind in ecclesiastical court put an end to by any statute of limitations or death of either party.

Against the plea. Plaintiff's right is founded on the fact of legitimacy of her husband, and there was a lawful marriage between testator and defendant; and every court leans in favour of legitimacy. Defendants may in many instances protect themselves against making discoveries attended with penal consequences: but it must be shewn, that that will necessarily follow: which does not appear in this case: for this is not a natural incest, such as forbid by the laws of nature, but only *malum prohibitum*, put an end to by death of either party, after which a suit cannot be instituted in ecclesiastical court for the punishment. Nor does the case cited determine, that the party is subject to ecclesiastical censure; only determining that it is a matter proper for their jurisdic-

tion. On a bill suggesting the wilful loss of a ship for that the party had insured to twenty times the value, though that is made felony by the statute, yet where defendant is required to set forth, what insurances he made on the ship, he is never allowed to protect himself against that; of which there are several instances. In *Wilson* v. *Prince*, *Pas.* 1746, a bill was for the earnings of a ship in the *East India Company's service*, which she might have made, if she had performed her voyage, charging that defendant had insured so largely, that it was his interest to lose the ship, and requiring account of what sums were taken up; defendant pleaded, that having taken up £3000 of the company, and taken an oath to trade for no more, if it appeared he had, he might be liable to indictment for perjury, and his answer read in evidence against him: the plea was over-ruled. If this plea should turn out false in fact, though in general cases there would be a judgment in chief against the false pleader, yet in this the court could not give that judgment: so that this would answer defendant's purpose as well as if it was ever so fair, and the court cannot then do right to the plaintiff. It might perhaps subject defendant to a small penance: whereas, preventing legitimacy, it is of great consequence on the other side.

Lord Chancellor. This appears a very plain case, in which defendant may protect [245] herself from making a discovery of her marriage; and I am afraid, if the court should over-rule such a plea, it would be setting up the oath *ex officio*; which then the parliament in the time of *Charles* I. would in vain have taken away, if the party might come into this court for it. The general rule is, that no one is bound to answer so as to subject himself to punishment, whether that punishment arises by the ecclesiastical law of the land. (2 Ves. sen. 389, 451; 1 Atk. 539; 2 Atk. 393; 1 Brown, 97. In case of a bankrupt smuggler, the commissioners may examine him, but he may demur to the interrogatories, and have the opinion of the court. 2 Atk. 200; 1 vol. 247; 3 Wms. 376; 1 Vern. 109.) Incest is undoubtedly punishable in ecclesiastical court; and such a crime is generally excepted out of the acts of pardon. The ecclesiastical court has conusance of incest in two respects, *diverso intuitu*: first to judge of the legality of the marriage, and to pronounce sentence of nullity; and if they do so, proceeding lawfully and rightfully, it binds all parties, being the judgment of a court having proper jurisdiction of the cause. The other is to censure and punish persons guilty by ecclesiastical censure, as for fornication, adultery, &c. Nor is it material what the nature of the punishment is. It is a punishment which must be performed or got rid of by commutation, which is like a fine. Then consider the present case. The discovery whether lawfully married takes in the whole, whether married in fact, and whether that marriage was lawful. Defendant has pleaded to it; which she may do; and in the plea it is proper to bring in facts and averments to support that plea: whereas a demurrer can be to nothing but what appears on the face of the bill, otherwise it would be a speaking demurrer. (Averments are necessary to exclude intendments which would be made against the pleader, for the court will always intend the matters charged against the pleader unless fully denied. 2 Atk. 241; Gilb. 185.) But here it was necessary to bring in such an averment, that testator was lawfully married before to her sister, and had issue; which is a fact necessary to shew; and that fact she has taken on herself to prove: the plea therefore is regular in form, and good in substance. The objection to the plea is, that one of the parties to the incestuous marriage being dead, there can be no proceeding afterward. I always took the distinction to be what is laid down in *Hicks* v. *Harris*, that by the law of the land the ecclesiastical court cannot proceed to judge of the marriage and to pronounce sentence of nullity after death of one of the married parties, especially where there is issue, because it tends to bastardise the issue; and none after death of one of the parties to that marriage is to be bastardised: but there is no rule of law standing to prevent either of the parties from punishment after death of the other. Suppose it was an offence of adultery or fornication, there is no rule of the civil or ecclesiastical law, that after death of one of the parties the survivor may not be punished for the offence: undoubtedly they may, either proceeding *ex officio*, by office of the ecclesiastical judge, or by promotion of a proper informant. Then why may not the ecclesiastical court do it in the case of incest, whether without the formality of marriage or attended with it? But it is said, *Hicks* v. *Harris* is no judicial determination in the point, and that all that was material before the court, was the joint jurisdiction; which is true: but there was a plain difference. If the court held, that the proceeding (and this is an answer to one part of the objection) even for the censure against the surviving party would have

tended to affect the legitimacy of the marriage or the issue, the court of *B. R.* would have stopped there: but they went on this, that it could not be given in evidence against [246] the issue or the plaintiff claiming under that issue: as was determined solemnly in *B. R.* on a long trial at bar, directed out of this court in *Hillyard* v. *Grantham*, in which I was of counsel. (See 3 Wooddeson, 318.) In that cause during life of the father and mother there had been a proceeding against both of them in the consistory court of *Lincoln* for living together in fornication, and sentence given against them. On the trial that sentence was offered in evidence to prove, that they were not married: the whole court were of opinion that it could not be given in evidence; because first, it was a criminal matter, and could not be given in evidence in a civil cause; next that it was *res inter alios acta*, and could not affect the issue: but they held, that if it had been a sentence on the point of the marriage on a question of the lawfulness of the marriage, it being a sentence of a court having proper jurisdiction, might have been given in evidence. If indeed there had been collusion that might be shewn on the part of the child to take off the force of it; because collusion affects every thing: but if no collusion, it binds all the world: but in a proceeding in a criminal way that could not be given in evidence: and that was the distinction the court went on in *Hicks* v. *Harris*. But if there had not been that authority, I should not have doubted on the nature of the thing, but that the ecclesiastical court might have proceeded after death of one of the party as well for incest as fornication; in which case there is no doubt they may. Thus far as to the merits of the plea. Some collateral arguments have been used, that it is not in every case the party shall protect himself against relief in this court upon an allegation, that it will subject him to a supposed crime. It is true, it never creates a defence against relief in this court, therefore in case of usury or forgery, if a proof can be made of it, the court will let the cause go on still to a hearing, but will not force the party by his own oath to subject himself to punishment for it (if plaintiff waves the penalty, defendant shall be obliged to discover, 1 Vern. 60, or whether the penalty arises from defendant's own particular agreement, he is obliged to discover. 2 Ver. 244. Or where the discovery sought is not of a fact which can subject defendant to any penalty, but connected with some other fact which may, 2 Ves. sen. 493). In a bill to inquire into the reality of deeds on suggestion of forgery, the court has entertained jurisdiction of the cause; though it does not oblige the party to a discovery, but directs an issue to try whether forged. I remember a case where there was a deed of rent-charge suggested to be forged: it was tried twice at law, and found for the deed: a bill was afterward brought to set it aside for forgery, and to have it delivered up to be cancelled. Lord *King*, notwithstanding the two trials, which has been in *Avowry* and *Replevin*, directed an issue: wherein it was found forged, and, I remember, was cancelled and cut to pieces in court. There are several instances of that: so that the relief the party may have is no objection. As to the objection from the consequence of allowing this plea if the defendant should fail in the proof of it, that would be an objection to the allowing any plea to a discovery: though it would [247] be no objection to a demurrer, because that must abide by the bill: but all pleas must suggest a fact (which fact must conduce to one single point, per Lord *Thurlow*, 1 Brown, 417. 1 Atk. 54): it must go to a hearing; and if the party does not prove that fact, which is necessary to support the plea, the plaintiff is not to lose the benefit of his discovery: but the court may direct an examination on interrogatories in order to supply that. The plea therefore ought to be allowed.

Next, *as to the demurrer of Sarah Brownsword*, for that plaintiff had not made out a title, the defendant's remainder being vested, and her claim was on failure of that estate tail in *John Brownsword*.

For plaintiff. These limitations must be taken to be executory devises, such as rested in suspence and contingency; and on the events, which happened, the subsequent limitations could never arise; for both events must first happen; *viz. John* must die before twenty-one without issue: whereas he attained twenty-one. Nor is there sufficient to warrant the turning this executory devise into a remainder. The testator meant to create a temporary trust, to have continuance till *John* came of age, and then that it should vest absolutely in him; or if he died before twenty-one leaving issue, then it should go to that issue; so that it is to be taken distributively. That this construction has been made in similar cases, *viz.* that both events of dying without issue and before twenty-one must happen before the contingent devise over takes place, see Eq. Ab. 188, and 1 Sid. 148. In any other construction the testator has

omitted (what he never could intend to do) the providing for the event of *John's* dying under age leaving issue.

Lord Chancellor. As this is a question upon the legal title to an estate on the construction of a will, if there was any doubt, I should not determine it on demurrer; but would, notwithstanding the inclination of my opinion might be in favour of defendant, over-rule the demurrer without prejudice to defendant's insisting on the same matters by way of answer; so that it might more fully come before the court at the hearing: this the court sometimes does on the construction of wills. But if the opinion of the court is, that as on the face of the bill plaintiff has no title, and the will is set forth *verbatim* in the bill; it is just, and more for the benefit of the parties, to cut it short on the demurrer; since it must be still determined just on the same matters as are before the court on the demurrer. (Prec. Chan. 588; 2 Brown, Parl. Cas. 468.) In these cases of wills the governing rule **[248]** of construction is the intent of testator (though prior words in a will expressly controul subsequent ones, yet to comply with testator's intention, the subsequent words shall take effect, and restrain the prior. 1 Brown, 489; Durnf. & East, 579); which the court is to find out by his words, and to construe conformable thereto, so far as it is possible consistent with the rules of law (Durnf. & East, 635; 2 Ves. sen. 32). The intent here was plain: here were two children, testator considered as his own: whether legitimate or not, I enter not into the question. On this demurrer I must take them to be legitimate. He had a mind to make a provision for them: and the material point is, that it is a limitation to them in tail; and if their issue failed he intended plainly to give it over to the other collateral branches of his family, and for want of such issue to his own right heirs for ever. The question is, whether I can by construction, or on the strict literal meaning of the words, let in the right heirs of testator so as to defeat all the subsequent limitations? This would be plainly contrary to his intent: but if the force of the words is such, as that the intent cannot be complied with, the rule of law must take place. It is said, he has given nothing over but on the contingency of *John's* dying without issue under age. Consider, what necessity there is from the words to construe it in that manner, which would be to defeat his intent. Having first given the whole legal fee to trustees and their heirs, he did not intend either of these two children should have any thing vested till twenty-one or the having issue, and then to have an estate tail; consequently as soon as *John* attained twenty-one, or had issue, though he died before twenty-one, that defeated and determined the estate in law given to the trustees, and vested a fee tail in him. He did attain twenty-one, and therefore had an intail; as he would, if he died before twenty-one, but had issue. Then the construction could not be, as insisted for plaintiff, as with a double aspect; if he attained twenty-one then to vest in him an estate; or if he died before, leaving issue, then to give it to that issue: that is not the construction of the will: but it is to give an estate tail in either event: so that such issue would take as heir of the body of his father an estate tail from him, in whom in point of law it vested, which estate would defeat the fee in the trustees. Then as to the subsequent words, if the court is compelled to make the construction the plaintiff insists on, the court will do it: but however in the construction of wills the court has construed the words conformably to the intent of the testator as much as possible, ranging in a different order and transposing them to comply therewith. (2 Ves. sen. 74; 2 Ves. sen. 78.) There is no necessity to do either in this case, or to supply material words: but there is a plain natural construction upon these words, *viz.* if the said *John* shall happen to die before twenty-one, and also shall happen to die without issue: which construction plainly makes the **[249]** dying without issue to go through the whole, and fully answers the intent, which was in that manner. Had the first devise been to *John* and his heirs, this construction, I believe, could not be made; for where there is such a contingent limitation, I do not know, that the court has changed *heirs* into *heirs of the body* to make it so throughout. But much stronger constructions have been made than this in devises; Cr. C. 185, and other cases in *Croke*; as in devise to one and his heirs, and if he should die before twenty-one or without issue then over, the court has said, it was not the intent to disinherit the issue, and therefore *or* shall be construed *and*: but if the first limitation had been in tail, there would be no occasion to resort to that, but the court would have made the construction I do now; *viz.* if he dies without issue before twenty-one, then over by way of executory devise; if he dies without issue after twenty-one, when the estate had vested in him, it would go by way of remainder; because he had made his original devise capable of a proper

remainder; in which case the court will always construe it a remainder. An estate tail is capable of a remainder, and it is natural to expect a remainder after it. It is contrary to his intent to let in this remainder to the right heirs to defeat all the intermediate limitations to his family. This is the intent of testator, and well warranted by an easy construction of the words of the will. The demurrer therefore must be allowed. (Reg. Lib. 1750, A. fol. 226, 227.)

(1) As to this case and pleas of the same nature, and as to a great variety of the cases, nearly to the present time, see Mr. Beames' lately published excellent and systematic work on Pleas in Equity, 257, 8, 9, 260, &c., and the notes; more especially post, 493. *Harrison* v. *Southcote*, post, 389, and 1 Atk. 528. *Chetwynd* v. *Lindon*, post, 451. *East India Company* and *Campbell*, 1 vol. 246; also 1 Atk. 539. *Chauncey* v. *Tarhourdin*, 2 Atk. 392. *Sharp* v. *Carter*, 3 P. W. 374. *Claridge* v. *Hoare*, 15 Ves. 59. *Lloyd* v. *Passingham*, 16 Ves. 59. *Paxton* v. *Douglas*, ibid. 289; and *Parkhurst* v. *Lowten*, 1 Meriv. 391.

Ex parte WILLIAMSON, *March* 25, 1751.

S. C. 1 Atk. 82.—Bankrupt.—Certificate allowed, notwithstanding a suspicion in the court as to the view in taking out the commission. (See *Ex parte King*, 11 Ves. 417, and 13 Ves. 181, agreeably to what is said by Lord *Hardwicke*, p. 250.) Former practice of traders in *Ireland* coming over and contracting debts in *England*, where they procured commissions of bankruptcy to be taken out against themselves by collusion.—[Supplement, 335.]

Petition that the court might disallow the certificate of the bankrupt *Williamson*, formerly a merchant in *Cork*, having purchased several shares of the seamen who had taken the rich prizes of *The Marquis D'Antin* and *Lewis Erasme*, and having assigned the same over to Mr. *Mackay* his correspondent in *London*, as a security for what he owed *Mackay*, who had principally taken out the commission against him; which the now petitioners (several of whom had bills depending in *Chancery* and the *Exchequer* for setting aside the said sales of shares) insisted, was fraudulently taken out.

Lord Chancellor. (1) I have myself very great jealousy and suspicion concerning the view with which this commission was taken out; and therefore gave the utmost latitude to the petitioners to have inspection of books and papers to make inquiry into the bankrupt's affairs, and with greater latitude than in most cases; because it was giving this liberty to them, before they were creditors under the commission: but another view I had was my dislike to traders in *Ireland* coming **[250]** over here, and obtaining commissions by collusion against themselves; therefore I gave this liberty to see, if there were any creditors in *Ireland*, who might come over, and prove their debts by the commission, that they need not be surprised; for as there they have no acts of parliament touching bankruptcy, it would be mischievous to creditors in that country, if this method was allowed. (Bankrupt laws since adopted in *Ireland* by statutes 11 & 12 *Geo.* 3.) But here has been no application to me to supersede this commission; therefore it is not now before me to consider, whether regularly taken out, or whether there was a sufficient debt; or whether the bankrupt was a sufficient trader in *England* to support the commission: for in such case application should have been made to supersede it: but if that had been the case, it would have failed; because it has been determined, that where a man, residing in one part of the realm or in other countries, contracts debts here, if he comes over here, a commission of bankruptcy may be taken out against him, as in the case of those who reside in the *Plantations*: although that may be managed so as to be attended with inconvenience as between *England* and *Ireland*. But the question now is, whether there is sufficient ground to allow this certificate or disallow it? As to that I sit here in execution of an act of parliament directing, under what terms a bankrupt shall have his certificate, requiring it to be signed by four parts in five in number and value of the creditors, who proved their debts under the commission, which must be allowed by the commissioners, and afterwards by the *Lord Chancellor*, or two judges to whom he shall refer it, without whose allowance it cannot have effect. There are no compulsory words in the clause to oblige the *Lord Chancellor*