Streets, that if he should grant an injunction and it should come out, on the hearing, that it was no nuisance he could not possibly make the defendant amends, for his time for burning would be expired ; and if it was a nuisance defendant would be sufficiently punished by actions which might be brought against him by every one of the parties that suffered any damage ; and this was not like the cases of cutting down avenues, or the like, which if done no possible amends or satisfaction could be made to the parties ; but here if the furniture or goods were hurt by the smoke, the sufferer would have a remedy at law ; and if brick-kilns were general nuisances it seemed strange that so many of them should be permitted to stand in the several quarters of this town.

Case 79.—HAWKINS *against* DAY. [1753.]

Payment by executor of simple contract debt, before breach of condition of bond, is good, and no *devastavit* in case of deficiency of assets, but payment of legacies is not.—Jan. 1753, at Lincoln's Inn Hall, before Lord *Hardwicke*, Chancellor. [Lib. Reg. 1752, A. fo. 72 a. S. C. 1 Dick, 151.]

On exception to the Master's report, the case was, *Benjamin Lane* being appointed clerk to the plaintiffs, who were co-partners in a sugar house, he entered into articles, and together with *John Lane* and *William French*, as his sureties, became bound in a bond of £5000 penalty for observing the covenants, &c., in those articles. *Benjamin Lane* having converted to his own use several sums of the partnership money, absconded and went abroad, and a commission of bankruptcy issued against him, but he did not conform ; *William French* being dead, and *John Lane* being a bankrupt, bill was brought (*inter alia*) for a satisfaction against the assignee of *Benjamin Lane*, and the assignees of *John Lane*, and against *Day* acting executor of *William French* ; who was required to admit assets, or set out an account of the personal estate of *French*.

The executor of *French*, in his answer, insisted he was a stranger to the bond, and the obligees never informed him of it ; and that he had paid away *French's* assets in discharge of his simple contract debts ; that if he had been informed of the bond he should have made a provision out of *French's* assets, if by law he might, as a guard against the said bond, in case of any future breach in the condition thereof and not have exhausted them in paying simple contract debts.

An account was decreed of the partnership estate and transactions, and of what was due from *Benjamin Lane*. [161] and if his effects under the commission should not be sufficient to satisfy them, then the effects of *John Lane*, and the assets of *William French*, were to be answerable, the latter in a course of administration.

The master reported a large sum due from *Benjamin Lane*, and deficiency of his estate, and that plaintiffs were to be considered creditors on the assets of *French* and effects of *John Lane*, the sureties ; and as the executor of *French* did not admit assets, he had taken an account, which he states ; and also that his executor had paid £3621, 15*s*. 9*d*. in discharge of legacies and simple contract debts, which not being of equal degree with the debt to plaintiff he had not allowed the same.

To which exceptions were taken by the defendant (*inter alia*), because the master had disallowed payment of £3120, 19*s*. on account of their being debts of an inferior degree to plaintiff's demands, though most of the payments were made, *bona fide*, by *Day* the executor, many years before breach of the security bond, which were therefore good payments.

After argument at bar,

Lord *Hardwicke*, C.

The questions are, 1st, Whether payment of assets in this case, before there was any breach of the condition, which is for performance of covenants, ought to be allowed as a good administration of the effects ?

2d, Whether payment of the simple contract debts and the legacies be good against the demand on this bond, they being paid by *Day* the executor, before he had notice of the bond. *Query*, If good at law ?

As to the 1st. Of opinion such payments are good, because the condition may never be broke, and consequently there may be no debt.

This case only extends to debts, not to legacies : the rule of this Court to grant prohibitions in case legatees sue in [162] the spiritual Court, and refuse to give security, is out of use now ; but this Court will decree a legatee to refund. I think all payments

of simple contract debts, made before breach of the condition in a bond, are good; but not of legacies.

2nd Question. The payment of debts by simple contract, by an executor, before he has notice of a debt by specialty, is a good payment in point of law; and so it was held by all the Judges in *Davis* v. *Monkhouse*, in *Fitzg. Reports*; and also in 3 *Lev.* 115, by three Judges against *Levinz.*

Objection, If an executor has no notice of a specialty debt, and an action is brought against him by a simple contract creditor, if then a judgment is recovered against him, that such judgment is good against the specialty creditor, but a voluntary judgment would not be so. I think that is an unsound opinion and distinction, for that would make it necessary in every case of a simple contract, to have a judgment in an action at law, before the executor could safely pay those debts.

The governor and company of the *New River* v. *Brownjohn*, is another case as to this point.

Objection, That two of the executors had notice; but that is not sufficient to affect *Day* with notice, because they concealed it from him.

First, I think if the other two executors had been strangers to the debt, notice to one would not have been notice to both.

Executors are not affected by each other's acts (see Amb. 219). Suppose the two executors had been strangers to the transactions, as the third was, notice to them might affect the third because it might be presumed they acquainted him with it; but give no opinion on that.

Upon the whole, the payment to simple contract creditors before notice of specialties is good. In this case there was a gross neglect in the partners, not to call on the clerk to account regularly. Exception allowed.(1) (See a full note of this case in the Appendix to this Edition (E).)

(1) Lib. Reg. See the order on hearing the exceptions in this case, and the Master's report at length from Lib. Reg. in 3 Mer. p. 555. The exception was allowed as to all the sums in the schedule (which contained the sums mentioned in the text to amount to £3120, 19*s.*) except as to the two legacies of £15 and £100, and except as to certain other items the particulars of which there appear.—See the observations of Sir *W. Grant* on this case, in *Simmons* v. *Bolland*, 3 Mer. 554, in which case, where a testator had entered into a covenant for payment of rent and repairs, but there was no existing breach of the covenant on rent in arrear. The executors were directed to pay over the residue to the legatee upon due indemnity from him to be settled by the master.

[163] Case 80.—LEMAN *against* ALIE, Jan. 27, 1753.

Bill by disinherited heir at law [to have inspection of deeds] dismissed without costs (which was ordered at the hearing, Lib. Reg.).—[Lib. Reg. 1752, R. fo. 209 b. S. C. Coxe MSS. D. D. 289.]

Bill by Sir *Tanfield Leman*, who was disinherited, to have inspection of deeds and writings,(1) and there appearing to be no title in the plaintiff, the cause was set down for further directions by the defendant, and it was prayed that the bill might be dismissed with costs.

Lord *Hardwicke*, C. There are two reasons against giving costs in this case. 1st, It appears plaintiff was entitled under an entail, which was cut off, and had a right to see how he was barred; and although fines and recoveries are of record, yet he might not from inspection of them know what estates were affected by them, or how far.

If heir at law brings a bill in this Court for a discovery, I would not have it understood, he shall pay costs; there is no pretence for it. If a motion should be made in such case for costs, he would move to amend, and pray inspection of deeds, and the Court would permit him to do it, and not give costs against him. Bills are seldom or ever brought by an heir at law for a mere discovery, but generally for production of deeds, and then relief is prayed.

2dly, Here is an honour left destitute of an estate. It is a gratitude and duty due to the crown to leave an estate to go with the title. It is a dishonour to the crown and the public not to do so; this reason governed in 1 *Wms.* 481, *Shales* v. *Barrington.*

Proposals being made by the counsel for the defendants, that the bill should be