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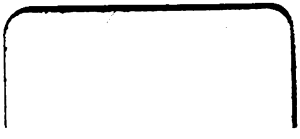

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OF LINCOLN'S INN,

ASSISTED BY

O. A. SAUNDERS, (EQUITY CASES). J. G. PEASE, AND ARTHUR B. CANE, (COMMON LAW CASES).

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VOL. LXXI
OF THE

1845-1846.

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PREFACE TO VOLUME LXXI.

Two examples in different kinds of the very wide conception of charity developed by our courts of equity may be seen in *Shrewsbury* v. *Hornby*, p. 153, where a bequest for the benefit of Unitarian congregations was upheld, not so very long after persons denying the doctrine of the Trinity ceased to be liable to penalties under the practically inoperative statute of William III. against blasphemy and profaneness; and in *Nightingale* v. *Goulburn*, p. 196, where a bequest to the Chancellor of the Exchequer to be appropriated to the benefit and advantage of Great Britain was held sufficiently charitable. *Blair* v. *Bromley*, p. 213, is an important authority on the liability of a partner for his co-partner's breach of trust.

In this volume we have a remarkable number of interesting and well-known cases in the law of contract and agency: *Grant* v. *Maddox*, p. 815, on the interpretation of terms by usage; *Smart* v. *Sandars*, p. 384, on the limits within which a factor for sale can maintain that his authority is irrevocable as being coupled with an interest; *Hart* v. *Mills*, p. 578, a warning to sellers of goods who deliver more than was contracted for; *Load* v. *Green*, p. 627, on the point that an intention, at the time of buying goods, not to pay for them is a fraud rendering the sale voidable; *Hills* v. *Sughrue*, p. 651, a singular case which has given some trouble, probably more than it was worth, to text-writers; *Sibree* v. *Tripp*, p. 545, on satisfaction of a money demand by

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F rst instance negligent in some way material to the If the plaintiff's negligence not only finally but ought about the damage he suffered, it cannot be called a contribution, any more than a man who whole bill for a dinner can be said to contribute to Here the defence admitted under the general issue perly not that the plaintiff's own negligence caused losion of gas in his house, but that, if any negli- lid cause it, that negligence was not the defendant ny's. Either the Company was bound to cut off the en the house was vacated or it was not. If it was s the Court held), there was no omission on the ny's part to do anything it ought to have done; hat it actually did as to removal of tenant's fittings own to have been done with due care. If it had been, laintiff would not have been bound to make sure that ompany's duty was performed, though a very prudent might have done so. There is only one true ground of ion upon the facts; not that the plaintiff was negligent, hat the defendants were not.

ith regard to the sword-blade bond mentioned in *Ashton awson*, a case of the year 1725 reported in the notes to *uharson* v. *Cave*, 70 R. R. at p. 264, it appears by an act from the *London Gazette* of 1708, kindly communi- d by Dr. Murray, the editor of the "Oxford English tionary," that these bonds or notes were securities issued a certain sword-blade company having an office in Birchin ne. As we go to press we hear from a learned corre- ondent in Dublin that its name was the Hollow Sword- ade Company, and that it "speculated largely in Irish rfeited lands, especially in the South of Ireland . . . conveyances frequently appear in Southern Irish titles henever the investigation goes back to the early part of the 8th century." He refers to *Anderton* v. *Magawley*, 3 Bro. P. C. 588. Another correspondent refers to Anderson's "History of Commerce," vol. ii., p. 192. Still later a

learned friend of the Inner Temple sends us an account so full and interesting that we add it bodily as a note.

As a rule we do not feel bound to explain the omission of a case merely because a reference to it persists in a current text-book. But Leake on Contracts is almost a book of authority, and therefore we have given at p. 839 the reason for not reprinting a case relied on by Leake.

In *Frazer* v. *Jones*, p. 190, we have a decision on appeal reported only in the Law Journal; and at p. 635 a material omission in the authorized report has been supplied from the same source. Amendments of this kind are, of course, not possible in a mere reprint of one series of reports.

F. P.

NOTE.—"Sword-blade notes" or "Sword-blade bonds" were issued by a firm of bankers who carried on business in London under the name of the Sword-blade Company at the time of the South Sea Bubble. The history of the Company is a curious one, and the following notes may perhaps be of some interest.

The Company was incorporated by Letters Patent on the 15th September, 1691, for the purpose of manufacturing sword-blades in the North of England. The back of the blade was to be hollow and contain a ball of quicksilver, which would run up and down, and so, it was supposed, increase the impetus of the blow. The enterprise was a failure, and the Letters Patent were acquired by a group of London merchants, who proposed to lend money on land in Ireland. They are said also to have made large purchases of forfeited estates in Queen's County and Antrim under the name of "The Governor and Company for Hollow Sword-blades in England." In 1703 they petitioned the Irish Parliament for an Act to enable them to take conveyances in the corporate name. This was never granted, and the estates are said to have been sold.

The Letters Patent then passed into the hands of a private banking firm, Messrs. Turner, Caswall and Sawbridge; they were bankers to the South Sea Company, of which Jacob Sawbridge, one of the partners, was a director. The other partners were Sir George Caswall, M.P., and Elias Turner. The firm is described in an Order of the House of Lords as "Turner and Company, commonly called the Sword-blade Company." During the early months of the year 1720 enormous sums passed through their hands; the Chancellor of the Exchequer, Aislabie, alone received through them nearly 800,000*l*. They had also extensive dealings in South Sea stock, out of which large profits were made, at any rate on paper.

By the month of September, 1720, the Bubble was bursting. An attempt was made to bring about an arrangement with the Bank of England; but when it was proposed that the Sword-blade Company should come in, "*By no means*," said Sir Gilbert Heathcote, one of the directors of the Bank, "*for if the South Sea Company be wedded to the Bank, he ought not to be allowed to keep a mistress;*" and the Bank, with its usual prudence (so says the Historical Register), rejected the proposal.

A few days later, on the 24th September, 1720, the Sword-blade Company stopped payment. They offered, it is true, to pay their notes in South Sea stock at 400; but the stock was already falling far below that value.

The partners in the firm of Turner and Company were severely examined before the Parliamentary Committees, and had to admit that they had falsified their books, that they had issued fictitious notes in the name of the Sword-blade Company to cover presents of stock to persons in high office, and that they had by corrupt means procured from the South Sea Company 50,000*l.* stock in the name of the Sword-blade Company, on which they had made a profit of 250,000*l.* Sir George Caswall was expelled from the House of Commons and committed to the Tower; and the estates of the partners were declared liable to make good the sum of 250,000*l.* to the South Sea Company.

This must have brought the banking business of the Sword-blade Company to an end; and in any case it would have come within the provisions of the Bubble Act against the misuse of obsolete charters. Some years later the name of the Company appears as co-defendant in an Irish ejectment suit; but it may be that it was merely a formal party.

(See Calendar of State Papers, Domestic Series, 1690—1691, p. 521; Journals of the House of Commons, Ireland, 9th October, 1703; Historical Register for 1720, pp. 368, 377; for 1721, pp. 64, 77, 312, 317; Journals of the House of Lords, 19th July, 1721; Journals of the House of Commons, 16th February, 10th March, 1720 (1721, N. S.), 21st April, 5th June, 1721; *Sword-blade Company* v. *Dempsey*, 1 Barnardiston, K. B. 405, 421, *S. C.* 2 Strange, 892; Macpherson, Annals of Commerce, vol. ii., p. 368.)

The value of a "Sword-blade bond" must have been very problematical by 1725.

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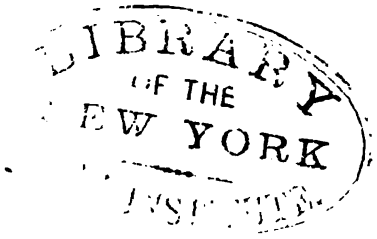

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NOTE.

The first and last pages of the original report, according to the paging by which the original reports are usually cited, are noted at the head of each case, and references to the same paging are continued in the margin of the text.

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The Revised Reports.

VOL. LXXI.

CHANCERY.

PHENÉ *v.* GILLAN (1).

1845.
July 10, 11.
Aug. 1.

WIGRAM, V.-C.

[1]

(5 Hare, 1—14; S. C. 15 L. J. Ch. 65; 9 Jur. 1086.)

Shares in a Banking Company were transferred by way of mortgage, and the mortgagor afterwards paid off the debt, and applied for a retransfer of the shares, but the directors of the Bank did not permit the retransfer to be made. In the meantime a creditor recovered judgment against their public officer, and threatened execution against the mortgagee, as one of the shareholders: Held, that, where the mortgage was made simply as an absolute transfer, subject to redemption, and nothing had passed binding the mortgagor to take a retransfer of the shares, the mortgagor was not liable to indemnify the mortgagee against debts incurred after the transfer made on the mortgage, and before the mortgage debt was paid off.

That, the mortgagor having elected to take a retransfer of the shares, the mortgagee became a trustee of the shares for the mortgagor, and the mortgagor was bound to indemnify him against the whole expenses or liabilities which he had properly incurred by holding and maintaining the shares.

That the mortgagor, indemnifying the mortgagee in respect of the costs, was entitled to take proceedings in the name of the mortgagee, to compel a retransfer of the shares, and to resist the proceedings against the shareholders under the judgment.

On the 12th of July, 1841, the plaintiff lent the defendant 880*l.* upon his promissory note, payable twelve months after that date, and also upon the security, by *way of mortgage, of 100 shares [*2] in the Western District Banking Company for Devon and Cornwall. The form of the latter security was an authority to transfer the 100

(1) *Hughes - Hallett* v. *Indian Mammoth Gold Mines Co.* (1882) 22 Ch. D. 561, 52 L. J. Ch. 418, 48 L. T. 107; *Hardoon* v. *Belilios* [1901] A. C. 118, 124, 70 L. J. P. C. 9, 83 L. T. 573.

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shares from the defendant to the plaintiff, and an agreement in the following words:

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"P. PHENÉ, Esq. "July 18th, 1841.

"SIR,—I hereby acknowledge the receipt of the sum of 880*l.* from you, for which amount I have given my promissory note in your favour, at twelve months date from this day; and as a collateral security I have delivered to you the certificate of my 100 shares in the Western District Banking Company. Now I hereby authorize you to act upon the notice of transfer of my aforesaid 100 shares at any time you may think proper during the said twelve months; and I hereby promise and engage to do every act necessary for completing such transfer on my part.

"I am, Sir,
"Your very obedient servant,
"W. CAMPBELL GILLAN."

The plaintiff applied to the Western District Banking Company to be recognised as having a charge upon the shares; but he was informed that he could not be acknowledged as having a right to the shares until a regular transfer was executed, and recorded on the register of the Bank; and the plaintiff accordingly insisted upon having a deed of transfer from the defendant; and an indenture, dated the 10th of March, 1842, was accordingly made between the parties, whereby the defendant assigned the 100 shares to the plaintiff; and the plaintiff thereupon signed an undertaking in the following form:

"W. C. GILLAN, Esq.

[*3] "SIR,—On repayment of the sum of 880*l.*, for which *amount I hold your promissory note, I hereby undertake to deliver back, and, in case of transfer, to retransfer to you, or to whom you may appoint, at your costs, the 100 shares in the Western District Banking Company delivered to me by you, and which I also hold as a collateral security for the payment of the aforesaid sum of money.

"PHINEAS PHENÉ.

"MELKSHAM, 15th July, 1841."

The deed of assignment was transmitted to the Bank by the plaintiff, who at the same time requested that his name should not be placed on the register, but was informed in reply that the rules of the Bank did not admit of holding the transfer without placing it

on the register book, which was invariably done on the receipt of the deed. The transfer was accordingly registered.

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The promissory note for 880*l.* was not paid when it became due, but a note for 1,000*l.*, payable six months after date, was then given by the defendant to the plaintiff, and the defendant at the same time wrote to the plaintiff a letter, in which he said, "When the promissory note is paid, you undertake to transfer to me the 100 shares in the Western District Banking Company now standing in your name in the share register book of that Company."

The 1,000*l.* was paid by the defendant to the plaintiff on the 4th of August, 1843, and the plaintiff, on the 23rd of August, applied to the manager of the Bank, and received a form of notice of transfer, which he delivered to the defendant, who signed the same and forwarded it to the Company, with a request to allow the 100 shares to be transferred to him from the plaintiff. Several applications were made to the Company by the defendant for the retransfer of the shares, and, on the 24th of *April, 1844, the defendant [*4] received a letter from the manager, stating that the directors had not yet allowed the transfer from the plaintiff.

On the 27th of September, 1844, a creditor recovered judgment against the public officer of the Bank, for a debt exceeding 3,000*l.*; and, on the 27th of December following, the plaintiff was applied to by the solicitor of the creditor of the Bank, who had obtained such judgment against the public officer, acquainting him, that unless he should pay into the Bank on the 4th of January, 1845, 3*l.* 10*s.* per share on the shares which he held, execution would be levied upon him for the full amount of the judgment creditor's debt. The bill was filed on the 17th of January, and prayed an account of the monies and expenses paid or incurred by the plaintiff since the 20th of August, 1843, by reason of the 100 shares having been transferred into his name; and that the defendant might be decreed to pay the same to the plaintiff. The bill also prayed an inquiry respecting the unpaid calls on the shares, and that the defendant might be decreed to execute to the plaintiff a sufficient indemnity against the debts and liabilities of the Bank, and take all necessary steps for obtaining the retransfer of the shares.

The defendant, by his answer, said, that the plaintiff had never communicated to him the circulars from time to time sent to the shareholders showing the state of the Bank affairs; and added, that he had strong ground for believing that the judgment

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recovered against the public officer was collusive, and that the debt for which it was recovered was not justly due. The defendant said he believed, that, if a suit were instituted, discovery might be obtained which would sustain an injunction against the judgment creditor, restraining him from proceeding [*5] *to execution on the judgment. The defendant said that he had always been willing to take a retransfer of the shares; and that he had offered to institute proceedings for the purpose of resisting the judgment, if the plaintiff would allow his name to be used in such proceedings; and that he had offered to give his bond to indemnify the plaintiff against the consequences of so using his name, but which the plaintiff had declined to accept or allow.

Mr. Wood and *Mr. Grove*, for the plaintiff, argued that the plaintiff must be regarded as a trustee for the defendant of the shares in the Bank; and that he was entitled to be indemnified by his cestui que trust against all the liabilities which he might have incurred. The circumstance, that the plaintiff acquired the shares as mortgagee, did not make him less a trustee when the mortgage was paid off: *Marsh* v. *Wells* (1), *Earl of Ranelagh* v. *Hayes* (2), *Balsh* v. *Hyam* (3).

Mr. Romilly and *Mr. Faber*, for the defendant, contended that a mortgagee was not in the position of a trustee; that the rights of the parties to a mortgage must be determined by the contract between them, and it was no part of that contract that the mortgagor should indemnify the mortgagee against the consequences of holding property which he held for his own security, and not for the benefit of the mortgagor. If any incidental advantage had arisen, as a bonus or payment upon the shares, the mortgagee would have received and applied it in discharge [*6] of his debt; and he *must be supposed to have contemplated all the liabilities to which the possession of the mortgaged property might subject him. There could be no right to indemnity in equity if the law gave no such right, for the contract must be the same in both Courts. What were the rights of the parties in equity? The mortgagee was entitled to payment or foreclosure. If payment should be made, the mortgagee might possibly require that it should include not only the debt, but also the expenses of

(1) 25 R. R. 160 (2 Sim. & St. 87).
(2) 1 Vern. 189.
(3) 2 P. Wms. 453.

retaining the security; but the mortgagor might be willing to be foreclosed, and on what principle should the equity of the mortgagee in that case go beyond foreclosure? The question is, not what the Court would impose upon the mortgagor if he came to redeem the mortgage; but whether the Court should introduce, in cases of mortgage, a new equity, not incidental either to redemption or foreclosure. They cited *Burnett* v. *Lynch* (1).

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THE VICE-CHANCELLOR:

At the conclusion of the argument in this case, I stated my opinion to be, that the plaintiff could have no right of action at law against the defendant in respect of the matters complained of in this suit; and that opinion has been fully confirmed by subsequent consideration. The plaintiff, by the transfer of the shares, became absolute owner thereof at law, and acquired all the rights, and became subject to all the liabilities of a shareholder, both as between himself and the world, and himself and the other shareholders; and, in the absence of express contract, I cannot make out the principle upon which the law should imply a contract that *the defendant, in the circumstances of this case, should indemnify [*7] the plaintiff against the consequences of the transfer of the shares. The question, therefore, in my opinion is, only whether the plaintiff has a right to any such indemnity in this Court. The case of *Humble* v. *Langston* (2), though it is not precisely in point, contains some observations which are important, as explaining the principle on which these cases are governed.

Now, in order fully to explain the reasoning by which I have come to the conclusion I am about to state, it may be convenient to suppose that the amount recovered against the public officer of the Bank consisted of three distinct debts, one of which was contracted before the shares were transferred to the plaintiff; another after their transfer, and before the debt was paid off; and the third after the debt was paid off.

With respect to the first of these debts, the plaintiff, subject to any special contract between the parties, would not, I apprehend, *primâ facie*, be liable to a stranger; but, as between himself and a shareholder, or between himself and Gillan, no doubt he might have been. If, therefore, there is no special case, he would be able at law to defend himself, if that were material, against a claim of any debt contracted before he became a shareholder.

(1) 29 R. R. 343 (5 B. & C. 589). (2) 2 Rail. Cas. 533.

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With respect to the third debt, (I reserve the second for the present), the state of the case was this: The shares were transferred to the plaintiff on the 10th of March, 1842, to secure a sum of 880*l.* On the 15th of July, 1842, the amount of the loan was increased from 880*l.* to 1,000*l.* On the 4th of August, 1843, the
[*8] debt was paid off by *Mr. Gillan. On the 25th of August, 1843, the plaintiff applied to the directors of the Company to transfer the shares in question to the defendant; and, in conformity with the deed of settlement, he signed a notice requiring them so to do, and sent that notice to the defendant. The defendant also signed that notice, and transmitted it to the office, and from that date until September, 1843, the retransfer of the shares to the defendant was pending before the Company, who, as I understand, have power under the deed of settlement to negative, upon certain terms, that transfer of shares; and that transfer has been delayed, so far as appears, only by difficulties or delays resting with or occasioned by the directors of the Company. During no part of this period did the defendant require the plaintiff to act otherwise in respect of the shares than by retransferring them to himself. In the month of September, 1843, a person, alleging himself to be a creditor of the Company, recovered judgment against the public officer of the Company, and that creditor is proceeding to make the judgment available against the plaintiff.

The effect of these transactions would, in my opinion, be, to entitle the plaintiff to the indemnity he asks in respect of the debt supposed to have accrued since the mortgage was paid off. I need not here inquire how the case would have stood if the defendant, at the time of paying off the money, had repudiated the shares. In fact he did not do so; but, acting upon the right which the original transaction gave him, to call for the retransfer of the shares, he elected to require such retransfer. From the position in which he thus placed the plaintiff, he cannot, in my opinion, now retire, only because it may turn out that it would have been
[*9] for his benefit to have repudiated the shares. The tenor of *the original contract, and the time which has since elapsed, may have materially altered the position of the plaintiff. The effect of the payment of the debt, combined with these subsequent transactions, was, in my opinion, to make the plaintiff a mere trustee for the defendant, and so he has continued, with the plaintiff's consent, down to the time of the institution of this suit, and, consequently, for all practical purposes, down to this time. His rights, therefore,

as against the defendant, are those of a trustee against his cestui que trust, and I cannot doubt but that a trustee, circumstanced as the plaintiff was, has a right to be indemnified by his cestui que trust against all liabilities which he may properly have incurred in that character. His liability in this Court is that of his cestui que trust.

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I might take the analogous case of a trustee of leasehold property under covenants for the benefit of a cestui que trust. It is quite clear, I apprehend, that, if such trustee were obliged to pay money for the benefit of his cestui que trust, he would have a right of indemnity over; and, therefore, supposing that trust to have commenced on the day when the money was paid, and that the liabilities have been incurred since that time, my opinion is, the plaintiff is entitled to be indemnified against those liabilities.

The remaining debt (that supposed to have been contracted after the shares were transferred, and before the debt was paid off) raises questions of considerable difficulty. In considering this part of the case, I will first suppose the mortgage to have been in the common form; that is to say, an absolute transfer, subject to redemption, and nothing to have passed by which the defendant was bound to take the shares again. In that simple case, is the defendant liable in this Court for all the *engagements of the [*10] Company, good and bad, in exoneration of the plaintiff, in the same manner as he would have been if he had continued registered owner of the shares? In that simple case I should incline strongly to say the defendant would not be liable. The question is not whether the defendant could redeem the shares without indemnifying the plaintiff, but whether he is under a personal liability to indemnify him, it being admitted that the Company is insolvent, and the shares comparatively valueless. The plaintiff became a partner for his own benefit, and at law he acquired all the rights and became subject to all the liabilities of a partner. I assume there is not at law any implied contract for the indemnity which the plaintiff asks. His rights and liabilities during the time he held his shares for his own benefit must be the same in equity as at law, so far as regards the personal liability of the plaintiff. The position of the parties is without doubt different in equity from what it is at law. At law, the defendant has no interest in the shares; in equity, he has a right to redeem them: and if he should elect to redeem, he may possibly be bound to indemnify the plaintiff against all expenses and liabilities, by means of which the

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shares have become what they are. But although the defendant may have a right to redeem, he may also waive that right, and submit to be foreclosed; and if he should chose so to do, I cannot think the plaintiff has any personal demand against him in this Court for expenses incurred in maintaining the mortgage property, which, by that supposition the defendant does not think fit to claim. Now that appears to me to be the position of the plaintiff, considered simply as a mortgagee. And, if that would be the case of a mortgage with a common clause of redemption, I think the form of the security in this case would not make any difference. I have stated this view of the case in order that the defendant may

[*11] distinctly *understand upon what ground I consider the plaintiff has some claim against him.

Another question then remains. In this case the defendant has, in my opinion, bound himself to accept the retransfer of the shares. In effect, he has elected and has bound himself by his election to redeem the mortgage. This he did, or must be supposed to have done, with full knowledge of the consequences. From the time from which he became so bound, he became in equity owner of the shares. Can he claim those shares without paying the plaintiff the expenses properly incurred in making them what they are; that is, the expense properly incurred in the management? I think not. The profits, if any, would have belonged to the defendant, and he must also be the loser if a loss has been sustained. Supposing, therefore, the suit to be properly framed, the defendant having elected to claim, under the original contract, a right to a retransfer of the shares,—having continued to treat with the plaintiff for the retransfer from the 4th of August, when the money was paid off, down to September, when the action was brought against the officer of the Company, and the delay of the retransfer having been occasioned by the acts of the directors, the defendant never having repudiated the shares, or called upon the plaintiff to act otherwise than he did, and having treated himself as owner of them,—my opinion is, that the plaintiff would be entitled to an indemnity.

But this difficulty then occurs—to this suit the directors of the Company are not parties. The plaintiff, therefore, making *this* demand against the defendant, is not on this record in a position at once to give him the shares; and the difficulty I have felt is, to determine whether I ought to require the directors to be made

[*12] parties, or whether, without doing so, I could, in the *present

state of the suit, make such a decree as I think the plaintiff is entitled to. I am not at present sufficiently informed with respect to the partnership deed. It was admitted on both sides that the deed gave the directors a power to refuse to permit the transfer of the shares, obliging them, in that case, if required by the shareholder who desired to sell, to take them at a price to be ascertained in a way pointed out by the deed; and this being a case, therefore, in which the plaintiff has no power to give the defendant the shares, in this suit, it appears to me that the decree, on that part of the case, can go no further than direct that defendant, indemnifying the plaintiff, may have leave to take such proceedings in his name as he may think fit for the purpose of compelling a retransfer of the shares, or of compelling the Company to purchase them according to the provisions of the deed. Upon that point, however, I wish to call the attention of counsel, to the partnership deed.

With regard to the other part of the case, all I can do is to declare that the defendant is bound to indemnify the plaintiff against all liabilities which would have been incurred by the defendant if he had remained the holder of the shares instead of the plaintiff, from the time they were transferred to the plaintiff. I cannot decide, at the present stage of the cause, what liabilities have been properly incurred; but, with regard to this part of the case also, the defendant, indemnifying the plaintiff in respect of costs, must be at liberty to take such proceedings as he may be advised in the name of the plaintiff for resisting the proceedings to which at present the plaintiff is liable at the suit of the creditor who had recovered the judgment.

It was contended, on behalf of the defendant, that, in the case of a trustee and cestui que trust, the trustee *cannot proceed in [*13]
this Court until he has been actually damaged, although, if he had paid anything, he might have come to be indemnified. I do not accede to that proposition. If it was a subsisting liability, the trustee is not bound to be out of funds for a moment. In this case, a judgment was recovered against a public officer of the Company; *primâ facie* the plaintiff is liable as a shareholder, and *primâ facie* he has a right to come to be indemnified in the way suggested.

It will be for the defendant to consider whether he can suggest any useful inquiries before the Master to ascertain what liabilities have been properly incurred; for (adverting to what I observe is stated in the answer, and what frequently occurs in these cases), it

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appears to me that the defendant must have a right not only to use the name of the plaintiff in defending these proceedings, and in taking proceedings against the directors to compel the transfer or purchase of the shares, but he must also have a right, in the name of the plaintiff, to take any proceedings he may be advised for the purpose of showing that he, with the other shareholders, is not liable to pay the debt; and, whatever decree I make, must be without prejudice to any proceedings which the defendant may think proper to take against the plaintiff himself for the purpose of showing why any liability, to which, *primâ facie*, the plaintiff would appear to be liable, and in respect of which this decree would give him an indemnity, should in any respect remain. All these points are taken by the answer, and I cannot deprive the defendant of the right in this suit to impeach those several matters. I am not at present able to say in what form precisely the decree ought to stand, but the observations I have made will explain what appear to me to be the proper declarations.

[*14] With respect to the point raised as to the nature of *the indemnity, the plaintiff is entitled, at least, to the recognizance of the defendant; to be settled by the Master if the parties differ.

1845. *July* 9, 10, 26.

WIGRAM, V.-C.

[14]

WILMOT *v.* PIKE (1).

(5 Hare, 14—23; S. C. 9 Jur. 839.)

A first mortgage of real estate was made to A. in fee. A second mortgage was then made to B. of the same estate, together with other real estate, by a release and conveyance of the respective premises to C., as a trustee for B., with power of sale. B. afterwards advanced a further sum to the mortgagor on the security of the same estates, but gave no notice of the advance to A. or C. Subsequently, C. (after inquiry of A. whether he had notice of any incumbrance other than his own, and that of which C. was a trustee for B.), advanced a further sum to the mortgagor on the same security, and gave notice of his mortgage to A.

Held, that the several mortgages took effect, with regard to the different estates, according to the order of time at which they were respectively created; and that their priorities were not affected by the giving, or the omitting to give, notice to the party in whom the legal estate was vested.

The doctrine of notice, applicable in determining the priority of charges on choses in action, does not prevail as to equitable estates in land.

By indentures of lease and release of the 1st and 2nd of June, 1824, between Washington Pike, of the first part; John Gregory Pike, of

(1) *Arden* v. *Arden* (1885) 29 Ch. D. 702, 54 L. J. Ch. 655, 52 L. T. 610; *Taylor* v. *London and County Bank* [1901] 2 Ch. 231, 70 L. J. Ch. 477, 84 L. T. 397, C. A.

the second part; and John Smith, of the third part, a parcel of land, in the parish of St. Allmund, in the borough of Derby, with the buildings thereon, was conveyed to the said John Smith, his heirs and assigns, by way of mortgage, for securing 700*l.* and interest. This mortgage was first transferred to Samuel Hey, and subsequently to John Fearne.

By indentures, dated the 22nd and 23rd of May, 1826, between Washington Pike, of the first part; John Gregory Pike, of the second part; John Flewker, of the third part; and Sir Robert Wilmot, of the fourth part, the premises comprised in the foregoing mortgage, and also a second piece or parcel of land containing 600 superficial square yards, with a building thereon, were conveyed to and to the use of Flewker, his heirs and assigns, by way of mortgage, for securing 600*l.* lent to Washington Pike by Sir Robert Wilmot; and the said conveyance was declared to be upon trust that the said John Flewker, his heirs and assigns, should permit *Washington Pike and his heirs to remain in possession of the [*15] premises until the 23rd of November then next, being the day appointed for the payment of the 600*l.* and interest; and upon trust, after such payment, to reconvey the premises to Washington Pike; but, if the 600*l.* and interest should not be paid on the said 23rd of November, then that Flewker and his heirs should thereafter, when and as he or they should think fit, sell and convey the mortgaged premises, and, out of the proceeds of any sale or sales, pay, first, the costs and expenses of the sale and execution of the trusts; secondly, the principal and interest due on the 700*l.* secured in the first mortgage; thirdly, the principal and interest of the mortgage debt of 600*l.* to Sir Robert Wilmot; and, lastly, the surplus to Washington Pike, his executors and administrators.

Sir Robert Wilmot died in 1834, and appointed the plaintiffs his executors. By indenture, dated the 3rd of July, 1835, between Washington Pike of the first part, and the plaintiffs of the second part, reciting the foregoing charges of 700*l.* and 600*l.*, and that the plaintiffs had advanced a further sum of 400*l.* to Washington Pike, for which he had executed his bond, the said Washington Pike covenanted and agreed with the plaintiffs, that, in case the said sum of 400*l.* and interest secured by the bond, or any part thereof, should remain unpaid on the 3rd of January then next, and should not be paid by the space of two months next ensuing, then that Flewker and his heirs should, at any time thereafter, at the request of the plaintiffs, sell and dispose of the said messuages and premises,

WILMOT v. PIKE.

and, out of the proceeds of such sale, after payment of the costs and expenses, and the said sums of 700*l.* and 600*l.*, repay the plaintiffs the said sum of 400*l.* and interest, and pay the surplus (if any) to Washington Pike.

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[16] By indentures of lease and release of the 9th and 10th of July, 1840, made between Washington Pike of the one part, and Flewker of the other part, Washington Pike conveyed the said messuages and premises to Flewker and his heirs, by way of mortgage, to secure 300*l.* advanced by him to Washington Pike, together with interest for the same, subject, as to the hereditaments comprised in the indentures of the 3rd and 4th of June, 1824, to the trusts therein contained, and, as to all the said hereditaments, to the trusts contained in the indentures of the 22nd and 23rd of May, 1826, for securing the sums of 700*l.* and 600*l.* respectively. Washington Pike covenanted to pay the 300*l.* and interest on the 10th of January then next; and, in default of payment, Flewker was thereby empowered to sell the property, and, after the payment of the 700*l.*, 600*l.*, and 300*l.*, the surplus (if any) was to be paid to Washington Pike.

In July, 1844, the executors of Sir Robert Wilmot filed their bill against Washington Pike, John Gregory Pike, John Flewker, and Fearne, in whom the first mortgage was then vested, praying a sale of the mortgaged premises, and the application of the proceeds, and the rents and profits until the sale, in the payment of the first mortgage of 700*l.*, and then in satisfaction of the subsequent mortgages of 600*l.* and 400*l.*, to Sir Robert Wilmot and the plaintiffs.

The defendant, Washington Pike, admitted the four mortgages, and that the mortgaged premises were an insufficient security for the whole. John Gregory Pike claimed no beneficial interest in the property. Flewker, by his answer, insisted upon his right to priority in respect of his mortgage of 300*l.* over the third mortgage,

[*17] which was made to the plaintiffs by way of further *charge to secure the 400*l.* due to them upon the bond. He submitted, that the plaintiffs ought to have given him (Flewker) notice of the further charge of 400*l.*; and that, owing to his having had no notice of such further charge, he (Flewker) had been induced to lend the 300*l.* on the security of the mortgaged premises. He alleged that he had taken the precaution of inquiring of the first mortgagee and his solicitors, whether they had notice of any other incumbrance. The defendant Flewker also examined a witness, who proved, that, on

the 22nd of January, 1841, he, by the direction of Flewker, served the solicitors of the first mortgagee with notice of the security for 300*l.*, executed by Washington Pike to Flewker.

Mr. Wood and *Mr. Renshaw*, for the plaintiffs, submitted that the doctrine with regard to the effect of notice by an equitable incumbrancer to the party having the legal interest, laid down in the cases of *Dearle* v. *Hall* (1), *Loveridge* v. *Cooper* (2), and *Foster* v. *Blackstone* (3), did not apply to interests in real estate; and that the priority in title must be determined by the priority of the several conveyances in point of time: *Jones* v. *Jones* (4), *Beckett* v. *Cordley* (5).

Mr. Jervis, for the defendants Washington Pike and John Gregory Pike.

Mr. Romilly and *Mr. Faber*, for the defendant Flewker, relied on the case of *Foster* v. *Blackstone* as an authority for the application of the same rule as to *notice, with reference to land vested in [*18] a trustee for sale, as to choses in action. They contended, also, that, whatever might be the rule to be applied with reference to the premises comprised in the first mortgage, as to the additional land comprised in the second mortgage, Flewker had the legal estate, and must be regarded, as to the 300*l.*, as the second incumbrancer.

Mr. Wood, in reply, said, that the land, in this case, was not converted, and must be governed by the rules of law applicable to real estate: *Bourne* v. *Bourne* (6).

THE VICE-CHANCELLOR:

At the time the bill was filed, the legal estate in the property comprised in the first mortgage of June, 1824, was vested in Fearne, as first mortgagee, for securing 700*l.* The property which was the subject of that mortgage, and also additional property, consisting of about 600 square yards of land, comprised in the deed of May, 1826, was vested in Flewker, as trustee, for securing 600*l.* and interest to Sir Robert Wilmot. Flewker, therefore, as trustee,

(1) 27 R. R. 1 (3 Russ. 1).
(2) 27 R. R. 1 (3 Russ. 30).
(3) 39 R. R. 24 (1 My. & K. 297): *S. C.*, *Foster* v. *Cockerell*, 3 Cl. & Fin. 456.
(4) 42 R. R. 249 (8 Sim. 633).
(5) 1 Br. C. C. 353.
(6) 62 R. R. 7 (2 Hare, 35).

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was second mortgagee of the property comprised in the first mortgage, and first mortgagee of the additional property comprised in the mortgage of May, 1826. The question in the cause arises between the third and fourth mortgages of July, 1835, and July, 1840, respectively.

The defendant Flewker insists, that neither Fearne, the first mortgagee, nor himself, as mortgagee in trust, had notice of the third mortgage at the time he advanced his money upon, and took the fourth mortgage; and he claims priority over the third mort-

[*19] gagee upon *that ground. In support of the argument, he relies upon *Dearle* v. *Hall* (1), *Loveridge* v. *Cooper* (2), and *Foster* v. *Blackstone* (3). He has also made a second point, namely, that, if his fourth mortgage is not entitled to priority over the third mortgage to the full extent, he is, at all events, entitled to such priority to the extent of the additional property comprised in the mortgage of May, 1826; and for this he relies upon the general proposition that he has the legal estate in that additional property, and had no notice of the third mortgage at the time he advanced his money on the fourth.

Now, with respect to the first point made by the defendant, I do not of course presume, at this day, to question the authority of the cases upon which the defendant has relied. But, when called upon to apply those cases to a case like that before me, I am bound to examine the reasoning upon which those cases proceeded. That reasoning is, in part, applicable to equitable interests in land, as much as to equitable interests in pure personal estate. But the expressions of Sir THOMAS PLUMER are applied to personal property. The whole object of his argument was to show by what acts a perfect transfer of an equitable interest in property not capable of actual delivery could be effected; and it is impossible to read his very elaborate judgments in *Dearle* v. *Hall* and *Loveridge* v. *Cooper* without seeing that his opinion as to the mode of transferring such property (contrary to his opinion in *Cooper* v. *Fynmore* (4)) was borrowed entirely from the decisions in bankruptcy, as to the acts

[*20] which were necessary *under the statute, to take a chose in action out of the order and disposition of a bankrupt; and it is deserving of remark, that, in the argument of those cases, as well as of the case of *Foster* v. *Blackstone* at the Rolls, and in the judgment of the COURT in each of those cases, no allusion whatever is made to

(1) 27 R. R. 1 (3 Russ. 1).
(2) 27 R. R. 1 (3 Russ. 30).
(3) 39 R. R. 24 (3 Cl. & Fin. 456).
(4) 3 Russ. 60.

equitable interests in land, as being within the principle of the cases then under consideration. It was not, I think, until the argument of *Foster* v. *Cockerell*, in the House of Lords, that the appellant's counsel referred to conveyances of equitable interests in land, as furnishing an undisputed precedent that such conveyances are perfect and complete, without notice to the trustees in whom the legal estate may be vested. However, in *Jones* v. *Jones* (1), an attempt was made to apply the doctrine in *Dearle* v. *Hall*, and the other cases, to equitable interests in land; but the VICE-CHANCELLOR, upon the undoubted authority of cases to which he referred, showed that those cases had no application to conveyances of equitable interests in land; and with this opinion agree all the modern text-books.

The only question, therefore, in my opinion, is, whether the interest of Sir Robert Wilmot, under the mortgage of May, 1826, is to be considered as an interest in land, or an interest in money to be produced by the sale of land. My opinion is, that his interest is that of a second mortgagee of the equity of redemption of the property in mortgage, notwithstanding the form of the security gives his trustee a power of sale.

I have read the pleadings in *Foster* v. *Blackstone*, and the case is treated as one in which the respective rights of Foster and Sir Charles Cockerell were to be adjudicated upon with reference to the facts that the estates *of the Duke of Marlborough had [*21] actually been sold, and that money (the proceeds of such sales) in the hands of the trustees was the subject of contest between the parties; and I think the judgment of the House of Lords proceeded upon the assumption, that the Court was applying the doctrine in *Dearle* v. *Hall* to pure personal estate. I think, therefore, upon the authority of the cases I have referred to, that the first point (wanting altogether the specialty which is found in the second point) must be decided in the plaintiffs' favour.

Upon the second point made by the defendant Flewker, my opinion, after some fluctuation, is, that the defendant is right. Suppose Flewker had sold under the power contained in the second mortgage, as he had clearly a right to do, and, after retaining in his hands the sums of 700*l.* and 600*l.* to answer the respective claims of the first mortgagee, and of Sir Robert Wilmot, to have paid over the surplus to Washington Pike,—could it be said that, by so doing, he had rendered himself liable for a breach of trust?

(1) 42 R. R. 249 (8 Sim. 633).

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It clearly could not. And again, if, instead of the sale which I have supposed, Washington Pike had contracted with the executors of Sir Robert Wilmot for a third mortgage to them, of which contract Flewker had no notice; and suppose, that, before the completion of that transaction, there had been a deed between Washington Pike of the first part, Flewker of the second part, and a fourth mortgagee of the third part, by which Washington Pike had assigned over the equity of redemption of the estate to the fourth mortgagee, for the purpose of securing the payment of his debt; and that Flewker had then declared himself a trustee for that fourth person. Assuming, for a moment, that the effect of such a deed would have been to give the new mortgagee a priority over Sir Robert Wilmot's executors, I apprehend that would clearly have been no breach of trust. Sir Robert Wilmot's executors not [*22] having given any *notice to Flewker, the latter would have been justified in declaring such trusts of the surplus as Pike should direct. Then the question is, whether the effect of such a deed would have been to give a priority to the fourth mortgagee. Now, the general rule, the rule relied on by *Mr. Wood* as to equitable interests in land, is the rule "*Qui prior est in tempore potior est in jure;*" and I have, on the former point, decided that neither the omission of one mortgagee to give notice, nor the activity of the other, would, in the circumstances of that case, give the second mortgagee priority over the first. But, if a first incumbrancer has a declaration of trust only by the borrower, and none by the trustee, and the second incumbrancer has a formal mortgage of the equity of redemption, and the trustee is a party to the deed, and declares himself a trustee for the second incumbrancer, will not that declaration by the trustee give the second priority over the first? I think the second would, in that case, have a better right to call for the legal estate than the first; and if it would be so in the case of a stranger, I think the trustee cannot be precluded by his situation as trustee from claiming the benefit of the legal estate without notice. His case, however, might, perhaps, be supported on the simple ground, that he had the legal estate, and advanced his money without notice, leaving every trust of which he had notice untouched by his present claim. I have referred to the cases of *Stanhope* v. *Earl Verney* (1) and *Maundrell* v. *Maundrell* (2); from which it appears, that, as to the trusts of a term, a declaration in form by a trustee, that he will stand possessed of the term, is

(1) 2 Eden, 81.

(2) 7 R. R. 393 (10 Ves. 271).

held equivalent to an assignment, so as to give the preference to the party who gets the declaration over one who has a good equitable interest, but not in the same form. I believe that attention to *this distinction will clear up nearly all that is apparently conflicting in the reported cases. A declaration of trust by a trustee, in whom the legal estate is, has always been considered of great weight in the determination of equitable rights.

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[*23]

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1845. *July* 1, 2, 11.

(5 Hare, 24—38; S. C. 9 Jur. 653.)

WIGRAM, V.-C.

[24]

The disclaimer of a trusteeship operates as if the person disclaiming had predeceased the continuing trustees, so that they satisfy the description of "surviving trustees."

A direction to sell particular parts of the testator's personal estate is not of much weight on the question of the conversion of the residue; for the rule as to conversion does not proceed on the presumed existence of a definite intention that the property shall be converted, but upon the expressed intention that the legatees shall enjoy the property in succession.

The direction, that the trustees should retain a percentage on the rents to be collected, fortified by other expressions in the will, regarded as evidence that the testator contemplated the enjoyment of the leasehold property in specie by the legatees.

THE testator, John Brown, by his will, dated in February, 1826, [devised and bequeathed certain freehold and leasehold property and certain chattels to] John Brown, John White, and John Bent, their [heirs,] executors, administrators, and assigns, upon the trusts thereinafter mentioned. And the testator declared his will to be, that the said trustees should stand possessed of the same respectively, upon trust, as soon as conveniently might be after his decease, to sell and dispose of the said freehold and leasehold premises and effects, and to invest the proceeds of such sale as therein mentioned. The testator then gave to his trustees all his six messuages or tenements in Beaumont Street, and also a messuage or tenement in Clipstone Street, (excepting a certain stable, which he directed should fall into and go along with the general residue of his estate and effects), to hold the said several messuages or tenements, and premises, with the appurtenants, unto his said trustees, their executors, &c., for the residue of the several terms of years to come therein, upon the trusts thereinafter declared. And after bequeathing an annuity of 200*l.*, upon trust, for his son William Henry Brown, and also an annuity of 20*l.* to

[25]

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Mary Latham, the testator declared, that, as to all the rest, residue, and remainder of his estate and effects, whatsoever and wheresoever, of what nature, kind, or quality the same might be, not thereinbefore specifically bequeathed or disposed of; and all monies to [*26] arise and *be produced by the sale thereinbefore directed, and the stocks or funds in which the same should be invested, and by the sale of the property and effects which the testator had desired should fall into and go along with the general residue of his estate and effects, the testator gave, devised, and bequeathed the same as follows, viz., as to one-sixth part or share thereof, the said testator gave, devised, and bequeathed the same unto his said son, John Brown, his executors, &c., to and for his and their own absolute use and benefit; and as to the remaining five-sixths shares thereof, the said testator gave, devised, and bequeathed the same unto the said John Brown, and John White, and John Bent, their executors, &c., upon trust, as to the said two houses, Nos. 16 and 17, Beaumont Street, and one-sixth part or share of the residue of his estate and effects, that his trustees, and the survivors and survivor of them, his executors, &c., should stand possessed thereof, upon trust to pay the rents, issues, interest, dividends, and annual proceeds thereof, unto his said daughter, Sarah Bent, the wife of W. B. Bent, for her life, for her separate use; and after the decease of his said daughter, upon trust to permit the said W. B. Bent to receive and take the rent, issues, interest, dividends, and annual proceeds thereof, for his life, to and for his own use and benefit; and from and after the decease of the survivor of them, W. B. Bent and Sarah his then wife, upon trust for all and every the child or children of his said daughter Sarah Bent, equally to be divided between and amongst them if more than one, and if but one, then to such one child, to be transferred at the age and time thereinbefore mentioned. The testator then devised and bequeathed the other four-sixths shares of the specific trust property and residue upon like trusts for the benefit of his other four daughters respectively, and their respective children. The will contained provisions for the maintenance [*27] *of the children after the decease of their parents,—powers for leasing any of the devised messuages or tenements, to be exercised by the trustees for the time being, with the consent of the respective tenants for life thereof,—and a direction that J. Brown the son, or some or one of the trustees acting for the time being, should keep a regular account of the rents and profits of his said estates, and of

the dividends and interest of the stock and other personal estate which he or they should collect and receive by virtue of the said trusts, and should be entitled to retain, as compensation for his or their trouble, 5*l.* per centum on the rents so to be collected by him or them, having first paid thereout all ground rents, insurance, and other outgoings and expenses, and 1*l.* per centum on the dividends to be received by him or them; such allowance not to extend to the share of John Brown, the son, nor to the annuity of 200*l.* for William Henry Brown; and it was provided, that, if either of them, J. Brown, J. White, or J. Bent, or any succeeding trustee or trustees to be nominated in their or either of their place or stead, as thereinafter mentioned, should, during the continuance of any of the trusts or powers created by or vested in them by the said will, happen to die, or refuse or neglect, or become incapable to act in the execution of the said trusts or powers, at any time or times before the said trusts or powers should be fully executed and performed, then and in that case, when and so often as the same should happen, it should and might be lawful to and for, and the testator thereby authorised and empowered, "the survivor of them, his said son J. Brown, and J. White, and J. Bent, and such new trustee and trustees to be nominated in their or either of their place or stead, as thereinafter mentioned," by any writing or writings under his or her hand, attested by two or more credible witnesses, to nominate and appoint any other fit and proper person or persons to be a trustee *or trustees for the purposes aforesaid, [*28] or such of them as should be then subsisting or capable of taking effect, in the place or stead of the said J. Brown, J. White, and J. Bent, or either of them, or any future trustee or trustees so dying or desiring to be discharged, or refusing or neglecting, or becoming incapable to act in the execution of the said trusts or powers; and the testator directed, that, thereupon, the trust property should be transferred and assigned upon the same trusts to such new trustee or trustees; and such new trustee or trustees should have the same powers as if he or they had been originally named in the said will.

The testator died in 1828. J. Brown, the son, and J. Bent, proved the will; White renounced probate, and disclaimed by deed. J. Brown and J. Bent, as executors and trustees, sold the estates expressly devised and bequeathed for sale, but made no sale or conversion of the leasehold estates which passed under the residuary gift.

The estate, so far as it was sold or got in, was invested in the

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funds, in the names of J. Brown and J. Bent. About fifty leasehold houses in various parts of London and Middlesex remained undisposed of, and the estate was managed and the rents received by J. Brown and J. Bent, and by J. Bent after the decease of Brown, and the income was distributed to the tenants for life and the parties interested.

Sarah Bent, the wife of W. B. Bent, and one of the daughters of the testator, had five children. One of these children, Sarah Ann
[*29] Bent, died in 1842, intestate, *and letters of administration of her estate and effects were granted to the said W. B. Bent, her father. W. B. Bent then offered for sale by auction the reversionary interest of Sarah Ann Bent in the leasehold houses, and in the stock standing in the names of the trustee, and such interest was purchased by the plaintiff and assigned to him by indenture, dated in August, 1842.

The plaintiff then filed his bill against J. Bent, the surviving executor and trustee, the representative of J. Brown, the son, and all the surviving children of the testator, the children of the testator's children, and the persons taking shares of the residue by assignments from different members of the family, being in the whole more than seventy persons in number. The bill alleged that the defendant, J. Bent, was of advanced age, and from bodily infirmity was incompetent to manage the trust estate, and that the stock ought not to remain in his sole control. The bill prayed, that the trusts of the will might be performed, and the usual accounts taken, and the personal estate got in and applied in a due course of administration, and that the leasehold premises not specifically bequeathed might be sold, and the proceeds invested, and the stock transferred into Court. The bill also prayed that new trustees might be appointed in the place of J. Brown, the son, and of J. White, and for a receiver.

In July, 1843, after the institution of the suit, J. Bent (White, the person who had refused to accept the trusts, being still living,) executed a deed appointing two other persons as trustees in the place of Brown, the deceased, and White, the disclaiming trustee, and applied to transfer the stock to the joint names of the three trustees. The plaintiff, who had caused a *distringas* to be placed
[*30] on the stock, then received the usual notice, *that, unless a bill was filed, or an injunction obtained by a certain day, the Bank would permit the stock to be transferred. The plaintiff thereupon brought his supplemental bill, praying a declaration that the new trustees were not duly appointed, and for an injunction to restrain the transfer of the trust funds.

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Some of the defendants, by their answers, insisted that the interest which the plaintiff had acquired by his purchase, gave him no right to sustain an administration suit; and that the suit was wholly unnecessary. They also went into evidence, showing that the plaintiff had been receiver of the estate for several years, from which office he was removed about the year 1839, and to prove declarations of the plaintiff, that he had purchased an interest in the estate, for the purpose of involving the family in a Chancery suit, and procuring a decree for the sale of the leasehold property.

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At the hearing, *Mr. Walker* and *Mr. Piggott*, for the plaintiff.

Mr. Romilly and *Mr. C. R. M. Jackson*, *Mr. Russell* and *Mr. Bacon*, *Mr. Wood* and *Mr. Rolt*, *Mr. Cooper* and *Mr. Spurrier*, *Mr. Blunt*, *Mr. Cooke*, *Mr. Shadwell*, *Mr. Perry*, *Mr. Shee*, *Mr. Stretton*, *Mr. Paton*, and *Mr. J. D. Taylor*, for the several classes of defendants.

The questions discussed at the hearing of the cause were, first, whether the plaintiff had become the purchaser of anything more than the interest of Sarah Ann Bent, the intestate, in certain specific property, in the state in which it then stood; or whether the property *assigned to the plaintiff comprehended also the whole of [*31] the interest of Sarah Ann Bent in the residuary estate of the testator; 2ndly, supposing that the plaintiff had purchased only a share in certain specific property, whether he was, in respect of that right, in a position enabling him to sustain a suit for the general administration of the testator's estate; and, 3rdly, if the plaintiff was entitled to institute a suit for the administration of the estate, whether the residuary leasehold estate of the testator ought to have been sold and converted, or whether the tenants for life were entitled to the enjoyment of that part of the estate in specie. On this point, the cases of *Howe* v. *Lord Dartmouth* (1), *Pickering* v. *Pickering* (2), *Daniel* v. *Warren* (3), *Sutherland* v. *Cooke* (4), were cited; 4thly, whether the appointment of the new trustees, by Mr. Bent, was within the power. * * *

THE VICE-CHANCELLOR:

I did not at any time of the argument entertain, nor have I since

(1) 6 R. R. 96 (7 Ves. 137).
(2) 48 R. R. 104 (4 My. & Cr. 289).
(3) 60 R. R. 148 (2 Y. & C. C. C. 290).
(4) 66 R. R. 162 (1 Coll. 498).

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entertained any doubt, but that the plaintiff, as assignee of Sarah Ann Bent, was entitled to proceed directly against the executor of
[*32] John Brown, *the testator, to enforce the rights he acquired as such assignee. The only doubt I have at any time entertained has been as to the specific nature of the relief to which he was entitled. To solve this doubt, I have considered what the rights of the plaintiff would have been if the assignment had been made, and the bill filed, within twelve months of the death of John Brown, before his debts and legacies had been paid, or any effectual steps had been taken to ascertain the residue of his estate and effects. Upon this hypothesis, I will assume, that *Mr. Rolt's* argument is correct,—that the executors had an absolute right to sell the specific property purchased by the plaintiff, if necessary for the purpose of administering his estate, and that the plaintiff purchased nothing but the chance of the specific property comprised in his purchase remaining unsold, when the clear residue of the testator's estate should have been ascertained. In this view of the case, (which is the most favourable to the defendants' argument), I think the plaintiff had such an interest in the whole and every part of the testator's estate as would entitle him to be a party to the account of the testator's estate, for the purpose, at least, of ascertaining the extent, if any, to which in the due administration of the estate the subject of his (the plaintiff's) purchase should necessarily or in fact be encroached upon.

If, therefore, I am now to consider the property included in the plaintiff's purchase as assets unadministered in the hands of the executors of John Brown, I think the plaintiff must be entitled either to have the usual accounts of the estate taken, or to have the property comprised in his purchase (either by the act of the parties or the decree of the Court) withdrawn from its position as assets unadministered, and constituted a trust fund, upon the trusts
[*33] declared of one-fifth of the *residue of the testator's estate. The only question upon this part of the case is, whether, before the bill was filed, any act had been done whereby the property comprised in the plaintiff's purchase had ceased to be assets of the testator unadministered in the hands of his executors, and had become vested in the same persons as trustees of the clear residue of his estate. Now, my opinion is, that I have no case or evidence before me upon which I can safely conclude, that the property comprised in the plaintiff's purchase had lost its character of assets unadministered at the time the bill was filed. The question may

be tried, by inquiring whether, if any party entitled to claim an immediate distribution of one-fifth part of the residue of the testator's estate, had filed a bill claiming one-fifth part of the property in question as ascertained residue, the executors were precluded from insisting upon the usual accounts of the testator's debts being taken before the distribution was made. My opinion is, that there is no circumstance in this case to preclude such right on the part of the executors. If I were to hold otherwise, my decision, if well founded, would preclude every executor and trustee from making any payments to residuary legatees until the accounts of his testator's estate had been taken under a decree of this Court. This disposes of the first point made in the argument, except as to costs, of which I shall presently speak.

The next question to be considered is, whether the leaseholds, which passed by the residuary clause of the will, ought to have been sold under the rule laid down in *Howe* v. *Lord Dartmouth*. The question depends upon the construction of the will.

(His Honour stated the material parts of the will.)

Now, in deciding upon the effect of this will, I may observe, that [34] I do not consider the rule laid down in *Howe* v. *Lord Dartmouth* as, in the least degree, impeached by the more modern cases. Those cases have clearly recognised the rule, and have decided only that in those cases circumstances afforded a necessary inference that perishable property comprised in a general residue was to be enjoyed in specie, notwithstanding its perishable nature. And the question which I have to decide is, whether there are circumstances in this will which ought to satisfy my mind that the testator intended that the leasehold property comprised in the residuary clause of this will should be enjoyed in specie. In the absence of such circumstances, the rule in *Howe* v. *Lord Dartmouth* must prevail. The leasing power, taken alone, certainly would not afford any such necessary inference. The testator has specifically devised to his three trustees, in trust, divers leasehold messuages and tenements: and the residuary clause does not specifically mention or describe any leasehold or other property, except under the general terms of his estate and effects not before disposed of. Now, this clause would operate upon after-acquired leaseholds. When, therefore, the testator empowers his trustees to grant leases of his messuages and tenements, "so devised to them in trust as aforesaid," the natural, if not the necessary effect of those words appears confined to the leaseholds before specifically bequeathed,

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and not to such leaseholds as might happen eventually to pass under the general words of the residuary clause.

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Again, much stress was laid in argument upon the circumstance, [*35] that the testator had in terms directed *particular parts of his personal estate to be sold, and had given no such direction respecting his general residuary estate; from which the inference was drawn, that the testator did not intend that his residuary estate should be sold. This argument, standing alone, would have no prevailing effect on my mind. The rule in *Howe* v. *Lord Dartmouth*, as I understand it, does not proceed upon the assumption that the testator intended his property to be sold, except so far as a testator may be presumed to intend that which the law will imply from the directions in his will. The rule proceeds upon this, that the testator has intended the enjoyment of perishable property by different persons in succession, and this the Court can only accomplish by means of a sale. To this also may, perhaps, be added the consideration, that the argument I am now considering may prove too much; for it will prove (if it proves anything) that no part of the residuary estate was to be sold,—a length to which it would be extremely difficult to carry the argument with success. And the particular instances in which the testator has directed a sale, may, perhaps, be explained by the position of the property to which the direction applies. In one instance, the sale directed is of a property which consists of freehold as well as leasehold and other personal estate, blended together in enjoyment and use. In the two other instances, the sale directed is of household goods and furniture, wines and liquors, in and about two dwelling-houses, which dwelling-houses are specifically bequeathed with the fixtures and appurtenances thereto belonging. It may, I believe, be safely said of all parts of this will which have been referred to in argument, except one that I shall presently notice, that they are circumstances to be regarded by the Court in considering the construction of the will; but by no means sufficient of themselves [*36] to evidence the purpose for which *they have been relied upon. The clause I refer to is that in which the testator directs that his son John, or one of his trustees, shall retain, as a compensation for trouble, a percentage of the amount of the rents collected; adding, by way of proviso, that this allowance was not to extend to the share of his son John therein. Now, after attentively considering this clause, my conclusion is, that the words "share of my son John therein" refer in construction to John's share in the general

residue of his estate, and not to the property specifically bequeathed to him; and, consequently, that the testator has in effect directed, that the percentage in question shall be payable out of the rents of the leaseholds comprised in the residuary clause; and although this direction might, perhaps, be satisfied by applying it to such rents and profits of those leaseholds as should arise before a sale, I think the cases of *Pickering* v. *Pickering* and *Goodenough* v. *Tremamendo* (1), are authorities for putting a more precise construction on the word "rents," and for holding that this will carries intrinsic evidence that the testator contemplated the enjoyment in specie of the leaseholds in question. This conclusion is fortified by the other circumstances to which I have referred, although those circumstances, standing alone, would not, in my judgment, have been sufficient evidence of the same intention. I have gone at some length into this question, because I consider myself bound by *Howe* v. *Lord Dartmouth*, except where I can find a necessary implication to the contrary.

I think the trustees are well appointed. This conclusion might perhaps be supported by the words of the clause itself; for the latter directions in that clause that are applied to the same case, in which, according to *the plaintiff's argument, the "survivor" of [*37] the trustees is supposed alone to have had the power of appointing new trustees, are inconsistent with the supposition, that the power could be exercised by the survivor only; but I think the case may be supported on a broader ground. If the three trustees had not been mentioned by name in the introductory part of the clause, it would have been clear to demonstration that the power was annexed to the office of trustee, in which case the disclaimer of one would have vested the office of trustee in the remaining two, and the power would in fact have been exercised by the surviving trustee; and I think the cases referred to justify me in holding that the trustees were so named in the introductory part of the clause, not for the purpose of founding a distinction between them and future trustees, but only because they happened in fact to be the trustees for the time being.

[Special directions were given as to the costs of the proceedings.]

(1) 50 R. R. 262 (2 Beav. 512).

1845.
June 26, 27, 30.
July 1.
Nov. 13, 25.
Dec. 4, 5.

WIGRAM, V.-C.

[39]

FRANCIS *v.* GROVER.

(5 Hare, 39—51.)

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The testator gave an annuity to A., and charged the same upon all his freehold and leasehold estate. He afterwards devised his freehold estates to trustees, (who were also his executors), upon trust (subject to the charge) to and for the use of his grandson and his heirs. The trustees, being in possession of the estates, paid the annuity to A. during the minority of the grandson, and within twenty years before the filing of the bill by A. against the grandson: Held, that such payment of the annuity by the trustees prevented the claim of A. to the annuity from being barred by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), ss. 2, 3.

That the grandson was not a trustee for the annuitant within the 25th section of the stat. 3 & 4 Will. IV. c. 27, or otherwise; and that, under the 42nd section of the same statute, the annuitant was not entitled to recover the arrears of the annuity for more than six years before the filing of the bill.

JOHN KEY, by his will, dated in 1805, after giving an annuity of 200*l.* to his mother, proceeded as follows: "*I give and bequeath unto Margaret Evans, now living servant with me, an annuity of* 20*l.*, *to be payable during her life*" (1). He then gave a life interest in a certain mill, or, in the alternative, an annuity of 50*l.* to another person, and proceeded: "I hereby charge and make liable all my freehold and leasehold estates, with and to the payment of the said several annuities given by this my will." The testator then gave, devised, and bequeathed to W. Tait and B. Greenwood, their heirs, executors, &c., all his freehold and leasehold estates, upon trust (except as to the collieries and premises therein mentioned, and nevertheless subject to and charged with the said several annuities thereinbefore bequeathed) to and for the use of the first and other son or sons successively of his daughter Elizabeth Grover, and their respective heirs, the eldest and first-born of such sons, and his heirs, to be preferred and take before the younger of such sons, and his heirs; with remainder to the daughters of the said Elizabeth Grover, and their heirs, as tenants in common. The testator then disposed of the collieries and of his residuary estate, and gave an
[*40] *annuity of 200*l.* to his daughter and her husband, in succession, out of the rents of his estates; and appointed W. Tait and B. Greenwood his executors. The testator died in 1808. B. Greenwood proved the will and accepted the trusts of the devise; and he paid the annuity of 20*l.* to Margaret Evans (afterwards the wife of John Francis) from the death of the testator until July, 1827. In December, 1829, the defendant Grover, the eldest son of the testator's daughter Elizabeth, attained his age of twenty-one, and

(1) A line was drawn with a pencil through the words in italics.

entered into possession of the devised estates. In April, 1844, John Francis and Margaret his wife, filed their bill against the defendant Grover, stating that the personal estate of the testator had been fully administered, and that his leasehold estates had long since expired, and praying a decree for payment of the arrears of the annuity amounting to 343*l.* out of the real estates devised to the defendant; and, in default, that a sufficient part of such real estate might be sold for that purpose.

The defendant Grover, by his answer, said, it was true that the will, as executed by the testator, had contained the bequest of the annuity of 20*l.* to Margaret Evans, but that the testator had afterwards cancelled such bequest, by drawing a line in pencil through the whole of the same, which was still visible upon the original will. The answer also claimed the benefit of the statute 3 & 4 Will. IV. c. 27 (1). The executor and trustee was long since dead. At the hearing, [the VICE-CHANCELLOR said that he did not think that there was any ground for saying that the annuity was barred, and he directed an issue at law on the question of revocation by the pencil mark. The issue was found in favour of the plaintiff].

Mr. Walker and *Mr. Headlam*, for the plaintiffs.

Nov. 25.

[45]

Mr. Romilly and *Mr. Elmsley*, for the defendant.

[46]

[It is not necessary to state the arguments on the question of cancellation.] The other points argued were, whether, as the defendant contended, the arrears of the annuity ought to be confined to six years before filing the bill, under the stat. 3 & 4 Will. IV. c. 27, s. 42: *Harrisson* v. *Duignan* (2), *Hughes* v. *Kelly* (3): or whether, as the plaintiffs contended, the defendant was a trustee for the payment of the annuity, and in that character liable to account without reference to the statute: *Hargreaves* v. *Michell* (4), *Ward* v. *Arch* (5), *Young* v. *Lord Waterpark* (6), *Ravenscroft* v. *Frisby* (7). The devisees in trust, by whom the annuity was formerly paid, were clearly trustees, as well for the annuitant as for the defendant: *Doe* d. *Player* v. *Nicholls* (8): and the rule was, that the estate of the trustee should be held to continue so

(1) An Act for the Limitation of Actions and Suits relating to Real Property, &c.

(2) 59 R. R. 689 (2 Dr. & War. 295).

(3) 61 R. R. 109 (3 Dr. & War. 482).

(4) 23 R. R. 231 (6 Madd. 329).

(5) 56 R. R. 99 (12 Sim. 472).

(6) 60 R. R. 324 (13 Sim. 204).

(7) 66 R. R. 8 (1 Coll. 16).

(8) 25 R. R. 398 (1 B. & C. 336).

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long as any of the trusts for which it was given remained to be performed.

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Dec. 5.

THE VICE-CHANCELLOR [declined to direct a new trial, and said]:

[49]

The question, whether the annuity was barred by lapse of time, I disposed of when I directed the trial at law.

The question which remains is, as to the arrears of the annuity recoverable, whether for only six years before filing the bill, or the entire arrears from the year 1827. I have not a doubt as to the construction of the 42nd section of the Act. That section declares, "that no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due" &c. That unquestionably confines the plaintiffs in this case to six years' arrears, unless they are within the saving clause in which land or rent is vested in a trustee upon an express trust, in which case the right of the cestui que trust shall be deemed to have first accrued "at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration" (1) &c. The present case is one of land devised to a person,

[*50]

not upon trust, but subject to and chargeable *with an annuity, and the question is, whether the beneficial owner of an estate, charged with the payment of an annuity under a will is a direct trustee, so that the annuitant, though making no claim for twenty years, can afterwards claim the whole arrears. If there be a devise to trustees in trust to pay an annuity, and no purchase for value intervening, the 25th section will govern the case. But this is a devise of land to a person beneficially, subject to a charge. Looking at the 42nd section, it appears to me impossible not to see that there are many cases of express charge, where that section would prevent the annuitant from recovering more than six years' arrears. Suppose the owner of an estate to acknowledge a sum of money to be lent to him, and to agree that certain specific lands shall stand charged with the payment of the money and interest. That is an express charge by contract. If that money is due in the form of a charge, then it is a case contemplated by the 42nd section, in which a person having a direct charge cannot recover. I do not see how to avoid that consequence, except by the argument that there is a distinction between a devise of land to a person subject to a charge,

(1) Sect. 25.

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and a charge upon land by act *inter vivos*. But even that argument does not meet the objection; for, by the terms of the Act, no "interest upon any sum of money charged upon or payable out of any lands or rent," can be recovered by any action or suit, but within six years (1). Suppose the charge upon an estate to be created by will, yet the Court will not give more than six years' interest. Suppose, again, the testator to give a legacy, and to direct that it shall be a charge upon land with interest until payment. There the charge is created by will, and yet according to the terms of the *Act interest could not be recovered for more than six years.

[*51]

My opinion is, that neither upon principle nor authority can this be considered as a case of express trust within the Act as between the plaintiffs and the defendant. Where an annuity is given by will, and the real estate of the testator is charged with the payment of it, and then the estate is simply devised, charged with the payment of the annuity, my opinion is, that that is not a case of express trust within the 25th section of the statute. It is a bequest or devise which creates a liability in favour of the annuitant, but it does not impose any fiduciary character upon the devisee. The cases of *Hughes* v. *Kelly* (2), and *Harrisson* v. *Duignan* (3), support this conclusion. The arrears of this annuity must therefore be confined to six years.

COLE *v.* JEALOUS.

1845. *July* 11, 14.

WIGRAM, V.-C.

[51]

(5 Hare, 51—55.)

Devise of a copyhold estate to three trustees, upon trust to permit A. to occupy the same or receive the rents and profits thereof for his life; and after the death of A. upon trust to sell the estate and divide the proceeds amongst the children of A.; and gift of the testator's residuary estate to the trustees upon other trusts, but charged with debts and "the costs and charges of proving and executing" the will: Held, that the fines payable on the admission of the devisees in trust to the copyhold estate were not part of the costs and charges of executing the will to be borne by the residuary estate, but that such expenses of admission were a charge upon the copyhold estate so devised.

SAMUEL JEALOUS, by his will, dated in 1840, devised his copyhold estates holden of the manor of Sutton Holland, in the county of Lincoln, parcel of the Duchy of Lancaster, to three trustees, upon trust, to permit his son, Henry Jealous, to occupy the same during

(1) Sect. 42.
(2) 61 R. R. 109 (3 Dr. & War. 482).
(3) 59 R. R. 689 (2 Dr. & War. 295).

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his life, or to let or demise the same, and pay the rents *and profits to his said son for his life, and after his decease, or in his lifetime, if the trustees should think fit, to sell the said estates, and divide the residue equally amongst the children of his said son. The testator then devised other estates to the same trustees for others of his children, and desired the residue of his estates to be sold, and charged the proceeds of such sale, and the monies to arise from his personal estate, with the payment of his debts, (except the mortgage debts charged on the estates specifically devised), and his funeral expenses, and the costs and charges of proving and executing his said will; and the testator then directed part of the fund to be invested for the benefit of his widow and certain of his children; and, after giving some legacies, he bequeathed all the residue of the monies arising from his real and personal estate to his son Samuel Jealous, (one of the trustees), for his own use and benefit; and he appointed the same trustees to be executors of his will.

[*52]

The plaintiffs were, after the death of the testator, admitted tenants of the copyhold estate devised to them in trust for the son Henry and his children. The fines and fees due to the lord and steward of the manor, upon such admittance, amounted to 480*l.* 5*s.* 6*d.* Henry Jealous did not pay this sum, and actions were brought against the plaintiffs to recover it; whereupon they paid it, as they alleged, out of their own monies, and filed their bill against Henry Jealous and his children for repayment.

The defendants, by their answer, said, that the testator was well acquainted with the customs of the manor of Sutton Holland; and that the maximum fine would be required, and knew that the defendant, Henry Jealous, had no means of paying the fine; and that it *was not the intention of the testator that the costs of the admission of the trustees to the copyholds should be raised by sale or mortgage of such estates; but it was his intention that the same should be paid out of the fund provided by him for executing the trusts of the will.

[*53]

Mr. Romilly and *Mr. Heberden*, for the plaintiffs, mentioned *Rivet's* case (1), and *Holder* v. *Preston* (2).

Mr. James Parker and *Mr. W. M. James*, for the defendants:

The testator has created a particular fund for defraying the costs

(1) Moore, K. B. 890. (2) Serjt. Wilson, 400.

of executing his will; and that will required that the trustees should procure the legal estate in the copyhold premises to be vested in them; they accordingly, in pursuance of these trusts, were admitted tenants of the manor in respect of this estate, and thereby incurred the legal liability to the lord of the manor. The expenses of the admission are therefore clearly a charge incurred in executing the trusts of the will, and payable out of the residuary fund designated for that purpose. The testator has, moreover, restricted the power of the trustees in mortgaging the estate to the amount already charged thereupon, and allowed them to create a mortgage for that amount only in case of the existing mortgage being called in. It must be therefore inferred, that the testator did not intend the fines to be raised out of the devised estate.

THE VICE-CHANCELLOR:

I have read the will in this case, and my opinion is, that the residue ought not to bear the expense of the *admission. The [*54] general rule is, no doubt, that, where a property is devised specifically, the devisee takes it subject to every burthen upon it; he takes it *cum onere*, as the common expression is. *Mr. James Parker* argued, that the fine in this case was not a charge upon the estate, and that I think may be admitted. But the proposition, that a party takes an estate *cum onere* is not confined to these charges, which are, properly speaking, charges upon the estate; it includes all charges which the ownership of the property entails upon the party who takes it, whether they are charges upon the estate or charges upon the person in respect of the estate. In the case of a specific bequest of leasehold property, or copyhold property, no doubt the party to whom it is given would have to pay the charge of taking upon himself the estate. The circumstance that it is given to him for life, with remainders over, does not exempt him, or some of those to whom it is given, from bearing the charge. In this case, it is given to trustees for one party for life, with remainder over for his children; but it is not the less a specific devise of that property, and the charges of the admission must fall upon the beneficial owners, or some of them, unless the words of the will are sufficient to show that it was the intention of the testator that these charges are to be paid out of the residue of his estate. The residue is given to the trustees, and out of the residue they are, among other things, to pay the costs of executing the will. I apprehend, that, within the description of the costs of executing the will, the

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charges of admission to copyhold property cannot be included. It is not more a part of the costs of executing the will than the payment of legacy duty is a part of such costs. Without, however, relying on analogous cases, I apprehend, that the expression, "charges of executing a will," has a meaning very far short of [*55] including the expenses of admitting *the devisees to a copyhold estate. That is not the import of the words.

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1845. *Nov.* 4, 5, 7.

WIGRAM, V.-C.

[55]

WAY *v.* BASSETT (1).

(5 Hare, 55—69; S. C. 15 L. J. Ch. 1; 10 Jur. 89.)

After a dissolution of partnership by death or otherwise, the surviving or continuing partners of the firm are, (in a suit against them by persons claiming to be creditors of the partnership), entitled to the protection of the Statutes of Limitation, although, as between themselves and retired partners, or the estates of deceased partners, the partnership accounts are unsettled; and the retired partners, or the executors of a deceased partner, are in such a suit against them entitled to the like protection.

Acts done by one of the surviving partners, who was executor of the deceased partner, which *acts* the surviving partners were in that character bound to do, cannot *primâ facie* be considered to have been acts done in the character of executor.

Where a promissory note was made payable at a certain time after sight, with interest thereon, and the interest was duly paid for several years, (as the bill alleged), the COURT held, that the note must be taken to have been acted upon according to its form and tenour; and therefore, that the presentment for sight must have been duly made before the interest was paid; and that the payment became due upon the note at the prescribed date after such presentment, and that the Statute of Limitations would begin to run from the time the payment so became due.

SIR RICHARD BASSETT, Robert Clarke, and Charles Bassett Roe, carried on the business of bankers at Newport, in the Isle of Wight, in partnership together, until August, 1825, under the style of Sir Richard Bassett, Clarke, and Roe.

[*56] On the 7th of May, 1825, David Way deposited with *the firm of Sir Richard Bassett, Clarke, and Roe, the sum of 400*l.* at interest, and took a receipt for the same as follows: "No. 295, Bank, Newport, Isle of Wight, 7th May, 1825. Received of Mr. D. Way 400*l.* on account; for Sir Richard Bassett, Clarke, and Roe: C. B. ROE, 400*l.*, at 3½ per cent. per annum."

In August, 1825, Robert Clarke died, and Thomas Blackford became a partner in the firm, which then took the style of Sir Richard Bassett, Roe, and Blackford.

On the 21st January, 1826, David Way deposited with the firm

(1) See now the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 14).

of Sir R. Bassett, Roe, and Blackford, a sum of 500*l.*, and received a promissory note as follows: "No. 435, Bank, Newport, Isle of Wight. I promise to pay, three months after sight, Mr. David Way, or order, 500*l.*, with interest after the rate of 3*l.* 10*s.* per cent. per annum, value received the 21st of January, 1826; for Sir Richard Bassett, Roe, and Blackford; 500*l.* C. B. ROE. Entered J. COWDRY." And on the 22nd January, 1831, David Way deposited with the same firm a sum of 1,500*l.*, and took a promissory note as follows: "No. 1,332, Bank, Newport, Isle of Wight. I promise to pay, three months after sight, Mr. David Way, or order, 1,500*l.*, with interest after the rate of 3*l.* 10*s.* per cent. per annum, value received, 22nd of January, 1831; for Sir Richard Bassett, Roe, and Blackford: C. B. ROE. Entered J. COWDRY." No interest was paid to David Way on his deposit during the lifetime of Clarke, but he received the interest due on the accountable receipt, and on the two promissory notes regularly, until his death, from the firm of Sir Richard Bassett, Roe, and Blackford.

In September, 1831, David Way died, having appointed *the plaintiffs his executors. On the 28th of February, 1835, the plaintiffs, as such executors, deposited with the same firm the sum of 1,000*l.*, belonging to the estate of David Way, for which they received a promissory note, as follows: "No. 2,481, Bank, Newport, Isle of Wight. I promise to pay, three months after sight, the executors of the late David Way, or order, 1,000*l.*, with interest after the rate of 3*l.* 10*s.* per cent. per annum, value received, 28th February, 1835; for Sir Richard Bassett, Roe, and Blackford: C. B. ROE." The plaintiffs, as the executors of David Way, regularly received the interest on the amount deposited by their testator and themselves from Sir Richard Bassett, Roe, and Blackford, during the life of Sir Richard Bassett. [*57]

On the 12th of March, 1837, Sir Richard Bassett died, having devised and bequeathed his real and personal estate to James White Bassett, Elizabeth Bassett, Charles Bassett Roe, and others, and appointed James White Bassett and Charles Bassett Roe executors of his will. After the decease of Sir Richard Bassett, the surviving partners, Roe and Blackford, carried on the business under the same style,—the names, Sir Richard Bassett, Roe, and Blackford, being still retained on the door of the Bank, and in the books and other documents of the concern; and the plaintiffs received from the frm the interest on the several deposits. This continued until May, 1842, when the customers of the Bank were invited to transfer their

WAY v. BASSETT.

accounts to the Isle of Wight Joint-stock Bank. No interest was paid on the deposits after December, 1842. In December, 1843, Charles Bassett Roe and Thomas Blackford became bankrupt.

[*58] On the 13th of December, 1843, the plaintiffs, the executors of David Way, filed their bill on behalf of *themselves and all other the creditors of Sir Richard Bassett against James White Bassett and Charles Bassett Roe, and the other persons who were devisees and legatees under the will of Sir Richard Bassett, praying that an account might be taken of what was due to the plaintiffs for principal and interest on the deposits, and of all the other debts and liabilities of Sir Richard Bassett, at his death; and an account of his personal estate and effects received by James White Bassett and Charles Bassett Roe, and of the rents, profits, and produce of the real estate of Sir Richard Bassett, which, since his death, had been received by the said devisees; and an account of what had been paid to his legatees, that the legacies might be refunded, and the real estate sold; and that the personal estate, the legacies when refunded, and the proceeds and rents and profits of the real estate might be applied in satisfaction of the debts of Sir Richard Bassett, including what was owing to the plaintiffs, in a due course of administration.

As a ground for the relief sought, the bill alleged, that Charles Bassett Roe was the principal acting executor of Sir Richard Bassett; and that, in the payment of interest on the deposits, he had acted as such executor, and had spoken of himself as such executor to the plaintiffs and the customers of the Bank; that the continuance of the name of Sir Richard Bassett in the firm, and the fact that Charles Bassett Roe was his principal acting executor, were notorious, and contributed much to the credit of the Bank; that, after the death of Sir Richard Bassett, the plaintiffs gave credit to the Bank on the supposition and belief, that the estate of Sir Richard Bassett continued liable, and that Charles Bassett Roe represented that estate. The bill stated, that Charles Bassett Roe and James White Bassett were indebted to the estate of Sir Richard

[*59] Bassett as such trustees and executors, *and that Charles Bassett Roe and Thomas Blackford were also largely indebted to that estate. The bill also stated, that the estate of Sir Richard Bassett was indebted to divers other persons as well as to the plaintiffs, in a large amount, and that his real and personal estate, though considerable, was insufficient for the payment of his debts.

The greater part of the defendants, by their answers, said that the debts claimed by the plaintiffs, if any such were ever due,

accrued more than six years before the filing of the bill; that the surviving partners had continued the business of the Bank, and assumed the debts of the old firm; and that the plaintiffs had accepted the credit of the surviving partners; and the defendants claimed the benefit of the Statute of Limitations.

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The payments of interest on the notes were indorsed on the notes from time to time, as they were made; and the indorsement was signed either by the principal clerk in the Bank, or by one of the partners. Upon the face of the three promissory notes was written, by Thomas Blackford, one of the partners, the words, "Accepted 11th March, 1843—BASSETT & Co." At the hearing,

Mr. Romilly and *Mr. Giffard*, for the plaintiffs:

Sir Richard Bassett was a partner in the Bank at the time of his death, and the plaintiffs were creditors of the Bank: they might then have pursued the assets of Sir Richard Bassett for their debt. [On that point they cited *Primrose* v. *Bromley* (1), *Cowell* v. *Sikes* (2), *Wilkinson* v. *Henderson* (3), and other cases.] The defendants allege [60] that the claim is barred, first, by the operation of the Statute of Limitations; and, secondly, by the acts of the plaintiffs in accepting the liability of the surviving partners in discharge of that of the deceased. The first answer is, that the debt has been kept on foot by the payment of interest. The interest was due on a debt which was still a partnership debt; for, notwithstanding the death of Sir Richard Bassett, the partnership would continue until the affairs should be wound up: *Crawshay* v. *Collins* (4), *Wilson* v. *Greenwood* (5), *Crawshay* v. *Maule* (6). The interest was paid, moreover, not only by one who was surviving partner, but by one who was also executor of the deceased partner; and all the effect would be given to that payment which could be attributed to it, supposing it to be done in either character: **Vulliamy* v. *Noble* (7). But, apart [*61] from the effect of the payment of interest, the debt was the debt of the firm, and to be paid out of the partnership property. Now, every partner was entitled in equity to have the accounts of the partnership taken, the debts got in, the liabilities paid off, and the surplus divided, or the deficiency supplied, amongst or by the several partners, according to their respective shares or rights. This equity

(1) 1 Atk. 89.
(2) 26 R. R. 46 (2 Russ. 191).
(3) 36 R. R. 386 (1 My. & K. 582).
(4) 10 R. R. 61 (15 Ves. 218).
(5) 18 R. R. 118 (1 Swanst. 471).
(6) 18 R. R. 126 (1 Swanst. 495).
(7) 17 R. R. 143; and see 34 R. R. 142 (3 Mer. 614).

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of the partners themselves, a creditor of the partners was entitled to pursue: *Ex parte Williams* (1), *Ex parte Kendall* (2), *Gray* v. *Chiswell* (3). If the accounts between the partners were open and unsettled, and the surviving partner were still liable, the deceased partner could not be discharged: *Braithwaite* v. *Britain* (4), *Winter* v. *Innes* (5). In this case, moreover, the form of the promissory notes prevented the operation of the Statute of Limitations as to them. The promise was to pay, not at any certain date, but "three months after sight." The debt, therefore, was not due until three months after presentation for payment; and the notes were not presented for
[62] payment until March, 1843. * * The facts which appear also plainly negative any acceptance of the liability of the surviving partners in exoneration of the estate of the deceased: *Devaynes* v. *Noble* (*Sleech's* case) (6), *Bishop* v. *Church* (7). * * *

Mr. Wood, *Mr. James Parker*, *Mr. Teed*, *Mr. Piggott*, *Mr. Rogers*, *Mr. A. J. Lewis*, *Mr. Beavan*, *Mr. Prior*, *Mr. Bevir*, *Mr. Bovill*, *Mr. Anstey*, and *Mr. Nicholl*, for the several defendants:

It is true, that the partnership continues after a dissolution until the joint-contracts of the partners are fulfilled, or the joint liabilities are determined. But it does not continue so as to enable the surviving or continuing partners to make a new contract; and to that extent the argument must go, if it be insisted that any act or conduct of the surviving or continuing partners can keep alive a debt or obligation, or otherwise augment or prolong any liability of the estate of the deceased partner, which, but for such act or
[*63] conduct, would *have been extinguished. [On this point they cited *Atkins* v. *Tredgold* (8), *Ault* v. *Goodrich* (9), *Webster* v. *Webster* (10), and
[*64] other cases.] The partners have, no doubt, mutual equities. *They are entitled to have the accounts of their transactions taken, and the affairs wound up; and this equity the creditor of any of the partners may insist upon, in order by that means to recover payment of his demand out of the surplus, if there be any, which is due to his debtor from the partnership. Even this equity, whether it be or be not barred by the Statute of Limitations, cannot be prosecuted

(1) 8 R. R. 62 (11 Ves. 3).
(2) 11 R. R. 122 (17 Ves. 520, 526).
(3) 7 R. R. 151 (9 Ves. 118).
(4) 44 R. R. 56 (1 Keen, 206).
(5) 48 R. R. 24 (4 My. & Cr. 101).
(6) 15 R. R. 151; and see 34 R. R. 142 (1 Mer. 568).
(7) 2 Ves. 100.
(8) 26 R. R. 254 (2 B. & C. 23).
(9) 28 R. R. 151 (4 Russ. 431).
(10) 19 R. R. 258, *n.* (3 Swanst. 490, *n.*).

after long delay: *Tatam* v. *Williams* (1). But the bill, in this case, is not framed or directed to the prosecution of any such equity as the argument supposes. It is, in fact, framed upon grounds which expressly exclude the existence of any equity or claim entitling the surviving partners to call for aid from the estate of the deceased: *Ex parte Ruffin* (2). * * *

Mr. Romilly, in reply. * * * [65]

THE VICE-CHANCELLOR: *Nov.* 14.

I think the cases of *Atkins* v. *Tredgold* (3), *Slater* v. *Lawson* (4), and *Ault* v. *Goodrich* (5) must govern this case; and that the acts of the surviving partners of the banking firm, as such partners, have not had the effect of keeping the plaintiff's debt alive against either the real or personal estate of Sir Richard Bassett. [67]

The second question made in argument was, whether the acts done by the surviving partners, or rather by the Bank, are not to be taken as the acts of the executors, or of one of the executors of Sir Richard Bassett, one of such executors being a partner in the banking firm. My opinion is, that, with respect to the acts of the surviving partners, they were such as the surviving partners in that character were bound and might have been compelled to do, and consequently that they are not acts which I can treat as acts of the executors of Sir Richard Bassett.

The third question is, whether the plaintiffs could enforce their debt against Sir Richard Bassett's estate, by reason of the equities between the surviving partners and his estate; and this depends, in the first instance, upon the form of the pleadings. In order that the plaintiffs may have such an equity, it is necessary that the accounts of the partnership should be taken, for the plaintiffs are only entitled to stand in the place of the surviving partners of Sir Richard Bassett, against his estate. Now the pleadings appear to me to have been framed not only so as not to raise that question, but to have been anxiously framed for the purpose of *showing that [*68] the plaintiffs are compelled (as they claim, according to the case of *Wilkinson* v. *Henderson* (6), to be entitled to do,) to pursue directly the separate estate of Sir Richard Bassett, and not to seek relief against his estate through his surviving partners. It is, I think, impossible to read the pleadings without seeing that this was advisedly

(1) 64 R. R. 325 (3 Hare, 347).
(2) 5 R. R. 237 (6 Ves. 119).
(3) 26 R. R. 254 (2 B. & C. 23).
(4) 1 B. & Ad. 396.
(5) 28 R. R. 151 (4 Russ. 430).
(6) 36 R. R. 386 (1 My. & K. 582).

WAY v. BASSETT.

done, with reference to the fact, that, instead of Sir Richard Bassett being indebted to his partners, his partners were indebted to him in respect of the partnership dealings. This is an answer to the argument which was founded on the language of Lord LANGDALE in *Braithwaite* v. *Britain* (1) and of Lord COTTENHAM in *Winter* v. *Innes* (2).

If the surviving partners may, as undoubtedly they may, both in law and equity, plead the Statute of Limitations in bar of the claim of a creditor of the firm, and that whether the partnership accounts have or have not been settled between themselves and a retired partner, or the estate of a deceased partner, it appears to me impossible to contend with success that the estate of a deceased partner should not be entitled to the same defence only because the partnership accounts have not been taken. If I were to go the whole length of the plaintiffs' argument upon this point, it would follow, that the Statute of Limitations never could be pleaded in bar to a debt claimed to be owing from a dissolved partnership, so long as the partnership accounts remained unsettled. I am satisfied that neither Lord LANGDALE nor Lord COTTENHAM intended to decide any such abstract proposition as that for which the plaintiffs have contended.

[*69] The only other question is the form of the note, and *the manner in which the parties have acted with reference to it. If the payment of the interest upon the note had been in conformity with the rights of the parties, it is impossible that I could consider the note as not having been presented for sight long before the death of Sir Richard Bassett. But it was said, that it was apparent that the payment of interest was not according to the tenor of the note, and that I must therefore assume that such payment had been made in consideration of the note not having been presented, and in pursuance of an agreement to that effect. No such agreement has been suggested on the pleadings, and the statements in the pleadings appear to exclude that suggestion. (His Honour read the statements in the bill to the effect that the interest on the 400*l.* and on the two promissory notes was from time to time duly paid by the firm of Sir Richard Bassett, Roe and Blackford, and was duly received by David Way, and by the plaintiffs up to the 31st of December, 1842.) This is an allegation that the parties acting upon the receipt and upon the notes have duly and regularly paid interest upon them. I think the Statute of Limitations which has been pleaded is an answer to the claim made in this case.

Bill dismissed with costs.

(1) 44 R. R. 56 (1 Keen, 206). (2) 48 R. R. 24 (4 My. & Cr. 101).

MACKIE *v.* MACKIE (1).

1845.
July 15, 16.

(5 Hare, 70—78; S. C. 9 Jur. 753.)

WIGRAM, V.-C.
[70]

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A devise and bequest of residuary real and personal estate was made to trustees, upon trust, with all convenient speed to sell the real estate, and such part of the personal estate as was in its nature saleable, but the mode and time of sale and of settling and adjusting accounts and of requiring payment of what should be due to the testator to be left entirely to the discretion of the trustees, and until such sale and the final adjustment of his co-partnership accounts, the rents and income of the real and personal estate remaining unsold, and the interest on any debt or debts owing to the testator was to be paid to the same persons and in the manner directed with respect to the income of the estate when invested. The testator gave the produce of his real and personal estate to his two daughters for their lives, with remainder over; and he recommended each of his two daughters to pay 25*l.* a year out of her moiety of the income of his estate for the education and maintenance of his nephew, until the nephew attained twenty-one years:

Held, that (there being no improper delay in the conversion of the estate) the daughters of the testator, as tenants for life, were entitled to the income actually produced by the residuary estate during the interval before the sale or realization of the whole of such estate, and the investment thereof according to the directions in the will; but that they were not entitled, during that interval, to any interest upon such parts of the residuary property, or on the value of such parts thereof as were unproductive.

That the two sums of 25*l.* were only to be allowed by the daughters to the nephew yearly out of their income during their lives, and that such sums did not constitute a charge upon the life interests of the daughters for the whole period of the minority of the nephew.

JOHN MACKIE, by his will, dated in November, 1838, after giving certain legacies, devised and bequeathed his real estate, and the residue of his personal estate, to W. Mackie and H. G. Williams, their heirs, executors, administrators, and assigns, respectively, upon trust, with all convenient speed, absolutely to sell and dispose of his said real estate, and such part of his said personal estate as was saleable in its nature, either by public auction or private contract; and directed that the time and mode of sale should be entirely left to the discretion of his trustees or trustee for the time being. And he directed his trustees or trustee for the time being to call in and require payment of all such debt and debts, sum and sums of money as should be due or owing to him at the time of his decease, and also to proceed to settle and adjust all outstanding accounts of his mercantile house or firm, and get in and receive all such sum and sums of money as should upon such settlement appear to be due to him. And the testator further declared that the time and mode of settling and adjusting such

(1) *Rowlls* v. *Bebb* [1900] 2 Ch. 107, 69 L. J. Ch. 562, 82 L. T. 633, L. T.

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accounts, and requiring payment of what should thereupon appear to be due and owing to him, should be left entirely to *the discretion
[*71] of his trustees or trustee for the time being; and that the produce of any such sale or sales as aforesaid, and all other sum or sums of money, to be received by his said executors and trustees for or in respect of any such debt or debts, or arising from his share and interest in the business then carried on by him in co-partnership with the said H. G. Williams, and all other his personal estate when converted into money, should from time to time be invested by his trustees or trustee for the time being, in their or his names or name, upon Government or real securities as therein mentioned, as the trustees or trustee for the time being might think advisable, with full power to vary such investment from time to time as they or he should think proper. And the testator declared that his trustees or trustee for the time being should be possessed of the said stocks, funds, and securities, and the interest, dividends, and income thereof, upon the trusts thereinafter declared. And the testator directed that until such sale or sales respectively, and the receipt of such debt or debts respectively, and the final settlement and adjustment of his co-partnership accounts, the rents and income of his said real and personal estate respectively remaining unsold, which should accrue due after his decease, and also the interest which should be received in respect of any such debt or debts owing to him as aforesaid, or in respect of his capital invested in his said partnership business, should be paid to the same persons, and applied in such and the same manner as was thereinafter provided with respect to the dividends, interest, and annual income of his said real and personal estate, after such investment as thereinbefore mentioned. And the testator directed his trustees or trustee for the time being to stand possessed of the produce of his said real and personal estate and effects: as to one moiety thereof, in trust
[*72] to pay the annual produce thereof unto *his daughter Flora West Mackie during her life; and after her decease, upon trust for her children as therein mentioned. And as to the remaining moiety thereof, in trust to pay the annual produce thereof unto his daughter Ann Simpson Mackie, during her life, and after her decease upon similar trusts for the benefit of her children. And the testator directed, that, in case either of his said daughters should die without having any child who should attain a vested interest in the moiety thereinbefore bequeathed to or in trust for such daughter, such moiety should be held upon the trusts declared

respecting the other moiety. And in case both of his said daughters should die without having any child who should attain a vested interest in the produce of his said real and personal estate, then the same should remain and be in trust for the person or persons who under or by virtue of the statute made for the distribution of the estates of intestates would then be entitled thereto in case he (the testator) had died intestate. And the testator appointed W. Mackie and H. G. Williams, executors of his will; and he added "I recommend to each of my said daughters to pay and allow my brother W. Mackie the sum of 25*l.* per annum out of her moiety of the income of my estate, to be employed by him in the maintenance and education of my nephew William Lewis Mackie, in such manner as my said brother shall think proper, until my said nephew shall attain the age of twenty-one years. I earnestly and strongly recommend and counsel my said daughters to settle and assure my property to which they are or may become entitled either under or by virtue of the settlement made on my marriage or otherwise (but nevertheless at their own discretion, and with full and free permission and liberty to act therein as they may think fit), upon similar trusts to those which are herein declared concerning the residue of my real and personal estate."

[73]

The testator died in January, 1839. The executors, in April following, filed the bill against the testator's daughters, Flora West Mackie and Ann Simpson, at that time infants and unmarried, and also against William Lewis Mackie, the nephew, to obtain the direction of the Court in the administration of the estate. Flora West Mackie attained her age of twenty-one years, and died in 1840, having by her will bequeathed the whole of her property to her sister Ann Simpson Mackie, whom she appointed her executrix. Ann Simpson Mackie attained her age of twenty-one, and died in 1842, having by her will given the whole of her property to her executrix Eliza Laing. A supplemental bill was filed against Eliza Laing and her husband, and the parties who, at the death of the last survivor of the two daughters, would have been entitled under the Statute of Distributions to the testator's estate if he had died intestate.

It appeared by the Master's report that the residue of the testator's estate consisted of a sum of 935*l.* in the hands of the executors; a debt of 6,241*l.*, due to the estate, as the testator's share of a partnership which he had carried on with H. G. Williams, one of the plaintiffs; a sum of 4,812*l.* Consols, standing in the names

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of the executors; a lease of certain premises for twenty-one years, determinable at the option of the lessee at the end of the first seven or fourteen years, at a rent of 120*l.*; and a reversionary interest in a moiety of a sum of 5,000*l.* Consols, expectant on the decease of Mrs. Thomas, a lady of very advanced years. The Master found that it would not be for the benefit of the estate that the reversionary interest in the moiety of the 5,000*l.* Consols should be sold. The two annual sums of 25*l.* each had been paid to the testator's brother W. Mackie, for the benefit of the nephew William Lewis Mackie, until the death of the last survivor of the *testator's daughters; and the Master found that the arrears of such sums from that time, William Lewis Mackie being still an infant, amounted to 129*l.* 2*s.* 5*d.* On further directions, William Lewis Mackie presented his petition for the payment of the 129*l.* 2*s.* 5*d.* to his father, for his benefit; and Mrs. Laing and her husband applied for payment to them of what should be found due to the estate of Ann Simpson Mackie, in respect of the life interest of the testator's daughters in the residue. At the hearing for further directions—

[*74]

Mr. Lloyd, for the plaintiffs.

Mr. Tinney, and *Mr. Toller*, for the executrix and residuary legatee of Ann Simpson Mackie.

Mr. Wilcock and *Mr. Taylor*, for the next of kin of the testator.

The questions were, first, whether the tenants for life were, under the terms of the will, entitled to receive the income of the residuary estate in specie, in the interval before its conversion into permanent investments by the trustees; or secondly, whether they were entitled during that time to no more than would have been produced if the fund had been laid out in permanent investments; or thirdly, whether, if the tenants for life were entitled to the income of the residuary estate in specie, they were entitled to require that a valuation should be made of the property which produced no actual income during that interval, or a part of that interval, in order that an income from that source, equal to what the property so valued would have produced if in a state of permanent investment, might be given to the tenants for life. * * *

[75] The other question was, whether the testator's nephew W. L. Mackie was entitled to have paid to him, out of what should be

found due in respect of the daughters' life interests, or so far as that would extend, two annual sums of 25*l.* each during his minority; or whether those sums were to be considered only as an allowance to be made to him by the daughters, year by year, out of the income of each year as they received it, and to cease at their deaths.

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THE VICE-CHANCELLOR: *July* 18.

I should have no doubt as to the question which has been argued between the representative of the tenants for life, and the parties entitled in remainder, with regard to the income of the residue during the lifetime of the tenants for life, if the case stood unaffected by the clause in this will relating to the power given to the trustees to postpone the sale or realization of the property until such time as they should think fit, and the clause which directs what is to be done until the investment shall have been made according to the trusts of the will. Where a general residue is given to a person for life with remainders over, and there is nothing more to guide the judgment of the Court, the Court does not (as a matter of course) permit the tenant for life to receive the interest produced by any part of such residue (except such part, if any, as may at the time of the testator's death be in a certain state of investment), but converts the residue into securities of a permanent nature, and gives the tenant for life the income derived from such securities.

In such cases, the tenant for life, being deprived of the actual income produced by the residue, it becomes necessary, in order that the amount of the income which the Court substitutes for it may be ascertained, that the amount of the residue itself should be ascertained by actual conversion, valuation, or otherwise. And accordingly the Court, as a general rule, fixes a time applicable alike to all cases at which the value of so much of the property, as shall not then be in that state of investment which the Court requires, shall be ascertained. But when (as in the present case) the testator himself directs, that, until his property shall be actually converted, the tenant for life shall receive the actual income of his property in specie as it stood at his death, the rule referred to has no application; the Court, in such a case, has only to see that the property is converted without improper delay; and it executes the declared intention of the testator in allowing the tenant for life to receive the income of the property until such conversion. This argument is fortified in the present case by [76]

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adverting to the state of the testator's property—for example, his partnership property—at the date of his will.

It was said, however, that the Court at all events should convert, or treat as converted, at the end of a year from the testator's death, so much of his property as was then and has since been unproductive. But if I am right in the conclusion I have come to, as to the general estate, I cannot apply different rules to different parts of the property, according as it may be more or less productive, from the accidental profits of trade, from dividends, or from other circumstances. The non-conversion of one part of the property is beneficial to the tenant for life; the non-conversion of another part is beneficial to the remainderman. I must presume that the testator made his will and allowed it to speak [*77] at his *death with reference to his knowledge of the state of his property. In modern cases, circumstances apparently trifling have been held sufficient to entitle a tenant for life to the enjoyment, in specie, of the residue for his life; and in this case there is no reason why I should refuse to follow the words of the testator's will, until his property is actually converted, provided such conversion is not improperly delayed. I give no opinion as to what the decree in this case would have been, if improper delay had been a point in the cause. The cases of *Sitwell* v. *Bernard*, and the other cases in 2 Roper, p. 301 (1), are the converse of this case.

The question which remains is, as to the allowance to the nephew. The words of the will are capable of the construction contended for by *Mr. Lloyd*, and also of that contended for on the other side, and the question is, which of the two constructions is to be adopted. If the effect of the will be, that the testator has created a charge upon the life income of each of the daughters, to the amount of 25*l.* a-year in favour of the nephew, it is clear that the charge will override all that they take, whether annually or not. If, on the other hand, the intention be that the daughters, out of what they annually receive, shall each make an annual allowance to the nephew of 25*l.*, then a different rule is applicable. I have looked at the case with the view of determining whether the will affords evidence of any paramount intention that the nephew should at all events have two annuities of 25*l.* each, during his minority: it is clear that the testator had no such paramount intention; for the daughters might in the first place have died before any part of the residue became payable, and

(1) Treatise on Legacies, ed. 3.

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secondly, the daughters if they had lived, might not have received *enough to provide for the payment of 25*l.* each a-year, until the nephew attained his majority; and in neither of those cases is there any charge upon the residue, that is, upon those who are less the objects of the testator's bounty than his daughters, so as to secure the continuance of the annuities of 25*l.* during the minority of the nephew. It is clear, therefore, that there is no paramount intention that he should at all events receive those annual sums. It is impossible to doubt that the daughters were more the objects of the testator's bounty than the nephew or those entitled in remainder; yet, according to the limitations in the will, the nephew is to have no provision made out of the remainder. As I have said before, the will is clearly capable of both interpretations, and I cannot carry the conjecture or inference which I have made beyond reasonable limits. It appears to me the plain intention is, that the daughters, out of what they receive, are to make an allowance to the nephew, and to retain the surplus for themselves. It is impossible to read the will without seeing that when the testator speaks of the sum to be allowed by the daughters of 25*l.* a-year each, out of their moieties of the income, he speaks of income which from time to time is to come to them, and out of which they are to make the payment. This is not therefore a charge upon the moiety of the income to be raised by the daughters during the minority of the nephew, if they receive enough: it is nothing more than an allowance to be made to him in every year out of what would otherwise be their available income. I am very far from saying that this is clear; but I think it is the sound as well as the natural construction of the words of the will.

BUCKELL *v.* BLENKHORN.

1845. *Nov.* 18, 19, 20, 21. 1846. *Jan.* 14.

WIGRAM, V.-C. [131]

(5 Hare, 131—149.)

The mere fact, that a party, having a power by deed to revoke and make a new appointment of trust funds, has attempted to make such revocation and new appointment by will, owing to her having forgotten the restrictions of the power, and being at the time unable to procure the deeds,—is not a ground upon which equity will supply the formal execution required by the terms of the power, or give to the will the effect of a deed, or convert the trustees of the property into trustees for the persons who would be appointees, if the will were a good execution of the power.

On the 30th of December, 1840, Sarah M'Lauchlan was possessed of two sums of stock, 805*l.* Consols and 265*l.* Long Annuities,

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and was entitled to a sum of 500*l.* owing to her by James Buckell, the plaintiff; 360*l.* owing to her by Paxton & Co.; and 50*l.* owing to her by John Ballandine. She was also, at the same time, possessed of thirty-nine shares in the Gas-light and Coke Company, and of sundry household goods, *furniture, fixtures, plate, linen, china, books, pictures, prints, jewellery, and other effects then in her residence.

[*132]

By indenture of the 30th of December, 1840, made between Sarah M'Lauchlan of the one part, and John Blenkhorn and John Alexander Blenkhorn of the other part, reciting that she was possessed of the before-mentioned property and effects, and reciting her intention to settle the same, Sarah M'Lauchlan assigned part of the property and effects, and agreed to assign the other part, to the said J. and J. A. Blenkhorn, upon trust for herself for life, and, after her death, in trust for such person or persons, for such interest or interests, chargeable with such sums of money, and for such intents and purposes, and in such manner, in all respects, as she the said Sarah M'Lauchlan should, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by one witness or more, direct or appoint; with limitations over in default of appointment: and power was thereby reserved to the parties to vary the securities or investments.

After the execution of the deed of December, 1840, the 805*l.* Consols, and 198*l.* Long Annuities, part of the 265*l.* Long Annuities, and the thirty-nine shares in the Gas-light and Coke Company, were transferred into the joint names of Sarah M'Lauchlan and J. and J. A. Blenkhorn, the trustees of the deed. The remaining sum of 72*l.* Long Annuities was sold, and the proceeds, together with the 50*l.* which had been paid by Ballandine, were laid out in the purchase of 450*l.* Consols, in the joint names of Sarah M'Lauchlan, J. and J. A. Blenkhorn, and the plaintiff, James Buckell, but upon the trusts of the indenture of the 30th of December, 1840. The plaintiff also had paid 100*l.* in part discharge of the said sum of 500*l.*, owing from him; and such 100*l.* *had, at the desire of Sarah M'Lauchlan, been paid to the plaintiff's daughter, Matilda Charlotte Buckell, in anticipation of the appointment thereafter made to her.

[*133]

By a deed-poll, dated the 27th of April, 1842, under her hand and seal, and attested by two witnesses, Sarah M'Lauchlan, after reciting that she was desirous, in exercise of the power of

appointment reserved to her by the indenture of December, 1840, and by an immediate assignment of her life interest in the 100*l.*, of vesting in the plaintiff's daughter the 100*l.* which had been paid to her; and was also desirous, by virtue of the same power, of making such appointment of the remainder of the trust property after her decease as thereinafter mentioned, thereby appointed 100*l.* to the plaintiff's daughter; and as to the remainder of the trust property, after her (Sarah M'Lauchlan's) death, she appointed the same in manner therein mentioned. And she thereby declared, that (with the exception of the 100*l.* thereby appointed to the plaintiff's daughter) it should be lawful for her, by any deed or deeds, to be executed by her in the presence of and attested by one or more witnesses, to revoke the appointments thereby made, or any of them; and by the same, or any other deed or deeds, to be executed or attested in the same manner, to make such new or other appointments of the trust property as she might think proper.

By an indenture of the 1st of September, 1843, made between Sarah M'Lauchlan of the first part, J. and J. A. Blenkhorn of the second part, J. and J. A. Blenkhorn and the plaintiff of the third part, Thomas Johns, of the fourth part, and J. and J. A. Blenkhorn and the plaintiff and Thomas Johns of the fifth part, reciting the indenture of the 30th of December, 1840, the deed-poll of the 27th of April, 1842, and the power of revocation therein contained, Sarah M'Lauchlan revoked *the deed-poll of the 27th of April, 1842, and [*134] the appointment thereby made, except as to the 100*l.* for the plaintiff's daughter; and, after directing that the trust property should be transferred, so as that the same should become vested in herself, the two Blenkhorns, the plaintiff and Thomas Johns, upon the trusts therein mentioned, she, in execution of the power and authority reserved to her by the indenture of the 30th of December, 1840, and the deed-poll of the 27th of April, 1842, and of all other powers enabling her in that behalf, directed and appointed that the trustees in whose names the property was directed to be transferred should stand possessed of the same in trust for such person or persons, for such interest or interests, chargeable with such sum or sums of money, and for such intents and purposes, and in such manner, in all respects, as she should, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by one witness or more, direct or appoint; and, in default of such appointment, in trust for her (Sarah M'Lauchlan) for life,

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and, after her decease, in trust, as to specific parts of the furniture and plate, for J. A. Blenkhorn absolutely; and as to the rest of the aforesaid furniture, jewellery, and other effects of a like nature, in trust for Thomas Johns absolutely; and as to the thirty-nine shares in the Gas-light and Coke Company, upon trust to pay the income thereof to J. A. Blenkhorn for life, and, after his decease, upon trust for the plaintiff's daughter, Matilda Charlotte, absolutely; and as to all the trust premises, except those specifically disposed of, upon trust, immediately after her (Sarah M'Lauchlan's) decease, to sell, call in, and convert the same into money, and to stand possessed of the monies arising therefrom upon trust to pay, first, the expenses of the sale, and of executing the trusts; secondly, to [*135] John Blenkhorn, 100*l.*; thirdly, to Hannah Barnard, 30*l.*; *fourthly, to Catherine, wife of Thomas Johns, 10*l.*; fifthly, to John M'Lauchlan, 10*l.*; sixthly, to Sarah Martin M'Lauchlan, 10*l.*; seventhly, to William Buckell, 100*l.*; eighthly, to a missionary society, 5*l.*; ninthly, to Matilda Hudson, 2*l.* 2*s.*; tenthly, to Theresa Blenkhorn, 2*l.* 2*s.*; eleventhly, to Anne Barnard, 20*l.*; twelfthly, 360*l.* in trust for the children of David Buist. She further gave a life interest in the two sums of 805*l.* and 450*l.* Consols to Sophia Barnard for life, and directed that the plaintiff should be released from his debt of 400*l.*, part of the trust monies owing from him. And as to the residue of the trust premises, after making thereout the payments and release before directed, she appointed one moiety thereof to the plaintiff absolutely, and the other moiety thereof to Thomas Johns absolutely; and she thereby declared, that, until the trust premises should be transferred to, or otherwise legally vested in, herself, the two Blenkhorns, the plaintiff, and Thomas Johns, the trustees in whom the same were vested should stand possessed of, and interested in, the same, upon such trusts as would nearest and best correspond with the trusts thereinbefore mentioned.

By a deed-poll, dated the 22nd of September, 1843, under the hand and seal of Sarah M'Lauchlan, and attested by two witnesses, indorsed on the indenture of the 1st of September, 1843, reciting, that she had determined, in exercise of the powers reserved to her, to execute the appointment thereinafter contained of and concerning the monies mentioned in the indenture of the 1st of September, 1843, to arise and be produced from the sale, calling in, and conversion of the several trust premises, (after making thereout the several payments and release by the same indenture directed to be made upon her decease, and, in default or for want of any appointment by her

to the contrary), one equal half part whereof was, by the same indenture, directed to be *paid after her decease in manner therein mentioned, and the other moiety whereof was, by the same indenture, directed to be paid in manner also therein mentioned; and reciting, that she had also determined to appoint a certain picture as therein mentioned; it was witnessed, and Sarah M'Lauchlan thereby, in execution of her said power, directed and appointed, after her decease, all the net monies to arise and be produced under the indenture of the 1st of September, 1843, from the sale, calling in, and conversion of the trust premises (after making thereout, and subject to the several payments and release of debt directed by the indenture of the 1st of September, 1843) as to 200*l.*, to Thomas Johns absolutely, and as to the residue, to the plaintiff absolutely; and she appointed to the plaintiff a framed and glazed picture therein mentioned. And by the same deed-poll it was also provided, that it should be lawful for Sarah M'Lauchlan, at any time or times, by any deed or deeds to be executed by her in the presence of and attested by one or more witness or witnesses, to revoke the same deed, and the appointments thereby made, or any part thereof; and by the same or other deed or deeds, to be executed and attested in the same manner, to make new appointments of the trust premises, or any part thereof, as she might think fit. [*136]

On the 29th of September, 1843, the two last-mentioned deeds were deposited by Sarah M'Lauchlan in the hands of Mr. Cates, her solicitor, to hold for the parties interested. On the 20th of November, 1843, in consequence of an application for the deeds, made through Thomas Johns, who, with his wife, resided with Sarah M'Lauchlan, Mr. Cates attended at her house with the deeds. Sarah M'Lauchlan was at this time seventy years of age, and in ill health. At the end of this interview, she desired Mr. Cates still to keep the deeds in his custody. Subsequently, another application *was made for the deeds by letter, with which, however, Mr. Cates, considering her to be under the influence of the persons around her, did not comply. On the 14th of February, Mr. Helsham, as the solicitor then employed by Sarah M'Lauchlan, again applied to Mr. Cates for the deeds; and on the 26th of February, 1844, a Judge's order was obtained, directing Mr. Cates, within fourteen days, to deliver all the deeds in his possession belonging to Sarah M'Lauchlan, to Mr. Helsham. [*137]

On the 28th of February, Sarah M'Lauchlan made her will, whereby she bequeathed to J. A. Blenkhorn her gas-light shares,

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and some articles of furniture and plate; to W. Buckell, 100*l.*; to James Buckell, the plaintiff, 600*l.* (the 400*l.* owing from him being taken as part thereof) and the picture; Anne Barnard, 30*l.*; Hannah Barnard, 30*l.*; John M'Lauchlan, 20*l.*; Sarah M'Lauchlan, his daughter, 10*l.*; James Helder, 5*l.*; Foreign Missionary Society, 5*l.*; Therza Blenkhorn, Matilda Hudson, and Sophia Buckell, 2*l.* each, for rings; to Thomas Johns, the residue of her furniture and plate; to Catherine Johns, her wearing apparel; to J. A. Blenkhorn, the 360*l.* owing from Paxton & Co., in trust for the three children of David Buist; to Sophia Barnard, an annuity of 40*l.* a-year for her life: and the testatrix continued, "Whereas I have, at various times, executed deeds of settlement and appointment, and various other documents, the contents of which I have forgotten, I do hereby revoke the same, and direct my executors to procure the same to be delivered up to be cancelled;" and, finally, the testatrix bequeathed the residue of her estate to J. Blenkhorn and Thomas Johns, equally to be divided between them: and she appointed J. A. Blenkhorn and Thomas Johns executors of her will.

[*138] Sarah M'Lauchlan died on the 2nd of March, 1844, *before any deeds had been delivered up under the Judge's order. The will was proved by the executors.

The bill was filed in June, 1844, by James Buckell, against the other trustees and parties claiming under the several instruments. The bill, as afterwards amended, prayed that the rights and interests of all parties might be declared; an account of the trust property come to the hands of the trustees, J. and J. A. Blenkhorn, Thomas Johns, and the plaintiff; and that the trust funds might be distributed amongst the parties interested under the deeds of the 1st and 22nd of September, 1843: or if the Court should be of opinion that the deeds were revoked by the will, then that the trusts of the will might be executed, and the plaintiff relieved and indemnified in respect of the trust property vested in him under the deed.

The defendants J. A. Blenkhorn and Thomas Johns, by their answer to the original bill, stated various applications which had been made to Mr. Cates for the deeds by or on the part of Sarah M'Lauchlan, and the death of Sarah M'Lauchlan before the deeds had been delivered up, for the purpose of showing that it was in consequence of the withholding the deeds that Sarah M'Lauchlan did not effectually revoke the deed-poll. The answer averred, that the said George Cates never delivered the said deeds, nor either of

them, to the said testatrix or the said Mr. Helsham, but, as defendants believed, in collusion with the plaintiff, for whom he now acts as solicitor, retained the same in his possession until after the death of the testatrix. None of the answers of the other parties suggested any fraud or collusion. The plaintiff and the defendants entered into evidence. The result of the evidence appears upon the judgment. At the hearing,

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Mr. Romilly and *Mr. William Rudall*, for the plaintiff; [139]

Mr. Tinney and *Mr. Rogers*, for the defendant Matilda Charlotte Buckell;

Mr. Wood and *Mr. Willcock*, for the defendants J. and J. A. Blenkhorn and T. Johns;

Mr. Kenyon Parker and *Mr. Leach*, for the other defendants.

The plaintiff relied upon the indenture of the 1st of September, 1843, and the deed-poll of the 22nd of September, 1843.

The case of the defendants was: first, that the retention of the deeds by Mr. Cates, who was the solicitor of the plaintiff, Buckell, was a fraud; and that where such fraud was committed by or for the benefit of a party entitled to property in default of appointment, the Court would supply the appointment, or treat the will as an actual execution of the power: *Middleton* v. *Middleton* (1).

Secondly, if no case of fraud or collusion between the plaintiff and his solicitor should be established, then, at least, the testatrix was prevented by accident or disability from revoking the deed-poll of the 22nd of September, 1843; and the Court would treat the will as an effectual appointment, and as if the deed-poll had been revoked: 2 Sugden Tr. Powers, pp. 142 *et seq.*, ed. 7.

Thirdly, if both the first and second ground of relief should fail, then that the will, as a writing, was a good *execution of the power [*140] reserved by the indenture of the 1st of September, 1843, so far as the trust property was not bound by the deed-poll of the 22nd of September, 1843 (2). * * *

In reply to the case set up by the defendants, it was said, first,

(1) 20 R. R. 233 (1 J. & W. 94).

(2) The VICE-CHANCELLOR decided in favour of the defendant upon the point, but that decision has been overruled: see *Smith* v. *Adkins* (1872) L. R. 14 Eq. at p. 407, 41 L. J. Ch. 628, 27 L. T. 90; and this report is accordingly confined to the point stated in the head-note.—O. A. S.

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that the allegations of fraud and collusion in withholding the deeds had failed; that it was clearly the duty of the solicitor to obtain the consent of, or at least communicate with, the trustees of the deeds before delivering them up. Secondly, that, if the charge had any foundation, it ought to have been made the subject of a distinct suit. Thirdly, that, neither accident nor disability was sufficient in equity to supply the place of a due execution of the power, in the absence of any fraud. * * *

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[141] THE VICE-CHANCELLOR:

The object of this suit is to ascertain the rights and interests of the plaintiff, and of the other parties in the cause, under the trusts of an indenture of the 1st of September, 1843, and of a deed-poll of the 22nd of the same month, and under the will of Sarah M'Lauchlan. It is admitted that the trusts of the indenture and of the deed-poll must take effect, unless and except so far as effect (if any) inconsistent with these indentures is to be given to the will of Sarah M'Lauchlan, made on the 28th day of February, 1844. The question which I have had to consider, is, what effect (if any) inconsistent with the indenture and the deed-poll is to be given to that will.

(His Honour stated the various instruments, and the other facts above mentioned.)

With respect to the defence founded on the alleged accident, (apart from fraud), which, the defendants say, prevented the testatrix from revoking the deed-poll, and making another effectual appointment of the property, I intimated an opinion, during the argument, that the Court would not supply the execution of the power on that ground. I think the decision Sir EDWARD SUGDEN

[*142] refers to (1), in which relief (sought on the *ground of mere disability) was refused, of greater authority than the *dicta* by which it is thought to be opposed. If the argument urged before me in this case be once admitted, it seems impossible to stop short of the conclusion, that the donee of a power should in all cases be liberated from its restraints, whenever he *bonâ fide* intended to execute the power, but could not at a given moment ascertain what those restraints were, and death or accident prevented his compliance.

I do not find evidence of any fraud. If, indeed, there had appeared to be any attempt to withhold or conceal the contents of, or proper information respecting, the instrument, the case might

(1) See *Middleton* v. *Middleton*, 20 R. R. 233 (1 J. & W. 94).

be otherwise. But the whole case which has been made out amounts only to this: that Mr. Cates insisted on retaining the custody and possession of the deed. Upon this point, the evidence of Mr. Cates (if uncontradicted), is decisive; and upon looking into the answer of the defendant Johns, it will appear that he states the same case. Inspection never was in question, as distinguished from the custody and possession of the deed. In the absence of any fraud or collusion, I am clear that a contest about the right custody of the deed is not enough to induce the Court to interfere with the legal effect of the instrument; and, in this case, I think there were circumstances to justify extreme caution on the part of Mr. Cates in parting with the custody of the deed. In coming to this conclusion, I should observe, that I have disregarded altogether the evidence of Mr. Cates, wherein he says, that, on the 20th of November, 1844, he offered inspection of the deed. If I had thought that material, I should have directed an inquiry, although it is very improbable that any different account of the transaction would have been elicited by such an inquiry; and the evidence of Johns would not have been admissible.

Next, as to the plaintiff's letter of the 20th of November, 1844, [148] that also goes to possession only. If he had had possession of the deed, and had refused to part with it unless with the concurrence of the other defendants, the trustees, I should have had difficulty in inferring fraud, provided inspection and information respecting it had not been withheld. This letter, I think, cannot put the case higher. Mr. Cates deposes, that, to the best of his belief, at the time of seeing Sarah M'Lauchlan on the 20th of November, 1844, he had not received the plaintiff's letter; and there is no other evidence bearing upon the charge of collusion.

[The remainder of the judgment deals with the point which is omitted from this report.]

LLOYD *v.* MASON.

(5 Hare, 149—155.)

1845.
July 26, 29.
Aug. 1.

WIGRAM, V.-C.

[149]

A married woman entitled to a legacy, appeared by her counsel at the hearing of the cause, and claimed her equity to a settlement out of the fund. The legacy was directed to be carried to the separate account of the husband and wife. The husband was a bankrupt, and his assignee sold his interest in the legacy. The solicitors for the purchaser and for the wife agreed to refer the claim of the wife to their counsel; and the counsel determined that she was entitled to a settlement of the moiety, subject to

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the costs. Before any further steps were taken, the wife died, leaving children: Held, that the husband and those claiming under him were, by the steps which had been taken, bound to allow a settlement of part of the fund upon the wife and children; and that, upon the death of the wife, the children were entitled to the portion which would have been settled.

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THE testator bequeathed his residuary estate, (after certain life interests therein) to the children of his daughter Sarah; one of the children of the daughter married H. Mason. The last of the tenants for life of the estate died in 1831, and in 1834, the bill for the execution of the trusts of the will was filed by one of the children of the testator's daughter. The decree directing the sale of the estate was made in 1837. In 1839 H. Mason became bankrupt, and the assignees in the bankruptcy sold and assigned his interest in the residuary estate of the testator to Sir W. Heygate. The agreement for the sale, signed by the parties thereto, was dated the 12th of June, 1840, and was made between the assignees, of the first part, H. Mason, of the second part, and Sir W. Heygate, of the third part. The parties thereto of the first and second parts thereby agreed to sell, and Sir W. Heygate agreed to purchase
[*150] *(among other things) all the right and interest of the parties thereto of the first and second parts to and in the share and interest of the said H. Mason, or of his assignees, in the share and interest of Sarah Mason the wife of the said H. Mason, subject to the costs of the parties to the said suit, so far as such costs related to the particular property or might be decreed to fall upon the same shares and interest, to or for the price or sum therein mentioned; and it was agreed, that upon such securities for payment thereof being given as therein mentioned, the assignees should immediately execute an assignment to Sir W. Heygate, or as he should direct or appoint, of the said share and interest of H. Mason, of and in the share and interest of Sarah Mason, his wife, of the said residuary estate, subject to the said costs. Sir W. Heygate thereupon presented his petition in the cause, praying that he might be declared entitled to the share of H. Mason in the stock then standing, or which might thereafter be standing, in trust in the cause; and that the same might be ordered to be paid to the petitioner. The petition came on with the cause on further directions, and counsel then appeared for Sarah Mason, and opposed the petition, claiming a settlement for the wife and children out of the fund. The COURT declared that Sarah Mason was entitled to one-ninth of the testator's residuary estate; and that the petitioner Sir W. Heygate was entitled to the share of H. Mason and Sarah

his wife therein in her right, subject to her equity (if any) to a settlement; and it was referred to the Master to apportion and divide the residuary fund into nine equal shares, and one of such shares, when apportioned, was ordered to be carried over to an account to be intitled "The account of H. Mason and Sarah his wife."

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After the fund had been carried to the account directed *by the order, the solicitors of Sarah Mason wrote to the solicitors of Sir W. Heygate, a letter dated the 23rd of November, 1843, as follows: "Our client is willing to leave it to the junior counsel of ourselves and Sir W. Heygate, to tax the amount of the allowance in respect of her share,—the costs of so doing to be borne by the fund. We shall be glad to hear from you at your earliest convenience as to this." Sir W. Heygate's solicitors replied, "We accede to your proposal on behalf of Sir W. Heygate. Our junior counsel shall be instructed on the subject." On the 1st of December, 1843, the counsel of both parties consulted on the point, in pursuance of instructions from their respective clients, and they agreed that if there were no special circumstances in the case, one half of the fund was the proper proportion to be settled on Mrs. Mason; but they required to be informed, whether there had been any settlement made on Mrs. Mason, whether H. Mason had ever appropriated other property of Mrs. Mason to his own use, and whether his wife was maintained by him. Upon information on these points being furnished, the counsel of both parties concurred in the following opinion or decision: "We think, that, under the circumstances of this case, a moiety of the fund directed by the order on further directions to be carried over to the account of H. Mason, and Sarah his wife, after deducting therefrom the costs of and incidental to Sir W. Heygate's petition, and of the necessary applications for getting the fund out of Court, ought to be settled on Mrs. Mason and her children." This opinion was written on the 3rd of January, 1844; on the 7th of January, Sarah Mason died.

[*151]

A petition was now presented by the children of Mrs. Mason, (who were all of age), praying that the costs of Sarah Mason and Sir W. Heygate deceased, and also of *the executors of Sir W. Heygate, (he having also died in the interval), and of the petitioners, of and incidental to the matters mentioned in the petition, might be taxed; that the fund standing to the account of H. Mason and Sarah his wife, might be sold, and such costs, when taxed, might be paid thereout; and that of the residue of such proceeds, one

[*152]

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moiety might be divided between the petitioners, and the other moiety paid to the executors of Sir W. Heygate.

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Mr. Rolt, for the petition, contended that Sarah Mason had in her lifetime sufficiently declared that she required a settlement of so large a portion of the estate as the rules of the Court would give her; and that the trust property had thereby become bound as effectually as if the Master had approved of a settlement on her behalf. [He cited *De la Garde* v. *Lempriere* (1), *Murray* v. *Lord Elibank* (2), and other cases.]

Mr. Tripp, for the executors of Sir W. Heygate, argued that the wife's equity to a settlement did not attach upon the property until some order had been made by the Court affirming her right; and that after her death the children could not insist upon such equity. [He cited *Fenner* v. *Taylor* (3), *Adams* v. *Lavender* (4) and other cases.]

Aug. 1.

THE VICE-CHANCELLOR:

[*153]

This is the petition of seven individuals, representing themselves as the only children of Sarah Mason, the *wife of Horatio Mason, a bankrupt. The object of the petition is, that they may be declared entitled among them to a sum of money, being one moiety of their mother's interest under the will of the testator in the cause. The ground of the claim is, that the mother was entitled under the common equity to a settlement, and that the fund in question is bound by the proceedings in the cause. If, in order to decide this case, an obligation had been imposed upon me, of deciding between the conflicting opinions of Sir JOHN LEACH and Lord LANGDALE, I should certainly have taken a great deal of time to consider the matter. But I may, I think, decide the case without expressing an opinion upon that point; and the only observation which it will be necessary to make is this: it appears that the question, whether the children can, after the death of their mother, insist upon her equity to a settlement, depends not upon the question whether the mother was bound, but upon the question whether the husband was bound. It is clear that an order, referring it to the Master to approve of a settlement, binds the husband though it does not necessarily bind the wife. There may be a case in which the wife is not absolutely bound, but in which, as against the husband, the children are entitled to the benefit of the mother's equity. If the

(1) 63 R. R. 103 (6 Beav. 344).
(2) 7 R. R. 346, Preface v. (10 Ves. 84).
(3) See 37 R. R. 300, 302 (1 Sim. 169); *S. C.* 2 Russ. & My. 190.
(4) 29 R. R. 743 (1 M'Cl. & Y. 41).

husband is bound, the children are certainly entitled. The question whether the husband is, or is not bound, must be governed by the ordinary principles of the Court. Where a decree is made for the plaintiff he may waive the decree, but the defendant is bound by it; but the mere filing a bill to enforce a right, does not necessarily bind him. The facts of the present case are these: (His Honour stated the facts of the case,—the gift by the will of the testator,—the suit,—the bankruptcy,—the sale of the bankrupt's interest in the property, *and the subject of the petition, which came on at the [*154] hearing for further directions.) Upon the petition coming on, and on the hearing on further directions, counsel appeared for Mrs. Mason and opposed the petition, on the ground that she and her children were entitled to a settlement out of the fund. Whether an order to appear specially for that purpose was ever obtained does not appear. She did, however, appear by her counsel, and asked that her share of the fund might not be paid out without a proper settlement being first made upon her and her children. The Court by its decree declared that Sarah Mason, was entitled to one-ninth of the testator's residuary estate, and that Sir W. Heygate was entitled to the interest of Horatio Mason and Sarah his wife therein, subject to her equity, if any, to a settlement; and an order was made to divide the fund constituting the residue into nine equal shares. Without expressly deciding the point, it certainly appears to me that that order might alone have been sufficient to decide the question. If an order referring it to the Master to approve of a settlement had been made at the same time, there would have been no question about it; but, as it stands, the wife might possibly not have been entitled to any settlement at all. The fund might have been under 200*l.*, or the husband might have made such a settlement upon his wife, as to have become the purchaser of her interest in the fund. The COURT, however, has ordered the fund to be carried over to a separate account, and declared that the interest of H. Mason, and Sarah his wife therein in her right, subject to the wife's equity to a settlement (if any) belonged to the petitioner. The fund has been carried over in the way directed by the order, and it was then quite of course for Mrs. Mason the day after, to have presented a petition praying conditionally, at least, a reference to *the Master to approve of a settlement; and if that had been [*155] done, there is no question, upon the authorities, but that the fund would have been bound. (His Honour then stated the proceedings which took place between the solicitors and counsel of both parties

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to adjust their respective claims.) The case therefore stands thus: the fund having, on the application of Mrs. Mason, been carried over to a separate account subject to her equity (omitting the words "if any" and she being in a condition to ask for the common order for a reference to the Master, instead of taking that course, proposed to Sir W. Heygate, that third parties should determine the amount of her claim, to which Sir W. Heygate acceded. It appears to me impossible that those who claim under Sir W. Heygate, can now be allowed to retire from that agreement, if the effect would be to deprive Mrs. Mason and her children of the equity which the agreement of Sir W. Heygate conceded. It appears to me therefore, that the children are entitled in equity to the fund which they would have derived under the settlement. There must be an inquiry to ascertain who are the children of Mrs. Mason.

1846. *Nov.* 12, 14.

WOOD *v.* MACHU.

(5 Hare, 158—162; S. C. 16 L. J. Ch. 21.)

WIGRAM, V.-C.

[158]

Reference as to title, directed on motion after answer to a bill for specific performance by the vendor against the purchaser, notwithstanding the purchaser stated that his requisitions on the abstract had not been complied with, although the time for completion of the contract had long expired, and he had given notice of his intention to rescind the contract.

Objections to title mean such objections as can only be properly the subject of adjudication upon the investigation of the title; and such are cases where the dispute is as to the application of the conditions of sale, the propriety or validity of the conditions themselves not being questioned.

The purchaser cannot, owing merely to the delay of the vendor in complying with his requisitions, determine the contract without notice, or bring an action for his deposit before the termination of his notice, where time was not originally of the essence of the contract. Whether he can do so after the expiration of notice, where time has not been made of the essence of the contract, or, being of the essence of the contract, has been waived, depends upon the conduct of the vendor after notice.

MR. ROMILLY, on behalf of the plaintiff, moved for the usual reference for title, on a bill by the vendor for specific performance, and on the answer of the purchaser.

[159] The estate was offered for sale by auction on the 11th of December, 1845. By the conditions of sale the purchase was to be completed by the 25th of March, 1846, and interest was to be paid on the purchase-money, if from any cause the payment was delayed beyond that time. The abstract was to be delivered within twenty-one days, and if no objections to the title were made within fourteen days after the delivery of the abstract, the title was to be deemed to

be accepted. One of the conditions of sale contained special provisions with regard to the evidence which the purchaser should be entitled to require, and of which he should bear the expense. The abstract was delivered by the vendor, and the objections by the purchaser were made, within the stipulated time. The answer stated, that none of the requisitions had been satisfactorily complied with: that, on the 21st of February, 1846, the defendant's solicitor had sent a draft of a conveyance of the property to the vendor, without prejudice to the requisitions then pending, that the draft had been returned on the 23rd of February, approved, except in some unimportant particulars, accompanied by a letter; and that a correspondence between the solicitors of the vendor and purchaser respecting the title had continued until the 24th of March, 1846. The answer stated, that, on the 24th of March, the solicitor of the purchaser wrote to the solicitor of the vendor, to the effect, that if the required evidence were not furnished within fifteen days from that date, his client would consider the contract at an end. Some further correspondence afterwards took place: and, on the 3rd of June, the purchaser's solicitor again wrote to the solicitor of the vendor, stating the advice which he had received as to the evidence to which the purchaser was entitled, and concluding, "I must, therefore, again give you notice, that, unless you evidence your client's pedigree within fourteen days from the date hereof, I *shall [*160] be under the necessity of commencing legal proceedings to recover back the deposit with interest and costs." On the 5th of June, the purchaser's solicitor again wrote to the solicitor of the vendor, "I have to acknowledge the receipt of your letter of the 4th instant, in reply to mine of the 3rd, to which I beg leave to refer; and although it may be unnecessary to give you any further or more formal notice on the subject, merely for the sake of regularity, I take leave to state, that unless you evidence your client's pedigree, in every respect required by my said letter, on or before the 20th of June instant, I shall treat the contract as abandoned, and bring an action to recover back the deposit-money, with interest and costs." Two other letters, one of the 12th and the other of the 15th of June, passed between the solicitors. The defendant, by the answer, reserved to himself the right, if necessary, of taking further objections to the title.

The purchaser commenced an action for the recovery of the deposit, on the 18th of June; and on the 3rd of July, the bill was filed by the vendor to restrain the action, and for specific performance of the contract.

WOOD v. MACHU.

Sir Francis Simpkinson and *Mr. W. Rudall*, opposed the motion. They submitted that this was a case in which a material question was raised on the liability of the defendant to perform the contract; and the question of title did not therefore arise until that of contract had been determined: *Page* v. *Adam* (1).

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The VICE-CHANCELLOR (after stating the facts of the case, and hold-
[*161] ing, that, supposing time to have been *originally of the essence of the contract, it was waived by the correspondence or dispute between the parties or their solicitors respecting the title, after the time fixed by the conditions of sale for the completion of the contract, namely, the 25th of March, and down to the month of June, 1846), proceeded:

The defendant insists, that his answer shows a defence other than as to the title, and that the Court cannot dispose of that before the hearing; or, in other words, that no reference can regularly be made upon this motion. The defendant is right in saying, that if there is a defence other than upon the title, no reference should be directed; and there is even authority for saying, that although the alleged defence be frivolous, it will be an answer to the motion. That, however, has not been the practice, at least since the case of *Withy* v. *Cottle* (2). Since the decision in that case, the practice of the Court has been, to look into the answer for the purpose of seeing whether that which the defendant calls an objection to performing the contract is an open question. A point raised by the answer, as an objection other than to the title, may be so surrounded and governed by authority, as, in fact, to create no difficulty, and to be, in effect, frivolous; and in that case the Court does not yield to the objection by refusing the reference. Such, certainly, is the result of my own experience; and it appears, by a late case, to be that also of another Judge of much greater experience: *Boyes* v. *Liddell* (3). But, however that may be, this, at all events, is clear, that the Court must look into the answer for the purpose of seeing whether the objection be or be not an objection to title. By objection to title in these cases, I understand that which can only become properly
[*162] the *subject of adjudication upon the investigation of the title. If the conditions of sale, so far as they impose conditions respecting the title, had been objected to, that might have been an objection to be disposed of before reference. But if (as in this case) the

(1) 55 R. R. 70 (4 Beav. 269).
(2) 23 R. R. 187 (T. & R. 78).
(3) 1 Y. & C. C. C. 133.

conditions are admitted to be proper, and the only question is as to the application of those conditions, it is only in the investigation of the title that the matter in dispute between the parties can properly be adjudicated upon. I might, indeed, give an opinion upon the points which in this case have become actually subjects of dispute; but whilst it is open to the defendant—as he contends by his answer it is—to raise further objections, it is impossible for the Court usefully to entertain the question. I cannot agree with *Sir Francis Simpkinson*, that the nature of the conditions make the question other than one of title.

The only other case made is this: In a case in which time originally was not of the essence of the contract, and in which the parties, after the day fixed by the contract for its completion, have gone on with discussions on the title without interruption, the purchaser, on the 18th of June, and without previous notice applicable to that day, declares the contract at an end by bringing an action for the deposit. That this cannot be done, has been so repeatedly and solemnly decided, that, in the simple case this answer presents, I am prepared to say, it is not an open question.

It is unnecessary that I should give any opinion what my judgment would have been, if the action had not been brought until after the 20th of June; but I do not think that it would have been different. The reference must be directed as to the title, with the addition, in this case, that the Master must have regard to the conditions of sale.

ALLEN *v.* ANDERSON (1).

1846. *Jan.* 20. *Feb.* 13.

(5 Hare, 163—170; S. C. 15 L. J. Ch. 178; 10 Jur. 196.)

WIGRAM, V.-C. [163]

The testator, who was a Scotchman, domiciled in England, devised all the rest and residue of his real, personal, and mixed estates and effects, whatsoever and wheresoever, which he might be seised or possessed of or entitled to at the time of his decease, upon trust for his children, in certain shares. One of the children being the heir-at-law of the testator, became entitled, according to the law of Scotland, to a heritable bond made by a debtor of the testator, after the date of the will, and given as a security for a debt, which was owing to him at the time the will was made:

Held, that the heir was not a trustee of the heritable bond for the executors of the testator, and that he was not bound to elect between the heritable bond and the benefits to which he was entitled under the will.

THE testator, William Anderson, by his will, dated in February, 1810, after giving to his wife, Ann Anderson, certain specific and

(1) *In re Fitzgerald* [1904] 1 Ch. 573, 73 L. J. Ch. 436, C. A.

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pecuniary legacies, gave, devised, and bequeathed unto his wife, and to H. Davidson and H. Deffell, their heirs, executors, and administrators, all the rest and residue of his real, personal, and mixed estate and effects, whatsoever and wheresoever, which he might be seised or possessed of, or entitled to, at the time of his decease, upon trust to sell and convert into money all such parts thereof as should not consist of money, or be invested in Government or real securities; and after discharging all his just debts, and funeral and testamentary expenses, to invest the produce of his said estates, and stand possessed of so much thereof as, together with a certain sum secured by the settlement on his marriage, should be equal to a moiety of his real, personal, and mixed estate, upon trust to pay the interest and dividends thereof unto his wife and her assigns, during her life or widowhood, and, subject as aforesaid, upon trust, as to so much thereof as, together with the sum comprised in the said marriage settlement, should be equal to a fourth part of his said real, personal, and mixed estate, in trust for such one or more of his child or children as his said wife should direct or appoint; and as to all the rest, residue and remainder of his real, personal, and mixed estate and effects, and the produce thereof which should remain after answering the several purposes, including such part thereof as his wife might not happen to appoint, and also including the stocks, funds, and securities, the income whereof was given to or for the benefit of his wife as aforesaid, from and immediately after she should *cease to be entitled thereto, the testator gave and bequeathed, and directed that his said trustees should stand and be possessed thereof, in trust for all and every his child or children then living, or thereafter to be born, equally to be divided amongst them, the interests therein to be vested in his sons at the age of twenty-one years, and his daughters at that age or marriage; and if but one such child should live to attain a vested interest as aforesaid, then he directed that the whole should be in trust for that one child. The testator appointed his wife, and H. Davidson and H. Deffell, executrix and executors of his will.

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The testator made a codicil to his will, dated in May, 1816, and thereby devised all the freehold hereditaments, whatsoever and wheresoever, of or to which he was become seised, possessed, or entitled, since the date of his will, upon the trusts of the will.

The testator made a further codicil in June, 1823, and thereby revoked the devise and bequest in the former will and codicil to his wife, and Davidson and Deffell, and devised and bequeathed

all his freehold estates, whatsoever and wheresoever, to the same executrix and executors, and E. Barkly, upon the trusts expressed in the will. By a last codicil, made in December, 1824, the testator devised to the same trustees a piece of land which he had subsequently purchased, upon the same trusts.

By a deed or trust disposition, dated the 20th of June, 1823, executed according to the law of Scotland, the testator conveyed certain lands and estates in the county of Cromarty, in Scotland, to the said trustees of his will, upon trust to sell the same, and stand possessed of the proceeds as part of the personal estate bequeathed *by his will. The testator died in 1825, leaving his widow, and [*165] Henry Anderson, his eldest son and heir-at-law, and seven other children. The executrix made a distribution of some part of the estate among the children. A part of the property of the testator, at the time of his death, consisted of a heritable bond or security upon an estate in Scotland, for the sum of 6,000*l.* This bond or security was afterwards paid off, and the sum of 6,000*l.* due thereupon was received by Henry Anderson, as the heir-at-law of the testator.

Henry Anderson, the heir-at-law, in 1831, assigned to the plaintiff part of his interest as one of the children of the testator in the trust fund, which, under the will of the testator, would be divisible on the death of the widow. The widow died in 1843. The plaintiff then claimed payment of the trust fund assigned to him, when his claim was met by the objection, that the monies received by Henry Anderson, including the 6,000*l.* paid in respect of the heritable bond, exceeded his share of the testator's estate; and that the 6,000*l.* must be brought into account before any claim through him, upon that estate, could be recognised by the executors. The bill was thereupon filed for an account of the residuary estate of the testator, and payment out of Henry Anderson's share of the sum assigned to the plaintiff.

The executors submitted, that Henry Anderson was bound to elect either to keep the money which had been paid to him in respect of the heritable bond, and abandon his interest under the will, or to bring into hotchpot the 6,000*l.*, and take his share of the residuary estate of the testator.

The facts either proved or admitted at the Bar were, that the testator was a native of Scotland, and, at the *time of making his [*166] will and codicils, was a merchant in London, and domiciled there; that the debt of 6,000*l.*, or a great part thereof, secured by the

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heritable bond, was owing to the testator at the time he made his will; but that the security of the heritable bond was not given until after the will and codicils had been executed.

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Mr. Wood and *Mr. W. M. James*, for the plaintiff, argued that there was nothing in the will to put the heir-at-law to his election: *Johnson* v. *Telford* (1), *Dummer* v. *Pitcher* (2).

Mr. Tinney, *Mr. Romilly*, *Mr. Bigg*, and *Mr. Oliver*, for the several defendants, contended that there was a sufficient intimation of the intention of the testator to divide his whole property amongst his family, and to give it to his executors for that purpose. There was no language which he could have used, at the date of his will, more effectually calculated to express that intention, than the words which the testator had used. [They cited *Brodie* v. *Barry* (3), *Shuttleworth* v. *Greaves* (4), and other cases mentioned in the judgment.]

Feb. 13.

THE VICE-CHANCELLOR:

[*167] The testator, by his will, dated the 17th of January, 1810, after giving to his wife certain specific and *pecuniary legacies, devised and bequeathed to trustees all the rest and residue of his real, personal, and mixed estate and effects, which he might be seised or possessed of or entitled to at the time of his decease, upon trust to convert the same into money, and stand possessed of the residue (subject, as to part, to a life interest to his widow) upon certain trusts for the surviving children of the testator.

On the 20th of June, 1823, the testator executed a trust deed, whereby certain property was vested in trustees, upon trust to sell and hold the proceeds as part of his personal estate. I understand it to be admitted that this deed was executed before the testator became possessed of the heritable bond; and that the bond was not therefore affected by it. The testator made three codicils to his will, but none of these affect the question in the cause. The testator died in 1825.

At the time of his death, the testator was the holder and obligee of a Scotch heritable bond, given after the date of the will, and of the deed which I have referred to, for securing a debt of 6,000*l*. The testator was by birth a Scotchman, but his domicile was English, and the bond was given to secure a mercantile debt

(1) 32 R. R. 207 (1 Russ. & My. 244).
(2) 39 R. R. 203 (2 My. & K. 262).
(3) 13 R. R. 637 (2 V. & B. 127).
(4) 48 R. R. 5 (4 My. & Cr. 35).

contracted in the city of London. He had eight children, of whom Henry, the eldest, became, according to the law of Scotland, entitled to the heritable bond as the heir of his father; the will under the circumstances being inoperative to pass any interest in real estate in Scotland. The plaintiff is entitled, by purchase from Henry, to such interest as he had in the bond, and under the will of the testator. The defendants represent the interests of the remaining children.

Two questions were raised by the defendants: *First, it was [*168] said that the interest of the testator in the heritable bond would be governed by the law of his domicile, and that Henry, the heir, would be a trustee of the bond for the parties entitled to the personal estate of the testator. Secondly, that Henry ought, under the terms of the will, to be put to his election, and that he could not take the bond as heir, and at the same time claim the benefit of the bequests made by the will in his favour.

Both of these points appear to me to be governed by authority. As to the heritable bond, the case of *Drummond* v. *Drummond*, cited by Sir WILLIAM GRANT in *Brodie* v. *Barry* (1), is a decision on the point. That case was the converse of the one now before me; but the principle of that case is based on the same rule of law as that relied upon by the defendants in support of the proposition, that the heir would be a trustee for the next-of-kin. The case of *Johnstone* v. *Baker* (2), cited in *The Duchess of Buccleuch* v. *Hoare*, appears to some extent an authority also; as was also the judgment of Sir THOMAS PLUMER in the case of *The Duchess of Buccleuch* v. *Hoare* (3). But I think the case of *Jerningham* v. *Herbert* (4) is an express authority in favour of the plaintiff.

As to the question of election, it occurred to me that two questions might have been argued in the defendants' favour: first, omitting the effect of the deed of the 20th of June, 1823; and secondly, taking that deed into account. Omitting the effect of the deed, it appears to me that if the point were not ruled by authority, the only question would have been, *whether the words of the will [*169] were large enough to describe the bond; and to show that the words of the will were large enough to comprehend the bond, I should not probably have thought it necessary to go beyond the case of *Churchman* v. *Ireland* (5). The cases in which it has been

(1) 13 R. R. 637 (2 V. & B. 127, 132).
(2) 4 Madd. 474, *n.*
(3) 4 Madd. 467.
(4) 28 R. R. 136 (4 Russ. 388).
(5) 1 Russ. & My. 250.

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held that a testator devising his estates is not to be understood as devising land of which he was the tenant in tail (*Pole* v. *Lord Somers* (1)), or copyholds not surrendered to the uses of the will, (*Judd* v. *Pratt* (2)), or property of which he was the joint owner with another, (*Dummer* v. *Pitcher* (3)), appear to have proceeded upon the ground that the property is not the testator's property in the strict acceptation of the term, and that therefore the words of the will do not describe it, if the testator had any property of his own to satisfy the words of the will. Those cases are analogous to the decisions respecting property subject to a power of appointment.

But, whatever opinion I might have formed in the absence of authority, I feel bound in the case before me by authority. Not relying upon the case of *Johnson* v. *Telford* (4), I feel bound by the previous authorities upon this point. The question, as Sir WILLIAM GRANT observes in *Brodie* v. *Barry*, is to be answered by considering what law is to govern the case; and, as he observed in that case (without approving the decision), the cases up to that time had established that the question was to be governed by English law, and that in applying the English law to the case, the Court would deal with real interests in Scotland as it would with copyholds in

[*170] England. Now, as a general devise of all "my real *estate in England" would not have the effect either of a devise or of a declaration of uses of copyholds not surrendered to the uses of the will, so in the case of Scotch lands, a devise of all his real estate by a testator would not have the effect by way of devise or declaration of uses of lands in Scotland which had not been previously conveyed in such manner as to allow the will to operate upon them. Omitting, therefore, the effect of the deed of January, 1823, it appears to me that the reasoning of Sir WILLIAM GRANT in *Brodie* v. *Barry* (though opposed to his private opinion) shows that this is not a case of election.

With regard to the deed, if it had any operation upon the heritable bond, the case of *Bennett* v. *Bennett's Trustees* (5), and the cases cited in *Brodie* v. *Barry*, might have materially altered the case; but I understand it is admitted that that deed has no effect upon the present question.

There must be a decree for payment of the fund, with interest,—

(1) See 12 R. R. 36, *n.* (6 Ves. 309, 319), per Lord ELDON.
(2) 13 Ves. 168.
(3) 39 R. R. 203 (2 My. & K. 262).
(4) 32 R. R. 207 (1 Russ. & My. 244).
(5) Robertson on the Law of Personal Succession, 227.

I cannot make the heir pay all the costs of establishing his right. The costs should have come out of the shares of all the other parties. The justice of the case as to costs would be for the executors to be paid their costs by the plaintiff, and the plaintiff to recover them over against the other parties; but I cannot make that order in this suit.

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PRENDERGAST *v.* LUSHINGTON (1).

1846. *Jan.* 24, 26.

WIGRAM, V.-C.

On Appeal. *Nov.* 19.

Lord COTTENHAM, L.C.

Affirmed in House of Lords. 1850. *Aug.* 7, 8, 9.

Lord BROUGHAM.

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(5 Hare, 171—177; affd. 16 L. J. Ch. 125—126; 11 Jur. 865; affd. in H. L. nom. *Prendergast* v. *Prendergast*, 3 H. L. C. 195—225; S. C. 14 Jur. 989.)

The testator gave to the executors and trustees appointed by his will so much of his personal estate as would produce a certain annuity, upon trust to select, appropriate, and set apart the same, in their uncontrolled discretion, and pay the interest, dividends, and annual produce thereof to his widow for her life or widowhood; and if the annual produce of the personal estate and effects so set apart and appropriated should from any cause be increased or reduced, his widow was to receive such increased or reduced interest, dividends, and annual produce; and, from and after her decease or second marriage, the testator directed that the personal estate and effects so appropriated or set apart should fall into his residuary estate. And the testator empowered his trustees, at their own discretion, to permit the whole or any part of his personal estate to remain on the securities on which the same might happen to be at his decease, or otherwise to convert and alter the same at their own absolute discretion. The testator's personal estate was invested in foreign funds. The trustees did not exercise their discretion as to the appropriation of the investments to answer the annuity, but submitted to act as the Court should direct: Held, that the Court would not direct any appropriation of the foreign funds to answer the annuity to the widow, but would direct the annuity to be raised by the purchase of Consols, referring it to the Master to inquire what part of the existing investments it would be proper for that purpose to call in, having regard to the interests of other parties under the will.

Cause set down again for hearing on further directions, on the petition of defendants out of the jurisdiction at the first hearing, who subsequently appeared, in order to enable them to appeal from the decree.

THE suit was instituted by the widow of the testator in the cause, for the purpose of obtaining for the trustees the direction of the Court as to the manner in which the trusts of the will ought to be carried into execution. After directing his debts and funeral and testamentary expenses to be paid, and giving certain specific legacies, including his furniture, leasehold residence, and household effects to the plaintiff, his widow, the testator proceeded: "I give and bequeath to my trustees hereinafter named so much of my personal estate and effects as at the time of my decease shall produce the clear annual income of 1,500*l.*; and I direct that the same shall be selected, and be appropriated and set apart, so soon

(1) *Harbin* v. *Masterman* [1896] 1 Ch. 351, 65 L. J. Ch. 195, 73 L. T. 591.

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as conveniently may be after my decease, by my said trustees, or the trustees or trustee for the time being, or the majority of them residing in England, in their uncontrolled discretion; and I direct that my said trustees, and the trustees or trustee for the time being under this my will, do and shall stand and be possessed of the personal estate and effects so to be appropriated and set apart, upon trust to pay the interest, dividends, and annual produce thereof, by equal half-yearly payments, unto my said dear wife
[*172] during her life, if she shall so long continue my widow, the *first of such half-yearly payments to begin and be made at the end of six calendar months next after my decease, and from and after the decease or second marriage of my said wife, I direct that the personal estate and effects which shall be so appropriated and set apart, or the stocks, funds, or securities in or upon which the same shall then be laid out or invested, shall sink into and become part of my residuary personal estate; and I direct, that, in case the yearly interest, dividends, and annual produce of the personal estate and effects so to be appropriated and set apart as aforesaid, or the stocks, funds, or securities in or upon which the same shall or may at any time or times hereafter be laid out or invested, shall from any cause whatever be increased or reduced in amount during the time the same are hereby directed to be paid to my said wife, then and in such case my said wife shall be entitled to have and receive such increased or reduced interest, dividends, and annual produce, as the case may be, in lieu or satisfaction of the interest, dividends, and annual produce hereinbefore directed to be paid to her." The testator then bequeathed the whole of his residuary estate to his trustees, upon trust to divide the same equally among his children who should be living at his decease, as therein mentioned. In a subsequent part of his will, the testator declared that it should be lawful for, and he thereby expressly authorised and empowered, his said trustees, and the trustees for the time being of his will, or the majority of them resident in England, at their own discretion, to permit the whole or any part of his personal estate to remain and continue on such securities as the same might happen to be invested at the time of his decease so long as they should see fit, without being in any way answerable or responsible for so doing; nevertheless he thereby fully authorised and
[*173] empowered his said trustees or trustee for the time being, *or the majority of them resident in England, to sell and absolutely dispose of or convert into money such part or parts of his personal estate

and effects as should not consist of money, or securities for money, and call in, recover, and receive such part or parts of his said personal estate and effects as should consist of money or securities for money, when and as they should in their discretion think fit, and to lay out and invest the money so to be raised and received in the public stocks or funds of Great Britain, or on Government or real securities, at interest; and from time to time to alter, vary, and transpose the stocks, funds, and securities in or upon which the same should or might be laid out and invested, and again to re-invest and lay out the money arising thereby upon any new or other or like stocks, funds, or securities, as they should in their own absolute discretion think fit or advisable; and, generally, to act in the premises in as full and ample a manner as he (the testator) could do were he living.

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The will was made in 1839, and ratified by a codicil in 1840. The testator died in 1845.

[At the time of the death of the testator, nearly the whole of his personal estate was invested in foreign funds, chiefly consisting of the bonds of various States in North America and of Portuguese Government bonds.]

The common inquiries in an administration suit were directed at the hearing, and the Master was also directed to inquire whether such parts of the testator's estate as were then outstanding and invested in any foreign stocks and securities, or any and what part thereof, ought to be sold. Affidavits were laid before the Master, stating the market price of the several stocks in July, 1845, (the time of the inquiry), their probable value if sold, and the interest produced by those which at that time paid interest. One of the witnesses, an American stock agent, deposed, that, in his opinion, it would not be for the benefit of the general personal estate of the testator that the American securities *should be sold; that there was good reason to believe the payment of interest would be resumed on several of those stocks which were not then paying interest; and that they could not at present be sold except at a price much below their real value. The Master being of opinion that all the foreign funds ought to be sold, the parties waived his report on the special inquiry, and raised the question on further directions on the general report.

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Mr. Romilly and *Mr. Tennant*, for the plaintiff, submitted that the Court would not direct any appropriation of the existing

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securities which would leave the annuitant dependant upon the foreign funds, the payment of which might be interrupted by war or other casualties; but that she was entitled to a sale of a sufficient part of the foreign stock to produce her annuity in the British funds, without reference to the question of depreciation as affecting the general estate.

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Mr. Tinney and *Mr. M'Naghten*, for residuary legatees, contended that the gift to the widow was a specific bequest, or in the nature of a specific bequest, and that the widow was bound to take it in the state in which it was left by the testator. The widow was not entitled to call upon the Court to exercise the power vested in the trustees, of converting the investments left by the testator. He evidently contemplated that his widow's annuity would be derived from fluctuating sources, when he provided that she should be entitled to the benefit of a rise, as well as suffer from a fall in the income which it produced.

[*176] The effect *would be to take from the children, the residuary legatees, a part of the property specifically bequeathed to them by the testator. The case of *Buxton* v. *Buxton* (1) was mentioned.

Mr. C. M. Roupell, for the trustees.

Mr. Romilly, in reply, denied that the bequests were specific: they would not have been adeemed if the testator had sold the foreign stock in his lifetime. The power was one, not so much to sell the foreign stocks, as to leave them outstanding. The power to sell was incidental to the office of executor, and would have existed if no clause to that effect had been contained in the will.

The VICE-CHANCELLOR inquired, whether any arrangement could be made by the parties interested in the estate for suspending the appropriation of the stock for the present, leaving the widow her lien on the entire trust fund? It appearing that this course could not be taken, his Honour held that,—however the case might have been if the trustees had acted upon their own responsibility,—the Court would only execute the trusts of the will by directing the sale, and investment in Consols, of a sufficient part of the trust property to provide for the annuity to the widow.

Declare, that, according to the true construction of the will of the testator, Guy Lenox Prendergast, the plaintiff, is entitled to

(1) 43 R. R. 138 (1 My. & Cr. 80).

have so much of the personal estate of the testator invested in Bank 3*l.* per cent. Consolidated Annuities as shall be sufficient to produce a clear income of 1,500*l.* per annum. Refer it to the *Master to inquire and state to the Court, what parts of the personal estate and effects of the testator ought, having regard to the interests of all parties, to be sold for the purpose of purchasing Bank 3*l.* per cent. Consolidated Annuities sufficient to answer such annuity as aforesaid; and whether it will be for the benefit of the infant defendants that the residue of the personal estate and effects of the testator, or any and what part thereof, shall be sold or left on the present securities, or what shall be done therewith. Liberty to state any circumstances specially with relation thereto. And the Master is to state specially the grounds on which he shall have come to any conclusion in relation thereto.

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Some of the defendants to the cause, against whom process was prayed when they should come within the jurisdiction, were desirous of appealing from the decree, and applied by petition for leave to appear and put in their answers; whereupon the COURT, by consent, ordered that the said defendants should be at liberty to appear and put in their answer to the plaintiff's bill filed in this cause, and that the said cause should be again set down *pro formâ* before his Honour the Vice-Chancellor Sir James Wigram, to be heard on further directions, for the purpose of making the decree, dated the 26th day of January, 1846, binding against the said petitioners, the defendants, &c.

The residuary legatees appealed from this decision.

1846. *Nov.* 19.

[16 L. J. Ch. 125]

Mr. Stuart, *Mr. K. Parker*, and *Mr. Hetherington*, for the appellants, contended that the gift to the plaintiff was of a specific character; that it was a gift of the income of a particular fund, and it was expressly *provided that any fluctuations in the stock which might be appropriated for her annuity should affect her alone, and absolute discretion was given to the trustees to select such funds as they thought proper; and that these provisions were inconsistent with an intention to invest a sufficient sum in the 3*l.* per Cents., which was the stock selected by the Court as being least liable to fluctuations: *May* v. *Bennett* (1).

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Mr. Tinney, *Mr. Romilly*, *Mr. Tennant*, *Mr. C. Roupell*, and *Mr. M'Naghten* appeared for other parties.

(1) 25 R. R. 72 (1 Russ. 370).

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THE LORD CHANCELLOR:

I never saw a case involved in less doubt than this. The testator gives so much of his personal estate and effects as at the time of his death shall produce the annual income of 1,500*l.*, and directs—(His Lordship here read the part of the will already set forth). He gives a sufficient sum of his personal estate which shall at the time of his death produce 1,500*l.* to his wife for life, and the trustees are to set apart such portions of the personal estate as will realize the sum of 1,500*l.* a year. But it is well known that difficulties arise in attempts to disentangle an estate from its liability to an annuity. The funds set apart for the purpose of raising the annuity vary by not producing so much at one time as they produced at another time. Then comes the question, how the annuity is to be made up for the annuitant. The testator protects his estate against that contingency by saying, that the fund being appropriated to produce the annuity at the time of his death, if the income varies one way or another, still the widow shall take what the fund produces: if the income increases, she shall have the benefit of it; and if it diminishes, she must take it subject to the diminution. And I am not able to find out what the contest is: there is property vested in foreign funds and producing a large interest, in proportion as the capital is supposed to be in danger; for that depends in all these cases on the value of the principal fund. If it is supposed to be in danger it is compensated for by a large annual payment: if it is supposed to be safe, then the income which it produces is comparatively small.

Now, as to how the discretion of the trustees was to be exercised in selecting these funds, I should say there is an easy answer to that question. They must do their best to carry into effect the intention of the testator; they must select those funds which are most likely to produce the 1,500*l.* a year, which he clearly intended his wife should have, though she was to take it for better or for worse, as the annuity increased or as it diminished. The rule of the Court is, that if no particular fund is by the will directed to be appropriated for that purpose, the fund must be invested in the 3*l.* per Cents. And there is nothing in this case to restrain the Court from acting according to its usual practice. The trustees are to set apart as they think fit. If they had done their duty, they would have set apart a sufficient sum in the 3*l.* per Cents. to produce the 1,500*l.* a year. If that is not the rule, what is the rule? I asked what the rule was. But I am at a loss to find out what rule to lay down as to the discretion of the Master. Because it is said,

I ought to send it to the Master. If I find that there is any rule which the Master ought to act upon, and say that the 3*l.* per Cents. is the right fund, there is no question of selection. I think there is no difficulty about that. It is quite unnecessary to send it to the Master, because I have not the least doubt, that there being here no appropriation out of a particular fund, the annuitant is entitled to an investment in the 3*l.* per cent. Annuities for the amount of her income.

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[On appeal to the House of Lords, reported in 3 H. L. C. 195—225, the decision in this case was affirmed by Lord BROUGHAM in the following judgment:]

LORD BROUGHAM: 1850.

The question arising in this case is of importance, from accidental circumstances, to the parties; and it is also important to the law as administered in courts of equity. As I entertain no doubt upon it, I shall not delay longer to dispose of the case, and put an end to a somewhat protracted family suit. [3 H. L. C. 218]

First of all, let me state the principle which the concurrent authorities of the case, and the known course of proceedings in our courts of equity have established. If a person leaves the disposition of his property after his decease to trustees, and, they declining or neglecting to act, the aid of the Court is required, the Court will not, as a matter of course, exercise the discretion with which the trustees were invested, but will follow its own established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding. But the Court will, no doubt, earnestly and anxiously look to the will of the testator, and so deal with the property as to effectuate the purpose that he appears to have had in view. Thus; if a gift be to one for life, with remainder to another; the Court, considering that there is a clear intention of giving to the remainderman that which the first taker was to have for his life *will prevent perishable and temporary interests from being wholly enjoyed by the tenant for life, and the remainderman disappointed: or will prevent an undue proportion from falling to the former, and a partial disappointment of the latter. This just purpose can only be effected by a conversion in some cases of the perishable property, and giving the party entitled for life only the enjoyment of the fruits of that into which the *corpus* has been converted. Thus, terminable annuities and leaseholds will be sold and [*219]

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the price invested for the benefit, first, of the taker for life; next for that of the party or parties in remainder. But as this proceeds wholly upon a regard for the testator's manifest intention, a like regard must be paid to whatever indicates a design on his part that, notwithstanding the form of the gift, the first taker should enjoy the subject-matter in specie, and thus possibly defeat the subsequent gift in part or even in whole, for *cujus es dare, ejus est disponere*. The Court therefore attentively and anxiously looks to all indications of such an intention, and before it orders a conversion, must be satisfied that such a course is not excluded by the whole instrument taken together.

It is perhaps hardly necessary to cite authorities in support of principles so plain; for they merely consist in this almost self-evident proposition, that the intention of the testator is to guide the Court which assumes the execution of his will. But illustrations of the manner in which the Court has acted in working out this guiding principle may be obtained from some well known cases.

Thus in *Collins* v. *Collins* (1), there was a devise of all property of all kinds, without any reserve, to A., and at her death
[*220] to be divided, and one half was to be at *her disposal, that is, one moiety of what the property should be when divisible at her death. A part consisted of leaseholds, and the MASTER OF THE ROLLS held that the leasehold property could not be directed to be sold, the intention plainly appearing that A. should enjoy it for her life.

Alcock v. *Sloper* (2), was a like case, where the intention that the property should not be converted, was held to be indicated by a direction to sell freehold and also leasehold property, after the death of the first taker, and the dividends of some Long Annuities were expressly given. The MASTER OF THE ROLLS, in that case gave the income of the annuities, and would not order them to be sold.

In *Pickering* v. *Pickering* (3) the gift was of "all the interest, rents, dividends, annual produce and profits," and of the "use and enjoyment of all my estate and effects whatsoever, real and personal, for and during the term of her natural life,"—certainly very large words to express any enjoyment—and there was a further material direction or gift of the absolute use, not for life, but, "for her own absolute use and benefit," of the "furniture, wine, coals, linen, china." The question arose on converting a leasehold house by a sale of the term, and the COURT held this to be excluded by the clear indication of the

(1) 39 R. R. 337 (2 My. & K. 703).
(2) 39 R. R. 334 (2 My. & K. 699).
(3) 48 R. R. 104 (4 My. & Cr. 289).

testator's intention in the very general and exhausting phrase of the gift, and in the further gift of the furniture in the house.

I can see nothing in *Howe* v. *Earl of Dartmouth* (1), which breaks in upon the doctrine held in these cases. On the contrary, taking the whole facts in that case, and all Lord ELDON's observations together, I think *they confirm the views sanctioned by the later decisions. [*221]

We have now to apply these principles to the case at the Bar. And, first, I hold it to be clear that the will invests the trustees with a discretion. They are to select and appropriate as much of the personalty as at the testator's death shall produce 1,500*l*. He gives them this amount, and desires them to select and appropriate it from his whole personalty. He does not say that they are to select that which at the time shall be producing 1,500*l*. but, they are to select so much as shall produce, that is, when invested, shall produce 1,500*l*., and they are to hold this, for what purpose? To pay the annual produce to his widow by half-yearly payments, beginning six months after his death. This discretion of itself clearly shows that the trustees were not to keep the *corpus* in specie; for of the ten or more kinds of securities, of which the testator was possessed at the date of the will and at his death also, some were such as paid at one period of the year, some at another, and some perhaps at no period of the year, or of any year. Again, he directs the fund to be distributed at his widow's death or second marriage, describing it thus, "the personal estate so appropriated, or the stocks, funds, or securities in or upon which the same shall then be laid out or invested." This most clearly implies that the conversion of the personalty by sale and re-investment was in the testator's contemplation, the conversion of that very portion, which the trustees should have selected, and not a conversion at the date of distribution; for it is the securities on which the same shall "then" be laid out, that is, at the widow's decease or second marriage; therefore, it must have been converted before either of those events in order to make the word "then" applicable. Again he *directs any rise or fall in the annual produce to be the gain or [*222] the loss of the widow; a further indication that he contemplated, perhaps even a speculative use of his funds by his trustees.

There are other parts of the will to the like effect. "And I hereby direct that it shall and may be lawful, and I authorize and empower my said trustees, or the majority of them, at their own discretion to permit the whole or any part of my personal estate to

(1) 6 R. R. 96 (7 Ves. 137).

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remain and continue in such securities as the same may happen to be invested upon at the time of my decease, so long as they shall see fit, without being in any way answerable or responsible for so doing; nevertheless I do hereby fully authorize and empower my said trustees to sell and absolutely dispose of, or convert into money, such part or parts of my personal estate and effects as shall not consist of money or securities for money; and call in, recover, and receive such as shall consist of money or securities for money, and to lay out and invest the money so to be raised and received in the public funds, or Government or real securities at interest, and from time to time to alter, vary, and transpose the stocks, funds and securities, in or upon which the same shall or may be laid out and invested, and again to re-invest, and lay out the money arising thereby upon any new or other, or the like stocks, funds or securities, as often as they shall in their own absolute discretion think fit and advisable, and generally to act in the premises in as full and ample a manner as I could do, were I living."

I take it then to be quite clear that the discretion was vested in the trustees. It is equally certain that they declined to exercise that discretion. It avails nothing to say that Mr. Harris Prendergast offers to act, if the Court shall protect and indemnify him. His [*223] *answer states his refusal, and the Court on this is applied to for its assistance.

Now how is the Court to act? The widow is to be provided for during her life or viduity, and the fund so appropriated out of the general estate is then to sink into the residue. The Court can do nothing which is not expressly or by plain implication directed by the testator to be done. It was said by the LORD CHANCELLOR (Lord COTTENHAM), in *Penny* v. *Turner* (1), and therein he only followed the constant current of decided cases, as *Brown* v. *Higgs* (2), *Longmore* v. *Broom* (3), and *Burrough* v. *Philcox* (4), "The mother had power to distribute the property as she thought best between the three sisters and their children. She certainly might have given some to each; they therefore, constituted the favoured class. Nothing was lost by the failure of the appointment, but the distribution or selection amongst this class. That having failed, the Court cannot supply the execution of the power, but, to effect the general intent, gives the property to the whole class equally."

(1) 2 Ph. 493.
(2) 4 R. R. 323 (4 Ves. 708); affirmed on re-hearing, 5 Ves. 495.
(3) 7 Ves. 124.
(4) 48 R. R. 236 (5 My. & Cr. 73—92).

Here the Court can exercise no discretion as to the investment of the property in one stock rather than in another. The rule of the Court is to invest in the Three per Cents. I agree with Lord COTTENHAM in holding that the testator, at all events, contemplated this as possible; indeed the rule of the Court so established must be regarded as known to all, and all must be understood to be aware that if trustees whom they appoint shall decline to act, the Court, acting, will follow its known rule. In this case the testator gave the trustees a discretion, which they declined to exercise; and it has devolved on the Court, which has no choice as *to the mode [*224] and manner of executing it, as regards the premises.

If indeed there had been found in the will any indication of an intention on the testator's part, testified either by express words, or to be gathered as implied, that any one fund should be preferred, or that any stock should remain in specie, and unconverted, or that any fund should be excluded, or that any other mode of dealing with the property should be pursued, or any other mode excluded; then of course the case would have fallen within the scope of those principles, which I stated in the outset, and would have come within the application of the cases, to which in order to give an illustration of the general principles, I have referred. But I can descry no such intention in this will, either expressed or implied; on the contrary, the testator clearly contemplated a possible, perhaps a probable, conversion, and in that he did not fetter the trustees, nor is the Court bound.

I advise your Lordships, therefore, that the judgment appealed from should be affirmed, and Mr. Harris Prendergast, who ought not to have printed any case, though he might attend by counsel, is not entitled to have out of the residuary estate, any costs of the unnecessary part of his case; his other costs he is entitled to have with the other parties.

[Appeal dismissed. Costs of all parties out of residuary personal estate of the testator except Mr. Harris Prendergast's costs of his printed case and appendix.]

1846.
July 7, 8, 18.

WIGRAM, V.-C.

Affirmed on Appeal.
July 25.

Lord COTTENHAM, L.C.

[215]

RANKEN *v.* HARWOOD.

(5 Hare, 215—223; S. C. 15 L. J. Ch. 446; 10 Jur. 794; affd. 2 Ph. 22.)

A creditor recovered judgment, and sued out a writ of *fieri facias* thereupon, in the lifetime of his debtor, and placed the writ in the hands of the sheriff on the day after the debtor died. A decree was afterwards made in the suit of an equitable mortgagee of certain parts of the real and personal estate of the debtor against his devisee and executor, for the sale of the mortgaged property, and if the proceeds of such sale should be insufficient to satisfy the plaintiff's debt, then for an account and application of the general personal and real estate of the testator, in a due course of administration. After this decree the judgment-creditor levied, under the *fieri facias*, on goods left by the debtor. The executor thereupon moved for an injunction to restrain execution, which the COURT refused on two grounds—first, because the decree for an account and administration of the general estate was not absolute, but was conditional on the mortgaged property proving insufficient to satisfy the plaintiff's demand; and secondly, because the judgment-creditor acquired a right to the goods of the debtor, by virtue of the writ of *fieri facias*, from the *teste* of the writ, and therefore paramount to the right of the executor.

ON the 25th of November, 1845, Thomas Kirk brought his action against Benjamin Harwood, and recovered judgment. Judgment was signed on the 9th of December, 1845, and thereupon a writ of *fi. fa.* was, on the 10th of December, delivered to the Sheriff of Middlesex, to which writ the sheriff returned *nulla bona*. On the 2nd of April, 1846, a writ of *fi. fa.* on the same judgment, endorsed to levy 522*l.* 9*s.* 8*d.*, was sued out, directed to the Sheriff of Surrey, and, on the 7th of April, the latter writ was placed in the hands of
[*216] the officer of *the Sheriff of Surrey for execution. On the 6th of April, the day before the last writ was delivered to the sheriff, Benjamin Harwood died.

In April, 1842, during the lifetime of Benjamin Harwood, a suit had been instituted by the plaintiff, who was an equitable mortgagee by deposit of deeds or instruments of certain leasehold premises and shares, and was second mortgagee of freehold and other property, against Benjamin Harwood, the mortgagor, and certain trustees for sale of the same property, appointed by a deed, to which Harwood, the other mortgagees, and the plaintiff, were parties. The bill prayed an account of what was due to the plaintiff, and payment; or, on default, that the mortgaged property might be sold, and the mortgagees, including the plaintiff, paid out of the proceeds, according to their priority. Upon the death of Benjamin Harwood, the plaintiff filed his bill of revivor and supplement against C. Boulton, the sole acting devisee and executor under the will of Benjamin Harwood, praying that the suit might stand revived, and

the plaintiff might have the benefit thereof, and that the defendant, C. Boulton, might admit assets of the estate of Benjamin Harwood, or that the necessary accounts might be taken of his real and personal estate, come to the hands of the defendant, and that the same might be applied in payment of the plaintiff's debt, and of the other specialty creditors of Benjamin Harwood, in a due course of administration.

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The defendant, C. Boulton, the executor, by his answer to the supplemental bill, stated, that the personal estate of Benjamin Harwood, when entirely realised, would not, as he believed, produce 100*l.*; that Benjamin Harwood was, at the time of his death, a prisoner for debt, subsisting on the county allowance; and that *he had no real estate whatsoever, except that comprised in the mortgage. [*217]

On the 6th of June, 1846, a decree was made in both causes, and thereby, after directing an account of what was due to the plaintiff and the other mortgagees respectively, it was by consent ordered, that the whole of the freehold and copyhold hereditaments, and the leasehold premises and shares, should be sold; and after giving the plaintiff liberty to bid, and providing for the payment of the purchase-money in the several events of the property being sold with or without the concurrence of the first mortgagees, or of the plaintiff, or any other parties becoming the purchasers, it was ordered, that if the monies which should arise, and which, in respect of the rents and profits received by, or on account or for the use of, the defendants (the trustees for sale), should be paid into Court, as thereinbefore directed, should not be sufficient to pay unto the plaintiff what was due to him upon his said securities, including the costs; and if the defendant, C. Boulton, should not admit assets of Benjamin Harwood, the mortgagor and testator, come to his hands, sufficient to pay what might remain due to the plaintiff for principal, interest, and costs, upon or in respect of his said securities; then the Master was to take an account of the personal estate of Benjamin Harwood, come to the hands of the defendant, C. Boulton, &c. And it was ordered, that the Master should also take an account of what was due for the said testator's specialty debts and funeral expenses. And the COURT did thereby order and decree, that the said personal estate should be applied in payment of what should remain due to the said plaintiff for principal, interest, and costs on his said securities, and of what should be reported due on the other specialty debts of the testator,

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and funeral expenses, in a due course of administration; *and in case the said personal estate should not be sufficient for that
[*218] purpose, then the Master was to inquire and state whether the testator, at the time of his death, was seised of or entitled to any freehold or copyhold estate, other than those comprised in the said securities of the plaintiff; and if he should find that the testator was so seised or entitled, then the Master was also to distinguish between such parts thereof (if any) as passed by the will of the testator, from such parts thereof (if any) as did not pass by his will. The receiver appointed in these causes was thereby ordered to pass his accounts before the Master: further directions and costs were reserved, and liberty was given to all parties to apply.

On the 1st of July, the Sheriff of Surrey, under the writ of *fi. fa.* in his hands, took possession of certain furniture and effects, formerly belonging to Benjamin Harwood, which were in his house at Streatham, at the time of his death, and had been since locked up in the same house. On the 2nd of July, the defendants, Kirk and the sheriff, were served with notice of the decree of this Court, of the 6th of June.

July 8.

The executor of Benjamin Harwood now moved for an injunction to restrain the sheriff from proceeding to remove or sell the furniture and effects seized by him under the *fi. fa.*, and to restrain the defendant Kirk from proceeding in the action.

Mr. Romilly and *Mr. Pole*, for the motion:

It is the rule of the Court, when it has taken upon itself the administration of assets, to restrain all proceedings at law against such assets, and permit parties having claims on the estate to
[*219] come in under the decree. "It is fully *settled," Lord ELDON says, in *Drewry* v. *Thacker* (1), that "a creditor seeking, and not having yet obtained, satisfaction at law, shall not be suffered to proceed there." And, again, in the same case, "After a decree for the administration of assets, those who make a demand which they have yet to recover against those assets must come in under that decree." The Court does not, in thus administering the assets, deprive the creditor of any legal right which he has acquired, but it enables him to bring into equity all his legal rights: *Whittaker* v. *Wright* (2). If, therefore, it be the fact, which the plaintiff does not

(1) 19 R. R. 274 (3 Swanst. 544). (2) 62 R. R. 120 (2 Hare, 310).

admit, that the judgment creditor has acquired a right to these goods, under the writ of *fi. fa.*, the effect of the injunction will not be to deprive him of that right, but the Court will give effect to it, under the decree. It was not only the right, but the duty of the executor, to apply to this Court for the protection of the assets, against the proceedings at law: *Clarke* v. *Earl of Ormonde* (1); the case of *Lee* v. *Park* (2) was also cited.

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Mr. Rolt and *Mr. J. H. Taylor*, for Thomas Kirk, the creditor:

The case on which the Court restrains proceedings is where they are brought against the executor. The present proceeding is not against the executor. The goods of the testator were bound at the *teste* of the writ; the creditor then acquired a perfect right to take the goods in execution, and that right is not defeated by the death of the testator: *Bragner* v. *Langmead* (3), *Fann* v. *Atkinson* (4), *Calvert* v. *Tomlin* (5), and the cases cited 1 Wms. Saunders, 219 f, 5th ed. According to the *common law, the goods belonging to the debtor at the date of the writ might have been taken by the sheriff, even in the hands of a subsequent purchaser (6): *Boucher* v. *Wiseman* (7). The stat. 29 Car. II. c. 3, s. 16, was passed to remedy the inconvenience of that rule; and by that statute it is provided, that the writ shall not bind the goods, but from the time of its delivery to the sheriff: this Act has been construed to extend only to protect purchasers (8). This, moreover, is not the case of an ordinary creditor's suit: there is no decree for the benefit of all the creditors. The amount of debts, as in a general administration suit, is under this decree to be taken only in case the estate shall be insufficient to pay the plaintiff his debt; and it is impossible, upon a contingent decree of that nature, to restrain the proceedings at law, which may be the only proceedings of which the creditor can have any benefit.

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THE VICE-CHANCELLOR: *July* 18.

The state of the case appears to be this: At the death of the testator, Kirk, the creditor, had an option to sue out a *scire facias* against the executor, or (passing by the executor altogether, and by

(1) 23 R. R. 8—143 (Jac. 108).
(2) 44 R. R. 154 (1 Keen, 714).
(3) 7 T. R. 20.
(4) Willes, Rep. 427.
(5) 5 Bing. 1.
(6) *Anon.*, Cro. Eliz. 174.
(7) Cro. Eliz. 440.
(8) 1 Wms. Saunders, 219 g, 5th ed.

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force of the proceedings had in testator's lifetime) to take in execution Harwood's goods in whosesoever hands they might be,—even in the hands of the executor himself. Kirk has chosen to pursue the latter course; and the question is, what is the position of the executor with respect to the assets? To explain this—let it be supposed that the writ, which issued on the 2nd of April, had been put into the hands of the sheriff in the lifetime of Harwood. In [*221] that case, *the goods would have been bound at, and ever since, the death of the testator. There never could have been an instant of time during which the executor could have dealt with the assets, unless in market overt, (an exception in favour of purchaser only), so as to have prevented Kirk from taking them in execution. If the executor had sold them by private contract, to raise money for any purpose of administration, or had delivered them to a creditor of testator in satisfaction of a debt, Kirk might have followed them. And this Kirk might do, without noticing the executor. It is, therefore, strictly true (whatever the consequences may be), that at the death of the testator, supposing the writ to have been then in the hands of the sheriff, Kirk had a dominion over the goods paramount to that of the executor; or, in other words, the amount of the assets of the testator, over which the executor had dominion adverse to Kirk's right, was the amount of the gross assets, *minus* the amount of Kirk's claim. On this point I may refer to Viner's Abridgment, tit. "Execution;" 1 Saunders, 219, where I believe the whole law on the subject is stated. The circumstance that the writ was not put into the hands of the sheriff until the death of Harwood does not (in point of reasoning) make any difference, because the writ, when put into the hands of the sheriff, took effect as from the *teste* of the writ, and was effectual by means of the proceedings had in the testator's lifetime.

A further observation to be made in considering the case is this: The creditors have no equity independent of the decree. However courts of equity may encourage suits for the general administration of estates, because they produce equality amongst creditors, the equity arises wholly out of the decree. The decree is said to be a judgment for benefit of all the creditors; and the Court stays pro- [*222] ceedings at law only because that decree *cannot be carried out if the creditors are allowed to proceed at law. I should state, however, that I do not regard the above observations as necessarily conclusive upon the question before me. I have no doubt that a creditor, who, at the death of the testator, was in the same position

as Kirk, might, for the purposes of a motion like this, be held to have lost his advantage by delay, in prosecuting his rights at law, and, perhaps, by other circumstances. But the case I have to deal with is one in which the creditor, having by diligence got a judgment against the testator in his lifetime, has actively prosecuted that judgment in a way which gives him the right I have already adverted to. The rights and powers of the executor are, from the beginning, subject to the rights which the diligence of the creditor has thus conferred upon him in the lifetime of the testator; and the assets which the executor has the power to bring for general administration are subject to these rights. In the case of *Lee* v. *Park* (1), Lord LANGDALE appears to have doubted Lord ELDON'S intimation of the law in *Clarke* v. *Lord Ormonde* (2), which, if Lord LANGDALE'S doubt be well founded, is in favour of the creditor here. Some important observations upon that head are to be found in Lord LYNDHURST'S judgment in *Vernon* v. *Thellusson* (3).

I can find no case in which the point has arisen; but I cannot think I ought, in such a case as the present, to deprive a creditor of the benefit the law gives him. Being of this opinion on that point, I shall abstain from saying whether the circumstance that the decree is contingent does not lead necessarily to the same conclusion.

Motion referred, with costs, to be paid by the defendant, the executor, to the judgment creditor and the sheriff; but the costs of the executor, and the costs paid by him, to be costs in the cause. [223]

The motion for the injunction was reheard before the Lord Chancellor, on the 25th of July, 1846, when his Lordship, without expressing any opinion on the question, whether the writ of execution sued out by the creditor gave him a right to the goods paramount to that of the executor (4), refused the motion, upon the form of the decree, which did not give the plaintiff an absolute or unconditional right to go in and prove his debt.

(1) 44 R. R. 154 (1 Keen, 714).
(2) 23 R. R. 8—143 (Jac. 108).
(3) 1 Ph. 466.
(4) On this point see now *Giles* v. *Grover*, 36 R. R. 27 (1 Cl. & Fin. 72).

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Nov. 5.

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(5 Hare, 238—242.)

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A., having a life estate, with remainder over in strict settlement, subject to a mortgage of the settled property for a term of 1,000 years, demised the property for a term of 200 years if he should so long live. A purchaser of the term of 200 years filed his bill to redeem the termor for 1,000 years, who was the first mortgagee of the estate: Held, that A., the owner of the life estate, subject to the term of 200 years, was a necessary party.

By indentures of lease and release, dated the 14th and 15th of May, 1824, being a settlement made upon the marriage of Sir Francis Vincent with Augusta Elizabeth, his wife, certain real estates were conveyed to the Earl of Carnarvon and the Earl of Roslyn, their heirs and assigns, to certain uses therein mentioned, with a proviso, that, notwithstanding any of the said limitations or trusts, it should be lawful for Sir Francis Vincent, from and after the decease of Dame Mary Vincent, (subject to a certain rent-charge), by any deed to be executed as therein mentioned, to charge a competent part of the said settled estates, or the estates hereinafter covenanted to be settled, with any sum, not exceeding 3,000*l.*, for furnishing the mansion-house of Debden Hall, and to raise the same monies by appointing the said hereditaments for any term of years in possession, unto any person or persons willing to make the advance thereof by way of mortgage, subject to redemption upon repayment of the monies to be charged, and interest at 5*l.* per cent. per annum. Dame Mary Vincent died in January, 1826. By indenture, dated the 30th of August, 1826, Sir Francis Vincent, in consideration of 3,000*l.* lent to him by H. H. Frazer, demised the settled estates, under the power in the settlement, to H. H. Frazer, his executors, administrators, and assigns, for the term of 1,000 years, with a proviso for redemption on repayment by Sir Francis Vincent, his heirs, executors, and administrators, or other the person or persons who might be interested in or entitled to the said hereditaments, of the said 3,000*l.* and interest. The mortgage debt to Frazer, and the securities for the same, were, in *August, 1830, transferred to the trustees of the Provident Institution.

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By an indenture, dated the 23rd of March, 1837, Sir Francis Vincent granted and demised the same estates to John Lyde, his executors, &c., for the term of 200 years, if the said Sir Francis Vincent should so long live, subject to the several charges and incumbrances on the life estate of the said Sir Francis Vincent, and subject to the said mortgage for 3,000*l.*, with a proviso for redemption on payment to Lyde of 1,987*l.* and interest on the 23rd

of March, 1838, and a power of sale on default of such payment. Default was made; and in 1843, the power of sale was exercised, and the plaintiff became the purchaser of the premises for the residue of the said term of 200 years.

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The bill stating the foregoing case, was filed in December, 1845, against the defendants, the trustees of the Provident Institution, in whom the mortgage of 3,000*l.* was vested, under the indenture of 30th August, 1836; and it prayed an account of what was due on that mortgage; and that, upon payment by the plaintiff to the defendants of what should be so found due, the defendants might be decreed to assign or convey the mortgaged premises to the plaintiff, or as he should direct, and to deliver to the plaintiff the title-deeds and evidences relating thereto.

The defendant, A. Henderson, one of the trustees of the Provident Institution, by his answer, said, he was advised that Sir Francis Vincent ought to be a party to the suit, and that he had been informed there were several other incumbrances on the said mortgaged premises subsequent to the said mortgage of 3,000*l.*

The cause was set down by the plaintiff under Order XXXIX. of August, 1841, on the objection for want of parties. [240]

Mr. Follett, for the defendant, in support of the objection:

The defendants represent the first mortgagees. Since their mortgage, a term of 200 years has been carved out of the equity of redemption, or out of the life estate of Sir Francis Vincent, which is a part of the equity of redemption; and upon this derivative interest the bill is founded. The plaintiff therefore cannot have a more extensive right than his mortgagor. Now, what are the rights of the mortgagees upon a bill for redemption filed by the mortgagor? Their rights are, to compel the mortgagor to work out the remedy which he has resorted to, and pay off the mortgagees; or, on default, that the bill for redemption shall operate in favour of the mortgagees, and result in a foreclosure. The mortgagees may require that the suit shall be framed so as to have this effect, whether it be filed by the mortgagor himself, or persons claiming partial interest in the property as second mortgagees. But the suit cannot have this effect unless it is so framed, that all persons interested in the equity of redemption may be bound by the foreclosure, which may be the effect of default of payment. As the suit is now framed, Sir Francis Vincent would not be bound by the

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result of this suit: *Farmer* v. *Curtis* (1), *Anderson* v. *Stather* (2). The other incumbrancers referred to, both in the bill and answer, as having charges on the mortgaged premises, or on the life estate of Sir Francis Vincent therein, are also necessary parties on the same grounds, all of them having interests carved out of the equity of redemption.

[241]

Mr. Southgate, for the plaintiff:

The objection must be confined to Sir Francis Vincent alone: the suggestion in the answer with regard to the other incumbrancers is not so made, as to entitle the defendants to call upon the Court in this stage of the cause for a decision of that question. With regard to Sir Francis Vincent, the objection assumes that a second mortgagee is not entitled to pay off or redeem a first mortgagee, without the concurrence of the mortgagor. This is contrary to the authorities: *Smith* v. *Green* (3).

Mr. Follett, in reply, submitted, that if the facts upon which an objection for want of parties arose appeared upon the pleadings, the suggestion that there were necessary parties absent, was sufficiently made by the answer, to enable the Court to determine the question upon this argument.

THE VICE-CHANCELLOR:

The only objection which I have now to consider is, the objection that Sir Francis Vincent ought to be a party. A mere statement of facts, from which it might appear that other persons are necessary parties, without pointing out the parties required, is not such a suggestion of a defect of parties as amounts to an objection within the meaning of the 39th Order.

Under a power created in the settlement of the estate, it appears that Sir Francis Vincent was enabled to charge the estate with

[*242]

3,000*l.*, in priority to all other charges *except one. The power was accordingly exercised. The equity of redemption, as I understand it, was vested in Sir Francis Vincent for life, with remainders over in strict settlement. Sir Francis Vincent then creates a term of 200 years by way of mortgage on his life estate, and gives the mortgagee a power of sale: that power of sale has been exercised. The interest of Sir Francis Vincent in such a case may be very

(1) 29 R. R. 140 (2 Sim. 466).
(2) 2 Coll. 209.
(3) 66 R. R. 180 (1 Coll. 555).

small; but it cannot, I think, be disregarded. In strictness, he is a necessary party. In principle, there is no difference between two hundred years and twenty years. HUNTER v. MACKLEW.

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Objection allowed, with costs.

GREEN *v.* PERTWEE (1).

1846. *July* 2, 6.

WIGRAM, V.-C.

(5 Hare, 249—252; S. C. nom. *Greer* v. *Pertwee*, 15 L. J. Ch. 372; 10 Jur. 538.)

[249]

A bequest of residue beyond a specified sum which is disposed of by the will does not carry lapsed shares of that specified sum.

THE testator in the cause, by his will, dated in 1839, devised his real estate to the executors and trustees of his will, upon trust for sale, and directed that the net monies to arise from such sale or sales, (after deducting the expenses attending the same), together with the rents and profits of the premises until the sale, should become and be taken and deemed to be part of his personal estate, and be applied as thereinafter mentioned; and bequeathed the whole of his personal estate to his executors therein named, upon trust to call in and convert the same into money, and stand possessed of the whole of such personal estate when converted, and of the net proceeds of the said real estate, and the rents and profits, after and subject to the payment of all his debts, funeral and testamentary expenses, the legacies given by his will, and which he might thereafter give by any codicil, the charges of proving his will, and all charges incident to the executorship thereof, upon trust, in the first place, to divide the same into ten equal parts or shares, and to stand possessed of the said parts or shares, upon trust for the several persons therein named. And the testator declared his will to be, that, in case the net residue of his property, after paying all his debts, legacies, and testamentary and other charges and expenses, should be found to exceed the sum of 10,000*l.*, then the sum of 10,000*l.* only thereof should be applicable to the trusts thereinbefore declared, and that each share should be satisfied by the payment of 1,000*l.* And in that case the testator bequeathed all the residue of his said property *beyond the said [*250] sum of 10,000*l.* unto, and to be equally divided between and amongst, all and every his nephews and nieces who should live to attain the age of twenty-one years, share and share alike.

(1) *In re Parker* [1901] 1 Ch. 408, 70 L. J. Ch. 170, 84 L. T. 116.

GREEN v. PERTWEE.

The residue of the real and personal estate of the testator, after payment of his debts, legacies, and the other expenses, exceeded the sum of 10,000*l.* One of the shares of 1,000*l.* lapsed by the death of a legatee of one of the ten shares in the lifetime of the testator.

The question was, whether the lapsed share of 1,000*l.* belonged to the nephews and nieces in their character of residuary legatees, or whether it was undisposed of, and belonged to the next of kin. The question was raised upon demurrer to the bill of the nephews and nieces of the testator.

Mr. Romilly and *Mr. Hallett*, for the testator's nephews and nieces, [cited *Easum* v. *Appleford* (1) and other cases].

Mr. Anderdon, *Mr. Wood*, *Mr. Bacon*, and *Mr. Walpole*, for the heir-at-law of the testator, who was one of his next of kin, and also for the other next of kin:

The gift to the nephews and nieces is a gift only of the excess of
[*251] the residue, beyond the 10,000*l.* No part of the 10,000*l.* *is given to them. A part of that sum, having lapsed, creates to that extent an intestacy. The lapsed sum of 1,000*l.* is a part of the residue apportioned by the testator amongst several legatees, and in such a case, where the gift of a portion of the residue fails, the portion so given does not pass to the other residuary legatees, but is treated as undisposed of: *Attorney-General* v. *Johnstone* (2), *Lloyd* v. *Lloyd* (3), *Skrymsher* v. *Northcote* (4). * * *

July 6. THE VICE-CHANCELLOR, after stating the words of the will:

The share in the sum of 10,000*l.*, which has become lapsed by the death of the legatee in the life-time of the testator, will be undisposed of, unless it passes under the residuary clause of the will; and the question is—whether the word "residue," as used in the latter part of the second clause, must be understood as describing the general residue of the testator's estate, or only the excess of the estate over the sum of 10,000*l.* The word "residue," in its large and general sense, comprehends whatever in the events which happen turns out to be undisposed of; but if it appears that the word "residue" is used in a more restricted sense, in that
[*252] *restricted sense the Court is bound to construe it. Now, if in

(1) 51 R. R. 238 (5 My. & Cr. 56).
(2) Ambl. 577.
(3) 55 R. R. 59 (4 Beav. 231).
(4) 18 R. R. 142 (1 Swanst. 566).

this case the question depended upon this, whether the testator intended his nephews and nieces to take his personal estate, except such parts as he had effectually disposed of by his will, the answer to that question must be in the negative. If the trust estate, after paying the debts and legacies, had been one shilling less than 10,000*l.*, the nephews and nieces would have taken nothing, although the legatees had all died in the lifetime of the testator. And if that be admitted, it is difficult to believe that the testator could have intended by the second clause not merely that the nephews and nieces should take any excess, but that, with the excess, they should take also what was not given them unless that excess existed.

It is not however by speculation that the case must be decided. The word "residue," as used in the beginning of the will, clearly means general residue. Of that there can be no doubt. When therefore the testator, in the concluding part of the clause, gives 10,000*l.* out of that residue to the ten legatees, and declares that the residue shall go to his nephews and nieces, it is of necessity that the word "residue" in that place means not the general residue in its extended sense, but the excess of the general residue over and above the 10,000*l.* and nothing more. This construction is supported, I think, by the cases of *Skrymsher* v. *Northcote* (1), *Lloyd* v. *Lloyd* (2), *Page* v. *Leapingwell* (3), and the other cases cited.

Let the costs be paid out of the general estate of the testator; for a different construction might have been put upon the will without violence to the language.

THE GOVERNORS OF CHRIST'S HOSPITAL *v.* ATTORNEY-GENERAL.

1846. *May* 2.

WIGRAM, V.-C.

(5 Hare, 257—258.)

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The proper form of suit to administer the funds of a charity is the information of the *Attorney-General;* but the trustees may file a bill against the *Attorney-General* to have the accounts of the charity taken, and to be personally discharged from liability in respect thereof, submitting to such account as the *Attorney-General* would be entitled to ask against them in an information; and in the same suit, if the *Attorney-General* desires it, the Court will direct a reference for a scheme.

THE plaintiffs were the trustees of funds which had been bequeathed to them from time to time for the liberation of

(1) 18 R. R. 142 (1 Swanst. 566).
(2) 55 R. R. 59 (4 Beav. 231).
(3) 11 R. R. 234 (18 Ves. 463).

THE GOVERNORS OF CHRIST'S HOSPITAL v. A.-G.

prisoners, for debts under 40*s*. The operation of the recent statutes relating to imprisonment for debt having deprived the charity of its objects, the plaintiffs filed their bill to obtain the direction of the Court for the future administration of the trust funds, making the *Attorney-General* the defendant.

Mr. White, for the bill.

Mr. Wray, for the *Attorney-General*, said that the course taken by the plaintiffs was novel. The proper course would have been for the trustees to have brought the case before the *Attorney-General*, that the suit might have been framed in the common way, by information,—the *Attorney-General* being informant, and the trustees, who were the accounting parties, the defendants.

THE VICE-CHANCELLOR:

The proper and formal shape of a suit for determining the mode in which the funds belonging to a charity should be administered is by the information of the *Attorney-General*. I do not, however, see why the trustees of property applicable to charitable purposes may not, like any other trustees, come to this Court to have the accounts of the trusts taken, and to be discharged from personal liability. But the trustees, although they are plaintiffs, must in [*258] such a case *submit to account in the same manner, and to the same extent, as the *Attorney-General* might have required if they had been defendants. I will refer it to the Master to settle a scheme for the future disposition of the funds of the charity, if the counsel for the *Attorney-General* asks for that direction, or does not object to its being made in this suit.

1846.
Feb. 19, 25.
March 25.

WIGRAM, V.-C.

[258]

HARBIDGE *v.* WOGAN (1).

(5 Hare, 258—271; S. C. 15 L. J. Ch. 281; 10 Jur. 703.)

In a marriage settlement the property of the wife was conveyed and assigned in trust for the wife for life for her separate use, remainder to the husband for his life, remainder to the children of the marriage, and in default of issue of the marriage, to the brother of the wife and his children. After the marriage the husband and wife filed their bill, charging that the brother, who was one of the trustees of the settlement, in concert with the solicitor's clerk, who took the instructions for, and attended the execution of the settlement, had fraudulently omitted or erased from the deed a general power of appointment by the wife, in default of issue of the marriage, and praying that the

(1) *Welman* v. *Welman* (1880) 15 Ch. D. 570, 49 L. J. Ch. 736, 43 L. T. 145.

settlement might be rectified by inserting such a power. The wife did not prove the instructions for the insertion of such a power, nor the fraud in omitting or erasing it, but it appeared by the evidence that the power had been introduced in the draft settlement prepared by counsel, and also in the engrossment; and the answer of the brother stated, that, the power having been noticed by him when the engrossment was read over to him, he objected to it, as not being according to his understanding of the intentions of the wife, when the solicitor's clerk admitted it was not, and struck it out. The Court held, that it was the duty of the brother, as one of the trustees, not to have permitted the power to be struck out without the express directions of the intended wife on that point; and that relief might be given in the suit, subject to the question whether the wife knew, when she executed the settlement, that it did not contain the power.

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By an indenture of settlement, dated the 7th of July, 1841, between the plaintiff Letitia Harbidge (then Letitia Wogan) of the first part, the plaintiff William Harbidge of the second part, the defendant William Wogan and T. E. Lander of the third part, and the defendants William Wogan and J. Fletcher of the fourth part, reciting that the plaintiff Letitia was seised in fee-simple of certain freehold property at Shiffnal, in the county of Salop, and was entitled to a sum of 1,100*l.*, invested on a mortgage security; and that a marriage had been agreed upon between the plaintiffs; and that, upon the treaty for such intended marriage, it was agreed between the parties that the said freehold property, and the said sum of 1,100*l.*, should be conveyed *and assigned to the defendants [*259] William Wogan and J. Fletcher, their heirs, executors, &c., upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, declarations, and agreements thereinafter expressed and declared; the plaintiff Letitia granted and released, and assigned and transferred, unto the defendants William Wogan and J. Fletcher, their heirs, executors, &c., the said freehold hereditaments, and the said sum of 1,100*l.*, and the interest to become due thereon in trust for the plaintiff Letitia and her assigns, until the marriage; and after the solemnization thereof, upon trust for the separate use of the plaintiff Letitia, independent of the plaintiff William Harbidge, or any future husband, but without any restraint upon anticipation; and from and after the decease of the plaintiff Letitia, upon trust for the plaintiff William Harbidge and his assigns for his life, and immediately after the decease of the survivor of the said plaintiffs, then upon trust for the children of the marriage, as therein mentioned; and if none of such children should attain vested interests as therein mentioned, then upon trust for the defendant William Wogan and his assigns for his life, remainder in trust for his children as tenants

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in common; and in case none of such children should attain vested interests as therein mentioned, then in trust for the defendant William Wogan, his heirs, executors, and administrators for ever. And the indenture contained provisions for the maintenance and advancement of the children of the marriage, for the sale of the trust premises by the trustees, with the consent of the plaintiffs, or of the survivor of them, for the investment of the trust monies, and change of the securities at the discretion of the trustees, upon the request of the plaintiffs, or the survivor of them, and for the appointment of new trustees: it also contained provisions that the [*260] receipts of the trustees should be good discharges *for the trust funds, and for the indemnity of the trustees.

The marriage of the said plaintiffs took place soon after the date of the settlement.

The bill was filed in March, 1842, by Letitia Harbidge (by her next friend), and William Harbidge, against the defendant William Wogan, and J. Fletcher, the trustees of the settlement; the children of William Wogan, the parties to whom the property was limited in remainder; and John Bulger, who, as the clerk of Mr. Robinson, a solicitor at Wellington, managed the business of the latter at Shiffnal, and had been employed in the preparation of the deed of settlement. The bill alleged, that, upon the treaty for the marriage, it had been expressly stipulated and agreed by and between the plaintiffs, that the property of the plaintiff Letitia should be settled upon and for the benefit of the plaintiffs and the children of the marriage, if any; and, in default of any children who should attain vested interests, that the plaintiff Letitia should have a general absolute power of appointment and disposition of the said property by deed or will, subject to the interests to be limited to the plaintiffs and the children of the marriage, and, in default of such appointment, for the benefit of the defendant William Wogan and his children; that the plaintiff instructed Bulger to prepare the settlement, and gave him express instructions to insert in it such power of appointment by her; and such power was accordingly inserted in the draft, and in the original engrossment of the settlement from the draft; but that the power was afterwards struck out of the engrossment by the contrivance and fraud of the defendant William Wogan, and the said John Bulger, without the consent of the plaintiffs. The bill alleged that the settlement was executed [*261] *by the plaintiff Letitia without being read over to her, and without any intimation that the power of appointment had been struck out

or omitted; and that it was not until some time after the marriage, when they applied to Bulger for and obtained a copy of the settlement, that they became aware that it did not contain such power of appointment.

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The bill prayed that the erasure or omission of the power of appointment by the plaintiff Letitia from the settlement might be declared fraudulent as against the plaintiffs; and that it might be declared that the plaintiff Letitia is entitled (subject to the trusts in favour of the plaintiffs and their children) to appoint and dispose of the property and funds comprised in the settlement as she might think proper, in priority to the trusts in favour of the defendant William Wogan and his children; and that, if necessary or proper, a new deed of settlement might be decreed to be executed by all proper parties for effecting the purposes aforesaid; that a new trustee might be appointed instead of the defendant William Wogan; for a receiver; and that the defendants William Wogan and John Bulger might be decreed to pay the costs of the suit.

The defendant William Wogan, by his answer, said that the plaintiff Letitia was his sister, and they had no other near relation except their mother; and that the plaintiff, before her marriage, had, of her own accord, stated to the defendant her intention to settle her property upon the defendant and his children after the death of herself and her then intended husband; and that she did not express any intention of reserving to herself a general power of disposition; that the plaintiff William Harbidge was a farmer's bailiff, in indigent circumstances, and the defendant was very averse to the *marriage, and feared that the plaintiff would dissipate [*262] his wife's property if he could influence her to give him power over it. The answer stated, that, having reluctantly consented to be a trustee of the settlement, he called on John Bulger, at his request, at the office of Mr. Robinson, in Shiffnal, in July, 1841, to execute the deed; that Bulger then read over the engrossment, and the defendant, perceiving that it contained a general and absolute power to the plaintiff Letitia of appointment and disposition over the property, subject to the life interests of herself and her intended husband, and the interests of her children if she should have any, told Bulger that the settlement in that respect was not according to the statement which had been before made to him of its intended contents, and that he (the defendant) considered the settlement would in that shape be useless, as it would be no security to his sister against the solicitations of her intended husband; that

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Bulger immediately said it was true that the settlement with respect to the said power was not according to the instructions which he had received, and that the power had been introduced by a mistake of Mr. Robinson; and Bulger thereupon, immediately and of his own accord, and not at the instance in any way of the defendant, struck out with his pen the power from the engrossment, stating to the defendant that he would explain the obliteration to the plaintiffs, and that he was certain it would be agreeable and satisfactory to them. The defendant said, that he desired Bulger to be very particular in explaining to both the plaintiffs the effect of the alteration previous to their execution of the settlement, which he promised; and the defendant thereupon, in the full conviction that the settlement, as altered, was in full accordance with the intentions of the plaintiffs, executed the same, and accompanied Bulger to the house of his mother, where the plaintiff Letitia [*263] *then resided, and where she then (though not in the defendant's presence) executed the deed. The defendant denied that it was ever stipulated or agreed by the plaintiffs, that the plaintiff Letitia should have such power of appointment as the bill alleged; and he denied that the plaintiffs had executed the same without having received any intimation that the power of appointment was struck out, but, on the contrary, the defendant said he believed they executed the same with full knowledge that it contained no such power; and he wholly denied the fraud imputed to him by the bill.

The defendant Fletcher, the other trustee, had no personal knowledge on the subject, and submitted to act as the Court should direct. The children of the defendant Wogan were infants, and submitted their rights and interests to the protection of the Court. The defendant Bulger died after the suit was instituted, and before he had put in any answer to the bill.

The plaintiffs went into evidence in support of the bill. Ann Franks, who had been a servant of the plaintiff Letitia's mother for several years before and at the time of the marriage, deposed, that she had frequently heard the plaintiffs, before their marriage, talking of having the property settled; and that she heard the plaintiff Letitia say she should wish to have the deed made so that she should have the property for her life, and that then it should go to her husband for his life, and that, after that, she should have a power of willing it away to whom she pleased, as she might wish to leave it to her brother and his children; that she heard the plaintiff express herself to the same effect to Bulger, in a

conversation respecting the settlement before the marriage; that the plaintiff was then nearly fifty years of age; that the witness heard what passed on the execution *of the deed by the plaintiff Letitia, and that no explanation of the deed was then given by Bulger, but that he only pointed out where the plaintiff was to sign her name. [*264]

Mr. Robinson was examined on the part of the defendant William Wogan, and deposed that Bulger had been the managing clerk of his business at Shiffnal; that Bulger had prepared a draft of the marriage settlement of the plaintiffs, and delivered it to him (Mr. Robinson), and requested him to draw another draft therefrom, treating the first draft as instructions; that such draft was the only information he (Mr. Robinson) received of the intentions of the plaintiffs; that the draft he so received from Bulger did not contain the power of disposition by the plaintiff Letitia, subject to the interest of the husband and wife, and children of the marriage; that he did not settle the draft he so received, but sent instructions to counsel to prepare another draft, and in such instructions directed that the draft should contain a power to enable the plaintiff Letitia to dispose of the trust property to any person she pleased; that he had no authority for so doing, and was not instructed by the plaintiffs or Bulger, or any other person, to have such power inserted; but he directed the same to be inserted of his own accord, fancying it might be an oversight on the part of Bulger, and finding several other usual clauses were omitted, which he thought ought to have been inserted; that he referred, in giving such instructions, only to the possibility of the plaintiff marrying again, and to enable her to provide for a second family; that the draft was prepared by counsel from such instructions, and that the settlement was engrossed from the draft so prepared by counsel; that Bulger afterwards told the witness that the power of appointment ought not to have been inserted in the instructions, as *the plaintiff Letitia was an elderly person, and there was no necessity for the precaution; and the witness thereupon directed Bulger to strike it out of the draft, when the same was returned from counsel. Several other witnesses also deposed to language and declarations by the plaintiff Letitia, to the effect that the settlement was framed in conformity with her desire and instructions. [*265]

Mr. Romilly and *Mr. Rogers*, for the plaintiffs:

The evidence, if it does not establish a case of fraud against the

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defendant Wogan, and the deceased defendant Bulger, at least establishes the fact that the settlement has not been framed in accordance with the intentions of the plaintiffs, or with the instructions which were given for its preparation. This is sufficient to entitle the plaintiffs to the relief which is prayed by the suit, so far as it extends to the rectification of the settlement, by the introduction of the power of appointment. They cited *Beaumont* v. *Bramley* (1), *The Duke of Bedford* v. *The Marquis of Abercorn* (2), and *The Marquis of Breadalbane* v. *The Marquis of Chandos* (3). It must not be forgotten that, by the death of Bulger, the plaintiffs had lost the benefit of discovery from him.

Mr. Tinney and *Mr. G. L. Russell*, for the defendant William Wogan and his children:

The case made by the bill is not a case of mistake, but of fraud. If the plaintiffs fail in establishing the fraud, they fail in the suit. Even supposing that the suit had been framed for relief on the ground of mistake, it must still fail; for, so far from any mistake [*266] having been proved, the *best evidence of which such a case admitted had been given, that the settlement, as it stood, was in perfect conformity with the intentions of the plaintiff Mrs. Harbidge, as those intentions had been always expressed before the marriage.

Mr. Kenyon Parker, *Mr. Faber*, and *Mr. Rudall*, for the other defendants.

Feb. 25.

THE VICE-CHANCELLOR:

At the time of the marriage of the plaintiff William Harbidge with the other plaintiff, Letitia his wife, Letitia was entitled to personal property amounting to about 1,000*l.*, and to a small freehold estate; and, upon the occasion of the marriage, it was agreed that the property of Letitia should be the subject of settlement; and a settlement was accordingly made. By the terms of this settlement the property stands limited to the separate use of Letitia for life, with remainder to her husband for life, with remainder to the children of the marriage; and, in default of children, the property stands limited to the defendant William Wogan (the brother of Letitia, and one of the trustees of the settlement) for his life, with remainder to his children. The settlement contains

(1) T. & R. 41. See 46 R. R. 187, *n.*
(2) 43 R. R. 200 (1 My. & Cr. 312).
(3) 45 R. R. 172 (2 My. & Cr. 711).

no limitation or power enabling Mrs. Harbidge, in the event of there being no children of the marriage, to dispose of the property, so as to defeat the ultimate limitation to William Wogan and his children. There are at present no children of the marriage; but according to the terms of the settlement, subject to the interests of any children who may be born, the property will vest absolutely in William Wogan and his children. The bill insists that the settlement ought to have contained a power enabling Mrs. Harbidge to dispose of the property in the event of there being no children of the *marriage; and it insists that the settlement, as engrossed, did [*267] contain such a power, but that it was afterwards struck out by a fraudulent contrivance to which William Wogan was a party; and the suit, in fact, seeks to have it declared that William Wogan and his children are to be treated as trustees for Mrs. Harbidge, so far as to give her a power over the property; or, in other words, to have that power inserted in the settlement.

I was of opinion, and stated at the hearing of the cause, that there did not appear to me anything in the mere terms of the settlement itself, in the absence of fraud, which could enable the Court to give the relief prayed; although it might be unreasonable, as well as unusual, that the power should be omitted. I was also of opinion, that, on the ground of mistake merely, the Court could not give the relief. The answer states that the power, after having been deliberately inserted in the settlement, has been struck out; and the case, therefore, if it rests upon anything, can only rest upon fraud. But, though the terms of the settlement, standing alone, would not be ground for impeaching the form of the settlement as it stands, it is impossible to deny that these terms may be a material circumstance to be considered, taken in connection with the other circumstances of the case.

Now, in order to try this case, I will suppose what I believe to be according to the fact, that the instructions given by Mrs. Harbidge to Bulger were in substance the same as those expressed in the articles as they now stand: that is, to settle the property upon herself for her separate use for life, with remainder to her husband for life, with remainder to her children, and, if no children, then to William Wogan for life, with remainder to his children. The first question in that case would be, *whether, if these instructions [*268] had been laid before a conveyancer of competent skill, they are such as he would have strictly acted upon, without further question or observation. In my opinion, which is confirmed by inquiries

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which I have made of persons of very great experience, a conveyancing counsel would have prepared the settlement, and have given the lady a power over the property, subject to the interest of her children, if any, or at least he would not have prepared the settlement without either inserting, or noticing the propriety of inserting, such a power; and the Court, if called upon to execute such articles, by directing a settlement in conformity therewith, would, in the first instance, have directed such a power to be inserted, or would have put it to Mrs. Harbidge expressly to determine whether she desired that power to be excluded.

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The next consideration is, the way in which this case was actually dealt with by those who framed the settlement, and by the parties to it. Bulger, who was not himself a solicitor, received, as the clerk of Mr. Robinson, the instructions from the plaintiff Letitia, and prepared a draft settlement literally in accordance with these instructions, not containing the power in question, and forwarded to his principal the draft he had so prepared. Mr. Robinson did not himself prepare the draft settlement; but, converting the information he had received from Bulger into instructions, he forwarded such instructions to his counsel at Shrewsbury, and in those instructions he inserted the very power which the plaintiffs say ought to have been inserted in the settlement: at the same time he noted in the margin of the instructions, that he had inserted the power with reference to the possibility of the lady marrying a second time, and having children of a second marriage.

[*269] In that point of view the instructions were not, perhaps, well *considered; for, if there had been one child of that marriage, that child would have taken to the exclusion of any children by a second marriage. However, these instructions, with whatever view prepared, went before counsel, who prepared the draft accordingly, and inserted in the draft the power which the plaintiffs say ought to be contained in the settlement. In the interval between the time that Mr. Robinson sent his instructions to counsel, and the time the draft was returned, an interview took place, according to Mr. Robinson's evidence, between him and Bulger, when Bulger told him that no such power ought to be inserted in the settlement, that Mrs. Harbidge was fifty years old, and, there being no prospect of children of the intended marriage, the property was to be settled absolutely upon William Wogan and his children. Upon Mr. Robinson receiving this information, he told Bulger, if that were the case, he had better strike the power out of the draft.

Upon the return of the draft from counsel, it is received by Bulger, who forthwith causes it to be engrossed, but without striking out the power. On the 6th of July, 1841, William Wogan, being then on a visit to Mrs. Harbidge, goes to Shiffnal, where Bulger lived, and waits upon him for the purpose of executing the settlement. Bulger then reads over the settlement to William Wogan, who immediately takes notice of the existence of this power. I have looked through William Wogan's answer; I cannot see that it is alleged that Mrs. Harbidge ever told him that she meant to settle her property upon him absolutely, and in a manner which would leave her no control over it. I cannot, from anything that is there stated by him, make out that she ever affirmatively said, "deprive me of the power of dealing with this property." She is merely made to say, "I don't wish to have any more trouble about the property." And the statement is, that, upon the power being *noticed by William Wogan, Bulger said that it was not intended [*270] to have such a power introduced, and immediately struck it out of the settlement; and in this state the settlement was executed by the defendant Wogan, by Fletcher the other trustee, and by the husband and wife.

With regard to the husband there is evidence, which I should not be dissatisfied with, that he read the settlement, and must have known that the clause in question was struck out, and that he deliberately executed it with the knowledge of that fact. The husband has no legal interest in the insertion of the power; and he is not a plaintiff in this Court in respect of the power, but only upon the ground that a fraud has been committed, and so far as the bill seeks to have new trustees appointed. I cannot, however, find any satisfactory evidence that the attention of Mrs. Harbidge was ever called to the fact that this settlement did not contain the power in question, or that she intended it should not be included. If instructions, in exact accordance with the instructions said to have been given by her, had been sent to counsel, such instructions would have led to the insertion of the power in the settlement, or to her attention being called to the question, whether she intended that it should be excluded. In this state of things, I think that the defendant William Wogan is in a position which prevents him from saying that Mrs. Harbidge is bound by that which has taken place. I think his position, as one who had accepted the office of trustee, made it his duty to say to Bulger, "the power must not be struck out until the directions of my sister can be taken with

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respect to it." The question to be tried is, whether Mrs. Harbidge, before the execution of the settlement, knew that the settlement did not contain the power. I should wish the parties to *consider whether, in the circumstances of the case, the question can be more conveniently tried by a reference or an issue.

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March 25.

The defendants, William Wogan and his children, moved that they might, by their counsel, be allowed to re-argue the case, on the point whether the Court would direct any issue or inquiry, upon the ground that under the actual circumstances it was the duty of the defendant William Wogan, as intended trustee, not to let the settlement in question be executed by the plaintiff Letitia, as altered, without previous notice being given to her of the fact of the alteration; or otherwise, that, upon the hearing of the motion, the terms of the issue or inquiry, to be directed by the decree, might be settled.

The VICE-CHANCELLOR directed an issue, whether the plaintiff Letitia, when she executed the settlement made before her marriage with William Harbidge, knew that such settlement did not contain a power enabling her to dispose of the property therein comprised, after and in the event of the decease of herself and her then intended husband, and failure of issue of the then intended marriage? The defendant William Wogan to be plaintiff at law, and the next friend of the plaintiff Letitia to be defendant at law. Liberty for the plaintiff at law to examine Harbidge and wife, and for the defendant at law to examine Wogan, if they respectively should so think fit.

ALLEN *v.* KNIGHT (1).

1846. *May* 6, 7, 22, 23, 25, 27.

WIGRAM, V.-C.

Affirmed on Appeal. 1847. *June* 4, 9.

Lord COTTENHAM, L.C.

[272]

(5 Hare, 272—281; affd. 16 L. J. Ch. 370—371; 11 Jur. 527.)

Four trustees sell out stock, under an agreement that the proceeds shall be lent to two of them, upon equitable mortgage, by deposit of the documents of title of a copyhold estate which belonged to the two trustees in undivided moieties. The money was lent, and the documents deposited; but afterwards, by some unexplained means, they came into the hands of one of the two trustees who had borrowed the fund, and that trustee made a second equitable mortgage on his own moiety of the estate, by depositing the documents with a third person, who took them without notice of the first mortgage; that trustee afterwards became bankrupt, and the second equitable mortgagee purchased and obtained from the assignees of the bankrupt a surrender, and was admitted tenant of the bankrupt's undivided

(1) *Northern Counties, &c.* v. *Whipp* (1884) 26 Ch. 482, 53 L. J. Ch. 629, 51 L. T. 806; *Taylor* v. *London and County Banking Co.* [1901] 2 Ch. 231, 70 L. J. Ch. 477, 84 L. L. 397, C. A.

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moiety, having, at the time of such purchase of the legal estate, received constructive notice of the first mortgage.

In a suit by one of the trustees (the lender of the trust fund, the other having become bankrupt) for foreclosure: Held, that the second equitable mortgagee, who had taken the legal estate with notice of the obligations of the mortgagor to third parties, could only hold that estate subject to such obligations, notwithstanding that he had originally taken his mortgage security without notice.

That, in the absence of any suggestion of a specific case, as against the plaintiff, charging him with acts whereby the mortgagor was enabled to commit the fraud, the mere fact of the possession of the title deeds by the mortgagor was not sufficient to postpone the claim of the first mortgagee.

That the fact of the loan of the proceeds of the stock having been a breach of trust, did not affect the question as between the first and second mortgagees.

That the cestui que trusts of the stock, not having been parties to or adopted the mortgage, were not necessary parties to the suit for foreclosure.

THE plaintiff, William Woodgate Allen, and the defendants, George Knight, Lewis Allen, and Charles Allen, were in October, 1836, trustees under the will of one Samuel Harris, for the benefit of the family of the testator, of a sum of 1,050*l.* New 3½*l.* per Cents., which stood in their joint names as such trustees. George Knight and Charles Allen procured the stock to be lent to them upon the security of the title deeds or documents of title of a copyhold estate at Twickenham, of which they were tenants in common, accompanied by articles of agreement, dated the 24th of October, 1836, between George Knight and Charles Allen, of the one part, and the plaintiff and Lewis Allen, of the other part, whereby George Knight and Charles Allen agreed to re-transfer the stock, when the same should become payable under the trusts of the will, and that the documents of title of the said copyhold estate should be deposited with Lewis Allen and the plaintiff, and remain a security for the same and for the indemnity of the parties.

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The deposit appeared to have been placed in the hands of Lewis Allen; but, by some means which were not explained, the title deeds came into the hands of Charles Allen; and Charles Allen, on the 5th of May, 1838, deposited the same deeds with Margaret Jellas and Charles Faircloth, in substitution for a previous security for two sums of 300*l.*, owing to them by Charles Allen, and by way of equitable mortgage of his undivided moiety of the estate. The second charge was taken by the second mortgagees without notice of the first. In June, 1838, Charles Allen became bankrupt, Lewis Allen also became bankrupt. The interests of the second mortgagees, Jellas and Faircloth, became vested in the defendants David and Elizabeth Smith.

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The defendants David and Elizabeth Smith purchased from the assignees of Charles Allen the equity of redemption of his undivided moiety in the estate, and in that transaction they had, through their solicitor, constructive, if not actual notice, of the first mortgage or charge of October, 1836, to the plaintiff and Lewis Allen. On the 12th of August, 1844, the equity of redemption of the moiety of Charles Allen was conveyed and released by his assignees to the defendants David and Elizabeth Smith; and on the 5th of November, 1844, the moiety of the tenements was surrendered, and the defendants David and Elizabeth Smith were admitted tenants of the manor in respect of such undivided moiety.

The bill, which was filed against George Knight, Lewis Allen, and David and Elizabeth Smith, prayed that the sum necessary to replace the trust fund, might be declared to be a charge on both moieties of the estate, and that the defendants might be decreed to execute to the plaintiff a legal mortgage for the same. Charles
[*274] Allen *died before the institution of the suit. The cestui que trusts of the stock were made defendants.

The answer of the defendants David and Elizabeth Smith insisted upon their title to priority as mortgagees of their undivided moiety, on the ground that the fraud upon them could not have been effected but from the negligence of the plaintiff in permitting the title deeds to come into the hands of Charles Allen; and they submitted that such negligence was a sufficient reason for postponing the plaintiff's charge, as to that moiety, to that of the defendants.

Mr. Wood and *Mr. Rolt*, for the plaintiff; and *Mr. Roundell Palmer*, for the defendant George Knight, who was interested in supporting the case of the plaintiff against the defendants David and Elizabeth Smith, inasmuch as the effect of giving priority to the latter mortgage would be to throw the plaintiff's charge entirely, or for the greater part, upon the moiety belonging to George Knight:

The defendants the Smiths have, by their acquisition of the legal estate in the moiety of the copyhold premises, comprised in the mortgage to the plaintiff and Lewis Allen, deprived themselves of any right which they may previously have had to hold the title deeds, as purchasers or mortgagees, without notice of the prior equitable mortgage. The defendants' security has now become merged in or united with the equity of redemption; and whatever the anterior priorities may have been, the charge which the plaintiff

now seeks to enforce is the first incumbrance: *Toulmin* v. *Steere* (1), *Parry* v. *Wright* (2), *Brown* v. *Stead* (3), *Smith* v. *Phillips* (4). The defendants are now in the same position as the mortgagor whose estate they have purchased: *Saunders* v. *Dehew* (5), *Beckett* v. *Cordley* (6). They cannot exclude any incumbrance of which they have notice at the time they took the legal estate in the mortgaged property: *Greswold* v. *Marsham* (7). The defendants might have been deceived or defrauded by Charles Allen, when he induced them to accept the equitable mortgage of his interest in the property, concealing from them the existence of the prior charge; but that is not attributable to any act of the plaintiff. No personal negligence or misconduct is imputed to the plaintiff; and his security, therefore, cannot be affected by the deception which may have been practised upon the defendants. The circumstance that the title deeds were not in his possession, and that they came into the possession of Charles Allen, is not an answer to the plaintiff's claim, he being only one of two mortgagees in trust for others, and therefore not entitled to the sole possession of the documents: *Evans* v. *Bicknell* (8), *Farrow* v. *Rees* (9).

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Mr. Romilly and *Mr. Fisher*, for the defendants David and Elizabeth Smith:

The case of *Toulmin* v. *Steere* and the other cases of that class have no application to this case. This is not a case in which the charge has become merged in the legal estate: the Court does not treat the union of interests in the same party as a merger, unless it is intended to have that effect, or it is beneficial to the party *that it should be so treated: *Forbes* v. *Moffatt* (10), *Lord Selsey* v. *Lord Lake* (11), *Lord Compton* v. *Oxendon* (12). * * The negligence of the mortgagees, who took the first charge in point of date, enabled the mortgagor to deceive the defendants, by pretending to be the owner of the moiety of the estate free from incumbrance; and there is a long series of authorities which establish the proposition, that, when a party has been drawn in to purchase an estate, or take a security, which is the same thing, by the misconduct or misrepresentation of another, such other party is precluded from

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(1) 17 R. R. 67 (3 Mer. 210).
(2) 24 R. R. 191 (5 Russ. 142).
(3) 35 R. R. 186 (5 Sim. 535).
(4) 44 R. R. 138 (1 Keen, 694).
(5) 2 Vern. 271.
(6) 1 Br. C. C. 353.
(7) 2 Ch. Ca. 170.
(8) 5 R. R. 245 (6 Ves. 173).
(9) 55 R. R. 1 (4 Beav. 18).
(10) 11 R. R. 222 (18 Ves. 384).
(11) 49 R. R. 316 (1 Beav. 146).
(12) 2 R. R. 131 (2 Ves. Jr. 264).

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setting up a prior security or interest of his own. * * If, however, the Court should be of opinion that it is material to ascertain as between the plaintiff and Lewis Allen, his co-trustee [277] —which of them was the party to whose negligence it was owing that the documents constituting their only security were permitted to depart from their possession; that is a question as to which the Court will direct an inquiry.

Mr. Stinton, for Lewis Allen.

Mr. Hallett, for the cestui que trusts under the will of Harris.

THE VICE-CHANCELLOR:

The facts of this case are not in dispute. The original priority of the incumbrances of October, 1836, and May, 1838, was of course according to their several dates; and what the Court has to consider is, whether that priority has been disturbed. At the time when the second mortgage was made, no notice existed of the prior mortgage; but before the purchase was completed, in 1844, the second mortgagees had constructive notice of that prior mortgage.

[278] The first question is, whether the conveyance of the legal estate by means of the surrender, and the admittance thereunder, has altered the relative position of the parties. Charles Allen, at that time, filled different characters. He was trustee, under the will of Harris, of the 1,050*l.* stock,—of the equitable mortgage for securing it,—and of the legal estate by which the equitable mortgage was protected. He was, in addition to his character of mortgagor, bound by express contract with two of the trustees of Harris's will. The question is, could the defendants, the Smiths, either as purchasers for value or as second mortgagees, having notice of Charles Allen's obligations to his cestui que trusts, insist upon holding the legal estate as against those parties, with notice of whose rights that estate was taken? I think they could not; and that they must hold the legal estate precisely as Charles Allen held it; for which the case of *Saunders* v. *Dehew* (1) is an authority, if authority were wanting. My opinion therefore is, that the change of the legal estate made no difference in the position of the parties.

The second question is, whether the circumstance, that Charles Allen was allowed to have possession of the documents, and was thereby enabled to commit the fraud, entitles the defendants, the Smiths, to have their mortgage preferred to that of the plaintiff.

(1) 2 Vern. 271.

It was argued for the Smiths, that the mortgage of October, 1836, was an improper investment of trust monies, and therefore was a breach of trust. This was admitted to have been the case; and it was said that that circumstance was favourable to the claim made on the part of the defendants, the Smiths. I think the breach of trust makes no difference between the two mortgagees. The case must be looked at as if the plaintiff had done that which he *was bound [*279] to do,—as if he had re-couped the trust estate the sum of 1,050*l.* stock, which was improperly lent upon mortgage, and was now seeking his own indemnity, by means of the security upon which the trust fund was so lent. I cannot see how a party claiming as second mortgagee can improve his case by the circumstance, that the first mortgagees, as between them and other persons, had committed a breach of trust. The question, therefore, turns simply upon the possession of the documents of title by Charles Allen, apart from any consideration with reference to the breach of trust. It was said, that these documents had, in fact, been left in the possession of Lewis Allen; that Lewis was the plaintiff's agent; and that Lewis had improperly allowed Charles Allen to have possession of the documents, by means of which the fraud was committed. Without relying upon the term "agent," I am not prepared to deny that the plaintiff might be bound by the acts of Lewis Allen, but there is no evidence as to what those acts were, or by what means Charles Allen obtained possession of the documents; and, in the absence of information upon that point, the case of *Evans* v. *Bicknell* (1) is an authority that the mere possession of the title deeds by the mortgagors is not sufficient by itself to postpone the claims of the first equitable mortgagees. No case has been suggested in the answer of the defendants, the Smiths, showing that any specific blame can be imputed to the plaintiff; and the only question is, whether I should direct an inquiry as between the defendants, the Smiths, and Lewis Allen, on the principle that his acts are the acts of, and bind the plaintiff. The question, whether the Court should direct an inquiry, is always matter of discretion. In this case, the argument for the Smiths, if taken strictly, proves too much. If their case be, that *the acts of Lewis Allen bind the plaintiff, then their case [*280] ought to have been made upon the record against the plaintiff. No such case has been made, nor is there any suggestion upon the record that any such case was supposed to exist. If the object of the inquiry be mere discovery, the discovery should have been

(1) 5 R. R. 245 (6 Ves. 173).

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sought before. I do not think I ought now to direct an inquiry to see what may possibly turn out to be the case, upon the mere supposition that it may appear that Lewis Allen did some act, by the effect of which Lord ELDON's observations in *Evans* v. *Bicknell* are rendered inapplicable to the transaction.

The only remaining question is that of costs. Unquestionably the defendants, the Smiths, have suffered by the fraudulent act of Charles Allen, and he could not have committed the fraud if the plaintiff and Lewis Allen had taken care that the deeds were in proper custody. I do not think, therefore, that it is a case in which the plaintiff ought to have his costs of the suit. Then, with regard to the costs of the cestui que trusts, it is quite clear that they are not necessary parties. They were neither parties nor privy to the mortgage of October, 1836. It is admitted to have been a breach of trust, and there is no suggestion that they have ever adopted the transaction, and thereby discharged the trustees from their liability. The cestui que trusts might have passed by the mortgage altogether, and have called upon the trustees to replace the stock. The suit, therefore, must be considered as a suit by the plaintiff for his own benefit. The strict course to have been pursued by the plaintiff in such a case, would have been to re-coup the trust estate, and then to sue for the purpose of recovering what could be recovered upon the mortgage. Even if the cestui que trusts had adopted the transaction, the expense of additional parties might *have been avoided, by procuring the cestui que trusts to join as plaintiffs. The plaintiff has no right, in a suit for his own benefit, to make the cestui que trusts defendants, and throw the additional costs thereby occasioned upon the second mortgagees. The bill must be dismissed with costs as against the cestui que trusts. I give no other costs, and, with that exception, make the ordinary decree of foreclosure in a suit by an equitable mortgagee having the first incumbrance.

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[The defendant appealed from this decision, as reported in 16 L. J. Ch. 370.]

1847. *June* 4, 9.

[16 L. J. Ch. 371]

Mr. Rolt, *Mr. Romilly*, *Mr. R. Palmer*, *Mr. T. Fisher*, and *Mr. Hallett* appeared for the different parties.

The LORD CHANCELLOR (without hearing a reply) said that the dealing which had taken place with the legal estate would not affect the question of priority between the incumbrancers, under the circumstances in which the conveyance was made. He also thought

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that the possession of the title deeds by the mortgagor was not attended with any fraudulent intent or *laches* on the part of the first incumbrancer, so as to postpone his lien and give any priority to the second mortgagee. He thought the VICE-CHANCELLOR had come to a correct conclusion, and he must, therefore, dismiss the appeal with costs.

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LISTER *v.* TURNER.

(5 Hare, 281—295; S. C. 15 L. J. Ch. 336; 10 Jur. 751.)

1846. *March* 12, 13, 23.

WIGRAM, V.-C.

[281]

An equitable mortgage by deposit of title-deeds, with an agreement in writing by the party making the deposit, to execute a formal mortgage of the property to the mortgagee for the balance which might be due to him, constitutes the equitable mortgagee a purchaser for good consideration within the stat. 27 Eliz. c. 4, in respect of that balance; and, it being a term of the agreement that the mortgage to be executed should contain a power of sale, the COURT, on a bill to set aside a prior voluntary conveyance by the mortgagor, as fraudulent and void, under the stat. 27 Eliz. c. 4 (1), decreed, that, on default of payment, the mortgaged property should be sold.

Whether, after the bankruptcy or insolvency of a debtor, any creditor (other than the assignees) can, in ordinary cases, sustain a suit to set aside a conveyance made by the debtor prior to the bankruptcy or insolvency, on the ground that the conveyance is fraudulent, within the stat. 13 Eliz. c. 5; or whether it is necessary that any creditor seeking to set aside a fraudulent conveyance must previously recover judgment at law for his debt,—*quære.*

BY an indenture, dated the 16th June, 1841, the defendant William Slater, who carried on business as a salt manufacturer, conveyed to Daniel Antrobus, his heirs and assigns, for a nominal consideration, several messuages and hereditaments described in a schedule to the deed, including certain freehold tenements in Meadow Street and Brunswick Road, Liverpool, upon trust, at any time or times thereafter, with the consent therein mentioned, to sell and dispose of the same, and to stand possessed of the monies to arise thereby, and of the rents and profits in the meantime, upon the trusts declared thereof by an indenture bearing even date, made between the said William Slater and Alice Mary his wife of the one part, and the said Daniel Antrobus of the other part. By the indenture of even date referred to in the indenture *of the 16th of June, 1841, the trusts of the said monies were declared to be, for the separate use of the said Alice Mary the wife, during the joint lives of herself and her said husband, William Slater, without power of anticipation; with remainder for the survivor of them; remainder for their children, as therein mentioned.

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(1) See now the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), s. 2.

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On 21st of July, 1841, the defendant William Slater deposited with his bankers, the Union Bank of Liverpool, the title deeds relating (amongst other property) to the freehold tenements in Meadow Street and Brunswick Road, Liverpool, comprised in the conveyance of the 16th of June, 1841, together with the documents of title to certain railway and mining shares, accompanied by a memorandum in writing as follows:

"To the Union Bank of Liverpool. In consideration of advances made and to be made by the Banking Company, called the Liverpool Union Bank, to me, I do hereby deposit with the said Company the title deeds, certificates for shares, and documents mentioned in the schedule hereunder written, as a security to the said Company for the general balance of account as bankers and customer between them and me, or of me and any person or persons who may join me in partnership, for bills or notes discounted or paid, and for loans, credits, or advances made to or for the accommodation, or at the request of me the said W. Slater, or of such partner or partners as aforesaid, and for interest and commission, and other usual charges and expenses; and I undertake and agree, upon the request of the directors for the time being of the said Company, and for better securing the said balance, to release, transfer, and assure, in due form of law, to such person or persons as they shall direct, all and singular the lands and hereditaments, and the messuages and
[*283] buildings thereon, and *all and singular the railway and other shares, and other the property mentioned and comprised in the said schedule hereunder written, for all my estate and interest therein, by way of mortgage, with full and absolute powers of sale, and of giving good and sufficient receipts to purchasers; but the sum to be secured by this deposit and memorandum shall not exceed 2,000*l.* As witness my hand, the 21st day of July, 1841, WILLIAM SLATER."

At the foot of the memorandum was a schedule of the deeds, certificates, and documents which were the subject of the deposit.

On the 9th of February, 1842, William Slater became bankrupt, and the defendants L. Frost, P. Haskayne and C. Turner were chosen and appointed assignees. At the time of the bankruptcy, the Union Bank claimed a balance of 944*l.* 6*s.* to be due from William Slater on the account referred to in the memorandum.

The bill was filed in November, 1844, by one of the registered public officers of the Union Bank, against the assignees in the bankruptcy; the trustee of the deeds of the 16th of June, 1841; William

Slater, his wife, and their infant children. The bill alleged, that the property comprised in the deeds and documents deposited with the Bank was a scanty and insufficient security for the debt; that the indentures of the 16th of June, 1841, were made without any good or valuable consideration; and that they were fraudulent and void as against the Union Bank, and were of no effect as against the equitable mortgage of the premises made by the said deposit; that, at the time of the execution of the indentures of the 16th of June, 1841, William Slater was indebted to the Union Bank in the sum of 600*l.* and upwards for his own private debt, was liable upon *various bills of exchange to the amount of 2,000*l.*, [*284] and upwards, and was indebted to various other persons in an amount considerably exceeding in the whole what he was able to pay or secure, without the estates and hereditaments comprised in the said indentures; and that the said indentures were therefore fraudulent and void, as against all the creditors of William Slater.

The bill prayed, that the two indentures of the 16th of June, 1841, might be declared fraudulent and void, and might be delivered up to be cancelled, or, at all events, that they might be declared fraudulent and void so far as the same related to such part of the property comprised therein as was comprised in the deeds and writings deposited with the Bank; and that an account might be taken of what was due to the Bank upon the security of the property, the title deeds, certificates, and other documents relating to which were deposited by Slater with the Bank; and that the sum which should be so found due might be declared to be a charge upon such property; and that the defendants might be decreed to pay such sum, with the costs, or, on default, that the said property might be sold, and the proceeds applied in or towards payment of the sum so found due, and costs. But if the Court should be of opinion that the plaintiff was not entitled to a sale of the said property, then the bill prayed that the defendants might on default of payment be foreclosed; and that the defendant, the trustee, and all necessary parties, might be ordered to execute all proper conveyances, assignments, and assurances of the said property as the Bank should direct.

The defendants the assignees did not dispute the debt of the plaintiff, or the security created by the deposit. The defendant William Slater, by his answer, said that the conveyance of June, 1841, had been *made in consideration of monies which [*285] he had received in right of his wife since his marriage, and

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which he considered it his duty to settle for her separate use. He denied that he was insolvent at the time of the execution of the deeds of June, 1841, and, on the contrary, alleged that his property (exclusive of the property conveyed by the said deeds), exceeded in value by several hundred pounds, the amount of his then debts and liabilities. The trustee and the cestui que trusts under the indentures of June, 1841, repeated the statements of William Slater, alleged that the mortgaged property was an ample security for the plaintiff's debt, and insisted on the validity of the conveyance under which they claimed. Evidence was given on behalf of the plaintiff of various debts owing by William Slater, at the date of the conveyance of June, 1841, but the COURT did not hold that such evidence was sufficient to prove insolvency.

Mr. Romilly and *Mr. Rolt*, for the plaintiff:

The Bank is a purchaser of the lands in Meadow Street and Brunswick Road, and the conveyance of June, 1841, is fraudulent and void as against the Bank, under the stat. 27 Eliz. c. 4. It is not important for this purpose that the Bank is only equitable mortgagee, for the Court, under the statute, will give effect to an equitable as well as to a legal title: *Buckle* v. *Mitchell* (1). The plaintiff being indebted at the time of making the conveyance of 16th of June, 1841, that conveyance is fraudulent and void as against creditors, under the stat. 13 Eliz. c. 5. It is not necessary that the plaintiff should prove that the debtor was indebted to the extent of insolvency: *Townsend* v. *Westacott* (2). The plaintiff *is entitled to a decree for sale of the property comprised in the mortgage: *Parker* v. *Housefield* (3). And he is also entitled to a declaration that the conveyance of June, 1841, is fraudulent and void as against creditors, under the stat. 13 Eliz. c. 5; and after that declaration he may pursue his remedies for the deficiency which the mortgaged property may be insufficient to pay.

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Mr. Anderdon and *Mr. Adams*, for the assignees of Slater:

The plaintiff, as equitable mortgagee, is entitled to a decree for foreclosure; he is not entitled to a decree for sale: *Price* v. *Carver* (4); *Meller* v. *Woods* (5); *Brocklehurst* v. *Jessop* (6). * * The assignees here

(1) 11 R. R. 155 (18 Ves. 100).
(2) 50 R. R. 193 (2 Beav. 340); *S. C.* 55 R. R. 19 (4 Beav. 58).
(3) 2 My. & K. 419. See 44 R. R. 3, *n.*
(4) 45 R. R. 244 (3 My. & Cr. 157).
(5) 44 R. R. 1 (1 Keen, 16).
(6) 40 R. R. 172 (7 Sim. 439).

represent all the creditors, and the declaration of the Court should therefore be, that the conveyance of June, 1841, is fraudulent and void under the stat. 13 Eliz. c. 5; and that, subject to the equitable mortgage as to part, the property comprised in the conveyance has become vested in the assignees. * * *

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Mr. Kenyon Parker and *Mr. Craig*, for the defendants the trustees under the deed of the 16th of June, 1841, and the wife and children of William Slater, the cestui que trusts under the same deed: [287]

The plaintiff has not succeeded in establishing either the fact that Slater was indebted at the time of the conveyance to any party who is now a creditor on his estate in respect of such debt, or that Slater was not then solvent. * * Supposing the Court to hold [288] that the plaintiff is entitled to relief under the stat. 27 Eliz. c. 4, at least it was his duty first to *realise the other property comprised [*289] in the equitable mortgage, and, if there should be any deficiency, then to avail himself of any right he might have under that statute to obtain payment of the deficiency out of that part of the property which is comprised both in the mortgage and in the voluntary conveyance; and even in that view the suit is premature.

Mr. W. M. James, for the defendant William Slater. * * *

THE VICE-CHANCELLOR: [290]

On the 21st of July, 1841, William Slater, who carried on business in partnership with two persons of the names of Antrobus and Irvine, deposited with the Union Bank of Liverpool title deeds and documents relating to freehold and other property, including certain freehold tenements in Meadow Street and Brunswick Road, as a security for the balance which was or might become due from William Slater, or his firm, to the Bank; and by the agreement in writing accompanying the deposit he undertook to execute a legal mortgage of the property comprised in the deeds and documents as the Bank should direct, but the sum to be secured was not to exceed 2,000*l.* On the 9th of February, 1842, William Slater became bankrupt. The balance claimed to be due to the Bank from William Slater at the time of the bankruptcy was 944*l.* 6*s.*, and that amount is now claimed by them. Stopping here, the claim of the plaintiff for what is due, and to have the same raised in the ordinary manner upon the property comprised in the security, is clear. The contest between the parties arises out of what follows: It appears, that,

LISTER v. TURNER.

on the 16th of June, 1841, about a month before the time of the deposit, William Slater had conveyed to Daniel Antrobus, as trustee, together with other property, that part of the property comprised in the plaintiff's security which consisted of the tenements in Meadow Street and Brunswick Road, upon trust to sell and apply the proceeds for the benefit of William Slater, his wife and children. This conveyance was voluntary. Now, to obtain the benefit of his security, the plaintiff must avoid the conveyance of June, 1841; and, accordingly, the bill raises two points. It insists, first, that the plaintiff is a purchaser for good consideration under the stat. 27 Eliz. c. 4, and that therefore the deeds of June, 1841, are void as against him, so

[*291] far as they comprise the property *in Meadow Street and Brunswick Road; and, secondly, the plaintiff contends that William Slater, at the time of executing these deeds, was indebted to the plaintiff and other persons to an amount exceeding what he was able to pay or secure, excluding the property comprised in the deeds; and that therefore the deeds of June, 1841, are void under the stat. 13 Eliz. c. 5. I will first state my opinion upon these points, so far as the decree I now propose to make requires that I should do so.

As to the first point, that the deeds of June, 1841, are void under the stat. 27 Eliz. c. 4, it seems to me that the case of *Buckle* v. *Mitchell* (1) is a direct authority for the proposition, that an equitable interest in land entitles a purchaser by contract to clothe it with the legal title. By that case I consider myself bound, and that will entitle the plaintiff to avoid the deeds of the 16th of June, 1841, and to enforce his security.

With regard to the second question, the plaintiff being entitled to relief under the stat. 27 Eliz., it would have been unnecessary for me to notice his claim for relief under the stat. 13 Eliz., were it not that the defendants have contended that this ground of claim for avoiding the deeds of June, 1841, has altogether failed, and that therefore the plaintiff must pay so much of the costs of the suit as have been incurred in respect of that claim. Those who have contended that the plaintiff's equity could not be sustained under the 27 Eliz. cannot with success urge that argument, unless they can show that the claim under the 13 Eliz. cannot be sustained on the present record, or that the evidence in the cause is insufficient to

[*292] sustain the *case. Both of these points were argued. I think the former should be decided in the plaintiff's favour. My view of the case is this: The plaintiff, after the deposit which was made on the

(1) 11 R. R. 155 (18 Ves. 100).

21st of July, 1841, discovered the existence of the previous deeds of the 16th June, 1841. If the deeds of June, 1841, are to stand, the deposit becomes valueless, so far as it relates to the Meadow Street and Brunswick Road property. The plaintiff, therefore, has a direct interest in showing that those deeds are invalid; for he thereby gives validity to his own security. Being a creditor having a specific interest in part of the property comprised in the deeds of June, 1841, he has an interest sufficient to sustain the suit; and, without at this time giving an opinion how far, in a suit framed as this suit is, the parties could, if they desired it, have the deeds of June, 1841, set aside, and the whole property which was conveyed by those deeds distributed amongst the creditors of William Slater; or whether, in a suit otherwise properly framed for that purpose, it is necessary for creditors seeking to set aside a conveyance as fraudulent under the stat. 13 Eliz. c. 5, to obtain a judgment at law, as was argued from the case of *Colman* v. *Croker* (1); or whether, if it be so, the bankruptcy of the mortgagor would not excuse the necessity of such a proceeding by a person having a specific lien on part of the property; or whether, if the plaintiff's relief depended wholly on the stat. 13 Eliz. c. 5, the evidence of insolvency is sufficiently clear for a decree without inquiry,—I think the right to sue in this case is established; and that the evidence, if not already sufficient, is such as would entitle the plaintiff to an opportunity of perfecting it. The question on this point is merely one of costs, and, the evidence being strong, it is sufficient to say, I think *there is no ground for distinguishing the costs of that part [*293] of the suit which is founded on the 13 Eliz. c. 5, from the other costs.

The next question is, as to the form of the remedy to which the plaintiff is entitled,—whether the decree is to give the plaintiff the benefit of a legal mortgage, or to direct a sale. The decisions with regard to the right of an equitable mortgagee are not uniform; but, in this case, the express terms of the contract are, that Slater shall convey the premises by way of legal mortgage, and that such mortgage shall contain a full and absolute power of sale; and to make the suit available for its objects, it is necessary that there should be a decree for sale. There is no reason, therefore, why such a decree should not be made.

(1) 1 Ves. Jr. 161.

1846.
Feb. 28.

WIGRAM, V.-C.

[295]

BENNETT *v.* BURGIS.

(5 Hare, 295—297; S. C. 15 L. J. Ch. 231; 10 Jur. 153.)

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In a suit to appoint new trustees of a settlement, where a part of the trust property had been lost by previous negligence or breach of trust, the COURT refused to confine the trust to the remaining property, but appointed the new trustees to be trustees of the whole of the property comprised in the settlement, directing (for the protection of the new trustees) a reference to inquire whether it would be proper to take proceedings for the recovery of the property which had been lost.

ON the marriage of the defendants, Bennett and his wife, in 1837, it was agreed that the interest of the wife, in a legacy of 500*l.*, bequeathed to her, and payable on her attaining twenty-one or marriage, and also her interest in remainder in a copyhold tenement, and in a small sum invested in the funds, expectant on the decease of her mother, should be assigned and vested in three persons as trustees, upon such trusts as the wife should appoint, and, in default of such appointment, in trust for her separate use for her life, without power of anticipation, remainder for the husband for life, remainder for the children of the marriage, as therein mentioned. Articles to the effect of this agreement were signed by the husband and one of the persons named as trustees. The wife was an infant. After the marriage, the executors of the person, by whom the legacy of 500*l.* was bequeathed, paid that sum to the husband and wife.

In 1845, the copyhold property and the stock became vested in possession in the parties interested under the articles; and the bill was then filed by the infant children of the marriage against the husband and wife, and the survivors of the persons named as trustees (the trustee who had signed the articles being stated to have

[*296] died insolvent), and against the provisional assignee of *the husband who was an insolvent debtor, praying that a settlement might be executed according to the articles, and that new trustees might be appointed of the trust property, other than the 500*l.* which had been so misapplied. The defendants named as trustees in the articles, by their answers, said they had never accepted the office, but were willing to do so with the sanction of the Court. The provisional assignee disclaimed all estate and interest in the trust property.

Mr. Drewry, for the plaintiffs:

The bill seeks to have trustees appointed of the residue of the trust funds, not of the whole property, which, according to the articles, ought to have been settled. New trustees, or trustees now

to be appointed, could not reasonably be expected to undertake the responsibility of accounting for the loss of the 500*l*. The executors by whom the legacy was paid to the husband and wife, are not, and could not properly be parties to this suit; and therefore it cannot appear in this suit whether the sum was so paid by the executors with or without notice of the articles for the settlement, or whether, if improperly paid by them, it can be recovered. If, therefore, the settlement, now to be executed by the trustees, were to comprise the legacy, there would be nothing appearing in the suit to discharge the new trustees from responsibility with regard to that fund.

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Mr. Follett, *Mr. Grove*, and *Mr. Hargrave*, for the other parties.

The VICE-CHANCELLOR said, it would be improper to appoint trustees of a part of the trust property, omitting *the remainder. [*297] He knew of no precedent of such an order; the effect of it might be to discharge parties who were answerable for the breach of trust from their liability, or at least to interpose difficulties in the way of the cestuis que trust in recovering the trust fund which had been misapplied. The new trustees might be protected by the order of the Court, without omitting any portion of the trust property. He would refer it to the Master to appoint new trustees of the entire property comprised in the articles, at the same time directing the Master to inquire what property was comprised therein, and whether any and what part thereof had been lost; and if he should find that any part thereof had been lost, then to inquire and state under what circumstances the same had been lost, and whether any, and if any what, steps ought to be taken for the recovery thereof.

LORD BROOKE *v.* ROUNTHWAITE.

1846.
April 30.
May 7.

(5 Hare, 298—306; S. C. 15 L. J. Ch. 332; 10 Jur. 656.)

WIGRAM, V.-C.

[298]

Bill by the vendor for the specific performance of a contract to purchase a timber estate, where the particulars of sale described it as comprising a certain wood "with upwards of sixty-five acres of fine oak timber-trees, the average size of which approached fifty feet," and in the particulars of the lot described it only as "sixty-five acres two roods and twelve perches of growing timber." It appeared, on the evidence for the plaintiff, that the average size of the trees was about thirty-five feet, but on that for the defendant that it was only about twenty-two feet; and the defendant, moreover, alleged that it was sold at a time when he had no means of seeing the wood, and that he relied on the particulars of sale: Held, that,

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as the representation on the particulars of sale had proved to be incorrect, and as it was not shown that the defendant knew it to be incorrect at the time of making the contract, the Court would not, at all events, enforce the specific performance of the contract without compensation; and that (inasmuch as the particulars of sale did not express what number of trees or quantity of timber the wood contained) it was not a case in which the Court could measure the extent of the deficiency, or ascertain the amount of compensation; and that the bill must therefore be dismissed.

A BILL for the specific performance of a contract. The property was offered for sale at the Auction Mart, London, in July, 1844, and was described as follows: "Particulars of the residue of the late Lord Monson's estates in Lincolnshire, devised to be sold, comprising Ingleby Wood, with upwards of sixty acres of fine oak timber-trees, the average size of which approaches fifty feet; and also a quantity of ash poles, from ten to twenty years' growth." The particulars of sale then pointed out the facilities which existed for bringing the timber to market; and the description of the lot, to which the question in this cause related, was as follows: "Lot 1 consists of Ingleby Wood, which contains sixty-five acres two roods and twelve perches of growing timber, chiefly oak and ash poles. It is at present in hand, and the only outgoings are 1*l.* 7*s.* 3*d.* land-tax, and parish rates 1*l.* 15*s.*" By the ninth condition of sale, which was the only condition material to the question, it was provided as follows: "If, through any misstatement, any error should arise in this particular, the same shall not vitiate the sale; but the purchaser shall take or make an adequate compensation, in proportion to the purchase-money, as the case may happen; such compensation to be settled by the referees, or their umpire, to be appointed in the usual manner." The defendant, by his agent, was the highest bidder for Lot 1, at the price of 4,725*l.*; and, by letter, promised to pay the
[*299] deposit of *10*l.* per cent. and the auction duty in ten days. After the specified time had passed, the defendant proposed to pay a moiety of the deposit, and the rest at the end of a month, and to allow the residue of the purchase-money to remain on the security of the estate. The plaintiff offered to agree to the former, but not to the latter term. The defendant afterwards refused to complete the purchase.

The bill prayed a decree for specific performance of the contract; and that, in case it should appear that any abatement out of the purchase-money ought to be made on the ground of error or misdescription of the premises, the amount of such abatement might be determined by the Court.

The answer of the defendant objected to perform the contract, on

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the ground, as was alleged, that the average size of the trees in Ingleby Wood did not approach fifty feet, and did not amount to more than about twenty-two feet; that the value of oak timber of the larger was very much greater than of the smaller size; that, from the season of the year before the purchase, there was no opportunity for the inspection or examination of the wood; and that the defendant's bidding had been founded entirely on the representation made by the plaintiff in the particulars of sale.

The evidence for the plaintiff went to show, that the timber-trees in Ingleby Wood were of the average size of thirty-four feet six inches each, reckoning those only to be timber-trees which contained at least ten cubic feet of wood; and the witnesses deposed, that, according to the custom of the trade, a timber-tree should contain that quantity. The witnesses for defendant deposed, that there were a much larger number of timber-trees *in the wood, including [*300] in that description (as they alleged should be included) all trees containing five cubic feet and upwards; that the effect of this computation was to reduce the average size to twenty-two feet each, and to reduce the value of the timber per foot in nearly the same proportion; for, if a tree containing fifty feet was worth three shillings per foot, a tree of twenty-two feet would be worth only two shillings per foot.

Mr. Romilly and *Mr. Shadwell*, for the plaintiff:

There was no misrepresentation of the subject. The description of "Lot 1" was perfectly accurate. The short and general description at the head of the particulars of sale could not be considered to form a part of the representation on which a purchaser would rely. That part of the announcement was too indefinite to convey any erroneous impression; it would, in fact, be true, even if the trees had been much smaller than they now are, for still the timber was approaching the size referred to. But, in fact, the difference between the average size, as stated in the particulars, and that as shown by the evidence for the defendant, arose not from any deficiency in the wood, but from its actual excess, and from the fact that the defendant took into the computation a vast number of trees containing less than ten cubic feet of wood, and which ought not to be reckoned as timber-trees. By this mode of measuring the wood, it was plain that the defendant could not diminish the average size of the timber, without at the same time, and in the same proportion, increasing its aggregate quantity. It was not a case in which the

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Court would hold the defendant to be entitled to compensation; there was no difference between the representation, which was indefinite, and the actual fact. The defendant *should not have purchased without adequate examination: *Trower* v. *Newcome* (1). It was not a case in which fraud was or could be suggested: *Fenton* v. *Browne* (2).

[*301]

Mr. Wood and *Mr. Malins*, for the defendant:

The defendant is a timber-merchant, and he contracted for the purchase of the wood as timber, and for the purposes of his trade. The deficiency in the average size of the trees, as timber, would not therefore be compensated by the greater number of the trees, of a smaller size, even if there were, in fact, a greater number than the defendant was entitled to expect. It was not, however, shown that the number was greater, although it was proved that the average size was far less than half of what it had been represented to be. The defendant was willing to complete his purchase upon having a compensation made for the deficiency in the size and value of the wood, according to the provision of the ninth condition of sale; there would be no difficulty in ascertaining the amount of compensation, for the maximum and minimum sizes were both defined, and the difference was a matter of ready calculation: *Hill* v. *Buckley* (3). If the Court cannot measure the compensation, it will certainly not compel the defendant to complete a purchase, where the subject proves to be totally different from that which he was led to expect.

May 7.

THE VICE-CHANCELLOR:

The defendant in this case contends, that, if he should be compelled *simpliciter* to perform this contract, he will not obtain, in the subject of his purchase, that which *the conditions of sale promised him; that the timber-trees do not in the average approach fifty cubic feet; and he insists that, if the contract is to be performed in specie, he is entitled to compensation for the difference in the value of the timber. The complaint is, that the value of the timber varies according to the growth of the tree; and that a cubic foot of timber cut from a tree containing fifty feet, is of greater value than a cubic foot of timber from a tree containing only five feet. He alleges that there are, in Ingleby Wood, only a given number of trees which can be accounted timber-trees; that their average

[*302]

(1) 17 R. R. 171 (3 Mer. 704).
(2) 9 R. R. 255 (14 Ves. 144).
(3) 11 R. R. 109 (17 Ves. 394).

contents are not more than twenty-two feet; and that such timber is of less value than if it were of the larger kind described in the particulars of sale. Upon these statements the defendant asks for compensation for the difference in value.

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I have certainly felt great difficulty in this case. I must consider the defendant as asking that a decree may be made giving him compensation. The argument on his behalf is, that the Court, if unable to give him compensation, from the impossibility of measuring the amount to which the subject of the contract falls short of the description, would dismiss the bill rather than compel the defendant to take that which he had a right to expect would be much more valuable than it has proved to be.

After reading the pleadings and evidence in the cause, I have found great difficulty in bringing my mind to believe that the defence set up is not a mere afterthought of the defendant. It appears, from the answer, that the defendant intends to represent that he bought the property without knowing anything of it, but from the recommendation of one Jabez West, who had himself no sufficient means of judging of the average size of the *timber, [*303] from having seen only a small part of the wood, when the trees were covered with foliage; and that West had relied on the representation contained in the particulars of sale. Jabez West has not been examined. Looking at the correspondence between the parties, it appears that, after the sale, the defendant was unable to provide the money for completing the purchase, and that he applied for an unlimited time to complete his purchase, leaving the balance of the purchase-money on the security of the estate; and it was not until this indulgence was refused, upon the ground that the property comprised in the purchase was trust property, that he took the objection that the timber was not of the kind he supposed it to be. I have endeavoured to discover whether, if the defendant should be compelled to take the property, he would or would not have given more than it was worth. He states the number of trees to be 1,616, containing an average of twenty-two feet, worth two shillings a foot, which would amount in value to about 3,500*l.*, omitting the tops, lops and poles, which may not be inconsiderable. This leaves a small sum per acre for the land, which can scarcely exceed its value, unless it is of the very worst quality. If, however, there has been a misrepresentation, I cannot refuse the defendant the benefit of that ground of defence, either in the way of compensation, or of a decree dismissing the bill,—merely upon such a speculation.

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This is a case in which it is impossible to give compensation. If the vendor had represented that the wood contained any given number of trees, and that such trees were of an average size of fifty feet, and that representation turned out to be untrue, a decree for specific performance, with compensation, might have been made. The Court might have measured the difference between that which [*304] was promised, and the actual fact; but in *the absence of any representation as to the number of trees, I do not see how it is possible for the Court to measure that difference; or how the amount of compensation is to be ascertained. If (to put an extreme case) the wood had been found to contain 1,000 trees, averaging fifty cubic feet, and no trees between that size and mere poles, the defendant admits that he would have no cause to complain, for the trees would have been of the promised average size, and there was no contract as to the entire quantity of timber to be found in the wood. But, according to the defendant's argument, if there were, in addition to the 1,000 trees I have supposed, another 1,000 trees averaging five feet, the general average would be reduced to twenty-seven feet, and the purchaser would be damnified and entitled to compensation, though he had 5,000 feet of timber more than in the first case, in which the contract would have been fully satisfied. He is injured, because, upon that hypothesis, in addition to a number of larger trees, he gets a number of smaller trees. It was at one time argued for the defendant, that the Court ought to consider the vendor as selling the quantity of timber found in the wood, and guaranteeing that it was all of the size mentioned in the particulars; but that view of the case cannot be maintained.

If, however, the Court is not able to see that the purchaser is damnified to a definite extent, capable of being ascertained, it may still be right to say that the vendor is unable to give the purchaser that which he promised; and if so, the Court may properly refuse to enforce the contract, though it cannot modify it by directing it to be performed with compensation. I agree that an indefinite representation by a vendor ought to put a purchaser upon inquiry; but a definite representation upon a point affecting the value of the [*305] subject of sale will *entitle the purchaser, if the representation be untrue, to resist the specific performance of the contract. This appears very distinctly from *Trower* v. *Newcome* (1), *Stewart* v. *Alliston* (2), *Fenton* v. *Browne* (3). Now, the sale in this case took

(1) 17 R. R. 171 (3 Mer. 704).
(2) 15 R. R. 81 (1 Mer. 26).
(3) 9 R. R. 255 (14 Ves. 144).

place at a time of the year when the wood could not be viewed. I think, therefore, the representation made must, as against the vendor, be taken as a definite representation that the vendor knew the timber in the wood approached an average size of fifty feet. Was this representation untrue, and the defendant thereby deceived? and if so, can I treat it as immaterial on the ground before alluded to, that the particulars of sale contained no representation as to the quantity of timber in the wood? This, I think, I ought not to do, though I acknowledge there is difficulty in the opposite conclusion. If the wood had consisted wholly of young timber-trees, it could not successfully have been contended that it was what the purchaser had contracted for, for the timber might be useless for years to come; though it might be difficult to say what degree of difference would be enough to vitiate the sale.

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The question, then, is, whether the representation was untrue or not. The witnesses for the plaintiff and defendant differ greatly, owing to the different modes in which they ascertain the quantity of timber,—one taking into account trees containing five cubic feet, and the other only those that contain ten. But the plaintiff states that thirty-five feet is the highest average; and he admits that the particulars of sale would have been more correct, if, instead of stating the average as approaching fifty feet, they had stated it at forty. Was the defendant, who is stated to be a timber-merchant, deceived by this representation? When I say that a *vendor, who [*306] makes a representation that is untrue, cannot enforce his contract, that, of course, supposes that the purchaser is deceived; if the purchaser knows at the time that the representation is untrue, he is not deceived, and cannot in that case avail himself of the fact that there has been misrepresentation. I am far from being satisfied as to what the justice of the case requires. Looking at that part of the answer relating to Jabez West, I felt considerable doubt whether it might not appear that he had sufficient knowledge of the wood, and that he had not made any representation by which the defendant could be deceived; but if this were so, it was the plaintiff's duty to have made out that case, which he has not done. As it is, there has been a representation which turns out not to be correct, and I think the proper course will be to dismiss the bill, but without costs.

1846.
Dec. 5, 7, 17.

WIGRAM, V.-C.

[306]

WINTER *v.* WINTER (1).

(5 Hare, 306—314.)

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The testator, by a will made before the Wills Act (7 Will. IV. & 1 Vict. c. 26) came into operation, bequeathed a share of his residuary estate to one of his sons, who was also thereby made one of the devisees in trust and executors of his estate. The son died after the Wills Act came into operation, leaving issue; and, after his death, the testator made a codicil to his will, altering a bequest to another child, but in other respects confirming his will: Held, that the gift to the son did not lapse, but that the same, so far as it was real estate, descended to the heir-at-law of the son, and so far as it was personal, to his executrix, under a will made before the Wills Act came into operation.

That, under the 34th section of the Wills Act, the effect of the re-publication of the will by the codicil, was the same as if the testator had at the date of the codicil made a will in the words of the will so re-published.

THE testator, John Winter, by his will, dated the 13th of November, 1833, after giving certain pecuniary legacies, gave and devised unto and to the use of his son, John Palmer Winter, and J. C. Cameron, their heirs and assigns, all his freehold and copyhold estates; and by the same will he gave and bequeathed unto the said John Palmer Winter and J. C. Cameron, their executors,

[*307] administrators, and assigns, all his leasehold and other *personal estate and effects, upon trust, that they, the said John Palmer Winter, and J. C. Cameron, or the survivor of them, should, in their or his discretion, sell the same, and stand possessed of and interested in the monies, and the rents, issues, and profits of the said real and personal estate, until such sale, upon trust, to pay and discharge his the said testator's debts, legacies, and funeral and testamentary expenses, and to stand possessed of and interested in the surplus thereof in trust, as to, for, and concerning one equal sixth part or share thereof for his (the testator's) son, the said John Palmer Winter, for his own use and benefit absolutely; and as to the other five sixth parts or shares for his (the said testator's) other children and grand-children severally, as in the said will respectively mentioned. And the testator appointed the said John Palmer Winter, and J. C. Cameron, the executors of his will.

Anna Maria, a daughter of the testator, to whom a sixth share of the residuary estate was given by the will, died in March, 1838, intestate and unmarried. The said John Palmer Winter, the testator's said son, one of the devisees in trust and executors, and the residuary legatee of the sixth part of the real and personal estate of the testator, died on the 23rd of November, 1838, having

(1) *In re Scott* [1901] 1 K. B. 228, 70 L. J. K. B. 66, 83 L. T. 613, C. A.

by his will, made in 1824, bequeathed all his estate, real and personal, to Mary his wife, and appointed her his executrix. Mary, the widow of John Palmer Winter, proved this will on the 8th of December, 1838.

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The testator, John Winter, made a codicil, dated the 16th of February, 1839, and thereby, after charging the share of his estate given by his will to his daughter, Mary Gillman, with the amount of a certain debt, he directed, that, after the decease of his said daughter, the remainder of the benefit given to her by his will should *go to other persons mentioned in his said codicil, and in [*308
all other respects, he thereby ratified his said will.

On the 22nd of August, 1840, the testator, John Winter, made another codicil, which did not alter the foregoing devises or bequests.

The testator died on the 5th of February, 1843. The will was proved by J. C. Cameron, the surviving executor, by whom the greater part of the freehold, copyhold, and leasehold estates were sold, before the institution of the suit, and the proceeds invested in the Government funds.

The bill was filed by Charles Winter, the eldest son of John Palmer Winter, who was the eldest son of the testator John Winter, against the other children and the executor of the said testator, and the widow and executrix and the younger children of John Palmer Winter, praying, that the rights of the several persons claiming to be interested in the real and personal estate of the testator might be ascertained and declared by the Court.

The facts were found by the Master's report, and the cause was heard for further directions.

The principal question arose upon the effect of the 33rd and 34th sections of the Wills Act, 7 Will. IV. & 1 Vict. c. 26 (1), with reference to the sixth share of *the residuary real and personal [*309]
estate, devised and bequeathed to John Palmer Winter, the son of the testator, John Winter.

Mr. Romilly and *Mr. Frederick Jones*, for the plaintiff:

The effect of the 34th section is not to alter the date of the will, by bringing the date of the will down to the date of the

(1) The 34th section enacts, "That this Act shall not extend to any will made before the 1st day of January, 1838; and that every will re-executed or re-published or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, re-published, or revived."

WINTER v. WINTER.

codicil; but the effect is to give a retrospective operation to the Act, and thereby make the Act to govern the construction of the will, which, without the aid of the codicil, it would not have done. * * With regard to the effect of the 33rd section, they cited and relied on *Johnson* v. *Johnson* (1).

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Mr. Walker and *Mr. Torriano*, for the defendant, Mary Winter, the widow and executrix of John Palmer Winter, argued in support of the like construction, [and cited *Brooke* v. *Kent* (2) and other cases].

[310] *Mr. Willcock*, for the younger children of John Palmer Winter.

Mr. Kenyon Parker and *Mr. Stinton*, for the defendant, Mary Gillman, one of the daughters of the testator.

Mr. Wood and *Sir Walter Riddell*, for the defendants, the other children of the testator, John Winter:

[311] * * In this case, taking the will to have been made at the date of the codicil, it contained a gift to a person not in existence; and by such a gift nothing could pass. Suppose a testator to make a bequest to his children generally, could such a gift be construed to extend to his children dead at the date of the will? and yet, to carry the purposes of the Act to the extent contended for, would involve that construction. They cited *Christopherson* v. *Naylor* (3), *Waugh* v. *Waugh* (4), *Tytherleigh* v. *Harbin* (5), *Doe* v. *Kett* (6).

Mr. Jervis, for the defendant, J. C. Cameron, the executor of the testator, John Winter.

THE VICE-CHANCELLOR:

The testator, John Winter, by his will, dated the 13th of November, 1833, gave a share of his residuary estate to John Palmer Winter, his eldest son. The Wills Act, 7 Will. IV. & 1 Vict. c. 26, was passed on the 3rd of July, 1837, and made to come into operation [*312] (as regards *the present case) from the 1st of January, 1838. In the year 1838, and after the Wills Act came into operation, John Palmer Winter died, leaving issue, which issue have survived the testator, John Winter. By a codicil, dated in February, 1839,

(1) 64 R. R. 252 (3 Hare, 157).
(2) 50 R. R. 59 (3 Moo. P. C. 334).
(3) 15 R. R. 120 (1 Mer. 320).
(4) 39 R. R. 129 (2 My. & K. 41).
(5) 38 R. R. 121 (6 Sim. 329, 332).
(6) 2 R. R. 475 (4 T. R. 601).

the testator, John Winter, altered a bequest in his will, and in all other respects ratified and confirmed the same. On the 22nd of August, 1840, the testator made a second codicil. The testator has since died; and the question is, whether the legacy to John Palmer Winter has altogether lapsed, or whether, by the operation of the Wills Act, it shall take effect, as if the death of John Palmer Winter had happened immediately after the death of the testator; and this depends upon the effect of the republication, and upon the construction to be put upon the words "shall die," in the 33rd section of the Act.

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With respect to the republication, the case must be considered as if the testator, on the 16th of February, 1839, had made a will in the very words of the will of the 13th of November, 1833, in which case there would have been the bequest of a share of the residue to John Palmer Winter, who was then dead.

The question on the construction of the 33rd section is, whether the words "shall die" mean shall die after a bequest to him by a will made after the 31st of December, 1837, or whether they mean shall die after the Act comes into operation. If the former meaning be given to the words, the claim of the representatives fails. If the latter, it is good. Upon the face of the Act itself, I certainly can find nothing to exclude the latter construction in favour of the former; and in the absence of anything upon the face of the Act to fix the meaning of the words, I am bound, as well as I can, to fix that meaning, by considering the policy of the Act, and the objects it was intended to accomplish.

Now, the policy of the Act, and the objects it was intended to accomplish, are, for the present purpose, sufficiently manifest. It was intended to prevent a portion given by a testator to a child going from the estate of such child, and his family from being left portionless, by reason only of the death of the child under certain circumstances—a consequence of law which the common feelings of mankind declared to be a disappointment of the intention of the father. [313]

The cases in which this event most commonly happened, and against which the Act was intended to provide, were cases in which the child died in the testator's lifetime, after the bequest was made, —and cases in which the testator, in providing for an absent child, was ignorant of the fact, that such absent child was dead. In both cases, the family of the child dying after, or dead at the time of the bequest, was left unprovided for; and it was to remedy this

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evil, amongst others, that the 33rd section of the Wills Act was passed.

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The construction of the Act, which alone will include all the cases which the Act must presumably have been intended to include, is that which makes the time of the legatee's death unimportant, provided he died after the Act came into operation, and the bequest to him is by a will made after that date; and, as far as I can see, that construction cannot possibly include any case not obviously within the purposes of the Act.

I may add, that if a testator, by a will executed before the Wills Act, had made a bequest to an absent child, who turned out to be dead at the time; and the will provided, that, if such child should die in the lifetime of the testator, leaving issue, who should survive
[*314] the testator, *the bequest should still take effect, (which the Act provides), I should in such a case have little difficulty in giving effect to the manifest intention of the testator. This is, in substance, the same case; for the will in this case was made after the Act came into operation, and it must be understood as expressing what the Act says shall be the consequence of it. It is true, that view of the question is not of itself sufficient to decide the present case, for I can only declare what the Act empowers me to declare; and if the construction of the Act be that the words "shall die" mean shall die after the making of the bequest, I could not have come to my present conclusion. I think, however, the sound construction of the Wills Act is, that, if the bequest be made after the Act came into operation, the Act will apply to a case where a child may have died before the will was made, but after the Act came into operation.

1846. *Dec.* 22. 1847. *Jan.* 11.

CROCKETT *v.* CROCKETT.

(5 Hare, 326—328.)

[326] [REVERSED on appeal, as reported in 2 Ph. 553; *S. C.* 17 L. J. Ch. 231; 12 Jur. 234.]

DALE *v.* HAMILTON (1).

1846.
Nov. 9, 11, 13.
Dec. 16.

WIGRAM, V.-C.

Affirmed on Appeal.
1847.
June 11, 12, 23, 26.

Lord COTTENHAM, L.C.

[369]

(5 Hare, 369—396; S. C. 16 L. J. Ch. 126; 11 Jur. 163; S. C. on app. 2 Ph. 266; 16 L. J. Ch. 397; 11 Jur. 574.)

The Statute of Frauds does not preclude a person from establishing by parol an agreement to form a partnership for the purpose of buying and selling land at a profit.

A. and B. for whom land had been purchased by C. with a view to its being resold in building lots, on the land being conveyed to them, signed a paper writing purporting to be a memorandum of an agreement between them relative to the land, by which it was agreed "that they should each advance half the purchase-money and receive interest on the same at five per cent., and that they were to have each one third interest in the purchase and to reserve one third of the profits arising therefrom for C., in lieu of his commission for purchasing, selling, surveying, valuing, and laying out the land in lots, or any other services that might be required of him; but that it was clearly and distinctly understood that C. should have no power or authority whatsoever over the land, and that he should not be entitled to receive any compensation therefrom until the whole was sold and paid for." The land having afterwards greatly increased in value, A. and B. refused to recognize C.'s interest in the speculation, and offered him a money compensation for his services. Whereupon C., who had objected, from the first, to the clause in the memorandum which excluded him from all control, as inconsistent with the original terms for which he had stipulated, filed his bill for an immediate sale of the land, claiming in effect to be a partner under the terms of the original stipulation. The VICE-CHANCELLOR directed issues as to the fact of the partnership and as to the terms of the partnership contract. On appeal the plaintiff elected to waive the issues as to a partnership and to claim an immediate decree for such relief as he was entitled to under the memorandum as a declaration of trust; and the LORD CHANCELLOR, being of opinion that the defendants, by repudiating the trust as to C.'s share, had devolved upon the Court the discretion which they had by the memorandum reserved exclusively to themselves as to the time of sale, declared C. entitled to one third, and referred it to the Master to inquire whether it would be for the benefit of all parties that the land should be sold.

IN June, 1843, the plaintiff, Thomas Aquila Dale, who was a surveyor and land agent, at Birkenhead, in the county of Chester, entered into a contract, in the name of Robert M'Adam, a merchant at Liverpool, with one Forsyth and his trustees, for the purchase of a parcel of land in Birkenhead; and the plaintiff sent to Mr. M'Adam a letter, dated the 24th day of June, 1843, as follows:

"I am happy to inform you that I have made a most excellent arrangement for the 26,000 yards of land, Prices Street and Camden Street, Birkenhead, being at four shillings and nine pence (say 4*s.* 9*d.*) per square yard; the present proprietor to pay for making Prices Street, which is now being completed. I consider this one of the best purchases that has been made for some time, as I can

(1) *Gray* v. *Smith* (1889) 43 Ch. D. 208, 59 L. J. Ch. 145, 62 L. T. 335; *In re De Nicols* [1900] 2 Ch. 410, 69 L. J. Ch. 680, 82 L. T. 840.

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clearly see a profit in it of at least 100 per cent. It must be understood that I am to be interested in the purchase, taking profit and loss of one-third; I taking all the trouble of laying out the lots and selling, and you finding the capital; and before any division of profits are made, you to receive interest at 4 per cent. per annum on all monies employed in such speculation.

"THOMAS DALE."

To this letter, Robert M'Adam replied as follows:

"28th June, 1843.

"I received your letter of the 24th inst., and shall be in Liverpool on Saturday, when I shall have the pleasure of seeing you.

"R. M'ADAM."

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Soon after this contract was made, and before the purchase was completed, Robert M'Adam agreed with the defendant, Robert Hamilton, a surgeon at Liverpool, that they (M'Adam and Hamilton) should advance each a moiety of the purchase-money, and be jointly interested in the purchase.

The plaintiff, soon afterwards, in the name of M'Adam, entered into a contract with one Hillier for the purchase of an adjoining plot of land at Birkenhead, which Hillier was under an agreement to purchase from the same vendors, and which contained 480 square yards. In September, 1843, the plaintiff prepared, and sent to Robert M'Adam a written agreement or memorandum, in the following words:

"Memorandum of agreement as to the terms on which R. M'Adam, Esq., and T. A. Dale are jointly interested in speculation of land situate at Prices Street, Lord Street, and Camden Street, Birkenhead, as purchased from T. Forsyth and his trustees, and also from J. Hillier, by the said R. M'Adam; that purchased from T. Forsyth and his trustees, containing 25,400 square yards, at 4*s.* 9*d.* per square yard; that from Hillier containing 480, at 8*s.* 6*d.* per square yard—General terms affecting such speculation; all accounts to be made up annually upon the principle of a banking account; interest at 5 per cent. to be credited to R. M'Adam, who engaged to advance the whole of the capital for working the said speculation to advantage; and all monies advanced to bear interest from the time of payment; and all monies received to go to the credit of the said account; the interest on such portions ceasing. This speculation is to be as follows, viz., that R. M'Adam takes

two-thirds of profit and loss, and T. A. Dale takes one-third of profit and loss; T. A. *Dale to make all measurements and surveys of land, supply all plans, survey all buildings at any time in progress, and do any business within his department or power, and effect sales, without any charge. This agreement for ourselves, executors, administrators, and assigns."

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The purchase-money of the two parcels of land, amounting to 6,248*l.* 7*s.* 6*d.*, was paid by M'Adam and Hamilton in equal moieties; and, by an indenture, dated the 16th of October, 1843, both parcels were conveyed to M'Adam and Hamilton, to hold the same in undivided moieties to them respectively, and to their respective heirs and assigns.

A memorandum of agreement made and signed by M'Adam and Hamilton expressed the terms of their contract to be as follows:

"Memorandum of an agreement between Robert M'Adam and Robert Hamilton, made the 27th of October, 1843, relative to a lot of land in Prices Street, Lord Street, and Camden Street, Birkenhead, say 25,400 square yards purchased from Thomas Forsyth and his trustees, at 4*s.* 9*d.* per square yard £6,044 7 6

480 square yards purchased from J. Hillier, at 8*s.* 6*d.* per square yard... ... ... 204 0 0

£6,248 7 6

That the said Robert M'Adam and R. Hamilton shall advance each one-half of the purchase-money, and that they shall receive interest on the same at the rate of 5 per cent. per annum, which interest is to be made up half-yearly, and calculated the same as bankers' accounts: That the said R. M'Adam and R. Hamilton are to have each one-third interest in the said purchase; *and that they are to reserve one-third of the profits arising therefrom for T. A. Dale, in lieu of his commission for purchasing, selling, surveying, valuing, laying out in lots, or any other services that may be required of him; but it is clearly and distinctly understood that said T. A. Dale shall have no power or authority whatsoever over the said land, and that he shall not be entitled to receive any compensation whatsoever therefrom until the whole is sold and paid for, and all outlay and expenses incurred thereon are deducted therefrom.

[*372]

"R. M'ADAM.

"R. HAMILTON.

"LIVERPOOL, 27th October, 1843."

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In December, 1844, Robert M'Adam died, having devised his real and personal property to six persons, in equal shares, and appointed two other persons his executors.

After the death of M'Adam, the defendants, Hamilton and the devisees under the will of M'Adam, proceeded to make a partition of the land comprised in the purchase, by conveying, in severalty, one moiety to the defendant, Hamilton, and the other moiety, in six lots, to the devisees of M'Adam. Conveyances were prepared, and were about to be executed for this purpose, when the plaintiff called upon the defendants to fulfil the contract, which he alleged had been made between himself and M'Adam, under which the plaintiff claimed to be entitled to one-third of the profits to be derived from the purchase.

The bill was filed in June, 1845, and the plaintiff thereby stated, that, as a surveyor and land agent, he had become peculiarly qualified, by knowledge and experience, to judge of the value, and of
[*373] the best mode of *laying out and disposing of land at Birkenhead, a town which had rapidly grown, and was still increasing in importance; and that Robert M'Adam proposed, in the year 1843, to enter into a joint speculation in land with the plaintiff, the plaintiff to select and conclude the necessary contracts for a suitable quantity of land, and to exercise his best skill and judgment, and professional services, in laying out and preparing such land for sale, and in superintending and negotiating the sale thereof; and Robert M'Adam to advance or provide the purchase-money, which was to be repaid to him with interest out of the proceeds of the re-sale before any division of the profits should be made. One-third of the profit or loss of such speculation to be shared and borne by the plaintiff, and two-thirds by M'Adam: That the plaintiff agreed to enter into the speculation upon the terms proposed; and agreed, also, that the land to be purchased should be conveyed to M'Adam, for their joint benefit. The plaintiff alleged that it was in pursuance of this agreement that he had selected and purchased the land comprised in the contracts with Forsyth and others, and Hillier: That shortly after the letter of the 28th of June, 1843, in reply to the plaintiff's communication that the larger purchase had been made, Robert M'Adam called upon the plaintiff and ratified the terms of the agreement, as stated in the plaintiff's letter of the 24th of June, 1843, except that the plaintiff, at the suggestion of M'Adam, then agreed that the latter should be allowed 5 per cent. interest on the purchase-money or capital which he might expend, and Robert

M'Adam promised, that, on the completion of the purchase, a formal memorandum, in writing, of the terms of the agreement should be made and signed by both parties: That the plaintiff subsequently consented to the admission of Hamilton to a participation in the contract. The bill alleged that M'Adam, being subsequently *pressed by the plaintiff to sign the memorandum which the plaintiff had sent to him in September, 1843, handed to the plaintiff a copy of the memorandum of the 27th of October, 1843, signed by M'Adam and Hamilton, and said he considered that memorandum to be sufficient, and that he would not sign any other. [*374]

The bill charged that the plaintiff had always objected to so much of the memorandum of the 27th of October, 1843, as purported to exclude him from any power or authority over the land, the same forming no part of the original agreement; however, the plaintiff accepted and determined to take the benefit of the said memorandum, until some other sufficient declaration of trust should be executed, subject and without prejudice to his rights in all other respects; and the plaintiff submitted that the effect of such memorandum, as a declaration of trust in his favour, ought not to be prejudiced by the clause of exclusion; but if no effect could be given to the plaintiff's rights, except subject to that clause, then the plaintiff submitted to be bound by the clause, according to its just construction.

The bill prayed that the lands in question might be sold for the best price that could be obtained, and that the accounts of the said joint speculation might be wound up and adjusted, and the monies to arise from the sale applied and distributed under the direction of the Court, in conformity with the terms of the said agreement between the plaintiff and Robert M'Adam, the plaintiff being ready and offering to render and perform all such services, in regard to the sale, as ought to be rendered and performed by him, pursuant to the agreement; that the defendants might be ordered to do and execute all necessary and proper acts and deeds *for the purposes of the decree, and might, in the meantime, be restrained from making a partition, sale, or conveyance of the land, or in any manner parting with or incumbering the same. [*375]

The defendant, Robert Hamilton, by his answer admitted that M'Adam had, about June or July, 1843, communicated to him (Hamilton) that he (M'Adam) had contracted for the purchase of the land at Birkenhead, upon the speculation of making streets or

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roads across the same, and selling it in lots for building purposes, and that he invited the defendant to join him in the speculation. The defendant admitted that M'Adam then said that he had employed the plaintiff to aid him in making the purchase, and in laying out and disposing of the land for building, and that he had agreed to give the plaintiff, by way of remuneration, and in lieu of all commission and other recompense, a clear third part of the profit which should be ultimately realized, charging 5 per cent. interest on the outlay, to be calculated half-yearly, as on bankers' accounts, such remuneration to depend entirely upon and to be payable only out of such ultimate profit; that M'Adam represented to the defendant that such arrangement had been made with the view of securing the best services and energies of the plaintiff throughout the speculation, and that the defendant agreed with M'Adam to advance one-half of the money, and take upon himself one-half of the said speculation. The defendant, Hamilton, also said, that, being under the impression that the agreement of the 27th of October, 1843, was binding upon him, and intending strictly to fulfil the same, if the plaintiff would have performed the services thereby on his part stipulated, instead of seeking to prejudice the speculation by a forced or hasty sale of the land, he (the defendant) had, at an interview with the plaintiff in May, 1845, *admitted, that, upon a sale of the lands, the plaintiff would be entitled to a third of the profits, according to the terms of the agreement of the 27th of October, 1843.

[*376]

The defendants, the devisees of Robert M'Adam, by their answer stated, that they resided at Swansea, and had no personal knowledge of the matters alleged in the bill. They admitted that the several letters addressed by the plaintiff to M'Adam, requesting that an agreement showing the joint interest of the plaintiff in the land might be signed by M'Adam, had been found by the executors of M'Adam amongst his papers, and that an entry was found, in the handwriting of M'Adam, in his ledger, to the effect of the agreement of the 27th of October, 1843.

The defendants, Hamilton, and the devisees of M'Adam, said that the plaintiff had, in July, 1845, sold his business of surveyor and land-agent at Birkenhead, and that he had ceased to reside at Birkenhead, and taken up his residence at Cheltenham; and therefore they submitted, that, if any such alleged agreement had been made, the plaintiff had become unable to perform such part thereof as he stated in his bill he had undertaken to perform; and they

claimed to be entitled to hold and retain the land in question for their own use and benefit, to the absolute exclusion of the plaintiff from all share and interest therein.

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The defendants, the executors of Robert M'Adam, set forth in the schedule to their answer, the documents relating to the purchase which they had found amongst the papers of Robert M'Adam since his decease, including the plaintiff's letter of the 24th of June, 1843,—the memorandum of agreement stated in the bill to have been sent by the plaintiff in September, 1843, to *M'Adam for his signature, but containing no note or mark made by M'Adam; a letter from the plaintiff to M'Adam, dated the 18th of August, 1843, as follows: "Enclosed I beg to send you a short agreement between you and myself, respecting land in Price Street, &c., Birkenhead. Yours truly, T. A. DALE;"—and also other letters from the plaintiff to M'Adam, requesting a note or memorandum of the terms of the alleged agreement. Among these was a letter of the 14th of November, 1843, in which the plaintiff requested M'Adam to give him a note, expressing that no sale should be effected without the plaintiff being consulted, and that as soon as the whole of the outlay, with interest, was reimbursed, the plaintiff should then from time to time receive one-third of all subsequent sales.

[*377]

The defendants submitted that the memorandum of agreement of the 27th of October, 1843, was not a contract with or a declaration of trust in favour of the plaintiff, and that the plaintiff had no right, estate, or interest whatever, either at law or in equity, to or in the land; the defendants claimed the protection of the statute for the prevention of frauds and perjuries, which enacted that no action should be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action should be brought, or some memorandum or note thereof, should be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised (1). The defendants submitted, that the plaintiff had no other right, interest, or claim than for a just and reasonable compensation for all *such services as he had rendered, and might render, in the disposing of the land to the greatest benefit; that they had offered to pay him such fair and just compensation; and they thereby offered him 1,000*l.* for the services he had already rendered.

[*378]

(1) Stat. 29 Car. II. c. 3, s. 4.

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The letters from the plaintiff to M'Adam and the memorandum were given in evidence; and it was proved that M'Adam had made in his ledger, under the date of October, 1843, this entry: "Dr.—Purchase of land in Prices Street, Lord Street, and Camden Street, Birkenhead. The money to be advanced one-half by Robert M'Adam, and one-half by Robert Hamilton. Robert M'Adam to have one-third interest in said purchase. Robert Hamilton to have one-third interest, and the profits arising therefrom after deducting all outlay and expenses thereon to be reserved for Mr. T. A. Dale, in lieu of commissions, &c., &c., as specified in agreement between Robert M'Adam and Robert Hamilton, dated 27th October, 1843." The evidence also showed that the value of the land had greatly increased. The estimate of the amount which might be produced by a sale or sales varied from 25,000*l.* to 47,000*l.* The defendants proved that the plaintiff had in July, 1845, sold his business at Birkenhead, and that he had gone to reside at Cheltenham.

Mr. Romilly and *Mr. Roundell Palmer*, for the plaintiff.

Mr. Rolt and *Mr. Willcock*, for the defendant Hamilton.

Mr. Wood and *Mr. Fleming*, for the defendants the devisees and executors of M'Adam.

[379] The principal questions argued were, first, whether the proof of the alleged partnership (the entire subject of the dealing being land) was sufficient to take the case out of the operation of the Statute of Frauds, or whether the cases in which that effect had been given to a partnership contract were not cases in which the dealing in land was only an incident to the partnership business, and not cases in which the partnership wholly grew out of the dealing in land: *Lake* v. *Craddock* (1), *Lloyd* v. *Spillet* (2), *Forster* v. *Hale* (3), *Jackson* v. *Jackson* (4), *Tawney* v. *Crowther* (5), *Gregory* v. *Williams* (6), *Crawshay* v. *Maule* (7), *Nerot* v. *Burnard* (8), *Fereday* v. *Wightwick* (9), *Lees* v. *Nuttall* (10), *Peck* v. *Cardwell* (11), *Welford* v. *Beazely* (12). Secondly, supposing that the existence of a partner-

(1) 3 P. Wms. 158.
(2) 2 Atk. 148.
(3) 4 R. R. 128 (3 Ves. 696; *S. C.* 5 Ves. 308).
(4) 53 R. R. 313 (9 Ves. 591).
(5) 3 Br. C. C. 161.
(6) 7 R. R. 136 (3 Mer. 582).
(7) 18 R. R. 126 (1 Swanst. 518).
(8) 28 R. R. 65 (4 Russ. 261).
(9) 32 R. R. 136 (1 Russ. & My. 45).
(10) 31 R. R. 99 (1 Russ. & My. 53).
(11) 50 R. R. 127 (2 Beav. 137).
(12) 3 Atk. 503.

ship obviated the effect of the statute, whether there was sufficient evidence of a partnership between the plaintiff and M'Adam and Hamilton? *Smith* v. *Watson* (1), *Reid* v. *Hollinshead* (2), *Braithwaite* v. *Skofield* (3), *Nerot* v. *Burnard* (4); or to establish a ground for a further inquiry on that point: *Ex parte Langdale* (5), *Gardner* v. *Rowe* (6). And, lastly, if there were no partnership, or the partnership were not a ground of relief, whether the agreement of October, 1843, between M'Adam and the defendant Hamilton, or the other circumstances of the case operated to raise a trust on behalf of the plaintiff: **Austin* v. *Chambers* (7), *Garrard* v. *Lord Lauderdale* (8), *Walwyn* v. *Coutts* (9), *Acton* v. *Woodgate* (10), *Morton* v. *Tewart* (11). [*380]

THE VICE-CHANCELLOR:

I cannot think that any one, reading the admission in the answer of the defendant Hamilton, and reading also the memorandum signed by Hamilton and M'Adam, and being at liberty to assume that such a contract was in fact made, can have any doubt of what the justice of the case requires. The land has risen from 6,000*l.* to near 30,000*l.* in value, and yet the plaintiff's right to participate in that profit is altogether denied. It is said, however, that the defendants are in law entitled to hold the land free from the plaintiff's claim; and if they are so, I certainly shall not, merely on moral grounds, take upon myself to alter what I find the law of the case to be.

The principal ground of defence was founded on the Statute of Frauds; and to that question I shall first address myself. The plaintiff, claiming an interest in land which is vested in the defendants, has not produced, and he admits there was not, any agreement in writing signed by M'Adam, such as he alleges to have been made between himself and M'Adam. The plaintiff admits that the agreement between himself and M'Adam was by word of mouth only, and he has not relied upon any act of part-performance in the sense, which, according to the doctrines of this Court, would, in *general, take the case out of the Statute of Frauds. It is, in general, of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an [*381]

(1) 2 B. & C. 401.
(2) 28 R. R. 488 (4 B. & C. 867).
(3) 33 R. R. 215 (9 B. & C. 401).
(4) 28 R. R. 65 (4 Russ. 261).
(5) 11 R. R. 196 (18 Ves. 300).
(6) 25 R. R. 214 (5 Russ. 258).
(7) 49 R. R. 1 (6 Cl. & Fin. 1).
(8) 30 R. R. 105 (3 Sim. 1).
(9) 30 R. R. 117 (3 Sim. 14).
(10) 39 R. R. 251 (2 My. & K. 492).
(11) 60 R. R. 35 (2 Y. & C. C. C. 67).

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agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in, if there were no contract. Of this, a common example is the delivery of possession. One man, without being amenable to the charge of trespass, is found in the possession of another man's land. Such a state of things is considered as showing unequivocally that some contract has taken place between the litigant parties; and it has, therefore, on that specific ground, been admitted to be an act of part-performance: *Morphett* v. *Jones* (1). But an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not, in general, admitted to constitute an act of part-performance taking the case out of the Statute of Frauds; as, for example, the payment of a sum of money, alleged to be purchase-money. The fraud, in a moral point of view, may be as great in the one case as in the other; but in the latter cases the Court does not in general give relief. In *Mundy* v. *Jolliffe* (2), however, the LORD CHANCELLOR decreed a specific performance, on the ground of part performance, where the acts were certainly equivocal; fraud, he said, was enough. In the present case the only acts done have been the conveyance, which apparently negatives the alleged contract, and the acts of the plaintiff, which may as naturally be referred to his character of a hired surveyor and agent, as to a contract giving him an interest in land.

[*382]

The plaintiff, however, has relied upon another ground for taking the case out of the statute. He says, *that where a partnership or an agreement in the nature of a partnership exists between two persons, and land is acquired by the partnership as a substratum for such partnership, the land is in the nature of the stock in trade of the partnership; and that, the partnership being proved as an independent fact, the Court, without regarding the Statute of Frauds, will inquire of what the partnership stock consisted, whether it be of land or of property of any other nature.

That land acquired as the substratum of a partnership is in this Court considered in the light which the plaintiff contends for, may be admitted upon very high authority: *Crawshay* v. *Maule* (3), *Fereday* v. *Wightwick* (4); and that where a partnership exists, and land is brought into, and actually held and used by, the partnership, for partnership purposes, the Court has dealt with it as

(1) 18 R. R. 48 (1 Swanst. 172).
(2) 48 R. R. 262 (9 Sim. 413).
(3) 18 R. R. 126 (1 Swanst. 518).
(4) 32 R. R. 136 (1 Russ. & My. 45).

partnership property, although the ownership, apparently, has not been in all the members of the firm, or, if in all, not apparently as partners, but under another title; and that the Court has so done, without calling in aid the doctrine of part-performance, must I think be also admitted. But whether a simple case, like that before me, divested of everything but an agreement for a partnership, can be brought within the scope of the cases relied upon, is a question of no inconsiderable difficulty.

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When the proposition was first advanced by the plaintiff, I confess, it appeared to me, that to admit the argument to the extent contended for would virtually be to repeal the Statute of Frauds, or nearly so; for if a party, by alleging an interest in land of any specific kind, can escape from that safeguard against fraud and perjury which the statute has provided, it *remains only that [*383] those, who are prepared by fraud and perjury to invade the rights of another, shall make that specific interest (to which it is said the Act does not extend) the ground of their claim, and the statute is at once evaded. Thus, if A. alleges that B. agreed to give him an interest in land, the statute applies; but, if he adds, that the land was to be improved and resold at their joint risk for profit and loss, then, according to the argument, the statute does not apply. At the same time, if decision has established the general proposition for which the plaintiff contends, it is not because his case (being within the authorities) is an extreme case, that I am at liberty to refuse him the benefit of such authorities. The case may exemplify the inconvenience of such an exception to the Statute of Frauds, but if the exception be established, and if the case be within it, the plaintiff is entitled to the relief he asks.

In order to try this question in the most simple manner, I will suppose the case to be the converse of what it is. I will suppose that the land purchased, instead of rising, had fallen in value; that a loss had been sustained, and that Hamilton and M'Adam were the plaintiffs seeking to compel Dale to contribute his proportion of the loss. If in that case the authorities would have enabled Hamilton and M'Adam, by proving the partnership with Dale, and that the land was part of the partnership stock and effects, to have compelled contribution from Dale, the same authorities will, upon like proof, support the present suit, upon the principle—that of mutuality in remedies—which enables a vendor to recover the purchase-money in this Court, though the remedy at law may be equally adequate and more appropriate; not, however, that the remedy at law would

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be equally adequate in this case, if the plaintiff is right in that which he contends for.

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[384] In *Jeffereys* v. *Small* (1), two persons jointly stocked a farm, and occupied it as joint tenants; one died, and the bill was to be relieved against survivorship. The LORD KEEPER said, that if the farm had been taken jointly by them, and had proved a good bargain, survivorship would take place; but, as to a joint undertaking in the way of trade, or the like, it was otherwise. In the case of *Jackson* v. *Jackson* (2), Lord ELDON, referring to this case, says, "The general law of merchants, originally applicable to trade only, has been extended a good deal—*Jeffereys* v. *Small*, approved, with some distinctions, in subsequent cases." The bearing of that case upon the principal case is closer than at first sight appears. The two parties were joint tenants by the original title. Their expenditure was equal, the perception of profits was equal, their acts and dealings were simply consistent with their rights as joint tenants, and, therefore, not evidence—certainly not unequivocal evidence, of an intention of the parties to alter their relative position as joint tenants; yet the Court appears to have admitted evidence of a contract to deal with it as in trade, and followed that contract up with its consequences. *Lake* v. *Craddock* (3) is an analogous case, in some respects, to the last, but it may not perhaps be considered an important authority for the plaintiff's proposition, except so far as it shows that a joint speculation in improving land, on a hazard of profit and loss, is treated in this Court as in the nature of merchandise, and the *jus accrescendi* not allowed; for it may be collected from the report, that the partnership contract between the litigant parties was admitted, and the only question was upon the consequences of that contract. These consequences

[*385] certainly were carried a *great length; for one of the five original contractors, who had retired for nearly thirty years, was held bound by a subsequent contract, made by the other four, for the purchase of other lands in aid of the original design. "Supposing," said the MASTER OF THE ROLLS, "one of the partners had laid out the whole money, and had happened to die first,—according to the contrary construction he must have lost all; which would have been most unjust." Lord ELDON's comment upon that case is this: "The purchase of the land was made to the intent, that they should become partners in the improvement; that it was only the

(1) 1 Vern. 217 (1683).
(2) 53 R. R. 13 (9 Ves. 591).
(3) 3 P. Wms. 158 (1729).

substratum for an adventure, in the profits of which it was previously intended they should be concerned" (1).

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The next case,—that of *Elliot* v. *Brown* (2), cited from Lord COLCHESTER'S Notes (2), has a closer bearing upon the present case. Two persons took a joint lease of a farm, and farmed it on their joint account. One died before the expiration of the lease. The title of his executors to a moiety of the stock was admitted by the survivor, but the survivor claimed the remainder of the lease by survivorship. The LORD CHANCELLOR said, "By the joint tenancy the lease would survive; yet, if turned by agreement into a partnership, it would not survive." The law (he said) was clear. The only question was, whether the agreement existed. He thought the lease accessary to the trade in which the parties were embarked. Of this case Lord ELDON says, "I have a note of my own of a case of *Elliot* v. *Brown*, in which another distinction was taken by Lord THURLOW,—that the law with reference to the stock would be the same as to the lease, provided the lease was taken for the same purpose as the stock, and the *lease was only the substratum" (3). The observation I made upon *Jeffereys* v. *Small* applies to this,—a joint tenancy by two,—personal occupancy by the two,—equal expenditure by the two, and equal profit to the two: all consistent with a joint tenancy. In the absence of contract, survivorship would be the legal consequence; but the LORD CHANCELLOR says, if there were a contract for a partnership it shall prevail, and the right of survivorship shall not attach. In these cases, without any contract in writing, or any dealing with the property by the joint tenants which was not consistent with the title by joint tenancy, the Court admitted evidence of a partnership contract, whereby the rights of the joint tenants, *inter se*, were varied.

[*386]

The next case I shall refer to may, perhaps, be considered as going much further. In *Forster* v. *Hale* (4), four persons, of whom Burdon was one, were bankers, in partnership. In June, 1791, Burdon, Peareth, and two other persons took a lease of the Hepburn Colliery for thirty-one years, as tenants in common, in equal fourth parts. The colliery was carried on under the firm of Burdon, Peareth & Co. Burdon died in December, 1792, and the bill was filed by two of the surviving partners in the Bank against

(1) 53 R. R. 17 (9 Ves. 597).
(2) 53 R. R. 17 (3 Swanst. 489, *n.* (1791)).
(3) 53 R. R. 17 (9 Ves. 596).
(4) 4 R. R. 128 (3 Ves. 696 (1798)).

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the executors of Burdon, claiming an interest as partners with Burdon in the fourth share of the colliery to which he was entitled under the lease. It is material in this case to observe, that the partners in the Bank, other than Burdon, never intermeddled with nor had any visible possession of the colliery. The colliery banked with the plaintiff's firm, and the private books of the Bank showed, that the bankers, besides Burdon, were treated as jointly interested with him. Burdon lived a long way off, and was not present at

[*387] the Bank, but he was a partner of the *firm. In the argument of the case at the Rolls three points were made: first, that, by Burdon's letters, produced in the cause, a trust for his copartners in the Bank was manifested and proved within the Statute of Frauds; secondly, that a trust by implication arose upon the entries in the banker's books; and thirdly, as it would appear by the arguments of counsel, although not by the statement of the case,—that a colliery was an article of trade, and therefore that the agreement was not to be considered as an agreement concerning land. The MASTER OF THE ROLLS held, that, by the letters of Burdon sent by him, a trust for his partners in the Bank was manifested and proved; and, he said, "I should have decided upon this evidence alone, provided there was no other evidence to rebut it in the other part of the case." He does, however, examine the other circumstances of the case, not for the purpose of seeing whether he could found a decree in the plaintiff's favour upon them, but for the purpose only of seeing whether the acts of the parties showed that his inference from Burdon's letters was an erroneous inference. Amongst other facts, he shows (as did the LORD CHANCELLOR afterwards on appeal), that the banking firm contributed to the expense of working the colliery. But in neither branch of the Court was it intimated that this would create a resulting trust to take the case out of the statute. Burdon in fact never saw the books; nor was there any signature in them. The case was carried by appeal to the LORD CHANCELLOR, and Lord ROSSLYN expressed his entire concurrence in the conclusion to which the MASTER OF THE ROLLS had come, upon the grounds on which he had founded it; but he considered the case as wholly out of the Statute of Frauds. The LORD CHANCELLOR, at the opening of the case, observed, that the question was not, whether there was

[*388] a declaration of trust within the statute, but, *"whether there was a partnership?" the subject being an agreement for land, the question was, "whether there was a resulting trust for that

partnership by operation of law. The question of partnership," he adds, "must be tried as a fact, and as if there was an issue upon it; if by facts and circumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence by which a partnership may be found, the premises necessary for the purposes of that partnership are, by operation of law, held for the purposes of that partnership" (1). It is right, however, that I should notice another passage in the judgment of the LORD CHANCELLOR from which it may possibly be thought that the force of the preceding language is in some degree weakened. He observes, that upon the first view he thought it was a case independent of the statute; and then he says, "the case appeared to me in rather a different point of view. From the nature of it, it seems to me, there was no occasion to affect the estate in the land; nor has the decree done so. It has not transferred the legal interest in the share of the colliery to the plaintiffs. The case is merely the case of agreement to share profit and loss in the trade of a colliery; which does not at all affect the ownership of the land, which is often carried on for a great number of years without any estate in the land given to those who are to share the profits. Nothing is more common than where a man is tenant in fee of land, where there is a coal work, he, partly sharing the rent and the profit, carries it on by mere license with other persons concerned in the business of the colliery. It is, therefore, merely the case of an agreement which may or may not *be within the fourth section of the statute. But this particular [*389] case is not even within the fourth section, because it was to be executed immediately" (2). The LORD CHANCELLOR then proceeds to show that the evidence proves the partnership, and concludes—"therefore, though an issue might have been had perhaps before the cause was canvassed, I cannot direct an issue; for if the verdict found that these plaintiffs were not engaged in partnership with Burdon in this colliery, I should not let that verdict stand" (3).

The case of *Peck* v. *Cardwell* (4) bears on the principal case in one of its aspects, but not, I think, in that which I am now considering.

The principle upon which I presume the above cases have proceeded has been partly the jurisdiction of the Court in cases between

(1) 4 R. R. 129 (5 Ves. 309).
(2) 4 R. R. 130 (5 Ves. 314).
(3) 5 Ves. 322. A similar passage may be found in the same judgment at p. 319; see 4 R. R., p. 131.
(4) 50 R. R. 127 (2 Beav. 137).

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partners touching the partnership property, and partly its jurisdiction to relieve against the fraud of a partner, who should avail himself of his legal rights in violation of his partnership contract; a fraud, as against which no remedy or no adequate remedy could be had at law. Is, then, the hypothetical case I am considering within the scope of the cases above referred to, and one in which I am bound to receive general evidence of the partnership contract, which the plaintiff suggests, and to follow it up, if proved, with the consequence contended for? In order to try this, let it be assumed that by parol evidence of unexceptionable credit the alleged contract can be proved, and that the plaintiff, in pursuance of it, selected the land for purchase, made the contract for it, and laid it out, and did every act which the contract required him to do;

[*390] Hamilton and M'Adam paying *the purchase-money; and a loss having been sustained, he refused to contribute to the loss. I confess I do not see what in principle there would be in that hypothetical case to distinguish it from the cases referred to. If in *Jeffereys* v. *Small* and *Elliot* v. *Brown* (I omit for the present *Forster* v. *Hale*) general evidence was admissible to alter this contract (the apparent rights of the parties being those of joint tenants), though there was no agreement in writing, and their acts were altogether and simply consistent with a joint tenancy, why should it be excluded in the case supposed? The circumstance that each joint tenant had an interest in the land, cannot affect the question as between themselves; and the circumstance that each was in possession made no difference, because their interest as joint tenants explained it; yet the Court, without any writing, and without once referring to the doctrine of part-performance, held that the rights of the partners, *inter se*, were altered by force of the partnership contract, and that alone. If the existence of a partnership contract were a sufficient reason to give new and altered interests in land in those cases, what but a merely arbitrary decision can exclude it here, the existence of the partnership contract, and an acting under it in the way supposed, being assumed? Nor do I see, on the same hypothesis, how, in principle, I can refuse to apply to this case the reasoning in *Forster* v. *Hale*. It is, without doubt, a gross moral fraud for a vendor who has got his purchase-money to withhold the conveyance, but payment of purchase-money will not take a case out of the statute. So, in *Forster* v. *Hale*, the advances made by the bankers, and accepted by Burdon together with other persons in the colliery, would have

made it a gross moral fraud in him to deny the interest of his partners in the Bank in the lease; still it was merely an advance of money, and though the banker's books in that instance made the case plain, that consideration affects *only the weight of the evidence, [*391] and not the question of its admissibility. It is clear, moreover, that Lord ROSSLYN founded himself entirely upon the proposition, that the existence of the partnership drew with it the right to have the stock of the partnership, whether land or other stock, ascertained; and though in one part of his judgment he observes that an estate in the land is not necessary to, and often does not accompany, the interest of partners in a mine, his argument throughout is founded on the partnership contract and the consequences incident to it. A contract between Burdon and a single individual, that that individual should have all Burdon's interest in the colliery, could not have been enforced. It was the partnership, and nothing else, which was the foundation of Lord ROSSLYN's judgment. Difficult, however, as the proposition is, it derives some support by way of analogy (though I admit a distinction may be taken between them) from the cases which were referred to and acted upon by Lord COTTENHAM, in *Taylor* v. *Salmon* (1), in which case, upon proof of agency, it was held, that a trust attached on land purchased by the agent, though he denied the agency. Here, in principle, the partner purchasing land for the use of his firm may be considered as the agent of his firm, in order to bring the case within the principle of the cases I have referred to.

But it is said that no such partnership as the bill alleges, and as I have up to this time assumed, is proved in this case,—and as against the devisees of M'Adam, it is true that there is no such proof. The question before me does not however rest there; there is this further question,—whether there is not enough proved to entitle the plaintiff to an issue upon that point?

Now, first observe the memorandum of the 27th of October, 1843. [392] Two objections were taken by the defendants to that document; one, that it was *res inter alios acta*, upon which *Garrard* v. *Lord Lauderdale* (2) and cases of that class were mentioned; and the other, that the plaintiff, upon the document being tendered to him, had rejected it, and that he could not again insist upon it. One observation appears to me to answer both of these objections. If the document were in the nature of a voluntary instrument, containing an offer to a person neither having nor claiming any

(1) 48 R. R. 34 (4 My. & Cr. 139). (2) 30 R. R. 105 (3 Sim. 1).

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precedent interest, either objection might possibly prevail. But that is not the case here. In order rightly to understand the effect of the document, I am bound to place myself by evidence in the position of the parties making, delivering, and receiving it. Now, from the beginning, the plaintiff had been insisting in writing upon the rights which he now claims, and pressing M'Adam to furnish him with written evidence of his rights. I refer to the plaintiff's letters to M'Adam, and to the memorandum of agreement sent by him to M'Adam for his signature. When, therefore, M'Adam, under these applications, gives the plaintiff the document of the 27th of October, 1843, I must understand him as giving it, not as an original proposal, but as an acknowledgment of the pre-existing right, which the plaintiff claimed, and the plaintiff does not lose the benefit of that acknowledgment, so far as it goes, because he complains, and perhaps truly, that it gives him less than he is entitled to.

The admission in Hamilton's answer carries the case much further against him; for what M'Adam said to him before he made
[*393] his bargain with M'Adam, and paid *his purchase-money, was an admission by M'Adam of the plaintiff's interest in the land, and therefore binding on Hamilton. It would have been evidence against M'Adam, and is therefore evidence against Hamilton, claiming under M'Adam by a conveyance subsequent to that admission. The admission in the answer is not evidence against M'Adam's devisees, because the answer of one defendant cannot be read against the other. The letters and documents sent by the plaintiff are not evidence under the Statute of Frauds; but if the question be one of fact, whether the plaintiff had an interest or not, I will not say that a claim, repeatedly made, and never denied by M'Adam, is a circumstance of no weight. As far as the question depends on the Statute of Frauds, it appears to me that the cases I have referred to are authorities to the benefit of which the plaintiff is entitled.

Three further points remain to be noticed: first, it is said by the defendants that there was no consideration, or no adequate consideration for the original agreement; secondly, that nothing had been done under it by the plaintiff; and thirdly, they relied on the fact of his having personally left Birkenhead and taken up his residence at Cheltenham.

With regard to the first question,—want of consideration,—I repeat what I said during the argument. If one man has skill,

and wants capital to make that skill available; and another has capital, and wants skill; and the two agree that the one shall provide capital, and the other skill, it is perfectly clear, that there is a good consideration for the agreement on both sides; and it is impossible for the Court to measure the *quantum* of value. The parties must decide that for themselves. As to the second point, that nothing has been done, *it appears to me, that all that was [*394] required of the plaintiff had been done up to the time that the dispute arose; at all events, enough had been done to subject him to a suit if a loss had been incurred; and if so, it must follow of course that he has done enough to entitle him to sue if a profit has been made, and the case is right in other respects: in fact, it appears to me, that, up to the time of the dispute, he had done every thing that could be required of him to be done; though the time for the most important part of his services may not have arisen. Nor can I say that the plaintiff's removal to Cheltenham precludes him from continuing to act on behalf of the parties according to the terms of the contract, although it may involve him in more expense than if he resided at Birkenhead. It is not suggested that any benefit has been lost up to this time by his absence. It appears to me a strange proposition for the defendants to say, that the plaintiff has no right under the contract, and yet that he shall remain at Birkenhead with his right denied, until the Court shall have come to a conclusion on the subject. I do not think that there is any thing in this objection absolutely to deprive him of all benefit of the contract, if he is in other respects entitled to it.

The difficulty of the case has led me to look into that which I may call the second branch of it. The plaintiff says, if the case is within the Statute of Frauds, that still a trust is sufficiently "manifested and proved" by the memorandum of the 27th of October, 1843; and though he objects to the terms of that instrument, so far as it excludes him from a voice in the business, as to the time of selling the land, he prefers taking such rights as the document may give him to having his bill dismissed. For the reasons I have already stated in commenting upon that document, I think the memorandum *is an acknowledgment of an existing [*395] right, and does at least manifest and prove an interest in the plaintiff to the extent therein specified.

It was then said, that the interest of the plaintiff, if any, had not yet ripened into a right in possession, and therefore that the bill is

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premature. I am not yet persuaded that such is the case. It may be argued, from *Peck* v. *Cardwell*, that an agreement, like that in question, is not determined by the death of one of the parties; an argument which, in one sense, is unfavourable to the plaintiff. But if that conclusion be admitted, it must follow that the agreement between the parties binds them to sell at the proper time, whenever that may be; and the question which I have considered is, whether the attempt at partition will not, if carried out, so completely destroy that unity and entirety of interest, which is essential to the due performance of the original contract, that the Court is bound at least to prevent it; or whether that circumstance, coupled with the unqualified denial of the plaintiff's interest, and his actual exclusion from the land, is not such a determination of the original contract, as will entitle him now to an immediate sale. I have found, however, after giving to each branch of the case the best consideration I can, so great difficulty in the way of a decision founded upon this second branch of it, that I think I shall best consult the interests of both parties, and the justice of the case, by directing such issues as will try whether any such an agreement as is alleged, was entered into between the plaintiff and M'Adam, before the 16th of October, 1843; and if such an agreement was made, whether it contained the term excluding the plaintiff from any voice in the determination of the time for selling the land. I mention the 16th of October, 1843, which is later than the time at

[*396]

which it is alleged that *the original agreement was made, in order to cover the real justice of the case, and on the authority of what is said throughout the case of *Forster* v. *Hale*, that if the evidence does not prove the agreement at the beginning, it is sufficient that it is subsequently shown.

[The decree directed the following issues:] First, whether, before the 16th day of October, 1843, it was agreed between the plaintiff and Robert M'Adam (in &c., deceased), that they should be jointly concerned in speculations, or a speculation, for buying, improving for sale, and selling land at Birkenhead, in the county of Chester; secondly, whether, if any such agreement was made, it was a term in such agreement that the plaintiff should have no power or authority in determining when the land purchased in pursuance of the said agreement should be resold. * * *

1847.

[2 Phillips, 271]

From that order there was an appeal and a cross-appeal: the defendants insisting that the bill ought to have been dismissed; the

plaintiff, that an immediate decree ought to have been made in his favour.

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At the hearing of the appeals,

Mr. Romilly and *Mr. Roundell Palmer* appeared for the plaintiffs.

Mr. Rolt and *Mr. Bagshawe*, for Hamilton.

Mr. Wood and *Mr. Fleming*, for the other defendants.

The argument turned chiefly on the question so much discussed in the judgment of the VICE-CHANCELLOR; the defendant's counsel contending that, so far as the case rested on agreement, the remedy was barred by the Statute of Frauds: independently of which, they argued that the agreement was in its nature one which, for want of mutuality, this Court would not enforce, as it had no power to compel the plaintiff to perform the services which he had agreed to render. They further *argued that, the memorandum of the 27th [*272] of October, if available at all to the plaintiff (which, for the reason suggested by the answer, they submitted it was not), he was bound to take the whole of it together, and to abide by the provision which excluded him from all control in the management, the effect of which would be, that, as his right would not arise until the defendants thought fit to sell, he had no present title to sue, because there was no present relief which the Court could give him.

The counsel for the plaintiff, on the other hand, contended that the Court would put a reasonable construction upon the memorandum, and, if it saw in that document a clear intention to give the plaintiff an interest in the profits of the speculation, would not allow the defendants to make that interest merely illusory by capriciously postponing a sale after the time when it would be for the benefit of all parties that a sale should take place. They also argued the case upon the agreement, independently of the memorandum; but, upon an intimation from the Court that there was not enough without the memorandum to warrant the Court in establishing the agreement without an issue, *Mr. Romilly*, in his reply, said that, rather than incur the expense of an issue, his client would prefer taking such relief as the Court could give him upon the memorandum as a declaration of trust; and upon that footing he asked an immediate declaration of the plaintiff's right, and a reference to the

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Master to inquire whether it would be for the benefit of all the parties that all or any part of the land should now be sold.

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June 26.

THE LORD CHANCELLOR:

This case became embarrassed in the Court below by an attempt, [*273] on the part of the plaintiff, to get what *appeared to be more beneficial than what I think he is clearly entitled to, and the obtaining of which was attended with a certain degree of difficulty from the want of an agreement in writing at the commencement of the plaintiff's connection with Mr. M'Adam. The Court directed issues to try the fact of partnership, which, if they were to be tried, might, I think, leave the parties in further embarrassment and without the means of coming to a conclusion as to their respective rights.

I need not, however, advert any further to that part of the case; because the Court below not having made any declaration in favour of the plaintiff, but having merely directed an issue for the purpose of ascertaining the right, the plaintiff is not satisfied with that decree, and has presented a petition of appeal, which came on for hearing together with an appeal on the part of the defendant, in which it was contended that there was no case made, and that the bill, of course, ought to have been dismissed. The plaintiff, therefore, by appealing, and by what is stated by his counsel at the Bar, is now willing to take such relief as I may consider him entitled to, founded on the memorandum of the 27th of October, 1843; and I cannot but think that if the case had rested on that memorandum in the Court below, all that embarrassment which was felt in disposing of the case would have been entirely saved; because the case, upon that memorandum, appears to me to be a perfectly plain and straightforward one.

The memorandum is a document signed by M'Adam and Hamilton; and the plaintiff's case is that he entered into an arrangement with M'Adam, the object of which was to purchase land at Birkenhead, not for the purpose of investment or of being retained as real estate, but for the purpose of being resold; and then they were [*274] *to divide the profits, the plaintiff being, as he says, entitled to one-third.

Letters are found from the plaintiff to M'Adam, who is now dead, undoubtedly showing that that was his view of the case; but those letters are no evidence of what they contain, not being recognised by the person to whom they were addressed, beyond this, that such

letters were written, and such demands and claims made on the part of the plaintiff. Great difficulty, therefore, arises in establishing the plaintiff's claim on those letters or on the transactions which took place anterior to the date of the memorandum of the 27th October, 1843; but that memorandum coming out of the possession of the plaintiff, and signed by M'Adam and by Hamilton (M'Adam having entered into an arrangement with Hamilton to divide with him his interest in the adventure), is in these words. (His Lordship read the memorandum.)

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Now without going out of that memorandum, without, on the part of the plaintiff, claiming any thing except what is to be found in the terms of that memorandum, this is perfectly clear, that there was a purchase made by M'Adam, afterwards divided between him and Hamilton, and that he and Hamilton were only to have one-third each in the adventure; that the adventure was, to sell the land and realise the profits after paying the expenses and the interest on the purchase-money, and to divide the profits into thirds, one-third for M'Adam, one-third for Hamilton, and one-third for Dale. That we have under the handwriting of Robert M'Adam and Robert Hamilton; and on the part of the defendants, it is asked in the face of that declaration of trust, that, by dismissing the bill, I should tell the plaintiff and tell the defendants too, that they the defendants, having declared that they are interested in one-third each, are *to [*275] keep the whole, and, that although they have declared that Dale is entitled to one-third, he is not to receive any thing at the hands of a court of equity; and that, upon a supposed application of the Statute of Frauds, a statute made to prevent fraud, and which, therefore, has provided that declarations of trust shall always, not originate in, but be evidenced by, writing. For there is this distinction between agreements and declarations of trust: in the one, it is the agreement itself, which is the origin of the interest, that must be in writing; in the case of a declaration of trust, which is only the recognition of a pre-existing interest, it is the evidence and recognition, and not the origin of the transaction, that must be in writing. Here the declaration recognises a past transaction, because the purchase had been agreed for before Hamilton became entitled to any share in it; and in this agreement between M'Adam and Hamilton they recognise Dale's right to have one-third part of the profit to be produced by the sale of the land after paying the expenses and interest on the purchase-money. Now it would be the strangest thing in the world, if the statute being satisfied, which

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it is, by finding this writing signed by the parties, the Court should not give relief to the party whom that document declares entitled to it.

It is nothing that the plaintiff is no party to this declaration of trust; that is not required. A declaration of trust may acknowledge a right in another party, if it is signed by the party declaring that he is a trustee for the other.

The right of the plaintiff, then, under that document, to a third share in the profits of this land being clear, the conduct of the defendants removes the few topics that have been urged against the
[*276] plaintiff's right; for if they by *their conduct repudiate the trust and endeavour to exclude him from that which they have themselves under their hands declared him to be entitled to, how are they to argue that he has withdrawn and has not acted under the trust? If the refusal had been on his side; if they, acknowledging his title, had called on him to render those services which seem to have been part of the consideration for letting him in to a share of the profits of this adventure, there might have been a difficulty in the case so presented. But when they insist that he has no right, and endeavour to exclude him, and tell him he has nothing to do with the land, there is an end of the case against the plaintiff for not having performed those services which, by their conduct, they have shown they would have refused to accept, if he had offered to discharge them.

The question, then, is, resting the plaintiff's title on this declaration of trust, what the Court ought to do. It is clear that the parties contemplated a degree of management for the purpose of realising the best profits they could from this adventure. The land was to be allotted and laid out, and various courses adopted for the purpose of obtaining a better sale; and the defendants insist that, by the terms of the declaration of trust, they are to be the sole judges of what that management is to be, and that the plaintiff was to have no voice in it. But the answer to that is, that if the defendants who are trustees, and who have declared themselves trustees, *quoad* the plaintiff's third, if they have themselves refused to perform the trust, if they, by endeavouring to appropriate the plaintiff's share to themselves and to withdraw it from the plaintiff, who is entitled to it, have refused to do that which, by the declaration of trust, they were to have done, why it is like all other
[*277] cases of trustees who refuse to execute the duty they have *undertaken, and this Court will take on itself, as far as it can, to put the cestui que trust in the situation in which he would have been if the trusts had been properly performed.

Now all that the Court can do is this, unless the parties will have sense enough, after what has taken place, to arrange among themselves some plan more for their benefit, and they must do that out of Court, I cannot interfere with that, though in the meantime I must assume that the plaintiff is compelled to apply to the Court for that which the Court alone can give him—I must make the decree in the terms *Mr. Romilly* has suggested; I must direct the land to be sold. It may be better for the parties not to sell the land immediately. If so, and they have any sense of their own interest, they will of course agree among themselves how to manage it. If not, I can only declare the plaintiff's right under this memorandum, and refer it to the Master to inquire whether it is for the interest of the parties concerned that the land should now be sold. If it is to be sold under the direction of the Court, there will be no difficulty in disposing of the purchase-money produced by the sale.

GREEN *v.* GREEN.

1840.

SHADWELL, V.-C.

[400, *n.*]

(5 Hare, 400, *n.*—402, *n.*)

A husband may be restrained from interfering with his wife's separate estate.

THE bill, which was brought by Ann Green, wife of Samuel Francis Green, by her next friend, against the said Samuel Francis Green and others, stated, that, by an indenture, dated the 8th of June, 1836, being a settlement made in contemplation of the marriage of the plaintiff and her said husband, certain leasehold premises in Whiting Street, Thomas Street, and Little Thomas Street, Lambeth, and certain furniture, fixtures, and effects, were bargained, sold, and assigned to Thomas Britchford and Allan M'Millan, upon trust for the sole and separate use of the plaintiff, notwithstanding her then intended coverture, for her life, with remainder for the said Samuel Francis Green, for his life, with remainders to certain other persons. That the marriage took place on the 21st of June, 1836. That Samuel Francis Green and the plaintiff had for some time past, by reason of improper conduct on the part of the said Samuel Francis Green, lived separate and apart from each other. That Samuel Francis Green, without the consent of the plaintiff, had entered into receipt of the rents and profits of the settled premises, had distrained the goods of some of the tenants, and had possessed himself and sold and disposed of some of the furniture and effects,

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and had applied such rents and proceeds to his own use; that he had also taken possession of the house, No. 2, Whiting Street, and threatened in like manner to possess himself of a sum of 30*l.* belonging to the plaintiff, in the Lambeth Savings Bank, being part of the settled property.

The bill prayed an account of the trust property, furniture, and effects, possessed by the defendant, Samuel Francis Green, and that he might be decreed to pay into Court what should be found due from him, that the defendant, Samuel Francis Green, might be restrained by injunction from taking proceedings to recover or receive the rents and profits of the trust property, or otherwise intermeddling or interfering with the trust estates, furniture, and effects, and from continuing in possession of the house, No. 2, Whiting Street. The bill also prayed that new trustees might be appointed, and, in the meantime, for a receiver.

[401, n.] The plaintiff, upon affidavit, obtained an injunction (Nov. 4th, 1839) restraining the defendant, Samuel Francis Green, and his agents, from receiving or taking any proceedings to recover possession of the money in the savings bank, or the interest thereof, and from taking any further and other proceedings, by distress or otherwise, against the tenants or occupiers of the pieces or parcels of ground, messuages or tenements, hereditaments, and premises, or other the trust estates, and from receiving the rents and profits thereof, or otherwise intermeddling or interfering with the trust estates, furniture, effects, monies, and premises; and from continuing in possession of the house and premises, No. 2, Whiting Street, until answer or other order.

The defendant, Samuel Francis Green, by his answer, said, that an indenture of settlement had been executed previous to his marriage with the plaintiff, merely to obviate the interference of other persons, but that it was agreed between himself and the plaintiff that after the marriage it should be destroyed. He said, that immediately after the marriage he had entered into possession or receipt of the rents of the property; that the property had been rated in his name in the parochial books; that he had caused distresses to be levied on tenants for non-payment of rent; and that he had possessed himself of the furniture and effects, and occupied the house, No. 2, Whiting Street, where the plaintiff resided, with her consent and concurrence; but he denied that he had sold or disposed of any part of the furniture or other property. The defendant, after putting in his answer, moved to dissolve the injunction.

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Mr. Dixon, for the motion, insisted that the injunction, in restraining the husband from continuing in possession of the house in which the wife resided, and from interfering with the furniture comprised in the settlement, operated as a divorce *à mensa et thoro*; and that in no case had the Court carried a trust for separate use to that extent.

Mr. Bilton, contrà, cited *Newlands* v. *Paynter* (1).

The VICE-CHANCELLOR OF ENGLAND said, that this Court had only to consider whether a trust for the separate use of the wife was created. There was nothing unlawful in the settlement, and he saw nothing to prevent the Court from protecting the interests of the parties under it. If the injunction *had the effect attributed to it, [*402, *n.*] a question which he could not determine, the husband would not be without his remedy in the Ecclesiastical Court.

Motion refused, with costs.

SHREWSBURY *v.* HORNBY.

(5 Hare, 406—408.)

1846. *Jan.* 20. *May* 8.

WIGRAM, V.-C.

[406]

A bequest for the assistance of Unitarian congregations held to be valid, and the trust directed to be carried into execution.

RICHARD COOKE, by his will, dated the 31st of August, 1837, after giving his wife a Government annuity of 300*l.* for her life, appointed Thomas Hornby, the treasurer of the Unitarian Association, or the treasurer of such association for the time being, trustee of that annuity, with a request that he and his committee would give to the Unitarian Chapel at Devonport 100*l.* a year during the continuance of the said annuity, and that the remaining 200*l.* a year might be applied, in sums of 20*l.* annually, to the assistance of respectable Unitarian congregations who stood in need of it. After some other bequests, charged on his leasehold property at Bath, the testator gave the said leasehold property to the said Thomas Hornby, in trust for himself and the committee of the Unitarian Association, to be converted into money as soon as convenient, and the produce to be applied in supporting "a Unitarian missionary, on something like the plan of the late excellent missionary, Mr. Wright. Should those Unitarian bequests be attacked as illegal, or should they be declared void," then all the testator had given to the Unitarian

(1) Since reported: 48 R. R. 131 (4 My. & Cr. 408).

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Association he gave to the plaintiff, her sister, and their children, as thereby directed.

The bill submitted, that not only was the bequest of the leasehold estate for charitable purposes void, but doubts had arisen, "whether the other bequests for the benefit of Unitarians, and for a Unitarian chapel, Unitarian congregations, and a Unitarian missionary, were not illegal and void, as being gifts to, or for the [*407] benefit of, or to promote or encourage, a religious sect *who impugn and deny the doctrine of the Trinity and the Godhead of Christ."

The defendant Hornby by his answer said, that, save that the gift of the leasehold property for the Unitarian mission was void under the Mortmain Act, he submitted that there was no reasonable ground for holding or considering the bequests for Unitarian objects illegal or void for the reasons stated in the bill, or justifying any doubt or question to that effect; and that the bill ought not to have raised any such doubt or question.

Mr. Romilly, for the plaintiff.

Mr. Schomberg argued that the bequest for the purpose of propagating or teaching Unitarian doctrines was illegal. In the case of *The Attorney-General* v. *Shore* (1) the question did not distinctly arise; and there was nothing in that case to establish the validity of such a gift. It formed the sixth question proposed to the Judges on that occasion, but the answers to the other points by several of the Judges rendered the answer to that question unnecessary. The legality of such gifts has been doubted by the highest authority: *Attorney-General* v. *Pearson* (2). The gift over, in case of the charitable disposition being void, therefore took effect: *De Themmines* v. *De Bonneval* (3).

Mr. Spence, *Mr. Evans*, and *Mr. Faber*, for other parties.

Mr. Wray, for the *Attorney-General*.

[408] The VICE-CHANCELLOR held, that the bequest of the Government annuity of 300*l.* to the defendant Thomas Hornby, upon the trusts mentioned in the will, subject to the life interest given to the widow, was a valid bequest, and ought to be carried into execution.

(1) 54 R. R. 445 (11 Sim. 592); on appeal 57 R. R. 2 (9 Cl. & Fin. 355).
(2) 17 R. R. 100 (3 Mer. 353).
(3) 29 R. R. 17 (5 Russ. 288).

DAWSON *v.* PAVER.

(5 Hare, 415—440; S. C. 16 L. J. Ch. 274; 11 Jur. 766; 4 Rail. Cas. 81.)

1844. *Nov.* 29.
1845. *March* 13, 14. *April* 15. *Nov.* 7, 8, 10. *Dec.* 5.
1846. *June* 12.
1847. *Jan.* 20. *Feb.* 20.

WIGRAM, V.-C.

[415]

An Act of Parliament, empowering Commissioners to inclose the common lands in a certain township, reciting the titles of certain landowners, and that it would be greatly for the advantage of the proprietors of the common lands that the same should be divided and inclosed, enacted, that it should be lawful for the Commissioners to set out and make such ditches, watercourses, and bridges, of such extent and form, and in such situations, as they should deem necessary in the lands to be inclosed; and also to enlarge, cleanse, or alter the course of and improve any of the existing ditches, watercourses, or bridges, as well in and on the same lands, as also in any ancient inclosures, or other lands in the township, as they should deem necessary: Held, that the Act did not empower the Commissioners to alter the drains in the common lands, so as to overload an ancient drain which flowed through the common lands from another township, and thereby to obstruct the drainage of the lands in such other township, to the damage and injury of the owners of such lands.

Where an Act of Parliament empowers certain persons to deal with their own property, or with property in a certain place or district, or defined by a certain description, and does not by express words, or by necessary implication, import that the Legislature intended to affect the rights of other persons in other property, courts of law do not construe mere general words in the Act as affecting the rights of strangers as to property not within the description of that with which the Act expressly purports to deal.

Whether an Act of Parliament is to be deemed a public Act, binding on all the Queen's subjects, or merely a private Act, depends upon the nature and substance of the case, and not upon the technical consideration whether the Act does or does not contain a clause declaring that it shall be deemed to be a public Act.

THE plaintiff was the owner of the manor of Osgodby, and of lands in the township of Osgodby, in the county of York. The township of Cliffe-cum-Lund adjoins the township of Osgodby on the east. An ancient drain, or watercourse, in the township of Osgodby, ran from and through the plaintiff's lands, in two branches, which met in Cliffe Common, in the township of Cliffe-cum-Lund, and thence ran in an easterly direction through the latter township, and the adjoining township of South Duffield, continuing for some miles further until it emptied itself into the river Derwent.

By an Act, intituled "An Act for inclosing lands in the township of Cliffe-cum-Lund, in the parish of Hemingbrough, in the East Riding of the county of York," (which received the Royal assent on the 31st of May, 1843,) reciting that there are within the township of Cliffe-cum-Lund, divers open and common fields, and divers commons and waste lands, and divers inclosed lands and homesteads; reciting also the title or claim *of the Lord Bishop of [*416]

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Ripon, and other proprietors of manors and lands within the township; and that the said open and common fields, and the said commons and waste lands, are, in their present state, incapable of any considerable improvement, and it would be of great advantage to the proprietors thereof, and persons interested therein, to have the same divided and inclosed, and specific parts thereof allotted to the proprietors thereof, to be held in severalty, and all rights of common therein extinguished, but that the purposes aforesaid cannot be effected without the authority of Parliament, it was enacted as follows:—

"(1) That the General Inclosure Acts, 41 Geo. III. c. 109, and 1 & 2 Geo. IV. c. 23, shall, so far as they are applicable, be deemed to be a part of this Act."

"(2) That Christopher Paver, of Peckfield, and Makin Durham, of Thorne, both in the West Riding of the said county, and their successors for the time being to be elected or appointed in manner hereinafter mentioned, shall be Commissioners for carrying this Act and the said recited Acts into execution; and it shall be lawful for the Commissioners, and they are hereby required, to divide, allot, and inclose the said open and common fields, and the said commons and waste lands, in the said township of Cliffe-cum-Lund, according to the regulations and provisions contained in the said recited Acts, and this Act."

"(27) That it shall be lawful for the Commissioners to set out and make such common ponds, ditches, watercourses, tunnels, banks, and bridges, of such extent and form, and in such situations as they shall deem necessary, in the lands to be inclosed, and also to enlarge, cleanse, or alter the course of and improve any [*417] of the present ditches or watercourses, *banks or bridges, as well in and over the same lands, as also in any ancient inclosures or other lands within the said township, as the Commissioners shall deem necessary, (making such satisfaction to the proprietors of such ancient inclosures or lands for the damage done thereby as the Commissioners shall think just,) and the expenses of making and enlarging, altering, and cleansing, such ponds, ditches, watercourses, tunnels, banks, and bridges, when the same shall be first done in pursuance of this Act, if not otherwise provided for, shall be raised by the Commissioners in the same manner as the other expenses of carrying this Act into execution; but all such ponds, ditches, watercourses, tunnels, banks, and bridges, shall at all times afterwards be repaired, cleansed, and maintained by such

persons and in such manner as the Commissioners shall by their award direct, provided that no watercourse be diverted or turned without the consent, in writing, of the person from whose lands the same may be diverted, and of the persons into whose lands the same may be turned, or to the prejudice of any person interested in such watercourse, except with his consent in writing."

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"(36) That the Commissioners shall not interfere with the property of the Hull and Selby Railway Company."

"(97) That if any person shall think himself aggrieved by anything done in pursuance of this Act, (except as to the allotments, and except as to such other determinations as are by the said first-recited Act or this Act directed to be final, and except such cases wherein an issue at law shall be tried as hereinbefore is mentioned), he may appeal to the General or Quarter Sessions of the peace which shall be held for the East Riding of the county of York within four months next after the cause of complaint shall *have arisen, on giving to the Commissioners, and to the party [*418] concerned ten days' previous notice in writing of such appeal, and of the matter thereof, (except with respect to the accounts of the Commissioners, which notwithstanding the same shall have been examined and published as aforesaid, may be appealed against at any time within one month after the enrolment of the award, on giving to the Commissioners such notice as last aforesaid), and the justices (not interested in the premises) in such Sessions assembled are hereby required to hear and determine the matter of every such appeal, and to make such order therein, and to award such costs and damages as to them shall seem reasonable; and the costs and damages which shall be so awarded, shall be levied by distress, and the said justices shall issue their warrant accordingly; and in case any such appeal shall appear to the said justices to be frivolous, vexatious, or without foundation, they shall award such costs to be paid by the appellant as to them shall seem reasonable, and such costs shall be levied in manner aforesaid."

"(98) That every order and determination of the said justices upon every such appeal shall be final, and shall not be removed or removable by *certiorari*, or any other writ or process whatsoever, into any of her Majesty's Courts of Record at Westminster or elsewhere."

"(100) Saving always to the Queen's most Excellent Majesty, her heirs and successors, and to the Right Reverend the Lord Bishop of

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Ripon, and to all other persons, bodies politic, corporate, or collegiate, their heirs, successors, executors, and administrators, all such estate,
[*419] right, title, and interest, claim and demand, *(other than and except such as are expressly barred and compensated for, or intended to be barred and compensated for, and extinguished by this Act), which they or any of them could or might have had in, to, or in respect of the lands hereby authorized to be divided, allotted, and inclosed in case this Act had not been passed."

"(102) That a copy of the Act printed by the Queen's printer shall be admitted as evidence."

The defendants Paver and Durham, as the Commissioners appointed under the Act, deemed it necessary for more effectually draining the lands to be inclosed, with a view to their improvement, to cut or make new drains in the waste lands of Cliffe-cum-Lund, which should carry the water, at different points in those lands, into the ancient drain or watercourse coming from the plaintiff's lands in Osgodby, and in pursuance of their plan they caused a new drain to be cut and opened into the ancient drain.

The bill was filed in November, 1844, and it alleged, that, in the preceding month of September, the plaintiff and his steward had inspected the courses of the intended new drains, and it then appeared to them, that if the new drains should be completed according to the design of the Commissioners, the effect would be to impede the accustomed flow of water along the ancient drain. The bill set forth a representation, alleged to have been made by the plaintiff to the Commissioners, of the apprehended result of their new drains, and stated that the Commissioners had, nevertheless, proceeded with their design, and, in accordance with their plans, had cut a deep drain in the waste land, communicating with, and
[*420] of equal if not greater *size than the ancient drain: that some of the lands to be drained by the intended new drains were situated higher than the plaintiff's lands; that the effect of the new drains would be to introduce into the ancient drain a much larger volume of water than it was constructed to carry, and by that means to pen back and dam up the accustomed flow of water from the plaintiff's lands; and that, in case of a heavy rain, the anticipated mischief would in a great measure occur from the new drain, even so far as it was already completed: and that, by the course of drainage proposed to be adopted by the Commissioners in the lands to be inclosed, irreparable mischief would be done to the crops of the plaintiff and his tenants. The bill prayed that the defendants, the

Commissioners, might be restrained from cutting, opening, making, or completing any drains, ditches, or watercourses in the township of Cliffe-cum-Lund, which should empty themselves or flow into the ancient drain, and from causing or permitting water to flow into the drain already cut and made by them, so as at any time to surcharge or increase the water in the ancient drain in the plaintiff's lands, with or by means of water flowing from any of the lands in the township of Cliffe-cum-Lund, or so as at any time to obstruct, force back, impede, or interfere with the free passage and flow of water from the plaintiff's lands in Osgodby, along the ancient drain, in like manner as the water therefrom had theretofore been anciently accustomed to flow.

* * * * *

1847. *Jan.* 20.

[426]

The cause came on to be heard. The parties did not enter into evidence. The plaintiff read from the answer of the defendants an admission of their design to make the new drains in question; and he relied upon the verdicts in [two issues which had been directed in the suit and had been determined in favour of the plaintiff].

Mr. Anderdon, *Mr. Romilly*, and *Mr. Crawford* for the plaintiff. * * *

[427]

Mr. Kenyon Parker, *Mr. Malins*, and *Mr. Shee*, for the defendants. * * *

[The following judgment contains a sufficient statement for the purpose of this report of the intermediate proceedings in the suit and on the issues and of the points raised by counsel and of the cases cited by them.]

Feb. 20.

[429]

THE VICE-CHANCELLOR (after stating the interlocutory proceedings which had been had in the cause):

The plaintiff alleges by his bill that the ancient main drain is sufficient, and not more than sufficient, for the purpose of draining his lands; and that if the additional water is allowed to be brought in from the Oxgangs drain without making a further outlet, or some other provision for carrying it off, the water will be penned back and his estate flooded. If that statement be true, there can be no doubt that the case is one of destruction in the view of this Court. The injury of which the bill complained was a prospective injury;

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[*430] for at that time no damage had actually *been sustained, and the plaintiff, therefore, had no means of trying his right in an action at law. All he could do was to come to this Court; and if he abstained from coming to this Court until the mischief was done, he would probably have been told he was too late, and that he must seek compensation for the destruction of his estate by an action for damages against the parties. Another reason why the plaintiff could not safely defer his application was, that if he had waited until the Commissioners had made their award, there was nobody against whom he could have proceeded for protection. The question, moreover, was one which admitted of a determination prospectively, for it depended on the levels of the land, and the application of known principles of science to those levels. In every point of view, the case appeared to me to be one in which he was entitled to come to this Court, if the facts were made out.

Upon the motion for the injunction being made *ex parte*, I did not think it was right to restrain the defendants from doing the precise act which it was said they were about to do, but I thought that I should rather meet the justice of the case by framing the order in a way which should amount simply to notice to the defendants of the strict right upon which it appeared to me the plaintiff was entitled to insist. This I thought would be effected by restraining the defendants from permitting the water from the new drain to flow into the ancient watercourse, so as to obstruct the plaintiff's drainage of any of the lands by means of such watercourse, as the same had been theretofore used and enjoyed by the plaintiff.

[*431] Now, whether that form of order is an useful or a proper form to be adopted under such circumstances, *I have not now to decide. It is a great satisfaction to me to know, that if the order was wrong it was practically harmless; for the defendants did not think it necessary to come to discharge it until upwards of three months afterwards. The motion to discharge the order was argued before me in March, 1845.

The first point taken upon that argument was, that the works which the plaintiff complained of were within the powers conferred upon the Commissioners by the Act of Parliament. The second point was, that no damage would in fact accrue from what the Commissioners were doing. In other words, the defendants insisted that they had a right to do the acts complained of, whether they occasioned damage to the plaintiff or not; and, therefore, that no

injury for which he could obtain redress in law would arise; and whether that were so or not, they insisted that the plaintiff would sustain no damage in fact. In the course of the argument of the motion, I referred to a case which came before the Lord Chancellor, upon an application to restrain some persons from building lodging-houses, or chambers, at the back of the houses in George Street, Hanover Square. The LORD CHANCELLOR, after adverting to the difficulty of restraining parties from doing an act which might not be injurious, said, he would allow the parties to go on, provided they would submit to any order the Court might afterwards make, if it turned out that that which they said would be no injury should in truth turn out to be an injury. The difficulties in that case and the case before me were *the same; and I made a proposal to the [*432] parties, that they should take that course. However, the defendants (and I do not at all complain of it, as they thought it was the right course) refused to enter into any undertaking, and left me to make such order as I thought fit. In these circumstances, there being no opportunity of bringing an action, I thought the case of *Blakemore* v. *The Glamorganshire Canal Company* (1) afforded a guide as to the course which I ought to take. There the question was, whether damage would result from a thing threatened to be done; and I directed the issue in the same form as Lord ELDON did in that case; whether the drainage made, and intended to be made, by the defendants, would obstruct the plaintiff's drainage, as theretofore used, to his damage and injury.

Now, I must say, that the parties ought to have appealed from my judgment, if they thought that I had done wrong in sending the case to an issue. If the act was one which the Commissioners had power to do, whether they drowned the plaintiff's estate or not, it was perfectly useless to ascertain, as a question of fact, whether their works would drown it or not. Instead of appealing from the order, the defendants went to trial of the issue, and a verdict was found for the plaintiff,—the learned Judge (Mr. Baron ROLFE) stating, that he should, as he thought, have come to a different conclusion, but that he was not dissatisfied with the conclusion to which the jury came. The case has been since before Lord Lyndhurst, whose scientific knowledge is of the first order, and his view of the question, and that which I have gathered from other inquiries, leads me to believe that the learned Judge who tried the cause overlooked one scientific *principle,—he deduced his conclusion from a case of [*433]

(1) 36 R. R. 289 (1 My. & K. 154).

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standing water; whereas here the question was, what would be the effect of penning back running water?

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I granted a new trial of the issue, upon the ground that there had been in the course of the season such weather as would enable the jury, who were to try the case a second time, to have facts instead of mere speculation to guide their judgment. In March, 1846, the second trial of the issue took place, when the verdict was as before. It was tried before Mr. Justice Patteson, who is also a Judge very well versed in matters of science; and he told me, that he not only was satisfied with the verdict, but that it was impossible to hear the case tried without coming to a conclusion that the jury were right; that it was perfectly clear Mr. Dawson's land would be flooded, if the plan of drainage in question were adopted.

The cause has now been brought to the hearing, and the defendants, not having chosen to appeal from the order directing the issue in March, 1845, have re-argued before me the point of law upon which they then insisted. With respect to that point my observations will be few. Where an Act of Parliament, in express terms, or by necessary implication, empowers an individual or individuals to take or interfere with the property or rights of another, and upon a sound construction of the Act it appears to the Court that such was the intention of the Legislature,—in such cases it may well be the duty of the Court, whose province it is to declare and not to make the law, to give effect to the decrees of the Legislature so expressed. But where an Act of Parliament merely enables an individual or individuals to deal with property of his or
[*434] their own, for their own benefit, and *does not, in terms or by necessary implication, empower him or them to take or interfere with the property or rights of others, questions of a very different character arise. Here the distinction between public and private Acts of Parliament becomes material. By a private Act of Parliament, I do not mean merely private Estate Acts, but local and personal, as distinguished from general public Acts. Public Acts, it is said in the books, bind all the Queen's subjects. But of private Acts of Parliament it is said, that they do not bind strangers, unless by express words or necessary implication the intention of the Legislature to affect the rights of strangers is apparent in the Act; and whether an Act is public or private does not depend upon any technical considerations, (such as having a clause or declaration that the Act shall be deemed a public Act), but upon the nature and substance of the case. For those general propositions it is not

necessary I should do more than refer to *Sir Francis Barrington's* case (1), and *Lucy* v. *Levington* (2). That the defendants' Act in this case is a local, personal, and in that sense a private Act of Parliament, does not admit of dispute. It is local, as being confined to a particular place; and personal, as being expressed to be for the benefit of individuals named in it, and not for the benefit of all her Majesty's subjects; however, all may incidentally be benefited by that which improves this particular district. (His Honour read the title and preamble of the Act (3).) Here we have that which in many of the reported cases is stated to be the distinguishing mark of a private Act of Parliament. It states that the persons intended to be benefited by the Act are the persons having personal interests in the property which it is the purpose of the Act to improve; and the Act *then appoints Commissioners, [*435] empowers them to enclose, and contains the drainage clause, upon which the defendants more especially found the right which they have insisted upon in this suit. The plaintiff is a stranger to the Act under which the defendants are proceeding.

Two questions have been argued in this case,—first, whether the general power to drain, in clause 27 (4), gives the parties interested in the land to be enclosed, through the Commissioners, larger powers as against the plaintiff than they had before the Act, so as to enable the Commissioners to do damage to strangers, which the proprietors of the land to be enclosed could not have done without the Act; and if that question be answered in the affirmative,—secondly, whether that larger power has been duly exercised in the present case.

In a former stage of the cause, I thought it right to let the defendants know what my opinion upon this point was. But although I thought it right to state that opinion, I did not think it right, in that stage of the cause, to act upon the opinion which I expressed. On that occasion I took a course than which none could be more calculated to protect a Judge of this Court against miscarriage; I directed an issue, in the form of the issues directed by Lord ELDON, after great consideration, in the case of *Blakemore* v. *Glamorganshire Canal Company*, whether the defendants had done the acts complained of to the "damage and injury of the plaintiff?" (5). The object of Lord ELDON, in so framing the issues,

(1) 8 Co. Rep. 138, a.
(2) 1 Vent. 175.
(3) *Supra*, p. 155.
(4) *Supra*, p. 156.
(5) 36 R. R. 298 (1 My. & K. 169).

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was, that upon the trial of the issues the defendants might have the benefit of every defence with which the Act of Parliament could furnish them. And this appears to be the safest, if not the only [*436] safe, *course which, in cases so circumstanced, can be taken; however, it may be open to the observation, that it does, in some degree, convert the issue into an action,—the issue being in substance the same with the declaration appearing by the reported cases to be in use where individuals have complained of acts done by Commissioners or trustees under Acts of Parliament not unlike the present (1). *Blakemore* v. *The Glamorganshire Canal Company* is in this respect undistinguishable from the present case; and the verdicts in this case establish one of those two propositions. Indeed, where relief is sought for, in respect of injury apprehended from acts to be done, there is, as it appears to me, no other way of trying the question. No one can argue with success, that the plaintiff in this case ought to have waited until the drain was made, the award published, and his estate destroyed.

With respect to the cases cited for the defendants, it will be found that the statutes under which the defendants acted empowered them in terms, or by necessary implication, to take or interfere with the property or rights of the parties complaining in the way complained of. In *The Governor and Company of the British Cast Plate Manufacturers* v. *Meredith* (2), the statute empowered the Commissioners to raise the street, the raising of which was the ground of the action. In *Sutton* v. *Clarke* (3), the defendants were empowered to cut any watercourses across any lands or grounds for the purpose of draining the highway. *Boulton* v. *Crowther* (4) is a case of the same class, as are the [*437] railway and canal cases which were cited. In all those cases *the purposes of the statute were of a public, or *quasi* public nature, and the scope of the statute was to enable the defendants to interfere with private rights, without which interference their operations could not be carried into effect. But it is not upon the public purposes of those statutes that I rely, but upon the express and definite powers given by the Acts. The case of *Riddle* v. *White* (5) was cited by both parties. That case was decided upon the very words of the Act, which, it was said, left no doubt upon the intention. The Lord Chief Baron M'DONALD said, "The Legislature

(1) 26 R. R. 528 (2 B. & C. 703); 16 R. R. 568 (6 Taunt. 34, 35); 49 R. R. 264 (6 Cl. & Fin. 906).
(2) 4 T. R. 794.
(3) 16 R. R. 563 (6 Taunt. 29).
(4) 26 R. R. 528 (2 B. & C. 703).
(5) 4 Gwill. 1387.

takes upon itself to alter entirely the mode of tithing all the lands which are to be the subject of the enclosure. It is impossible to say that the rector is entitled to his tithes of the land in question, without saying that he would have it in his power to defeat all the purposes of the Act, which the Legislature never could intend. This case is, in point of principle, precisely the same as the case in Vernon (1). In private Acts in general, the Legislature does nothing more than enable persons to enter into a contract who could not otherwise enter into it; and the persons who are parties to the Act are expressly named in it: but here the Legislature does a great deal more; it takes on itself to act on the land itself, to declare that it shall be discharged of tithes. According therefore to the principle of the decided cases, and indeed of common sense, we think that the rector cannot claim his tithes against the express words of the Act of Parliament" (2). From a note to that case (2), it may perhaps be questionable whether the decision would have been the same if the Lord Chief Baron EYRE had remained at the head of the Court. But this is immaterial; for the case went upon the ground that the lands were bound. *_Stead_ v. _Carey_ (3) [*438] was decided upon the like ground, that the words of the Act were conclusive in favour of the intention to bind all the world. But these cases leave untouched the proposition, that an Act of Parliament, not being a public Act, will not bind the rights of strangers, unless by express words or necessary implication the intention to do so can be collected. It is a question of construction.

Now, what is there in the present case from which to imply an intention on the part of the Legislature to empower the proprietors of and persons interested in the lands to be enclosed to invade the existing rights of others? Omit the consideration, that the Commissioners are officers having no interest in the lands, and this question can admit but of one answer. Then, how is the case altered because Commissioners are appointed: they are appointed, not because it was intended that the rights of strangers should be invaded, but because such machinery was required to effectuate the object of the Act as between the owners of the lands. I do not impugn the doctrine, that Commissioners so appointed, and acting to the best of their judgment, are not to be charged with damages consequential upon the acts they are empowered to do. But here the question is, what acts have they power to do?—and I am at a

(1) _Ward_ v. _Cecil_, 2 Vern. 711.
(2) 4 Gwill. 1395.
(3) 1 C. B. 496.

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loss to understand how an answer to that question can be found in the fact that Commissioners are appointed. But as I said before, the verdicts cover not only that, but every question that can be made in the case. The verdicts are wrong, if the defendants' argument is right. I think myself bound, therefore, to make a decree for the plaintiff.

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The plaintiff has not gone into any evidence by which, in this [*439] stage of the cause, I can be informed of *those details by which my judgment was governed in the earlier stages, and by which (if I had them judicially before me) the frame of my decree might be regulated. The two verdicts, and those only, constitute the plaintiff's evidence in the cause; and though I may refer to the interlocutory proceedings for the purpose of informing myself what those verdicts have decided, I cannot go further. The verdicts decide that the plaintiff is damaged by the use of the defendants' drains, as they and the other drains now are, but they decide nothing more. This makes it very difficult to frame a decree which shall not be open to the objection, either that it improperly restrains the powers of the Commissioners, or that it is based upon assumptions not warranted by the evidence strictly before me. Something was said about the plaintiff's title: I apprehend that that is sufficiently shown. Mr. Dawson is in the admitted possession of the lands, and this is a trespass committed upon him, which trespass the verdicts have established. On that part of the case I entertain no doubt. But I can only make a decree which the plaintiff's possession, coupled with the verdicts, without more, will support.

Declare, that the defendants, in exercising the powers given them under the Act of Parliament, intituled &c., are not at liberty to set out, make, or use any drain or watercourse, whereby the drainage of the plaintiff's lands, by means of the ancient watercourse or drain in &c., in such manner as the same has been heretofore used and enjoyed by the plaintiff, will be obstructed. And restrain the defendants from using the drain or watercourse in &c., called the Oxgangs drain, for the purpose of draining the waters from the Oxgangs and Whitemoors in &c., or any part thereof, into the plaintiff's ancient drain or watercourse in &c., in the present state and condition of that drain and the other drains in &c., and also from using the same Oxgangs drain (in its present or any altered state for the like purposes) without providing, for

the water to be brought into the said ancient watercourse or drain, an outlet sufficient to *prevent the drainage of the plaintiff's lands, by means of the ancient drain or watercourse, in such manner as the same has been heretofore used and enjoyed by him, being obstructed. Tax the costs of the plaintiff of these suits (except the costs of the two motions hereinafter mentioned) and also the costs of the issues, and of the motion for a new trial; and tax the costs of the defendants of the motion of the 15th day of December, 1845, and of the motion for the costs of the issues, and let the same be deducted from the costs first directed to be taxed. And let the balance be paid by the defendants to the plaintiff.

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1846. *May* 1, 2, 6, 30.

(5 Hare, 440—468; S. C. 10 Jur. 516.)

WIGRAM, V.-C. [440]

On a devise of successive interests in leases for lives or years, where the testator directs that the leases are from time to time to be renewed, without more, the fines and expense of renewal are to be borne by the tenant for life and remainderman, or parties successively entitled, in proportion to their actual enjoyment of the estate, and not in proportion to an extent of enjoyment to be determined speculatively, or by a calculation of probabilities.

There is no difference in the rule as to the apportionment of fines for renewal between the devisees of successive interests in the estate, whether the leases are for lives or for years.

If the testator provides a specific fund for the renewals, or directs that the renewals shall be raised or borne by the parties in a certain manner, or in certain proportions, such direction supersedes the general rule; but if trustees, having power to direct the manner in which the fines shall be raised, do not exercise the power, the Court will pursue the general rule which would be adopted in the absence of any direction as to the manner of providing for the fines.

Where the tenant for life pays the whole fine on renewal, he will have a lien on the estate for the proportion which shall ultimately appear to be chargeable on the remainderman, or parties entitled in succession; and where the remainderman renews, or the renewal is effected by means of a mortgage of the estate, the tenant for life may be required to give security to the remainderman for a proportionate part of the fine, calculated upon the assumed duration of the life interest; and if that interest should endure longer than such assumed period, he may be required to give further security, without prejudice in either case to the actual amount which, at the determination of his interest, shall appear to be his due proportion of the fine.

W. JONES, by his will, dated in June, 1803, gave, devised, and appointed all his freehold and copyhold lands and hereditaments unto the use of trustees, upon trust to convey, settle, and assure the same to the use of his great nephew, William Jones, and his assigns, during the term of 99 years, if the said William Jones

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should so long live, without power to commit waste, remainder to the use of the first and every other son of the said William Jones, severally and successively, according to their respective seniorities in tail male, with remainder over and with reversion to the testator's own right heirs. And the testator gave, devised, and bequeathed to the *same trustees, the rectory of Newport, in the county of Monmouth, and the great tithes in the parishes of St. Woollos and Bettws, held by lease from the Bishop of Gloucester, for the lives of the persons in such lease named, or to be held at the time of his decease by any renewed lease or leases, and the manor of Peterstone and the rectory and tithes of Peterstone, and all other the premises in the same county held by lease from the Dean and Chapter of Bristol, for the term of years in such lease mentioned, or to be held at the time of his decease by any renewed lease of the said premises, and all other lands and tenements of or to which he was then, or at the time of his decease, seised, possessed, or entitled for any lease or leases for lives or years, to hold the said manors, rectories, hereditaments, and premises, unto and to the use of the said trustees, their heirs, executors, administrators, and assigns, according to the nature and quality of the same premises respectively, in trust, by such assignments and assurances as counsel should advise, to settle the said leasehold premises so that the same might be possessed, held, and enjoyed by the said trustees, their heirs, executors, administrators, and assigns, upon trust, by and out of the rents, issues, and profits of said leasehold hereditaments and premises, yearly and every year, and in all other times and seasons, duly to pay, satisfy, and perform the rents, reservations, covenants, and agreements reserved and contained by and in the then subsisting indentures of lease of the said lands and tenements respectively, or which by and in the several leases to be from time to time renewed or taken thereof, as is thereinafter mentioned, should be reserved and contained on the lessees' part to be paid and performed, and by and out of the rents, issues, and profits, or by mortgage of the said leasehold lands and tenements, or by such other ways and means as should be advisable in that behalf, forthwith to raise such sum and *sums of money as should be sufficient to defray the fine and fines and other charges of renewing the said lease or leases, or any future lease or leases to be granted to them or him for life or lives, or for any term of years, when and as often as there should be occasion, or as such leases had usually been renewed, and from time to time to renew the said several leases accordingly,

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for which purposes it should and might be lawful to and for the said trustees, their heirs, executors, administrators, and assigns, when and so often as there should be occasion, or when and so often as the usual course for the renewal of the said leases should require, to surrender the subsisting leases, or the leases to be thereafter taken of all or any of the premises, and to take new leases of the same premises; and subject to the aforesaid several trusts for the providing for the renewals of the leases of the said leasehold premises, such trusts should by the settlement thereby directed to be made or declared of the said premises, as would best and nearest correspond with the uses and trusts thereinbefore directed to be limited or declared of and concerning the fee-simple hereditaments thereinbefore devised, so as the same leasehold premises should and might from time to time be held or enjoyed by the person or persons who for the time being should by virtue of or under the settlement thereinbefore directed to be made as aforesaid, be entitled to the possession, or the rents, issues, and profits of the said fee-simple hereditaments, or as near thereto as the nature and quality of the said estates and the rules of law and equity would permit; but in the intended settlement it was to be provided, that, for the effect or purpose of transmission, the said leasehold premises should not vest absolutely in a son of any person thereby made tenant for ninety-nine years, if he should so long live, of the said fee-simple hereditaments, until such child attained the age of twenty-one years; and also, that if such of the said leasehold premises *as were or should be held for a term or terms of years, [*443] should not, under the trusts thereinbefore contained, vest absolutely in some child or grandchild of his said nephew, the said trustees, their executors, administrators, and assigns, should stand and be possessed of and interested in the said leasehold premises, in trust for his nephew, the said John Jones, his executors, administrators, and assigns, for his and their use and benefit. And the testator declared that such intended settlement should contain a power for the trustees, their executors, &c., to lease the premises comprised in the said lease or leases, for any period not exceeding twenty-one years, without fine; a provision for applying a competent part of the rents and profits to the maintenance of the persons for the time being entitled under the settlement; for the investment of the surplus, upon the trusts thereinafter declared, of the residuary personal estate; and a power of jointuring; and such further and other clauses, declarations, and agreements conformable to the

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spirit, true intent, and meaning of that his will, or the settlement so to be made as aforesaid, as the said trustees or the survivor of them, or the executors, administrators, or assigns of such survivor, should think proper. And the testator gave to the same trustees, their executors, &c., all other his personal estate whatsoever, not specifically bequeathed, upon trust, to call in and convert and invest the same in the purchase of other lands as therein mentioned, and to settle and assure such other lands to the uses thereinbefore declared of and concerning the said devised lands and hereditaments, or as near thereto as the nature of the estates, the deaths of the parties, and other intervening circumstances would then admit of; and the testator appointed the same trustees to be executors of his will.

[*444] The testator died in April, 1805. William Jones, his *great nephew, was then seven years of age. The trustees entered into possession of the estates, and accumulated the rents, profits, and income of the freehold and leasehold estates, and the residuary personal estate to a large amount. The trustees also, in May, 1808, executed indentures of lease and release for the purpose of settling the estates according to the trusts of the will. Under subsequent appointments, the defendants, John Jones and William Vaughan, were the substituted trustees of the estates.

William Jones, the great nephew, attained his majority on the 1st of December, 1819.

Some of the leasehold estates of the testator were held, for lives, under the Bishop of Gloucester, and were of the value of about 650*l.* a year, after deducting the reserved rent of 8*l.* a year; and other parts of such leasehold estates were held for years under the Dean and Chapter of Bristol, and were of the value of about 450*l.* a year, after deducting the reserved rent of 34*l.* 13*s.* per annum. The leaseholds for lives were usually demised for three lives, renewable on payment of a fine on the failure of any one or two of the lives; and the leaseholds for years were demised for twenty-one years, renewable on payment of a fine at the end of every seven years. The three lives upon which the rectory and tithes of Newport were held at the death of the testator, all subsisted until July, 1840, when one of the lives dropped, leaving the two survivors of the respective ages of 60 and 76 years. The trustees thereupon agreed with the Bishop of Gloucester for the renewal of the lease for 4,000*l.*, by the addition of another life; and in consideration of that sum, and the surrender of the former lease, a new lease, dated the 28th

of August, 1841, for the three lives, was granted to the trustees. *The lease held of the Dean and Chapter of Bristol, had been granted to the testator in November, 1802, for twenty-one years, and the same was renewed by the trustees in November, 1809, for a term of twenty-one years, on payment of a fine of 854*l.* 10*s.* 7*d.*; in November, 1816, on a fine of 1,205*l.* 0*s.* 6*d.*; in November, 1823, (after the majority of William Jones,) on a fine of 950*l.*; in November, 1830, on a fine of 1,100*l.*; and in September, 1840, on a fine of 2,350*l.*; making together, 6,459*l.* 11*s.* 1*d.*, exclusive of costs. The sums thus paid by the trustees for fines were, until the majority of William Jones, paid out of the accumulated rents and profits of the freehold, leasehold, and residuary personal estate, and, after the majority of William Jones, out of the capital of the trust funds in the hands of the trustees. [*445]

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William Jones had several children. The bill was filed by Reginald, his eldest son, an infant, the first expectant tenant in tail in remainder of the estates under the will and settlement. The bill charged, that, when the trustees, in November, 1816, renewed the lease from the Dean and Chapter of Bristol, they, being then in possession of the rents and profits of the premises comprised in the lease, ought forthwith to have begun to put by or reserve out of such rents and profits, a fund towards the next septennial renewal; and such fines being considered as divided into seven parts, one seventh part ought to have been put by or reserved out of each year's rents and profits by the trustee, until December, 1819, and by the defendant, William Jones, the tenant for life in possession, after that time: that when the lease was renewed in November, 1823, the 950*l.* then paid, ought not to have been wholly paid out of the capital of the trust funds in the hands of the trustees, but should have been apportioned between the trustees and William Jones, *according to the respective periods of their enjoyment of the premises since the renewal of 1816, namely, a little more than three seventh parts by the trustees, and something less than four seventh parts by the defendant, William Jones; and as to the fines paid for the renewals of the same lease in 1830 and 1840, and for the renewal of the lease from the Bishop of Gloucester in 1841, that the same ought to have been wholly paid or borne by the defendant, William Jones, and no part by the trustees; or, otherwise, that the fine paid on the renewal of the lease for lives in 1841, should be considered to have been raised as or by way of mortgage of such leaseholds for lives, in which case [*446]

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the defendant, William Jones, as such tenant for life, ought to pay or keep down the interest on the amount of the fine during his life; and that his estate, after his decease, would be liable to contribute such further sum as with the annual interest would be equivalent to the relative duration of his future enjoyment of the renewed estate, as such tenant for life in possession; or otherwise that the amount of benefit derived by the defendant, William Jones, from such renewal should now be ascertained, by first putting a value, as on the 28th of August, 1841, (the date of the renewed lease,) on the joint duration of the lives of the defendant, William Jones, and of the then cestuis que vie (or the longest liver of them), and next, putting a value, as on the same day, on the joint duration of the lives of the defendant, William Jones, and the same cestuis que vie, and William Beaumont, the new cestui que vie (or the longest liver of them), and by taking the difference, or excess of value, as the measure of benefit derived to the defendant, William Jones.

The bill prayed that the trusts of the will might be carried into [*447] execution, and that the defendant, William *Jones, might be decreed to account for and pay to the defendants, the trustees, a proportionate part of the renewal fines, and the costs incurred in and about such renewals; or that he might be decreed to bear a proportionate part of the fine paid on the lease of 1841, by charging the same by way of mortgage on the premises, the defendant, William Jones, keeping down the interest at 4*l.* per cent., and his estate being liable at his decease to contribute such further sum as, with such yearly interest, should be equivalent to the relative duration of his enjoyment of the renewed estate; or that the relative proportions of the fine might be ascertained by valuation as aforesaid; and that the defendant, William Jones, might be decreed to provide for and secure the payment of the sum for which his estate should be liable at his decease. The bill also prayed a declaration, whether the settlement of May, 1808, was, in certain points, a due execution of the trusts of the will.

The facts were not in dispute, and the defendant, William Jones, the tenant for life, as well as the trustees, submitted the question to the Court.

Mr. Walker and *Mr. F. Bayley*, for the plaintiff [cited *White* v. *White* (1)]:

[448] Where the amount of the fine and the time of renewal is

(1) 4 R. R. 161 (4 Ves. 24; 5 Ves. 554; 9 Ves. 554, 560).

uncertain, as in leases for lives, or cases where the fines are arbitrary, and it is impossible to set aside annually the sum which will be actually necessary, the Court cannot determine *ab ante* the proportions chargeable upon the successive interests without the hazard of a wrong determination (1). And where a proportion of the fine cannot be laid aside year by year, the respective proportions of the tenant for life and remainder-man cannot be known, until the death of the tenant for life has ascertained the extent of the benefit which he has derived from the anticipated payment. Even then we arrive rather at the amount of the benefit which the remainder-man possibly may, than that which he must necessarily derive from the renewal, for, as said by Lord ELDON (2), "the actual interest the remainder-man takes may be nothing more than the opportunity, that the lease renewed *in præsenti* has secured, to apply at the end of that term for another renewal." [They also cited *Lord Montford* v. *Lord Cadogan* (3), *Earl of Shaftesbury* v. *Duke of Marlborough* (4), *Playters* v. *Abbott* (5), and other cases.] In the absence of any express or definite direction, the Court will [449] pursue the modern rule, which has been to apportion the charge between the tenant for life and the remainder-man according to their interests in the premises: *Allan* v. *Backhouse* (6), *Greenwood* v. *Evans* (7), *Reeves* v. *Creswick* (8). * * *

Mr. Tinney and *Mr. Campbell*, for the defendant William Jones, the tenant for life: [450]

* * *Allan* v. *Backhouse* (9) is a case which stands alone. * * [457] The decree, as drawn up, directed an inquiry, "how much of the said fine, fees, and expenses, with reference to the interest of the plaintiff in the said estates, ought to be borne and paid by him." This decree was affirmed by Lord ELDON, on appeal (10). The actual benefit derived by the tenant *for life could not, it is clear, be ascertained in [*458] his lifetime. At the time of the inquiry he had derived no benefit: one of the cestuis que vie at the death of the testatrix was still in existence, and being still only twenty-nine years of age, he might very

(1) 4 R. R. p. 176 (9 Ves. 556).
(2) 4 R. R. p. 176 (9 Ves. 557).
(3) 13 R. R. 270; 16 R. R. 135 (19 Ves. 635; *S. C.* 17 Ves. 485).
(4) 39 R. R. 153 (2 My. & K. 111).
(5) 39 R. R. 148 (2 My. & K. 97).
(6) 13 R. R. 23; 23 R. R. 167 (2 V. & B. 65).
(7) 55 R. R. 9 (4 Beav. 44).
(8) 51 R. R. 439 (3 Y. & C. 715).
(9) 13 R. R. 23 (2 V. & B. 65).
(10) Lin. Inn, August 7th, 1821. It is believed that the only report of Lord ELDON's judgment, in print, is contained in the Law Magazine, Vol. 26, p. 112. London, 1841. [See 40 R. R. Preface, viii.]

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possibly survive the tenant for life; in which case the latter could never derive any actual benefit from the renewal. The interest of the plaintiff was that of beneficial owner of the estates for his own life; but that in itself afforded no guide in determining how much of the fine he should bear. It is clear, therefore, that the decision in *Allan* v. *Backhouse* is not founded upon the reasoning in *White* v. *White*, and is not in accordance with what it has been said is the modern rule of apportionment. The result of the decree was, that the tenant for life was made to bear 3,132*l.* as his portion of the fines and expenses, and the remainder-man 3,724*l.*, and the costs of the suit, as his portion of the expense of the renewal, at a time when it was wholly uncertain whether one, or which of the parties would receive any benefit from the renewed lease (1). In *Greenwood* v. *Evans* (2), the trust was to renew "out of the rents and profits of the premises, or by mortgage thereof, if found expedient." * *

[460] In this case the amount of the fines, both on the leases for lives and years, were wholly uncertain in amount, and it could not therefore have been the duty of the trustees to lay by annually any certain sum to provide for them. The case must be governed by the intention of the testator, so far as it can be gathered from the will, and the particular trusts indicate that the fines are to be raised by mortgage, as distinguished from the other charges on the premises. The trustees are, out of the rents and profits, yearly to pay the rents reserved,—and they are, out of the rents and profits, or by mortgage, or by such other ways as shall be advisable, forthwith to raise the renewal fines. The first direction obviously relates to annual rents and profits,—and the second to gross profits or *corpus*.

Mr. Wetherell, for the trustees.

May 6. THE VICE-CHANCELLOR (after adverting to the other points in the cause):

The important question is that which is raised respecting the

(1) The Master, by his report, in *Allan* v. *Backhouse*, 16th Dec., 1823, found that 6,654*l.* 2*s.* 4*d.* was properly paid by the plaintiff as the fine on renewal, and 202*l.* 5*s.* 10*d.* for the fees and expenses attending the renewal, making togther 6,856*l.* 8*s.* 2*d.*; that, with reference to the interest of the plaintiff in the estates, the sum of 3,132*l.* ought to be borne and paid by the plaintiff as his proportion of the 6,856*l.* 8*s.* 2*d.*, which left 3,724*l.* 8*s.* 2*d.*, which sum of 3,724*l.* 8*s.* 2*d.*, together with 454*l.* 16*s.* 4*d.*, the costs of the several parties of the suits as taxed, &c., pursuant to the said decree, amounted to 4,179*l.* 4*s.* 6*d.*, "which said sum of 4,179*l.* 4*s.* 6*d.* is to be raised by sale or mortgage of a competent part of the said devised estates, pursuant to the directions of the said decree."

(2) 55 R. R. 9 (4 Beav. 44).

mode of providing for the fines on renewals. I think the cases of *White* v. *White* (1), *Allan* v. *Backhouse* (2), and *Greenwood* v. *Evans* (3), have clearly settled that no distinction was to be drawn, in considering this question, between leases for years and leases for lives. The principle may, in some cases, be more difficult of application to leases for lives than to leases for years, and there may be a difference in the mode of raising the fine, but still the question, as to the proportion and the manner in which the tenant for life *and remainderman are to bear the charge, is clearly [*461] unaffected by that distinction. Treating both leases in this case as governed by the same principle, the question is as to the mode of raising the fund. I do not think there is, at the present day, any very great doubt as to the abstract rule in cases where the testator has by his will (as in this case) directed absolutely that the leases shall be renewed. In the absence of any direction by the testator as to the mode of providing the fines, the rule is, that the parties must bear the expense of renewal in proportion to their respective interests in the estate. In the present instance, the testator directed that the fines were to be renewed out of rents and profits, or by mortgage, or by such other ways and means as should be advisable; than which (without giving any opinion whether the words authorize a sale or not) it is scarcely possible to give a larger power. Setting aside for the present the question as to raising funds by anticipation for future renewals, and supposing nothing had been done by the trustees, the Court, if called upon to act, would have adopted the reasoning which is usual in cases of this kind. A direction that the fine should be raised by sale, without more, might be a strong argument for saying, that the *corpus* of the estate was to bear it, and that the entire estate was intended to be settled, subject to the subordinate direction that it was to undergo a perpetual diminution with a view to being otherwise preserved. The case of fines on the admission to copyholds better illustrates the effect of this mode of proceeding, for the estate must ultimately be consumed, and such may also be the effect with regard to leaseholds. But where there is a direction that the trustees shall raise the fine either by sale or mortgage, or by the application of rents and profits, or in any other mode which they shall think fit, there the effect, *as between the parties, would [*462] obviously be different according to the mode which the trustees,

(1) 4 R. R. 161 (9 Ves. 554).
(2) 13 R. R. 23; 23 R. R. 167 (2 V. & B. 65).
(3) 55 R. R. 9 (4 Beav. 44).

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exercising the power, might adopt. If they raised it out of the annual rents and profits, the manifest effect would be to throw the charge upon the party in possession, preserving the entire estate. If, on the other hand, they raised it by a sale, then the estate would undergo a diminution of so many acres, the tenant for life losing the rent of the portion sold, and the remainderman losing it in perpetuity. Where, however, the trustees not acting under the power, the Court is called upon to exercise a discretion, the effect of which, in one way, would be to throw the burden upon one party, and if the discretion be exercised another way to throw it upon a different party, and there is no reason for adopting one mode rather than the other, there the equitable rule would appear to be not to throw the burden more upon one party than upon the other, but to apportion it between them. This seems to me to be Sir THOMAS PLUMER'S decision in *Allan* v. *Backhouse*, adopted I think by Lord LANGDALE in the case of *Greenwood* v. *Evans*. I cannot help thinking that where a testator points out different modes of raising the fines, all of which have reference to the convenience of the estate, it is inconsistent with the intention that the parties are to enjoy the estate in succession, that their rights should be altered by the manner of proceeding, unless there be an inevitable necessity for such alteration. I am far from thinking there are not difficulties in the case. I do not know how the Court can do otherwise, in justice, than treat the case as one in which there is no direction binding upon the Court, and direct the usual apportionment to be made. That view of the case is supported by the decision in *Allan* v. *Backhouse*, and other cases, and [*463] does not conflict *with the cases of *Playters* v. *Abbott* (1), and *The Earl of Shaftesbury* v. *Duke of Marlborough* (2). With respect to the anticipation as to future renewals, the theory appears to be, upon each renewal to look at the property as about to be purchased for the benefit of the settlement, and then to consider in what way the fine for the renewal is to be borne by the parties who are to enjoy the lease when renewed. That seems to be the effect of the case of *Greenwood* v. *Evans*.

May 30. THE VICE-CHANCELLOR:

I do not know that I can do more than state the conclusion to which I have come, after referring to the cases. I have not yet the actual state of the renewal question before me, in such a way,

(1) 39 R. R. 148 (2 My. & K. 97). (2) 39 R. R. 153 (2 My. & K. 111).

and with such accuracy, as to know what precise directions are to be given; but I will explain what my view is, that it may be applied to the particular facts. I stated at the conclusion of the argument my general view of the case. The only question I reserved was, as to the mode of apportioning the renewal fines between the tenant for life and the remainderman. By the mode, I do not mean their several proportions, but the manner in which I am to effect the apportionment. The general rule recognized by Lord ELDON, in *White* v. *White* (1), and followed in all the subsequent cases, as to the proportions in which a tenant for life and remainderman are to bear the expenses of renewal where there is no express direction of the testator, is, that they bear it in proportion to the actual enjoyment they have of the lease renewed. It is not necessary in this case that I should express an opinion whether there is any distinction *with respect to this rule between [*464] cases which arise under settlements by deed, and cases under wills; and I therefore abstain from expressing any opinion upon that point.

This case does not, in the first place, depend on the general rule. There is a direction given; and there being a direction, it must be followed. The testator has empowered the trustees, out of the rents and profits, or by mortgage, or in such other ways and means as they should think fit, to raise the necessary funds for renewing the leaseholds, some of which are held for lives, and others for years. The trustees might, perhaps, have so acted as to have thrown the burden in a manner not according with the general rule; and I do not mean to give any opinion whether, if they had done so, the Court would have interfered to alter the way in which the trustees had placed the burden. In this case, however, the trustees have not taken upon themselves to exercise the discretion which is given them by the will, and they have thrown it on the Court to exercise it. The Court, therefore, having a will before it in which no particular way is pointed out as preferable to another,—in which the trustees had power to have raised the fines out of rents and profits, or by mortgage or otherwise, as they thought fit,—the question is, how the Court is to act? I think that, in the absence of any special ground for departing from that course, the proper way is for the Court to raise it in such a manner as to equalize the burden among all the parties;—that is, according to the rule which the Court pursues in the absence of any special

(1) 4 R. R. 161 (9 Ves. 554).

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direction. I consider that a case in which the trustees have power to raise the fines in any way, but have thrown on the Court the execution of the trust, is a case in which the Court will pursue its own general rules. If I were to adopt one alternative *mode suggested by the words of the power, I might throw the whole burden of a fine on a tenant for life; and the effect might be, that he would enjoy substantially no benefit from the gift; if I adopt another alternative, and throw the burden on the estate, the effect may be equally unjust upon the remainderman. I think, therefore, the proper course is, to raise the fines in that way which will throw the burden on the parties in proportion to the interests they take in the leaseholds liable to the charge.

[*465]

Now the rule is, that the parties are to pay in proportion to their enjoyment; by which I understand their actual enjoyment to be meant, and not an extent of enjoyment to be determined by mere speculation, or by a calculation of probabilities; and the question is, how that apportionment is to be effected. If the tenant for life is willing to take upon himself to renew, it appears to me, according to the cases, there is very little difficulty in carrying out the transaction; he will enjoy the estate during his own life, and when the actual period of his enjoyment is ascertained, his estate will have a lien upon the residue of the term for any over-payment which may have been made. The tenant for life having paid the whole, if he has not the whole enjoyment, his estate will have a lien for whatever ought to be paid by the remainderman. The case is one of much greater difficulty where the renewal is made by or at the expense of the remainderman, or (which as to this difficulty is the same thing) where the trustee is to raise the money and charge it on the *corpus*. In that case, unless some course be taken to protect the interest of the remainderman, the tenant *for life may enjoy the estate during his whole life without bearing any greater charge than the interest on the debt created by the renewal, and he may leave no assets to pay his proportion of the principal money. This is one of the difficulties noticed by Lord ELDON in *White* v. *White*. That inconvenience may perhaps be avoided by requiring the tenant for life to give security, a course to which Lord ELDON points in that case. The late cases of *Greenwood* v. *Evans* (1) and *Reeves* v. *Creswick* (2) are authorities which recognize the course of giving security as a course proper to be pursued where no other means are open for providing for a proper apportionment.

[*466]

(1) 55 R. R. 9 (4 Beav. 44). (2) 51 R. R. 439 (3 Y. & C. 715).

It is not to be disputed, that there is a practical difficulty even in this mode of proceeding; the difficulty is in determining for what sum the tenant for life is to give security? If he gives security for the whole amount of the fine, because by possibility he may enjoy the whole benefit resulting from the renewal, the difficulty is got over; but the tenant for life may not be able to give security for the whole, although he might for a part; and how is the Court in such a case to deal with the interests of the parties? I do not mean to give any opinion as to the way in which the Court would proceed in cases that might be suggested, but, in considering what is proposed as a general rule, it is right not to disregard the inconvenience or difficulty which in some cases might arise in its application. I do not, however, think that the difficulty, to which I have adverted, is insuperable. The tenant for life may, in the first instance, be required to give security for an amount calculated upon the assumption that his life will last during a portion of the renewed lease. If he should die within the time during which it was assumed that his life would last, *the security would of course [*467] be more than sufficient to satisfy his proportion of the fine, and it would be void for the excess. If he outlived that time, he might, if necessary, be called upon to give a further security to cover the additional proportion then to be attributed to him. In the case of *Allan* v. *Backhouse* (1) and other cases, it would appear that the party was not called upon in the first instance to pay the whole, but it was apportioned, and I presume on the principle that he should be required to pay the apportioned sum in the first instance, without prejudice to the question whether he might not ultimately be liable to pay more.

It appears to me, being guided by the light which the cases afford me, proper to declare the rights of each party, as they are expressed by Lord ELDON in *White* v. *White*,—that is, to declare that each party is to bear the burden of the renewal in the proportion of his actual enjoyment of the estate. There will be a direction for the tenant for life to keep down the interest, and a reference, as in *Allan* v. *Backhouse* (1), to ascertain what proportion of the fine was properly payable by him. This inquiry is necessarily by anticipation. There will then be a reference, as in *Greenwood* v. *Evans* (2), for the Master to approve of a security, and these directions must be followed by a declaration, that the reference

(1) 13 R. R. 23; 23 R. R. 167 (2 V. & B. 65).

(2) 55 R. R. 9 (4 Beav. 44).

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and security are to be without prejudice to the question whether the tenant for life may or may not be liable to pay less or more than the sum for which the security is given. I believe that decree will accord with the cases which have already been decided, and it appears to me to meet every consideration which arises on the case. [*468] There will be an additional complexity *in this case from the circumstance, that the fines have been hitherto paid out of a fund which confessedly was not liable to bear them, and which fund will therefore have to be indemnified.

"And it is ordered that the said Master do inquire and state what renewals have been made of the said testator's leasehold estates respectively, and when, and by whom, and out of what funds the fines, fees, and expenses attending such renewals, and each of them, have been paid. And this COURT doth declare that the defendant, William Jones, as tenant for life, ought to contribute to such renewals, and to the fines, fees, and expenses attending the same, in proportion to such benefit as he has derived or may derive from such renewals, and every or any of them. And it is ordered, that the said Master do inquire and state to the Court what sum ought to be paid, or secured to be paid, by the said William Jones, in respect of such his proportion, and what security he ought to give in respect thereof. But this direction as to such security is to be without prejudice to the question, whether the defendant William Jones may not ultimately be liable to pay more or less than the sum for which the Master shall find that such security ought to be given."

1846. *May* 29. *June* 4.

WIGRAM, V.-C.

[469]

SHARLAND *v.* MILDON (1).

(5 Hare, 469—474; S. C. 15 L. J. Ch. 434; 10 Jur. 771.)

The widow of the testator employed A. to collect some of the debts due to the testator's estate, which A. accordingly collected, and paid over to the widow, believing that she was the administratrix. The widow subsequently died without having obtained letters of administration: Held, that A. having received monies which he knew to be part of the estate of the testator, and not having accounted for such monies to the legal personal representative of the testator, A. was liable to be sued as executor *de son tort*.

That the liability was not avoided by the suggestion that A. acted as the agent of the widow, inasmuch as the acts of the widow and A., in reference to the testator's estate, were the acts of wrong doers, and the law does not

(1) *In re Lovett* (1876) 3 Ch. D. 198.

recognize the relation of principal and agent as existing amongst wrong doers.

That A. was liable as executor *de son tort* to account to a party interested in the testator's estate, in a suit for that purpose, without any charge of collusion between such executor *de son tort* and the legal personal representative.

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THE testator George Sharland died in January, 1842, leaving Grace Sharland his widow, a son and two daughters. One of the daughters was the plaintiff, an infant. The widow died in November, 1842, intestate, and John Loosemore, who had been her solicitor, obtained letters of administration of her estate in February, 1843. The original bill was filed in August, 1844, against Robert Mildon, John Hewish, and against the son and the other daughter of the testator, stating that the testator had left two documents of a testamentary character, one of which was and the other was not executed; that Robert Mildon and John Hewish claimed to act as trustees of the real and personal estate of the testator, and praying that the will might be established, accounts of the real and personal estate possessed by the several defendants taken, the estate duly administered, and a receiver and guardian appointed during the minority of the plaintiff. By a supplemental bill, the plaintiff stated, that it had been since discovered that Grace Sharland, the deceased widow, had not proved the will, or obtained letters of administration of the estate of the testator, and that the said will had not been proved until the 14th of February, 1845, when probate was granted to the defendant Robert Mildon, during the minority of the plaintiff. The *bill charged that so far [*470] as Grace Sharland, Robert Mildon, and John Hewish, had jointly or severally acted in the administration of the testator's personal estate prior to the grant of probate, each of them had acted therein as an executrix or executor *de son tort*, and as such become liable to account to the plaintiff for the assets of the testator possessed or received by themselves respectively, or by any of them respectively, by means of the agency of the others or other of them. The supplemental bill also charged the defendant John Loosemore with having acted both before and since the probate of the testator's will in respect of the estate, and charged him in like manner as liable, as executor *de son tort*, to account to the plaintiff; and it prayed that the defendant Loosemore, as the representative of Grace Sharland, and that each of them Loosemore, Mildon, and Hewish, respectively, so far as he had possessed the testator's personal estate prior to the grant of probate of the will, might be

SHARLAND v. MILDON.

declared personally liable as executor *de son tort*, and be decreed to account, and make good accordingly what he had so received.

John Loosemore by his answer admitted, that, acting professionally for Grace Sharland, he had received a debt of 5*l.* 5*s.* due to the estate of the testator, and that since her decease he had sold certain articles of furniture and wearing apparel belonging to the testator's estate which were in the possession of Grace Sharland at the time of her death, and which had produced about 50*l.*; and the defendant submitted to the Court the question, whether he was thereby liable as executor *de son tort*.

John Hewish by his answer admitted, that shortly after the
[*471] decease of the testator, at the request of *Grace Sharland, his widow, and of his son and heir-at-law, he (Hewish) took up his abode with the said Grace Sharland for some time, and at her request, and as her agent, and in her name, applied personally to some of the debtors of the said testator, and received from some of them the amounts of their respective debts, or some sums on account thereof, for the purpose only of being handed over to Grace Sharland, and all which sums he immediately handed over to her accordingly, he acting therein merely as a messenger between Grace Sharland and the said debtors. The defendant John Hewish also stated, that he had in his possession an account or memorandum book of the testator which was delivered to him by Grace Sharland, and which was then in the possession of her personal representative, and in such book were entries, made by him (Hewish), of debts and sums so received by him, and also of debts received by Grace Sharland herself. The defendant Hewish said that, after referring to the book, he had set forth a list of the sums so received by him as such agent or messenger, and also by Grace Sharland, and he stated that some of such sums were received by her in his presence, and others she informed him that she had received, and although he believed such lists to be imperfect, he was unable to set forth any other account. The defendant said that Grace Sharland had represented to him, and he believed, and acted in the belief, that she had actually obtained letters of administration of the testator's estate: he submitted that what he so did was not sufficient to make him executor *de son tort*, or to fix him with any personal liability.

Mr. Greene, for the bill, argued that by the receipt of monies
[*472] owing to the estate of the testator (knowing *that they belonged to

such estate) each of the defendants had become liable to be charged as executor *de son tort*: *Padget* v. *Priest* (1). Having incurred that liability, they could only discharge themselves of it by accounting to the legal representatives, and that the defendants had not done. The liability could not be avoided by the suggestion that the defendant acted as agent for another person, for in tort every party was a principal: *Stephens* v. *Elwall* (2), *Snowdon* v. *Davis* (3).

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Mr. W. M. James, for the defendant Hewish, argued, first, that he was a mere servant or agent of the widow, who was entitled to be, and was, as he supposed, the administratrix or legal representative of the estate of the testator; and that he had done nothing more than obey the directions of or assist the widow in securing the estate of the testator which was dispersed in various hands. * * *

June 4.

THE VICE-CHANCELLOR:

[473]

The widow of a deceased person,—the testator in the cause,—intending to obtain representation to her husband, began to collect his assets before she had obtained such representation, and in the course of doing so she employed the defendant Hewish to collect the debts owing to the testator. Hewish accordingly received several of the debts, knowing them to belong to the testator's estate, and paid them over to the widow. The widow did not afterwards become the legal representative of the testator, and another party has obtained such representation. The consequence is, that the widow might without question be sued as executrix *de son tort*. The question is as to Hewish. The case of *Padget* v. *Priest* (1) appears to be an authority for the proposition, that if Hewish in this case had not paid over the money which he received, but had retained *it in his hands, he also might have been sued as executor [*474] *de son tort*. It does not appear clearly from the report of that case, whether that was the precise ground upon which the judgment went, but according to the marginal note it seems to have been the point decided. One Judge, Mr. Justice BULLER, however, appears to have expressed a doubt whether the party, if he had been a mere servant, would have been liable. The case, in the present instance, is one of great hardship on Mr. Hewish, and I desired to look into the cases, to see if I could avoid treating him as executor *de son tort*. The fact that he would be liable if he had received

(1) 1 R. R. 440 (2 T. R. 97).
(2) 16 R. R. 458 (4 M. & S. 259).
(3) 1 Taunt. 359.

SHARLAND v. MILDON.

the money, and had not paid it over, is admitted, or well established; and if that be so, it seems to follow logically that the defendant cannot discharge himself, except by paying over to the legal personal representative of the testator the money which he has so received. Hewish might have acted in this case purely in a ministerial character, as, for example, a servant might have acted in bringing or removing furniture under the direction of his employer; but the authorities clearly show that the doctrine,—that the possession of an agent is the possession of a principal, has no application to the case of a wrong doer: *Stephens* v. *Elwall* (1), *Snowdon* v. *Davis* (2). Although, therefore, the rule operates severely in this case, Hewish, who in the act in question was a wrong doer, must remain a party to the suit.

FRAZER *v.* JONES.

1846. *Nov.* 5, 6, 7, 13.

WIGRAM, V.-C.

Affirmed on Appeal. 1848. *April* 27, 28, 29. *May* 1.

Lord COTTENHAM, L.C.

[475]

(5 Hare, 475—483; affd. on app. S. C. 17 L. J. Ch. 353; 12 Jur. 443.)

P. being indebted to B. makes a mortgage of an equity of redemption of real estate to B. for the purpose of securing the debt, and, by the indenture of mortgage, it was falsely recited, that the mortgaged estate was subject to an equitable charge for monies due to J., secured by the deposit of a deed. P. retained the deed in his own possession, and subsequently deposited it with J. as a security for money partly lent to P. by J. before, and partly after, the mortgage of the estate to B. J., at the time of the deposit, had no notice of the prior mortgage to B.: Held, that inasmuch as an actual prior charge on the estate, if afterwards paid off by P., or otherwise avoided, would have left B. in the position of the first mortgagee of the equity of redemption,—the recital of a charge, which had in fact no existence, could not have the effect of postponing B.

That the interest acquired by J., by the subsequent mortgage by way of deposit, could not be enlarged by the effect of the false recital, and was only an interest in the equity of redemption, subject to the mortgage to B.; and that B., in a suit for that purpose, was entitled, as against J., to the ordinary decree for payment or for foreclosure, and delivery up of the deed on default.

IN September, 1842, David Jones, as principal, and John Powell, as surety, were indebted to the Monmouthshire and Glamorganshire Banking Company, in the sum of 650*l.*, in respect of several promissory notes which David Jones had made, and John Powell had indorsed to the Banking Company. David Jones was at the same time indebted to John Powell in the sum of 1,800*l.*, which was secured by an indenture of mortgage dated the 21st of June, 1841, made by David Jones to John Powell, of certain parcels of lands, messuages, and premises, at Tredegar, in the county of

(1) 16 R. R. 458 (4 M. & S. 259). (2) 1 Taunt. 359.

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Monmouth, subject as to part thereof to a prior mortgage to Thomas Parry. David Jones was also indebted to the Banking Company in other sums of money.

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By an indenture, dated the 8th of September, 1842, made between John Powell, of the first part, David Jones, of the second part, and two persons as trustees of the Banking Company, of the third part, reciting the mortgage of the 21st of June, 1841, and reciting that the said sum of 1,800*l.*, with an arrear of interest, was still owing to John Powell from David Jones; reciting also "that John Powell, on or about the 7th of February, 1842, deposited the last-recited indenture of mortgage with John Jones, as collateral security for the repayment of the sum of 1,000*l.* due to him from John Powell on bond, and the interest thereon;" and reciting that David *Jones and John Powell, as his surety, were indebted to [*476] the Banking Company in the said sum of 650*l.*, for money lent and advanced, and that it had been agreed between the parties thereto that the repayment thereof with interest should be secured by the assignment and conveyance, and in manner thereinafter mentioned; the said John Powell bargained, sold, and assigned unto the said trustees for the Banking Company, their executors, administrators, and assigns, the said sum of 1,800*l.*, and the said indenture of mortgage, and all other deeds for better securing the same; and the said John Powell, with the privity and consent of David Jones, thereby also bargained, sold, and assigned, granted and confirmed unto the same trustees, their executors, administrators, and assigns, the said parcels of lands, messuages, and premises, subject, as to part of the said premises, to the said mortgage to Thomas Parry, and as to the whole thereof, "to the equitable right and interest acquired by the said John Jones by virtue of the deposit with him of the said mortgage-deed of the 21st of June, 1841, as collateral security for the payment of the sum of 1,000*l.* and interest, as thereinbefore mentioned," subject nevertheless to a proviso for redemption of the said premises, on payment by David Jones and John Powell, or either of them, to the said trustees for the Banking Company, their executors, administrators, and assigns, of the said sum of 650*l.* and interest, as therein mentioned. The deed contained a power of sale of the mortgaged premises by the mortgagees in case of default of payment by the mortgagors, and covenants by the mortgagors for payment of the 650*l.* and interest, and by the mortgagees not to exercise the power of sale, in case of payment being made as therein mentioned.

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In the year 1841, David Jones had become indebted to John Jones in the sum of 87*l.* On the 20th of September, *1842, John
[*477] Jones lent to John Powell a sum of 113*l.*, and John Powell gave his bond for 200*l.* to John Jones, and also deposited with him the said deed of the 21st of June, 1841, with a memorandum of deposit to the effect that the deed was to be held by John Jones as an additional security for the 200*l.* and interest.

On the 5th of October, 1842, the Banking Company gave both Thomas Parry and John Jones notice of the mortgage of the 8th of September, 1842, made to the trustees for the Bank.

The bill was filed by the public officer of the Banking Company and the trustees for the Company, who were parties to the mortgage deed of the 8th of September, 1842, against John Jones, David Jones, and John Powell. The bill alleged that the plaintiffs had recently discovered that the deposit of the deed of the 21st of June, 1841, with John Jones, did not take place until after the date of the mortgage of the 8th of September, 1842; that the 1,000*l.*, mentioned in the recital of the last-mentioned deed as being due to John Jones, had never been in fact owing; and that John Jones had no equitable right or interest in the premises by virtue of the deposit. The bill prayed that John Jones might be decreed to deliver up to the plaintiffs the deed of the 21st of June, 1841; and if it should appear that he had any interest in the premises under the bond and memorandum of deposit made on the 20th of September, 1842, that such interest might be declared to be subject to the mortgage to the Banking Company; that the defendants might be decreed to pay to the plaintiffs what should be found due to the Banking Company on their said mortgage, with costs; or in default, that the defendants might be foreclosed, and might deliver
[*478] over to *the plaintiffs all deeds and writings in their hands relating to the premises; and might also be decreed to pay to the plaintiffs the costs of the suit.

The defendant, John Jones, denied any knowledge of the recitals in the deed of the 8th of September, 1842, and he admitted that the 1,000*l.* was not due to him: he claimed, however, the benefit of the deposit of the deed of the 21st of June, 1841, as a security for the 200*l.* and interest; and denied an allegation made in the bill, that at the time the deposit was made he had notice of the mortgage to the Bank of the 8th of September, 1842.

Mr. Wood, *Mr. Rolt*, and *Mr. Whitbread*, for the plaintiffs.

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Mr. Romilly and *Mr. Busk*, for the defendant John Jones, argued that he was entitled to a charge upon the property, in priority to the Bank, to the extent of the actual amount of the debt due to him. The Bank, by means of the recital in their security of the 8th of September, was informed of the existence of an equitable interest in John Jones; that information might have been true or false, but still it was information given to the Bank. There were two courses open to the Bank,—either to take the recital as a fact, and submit to be bound by it, or to verify its truth by inquiry of the party in whom the alleged interest, prior to that of the Bank, was said to be vested. They did not take the latter course, and by not taking it they permitted the mortgagor to commit a fraud on the party to whom the alleged interest was given, which would not have happened if the inquiry had been made. This was such *wilful blindness or *laches* on the part of the Bank, that they must [*479] be bound, by the recital, to stand as mortgagees, subsequent to the amount of the debt due to the plaintiff not exceeding the 1,000*l.* mentioned in the recital: *Head* v. *Egerton* (1), *Evans* v. *Bicknell* (2), *Stanhope* v. *Earl Verney* (3), *Wilmot* v. *Pike* (4), *Hiern* v. *Mill* (5), *Jones* v. *Smith* (6), *Whitbread* v. *Jordan* (7), *Taylor* v. *Baker* (8), *Maundrell* v. *Maundrell* (9).

Mr. Humphrey for the other defendants.

THE VICE-CHANCELLOR: *Nov. 7.*

There appears to me to have been great misconduct on the part of some of the parties. The Bank, who are creditors of David Jones and Powell, require them to give a security; and thereupon David Jones and Powell represent to the Bank that the property which they proposed to give as security for the debt owing to the Bank, was subject to a charge in favour of a person of the name of Parry, which was true; and subject to another charge of 1,000*l.*, in favour of John Jones the defendant, which was untrue. It is true that the Bank, at the time this transaction took place, had no right to call for a specific security, but they had a right to take proceedings to enforce the payment of the debt. Now I certainly do not desire that any expression used at the Bar should be

(1) 3 P. Wms. 280.
(2) 5 R. R. 245 (6 Ves. 174).
(3) 2 Eden, 81.
(4) *Ante*, p. 10.
(5) 9 R. R. 149 (13 Ves. 114).
(6) 58 R. R. 22 (1 Hare, 43).
(7) 41 R. R. 281 (1 Y. & C. 303).
(8) 19 R. R. 625 (5 Price, 306).
(9) 7 R. R. 393 (10 Ves. 270).

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[*480] qualified with regard to those who made the untrue representation. Whether it was a legal *fraud or not, the false representation was a moral fraud. It appears that a security was taken by the Bank for the debt owing by David Jones and Powell, ostensibly subject to this charge of 1,000*l.* said to be owing to John Jones. The effect of this was, that Powell, who, if he had told the truth, would have been called upon to give up his mortgage-deed of June, 1841, for 1,800*l.*, was enabled to keep the deed in his possession, and by means of that possession afterwards to commit a fraud on John Jones. If I exclude the suggestion which has been made in the bill, that John Jones was a party to the fraud which was practised on the Bank, it is the simple case of two innocent parties, one of whom is to suffer by a fraud committed by a third; and the only question is, which of the two equities is to be preferred? It seems to me the question must ultimately come to this,—what interest had Powell to dispose of, on the 20th of September, when he professed to give the security to John Jones? If there had been a mortgage to John Jones on the estate at the time, according to his statement, and Powell had afterwards paid off that security,—not attempting to do anything to keep it alive in his own favour, as to the effect of which I do not give any opinion, it would have let in the other mortgage. It may, in this case, be open to a question, whether, in truth, there was any charge on the estate,—whether, the moment after the deed of the 8th of September was executed, Powell had any interest whatever in the estate in priority to his own mortgagee, the Bank, although the Bank had agreed to take the security *minus* the 1,000*l.*; then comes the question, how Powell could transfer to John Jones more than he had himself?

Nov. 13.

THE VICE-CHANCELLOR:

[481] The position of the parties in this cause is this: If I give the defendant, John Jones, priority over the plaintiffs, I shall not, by so doing, deprive the plaintiffs of the value of any part of the security which they contracted for, and supposed they had acquired. I shall in effect give to each party what he contracted for, and regarded his security as giving him; the truth being, that the plaintiffs are contending for the benefit of a rule of law, which they say entitled them to a better security than they expected to obtain. If, on the other hand, I give the plaintiffs the benefit of the rule they claim, I shall put the defendant in no worse position

than that in which every equitable mortgagee finds himself who advances his money in ignorance of a prior charge. I think, however, that I am bound to consider,—and perhaps more strictly in a case like this, what are the strict rights of the parties. My opinion is, that the plaintiffs are entitled to the priority which they claim. If John Jones had taken the security which the mortgagor stated that he had, and the mortgagor had afterwards paid off that charge, the extinguishment of the charge would, beyond all dispute, have enured to the benefit of the plaintiffs. So, also, if John Jones had had the charge, and the charge had been avoided as being illegal, or on any other ground, either by the act of the mortgagor, or by the act of the plaintiff. For both these propositions there is clear authority. And the principle of the decision is, that the mortgage, as between the mortgagor and the mortgagee, is a mortgage of the mortgagor's entire interest, saving only the rights of prior incumbrancers. If in this case John Jones had not intervened, I cannot entertain a doubt that the whole of the mortgagor's interest was pledged to the *plaintiffs by the mortgage [*482] of the 8th of September, 1842. The conclusion is, that after executing that mortgage, the mortgagor had no interest, legal or equitable, in the mortgaged premises in priority to the plaintiffs, nothing, in fact, which, in equity, he could transfer to John Jones. The priority must be determined by the dates of the advances, and the case in the plaintiffs' favour is certainly not the less strong, if John Jones (as he says) had no notice at the time of his advance of the plaintiffs' security; for, on that supposition he cannot by possibility have been misled by the form of their security.

A question was raised respecting the costs occasioned by the allegation in the answer of John Jones, that he had no notice of the plaintiffs' charge at the time he advanced his money,—the plaintiffs contending that he had such notice, and much evidence having been gone into on that point. Now, it appears to me that this issue was immaterial on the merits. The only question in the cause is, whether the mortgagor, after the execution of the mortgage of the 8th of September, 1842, retained any interest in the mortgaged premises as against the plaintiffs, which he could make the subject of the security to John Jones. That question is quite independent of the question of notice. If the mortgagors (1) had retained such an interest, the mortgage would be good whether

(1) *Sic.*

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John Jones had notice of it or not. If they (1) had no notice, of course the same conclusion must follow. The issue appears to me to be equally immaterial on the question of costs. The knowledge of John Jones, at the time of the filing of the bill, and not his knowledge at the time of taking his mortgage, is the material question. The issue, therefore, being immaterial, both on the merits and *with a view to the costs, I cannot make John Jones pay the costs of the litigation to which it has led.

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With respect to the general costs of the suit, excluding the above costs, I cannot, on the general ground that John Jones is a second mortgagee, with notice of a prior charge, order him to pay the costs of the suit. To give them upon that principle would be to establish that, in every case, the first mortgagee has a right to contend that the second mortgagee, taking the benefit of a decree in a suit, should pay the costs, and not that the costs should, as in the ordinary case, be added to the mortgage-debt, and made a charge upon the estate. In the circumstances of this case, I think that the common order is the proper order to be made. It is true that some extra costs may have been occasioned by the question raised in the cause between the plaintiffs and John Jones, for at the hearing there was a more material question to argue than otherwise there would have been. I think, however, that the nature of the question and the circumstances of the case are sufficient to justify me in making the common order. There will be a declaration that the plaintiffs are entitled as the first mortgagees, adding their costs to the debt, and then a decree for foreclosure on default in the usual way. In case of foreclosure, the defendant must deliver up the deed.

[John Jones appealed from this decision, as reported in 17 L. J. Ch. 353.]

1848. *April* 27, 28, 29.

[17 L. J. Ch. 354]

Mr. Wood, *Mr. Rolt*, and *Mr. Whitbread*, for the plaintiffs, and in support of the decree, contended that as the recital of the prior debt to Jones was admitted to be untrue, no interest remained in David Jones or Powell which could give John Jones priority over the Banking Company. He might take all the estate which Powell could assign to him; but that estate was merely an equity of redemption, subject to the mortgage to the Bank. Even if John Jones had no notice of the claim of the Bank, he would still be a

(1) *Sic.*

later incumbrancer, and if he and the Bank were equally innocent parties, then the rule *qui prior est tempore potior est jure* would settle the question in favour of the Bank.

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The *Solicitor-General* and *Mr. Busk*, for John Jones, contended that the conflicting claims had arisen out of the *laches* of the Banking Company. The recital mentioned a prior charge in favour of J. Jones. If they had applied to J. Jones, the truth or error of that recital would have been ascertained. They allowed Powell to keep possession of the deed of 1841, and by those means Powell obtained an advance from J. Jones. The Banking Company accepted the security under the impression that J. Jones had a claim upon it to the extent of 1,000*l.*; and if his priority as to 200*l.* was established, they would still be in a better position than they had contracted for.

THE LORD CHANCELLOR (before hearing the reply):

I think I can dispose of part of the case now. As to so much of the decree as relates to the priority there is no question. There is no case stated which can possibly affect the right of the Bank to be treated as incumbrancers prior to whatever John Jones may be entitled to claim. A fraud most undoubtedly was practised upon the Bank: whether John Jones was a party to it or not is a matter which may be left in doubt upon the evidence; but that David Jones and John Powell intended to commit a fraud upon the Bank is beyond all question. Because having an estate between them, one as owner and the other as incumbrancer, subject to a prior mortgage to one Parry, and being desirous of giving security to the Bank, they recite what is false as to some other person, that there is a second mortgagee on the property, namely, John Jones; and the Bank being desirous of having the best security they can get, these defendants represent that the best security they have is their estate, subject to a mortgage to Parry and subject to another to John Jones. Therefore it gives to them such title as the owner, David Jones, and John Powell, the mortgagee, could give to the Bank, but excepts the mortgage to Parry, which was a real subsisting mortgage, and the supposed fictitious mortgage to John Jones. The only object they could have was to preserve some interest in themselves which they could deal with as they thought proper, and to that extent it was a fraud upon the Bank; who, no doubt, were desirous of having the best security which those

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parties could give them. That transaction beyond all question was false and fraudulent. I do not at present discover whether John Jones was a party to it or not. It being stated that John Jones was the depositee of the mortgage deed to John Powell, of course the Bank would never think of asking for possession of the deed, which the recital would show they had not got in their possession. If the recital were true, the mortgage deed under which John Powell was entitled would be not in the possession of John Powell or David Jones, but in the possession of John Jones; and therefore, of course, that deed was not asked for or required to be produced or deposited with the Bank, because the Bank was informed it was already deposited and in the hands of John Jones. There was no [*355] *improper conduct or negligence on the part of the Bank: they were merely victims of a fraud which the other parties had worked, and had in fact, practised on them.

David Jones and John Powell having so far succeeded in imposing on the Bank, and having thus got, as they supposed, an interest in themselves, which they could deal with for their advantage, they make an agreement with John Jones, under which he now claims 200*l.*, part of that sum being for a debt and partly for an advance made at the time. Now, that the maxim of *prior tempore potior jure* applies to a transaction like this is beyond all controversy or question. There is nothing to displace it. It is a maxim as between equities which always applies, unless there be something to take the parties out of that general rule. A party, no doubt, who is entitled in equity to priority may lose it, and another party may gain it in various ways; but that does not interfere with the general principle. There is nothing in this case to take it out of the general principle. The Bank is entitled to priority; and so far, therefore, the decree is, in my opinion, right.

But then comes the question which I should not have had much difficulty about if it had not been for the case of *Joyce* v. *De Moleyns* (1), which raises a proposition that I believe is raised for the first time; because the case of *Wallwyn* v. *Lee* (2), which is supposed to have been an authority for it, is very distinguishable; but it raises, undoubtedly, a question, and one that it is perhaps extremely difficult to deal with against the authority on which that case was pronounced: at least it is one that requires careful consideration before I should feel justified in overruling a decision

(1) 69 R. R. 318 (2 J. & Lat. 374). (2) 7 R. R. 142 (9 Ves. 24).

so much considered as the case of *Joyce* v. *De Moleyns* appears to have been. But I wish *Mr. Wood* to consider what he is fighting for with regard to this deed. Because, as the decree stands, if a foreclosure takes place, his client has got the estate of the mortgagee and the estate of the mortgagor; and what good that piece of parchment would do—which is the title under which the mortgagee claims, and under which he was entitled to a legal estate, but which legal estate has become vested in the Banking Company, I cannot understand. It cannot be used as available for any purpose. It is not necessary for his title if he wants to convey; and why, therefore, a struggle is made for that piece of parchment, which is entirely destroyed in all its effect by the conveyance under which the bankers claim, is not very easy to discover.

Now there are two rather nice questions to be disposed of, if that be insisted on: first, whether in an ordinary case of a mortgage or a foreclosure, where some of the title-deeds have been left in the hands of the mortgagor, and have not been as they ought to have been, transferred to the mortgagee—whether, in a bill of foreclosure, it is or is not according to the practice of the Court to order the deeds to be delivered over. The registrar would not so draw up the decree without a special case being made (1). In ninety-nine times out of a hundred there is no question about the deeds being left with the mortgagor, because they would be handed over to the mortgagee; but if, as the bill states, they have been left in the hands of the mortgagor, though they ought to be in the hands of the mortgagee, in order to make the title which the decree of foreclosure professes to make good, whether there is any objection to the Court exercising the jurisdiction and ordering the deed to be delivered over, or whether it should leave the mortgagee to an action to obtain such a document, I, at present, give no opinion, because I have not heard the reply on that part of the case. I can only know from long experience, confirmed by those who have had more recent experience in the practice subsequent to my experience, that all who draw a bill of foreclosure allege that the mortgagor has in his hands some title-deeds belonging to the estate, and prays that on foreclosure what he so has may be delivered over to the mortgagee. That universal practice can hardly be supposed to have been adopted and acted upon without a general understanding in the profession that the Court has that

(1) Mr. Walker, the registrar, stated that such a direction would not be inserted in the decree, without a special order.

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jurisdiction. There is one case in Mr. Seton's Decrees in which *that was done, and, as might be expected, several others in which it was not done, because it does not appear there was the material. There is, on the other hand, for instance, I own, an expression of opinion by Sir WILLIAM ALEXANDER, that that is not consistent with the practice of the Court. If it is necessary to consider that, it may be important to investigate that part of the case further.

Then, with regard to the other defences, all founded upon this piece of useless, superannuated and exploded parchment. There is another question of whether a party can defend himself on the ground of being a purchaser without notice. Now, that turns again on the authority of the case of *Joyce* v. *De Moleyns*, which cannot be distinguished from the present, because there was a mere depositor in the case of *Wallwyn* v. *Lee*, which shows the distinction between the cases. There was an actual depositing by the party claiming to be entitled to the estate, and professing, therefore, to convey an estate which he had not; it is true, being a tenant for life, though professing to be tenant in fee, he was only tenant for life, and the claim was by a party in remainder. There you meet the allegation of plea of a purchaser for valuable consideration without notice. The party intending to deceive conveyed it to the defendant. The defendant says nobody else shall compel me to discover, or shall exercise any equity against me, to take away a title which I have derived without notice from a party being in possession of or pretending to have the fee of the estate. That was *Wallwyn* v. *Lee*. No such plea was put in in *Joyce* v. *De Moleyns*, because it was a mere deposit. As far as I am at present informed, that is the only case in which the rule has been applied to the mere question of an equitable title. Sir EDWARD SUGDEN there applies the rule to a mere equitable title. The heir-at-law did not convey the legal title. If he had conveyed the legal title, then it would have been the same as *Wallwyn* v. *Lee*. The legal title had descended to him, and he became trustee therefore for the purpose of the will, but he only created the defendant's interest by a deposit, and as far as I am informed, it is the only instance to be found in which a party claiming only an equitable interest is entitled to protect himself on that ground. One would naturally infer that a party who only purchases an equity takes it subject to such equity as the party granting it to him might be able to assign to him. Instead of that, the effect of

the decision seems to give him a better title than a purchaser of an equity or any person entitled to an equity can have, because a party who has an equity knows he takes it subject to all prior equities; however, I give no opinion on that, because, unless I am asked to decide who is entitled to this piece of parchment, the question does not arise. That, however, remains for *Mr. Wood* to address me upon.

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Mr. Wood replied.

THE LORD CHANCELLOR, after stating the evidence which had been given respecting John Jones's knowledge of the transactions, continued as follows: *May* 1.

I think, therefore, this case is made out as clearly and satisfactorily as it is possible for a case of fraud to be made out, and that John Jones was from the commencement a party, if not for his own benefit, at all events he lent himself to be a party to the fraud that was attempted to be practised by the mortgagors upon the bankers. Then, if that is so—and it is fairly and properly admitted by the *Solicitor-General*—there can be no case made against the case of fraud, and whatever may have taken place between him and the mortgagor cannot possibly improve his own situation, or deprive the plaintiffs of the full benefit of those equities which they would have been entitled to as against the mortgagors themselves—the assignment of the deed itself, together with the premises comprised in the deed under that provision, independent of all question of what would have been the ordinary course in a case of foreclosure. In that instrument, by which that deed is assigned to the plaintiffs, the plaintiffs, if they are to become entitled to the property by foreclosure, have a right to the benefit of the contract; and that contract, therefore, would necessarily have to be performed against those who improperly retained the deed, namely, the mortgagors, and he, John Jones, cannot derive a better title than what they had to give him; and, therefore, beyond all doubt *the title-deed must be delivered up in the event of a foreclosure. [*357]

(His Lordship then suggested some alterations in the form of the decree, which had been altered after the hearing of the cause, in consequence of the Banking Company paying off the first incumbrance.)

The principal question turning on the matter that is raised on

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the pleadings in the cause being, as I conceive, free from all doubt, and to get rid of that being the object of the appeal, it does not appear to me these alterations ought to affect the question of costs, they not being in fact the object of the appeal. It is a case in which, I think, I cannot, consistently with justice, give costs, and the Court ought not to let the parties escape from the costs which they ought to pay. I think, therefore, that those alterations must be made which I have suggested; but the party appellant must pay the costs of the appeal.

As to the costs of the appeal of David Jones and John Powell, I think when parties join in a fraud, and one struggles against it and occasions expense, those who are the originators, the persons primarily culpable in the fraud, are not to be protected from the expense of litigation arising from their own fraud.

1847.
March 22.
April 19.

WIGRAM, V.-C.

Affirmed on Appeal.

1848.

Lord COTTENHAM, L.C.

[484]

NIGHTINGALE *v.* GOULBURN.

(5 Hare, 484—491; S. C. 16 L. J. Ch. 270; affd. 2 Ph. 594; 17 L. J. Ch. 296; 12 Jur. 317.)

A bequest to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain, held to be valid so far as related to the pure personalty, but void in respect of the personalty savouring of realty.

COLONEL PETRIE, by his will dated in July, 1843, bequeathed several legacies, gave an annuity of 200*l.* to his widow for her life, and, after the decease of his widow, disposed of his residuary estate in the following words: "I now desire that my said trustees or trustee shall convert all and singular my investments in the stocks, funds, and other securities into money, and do and shall pay such money, and all other trust monies whatever, remaining not disposed of after payment of all and every the legacies, bequests, donations, and sums of money aforesaid, and all expenses attending the execution of the trusts of this my will, to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country, Great Britain."

The Master found that the estate of the testator, at the time of his death, consisted of certain stock in the public funds, therein stated (which amounted together to about 20,000*l.*), being pure personalty; and to a sum of 300*l.* due upon mortgage. The parties to the suit, on further directions, were the trustees of the

fund, the Chancellor of the Exchequer, the *Attorney-General*, and the next of kin of the testator.

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Mr. Twiss and *Mr. Wray*, for the Chancellor of the Exchequer and the *Attorney-General*. * * *

Mr. Romilly, *Mr. Hallett*, and *Mr. Bell*, for the several next of kin of the testator. [485]

[The arguments of counsel and the principal cases cited by them are stated in the judgment.]

THE VICE-CHANCELLOR: [486]

The question is, whether this bequest can be supported as a charitable bequest; or whether the property comprised in it is undisposed of, and as such is distributable amongst the next of kin of the testator?

The argument in favour of the *Attorney-General* was, that the bequest being for the benefit of the country at large, no application of the fund would be lawful other *than for a general public purpose; [*487] and that every such an appropriation for a general public purpose would be a charitable use within the statute of Elizabeth. The argument for the next of kin was, that the words of the bequest are so general as to admit of the application of the property by the trustee to purposes not charitable, within the construction of that term adopted in the decided cases. If it can be shown that the trustees could have such a power as that which it is suggested on the part of the next of kin that he would have, the case is at an end; but, to assume that, would be to take for granted the very point in dispute.

I do not understand the observations of Sir W. GRANT, in *Morice* v. *The Bishop of Durham* (1), as deciding that no general words could be equivalent to the word "charity;" nor do I think it would be right, with reference to the decided cases, to lay down any such general rule. In *West* v. *Knight* (2), a bequest "to the parish of Great Creaton," was held to be a charitable bequest, to be applied for the benefit of the poor of the parish named, upon the express ground that it was within the Statute of Charitable Uses. In *Jones* v. *Williams* (3), it was held by Lord CAMDEN, that any general public purpose, extending to the poor as well as to the rich, was a charitable

(1) 7 R. R. 232 (9 Ves. 406).
(2) 1 Cas. in Ch. 134.
(3) Ambl. 651.

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use within the statute. In *The Attorney-General* v. *College of William and Mary* (1), the testator bequeathed the residue of his estate to be laid out for "charitable and other pious and good uses, at their discretion," and it was held a valid charitable bequest; and upon the authority of that case, a bequest of 2,000*l.*, to be laid out until the testator's son came of age, in purposes expressed no *more definitely [*488] than in the words, "in the service of my Lord and Master, and, I trust, Redeemer," was held a good charitable bequest: *Powerscourt* v. *Powerscourt* (2); though it was argued that private charity would satisfy the bequest. In *The Attorney-General* v. *Heelis* (3), Sir JOHN LEACH, referring to the case of *The Attorney-General* v. *Brown* (4), as a case in which he had occasion to consider the subject very fully, said, it was his opinion, that funds supplied from the gift of the Crown, or of the Legislature, or from private gift, for any legal, public, or general purpose, were charitable funds, to be administered by courts of equity; and that it was not material that the particular public or general purpose was not expressed in the statute of Elizabeth, all other legal, public, or general purposes being within the equity of that statute. That case was the subject of observation before Lord Eldon, in *The Attorney-General* v. *The Mayor of Dublin* (5); and what was there said again became the subject of observation by the VICE-CHANCELLOR in *The Attorney-General* v. *The Mayor and Corporation of Carlisle* (6). I do not, however, collect from those cases that the law laid down in *The Attorney-General* v. *Heelis* was disapproved of by Lord ELDON, but that the law, as laid down in that case, if correct, tended to show, that, in *The Attorney-General* v. *Brown*, Lord ELDON had felt unnecessary difficulties in deciding the case.

In *The Attorney-General* v. *The Earl of Lonsdale* (7), property was given by a testator upon trust for a school in Lowther, in the county of Westmoreland, or otherwise, upon such trusts, and for such other purposes as his executors should think most conducive to the good of [*489] the county of Westmoreland, and especially of the parish of *Lowther. The charity as to the school altogether failed; but the COURT nevertheless held the bequest to be good, and directed the property to be applied to other charitable purposes for the benefit of the county. Had the words of the bequest been, "or otherwise upon such trusts

(1) 1 Ves. Jr. 243.
(2) 1 Moll. 616.
(3) 25 R. R. 153 (2 Sim. & St. 67).
(4) 1 Swanst. 265. See 25 R. R. 158, *n.*
(5) 30 R. R. 43 (1 Bligh, N. S. 334).
(6) 29 R. R. 133 (2 Sim. 437).
(7) 27 R. R. 176 (1 Sim. 105).

and for such other purposes as my executors shall think fit," then, according to the cases cited in argument, the gift could not have been supported as a charity. But the terms of the gift in fact amounted merely to a direction to apply the property for the good of the county, without making use of the word "charitable." In *Mitford* v. *Reynolds* (1), the testator bequeathed the residue of his property "to the Government of Bengal, for the express purpose of that Government applying the amount to charitable, beneficial, and public works at and in the city of Dacca, in Bengal, the intent of such bequest and direction being, that the amount shall be applied exclusively to the benefit of the native inhabitants in the manner they and the Government may regard to be most conducive to that end." Now, if the words "charitable, beneficial, and public," in that case are to be read collectively, there is no question that charity would govern the whole of the bequest. If, however, they were to be taken distributively, so that the Government might apply the funds either to charitable, or to beneficial or public works, without reference to charity, there would be an end to the argument. The LORD CHANCELLOR, in delivering judgment, says, that, in the latter case, there could be no doubt that the whole disposition would fail; but, taking the whole together, he considers the meaning to be, that the money shall be applied to works,—something to be constructed or established for the benefit of the native inhabitants of Dacca,—not for any particular class of the native inhabitants, *but for all the [*490] native inhabitants in general, both rich and poor; and he holds it to be, within all the authorities, a valid charitable bequest. The LORD CHANCELLOR does not construe the word "charitable" as governing the whole of the bequest; but respecting that word, he says that the bequest is for the benefit of all the native inhabitants in general, both rich and poor, and that it was, therefore, good. I do not think anything turns on the point, as to the application of the fund in building works, as distinguished from any other mode of application.

In the case of *Newland* v. *The Attorney-General* (2), in which there was a bequest of stock to his Majesty's Government in exoneration of the National Debt, Lord ELDON directed the fund to be transferred to such person as the King, under his sign manual, should appoint. The cases of *Howse* v. *Chapman* (3), *Townley* v. *Bedwell* (4), which are cited in *Mitford* v. *Reynolds*, in explanation of that judgment,

(1) 65 R. R. 372 (1 Ph. 185, 706).
(2) 3 Mer. 684.
(3) 4 R. R. 292 (4 Ves. 542).
(4) 9 R. R. 352 (6 Ves. 194).

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are also important upon the question raised in this case by the argument on behalf of the next of kin.

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It was said, however, that if I should decide against the claim of the next of kin, my decision would be opposed to that of Lord LANGDALE, in *Kendall* v. *Granger* (1). I am not of that opinion; I agree with Lord LANGDALE, that many things of general utility may not fall within the definition of charity, as the term is understood in the Court; for many things of general utility may be strictly matters of private right, although the public may indirectly derive a benefit from them. The expenditure of money to promote the construction of railroads or canals (for example), which are

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private *property, in no respect under the control of the *Attorney-General*, might often be an expenditure in the encouragement of things of general utility, but could not be said to be an expenditure for a charitable purpose. But this case is distinguishable from that of *Kendall* v. *Granger*. This is not simply a bequest to trustees for purposes of a general and wholly unrestricted nature, but for the benefit and advantage, that is, for the good of a particular class,—a large class, it is true, but still a class coming within some defined limits, and which is within the decision in *Mitford* v. *Reynolds*. If a bequest were made to a trustee to be appropriated, at his discretion, for the benefit and advantage of A. B., that would in equity be a bequest to A. B. The British public, in this case, stand in the situation of A. B. in the case I have supposed; but it has not been argued, that that difference alone was fatal to the bequest.

I am of opinion that this bequest is valid, unless it can be shown that the Chancellor of the Exchequer may, consistently with the trust under the will, appropriate the fund to purposes in which the British public have no direct and immediate interest,—no interest except incidentally and indirectly,—or that he is at liberty in fact to appropriate it to any other than such general public purposes as the *Attorney-General* might protect and control. I cannot conceive a purpose to which these trust funds could be lawfully applied, according to the will, which would not be so general and public in its character as to constitute a charitable use. The case is certainly open to doubt; but the conclusion to which I have come is, that the bequest is valid.

[One of the testator's next of kin appealed from this decision, as reported in 2 Ph. 594; but the LORD CHANCELLOR affirmed the decision in the following judgment.]

(1) 59 R. R. 507 (5 Beav. 300).

The LORD CHANCELLOR—after observing that the fund was pure personalty, and, therefore, that there was no question on the Mortmain Act, but that if the legacy was good, it was clearly a charity legacy in the large sense of that term, as adopted in *Attorney-General* v. *Brown* (1), *Attorney-General* v. *Heelis* (2), *Attorney-General* v. *Corporation of Dublin* (3)—proceeded as follows: [2 Phillips, 595]

Many bequests have been held good charitable gifts to parishes, towns, counties, and provinces: *West* v. *Knight* (4), *Attorney-General* v. *Mayor of Carlisle* (5), *Attorney-General* v. *Lord Lonsdale* (6), *Mitford* v. *Reynolds* (7); and so have gifts in aid of the public revenue; as in *Thellusson* v. *Woodford* (8), in which case the *Attorney-General* was a party, and the trusts of the will were established, and no objection raised to the gift, and in *Newland* v. *Attorney-General* (9). Why then is the present gift not good? Why is this kind of charitable gift to be held void because the particular objects are not specified, when that objection does not prevail in what have been called proper charities.

It is no criterion of the invalidity of a charity bequest, that it is not capable of being administered in this Court, for that is the case in every charitable gift which is administered under the sign manual: *Moggridge* v. *Thackwell* (10); but it is a criterion when the question is, whether the gift be charitable or not, as in *Morice* v. *The Bishop of Durham* (11) and many similar cases *which have occurred since, none of which appear to me to have any application to the present. [*596]

If a gift to the Government for the benefit of the public be good, can it become bad because it is given to one member of that Government for the same purpose? If any objection could be founded upon the circumstance that the particular objects of the gift were not specified, the selection of an officer of the Government at the head of a particular department would seem very much to diminish that objection. The Chancellor of the Exchequer for the time being cannot take the legacy for himself; but the gift to the holder of the office strongly marks in what manner the public were to be benefited, and would probably be considered as precluding the exercise of any discretion in the application. This, however, is not now for consideration, the question being, whether the gift itself is void. I see

(1) 1 Swanst. 265. See 25 R. R. 158, *n*.
(2) 25 R. R. 153 (2 Sim. & St. 67).
(3) 30 R. R. 43 (1 Bligh, N. S. 312).
(4) 1 Ca. in Ch. 134.
(5) 29 R. R. 133 (2 Sim. 437).
(6) 27 R. R. 176 (1 Sim. 105).
(7) 65 R. R. 372 (1 Ph. 185).
(8) 4 R. R. 205 (4 Ves. 227).
(9) 3 Mer. 684.
(10) 6 R. R. 76 (7 Ves. 36).
(11) 7 R. R. 232 (9 Ves. 399).

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no reason for doubting the propriety of the many similar cases which have been referred to, and if I did, thinking as I do that the present falls within the principle of them, I should be bound to follow them. I must dismiss the appeal with costs.

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1847.
Feb. 26, 27.
March 17.

WIGRAM, V.-C.

[493]

KIRWAN *v.* DANIEL.

(5 Hare, 493—501; S. C. 16 L. J. Ch. 191; 11 Jur. 235.)

The plaintiff being entitled to an annuity of 300*l.* charged upon plantations in the West Indies, belonging to K., entered (as agent for K.) into an agreement with D., by which D. in consideration of having the produce consigned to him until his advances were satisfied, was to ship supplies to the plantations, and honour bills drawn upon him D. by K. for the expenses of management, and also to pay the plaintiff's annuity. The consignments were made, and D. paid the plaintiff's annuity for one year, and then discontinued the payment, although he received subsequent consignments. The bill prayed that D. might be ordered to pay the annuity so long as he continued to receive the consignments: Held, on demurrer, that, without deciding whether the plaintiff could (with reference to the decision in the case of *Garrard* v. *Lord Lauderdale*, 30 R. R. 105 (3 Sim. 1)) sustain a suit to enforce the agreement as against D., D. could not, after the payment of the annuity which he had made under the contract, withhold from the plaintiff the benefit of the contract for the further payment of the annuity.

THE bill, which was filed in December, 1846, by Matthew Kirwan, against Thomas and John Daniel, John Francis Kirwan, M. Hale, and H. Smith, stated an indenture, dated in March, 1841, made between the plaintiff, of the first part, John Francis Kirwan of the second part, and M. Hale and H. Smith of the third part, whereby, for certain considerations, and among others, in consideration of an annuity of 300*l.* to the plaintiff for his life, and another annuity of 100*l.* to Sarah Kirwan, commencing at the decease of the plaintiff, for her life, (which annuities John Francis Kirwan covenanted to pay), certain plantations in Montserrat were conveyed to M. Hale and H. Smith, and their heirs, to the use and intent that the plaintiff and Sarah Kirwan might receive and take out of the said plantations such several annuities, as the same should become due; and subject to the said charges and certain other charges thereon, to the use of John Francis Kirwan, his heirs and assigns.

The bill then stated that, in October, 1841, John Francis Kirwan, who had entered into possession of the plantations, was desirous of making an arrangement with some mercantile house in London for consigning to them the produce, such mercantile house undertaking to ship the supplies required from this country for the use of the plantations, to provide for the payment of a rent of 200*l.* per

annum, to which an estate called "Old Road," in the possession of John Francis Kirwan, was subject, *and also to provide for the payment of the said annuity to the plaintiff: that the plaintiff was empowered by John Francis Kirwan to enter into such arrangement and agreement, and that the defendants, Thomas Daniel and John Daniel, carrying on business as merchants in London under the firm of Thomas Daniel & Co., being desirous of becoming consignees of the produce of the plantations, and willing, in consideration thereof, to undertake to ship the necessary supplies for the same, and to provide for the payment of the rent of 200*l.*, and of the plaintiff's annuity of 300*l.*, and also to honour the bills which might be drawn by John Francis Kirwan for the proper cultivation and management of the plantations, the following agreement was entered into between and by the plaintiff, as such agent of the said John Francis Kirwan, duly authorised as aforesaid, "and also on his own behalf, in respect of his said annuity of 300*l.*, charged on the said plantations, comprised in the said indenture of March, 1841," and N. and H. Mayo, another firm, West India brokers, who claimed some lien on the plantations, and the defendants, Daniel & Co.: [*494]

"LONDON, 29th of October, 1841—It is agreed between John Francis Kirwan, Esq., of Montserrat, represented by his uncle, Matthew Kirwan, Esq., of Brighton, at present in London, and Messrs. N. and H. Mayo, and Messrs. Thomas Daniel & Co., of Mincing Lane, London, that Messrs. Daniel & Co. shall honour the bills drawn by Mr. J. F. Kirwan, of Montserrat, for the proper cultivation and maintenance of the three estates, viz. Farm, Waterwork, and Old Road, in the said island; and also that they should ship such supplies as may be required from this country for the said properties; and pay Mr. Matthew Kirwan quarterly, commencing from the 1st of October now last past, 75*l.*, in discharge of his annuity of 300*l.* secured on the estates Farm and Waterwork, the *which produce of the said three estates to be sent to Daniel & Co., in repayment of such advances, and until the same are fully liquidated, they T. D. & Co. undertaking, should there be a surplus in their hands after the said liquidation, to pay over the said surplus to N. and H. Mayo, in part-payment of interest and principal of a claim they have by assignment from W. Jenkins against the estates Farm and Waterwork; but N. and H. Mayo are not precluded from hereafter taking other steps for realizing their claim, should they [*495]

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have reason to be dissatisfied with the working of the present scheme. Signed—MATTHEW KIRWAN, N. and H. MAYO, THOMAS DANIEL & Co."

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The bill stated, that, in pursuance of the said agreement, the defendant, John Francis Kirwan, had, from and since the date thereof, consigned and still continued to consign to the defendants, Daniel & Co.,—who had from time to time duly received,—the produce of the plantations: that the defendants, Daniel & Co., duly paid to the plaintiff the four quarterly payments, which became due in respect of the said annuity of 300*l.*, to the 1st of October, 1842; but that, since that date, they had not made any payment to the plaintiff in respect thereof, with the exception of three sums, making together 125*l.*; but the plaintiff had in June, 1845, received from John Francis Kirwan a sum of 105*l.* in respect of the arrears of the annuity: that a large sum of money was then due to the plaintiff in respect of such arrears, and the defendants, Daniel & Co., had refused to pay such arrears, or to provide for the future payment of the said annuity to the plaintiff.

The bill charged, that, according to the true construction of the agreement, Daniel & Co. were bound to pay the annuity to the [*496] plaintiff so long as they should receive *the consignments of produce, without reference to the value or amount of such consignments; but which, however, the bill alleged, were sufficient. The bill prayed an account of what was due to the plaintiff for the arrears of the annuity, and that Daniel & Co. might be ordered to pay the same, and also to continue the payment of the annuity quarterly during such time as they should continue to receive the produce of the plantations.

Messrs. Daniel & Co. demurred for want of equity.

Mr. Rolt and *Mr. Dickinson*, for the demurrer:

It is not competent to the plaintiff to establish an interest in the agreement, by alleging that it was made by him, not only as the agent of John Francis Kirwan, but also on his own behalf. The terms of the agreement, and the parties entitled to the benefit of it, must be found on the agreement itself, and to that agreement it appears that the plaintiff is no party, except in his character of agent. The plaintiff has no interest in the agreement made between John Francis Kirwan and Daniel & Co.: *Garrard* v. *Lord Lauderdale* (1), *Wallwyn* v. *Coutts* (2). The fact that the plaintiff, being the agent in

(1) 30 R. R. 105 (3 Sim. 1).

(2) 17 R. R. 173 (3 Sim. 14; *S. C.* 3 Mer. 707).

the transaction, had notice of the terms of the agreement, and might have expected or relied upon receiving the annuity, does not give him a right to sue upon the agreement: *Garrard* v. *Lord Lauderdale*, *Acton* v. *Woodgate* (1), *Scott* v. *Porcher* (2). [They also cited *Fitzgerald* v. *Stewart* (3).]

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Mr. Romilly and *Mr. Heathfield*: [497]

The bill states that the agreement was made by the plaintiff, on his own behalf, as well as on behalf of the other party; and that statement must, for the purposes of the demurrer, be taken as true: it must be taken as a fact, added to the written contract. Taking the contract, simply as expressed in the written agreement, still, after the payment of the annuity by Messrs. Daniel & Co. for a considerable time in pursuance of the contract, they could not hold the consignments, and refuse to perform the other part of their agreement, by continuing to make the payment. [They cited *Burn* v. *Carvalho* (4), *Hutchinson* v. *Heyworth* (5), *Miln* v. *Walton* (6), and other cases.]

THE VICE-CHANCELLOR, after adverting to the opinion he had expressed on the case at the close of the argument:

The facts of this case are these: John Francis Kirwan was the owner of some plantations in Montserrat, *in the West Indies; he [*498] was the nephew of the plaintiff, and the plaintiff was his agent. The plaintiff was entitled to an annuity of 300*l.* payable out of the plantations in question. John Francis Kirwan was desirous of making arrangements with some one in this country to send out supplies to the West Indies, for the due cultivation and management of the estates; and, according to the allegations of the bill, he authorised the plaintiff to make such arrangements, and also to provide for payment of the plaintiff's annuity of 300*l.* a year, as well as a rent of 200*l.* payable to another person. There is some question on the construction of the agreement, whether the annuity was to be payable by the consignees at all events, or whether it was only to be payable out of such consignments as they received; but as the bill states that they have received consignments sufficient to pay the annuity, or to pay it in part, it is for the present purpose immaterial which of these constructions shall be adopted. Now,

(1) 39 R. R. 251 (2 My. & K. 492).
(2) 17 R. R. 161 (3 Mer. 652).
(3) 2 Russ. & My. 457, as to which see a note *post*, p. 207.
(4) 48 R. R. 213 (4 My. & Cr. 690).
(5) 48 R. R. 530 (9 Ad. & El. 375).
(6) 60 R. R. 184 (2 Y. & C. C. C. 354).

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the plaintiff, according to the allegations in the bill, having had this commission, entered into an arrangement with the defendants, Messrs. Daniel & Co., in the month of October, 1841, which was as follows: (His Honour read the agreement, *supra*, p. 203.) The bill then alleges that Messrs. Daniel & Co. thereupon became the consignees; that they accepted bills; that the produce was consigned to them; that up to a certain time, which is stated, they regularly paid the annuity, and that they have since discontinued paying it, and the bill seeks a decree against Messrs. Daniel & Co., that they continue to pay the annuity so long as they shall continue to receive the consignments. Messrs. Daniel & Co. have demurred to the bill, and they insist that the plaintiff, being no party to, and having no ultimate interest under the agreement of October, 1841, has no right to sue them for his annuity, although, of course, John
[*499] Francis Kirwan, *as the author of the deed, might have compelled them to carry it into effect.

I do not mean to go into the question of the effect of the agreement. It appeared to me that the Messrs. Daniel might probably have a right to say, that, although the plaintiff appears to be the agent, yet, as the agreement is made with him as the agent for another person who is named as the party to the agreement, they did not by that arrangement,—merely by his being mentioned as the agent, give any right to the plaintiff himself under the agreement. They might very well say, "We are quite content to be liable to those with whom we are dealing, whose bills we accept, and from whom we receive the consignments, but we will not be liable to a third person." I do not, therefore, give any opinion whether on the agreement alone the plaintiff would have a right to sue. It was on that ground I was apprehensive that a decision on this demurrer might appear to conflict with the case of *Garrard* v. *Lord Lauderdale*, a case which, in one of its bearings, is of some difficulty.

So far as *Garrard* v. *Lord Lauderdale* follows *Wallwyn* v. *Coutts*, as reported, but misreported in Merivale (1), I shall assume its authority to be unimpeachable; but the case of *Garrard* v. *Lord Lauderdale* went much further than *Wallwyn* v. *Coutts*, for, in that case, the creditors were named as parties to the deed, of the third part; the trustees gave notice of the deed to the creditors (of whom the plaintiff was one), who were named as parties of the third part, and whose debts were to be paid, and the COURT held that the notice

(1) 17 R. R. 173 (3 Mer. 707).

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was immaterial. The case to that extent was, I believe, a case of the first impression; and the decision was certainly a surprise on those in whose favour it was pronounced. The argument was, that the deed, *per se*, gave no interest to the creditors; and if that were admitted, then it was said a simple notice to the creditor of a deed which *per se* gave him no interest, could not enlarge the effect of the deed. That may be true, so far as the effect of the deed is concerned; but the argument omits the material consideration, that, although the notice may not alter the effect of the deed, it may alter the position of the creditor; and Courts both of law and equity have repeatedly decided, that, where a creditor on whose behalf a stake has been deposited by the debtor with a third person, receives notice of that fact from the stakeholder, the notice will convert the stakeholder into an agent for, and a debtor to that creditor; and those cases have been decided on the ground that the creditor may, on the faith of the notice, have forborne to sue. The late cases at law which were cited at the Bar are very strong, and in principle I cannot distinguish them from a trust in equity, as in *Garrard* v. *Lord Lauderdale*.

I should not, however, have presumed to make these remarks, were it not for the observation of the MASTER OF THE ROLLS in *Acton* v. *Woodgate*, the observations of the same learned Judge in an unreported case, of which I was furnished with a note by Mr. Russell many years ago; and the observation of Sir EDWARD SUGDEN on *Brown* v. *Cavendish*, as well as the difficulty always felt in applying the case of *Garrard* v. *Lord Lauderdale* in the particular alluded to. It appears to me, however, that I can decide this case without being in any danger of impeaching that authority. The case of *Fitzgerald* v. *Stewart* (1) has a material bearing upon the question, and I refer particularly to the LORD CHANCELLOR'S

(1) 2 Russ. & My. 457, where, in a somewhat similar case, the consignee had assented to the arrangement for the payment of the annuity which the annuitant was entitled to receive under an order of Court made in Jamaica and the consignee had received the consignments and paid the annuity for several years under the arrangement made with the receiver appointed by the Court in Jamaica. In that case, the LORD CHANCELLOR said (2 Russ. & My. p. 459): "I cannot accede to the doctrine that an annuity is to be taken by piecemeal, as so many separate transactions. On the contrary, it is all one transaction. The defendants have duly paid it for a certain time, and after leading the plaintiff to expect that they would continue to pay it, they turn round and repudiate their own act;" and he held that there were facts and dealings in the case from which by implication the relation of trustee and cestui que trust might be fairly considered to be constituted as between the consignee and the annuitant.—O. A. S.

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observations in that case (the same Judge who decided *Garrard* v. *Lord *Lauderdale*), that in the case of an annuity, the annuity is to

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be treated as an entire sum, and not merely as a succession of accruing payments; and that, where the annuity is paid by the trustee, that trustee thereby makes himself liable afterwards to the continued payment of the annuity, so long as he is placed in a position to make it. I do not by this decision in the least degree contravene *Garrard* v. *Lord Lauderdale*, but I do not (according to Lord BROUGHAM'S reasoning upon an annuity) extend it.

Demurrer overruled.

1846.
June 2, 4.

WIGRAM, V.-C.

[501]

LOWES *v.* LOWES (1).

(5 Hare, 501—506; S. C. 15 L. J. Ch. 369; 10 Jur. 453.)

The testator by his will devised and bequeathed all his real and personal estate to trustees, subject to debts, &c., upon trust by and out of the rents, issues, and profits thereof, to pay an annuity of 100*l.* to his wife during her life or widowhood, and subject thereto, upon trust for his daughter for life, with remainder to her children, remainder to his brother. And the testator empowered his trustees, at their discretion, during the continuance of the trusts and notwithstanding the same, to continue and carry on all or any of the farms or other concerns in which he might be engaged at the time of his decease, and to restrict or increase any such concern, and to demise, mortgage, or sell all or any part of his real estate or chattels real: Held, that the widow was not entitled both to the annuity given to her by the will and to her dower out of the real estate.

THE testator, N. Lowes, devised and bequeathed all his real and personal estate to his executors and trustees, and subject to his debts and funeral and testamentary expenses, and the expenses which the trustees should deem it expedient to incur in the management of the trust premises, or otherwise in the execution of the will,—he directed his trustees, by and out of the rents, issues, and profits thereof, to raise the yearly sum of 100*l.*, and pay the same quarterly to his wife, Lucy Lowes, or as she (not by way of anticipation) should appoint, so long as she should continue his widow; and subject as aforesaid, the testator directed that his trustees should stand and be possessed of the said trust premises, in

[*502]

trust to apply the whole or any part of the *rents, issues and profits thereof, in or towards the maintenance or education or otherwise for the benefit of his daughter, Mary Lowes, until she should attain the age of twenty-one years, or be married, and that the unapplied

(1) The old law of dower, though now of little practical importance in England, supplies illustrations of the equitable doctrine of election, and this case may possibly be useful for that reason.—O. A. S.

income should be accumulated, and be liable to be applied in like manner, and, subject to such liability, be deemed accretions to the capital whence it arose. And when his said daughter should attain twenty-one, or be married, the testator directed his trustees to pay the rents, issues and profits of the trust premises to his said daughter, or as she should (not by anticipation, charge or assignment) appoint, for her life, for her separate use; and after the decease of his said daughter, in trust for her child or children who should live to attain the age of twenty-one years, or be previously married; and in default of such child or children, in trust for the testator's brother, John Lowes, his heirs, executors, &c., for ever. And the testator provided, that if his daughter should die under twenty-one without issue, in the lifetime of his wife, that the annuity of 100*l.* should be paid to his wife for her life for her separate use. And the testator thereby empowered his trustees, during the continuance of the trusts of the will, to continue and carry on all or any of the farms, or other concerns in which he might be engaged at the time of his decease, for such period, and in such manner in all respects as his said trustees should think proper, and especially with full power for his trustees to restrict or diminish, or to enlarge or increase any such concern, and to make any purchases whether of real or personal estate, and to enter into such contracts as they should deem expedient for the purposes aforesaid; and he thereby empowered his trustees, during the continuance of the said trusts, to demise or lease all or any part of the hereditaments for the time being vested in them upon the trusts aforesaid, *either at will, from year to year, or for any term [*503] of years not exceeding twenty-one years, in possession, and not in reversion, at the best yearly rent, without taking any fine or premium, and with or without a power for the lessee to surrender the premises, and under and subject to such other covenants as his trustees should think proper, but so that the respective lessees should covenant for payment of their respective rents, and execute counterparts of their leases as therein mentioned. And the testator thereby empowered his trustees, during the continuance of the said trusts, to sell, or mortgage and afterwards sell, all or any part of the trust premises which consisted of real estate or chattels real, whether subject to a lease or not, and at such time or times, and subject to such conditions as his trustees should think expedient. And the testator declared that the monies to arise by the exercise of the said powers, should be held upon the same trusts as were

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declared of the premises from whence they arose, but should be deemed personal estate; and he empowered the trustees to continue or vary the investments of his property existing at his decease.

The will was dated in October, 1838, and the testator died in 1841.

The plaintiffs, who were the executors and trustees, filed their bill to have the trusts carried into execution under the direction of the Court; and prayed a declaration, whether Lucy Lowes, the widow, had elected or was bound to elect between the annuity given to her by the will and her right to dower.

The bill alleged that, after exhausting the personal estate in the payment of the debts and expenses, a large mortgage debt remained due, and that after satisfying the interest on that debt, about 170*l.* [*504] a year only *remained applicable to the purposes of the will. The bill alleged that the widow had accepted one quarter's payment of the annuity. The widow, by her answer, submitted that she had not elected, and was not under the terms of the will bound to elect between the bequest and her dower. The daughter of the testator was an infant.

Mr. Romilly and *Mr. Toller*, for the widow, contended that [no inconsistency arose out of the provision for the management of the farms, or the power of lease or sale. Those powers were capable of being exercised without disturbing the right of the widow, for it was not necessary that they should be exercised as to the entire [505] estate.] The acceptance of a quarter's payment of the annuity could not be deemed an election by the widow, even if she were bound to elect: *Reynard* v. *Spence* (1).

Mr. Wood and *Mr. Anstey* for the plaintiffs, *Mr. Forster* for the infant daughter of the testator:

The gift of the annuity to the widow charged on the real and personal estate as a general fund,—the estate being insufficient, after paying the interest of the mortgage, to satisfy the annuity, and also preserve to the plaintiff her dower,—the provision enabling the trustees to carry on and manage the farms,—and the power of sale and of mortgaging, are all inconsistent with any allotment of dower to the widow out of the same estates, by metes and bounds. * * The question is, whether the trustees have powers under the will [*506] which, in their extent, are inconsistent *with that right; and if they

(1) 55 R. R. 27 (4 Beav. 103).

have such powers, it is a clear manifestation of intention that dower shall be excluded: *Miall* v. *Brain* (1); *Taylor* v. *Taylor* (2); *Hall* v. *Hill* (3). www.libtool.com.cn

THE VICE-CHANCELLOR:

If, with reference to this question, we could stop at that part of the will at which the clause begins that enables the trustees to manage the farms, it does not appear to me, upon the authorities which have been produced, that the widow would have been put to her election. It is not necessary, however, that I should express any opinion upon the effect of the will, apart from the provisions with regard to carrying on the farms, and the powers of leasing and sale. The only question is, whether the power given by the will to the trustees to carry on the farms, or otherwise to deal with the property by way of demise, sale, or mortgage, can be treated as consistent with the preservation of the dower. If in this case I were to decide that the terms of the will do not put the widow to her election, my decision would not substantially be reconcilable with the cases of *Miall* v. *Brain* (1), or *Roadley* v. *Dixon* (4), or with the observations upon the case of *Villa Real* v. *Lord Galway* (5), which are made by Lord REDESDALE in his judgment in *Birmingham* v. *Kirwan* (6). If any distinction were to be drawn between general and discretionary, and more specific powers of management, the law on this subject would be made more difficult in its application than it already is. I must declare that the widow is bound to elect.

MORRISON *v.* MARTIN.

1846. *June* 30.

WIGRAM, V.-C.

[507]

(5 Hare, 507—508.)

Under a bequest of 100*l.* each to the two children of the testator's nephews, A. and B.; A. had three children, and B. two children: Held, that the five children who were living at the date of the will and at the death of the testator were entitled, under the bequest, to 100*l.* apiece.

THE will of James Hannay, dated in 1843, contained, after several bequests, the following: "And to the two children of my late nephews, James Martin and Andrew Douglas, I bequeath 100*l.*

(1) 20 R. R. 277 (4 Madd. 119).
(2) 57 R. R. 542 (1 Y. & C. C. C. 727).
(3) 58 R. R. 223 (1 Dr. & War. 94).
(4) 3 Russ. 192.
(5) 1 Br. C. C. 292 *n.*
(6) 2 Sch. & Lef. 444. Some observations by Lord ST. LEONARDS on these cases will be found reported in *Hall* v. *Hill*, 58 R. R. at pp. 229, 230 (1 Dr. & War. at pp. 103, 104).—O. A. S.

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each." James Martin, the nephew, left three children, and Andrew Douglas, the other nephew, left two children. The five children claimed 100*l.* apiece; but the residuary legatees contended that the bequest was void for uncertainty, or that only one sum of 100*l.* was given to the children of each of the nephews; or that, at all events, only 200*l.* was given among them.

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Mr. Romilly, for the plaintiffs, the executors.

Mr. Goldsmid, for the three children of James Martin, and *Mr. M'Naghten*, for the two children of Andrew Douglas, [cited *Garvey* v. *Hibbert* (1), *Harrison* v. *Harrison* (2), *Hare* v. *Cartridge* (3), *Lee* v. *Pain* (4), and other cases].

Mr. Heathfield, and *Mr. Templeton Wood*, for the residuary legatees, submitted that, although it was clear the testator had mistaken the number of the children of his two nephews, yet it was equally clear that he had expressed distinctly the sums of money
[*508] *which he intended to give. It was merely a correction of manifest error in a testator to include the whole of the class which the testator designed to comprehend, when he had mistaken the number of which the class was composed; but it was going much farther, not only to add to the expressed number of the legatees, but also to increase the sum which the testator had given to the class; this was a construction only to be adopted, where, from other circumstances of the case, it was clear the amount of legacy had been inserted by mistake, and not in a case like the present, where there was no suggestion of any such mistake.

The VICE-CHANCELLOR held, that all the children of James Martin and Andrew Douglas, who were living at the date of the will and at the death of the testator, were entitled, under the bequest, to 100*l.* apiece, and a declaration and decree for payment was made accordingly.

(1) 12 R. R. 155 (19 Ves. 125).
(2) 32 R. R. 145 (1 Russ. & My. 72).
(3) 60 R. R. 309 (13 Sim. 165).
(4) 67 R. R. 41 (4 Hare, 249).

BLAIR *v.* BROMLEY (1).

(5 Hare, 542—560; 16 L. J. Ch. 105; 11 Jur. 115; affd. 2 Ph. 354; 16 L. J. Ch. 495; 11 Jur. 617.)

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1846.
Nov. 13, 14, 16, 17, 18, 25.

WIGRAM, V.-C.

Affirmed on Appeal.

1847.
June 23, 26, 30.
July 7.

Lord COTTENHAM, L.C.

[542]

Two solicitors having entered into partnership, each of them continued to attend to the business of his former clients, but on the partnership account; and one of the partners having proposed to invest a sum of money belonging to a client in a certain mortgage (2), the proposal was agreed to by the client, and the money was paid to the joint account of the partnership, at their bankers, for the purpose of the investment. The negotiations for the mortgage were broken off by the proposed mortgagor, but the partner by whom the proposal had been made to the client untruly represented to the client that the mortgage had been effected, and thenceforward continued to pay the interest as if it had actually been done. Although the banking account was kept in the name of the firm, the monies standing to the account belonged exclusively to the partner who committed the fraud; he alone attended to and had the control of the account, and the fraud was unknown to the other partner. Five years after the receipt of the money from the client the partnership was dissolved; and ten years after the dissolution of the partnership, the partner who had committed the fraud became bankrupt, and the client, who from the time of the dissolution until the bankruptcy had continued to employ him as his solicitor, discovered the fraud. The client then filed his bill against the other partner to recover the money.

Held, that the defendant was originally liable to the plaintiff for the money received by the firm; that his original liability was continued, as well after as before the dissolution of the partnership, by the fraudulent representations of his former partner; and that in equity the limitation in bar of the claim did not begin to run in favour of the defendant until the time when the client discovered the fraud.

That the fraud and misrepresentation of one of the partners entitled the client to relief in equity against the other, not only if the case was one in which the client might have recovered in an action at law against such other partner, but also if the remedy at law against the other partner was barred by the lapse of time.

WILLIAM BROMLEY and the defendant Joseph Warner Bromley were in partnership together, as solicitors, from April, 1820, to September, 1834. For the first five years of the partnership the defendant received a certain annual sum and half the profits made by the business of his own clients; and for the remainder of the partnership, his share was a third of the *profits of the whole of the [*543] partnership business. Before the partnership commenced, William Bromley had been the solicitor of Mr. Blair, and during the partnership the firm was employed by Mr. Blair as his solicitors. In the transaction of their partnership business William Bromley and the defendant attended to different portions, and the business

(1) *Thorne* v. *Heard* [1894] 1 Ch. 599, 63 L. J. Ch. 356; affirmed [1895] A. C. 495, 64 L. J. Ch. 652, 73 L. T. 291. The decision in the principal case is not affected by the Trustee Act, 1888: *Moore* v. *Knight* [1891] 1 Ch. 547, 60 L. J. Ch. 271.—F. P.

(2) Dist. on this point *Harman* v. *Johnson* (1853), 2 E. & B. 61, 22 L. J. Q. B. 297.—F. P.

BLAIR v. BROMLEY.

of Mr. Blair, and especially that part of it which related to the investment of his money was conducted by William Bromley. Mr. Blair died in 1828, leaving considerable sums of money invested upon mortgage, which by his will he bequeathed to his wife for life, with remainder to his children. The plaintiffs William Thomas Blair, and Thomas Blair, and the widow, were the executors and executrix appointed by the will, which was proved by the plaintiffs alone. In 1829, a mortgage for 14,000*l.*, part of the testator's estate, was paid off, and the money paid into the Bank of England to the separate account of the plaintiff William Thomas Blair. Some correspondence soon afterwards took place between William Thomas Blair and William Bromley on the subject of the new investment, which was required for monies belonging to the estate, and William Bromley proposed to William Thomas Blair, that a sum of 4,500*l.* should be lent upon a mortgage in fee to a Mr. Seabrooke. William Thomas Blair acquiesced in the proposal, and forwarded from Ilfracombe, where he then resided, to William Bromley at the office of the partnership in Gray's Inn, a cheque on the Bank of England drawn in favour of Mr. Seabrooke for the sum of 4,500*l.* This cheque was dated "London, 1st October, 1829," and was enclosed in a letter to William Bromley, which was dated "Ilfracombe, 29th September, 1829." The cheque was crossed by William Thomas Blair with the name of Messrs. Rogers & Co., who were then the bankers of the partnership, and [*544] on the *2nd of October, 1829, the cheque was paid into the Bank of Messrs. Rogers & Co. to the credit of the joint account of William Bromley and the defendant (1). An abstract of Mr. Seabrooke's title was laid before counsel, and a draft of the proposed mortgage deed was prepared; but the treaty for the mortgage proceeded no further. The fact that the proposed mortgage for 4,500*l.* on Mr. Seabrooke's estate had not been effected, was not known to the plaintiffs until the year 1844. During the whole of the intervening time, until the death of Mrs. Blair, the tenant for life, William Bromley, who, after the dissolution of the partnership, continued to be employed by the plaintiffs as their solicitor, accounted with Mrs. Blair for the interest of the 4,500*l.*, at 5*l.* per

(1) The counsel for the defendant objected to the admission of the cheque in evidence, on the ground that, being drawn at Ilfracombe, more than fifteen miles from the Bank of England, it required to be stamped. See 55 Geo. III. c. 184, s. 13; 9 Geo. IV. c. 49, s. 15. The point was not decided, for the COURT considered the evidence for the plaintiffs to be sufficient without the cheque.

cent., as if it had been duly received by him from Mr. Seabrooke; and in a letter to William Thomas Blair, in April, 1830, purporting to contain a statement of the situation of the trust fund lent upon securities, there was the following particular: "Mr. Seabrooke, 4,500*l.*; 3rd October, 1829." In a subsequent statement the pretended mortgage was mentioned as follows: "4,500*l.* to J. Seabrooke, Esq., at 4½ per cent.; 12th September, 1829: this will shortly be paid back." Mrs. Blair died in November, 1841, and William Bromley thereupon advised that a suit should be instituted for the direction of the Court in the administration of the testator's estate, which was accordingly done.

A *fiat* in bankruptcy issued against William Bromley *in January, [*545]
1844, and it then became known to the plaintiffs that the pretended mortgage on the estate of Mr. Seabrooke had no existence. In June, 1844, the bill was filed, praying that the defendant Joseph Warner Bromley might be decreed to pay to the plaintiffs the sum of 4,500*l.* with interest at 5 per cent. by the year, and the costs of the suit; the plaintiffs offering to abide the directions of the Court touching their proof under the bankruptcy.

The defendant by his answer stated, that he had never been retained by the deceased Mr. Blair, nor by the plaintiffs as their solicitor, and that the business of the deceased and of the plaintiffs had been exclusively conducted by William Bromley. The defendant denied that it was in his character of solicitor that William Bromley received the 4,500*l.*, and he insisted that his partnership responsibility extended only to acts which were strictly professional. He submitted, that if he had incurred any liability owing to the partnership, such liability must have ceased at the dissolution in September, 1834, and he claimed the protection of the Statutes of Limitation.

It was not disputed that the defendant was personally ignorant of the fraud which had been practised by William Bromley. It appeared in evidence, that on the 2nd of October, 1829, there was standing to the credit of the plaintiff William Thomas Blair, in the Bank of England, the sum of 16,000*l.*, and that on that day 4,500*l.* was drawn thereout, and paid to Messrs. Rogers & Co., and that on the same day Messrs. Rogers & Co. received a sum of 4,500*l.* from the Bank of England, which they carried to the credit of the partnership account. William Bromley, who was examined as a witness for the defendant, deposed that the capital or *monies [*546]
necessary for the business of the firm, standing to the joint account

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at Messrs. Rogers & Co., was exclusively provided by himself, and was his sole property, and, therefore, that the pass-books and accounts relating thereto were exclusively kept by himself,—the defendant having no interest therein, except so far as related to any cheques which the defendant might have occasion to draw for the purposes of the business; and that, at the dissolution in 1834, there was a balance of 1,370*l.* to the credit of the joint account, which balance was thereupon transferred to the sole account of William Bromley. It appeared that a few of the letters from the plaintiffs and Mrs. Blair had on the outside been directed to the firm, but the greater part had been directed to William Bromley, and the contents of such letters were always addressed to William Bromley singly. The abstract and draft relating to the proposed mortgage from Mr. Seabrooke were indorsed with the name of the firm. A bill of costs, which had become due from the plaintiffs to the firm amounting to 89*l.*, and a receipt by the firm for the amount, were also put in evidence.

The argument at the hearing was directed to three principal points: first, as to the right of the plaintiffs as against the defendant, who was not privy to the fraud; secondly, supposing the right to have existed, whether it was barred by lapse of time, either as *laches*, or by force of the Statutes of Limitation; and lastly, supposing the right to have existed, and not to be barred, whether the defendant was liable to be sued in equity or only at law.

Mr. Bethell, *Mr. Wood*, and *Mr. Prendergast* for the plaintiffs:

[*547] In dealing with a firm consisting of several *partners, in the ordinary course of their business, a party is entitled to the joint security of all the partners for the due performance of the contract, and all the members of the firm are liable to answer for the fraud of one of the partners. [On this point they cited *Marsh* v. *Keating* (1), *Sadler* v. *Lee* (2), *Bond* v. *Gibson* (3), and other cases.] There has been no *laches*, for *laches* can only be imputed where the party injured does not call for relief within a reasonable time after he is aware of the injury, but in this case the fraud was not discovered until the year 1844. [On this point they cited *Ault* v. *Goodrich* (4), *Way* v. *Bassett* (5), *Booth* v. *Earl of Warrington* (6).]

(1) 37 R. R. 75 (2 Cl. & Fin. 250).
(2) 63 R. R. 95 (6 Beav. 324).
(3) 10 R. R. 665 (1 Camp. N. P. 185).
(4) 28 R. R. 151 (4 Russ. 430).
(5) *Ante*, p. 32.
(6) 4 Br. P. C. Tom. ed. 163.

Mr. Romilly, *Mr. Bacon*, and *Mr. Craig*, for the defendant: BLAIR v. BROMLEY.

The object of this suit is to recover a sum of money alleged to have been received from the plaintiffs fifteen years before the bill was filed, and ten years after the dissolution of partnership, and, therefore, ten years after any acknowledgment of the debt made in the name of the defendant. * * The Court will not deprive a defendant, charged, not with any actual fraud, but charged constructively with the fraud of another person from which the defendant has not derived any pecuniary advantage, of the benefit of the statute: *Beckford* v. *Wade* (1). * * It is a case in which the plaintiffs have, not only in the original transaction, but throughout the subsequent circumstances, been content to rely, and in which they have, in fact, relied, not on the faith or the liability of the partnership, but on the faith and on the responsibility of William Bromley alone. * * * [548] [549]

Mr. Bethell, in reply: [550]

* * It is not the defendant's personal knowledge on which the title to relief is founded; it is on his constructive knowledge, on his duty to see and to know that the money of his employer was faithfully disposed of, and on his interest in the knowledge of the true facts, which, in law, forbids the supposition that he had not that knowledge. It is not an excuse for omitting his duty to his clients, that he did not discharge the duty he owed to himself. * * The true question is, whether William Bromley, if he were the defendant, would be liable in this Court, for, if he would in that case be liable, the present defendant must be liable also. [551]

THE VICE-CHANCELLOR: *Nov.* 18.

The *onus* on the plaintiffs in this cause is first to charge the defendant with a liability for the money, which is the subject of the suit. The only evidence by which the defendant is charged in the first instance (excluding the cheque) is by a correspondence that passed between William Thomas Blair and William Bromley, in which mention was made of investing part of the testator's estate, and the result of which correspondence was a proposal, on the part of William Bromley, acceded to by the plaintiff, William Thomas Blair, for investing 4,500*l.*, part of the testator's estate, on the mortgage to Mr. Seabrooke. It appears that the arrangements having been made for this investment, William Thomas Blair wrote

(1) 11 R. R. 20 (17 Ves. 97), per Sir W. GRANT.

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to William Bromley, and asked him the name of the bankers to be written across the cheque for the 4,500*l.*, which was to be remitted

[*552] to *William Bromley for the purpose of completing that transaction. I omit the evidence of the cheque itself. It appears that, at this time, there was 16,000*l.* standing at the Bank of England in the name of William Thomas Blair, one of the two executors, and as this 16,000*l.* was standing in the name of William Thomas Blair alone, it was not *primâ facie* ear-marked or distinguished as the property of the testator. It appears that on a given day a sum of 4,500*l.*, part of the 16,000*l.*, was drawn out, and William Thomas Blair was debited with the amount of that sum. The clerk at the Bank of England says, that from looking at the books he is enabled to say that the 4,500*l.* so drawn out was paid to Rogers & Co., who were the bankers of the defendant's firm, and it appears that on the same day Rogers & Co. received a sum of 4,500*l.*, which was carried by them to the credit of the firm of the Bromleys. A subsequent correspondence took place, in which William Bromley, in his own name, but in fact on behalf of the firm, stated that the 4,500*l.* had been invested on Seabrooke's mortgage in the manner which had been previously arranged. Leaving out the cheque, that is all the evidence which the plaintiffs have to charge the firm, and I think it is enough.

I confess that it appears to me, as it has from the beginning, that it is impossible, on the facts I have stated, not to conclude, that the 4,500*l.* credited to the firm, at Rogers & Co., was the 4,500*l.* derived from the plaintiff William Thomas Blair. It might, perhaps, have been material for the defendant, in some views of the case, to have contradicted that conclusion. He has examined William Bromley as a witness, and though he—the party who knew the whole of the transaction—is examined, no attempt is made to contradict by his evidence the inference to which the facts

[*553] above stated *appear to me necessarily to lead. It appears to me, therefore, without saying to whom the 4,500*l.* belongs, that I should charge the firm with the receipt of so much money from William Thomas Blair.

Now it was said, that, if this money was not proved to be part of the estate of the testator, that this bill would be erroneous in form; because the plaintiff Thomas Blair has, in that case, no interest in the question. [His Honour having disposed of this point of form as immaterial, continued as follows:]

[554] Then comes the question of discharge; and in explaining how

the case appears to me to stand, I will suppose the bill to have been in this simple form,—alleging that the 4,500*l.* was paid to the Bromleys for the purpose of being invested,—that Seabrooke had refused to complete the transaction, and that the money had ever since remained in the hands of the firm. In that view of the case, the firm being once charged would of course continue liable, until it was, in some manner, discharged of the money, or the money was, in some way, applied to the plaintiff's use. It would then become material to inquire whether there had been any acknowledgment by the firm, which would prevent the application of the Statute of Limitations; because the money having been paid to the firm in October, 1829, unless in the simple case I have put the liability is kept alive, the demand would be barred by the operation of the statute. It is therefore material, with a view to avoid all difficulty, that I should inquire down to what time the acknowledgment was continued, and if upon looking at the documents in evidence I should conclude that the liability of the firm was acknowledged by the act of either of the partners, by the payment of interest, or by any writing down to the year 1839, *there will be [*555] no difficulty; for that will prevent the application of the statute, and will enable the plaintiffs to obtain relief, subject only to the question, whether, in that simple case, no fraud being supposed, the proceedings ought not to have been at law instead of equity.

In order to try whether I am right in that view of the case, I will suppose, first, the case of there being no dissolution of the partnership. No question at law would then arise. Next, suppose the case of a dissolution, but no specific employment of William Bromley by the executors of the testator after the dissolution. In that case, I apprehend, there would be no doubt of the continuing liability; for the mere fact that parties do not choose to continue in partnership would not discharge either of them of a liability contracted by their joint receipt at a preceding period; the application of the statute being prevented by the payment of interest, or other acknowledgment of the liability of the firm.

The next question is, whether the subsequent dealing between the executors of the testator and William Bromley alone can have the effect of discharging the defendant. It appears to me it can have no such effect. It is true, that in the case of *Thompson* v. *Percival* (1) and other cases, the doctrine which was laid down in the case of *David* v. *Ellice* (2) has been altered, but that has been

(1) 53 R. R. 187 (5 B. & Ad. 925). (2) 29 R. R. 216 (5 B. & C. 196).

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on the ground of a presumed contract to discharge one party by treating the other as debtor. There can be no such ground in the case of a single transaction, which has been continued simply by
[*556] the payment of interest according to the *tenor of the original contract between the parties. In none of these cases, therefore, would there be a good discharge.

Then, the only question is, whether the relief is in equity or at law. Supposing it to be *primâ facie* a case cognizable in a court of law, and not a case for equity, the plaintiffs must get over that difficulty by showing that the case is, on some ground, brought within the jurisdiction of this Court, as that which is here relied on,—namely, fraud or misrepresentation. Whether it be put on the general ground of fraud, or whether of fraud in a person standing in the situation of attorney or agent, makes no difference; the misrepresentation in both cases is the gist of the complaint.

I have not in this case, for a moment, entertained a doubt, tha if the bill had been filed against William Bromley, he might hav been charged in this Court; because, in that view of the case, should impute to William Bromley that the misrepresentation h made at the beginning of the transaction had been continued b him, from time to time, down to the day the fraud was discovered there would be both *suppressio veri* and *suggestio falsi*; and th case would fall within the common principle of the jurisdiction the Court. But the case, as opened at the Bar, and as I understa it on the pleadings, is,—not that William Bromley, when he fi made the suggestion of investing this money on Seabrooke's mo gage, was not really negotiating for the mortgage with Seabrooke, not that he had originally any fraudulent purpose or intenti but that the transaction in its inception was perfectly regular. appears, that the firm went through the form of perfecting mortgage; the abstract was delivered, and was laid before coun
[*557] who advised upon it; the conveyance was prepared, *and it was until after this that Mr. Seabrooke for some reason refused complete the transaction. In that view of the case there was fraud in the origin of the transaction; and the only ground charging the firm originally was the actual receipt of the mo the consequence of which I have already suggested. In this of things, it turns out that William Bromley did represent tha mortgage had been obtained, which in point of fact had not obtained; and as I have said before, I must consider hi repeating that fraudulent representation down to the last mor

1847 (as (p. 359) :]

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C. 107.
245 (6 Ves. 182).

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I have not in this case, for a moment, entertained a doubt, that if the bill had been filed against William Bromley, he might have been charged in this Court; because, in that view of the case, I should impute to William Bromley that the misrepresentation he made at the beginning of the transaction had been continued by him, from time to time, down to the day the fraud was discovered; there would be both *suppressio veri* and *suggestio falsi*; and the case would fall within the common principle of the jurisdiction of the Court. But the case, as opened at the Bar, and as I understand it on the pleadings, is,—not that William Bromley, when he first made the suggestion of investing this money on Seabrooke's mortgage, was not really negotiating for the mortgage with Seabrooke,—not that he had originally any fraudulent purpose or intention, but that the transaction in its inception was perfectly regular. It appears, that the firm went through the form of perfecting the mortgage; the abstract was delivered, and was laid before counsel,
[*557] who advised upon it; the conveyance was prepared, *and it was not until after this that Mr. Seabrooke for some reason refused to complete the transaction. In that view of the case there was no fraud in the origin of the transaction; and the only ground for charging the firm originally was the actual receipt of the money, the consequence of which I have already suggested. In this state of things, it turns out that William Bromley did represent that the mortgage had been obtained, which in point of fact had not been obtained; and as I have said before, I must consider him as repeating that fraudulent representation down to the last moment.

We have then to deal with the case of an innocent party. If the jurisdiction of the Court is to be founded solely on the ground of fraud, the question is, whether this defendant, who originally is charged simply by means of the receipt of the money, can by the fraudulent representation of William Bromley be made liable in this Court, supposing he would otherwise be liable only at law. I do not mean at this moment to give any opinion upon that. It may be quite a clear point when I come to consider the pleadings. I cannot, however, question the soundness of the decisions referred to on behalf of the plaintiffs, in which it has been held, that the act of one partner, done in regard to the regular business of the firm, shall be binding on his co-partner, and that may very well apply in a case where one partner, in transacting such business, has made a fraudulent misrepresentation.

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THE VICE-CHANCELLOR: *Nov.* 25.

At the conclusion of the argument in this case I stated my opinion, to which I still adhere, that I must *decide on the liability [*558] of the defendant upon the assumption that the 4,500*l.*, the subject of the suit, came into the hands of his firm without fraud, and that the firm was originally chargeable in respect only of the receipt of the money; and that the only question is, whether the fraudulent acts of the defendant's partner are to be deemed the acts of the firm, regard being had to this,—that the Statute of Limitations is a bar to the claim against the defendant personally, unless the acts of William Bromley are to be taken as the acts of the firm.

Now my opinion is, that the false representation, first made by William Bromley, that the mortgage intended to have been executed by Seabrooke was executed by him, whenever and by whatever means that representation was made, must be deemed and taken as the representation of the firm. The receipt of the money for the purpose of effecting the mortgage was undoubtedly the receipt of the firm. Upon the evidence in this case, and upon the principles of courts of justice, I must (whatever the fact may be) impute to the defendant a knowledge of that receipt, and of the purpose for which the money was received. In this state of things it was the duty of each partner to see that the mortgage was executed, and unquestionably the information given to the mortgagees that the mortgage was executed, was a representation within the scope of the duty which they had undertaken. I cannot stop short of the conclusion, that if the firm had employed an agent to do the work

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for the firm, the representation in question, if made by that agent, would have been the representation of the firm, and I cannot view the case less favourably for the plaintiffs, because the agent of the firm on this occasion was one of the members of the firm.

[559] I do not pursue further the question which was argued at the Bar, whether the fraudulent misrepresentation of William Bromley would affect the defendant. The *onus*, in the first instance, was upon the plaintiffs to prove the misrepresentation they alleged to have been made by the firm. Having proved that in the single case which I have mentioned, they have proved enough, until the defendant shows that the fraud was discovered at a time which bars the right to relief. The discovery of the fraud is not shown to have taken place until within a very short period before the bill was filed. Then there is the *suggestio falsi*, which is necessary to constitute the fraud in this case, and the loss of the money in consequence of that suggestion, unless it is recoverable against the defendant.

In order that my decision in this case might be placed on as broad a basis as possible, I have endeavoured to inform myself how the case would stand at law, if the plaintiffs had brought the action at law against the defendant, founded only on the receipt of the money. It is admitted that the Statute of Limitations would have been an answer to the demand. I have endeavoured to inform myself whether there was any form of action by which the plaintiffs' proceedings at law might have avoided the Statute of Limitations; and I believe I am correct when I say, there is no proceeding at law by which they could have avoided the effect of the statute; no proceeding founded solely on any distinction arising out of the fraud. The consequence is that the plaintiffs have lost their remedy at law; and they are remediless unless relief be given in this Court. The jurisdiction of this Court is assumed on the ground of the fraud, and the time will run only from the discovery of the fraud.

[560] I certainly feel that this is a case of great hardship on the defendant, and I must add my belief, which I partake with the counsel for the plaintiffs, that there is not the slightest ground for any moral charge against the defendant. It is on the ground of his civil liability that I am bound to decree the payment of the money, with interest and costs.

[This decision on appeal by the defendant was affirmed by the

LORD CHANCELLOR, in the sittings after Trinity Term, 1847 (as reported in 2 Ph. 354—361), by the following judgment (p. 359) :]

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1847.

THE LORD CHANCELLOR:

[2 Phillips, 359]

In this case the payment of the 4,500*l.* into the funds of William Bromley and his partner, for the purpose of investment, is proved, and their liability admitted. Afterwards Mr. Bromley, one of the partners, representing that it had been invested, paid sums equal to the interest, and made a charge in a bill of costs for some of the expenses incident to such investment.

Whether the defendant knew of the transaction or not, he certainly had the means of knowing it. But neither is necessary; for the duty of laying out the money was in the ordinary course of the business of the firm; and they had undertaken it; and in that case I agree with what is laid down by the MASTER OF THE ROLLS in *Sadler* v. *Lee* (1), that all the partners became liable for the several acts of each. In *Sadler* v. *Lee* the act consisted of abusing the power which the owner of the fund had conferred upon the several members of the firm by his power of attorney. In this case *the act consists in representing that the 4,500*l.* had been [*360] invested on the security; but in *Bate* v. *Scales* (2), where a similar misrepresentation had been made by a trustee, who ought to have invested money in stock, Sir WILLIAM GRANT "considered the case of a representation that the stock did exist, as precisely a parallel case to the actual existence of the fund in stock upon that day, which stock was sold out." In the present case, the misrepresentation continued until the fraud was discovered: the case, therefore, according to Sir W. GRANT, is the same as if on that day the fund, having been previously invested, had been called in and received by Messrs. Bromley, in which case there could not have been any question as to the Statute of Limitations.

Those who, having a duty to perform, represent to those who are interested in the performance of it that it has been performed, make themselves responsible for all the consequences of the non-performance: *Brown* v. *Southouse* (3), which was the case of an agent; *Evans* v. *Bicknell* (4), where Lord ELDON lays down the rule generally. In *Barwell* v. *Parker*, Lord HARDWICKE applied the rule to the case of a scrivener who had undertaken to lay out money. The principle, indeed, is deeply rooted in our equitable

(1) 63 R. R. 95 (6 Beav. 330).
(2) 8 R. R. 345 (12 Ves. 402).
(3) 3 Br. C. C. 107.
(4) 5 R. R. 245 (6 Ves. 182).

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jurisdiction, as in *Middleton* v. *Middleton* (1), and *Luttrell* v. *Olmius*, referred to by Lord ELDON in *Mestaer* v. *Gillespie* (2).

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What, then, is the nature of the liability which so arises from the misrepresentation? Merely a guarantee that the parties whose interest might be affected by the misrepresentation shall be placed in the same situation as if the fact represented were true. The [*361] misrepresentation *was probably made for a fraudulent purpose; but the consequence is a merely civil liability; and as one partner may certainly bind another as to any matter within the limits of their joint business, so he may by an act which, though not constituting a contract by itself, is in equity considered as having all the consequences of one.

I am, therefore, of opinion that William Bromley's partner, though he had no knowledge, or means of knowledge, of his misrepresentation, would have been affected by this equity arising from it, and that time did not begin to run against the plaintiff's right until the discovery of the fraud.

What I have already said, and the cases to which I have referred, make it unnecessary to say much upon the objection that the plaintiff's remedy, if any, is at law. In all these cases the effect of the misrepresentation raises an equity to restore the parties deceived as nearly as possible to the situation, in which, but for the misrepresentation, they would have stood, and for which damages in an action might be a very inadequate remedy: and it is no objection to this equity that the facts may also support an action. It is more than 120 years since a similar objection was made in *Colt* v. *Woollaston* (3) and overruled.

I am, therefore, of opinion that the decree of the Vice-Chancellor WIGRAM must be affirmed with costs.

1846. *Dec.* 12, 15, 18.

WIGRAM, V.-C. [560]

WORLEY *v.* FRAMPTON.

(5 Hare, 560—566; S. C. 16 L. J. Ch. 102; 10 Jur. 1092.)

A copyholder agreed to demise a tenement within the manor for sixty-three years on a building lease, and, as the custom did not allow a lease to be made for more than twenty-one years, the copyholder agreed to execute a lease for twenty-one years, with a covenant, for himself, his heirs and assigns, to renew the lease for a further term of twenty-one years at the expiration of the first, and for a further term of twenty-one years at the expiration of the second term. The copyholder died before the lease was

(1) 20 R. R. 233 (1 J. & W. 96).
(2) 8 R. R. 261 (11 Ves. 638).
(3) 2 P. Wms. 156.

executed, having devised the premises to a trustee: Held, on a bill by the lessee against the trustee for specific performance, that the trustee, having no beneficial interest in the estate, was not bound in the lease for twenty-one years to enter into any covenant for the renewal of the lease at the expiration of that term, and that he could only be required to covenant against his own acts.

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By an agreement, dated the 23rd of November, 1832, J. A. Frampton agreed to grant to Worley, the plaintiff's testator, a building lease of a copyhold tenement, held of the manor of Hornsey, for the term of sixty-three years, reserving a pepper-corn rent for the first year, and *annual rent of 10*l.* for the remainder [*561] of the term; and as the custom of the manor did not permit a lease to be made for a longer term than twenty-one years, it was agreed that J. A. Frampton, his heirs and assigns, should execute to W. Worley, his executors, administrators, and assigns, a lease of the premises for twenty-one years, from the 24th of June, 1831, reserving the said rent; and it was provided that the lessee should, among other things, thereby covenant to build a dwelling-house, of the value of 500*l.*, upon the premises, within twelve months, and not to permit any other building to be erected upon the demised land, which might be a nuisance to the adjoining premises; and that the lessor should covenant for himself, his heirs and assigns, for the quiet enjoyment of the premises by the lessee, his executors, administrators, and assigns, during the term, and also for the renewal of the said lease for the further term of twenty-one years, and for the further renewal of such lease for the further term of twenty-one years at the expiration of the said renewed term, so that the lessee, his executors, administrators, and assigns, might enjoy the premises for the term of sixty-three years.

J. A. Frampton, the intended lessor, died before the execution of the lease, having devised the tenement to the defendant, W. H. Frampton. W. Worley, the lessee, also died, having bequeathed to the plaintiff his interest in the premises comprised in the contract. The dwelling-house was built in pursuance of the agreement.

The sole question in the cause arose upon the form of the lease. The defendant, as trustee of the legal estate under the will of J. A. Frampton, insisted that he was *not bound to do more than [*562] covenant that he had done no act to incumber the premises; and he declined to enter into a covenant for the future renewals at the expiration of the first or second term of twenty-one years. The plaintiffs insisted that they were entitled to the same covenants from the defendant, the devisee of the legal estate, as they would

WORLEY v. FRAMPTON.

have been entitled to from the devisor under the contract; and they filed their bill for specific performance. The Master, to whom it was referred to approve of a lease, according to the terms of the agreement, settled the draft of a lease to be executed by the defendant, containing a covenant, in the following form:

"And the said W. H. Frampton, in pursuance of the said stipulation in the said recited articles of agreement contained for the insertion in the lease to be granted in pursuance thereof, of such covenant for renewals as therein mentioned, and for the purpose of effectually binding at law the reversion of the said premises, with the performance and observance of such covenant for renewal, but not so as to bind the said W. H. Frampton, or his representatives personally, except in the event of his or their hereafter acquiring a beneficial interest, and then only to the extent of such beneficial interest in the said premises, doth, for himself, his heirs and assigns, covenant, promise, and agree with and to the said Thomas Fernee, his executors, administrators, and assigns, that he, the said W. H. Frampton, his heirs or assigns, shall and will, at the expiration of the said term of twenty-one years hereby granted, at his or their own expense (1), procure from the lord of the manor the necessary license to demise the said
[*563] premises for the *further term of twenty-one years, and shall and will, in pursuance of such license, at the joint expense (1) of the said W. H. Frampton, his heirs or assigns, and of the said Thomas Fernee, his executors, administrators, and assigns, accordingly grant a renewed lease of the said premises unto the said Thomas Fernee, his executors, administrators, and assigns, for the further term of twenty-one years, to commence from the expiration of the said term hereby granted, at the like yearly rent of 10*l.*, and under and subject to the like covenants and agreements on the lessee's part to those on his part herein contained, with a like covenant by the said W. H. Frampton, his heirs or assigns, for obtaining, at his or their expense, at the expiration of the said further term of twenty-one years, a further license from the lord of the manor to demise the said premises for a further term of twenty-one years, and also for granting at such joint expense aforesaid a second renewed lease of the said premises for the said further term of twenty-one years, at the like yearly rent, and under and subject to the like covenants to the rent and covenants respectively herein reserved and contained, except the said covenant for renewal, in

(1) This was a term of the agreement.

order that, by means of these presents and the said two renewed leases respectively, the said Thomas Fernee, his executors, administrators, and assigns, may have and enjoy the said premises for the said term of sixty-three years, according to the said recited articles. Provided always, and it is hereby agreed and declared, that the said last-mentioned covenant by the said W. H. Frampton is meant and intended only to bind the reversion of the said premises hereby devised, and the said W. H. Frampton, his heirs and assigns, in respect thereof, and that he or they shall be liable to an action of damages *for breach of the said covenant as owner or [*564] owners of his said reversion, but not further or otherwise."

The defendant excepted to the report.

Mr. Humphrey and *Mr. Faber*, in support of the exception:

The defendant is merely a trustee of the legal estate without any beneficial interest, and the only covenant which can be required from him is that he has himself done no act to incumber the property. In the case of *Page* v. *Broom* (1), and in all other cases in which the parties, having the legal estate, have been required to do more than covenant against their own acts, the reason was that, in addition to their characters as trustees, they had some beneficial interest, and their covenants (beyond the common trustee's covenants) have been limited to their beneficial interest.

Mr. Romilly and *Mr. Nevinson* for the plaintiff:

The right of renewal arises out of the agreement, and *it is [*565] admitted to be a right which runs with the land; why then should it not be protected by a covenant running also with the land? *Furnival* v. *Crew* (2); *Barclay* v. *Raine* (3). It is a right which the plaintiffs may insist upon in equity, against the defendant, if the defendant should be entitled to the legal estate in the reversion, at the expiration of the first demise: *Rawstorne* v. *Bentley* (4). There is no reason why the defendant, who is now in the place of the original lessor, should not enter into covenants to do all he may hereafter be compelled in equity to do, and the covenant settled by the Master goes no farther. If the defendant had come into the Court for specific performance of the agreement, it would have been decreed only upon the terms of his entering into the covenants stipulated, and the plaintiffs are entitled to the same equity:

(1) 52 R. R. 13 (3 Beav. 36).
(2) 3 Atk. 83, 88.
(3) 24 R. R. 206 (1 Sim. & St. 449).
(4) 4 Br. C. C. 415.

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Powell v. *Lloyd* (1). The devisee is within the description of "heirs and assigns" in the agreement: *Roe* v. *Hayley* (2).

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Dec. 18.

THE VICE-CHANCELLOR:

It has been argued that the effect of the covenant, approved of by the Master, if entered into, would be to bind the land, and give the party the best legal interest he can now have in the property. But the defendant objects to enter into such a covenant, and the only question is whether I can compel a mere trustee to enter into any but the usual covenants in respect of his own acts. It is admitted that the plaintiff would have had a good equitable title without this covenant, but the plaintiff says that that is not sufficient.

[566] I must be distinctly understood as not giving any opinion how I should have dealt with the case if the defendant, having declined to enter into the covenant, the plaintiff had on that ground desired to be discharged from the contract rather than dispense with the covenant,—that is, how I should have dealt with the case if Mr. Frampton had been the plaintiff, declining to enter into the proposed covenant, and Worley, as defendant, had asked to be discharged unless the covenant were entered into. That is not the case. Worley does not seek to be discharged: he says that he will take the lease with the equitable title only, if he shall not be entitled to the covenant; and the question is, whether I can compel a bare trustee to enter into it. Why the trustee should have declined entering into this covenant is not a question into which I am at liberty to enter. It certainly appears to be as harmless a covenant as can be, for, beyond all dispute, the covenant would bind the land and not hurt the trustee. But, according to the established practice, I think I cannot compel the trustee to do more than enter into the usual covenant, that he has done no act to incumber the property. The case of *Page* v. *Broom* (3) is clearly distinguishable from this case, as are also the other cases which were referred to. It is, I think, to be regretted that the plaintiff should not have the benefit of the covenant. I almost hope it will be given as a matter of favour; but I think I cannot compel the trustee to execute it. The exception, therefore, must be allowed, the deposit ordered to be returned, and the case referred back to the Master.

(1) 31 R. R. 598 (2 Y. & J. 372).
(2) 11 R. R. 455 (12 East, 464).
(3) 52 R. R. 13 (3 Beav. 36).

BULL *v.* PRITCHARD (1).

(5 Hare, 567—572; S. C. 16 L. J. Ch. 185; 11 Jur. 34.)

1846.
Dec. 1, 2.
1847.
Jan. 11. 12, 15.

WIGRAM, V.-C.

[567]

In a devise of real estate upon trust for the daughter of the testator for her life, and from and after her decease to convey such estate unto and equally between and among all and every the child and children of the daughter, who should live to attain the age of twenty-three years, and to his, her, and their heirs and assigns for ever; and in case there should be no such child or children, or, being such, all of them should die under twenty-three without issue, then over, with power to apply the interest of each child's share for his maintenance, notwithstanding the share should not be then absolutely vested: *Held*, that the attainment of the age of twenty-three years was part of the description of the devisees; and the devise being to a class, after a life in being, the limitations over were too remote.

THOMAS EVANS, by his will dated in 1809, after devising his freehold estates to trustees, upon trust to pay the rents and profits to his daughter, Mary Bull, during her life, for her separate use, proceeded: "And from and after the decease of my said daughter, I do hereby direct, limit, and appoint that my trustees or the survivor, &c., do, by good and sufficient conveyances and assurances in the law, convey and assure my said freehold estates unto and equally between and among all and every the child and children of my said daughter, Mary Bull, who shall live to attain the age of twenty-three years, and to his, her, and their heirs and assigns for ever, as tenants in common and not as joint tenants; and if there shall be but one such child, then to such only child, his or her heirs or assigns for ever; but in case there shall be no such child or children, or, being such, all of them shall die under the age of twenty-three years without lawful issue, then upon trust that my said trustees, or the survivors or survivor of them, or the heirs or assigns of such survivor, do, by such like good and sufficient conveyances and assurances in the law, convey and assure my said freehold estates unto and equally between and amongst all and every my brother and sisters, namely, John Evans, Mary Spendlove, Elizabeth, the wife of John William Nevett, and Martha, the wife of the said John Millsom, and to his, her and their respective heirs and assigns for ever, as tenants in common."

The testator then directed that a leasehold estate in Southwark should be held by his brother at a certain rent, and he gave all the residue of his estate and effects *to the same trustees, whom he [*568] appointed his executors, upon trusts (2) similar to those declared

(1) *Abbiss* v. *Burney* (1880) 17 Ch. D. 211, 50 L. J. Ch. 348, 44 L. T. 267.

(2) 25 R. R. 27 (1 Russ. 214).

BULL v. PRITCHARD.

of his freehold estates. And the testator gave his trustees and executors power to apply the interest of each child's respective share, or so much thereof as they might deem necessary, towards their maintenance, education, and bringing up, notwithstanding such child's share should not be then absolutely vested.

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The testator died in 1817. Mary Bull, the daughter and only child of the testator, had at that time one child, Mary, the grand-daughter, who afterwards died intestate and without issue, leaving her uncle, the father of the plaintiff, her heir-at-law, and which uncle afterwards died intestate.

After the death of Mary the grand-daughter, a bill was filed by Mary Bull, the daughter of the testator, and her husband, against the surviving executor and trustee, and against the surviving brothers and sisters of the testator, and the representatives of those who were dead, praying a declaration that the limitations and trusts created by the will concerning the freeholds, leaseholds, and residuary personal estate of the testator were void for remoteness. Upon the hearing of that suit in 1826, a declaration was made that the limitations over of the leaseholds after the death of Mary Bull, the daughter, were void; but the COURT refused to decide in her lifetime on the rights of the parties in the freehold estate.

Mary Bull, the daughter, survived her husband, and died in 1838,
[*569] without having had any other issue than *the said Mary the grand-daughter, and having executed a will whereby she devised "her moiety, or equal half part, and all her share and proportion, right and interest of, in, and to a messuage or tenement, dwelling-house and premises, situate in Three Crown Court, Southwark, with the appurtenances," to the plaintiff in fee; and she devised and bequeathed the residue of her estate, both real and personal, to trustees upon trust for the younger brothers and sisters of the plaintiff. Part of the freehold estate of the testator was situated in the Borough Market, Southwark, and had formerly been occupied with a house in Three Crown Court, but was not actually situated in the latter place: this was believed to be the property which Mary Bull, the daughter, had intended by her will specifically to devise to the plaintiff.

The plaintiff by his bill stated that he was advised, and submitted to the Court that Mary Bull, the daughter, had only a life-interest in the freehold estates of the testator, and that subject thereto, the same, by virtue of the will, vested in Mary, the grand-daughter in fee; and that the plaintiff was now entitled to the same in fee, as

heir-at-law of his father, who was the heir-at-law of Mary, the grand-daughter. But if the Court should be of opinion that Mary Bull, the daughter, had become entitled, in fee, to the freehold estate, then the plaintiff was entitled, under her will, to the premises thereby devised and described as situated in Three Crown Court; and it prayed that the property might be conveyed, and the rents and profits, accrued since the death of the testatrix, paid to the plaintiff accordingly.

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The defendants were—the heir-at-law of the last trustee under the testator's will, and the trustees and the other cestuis que trust under the will of Mary Bull, the daughter.

On the opening of the cause, it being intimated by the counsel for the plaintiff that they intended to argue in support of the validity of the gift to the child or children of Mary Bull, notwithstanding the decision of Lord GIFFORD, M. R., that such limitation as to the leasehold was void for remoteness, the VICE-CHANCELLOR suggested that the plaintiff should apply to the Lord Chancellor for liberty to set down the cause before him. The application was accordingly made, but his Lordship said that as the judgment of the MASTER OF THE ROLLS, as to the personal estate, could not be pleaded in the suit, and it was merely an authority, the cause should take its course. [570]

Mr. Romilly and *Mr. Heathfield*, for the plaintiff:

Mary, the grand-daughter, took a vested remainder in fee, with an executory devise over in case of her death under twenty-three. *Bland* v. *Williams* (1), in which Sir JOHN LEACH, M. R., proceeds on the assumption that the decision of Lord GIFFORD, on the question as to the leaseholds in this case, was not an authority: *Doe* d. *Dolley* v. *Ward* (2). But another answer to the argument to be founded on that case, and also on several other cases, is, that decisions on the construction of limitations of personal estate are not applicable to cases of real estate: *Doe* d. *Hunt* v. *Moore* (3), *Phipps* v. *Ackers* (4).

Mr. Sidebottom, for the devisees of the residuary estate under the will of Mary Bull, the daughter:

The words of the gift in this case affect both the time *of enjoyment and the description of the devisee: until persons having all the qualifications which the testator requires come into existence, [*571]

(1) 41 R. R. 93 (3 My. & K. 411).
(2) 48 R. R. 599 (9 Ad. & El. 582).
(3) 13 R. R. 329 (14 East, 601).
(4) 39 R. R. 115 (9 Cl. & Fin. 583).

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the estate must remain contingent: *Duffield* v. *Duffield* (1). The age of twenty-three is a part of the description of the devisee; and, without that age, there is no gift: *Newman* v. *Newman* (2), *Festing* v. *Allen* (3), *Vawdry* v. *Geddes* (4).

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THE VICE-CHANCELLOR:

I shall first consider this case, omitting the clause which enables the trustees to apply the interest of the children's shares in their maintenance; and afterwards consider the effect of that clause upon the question of construction.

Now there are two classes of cases, under one or the other of which the present case must fall. One class is, where the devise is to a party at a given age, and the property is given over if the devisee dies under that age. The other is, where the description of the devisee is such as to make the given age part of that description. In cases of the former class, the COURT has discovered an intention expressed in the will, that the first devisee shall take all that the testator has to give, except what he has given to the devisee over; and, in order to give effect to that intention, has held, by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over: *Phipps* v. *Ackers* (5). In
[*572] the second class, the COURT has *held the devise contingent, upon the ground that no one could claim who could not predicate of himself that he was of the age required,—that otherwise he did not answer the entire description: (*Festing* v. *Allen* (3), and the cases there referred to). The question is, under which of these two classes does the present case fall? I think clearly under the second class. It is not necessary that I should say whether greater violence would be done to the language of the will in this case than was done in some of the cases of the first class,—as, for example, in the case of *Doe* v. *Moore* (6). The two cases are, in principle, widely different from each other, and this case, in my opinion, clearly falls under the second class.

Then does the clause as to maintenance, education, and bringing up alter the case? I think not. That such provisions are, in many cases, material upon questions of vesting cannot be disputed; but

(1) 32 R. R. 70 (3 Bligh, N. S. 260).
(2) 51 R. R. 206 (10 Sim. 51).
(3) 12 M. & W. 279; see next page.
(4) 32 R. R. 196 (1 Russ. & My. 203).
(5) See 39 R. R. 115 (3 Cl. & Fin. 703).
(6) 13 R. R. 329 (14 East, 601).

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there is nothing unreasonable or improbable in giving the benefit of maintenance, education, and bringing up, to the devisee of a contingent interest. The question is, whether I can allow that clause to have any effect upon the description of the devisee, which description, without that provision, includes, as a part of it, the age of twenty-three years. I think not. The devise is not to the children, at, or when, or if, but, in effect, to such only as attain the age of twenty-three years; and the interim gift has no legitimate bearing on the question.

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FESTING *v.* ALLEN.

(5 Hare, 573—579).

1842. *Nov.* 22, 24. *Dec.* 5, 6, 10. 1844. *July* 5.

WIGRAM, V.-C.

[573]

A devise of real estate to the use of A. for life, with remainder to the use of all and every the child or children of A. who shall attain the age of twenty-one years, and for want of such issue, over, creates a tenancy for life in A., with a contingent remainder in fee to such of the children of A. as shall attain twenty-one; and on the death of A., leaving infant children, but having had no child who had then attained twenty-one, the interest of the children of A. was divested, and the limitations over were defeated (1).

Where a testator bequeathed an annuity to his granddaughter for her life, and directed that if she should die during the lifetime of his widow, the annuity should be paid for the maintenance of the children of the granddaughter, and that, from and after the decease of his widow and granddaughter, the value or the amount of the annuity (such a sum as would produce it according to the then legal rate of interest) should be paid to all and every the child and children of the granddaughter, if more than one, to be equally divided amongst them, when and as they should respectively attain the age of twenty-one years, and if there should be but one, then the whole to such one child, with a gift over in case of the death of the granddaughter without issue who should attain the age of twenty-one,—the children of the granddaughter are not entitled to the annuity or interest of the fund after the death of the widow and their mother, until they attain the age of twenty-one years (2).

ROGER BELK, in 1821, devised his real estates to trustees, to the use of his wife for her life, and from and after her decease or second marriage, to the use of his granddaughter Martha Hannah Johnson and her assigns for her life, and from and after her decease, "to the use of all and every the child or children of the said Martha Hannah Johnson, who shall attain the age of twenty-one years, if more than one, equally to be divided between them" as tenants in common, and to their several and respective heirs and assigns, and if but one, then to the use of such one child, his or her heirs or assigns; and for want of any such issue, upon trust,

(1) *In re Brooke* [1894] 1 Ch. 43, 47, 63 L. J. Ch. 159.

(2) *In re Dickson* (1884) 28 Ch. D. 291, 29 Ch. Div. 331, 54 L. J. Ch. 510; *In re Inman* [1893] 3 Ch. 518, 62 L. J. Ch. 940.

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as to one moiety, to permit Ann Johnson, the wife of his grandson T. R. B. Johnson, to receive the rents and profits for her life, for the maintenance and education of all and every the child and children of his said grandson T. R. B. Johnson, and from and after her decease, to the use of all and every the child and children of his said grandson T. R. B. Johnson, "who shall attain the age of twenty-one years, if more than one, equally to be divided among them" as tenants in common, and to their several and respective heirs and assigns for ever, and if but one such child, then to the use of such one child, his or her heirs and assigns; and as to the other moiety, to stand seised and possessed thereof, to the use of Sarah Rhodes for her life, and from and after her decease, to the use of all and every the child and children of the said Sarah Rhodes "who shall attain the age of twenty-one years, if more than one, to be equally divided among them" as tenants in common, and to their several and respective heirs and assigns; and if but one such child, then to the use of [*574] such *one child, his or her heirs and assigns. And if either of them the said T. R. B. Johnson or Sarah Rhodes should happen to die without issue, who shall attain the age of twenty-one years, then the testator provided that the trustees should stand seised and be possessed of the entirety of the said real estate, to the use of the survivor of them the said T. R. B. Johnson and Sarah Rhodes for life, and from and after his or her decease, to the use of his or her child and children in such and the same manner as the original share was thereinbefore devised, in trust for them; and if both of them should die without such issue, then to the use of Ann, the wife of John Butt, her heirs and assigns.

The testator died in 1824. The widow survived him, and died in the lifetime of Martha Hannah Johnson the granddaughter. Martha Hannah Johnson married Thomas Festing, and died in 1833, leaving the plaintiffs, her three children, then infants, surviving.

Upon the bill of the children of Martha Hannah Festing, the granddaughter, the VICE-CHANCELLOR directed a case to the Court of Exchequer, and the opinion of that Court was certified to the effect, that, upon the death of Martha Hannah Festing, the heir-at-law of the testator took an estate in fee-simple in the real estate devised by the will; that, upon her death, the plaintiffs, her infant children, took no estate or interest in such real estates, or the rents and profits thereof; and that, upon her death, neither Ann Johnson, nor her children, nor Sarah Rhodes, nor her children, took any

estate or interest in such real estates, or the rents and profits thereof (1).

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Under the same will, a question arose as to the right of the plaintiffs, the infant children of Martha Hannah Festing, to the application for their benefit, during their minorities, of the interest of a legacy. [575]

The testator gave his residuary personal estate to trustees upon trust to invest the same and stand possessed thereof, in the first place, out of the interest and annual produce to pay unto Martha Hannah Johnson an annuity of thirty pounds during the life or widowhood of his wife; and from and after the decease or second marriage of his wife, to pay unto the said Martha Hannah Johnson one annuity of forty pounds for her life, for her separate use, and from and after her decease, if she should die in the life-time, and during the widowhood of his wife, to pay the said annuity of thirty pounds unto and for the maintenance and education of all and every the child and children of the said Martha Hannah Johnson, and from and after the decease or second marriage of his said wife, and the decease of the said Martha Hannah Johnson, then that his said trustees should, by and out of the said trust monies and the interest and annual produce thereof advance and pay the value or amount of the said annuity of forty pounds unto all and every the child and children of his said granddaughter Martha Hannah Johnson, if more than one, to be equally divided amongst them, share and share alike, when, and as they shall respectively attain the age of twenty-one years, and if there shall be but one, then the whole to such one child.

And there was a gift over in case of the death of Martha Hannah Johnson without issue, who should attain the age of twenty-one years.

By a codicil the testator declared that the value or amount of the annuity of forty pounds directed by his will to be paid unto the children of his granddaughter Martha Hannah Johnson, from and after her decease, should be such a sum of money as would produce, according to the then legal rate of interest, the yearly sum of forty pounds. [576]

Mr. Kenyon Parker, *Mr. Malins*, and *Mr. Shee* argued that the interest of the fund appropriated to or out of which the annuity

(1) See a full report of the arguments and of the judgment of the Court of Exchequer, 67 R. R. 339, 12 M. & W. 279, 13 L. J. Ex. 74.

FESTING v. ALLEN.

was paid to Martha Hannah Festing, should be paid to or for the maintenance of the infant plaintiffs from the time of the decease of their mother. They dwelt on the necessity for appropriating, in some events, a particular sum to answer the annuity,—on the gift of maintenance, if the widow had survived the plaintiffs' mother,—and cited *Acherley* v. *Vernon* (1).

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Dec. 10.

THE VICE-CHANCELLOR:

If I am to read it as a legacy to the children when they attain twenty-one, it would, according to the opinion expressed by Sir WILLIAM GRANT in *Hanson* v. *Graham* (2), be a contingent legacy. Notwithstanding Lord ALVANLEY's decision in *May* v. *Wood* (3), the most favourable way of reading the will is to consider the words "to be divided" as equivalent to the words "to be paid," so as to make the gift to the children immediate, with a postponement only of the time of payment. This being the only construction of the will which can give the children a vested interest in the legacy, I [*577] will, *for the present purpose, so construe this will in the children's favour, although the legacy (as I understand the will) is given over, if all the children die under twenty-one.

Then, what is the rule of the Court with respect to vested legacies payable at a future day? The admitted rule is, that the legacy does not carry interest until the day of payment shall have arrived. By what reasoning am I asked to give interest upon this legacy before the day of payment? It is first said, that maintenance is given in another case on the death of the mother. I admit that as a reason for believing that I may disappoint the real intention of the testator, if I do not give interest before the children attain twenty-one, in the event which has happened. But the question to which I am confined is, whether the testator has given such interest in fact, or said that which can justify me in deciding that he has, in this case, manifested an intention to give it? Then, stress was laid upon the words "from and after." But I have already given full effect to these words in treating them as evidence that the gift of the legacy was immediate, and the payment only as postponed; unless the words are to be read as directing a severance of the legacy from the bulk of the estate, and unless such direction is to have the effect of entitling the legatees to claim interest upon the legacy,—which was the third point relied upon for the legatees.

(1) 1 P. Wms. 783.
(2) 5 R. R. 277 (6 Ves. 239).
(3) 3 Br. C. C. 471.

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Now, although a direction to sever a legacy from the bulk of an estate has often been relied upon as an argument favourable to a claim of interest upon a deferred legacy,—*Acherley* v. *Vernon* (1), *Boddy* v. *Dawes* (2), **Saunders* v. *Vautier* (3), *Vawdry* v. *Geddes* (4), [*578] *Lister* v. *Bradley* (5),—it is impossible to hold that the mere necessity of making such a severance in some events only (as in the case of the residue becoming payable before the legacy itself is payable, or other cause unconnected with the legacy itself) can have the effect of giving interest upon a deferred legacy before it becomes payable. There is not one instance in twenty of deferred legacies in which that might not happen. In this case, however, it was said that the necessity of providing for the mother's annuity would, in certain events, render a severance of the legacy necessary, and that whatever might become necessary in the execution of such a trust of the will, must be considered as directed by the testator himself, although, in terms, no severance may be directed. My observation upon this is, that so far as the language of the will goes, the testator clearly supposes the mother's annuity will be paid out of interest arising upon the undivided *corpus* of the estate, and as the legacy is given over in the event of Martha Hannah dying without issue who live to attain the age of twenty-one, I cannot think the will shows that severance of the legacy from the bulk of the estate was in the contemplation of the testator, only because in certain events the executors might be obliged to pay over the residue before the destination of the legacy was determined. Besides, that the amount given to the children at the time at which it is given, is not necessarily the same sum as might have been required to provide for the mother's annuity in the event of the residue becoming payable in her lifetime, is manifest from the direction in the codicil as to the mode of ascertaining the amount of the children's legacy.

With respect to the case of *Acherley* v. *Vernon* (1), that case [579] proceeded partly upon the ground that the testator had placed himself *in loco parentis* to the legatee,—and that case has rarely been cited without drawing from the Court the observation that it was a case depending upon special circumstances,—as in *Crickett* v. *Dolby* (6) and *Hearle* v. *Greenbank* (7). It was, however, said, that the testator here was *in loco parentis*; but that is not implied from

(1) 1 P. Wms. 783.
(2) 44 R. R. 91 (1 Keen, 362).
(3) 54 R. R. 286 (1 Cr. & Ph. 240).
(4) 32 R. R. 196 (1 Russ. & My. 208).
(5) 58 R. R. 7 (1 Hare, 10).
(6) 3 Ves. 10.
(7) 3 Atk. 697, 716.

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a gift to grandchildren *per se*: 2 Roper, Leg. 224. And here there is nothing but that relationship.

Upon the whole, though I may disappoint the real intention of the testator, it is better to do that than to introduce distinctions so subtle that they simply subvert a general rule, without being themselves capable of reduction to any definite principle.

1844. *July* 5.

Upon the certificate of the Court of Exchequer as to the real estate,

Mr. Lowndes and *Mr. W. T. S. Daniel*, for the heir-at-law, asked that the bill might be dismissed as against him, with costs.

Mr. Kenyon Parker, *Mr. Malins*, and *Mr. Shee*, *contrà*.

The VICE-CHANCELLOR gave no costs.

1847. *June* 24, 25. *July* 13.

WIGRAM, V.-C. [580]

SAY *v.* CREED.

(5 Hare, 580—589; S. C. 16 L. J. Ch. 361; 11 Jur. 603.)

The testatrix devised and bequeathed the rents, issues, and profits of her real and personal estate to her sister for life, and upon and after her decease, upon trust to sell the real estate, and pay the money arising therefrom to such persons as the testatrix should, by any codicil, direct; and, if she should not bequeath the same by any codicil, then to pay the same unto and amongst her next of kin: and, by her codicil, the testatrix revoked the former devise and bequest made by her will, and devised and bequeathed all the said real and personal estate to other trustees, upon the like trusts, but directed that all "the said residue" should be paid to her next of kin on the part of her mother, and not to any of her next of kin on the part of her father: Held, that the testatrix died intestate as to the residuary personal estate.

That the next of kin of the testatrix, *ex parte maternâ*, at the death of the tenant for life, were, under the codicil, entitled to the proceeds of the real estate.

CATHARINE ASTLEY, by her will, dated in 1815, devised her real estate to trustees upon the trusts thereinafter mentioned, and she bequeathed her personal estate and effects to the same trustees, subject to the payment of her debts, funeral and testamentary expenses and legacies, upon the trusts thereinafter mentioned. And the testatrix directed her trustees, as soon as conveniently might be, after her decease, to convert all such part of her said personal estate, as should not consist of money or security for money, into money, and invest the same upon real or Government securities; and she empowered her trustees to continue out at

interest all such monies as she had then at interest, and also to call in and re-invest all or any part of her personal estate as the said trustees, or the survivor, his executors, &c., should think fit. And the testatrix then declared that the said devise and bequest of her said real and personal estates were made to the said trustees upon trust, that they should receive and take all the rents, issues, and profits of all her said real and personal estates, and pay the same unto her mother, Catharine Astley, and her assigns, for her own use and disposal, during her life, and from and after her decease, upon trust to pay the same unto her sister, Lucy Brown, for her separate use; and from and after the decease of her said mother and sister, upon trust to sell the said real estates, and the money arising therefrom, together with all the rents and profits thereof, from the last payment made to the survivor *of her said mother [*581] and sister, should be paid by the said trustees (after deducting the charges of executing the said trusts) unto such person or persons, and in such manner and form, "to whom" she should, by any codicil, note, or memorandum, give or bequeath the same. But in case she should not, by any codicil, note, or memorandum, give and bequeath the said monies, or not thereby give, bequeath, and dispose of the whole thereof, then the testatrix directed that the same, or such part thereof as should not be disposed of, should be paid by the said trustees unto and amongst her next of kin, in due course of administration, as the law directs in respect of intestates' personal estates.

The testatrix made a codicil to her will, dated in 1818, reciting that she had, by her will, devised her real estates upon the trusts "hereinafter" mentioned, and that she had bequeathed her personal estate upon the trusts "thereinafter" mentioned, and she then, by the codicil, revoked such devise and bequest, and thereby gave, devised, and bequeathed all her real and personal estate and effects whatsoever unto other trustees, their heirs, executors, administrators, and assigns, to, for, and upon the like trusts, and subject, and with the same powers and authorities, as in her said will mentioned. "But," the testatrix proceeded, "I do hereby revoke and declare that, in case I shall not make any further codicil to this my will, and dispose of the residue directed by my said will to be paid to my next of kin, I do hereby will and direct that all the said residue shall be paid to my next of kin on the part of my said mother only, and not to any of my next of kin on the part of my late deceased father." And the testatrix appointed the

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same trustees to be the executors of her will and codicil. The testatrix died in November, 1828.

[582] Lucy Brown, the sister of the testatrix, and the tenant for life under her will, survived the testatrix. She was the sole next of kin of the testatrix living at the time of her death, and she was also, at the same time, the only next of kin of the testatrix on her mother's side. Excluding Lucy Brown, the tenant for life, the person who, at the death of the testatrix stood nearest in the relation of next of kin of the testatrix on her mother's side, was Phillip Bell, an uncle of the testatrix.

Lucy Brown, the tenant for life, died in June, 1843. Phillip Bell was then dead; and the next of kin of the testatrix, on her mother's side, living at the death of Lucy Brown, were his children and others in the same degree of relation. The plaintiff was the personal representative of Lucy Brown. The Master found the several sums, which had been produced by the real and personal estate respectively, and the amount of the residue. On hearing the cause for further directions,

Mr. Rolt and *Mr. Roundell Palmer*, for the plaintiff.

Mr. Romilly and *Mr. Malins*, *Mr. Walpole* and *Mr. Fleming*, *Mr. Chandless* and *Mr. Surrage*, for next of kin of the testatrix, *ex parte maternâ*, living at her death, excluding Lucy Brown.

Mr. Wood and *Mr. Prior*, for the next of kin of the testatrix, living at the death of Lucy Brown.

[The points raised by counsel and the principal cases cited by them are referred to in the following judgment:]

[584] THE VICE-CHANCELLOR:

Two questions have been argued before me,—first, whether the personal estate of the testatrix is included in the bequest contained in her codicil to her next of kin on the part of the mother, or whether the testatrix died intestate as to such personal estate; and, secondly, who are the persons entitled, under the bequest in the codicil to such next of kin.

The case has this peculiarity—that the decision upon either point, separately taken, may affect the decision upon the other point. Thus a decision that, according to the construction of the words of the gift, the testatrix had given the proceeds of the sale of her real estate, at her death, to the same persons to whom the law,

without any disposition, would at that time give her personal estate, would meet (if, indeed, it did not displace) the argument founded upon the improbability that the testatrix intended, in this case, to die intestate as to her personal estate. Again, a decision that the next of kin, to take under the codicil, were the parties answering the description of the next of kin at the death of Lucy Brown, would leave that argument in force. In considering the case, I have endeavoured to follow the rule to which I shall more particularly advert, of construing the words of the testatrix in their natural sense, inquiring what the testatrix intended, by examining her words in all parts of the will.

For the purpose of trying the question of intestacy, I will suppose, first, the next of kin, to whom the bequest is made in the codicil, to mean next of kin living at the death of Lucy Brown. Assuming that to be so, after repeated considerations of the will and codicil, my conclusion is, that in the will the proceeds of the sale *of the real estate only are given to the testatrix's next of kin. [*585] If so, the gift in the codicil described as "the residue, directed by my said will to be paid to my next of kin," cannot be more extensive. That such is the plain and grammatical construction of the will I cannot doubt, unless that meaning can properly be altered or modified by reason of some inherent force in the word "residue" in the codicil. The proceeds of the sale of the real estate is the last antecedent, and the use of the word "but" emphatically limits the reference to that antecedent. It appears to me also, that the testatrix generally, in her will, when directing a conversion of her property, correctly says into "money," in the singular number, speaking of the real and personal estate; but, when she speaks of money then existing, she calls it "monies." This change of expression would be correct according to legal phraseology; but, I confess, that the observation upon it appears to me much too critical to be a safe guide as to what the testatrix meant. The observations upon the word "residue," in the codicil, appeared to me, at one time, to be more deserving of attention, as showing that the testatrix, by the use of the word "residue" in the codicil, expressed what she supposed she had done by her will; but I am satisfied that the word cannot *per se* produce the effect contended for. The testatrix, by the codicil, expressly sends me back to the will to ascertain the meaning of the word "residue," and, when I look at the will, I find that it is confined to the real estate, which is there given in express terms, subject to the payment of certain charges

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and expenses, which are directed to be paid out of the proceeds. Taking the words, therefore, in their strict and natural sense, it appears to me that there is no ground whatever for saying that the will and the codicil go beyond the proceeds of the real estate.

[586] Nothing, then, remains upon this part of the case except the argument, which has been founded upon this, that the testatrix (upon the supposition I am now proceeding upon), has given the residue of her real estate by her will to next of kin living at the death of Lucy Brown, and has left her personal estate to go, according to law, amongst her next of kin living at her own death. That this, if intended, was capricious, I do not deny; but it is not so capricious or extravagant as to justify me in giving to the testatrix's language a meaning which it does not bear. If I were at liberty to act upon conjecture, I should probably come to a different conclusion; but, in deciding on the claims of the next of kin living at the death of Lucy Brown, and who cannot therefore have been personally and individually objects of the testatrix's bounty, it is not upon conjecture that I should be justified in departing from the letter of the will. I may observe, also, though I do not rely upon it, that the general structure of the codicil favours the literal construction of the words.

The next point is, as to the persons who are to take the residue given by the codicil. The question is, whether the assumption I have hitherto made use of is correct or not. The persons who claim are, first, the plaintiff, who claims as representing the sole next of kin, *ex parte maternâ*, living at the death of the testatrix, although the party whom he represents was next of kin also *ex parte paternâ*. The second class of claimants comprises the persons who, if Lucy Brown had died in the lifetime of the testatrix, would have been her next of kin *ex parte maternâ*. The other claimants are the only next of kin of the testatrix, *ex parte maternâ*, living at the death of Lucy Brown; and my opinion is, that the last class of

[*587] persons, the next of kin, *ex parte maternâ*, of *the testatrix living at the death of Lucy Brown are the persons to whom the property is given.

The rule of law as laid down, and, I believe, correctly, in modern cases, is, that the words of the will, in cases of this description, are to be construed in their strict and proper sense, unless, from the context, it appears that they were used in some other sense, or unless the circumstances of the case exclude it. The rule was

applied in *Holloway* v. *Holloway* (1), and has since been followed in numerous cases, of which *Jenkins* v. *Gower* (2) and *Seifferth* v. *Badham* (3) are examples; and upon that rule I have repeatedly acted in cases like the present. According to those authorities, where a testator gives property to a tenant for life, and, after the death of the tenant for life, to his next of kin, and there is nothing in the context to qualify, or in the circumstances of the case to exclude, the natural meaning of the testator's words, the next of kin of the testator living at his death will take; and, if the tenant for life be such next of kin, either solely or jointly with other persons, he will not on that account only be excluded. This rule is generally admitted; but it must, I think, be admitted also, that it has been much relaxed in some modern cases,—as much perhaps as it safely can be consistently with the preservation of the rule itself. That relaxation is favourable to my conclusion in this case, although I believe it is not necessary that I should rely upon it. In applying the rule to this case, the Court is bound, as Lord BROUGHAM observed in *Guy* v. *Sharp* (4), and as has been said in other cases, to place itself in the situation of the testator, *and [*588] inquire what the testator's words express, when used by a person in that situation. Now, in this case, the will and codicil speak, at the latest, at the death of the testatrix. At the date of the codicil, the father and mother of the testatrix were dead, for she speaks of her late father, and she had no brother or sister living, except Lucy Brown, nor any child of a brother or sister. It was, therefore, of necessity, that, if Lucy Brown survived her, which she must have contemplated would be the case, that Lucy Brown would be her only next of kin living at her death. When, therefore, the testatrix, in such circumstances, described her next of kin, to whom she has given her property, in terms which import that she contemplated a plurality of persons under that description, the question is, whether her words, if properly interpreted, do not describe some persons other than Lucy Brown. Without expressing any opinion of my own upon the case of *Jones* v. *Colbeck* (5), decided by Sir WILLIAM GRANT, I may observe, that it is an authority for the proposition that the words must be so interpreted. Again, Lucy Brown, whom the testatrix, at the date of her will and codicil, knew would be her sole next of kin, if she survived her, is tenant for life of the whole of the fund; and although that might be immaterial in cases

(1) 5 R. R. 81 (5 Ves. 399).
(2) 2 Coll. C. C. 537.
(3) 10 Jurist, 892.
(4) See 1 My. & K. 602.
(5) 6 R. R. 207 (8 Ves. 38).

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otherwise circumstanced, as in *Holloway* v. *Holloway*, *Jenkins* v. *Gower*, *Seifferth* v. *Badham*, and the cases there referred to, it has been considered material in a case so circumstanced, *Miller* v. *Eaton* (1); upon which case also I abstain from expressing any opinion. And without giving any opinion upon the case of *Bird* v. *Wood* (2), it may be observed, that it is a case clearly distinguishable from the present, upon the direction contained in the will respecting the vesting, upon which the VICE-CHANCELLOR principally relied.

[589] I have considered the party in whose favour I decide this case, as entitled to the benefit of the observation, that the cases of *Jones* v. *Colbeck* and *Miller* v. *Eaton* are in his favour; but I purposely abstain from resting my own decision upon them. The argument against the claim by the other next of kin, upon which I decide this case, is, that the testatrix, at the date of the codicil, knew that Lucy Brown, if she survived her, would be her next of kin *ex parte paternâ*, as well as *ex parte maternâ*; yet, in her codicil, in which, for the first time, she distinguishes the next of kin one from the other, she describes the objects of her bounty as next of kin on the part of her mother, and not next of kin on the part of her father. That appears to me to lead to the same construction as would be deduced from the authority of the cases I have referred to.

1847.
July 13, 16.

WIGRAM, V.-C.
[589]

BRADLEY *v.* BARLOW.

(5 Hare, 589—595.)

Legacy to Anne, the wife of Peter, for life, remainder to Peter, the husband, for his life, and, after the death of the husband and wife, upon trust to pay the interest for the maintenance of such children of Anne as should be living at her death, until they should respectively attain twenty-one, and when and as they should severally and respectively attain their said ages of twenty-one years, upon trust to pay and transfer the legacy equally unto and amongst all the children of Anne, when and as they should severally and respectively attain their said ages of twenty-one years; and, if any of the said children should die under twenty-one, then unto such as should attain that age, share and share alike; and, in case all and every of the said children should die under age, then to pay the legacy to the testator's next of kin. The children of Anne, who attained twenty-one years of age, acquired vested interests in the legacy, although they died in the lifetime of Anne, the tenant for life.

THOMAS POTTS, by will, dated in 1810, bequeathed 500*l.* to trustees, upon trust, at the expiration of one year next after the testator's decease, to invest the same, and to pay the interest and

(1) 14 R. R. 259 (G. Coop. 272). (2) 25 R. R. 238 (2 Sim. & St. 400).

dividends thereof unto or for the use of Anne Ellem, wife of Peter Ellem, for and during her life, for her separate use; and from and after her decease, in trust to pay the said interest and dividends unto the said Peter Ellem for his life, and from and after the death of the survivor of Peter Ellem *and Anne his wife, in [*590] trust to pay, apply, and dispose of the interest and dividends of the said sum of 500*l.*, or a sufficient part thereof, for and towards the maintenance, education, support, and bringing up of such child or children of the said Anne Ellem as should be living at the time of her death, until such children should severally and respectively attain their several and respective ages of twenty-one years; and when and as they should severally and respectively attain their said ages of twenty-one years, in trust to pay, assign, and convey the said sum of 500*l.*, with the interest, dividends, and produce thereof, as should not have been applied for putting any or either of them to business, or otherwise advancing any or either of them in life, pursuant to the power thereinafter for that purpose contained, equally unto and amongst all the children of the said Anne Ellem, when and as they should severally and respectively attain their said ages of twenty-one years. And in case any or either of the said children of the said Anne Ellem should happen to die before having attained twenty-one years, then in trust to pay, assign, transfer, and convey the said sum of 500*l.*, and the interest, dividends, and produce thereof, or such part thereof, as should remain unapplied as aforesaid, unto such of the children of the said Anne Ellem as should live to attain his, her, or their respective age or ages of twenty-one years, share and share alike, if more than one; but in case all and every of the said children of the said Anne Ellem should happen to die under age, then in trust to pay, assign, transfer, and convey the said sum of 500*l.*, and the interest, dividends, and produce thereof, or such part thereof as should remain unapplied as aforesaid, unto the testator's next of kin, according to the Statute of Distribution of intestates' personal estate and effects; and he thereby empowered and directed his trustees to pay, assign, transfer, and convey the same accordingly.

There was a subsequent gift to Amelia Oldham, for her life, [591] remainder to any husband with whom she might intermarry for his life, and a trust to apply the interest for the maintenance of all and every such child or children of the said Amelia Oldham, as she should have living at the time of her decease, until they should attain twenty-one, and to transfer the capital unto and amongst

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all the said children of Amelia Oldham, when they should respectively attain twenty-one, and a gift over in case of the death of all the said children under age and without leaving issue. In case of the death of Amelia Oldham under twenty-one, a sum bequeathed to her was given unto such of several persons (J. Lock, T. Taylor, and others) as should be living at the time of the decease of Amelia Oldham, equally; and if any of them should have died in her lifetime, leaving issue, the share of the person so dying to be transferred to such issue. And the testator bequeathed the residue of his personal estate to John Taylor, his executors, administrators, and assigns.

The 500*l.* was invested by the executors in stock, which was afterwards converted into 572*l.*, 3*l.* 5*s.* per cent. Annuities. The dividends were paid to Anne Ellem, until her death in 1841. Anne Ellem had four children, Mary, William, Anne, and John. Mary, Anne, and William attained their ages of twenty-one years, and died in the lifetime of Anne Ellem, their mother. John died in her lifetime without having attained twenty-one.

The bill was filed by the personal representatives of Mary, Anne, and William, against the executors of P. Barlow, the last survivor of the trustees,—the next of kin of the testator at the time of his death,—and the assignee of the residuary legatee, praying that the

[*592] 572*l.* *stock, and the dividends since the death of Anne Ellem, might be transferred and paid to the plaintiffs respectively, as such personal representatives.

Mr. Tinney and *Mr. Bagshawe*, for the plaintiffs:

The ruling words of the bequest are the words which direct a division of the fund amongst the children of Anne Ellem when they shall attain the age of twenty-one years: this constitutes a gift in remainder expectant upon life-estates, and is followed by a gift over to the next of kin in case of the death of the children under age. The reference to children living at the death of Anne Ellem, is a part of the maintenance clause, which does not cut down the substantial gift.

Mr. Lee, for the next of kin:

The trust declared of the fund, is for such of the children of Anne Ellem as shall be living at the time of her death. In a subsequent gift, made in a similar form, to the children of Amelia Oldham, the language is rendered entirely unequivocal by the word

"said," identifying the objects to whom the *corpus* is bequeathed with those to whom maintenance is given. But the meaning of the language is obviously the same: *Archer* v. *Jegon* (1). The gift to the next of kin, in the event of the death of the children of Anne Ellem under age, has therefore taken effect: *M'Kinnon* v. *Sewell* (2). The rule of construction adopted by the COURT in the case of *Say* v. *Creed* (3) supports this conclusion.

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Mr. Anderdon and *Mr. Hislop Clarke*, for the assignee of the residuary legatee, contended that the gifts to the children of Anne Ellem had failed by their death in her *lifetime; that the gift to the next of kin had not taken effect, inasmuch as all the children had not died under age; and that the fund passed under the residuary gift: *Greene* v. *Ward* (4).

[*593]

THE VICE-CHANCELLOR:

Before the argument on this case commenced, and on the same day, I gave judgment in the cause of *Say* v. *Creed* (5), in which (as in the principal cause) I had to determine the construction of a will. Some expressions which I made use of in explaining the grounds of my judgment in *Say* v. *Creed*, were cited by the defendants' counsel in the present case. Now I certainly intended to lay down no new proposition by what I said in *Say* v. *Creed*, and I probably should have said nothing as to the general rules by which the Court should be governed in construing a will, if it had not been that two cases decided by a Judge of the highest authority (I refer to *Jones* v. *Colbeck* (6) and *Miller* v. *Eaton* (7)) had been pressed upon me as authorities (as they certainly were authorities) for the conclusion I came to respecting the next of kin in that case. I was anxious, in referring to these cases, to observe that I considered them as admitting the general rule of construction I had laid down; and that if those cases were unsatisfactory, (upon which I gave no opinion), they were so not upon the ground that they impeached the general rule, but that such rule had been ill applied in them; an observation which (I conceive) applies also to *Briden* v. *Heulett* (8) and some other modern decisions. In *Say* v. *Creed* the restriction in favour of heirs *ex parte maternâ* only, *was alone sufficient to decide that case, and upon that I decided it. But as *Jones* v. *Colbeck* and

[*594]

(1) 42 R. R. 218 (8 Sim. 446).
(2) 39 R. R. 175 (2 My. & K. 202).
(3) *Supra*, pp. 238 *et seq.*
(4) 25 R. R. 38 (1 Russ. 262).
(5) *Supra*, p. 238.
(6) 6 R. R. 207 (8 Ves. 38).
(7) 14 R. R. 259 (G. Coop. 272).
(8) 39 R. R. 146 (2 My. & K. 90).

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Miller v. *Eaton* have never been overruled, I thought myself bound to give the plaintiff the benefit of the observation, that they were authorities in his favour.

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In the present cause I have no doubt upon the construction of the will, within the limits of the rule which obliges me to ascertain the testator's intention from what he has said, and from that alone. In doing this, I shall begin by excluding the life-interest of Peter Ellem, the husband. (His Honour read the will to the end of the limitation to the children of Anne Ellem,—leaving out the gift to Peter Ellem.) Now, if the will had given no life-estate to Peter, and had stopped where I have stopped, I should scarcely have thought it admitted of doubt but that any child of Anne who attained twenty-one in her lifetime would take a vested interest. It is true the direction as to maintenance applies in terms to children living at her death; but it is obvious that the direction is so limited only because the testator is speaking of them as supposed minors at that time. It cannot be successfully argued that it was necessary that a child of Anne should be a minor at her death, in order to bring herself within the gift; and if that is excluded, there is nothing in the words of the will which conflicts with the construction contended for by the plaintiff, and much that requires it: but when the clause of the will is read which describes the event upon which the legacy is given over (1), that conclusion is satisfactorily confirmed. Upon that clause it is manifest that Anne Ellem and her children were to take whatever was not given to the legatee over. The life-interest in Peter

[*595] Ellem rather confirms this construction than *otherwise; for it explains some apparently conflicting directions in the will, but without being admissible as a ground from which to infer that the gifts to the children of Anne were not such as they would have been, if no life-estate were given to Peter.

The bequest to Amelia Oldham and her children, and I may add the contingent bequest of 3,000*l.* Reduced Annuities to John Lock, Thomas Taylor, and the others, also appear to me rather to confirm my view of the question in this cause; for, although in these cases the legacies are given over in case of the deaths of the legatees before they become entitled in possession, there is a substituted bequest to their issue in case any should die leaving issue, a provision which is not found in the bequest now in question.

(1) *Supra*, p. 245.

MAJOR *v.* WARD (1).

1847.
June 19, 21, 22.
July 16.

WIGRAM, V.-C.

[598]

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(5 Hare, 598—605.)

Stephen took a conveyance of an estate from William, his father, and then mortgaged the estate, with a power of sale on default of payment of the mortgage money and interest within three months after notice, in writing, given to Stephen, his heirs, executors, administrators, or assigns, or left at his or their usual or last known place of abode. The conveyance to Stephen from William was afterwards declared void, as against the creditors of William. Some years afterwards, the mortgagee caused the notice demanding payment to be affixed to the door of the house which was the last known place of abode of Stephen; and the mortgagee, a short time before the expiration of the three months, entered into a contract for the sale of the property: Held, that as the right of the mortgagee under the power of sale was paramount to that of the creditors of William, the notice to Stephen was sufficient.

That such notice was well served by being fixed on the door of Stephen's last known place of abode.

That the contract for sale of the property, although made before the expiration of the notice, was not therefore invalid.

In 1784, a certain tenement and four acres, and one acre and a half of land dispersed in the common field of A. were conveyed to the party under whom the vendor claimed. In 1818, the devisee of the same party conveyed the tenement with an allotment of land described as containing three acres and one rood, allotted to the devisor under an Act passed in 1801, for enclosing part of the parish of A., in lieu of five acres of common field lands. The estate was contracted to be sold in 1841: Held, that in the absence of any proof that the whole of the common lands in A. had not been allotted, or that any other allotment had been made to the same party, the Court would assume that the allotment had been made in substitution of the common lands comprised in the deed of 1784.

EXCEPTIONS to the Master's report, in a vendor's suit, finding that a good title could be made to a tenement called "Old Hall," and three acres of land in East Hendred.

One objection was, that due notice had not been given of the sale, which had been made by the mortgagee under the powers contained in the mortgage deed; and another was, that an allotment of common land, part of the estate described as having been allotted to the mortgagor in lieu of four acres of common field land, was not shown to have been allotted to him in lieu of the four acres of land which were formerly occupied or enjoyed with the tenement called "Old Hall."

The tenement called "Old Hall," and four acres of arable land, dispersed in the common field of East Hendred, belonging to the said tenement, or therewith usually occupied or enjoyed, and an acre and half of arable land, also in the said common field, were conveyed to

(1) *Farrar* v. *Farrars, Lim.* (1888) 40 Ch. Div. 395; 58 L. J. Ch. 185, 60 L. T. 121.

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one Beasley and his heirs, by a deed dated in December, 1784. Beasley devised the premises to William, his son. In January, 1818, William Beasley, the son, mortgaged the property in fee to Mary and

[*599] Rebecca Smith for securing 400*l.* and interest. In the *mortgage deed the parcels are described as a messuage or tenement in East Hendred, called Old Hall, with the malt-house, stable, and outbuildings thereto next adjoining, together with the garden, orchard, and plot of arable land following; viz. all that allotment of land adjoining to the said messuage or tenement, containing by admeasurement 3 acres and 1 rood (be the same more or less), and which said allotment of land was in part by the award of the Commissioners appointed in and by an Act of Parliament made and passed in the 41st year of Geo. III., intituled "An Act for dividing and allotting that part of the parish of East Hendred called Westmanside, in the county of Berks," allotted, awarded, and confirmed unto William Beasley, for and in lieu of four acres of common field land, and which said allotment of land was then laid down in meadow, fenced, and well planted with trees.

In 1822, Rebecca Smith died, leaving Mary, and Ann, another sister, her co-heiresses-at-law, having also appointed them her executors and residuary legatees. By a settlement made upon the marriage of Ann, in October, 1827, one moiety of the 400*l.* secured by the mortgage of 1818, with other property of Ann, were assigned to trustees, upon the trusts of the marriage settlement. By indentures of July, 1828, William Beasley further charged the property with 100*l.* in favour of Mary Smith, subject to the 400*l.* secured by the prior mortgage. By indenture, dated the 13th and 14th of September, 1833, in consideration of the payment of the 400*l.*, and 100*l.* expressed to be paid by Stephen Beasley to Mary and Ann Smith, the property was conveyed by the mortgagor and mortgagees to such uses as Stephen Beasley, the son of William, should appoint, and subject thereto to uses to bar dower, with remainder to the use of Stephen, his heirs and assigns.

[600] By indentures, dated the 23rd and 24th of September, 1833, Stephen Beasley conveyed the same property to Thomas Major, the plaintiff, in fee, by way of mortgage, to secure 500*l.* and interest; and it was by the mortgage-deed provided and declared, that in case default should be made by the said Stephen Beasley, his heirs, executors, administrators, or assigns, in payment of the said sum of 500*l.*, or the interest for the same, or any part thereof respectively, on the days and times thereinbefore appointed for payment thereof

respectively, the said Thomas Major, his executors, administrators, and assigns, should at any time or times thereafter give notice, in writing, to the said Stephen Beasley, his heirs, executors, administrators, and assigns, or cause the same to be left at his or their usual or last known place of abode or residence, requiring payment of the said sum of 500*l.*, and the interest for the same, or so much thereof respectively as should then remain unpaid; and if the said Stephen Beasley, his heirs, executors, administrators, and assigns, should make a further default in payment of the same, or any part thereof, for the space of three calendar months next after delivery of any such notice as aforesaid, then, and in any such case, it should and might be lawful to and for the said Thomas Major, his heirs and assigns, at any time or times thereafter absolutely to sell, convey, or dispose of the said hereditaments and premises thereby appointed, granted, and released, or intended so to be, either entirely and altogether, or in parcels, by public auction or private contract, or partly by public auction and partly by private contract, to any person or persons willing to become the purchaser or purchasers thereof, for such price or prices, or such sum or sums of money as to the said Thomas Major, his heirs or assigns, should seem proper, with full power and liberty to purchase in the same at any public auction, without liability for any *loss to be [*601] incurred thereby; and for the purpose of any such sale or sales to enter into, make, and execute all such contracts, covenants, and agreements, conveyances, assignments, assurances, deeds, acts, matters, and things, as to the said Thomas Major the elder, his heirs and assigns, should seem reasonable. And it was further agreed and declared, that all such contracts, conveyances, and assurances, made or executed by the said Thomas Major, his heirs or assigns as aforesaid, with or without the concurrence of Stephen Beasley, his heirs or assigns, should be effectual and binding; and that the said Thomas Major should stand possessed of the monies to be produced by such sale, upon trust to pay the costs and expenses thereof; the said sum of 500*l.* and interest; and as to the surplus, upon trust for Stephen Beasley, his heirs, executors, administrators, or assigns. Thomas Major took a further charge of 150*l.* and interest on the same property in October, 1833.

The indentures of the 13th and 14th of September, 1833, whereby the property was conveyed from William to Stephen Beasley, were, by a decree in a creditor's suit, made in 1840, declared to be void, as against the creditors of William Beasley.

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In November, 1841, Thomas Major claimed to be a creditor of Stephen Beasley under the mortgage for the principal and an arrear of interest, making together 693*l.* 17*s.* 6*d.*; and he caused a notice, dated the 24th of November, 1841, to be prepared, requiring Stephen Beasley to pay that amount, and all expenses, on or before the expiration of three calendar months from the date thereof, which was the 24th of November, 1841, or that he Thomas Major should proceed to a sale of the premises according to the powers vested in him by the mortgage deed. This notice was not served
[*602] upon *Stephen Beasley otherwise than by affixing it upon the door of a house, alleged to have been his last known place of abode. On the 18th of November, 1841, before the time mentioned in the notice had expired, Thomas Major entered into the contract for the sale of the property to the defendant at the price of 700*l.*, which contract was the subject of the suit.

Mr. Lee and *Mr. Heathfield*, for the defendant, argued, that after the invalidity of the conveyance to Stephen was declared by the COURT, the notice to Stephen, even supposing it to be well served, would be unavailing, inasmuch as the creditors of William, and not Stephen, were the parties entitled to the surplus proceeds: the power of sale, therefore, had not arisen, and the sale could not be sustained. They contended also, that the title to the allotment, under the Inclosure Act, was dependent upon the title to the lands in respect of which it was allotted, and that, therefore, it was necessary, as a preliminary step, to identify the particular lands in respect of which the allotment was made, and show that there was a good title to those lands in the party from whom the title to the allotment was derived: *Hodgkinson* v. *Cooper* (1).

Mr. Malins and *Mr. Welford*, for the plaintiff.

THE VICE-CHANCELLOR:

After disposing of other objections,

With reference to the objection of the insufficiency of the notice,
[*603] it was said, that after the decree in the *creditors' suit, declaring the conveyance to Stephen void as against the creditors of William, it was not enough that Stephen Beasley should be served, but that the creditors of William Beasley, in whose favour that decree was made, should also have been served. It is admitted that the mortgage to Major, and the power of sale contained in it, were

(1) 9 Beav. 304.

unaffected by that decree. The position of the parties is, in fact, somewhat anomalous. The creditors of William claim, not under, but paramount to, Stephen. There is no privity between William Beasley's creditors, and Stephen's, and those who claim under Stephen. But the title of Major, who claims under Stephen, is paramount to that of the creditors of William. The creditors of William in such circumstances may have a right to redeem, and a right to require Major to account for the proceeds of the sale, but (not claiming under Stephen) they have no right to interfere with the power of sale vested in Major, and which his contract with Stephen gave him. Assuming, then, that Stephen was the only person to whom it was necessary that notice should be given,—was the act, done in the present case, sufficient? I think it was. The power of sale in the mortgage deed made a notice left at the last known place of residence of Stephen, sufficient, and if Stephen left that place vacant, and the door closed, I think, as against him, which (in my view of the case) is the only question, affixing the notice on the door was sufficient, at least to throw the *onus* on the other side of showing that something more should have been done, or why that which has been done is insufficient?

It was also argued, that evidence should have been given that Stephen Beasley was actually living, when notice was affixed on the door. Upon the facts which are before me I think not. The common presumption *is, that life continues; and there is no [*604] suggestion here, that any ground exists for supposing Stephen to have been dead.

The next ground of objection was, that the agreement for sale, being before the expiration of the period fixed by the notice, the sale was void. I do not give any opinion how it would be, if an undervalue or any special circumstance were suggested, calculated to impeach the sale. But here the question is put in the abstract,—that a mortgagee with a power of sale may not,—a day before the power of sale is to arise,—make a conditional agreement with a purchaser that he shall have the estate at an agreed price, if the mortgagor do not redeem it. I cannot go the length of saying such an agreement is, *ipso facto*, void.

The next question is, with respect to the allotment. Now the allotment is not in respect of a right of common appurtenant to other lands. If so the title to the other lands would be material. But this is an allotment by way of substitution for four acres of lands in the common. If the title be good to the four acres for

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which substitution is made, the title to the substituted acres is good also. Now the title to the four acres and the one and a half acre would be clearly good by the effect of time. The theory on which the objection is founded, therefore, must be that the four acres, in respect of which the allotment was made, were other four acres than,—and not included in,—those in the deed of 1784. If upon inspection of the award, it appeared that the whole of the common

[*605] lands were not allotted, *or that any other allotment was made to William Beasley, a question might possibly have been raised on the point. But in the absence of some evidence to raise the question, I cannot presume, which in effect I am called upon to do,—that William Beasley, between the year 1784, and the time of the award, had parted with the common land which he had in the year 1784, and that the four acres, in respect of which the allotment was made, were not the same as those comprised in the deed of 1784. I think the objection cannot be sustained.

IN THE COURT OF COMMON BENCH.

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HOLDEN *v.* THE LIVERPOOL NEW GAS AND COKE COMPANY (1).

1846. *May* 22.

[1]

(3 C. B. 1—15; S. C. 15 L. J. C. P. 301.)

A Gas Company incorporated by Act of Parliament, with the usual powers to take up pavements, &c., for the purpose of laying down and repairing mains, pipes, &c., had for some years supplied gas to a house belonging to the plaintiff; the only means of shutting it off being by a stop-cock within the house, the key of which was kept by the occupier. The last tenant, on quitting, gave notice to the Company that he should not require any further supply; and one of their workmen, at his request, removed a chandelier from one of the rooms, leaving the end of the pipe properly secured. The internal fittings were the property of the plaintiff. Whilst the house remained untenanted, the gas by some unexplained means escaped, and an explosion took place, by which the house was considerably damaged.

In case against the Company, alleging a breach of duty on their part in not taking proper means to prevent the influx of the gas into the house, the Judge having, upon the above facts, directed a nonsuit, the COURT declined to interfere.

Negligence on the part of the plaintiff, was held to be an admissible defence under the plea of Not guilty (2).

CASE. The declaration stated, that the plaintiff, before and at the time of the committing of the grievance by the said Liverpool New Gas and Coke *Company as thereinafter mentioned, was, and [*2] from thence hitherto had been and still was, lawfully possessed of a certain house, with the appurtenances, situate and being in the borough of Liverpool, in the county palatine of Lancaster; that, before and at the time of the committing of the said grievance, the said Liverpool New Gas and Coke Company was possessed of divers large quantities of a certain dangerous, inflammable, and explosive gas, then being under the care of the said Liverpool New Gas and Coke Company: yet the said Liverpool New Gas and Coke Company, well knowing the premises, but disregarding their duty in that behalf, and contriving and wrongfully and unjustly intending

(1) The case seems to have been decided on three grounds, namely, (1) that there was no breach of duty on the part of the defendants; (2) that if there was any breach of duty it did not conduce to the accident; (3) that the plaintiff was guilty of contributory negligence. On the first and second points the burden of proof is on the plaintiff; but it seems that as regards contributory negligence, the burden of proof was on the defendants, and the question ought to have been left to the jury: see *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (1878) 3 App. Cas. 1155, 1175; *Wakelin* v. *L. & S. W. Ry. Co.* (1886) 12 App. Cas. 41; 56 L. J. Q. B. 229.—J. G. P.

(2) See per Lord PENZANCE in *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery*, 3 App. Cas. 1155, at p. 1178.—J. G. P.

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to injure and prejudice the plaintiff in the possession and enjoyment of his said house, and to injure the said house, theretofore, to wit, on the 1st of April, 1844, wrongfully and injuriously took such little and bad care of their said gas, that, by reason of the carelessness, negligence, and improper conduct of the said Company in that behalf, divers large quantities of the said gas of the said Company wrongfully and unlawfully then passed, diffused, and spread itself towards, unto, into, and about the said house of the plaintiff, and then caught fire, and exploded therein: by means of which premises the said house of the plaintiff was then greatly damaged, shaken, burnt, and injured, and then became and was out of repair and dilapidated, and the plaintiff was thereby prevented from enjoying the same, as he otherwise might have [*3] done and ought to have done, for *a long time, to wit, six months then next following, and was also deprived of great gains and profits, to wit, 100*l.*, which he would have otherwise derived from letting the said house during the last-mentioned period, and was also forced and obliged to, and necessarily did, pay, lay out, and expend divers large sums of money, in the whole amounting to a large sum, to wit, 500*l.*, and was also forced and obliged to, and necessarily did, contract and become liable to pay divers other sums of money, in the whole amounting to another large sum, to wit, 500*l.*, in and about repairing the damage so done as aforesaid.

Pleas: first, Not guilty—secondly, that the plaintiff was not possessed of the house in the declaration mentioned, *modo et formâ*. Issue thereon.

The cause was tried before Cresswell, J., at the last Summer Assizes at Liverpool. The facts that appeared in evidence were as follow: The plaintiff was the owner of a dwelling-house in Salisbury Street, Liverpool; and, whilst in his own occupation, in the year 1826, he caused it to be supplied with gas from the works of the Liverpool New Gas and Coke Company, which was incorporated by Act of Parliament (1), with extensive powers for taking up pavements, &c., for the purpose of laying down and repairing their mains and pipes (2). The mode of supplying gas to the different houses, was by an iron pipe from the main in the street, through the outer wall of the house, and thence through a meter, between which and the wall was a stop-cock, to admit or exclude the passage

(1) 4 Geo. IV. c. xxxix.

(2) The 49th section enacted that it should be lawful for the Company of Proprietors to dig and sink trenches and drains, and to lay pipes, and put and affix stop-cocks and plugs, &c.

of the gas to the meter and thence to the burners, at the pleasure of the occupiers, in whose possession the key of the stop-cock was. It appeared that the Company had no *external means of cutting off the gas from the houses supplied by them, except by the removal of the pipes from the main; stop-cocks on the outside of the houses having been disused since meters were first introduced, which was before the Company in question was formed. Two persons in the employ of other Gas Companies—the one at Liverpool, the other at Manchester—were called to prove that the course usually adopted by them, with regard to empty houses, was, to intercept the supply by means of stop-cocks on the outside, or by taking up the pavement and removing the pipes: but, on cross-examination, it appeared that these two Companies were established before the meter had come into general use. [*4]

In October, 1831, the plaintiff ceased to reside in the house in Salisbury Street; since which time it had been in the occupation of several tenants in succession; the Company continuing to supply gas to such tenants down to the time of the happening of the accident hereinafter mentioned. Mr. Withnell, the last tenant, who entered at Lady Day, 1842, quitted at Lady Day, 1844, previously to which day, he gave notice to the Company that he was about to vacate the premises, and would not be liable for any further supply of gas thereto. At the time Withnell quitted the house, a workman in the employ of the Company, at his request, and by the direction of the Company's foreman, went there for the purpose of taking down a chandelier in the dining-room, and a lamp in the hall, which were the property of Withnell, and which were carried to and fixed by the Company in the house to which Withnell had removed. This person, when he unfixed the chandelier and lamp, properly secured the ends of the pipes with metal caps screwed on with white lead, and left all safe. The stop-cock and meter used in the house in question, were the property of the plaintiff.

On the 8th of April, by some unexplained means, *nothing having previously occurred to indicate danger (1), an explosion of gas took place in the plaintiff's house, which occasioned considerable damage [*5]

(1) It was in evidence, that the occupier of the adjoining house, between seven and eight o'clock in the evening of that day, being annoyed by a smell of gas on his own premises (of which he had given immediate notice to the Company, requesting them to send some one next day to ascertain whence it escaped), went to the cellar for the purpose of turning off his own supply, having a lighted candle with him; and that the explosion in the plaintiff's house took place at that instant.

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thereto. Upon a subsequent examination of the premises, it appeared that the gas was turned on, and that the internal supply pipes had been torn or cut from the meter, and carried away. How this had occurred, there was no evidence to show; but it was assumed to have been the act of some person who had feloniously entered the house after Withnell, the last tenant, had quitted it.

It was contended, on the part of the plaintiff, that it was the duty of the Company, upon the receipt of a notice from the tenant that he no longer required the gas, to take effectual means to prevent it from entering the house; that, after such notice, they had no right to send their gas upon the premises; and that, if for the purpose of prevention, it was essential that there should be a stop-cock outside the house, they were bound by law to provide it.

The learned Judge,—conceiving that no such duty was cast upon the defendants, but that it was the duty of the landlord, or of the outgoing tenant, who had the means of controlling the influx of the gas, by the internal stop-cock, to see that it was properly turned off, —directed a nonsuit. "I have always," observed his Lordship, "understood it to be a principle applicable to actions for negligence, that there should be no negligence or want of reasonable caution on the part of the plaintiff. In this case, the tenant of the house [*6] must for this purpose *be identified with the plaintiff himself, who must be responsible for not taking care that the stop-cock inside the house was properly turned (1). Inasmuch, therefore, as the plaintiff's own negligence in leaving the stop-cock open, undoubtedly contributed in a material degree to the accident—or, indeed, entirely occasioned it—I think the action cannot be maintained."

Sir T. Wilde, Serjt., in Michaelmas Term last, obtained a rule *nisi* for a new trial, against which

Channell, Serjt. (with whom was *Crompton*), showed cause:

The defendants have been guilty of no negligence. They had no control over the pipes in the plaintiff's house; nor is there any thing in the Act of Parliament by which they are incorporated, that imposes upon them any such duty as that with which it is sought to charge them in this action. The notice given to them by the

(1) If the defendants had called witnesses, this difficulty would, in all probability, have been obviated; for, it can hardly be supposed that their workman, — who would have been called to prove that, on removing the chandelier and lamp, he properly secured the ends of the pipes,—when he did so, neglected to turn off the gas at the meter.

tenant was intended merely to intimate to them that they were not to charge him for any further supply of gas to those particular premises: it was not a notice to them to remove the pipes. The internal fittings being the property of the plaintiff, it was his duty to have some one to take care of the house, and to see that the stop-cock, which was solely under his control, was properly turned. He has, therefore, at all events, been so far contributory to the injury of which he complains, as to preclude him from charging the defendants. The case falls precisely within the rule of law laid down by PARKE, B., in *Bridge* v. *The Grand Junction Railway* *Company (1). * * * [*7]

Sir T. Wilde, *Talfourd*, and *Manning*, Serjts. (with whom was *John Henderson*), in Hilary and Easter Terms, *were heard in support of the rule: [*8]

The defence now relied on was not admissible under the pleas here pleaded. * * The doctrine laid down by Lord ELLENBOROUGH in *Butterfield* v. *Forrester* (2), and recognised by this Court, though with little discussion, in *Marriott* v. *Stanley* (3), cannot be sustained to its full extent, and is inconsistent with the subsequent case of *Smith* v. *Dobson* (4). * * *

(CRESSWELL, J.: That is not necessarily inconsistent with the doctrine of *Butterfield* v. *Forrester*. [9]

MAULE, J.: In the Admiralty Court, if two ships have come into collision without fault on either side, or with an equal degree of negligence on the part of those in charge, the owners of each are made to bear the costs of repairs in equal proportions.)

[They cited *Lynch* v. *Nurdin* (5).] In the present case, the evidence clearly established a *primâ facie* case of negligence against the defendants. They are a Company incorporated for their own benefit, with ample powers in derogation of the rights of the public; having under their management and control a dangerous and insidious fluid, which it was their duty so to deal with, by all reasonable means in their power, as to guard against the possibility of injury to the public. Their right to let in this inflammable gas to the plaintiff's *house was co-extensive only with the term for which [10] [*11]

(1) 49 R. R. 590 (3 M. & W. 244).
(2) 10 R. R. 433 (11 East, 60).
(3) 1 Man. & G. 568; 1 Scott, N. R. 392.
(4) 60 R. R. 451 (3 Man. & G. 59).
(5) 55 R. R. 191 (1 Q. B. 29; 4 P. & D. 672).

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their customer held it. The moment they received notice from him that he no longer required to be supplied with gas at that place, the Company's right to introduce it there ceased, and it became their duty to prevent its influx therein.

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(TINDAL, Ch. J.: The evidence shows that there is a stop-cock inside the house, under the control of the owner or occupier, and that the internal fittings are the property of the plaintiff: was no duty cast upon him to protect himself?)

If there was evidence that the plaintiff had been guilty of negligence that was in any degree conducive to the injury complained of, that should have been submitted to the jury. There was, however, nothing to show that there had been any want of due caution on his part; and he clearly cannot be held responsible for the acts of persons who might furtively and without his consent or privity have come upon the premises. The Company were bound to furnish themselves with adequate means to intercept the supply from the outside of the house, if the safety of the public required it. * *
[12] The defendants *primâ facie* are wrongdoers. They had no right, by the unauthorized introduction of their gas into the plaintiff's house, to impose upon him the exercise of any degree of care.

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the Court:

The plaintiff in this case having been nonsuited on the trial of the cause before my brother Cresswell at the Liverpool Assizes, a rule to show cause was granted why such nonsuit should not be set aside and a new trial had, on the ground of misdirection.

The declaration stated that the plaintiff was possessed of his house, and the defendants possessed of large quantities of dangerous gas; yet the defendants took so little and such bad care of the gas, that it passed into the house and exploded, and damaged the
[*13] plaintiff's *house: and, upon the issue of not guilty, the learned Judge ruled, on the evidence brought forward, that the injury was not occasioned by the breach of any duty cast by law on the defendants, and directed the plaintiff to be called. And we think, upon the facts proved at the trial, such direction was right.

The plaintiff was the owner of the house, which had been let out to successive tenants, the last of whom had been in possession for about two years; the house having been supplied with gas by

the defendants during the whole time of his tenancy, by means of pipes and fittings which had been put up and fixed within the house at the expense of the plaintiff, the landlord, and which were his property. The last tenant had quitted the house about ten days before the explosion took place, and, previously to his quitting, he had given notice to the Company that no further supply would be wanted by him, and had requested them to remove a lamp in the drawing-room which was his property, which had been accordingly done by their servants on the 28th of March, when the pipe which fed the lamp was left properly capped, and when there was no smell of gas in the house. No explanation was given as to the mode in which the escape of the gas, or the explosion, which took place on the 8th of April, was occasioned; but it might fairly be inferred that the inside pipe, between the gas-meter and the burner, had been broken or cut by some wrong-doers who had entered the house whilst it was empty, during the interval between the two days above mentioned.

The mode by which the gas was supplied to the house, was by a pipe from the Company's main in the street, which passed through the outer wall into the meter, and from thence supplied two lamps in the house, by feeders, with proper stop-cocks at the mouth of each. There was a stop-cock to the pipe between *the inside of [*14] the wall and the meter, of which the tenant had the key, and could thereby either stop the gas entirely, or admit it for such time as was required. But the Company had no stop-cock to the pipe on the outside of the wall.

On the part of the plaintiff, it was contended that it was the duty of the defendants, upon notice by any tenant of a house that the supply of gas was no longer wanted, to turn off the gas immediately from the house; that they had no right to introduce the gas into the house after such notice; and that, if an outer stop-cock in the street was absolutely necessary for turning off the gas, it was their duty to have provided such stop-cock accordingly. And, undoubtedly, if such duty was cast by law on the defendants, the direction of the learned Judge was wrong, for no such outer stop-cock was provided.

But, upon looking at the Act under which this Company was formed, no such direction appears to be given to the Company by the Legislature; although it appeared in evidence that a different Company formed for the supply of gas in the same town, had in fact made use of outer stop-cocks in the street. And we have no

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authority, as it appears to us, to say, that, as the Legislature is silent on this point, the common law would impose this precise duty on the defendants, or any other duty than that which is expressed in the declaration, namely, the general duty of using proper and sufficient care in the supply of gas.

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Now, looking at the liability of the defendants in this point of view, it appears to us that the injury sustained by the plaintiff is not solely imputable to the want of due care on the part of the defendants, but that the plaintiff has, by his own voluntary act, been contributory to it himself. The plaintiff knew that the pipe [*15] which brought gas into the house, still remained as *before, with the stop-cock in the inside of the house, which would prevent the gas being supplied to the house if properly turned; and the house, being without a tenant, was under his own charge and care. We think, therefore, the plaintiff was himself wanting in the ordinary care of seeing that the stop-cock in the inside was closed, which would have effectually prevented the gas from escaping. And this defence appears to us to have been clearly admissible under the general issue, according to the decision in *Bridge* v. *The Grand Junction Railway Company* (1).

We therefore think the nonsuit right, and that the rule for setting it aside must be discharged.

Rule discharged.

1846. *May* 22.

POWLES *v.* PAGE (2).

(3 C. B. 16—31; S. C. 15 L. J. C. P. 217.)

[16]

A., B., C., and D., who carried on business under the firm of G., P., & Co., in 1840 opened an account with a Banking Company established under the 7 Geo. IV. c. 46, 1 & 2 Vict. c. 96, and 5 & 6 Vict. c. 85. In 1842, A. retired from the firm, but this fact was not advertised in the *London Gazette*, nor was any alteration made in the pass-book:

Held, that the mere fact of D., one of the firm of G., P., & Co., being also a director of the Banking Company (but having as such no share in the management of or interference in the banking accounts), did not amount to notice, actual or constructive, to the Bank, of the dissolution, so as to discharge A. in respect of a debt subsequently accruing, a Banking Company so established, differing in this respect from an ordinary trading partnership.

ASSUMPSIT, to recover the sum of 2,400*l.* 1*s.* 4*d.*, with interest from the 7th of November, 1843, being the balance of a banking

(1) 49 R. R. 590 (3 M. & W. 244; *S. C.* 6 Dowl. P. C. 340).

(2) Judicially cited in *Swift* v. *Winterbotham* (1873) L. R. 8 Q. B. 250, 42 L. J. Q. B. 111; *S. C.* L. R. 9 Q. B. 301, 43 L. J. Q. B. 56.—J. G. P.

account. The declaration contained counts for work, and labour, and commission, and the usual money counts.

The defendant pleaded, first, *non assumpsit*; secondly, payment; thirdly, that the defendant was sued as one of a co-partnership, trading under the name of Grantham, Page, & Co., consisting of the defendant, John Grantham, John Philips Mather, and William Dixon, and that the said co-partnership had a set-off against the Banking Company; fourthly, that the defendant retired from the said co-partnership, which was thenceforth carried on under the firm of John Grantham & Co., and that there was an agreement between all the members of the firm of Grantham, Page, & Co., and the Banking Company, that the Banking Company should accept the firm of John Grantham & Co. as their debtors for the sum due from Grantham, Page, & Co., and exonerate and discharge the defendant from all liability for such sum, and that such agreement was performed; fifthly, as to 3,177*l.* 6*s.* 4*d.*, accord and satisfaction, by the delivery of two bills of exchange, amounting to that sum.

The replication joined issue on the first plea, traversed *the second and third pleas, and the agreement and performance of it mentioned in the fourth plea, and the agreement to accept, and the receipt of, the bills mentioned in the last plea. Issue on the traverses. [*17]

The particulars of demand comprised all the items on the debit side of the account of Grantham, Page, & Co., from the opening to the closing of their account with the Bank.

The cause came on to be tried before Tindal, Ch. J., at the sittings for London after Hilary Term, 1844, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:

The plaintiff is one of the public officers of the Liverpool Banking Company, carrying on business at Liverpool under the 7 Geo. IV. c. 46, and, in that capacity, sues the defendant for the balance of a banking account, alleged to be due to the Bank from the defendant and his late partners, who traded in Liverpool under the firm of Grantham, Page, & Co. The partnership was created by parol, and for no definite period: and it is alleged by the defendant to have been dissolved, as to him, on the 6th of January, 1842, as after mentioned.

The firm consisted of four persons, viz. the defendant, John Grantham, John Philips Mather, and William Dixon, and carried on the business of iron-boat builders, in Liverpool. John Grantham

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was the party who usually transacted business with the Bank. When the account of Grantham, Page, & Co. was opened, it was understood that Grantham alone was to draw the cheques; the defendant on several occasions being present when Grantham drew cheques in the name of the firm, and occasionally accompanying him to the Bank. The defendant, who was a skilful artisan, but could neither read nor write, had the principal management of the works. The account of Grantham, Page, & Co. was opened on the 4th of February, 1840. On the 2nd of July, 1842, a separate [*18] account was opened in another *pass-book between the Bank and the firm of John Grantham & Co., which consisted of all the members of the firm of Grantham, Page, & Co., with the exception of the defendant Page.

The firm of John Grantham & Co. failed in July, 1843, at which period they owed the Bank the sum of 3,000*l.*, which was independent of the amount of the two bills of exchange accepted by John Grantham & Co. on account of the balance due from Grantham, Page, & Co., as hereinafter stated.

There was also a firm of Page (the defendant) and Grantham (which was dissolved in June, 1842, a notice of the dissolution of which appeared in the *Gazette* on the 5th of July, 1842), and another firm of Mather, Dixon, and Grantham, who carried on business in Liverpool as iron-founders and steam-engine makers, and, after June, 1842, as boiler-makers, having succeeded to the business of Page and Grantham, after the dissolution of that firm: but they had no account with the bank. The Grantham appearing as a member of those firms, was the same Grantham who was a member of the firms of Grantham, Page, & Co., and John Grantham & Co.

On the 31st of December, 1841, the balance due to the Bank from the firm of Grantham, Page, & Co. was 1,334*l.* 5*s.* 1*d.*; and between the 6th of January and the 15th of April, 1842, there had been payments into the Bank to the amount of 1,700*l.*; but sums to an equal or larger amount had been from time to time drawn out: and the Bank, during the same period, continued paying the acceptances of Grantham, Page, & Co. which had been given and dated prior to the 6th of January, 1842; and all the bills so paid were entered in the pass-book of Grantham, Page, & Co. No proof was given that Grantham, on paying the last-mentioned sums so amounting to 1,700*l.* into the Bank, directed them to be appropriated to the discharge of any particular items.

The balance appearing due in the pass-book, which *was produced by the defendant on the plaintiff's requisition, and given in evidence by the plaintiff, from Grantham, Page, & Co., on the 30th of June, 1842, was 2,857*l.* 6*s.* 2*d.*, which, with the additional advance of the 155*l.* after mentioned, and interest and commission, amounted, on the 31st of December, 1842, to 3,177*l.* 6*s.* 4*d.* The usage of the Bank was, to balance all customers' accounts half-yearly, on the 31st of December and the 30th of June. [*19]

Frequent applications had been made by the Bank to Grantham, as a member of the firm of Grantham, Page, & Co., in the year 1842, to reduce the balance due to the Bank from that firm; and, on being threatened with legal proceedings in December, 1842, unless the balance were liquidated, he wrote requesting a small advance of money from the Bank to enable the firm to pay their workmen's wages, and promising to make arrangements to liquidate the balance then due. At an interview between Grantham and Mr. Wilson, the manager of the Bank, the latter complained that the firm of Grantham, Page, & Co. were, by not liquidating their account, holding a portion of the capital of the Company in suspense, which could not be allowed; on which Grantham proposed to give the Bank two bills drawn by Mather, Dixon, & Co., upon, and accepted by, John Grantham & Co., on account of the balance then due to the Bank, stating that by the time those bills should have become due the funds of Grantham, Page, & Co. could be collected, so as to meet the bills. Wilson agreed to receive such bills, at five, six, or seven months, as might be convenient. It was not proposed by Grantham to discharge Page; nor was any proposal to that effect ever made, either before or after the giving of the bills. The bills were delivered to the Banking Company on the 13th of January, 1843, and were made payable at Messrs. Currie & Co., bankers, the London correspondents of the Liverpool Banking Company. These bills were agreed *to be drawn for the balance of the banking account, with interest for the time they had to run; but there was a slight miscalculation as to the amount. The first of the two bills was dated the 2nd of January, 1843, drawn by the firm of Mather, Dixon, and Grantham, upon, and accepted by, the firm of John Grantham & Co., and due on the 5th of June, 1843, for 1,587*l.* 6*s.* 4*d.* The second was drawn and accepted by the same parties, dated on the 2nd of January, 1843, and due on the 5th of August, 1843, for 1,590*l.* The first bill was negotiated by the Bank; but it was retired by the Bank, who, when [*20]

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it became due, paid it, having previously taken a renewal, at the request of John Grantham, who made no communication upon the subject to the defendant. The renewed bill was also dishonoured, as also was the second of the above bills, viz. that for 1,590*l.* due on the 5th of August, 1843. On the 8th of that month, above a month after the failure of the firms of John Grantham & Co., and Mather, Dixon, & Co., Wilson wrote to the defendant, informing him of the dishonour of the bills, and telling him that the Bank would hold him liable for the amount due to them from the firm of Grantham, Page, & Co. In consequence of this letter, the defendant a few days afterwards called on Wilson, at the Bank, and told him that the firm of Grantham, Page, & Co. had been dissolved, and that the defendant was consequently not liable; to which Wilson replied, that, though they had dissolved partnership, he must pay the debts of the partnership: the defendant represented that his case was a hard one; to which Wilson replied that he was sorry for it, but his duty to the Bank prevented his taking that into his consideration.

The firm of Mather, Dixon, & Co., having stopped payment early in July, 1843, entered into a composition with their creditors, and paid a dividend of 5*s.* in the pound: and the Bank, in pursuance of an agreement with Page, the defendant (which accom-

[*21] panied and was *to be considered as part of the case), entered into the composition deed, and received under the composition deed the sum of 794*l.* 19*s.* 4*d.*; and the balance claimed by the Bank in this action, after deducting that amount, remains unpaid. Two further sums of 2*s.* and 1*s.* in the pound have been paid since this action was tried. Interest is claimed by the Banking Company on the balance due, from the 31st of December, 1844, after giving credit for the above-mentioned two dividends.

On the 6th of January, 1842, by agreement and arrangement between the defendant and his former partners, John Grantham, John Philips Mather, and William Dixon, early in the same month, that the defendant should quit the firm of Grantham, Page, & Co., the following memorandum, signed, at the office of Grantham, Page, & Co., by the said John Grantham, John Philips Mather, and William Dixon, was delivered to the defendant, and accepted by him:

"LIVERPOOL, 6th January, 1842.

"MR. JOHN PAGE,—We hereby release you from the partnership which existed between us and you in the iron-ship building yard,

carried on under the name of Grantham, Page, & Co. In consideration of your giving up all claim to the property belonging to the said establishment, we hereby engage to pay you the sum of 200*l.* at the expiration of two years from this date.

(Signed) "JOHN GRANTHAM.
"JOHN P. MATHER.
"WILLIAM DIXON."

This was the only document that was executed between the parties. The above 200*l.* has never yet been paid; but, early in July, 1842, the defendant came to the Bank in company with Grantham, and paid in 500*l.* in cash and some bills to his private account, saying that *they were a portion of what had been repaid [*22] to him from the firm of Grantham, Page, & Co.

Shortly after the above memorandum had been signed, the style of the firm of Grantham, Page, & Co., was altered to "John Grantham & Co.," in the cards and invoices; and the name of Page was in the same month of January, 1842, blacked out from the inscription "Grantham, Page, & Co.," over the door where the business of the firm was carried on. No notice of the dissolution appeared in the *Gazette*, nor was any balance struck in the partnership accounts; nor was any account taken of Grantham, Page, & Co.; nor was any change ever made in the pass-book of Grantham, Page, & Co., to Grantham & Co. The last cheque on the Banking Company drawn by John Grantham in the name of Grantham, Page, & Co., was drawn on the 2nd of July, 1842, for 55*l.*, and was paid by the Bank.

Dixon, one of the partners of the firm of Grantham, Page, & Co., was also a holder of thirty shares in the Liverpool Banking Company, and a member of the general board of directors from March, 1841, till April, 1843, and attended the weekly meetings of the directors; but his being a director gave him no management of, or interference in, the banking accounts, which, together with the business of the Bank, were managed by Wilson, (who was not a shareholder), with the concurrence of three managing directors, of whom Dixon was not one. Dixon never mentioned to any of the directors of the Bank that the firm of Grantham, Page, & Co. had been dissolved, or that Page had retired.

On the 15th of April, 1842, a bill for 1,000*l.*, drawn by John Grantham & Co., was paid into the Banking Company.

The defendant contended, at the trial, that Dixon's knowledge of the alleged dissolution of the firm of Grantham, Page, & Co.,

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operated as notice to the *Banking Company. No question of fact was submitted to the jury; but it was agreed that the Court should
[*23] have the power to draw any inference which a jury might have drawn, and should direct how the verdict should be entered; and, if for the plaintiff, for what amount.

Copies of the pleadings, and of the pass-book of Grantham, Page, & Co., and the agreement above mentioned, accompany, and are to be considered as part of, the case, and to be referred to accordingly.

The questions for the opinion of the Court are, whether the verdict should be entered for the plaintiff or the defendant, and on what issues; and, if for the plaintiff, for what amount.

Channell, Serjt. (with whom was *Warren*), for the plaintiff (1). * * *

[26] *Byles*, Serjt. (with whom was *Tomlinson*), for the defendant. * * *

[28] *Channell*, Serjt., was heard in reply.

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the COURT:

This was an action of assumpsit, brought to recover the balance of a banking account. The declaration contained counts for work and labour and commission, and the money counts. The defendant pleaded, first, *non assumpsit;* secondly, payment; thirdly, that the defendant was sued as one of a co-partnership trading under the name of Grantham, Page, & Co., consisting of the defendant, John
[*29] Grantham, John Philips Mather, *and William Dixon, and that the said co-partnership had a set-off against the Banking Company; fourthly, that the defendant retired from the said co-partnership, which was thenceforth carried on under the firm of John Grantham & Co., and that there was an agreement between all the members of the firm of Grantham, Page, & Co., and the Banking

(1) The points marked for argument on the part of the plaintiff were: That the special case disclosed no evidence of notice to the Liverpool Banking Company of the alleged dissolution of the firm of Grantham, Page, & Co., the knowledge of such supposed fact by Dixon, under the circumstances stated, not amounting in law to notice thereof to the Company; that none of the defendant's pleas were supported by the facts set forth in the special case; and that the plaintiff was entitled to have the verdict entered generally for him, for the balance of 2,400*l.* 1*s.* 4*d.*, and interest, subject to the deduction mentioned in the special case.

Company, that the Banking Company should accept the firm of John Grantham & Co., as their debtors for the sum due from Grantham, Page, & Co., and exonerate and discharge the defendant from all liability for such sum, and that such agreement was performed; fifthly, as to 3,177*l.* 6*s.* 4*d.*, accord and satisfaction by the delivery of two bills of exchange amounting to that sum. The replication joined issue on the first plea, traversed the second and third, denied the agreement and the performance of it mentioned in the fourth plea, and also the agreement to accept, and the receipt of the bills mentioned in the last plea.

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The case came on to be tried before me at the sittings in London after Hilary Term, 1844; when it was agreed between the parties that no question should be submitted to the jury, but that the facts should be stated in a special case for the opinion of the Court, and that the Court should have power to draw any inference which a jury might have drawn, and should direct how the verdict should be entered on the several issues joined. The case was argued before us during the last Term; and the Court took time to consider the several points which were then discussed. The principal question in the case was, whether the Banking Company had either actual or constructive notice of Page's withdrawal from the firm of Grantham, Page, & Co., before the debt now sought to be recovered was contracted. We think it clear that the facts stated in the case do not warrant the inference that the Banking Company actually knew of the dissolution of partnership between Page *and his [*30]
co-partners; and, indeed, it was hardly contended by my brother *Byles* that such an inference could fairly be drawn. But his main argument was, that, as Dixon, one of the firm of Grantham, Page, & Co. was a shareholder in the Liverpool Bank, what he knew must, in point of law, be considered as known to the Banking Company. It has been held that notice to the principal is notice to the agent, because it is the duty of the principal to give notice to his agent: *Mayhew* v. *Eames* (1). In like manner, notice to the Bank of England in London, has been held to operate as notice to their branch Banks; at all events, from the time when information of it could be transmitted to them: *Willis* v. *The Bank of England* (2). But those cases are obviously distinguishable from the present: the Banking Company and its individual shareholders cannot be considered as bearing the relation to each other of principal and

(1) 27 R. R. 427 (3 B. & C. 601; 5 Dowl. & Ry. 484; 1 Car. & P. 550).

(2) 43 R. R. 282 (4 Ad. & El. 21; 5 Nev. & M. 478).

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agents. The cases of *Porthouse* v. *Parker* (1) and *Jacaud* v. *French* (2) bear a greater resemblance to the present; for, in those cases, it was held, that, where a firm consists of several persons, the knowledge of one is the knowledge of all. And, such being the established rule of law, the real question in this case is, whether Dixon is or is not to be considered as a member of an ordinary banking co-partnership; for, if he is, the knowledge acquired by him in the firm of Grantham, Page, & Co. would be binding upon him and his co-partners in the banking concern, and they could not sue Page for a debt contracted by Grantham, Page, & Co. after Dixon knew that he, Page, had withdrawn from that firm. But we are of opinion [*31] that a joint-stock Banking Company, established under the *provisions of the 7 Geo. IV. c. 46, and 1 & 2 Vict. c. 96, and suing in the name of a public officer, is not to be considered as an ordinary co-partnership, but a *quasi* corporate body, and that such joint-stock Company is not affected by that which may be known to any individual shareholder. The public officer represents a fluctuating body, and sues for the existing body of shareholders, who may be different persons from those who were so at the time when the cause of action accrued. And this opinion is confirmed by what fell from Mr. Baron PARKE in *Steward* v. *Dunn* (3), although it was unnecessary to decide the point in that case. It was pressed upon us, in the course of the argument, that, even assuming that to be the law in general, yet, as Dixon was a member of the board of directors, the Company must be affected by that which was known to him: but, as the case states that he had not, as a director, any management of, or interference in, the banking accounts, we think that the circumstance of his being a director makes no difference in this respect.

The plaintiff, then, is entitled to a verdict upon the first issue, on *non assumpsit;* and, as it appears to us that the facts stated do not make out any of the defendant's special pleas,—as to which, indeed, no argument was offered before us,—the verdict must be entered generally for the plaintiff, for the balance sought to be recovered.

Postea to the plaintiff.

(1) 10 R. R. 637 (1 Camp. 82).
(2) 11 R. R. 390 (12 East, 317).
(3) 12 M. & W. 664. "Since that Act, a Company of this kind is in the nature of a corporation, not an ordinary co-partnership suing jointly; so that notice to one of its members is not notice to all." *S. C.* 1 Dowl. & L. 642, 649.

POTT AND OTHERS *v.* EYTON AND JONES (1).

1846. *May* 22.

(3 C. B. 32—41; S. C. 15 L. J. C. P. 257.)

[32]

A., who was concerned in a colliery, in the year 1830, built and stocked a general shop in its neighbourhood, for the purpose of supplying goods to the workpeople, placing B. there to conduct the business; A. receiving for his own use 7 per cent. upon the amount of the gross sales made to the miners; and B. taking all the rest of the profits of the concern, from whatever source derived. A.'s name appeared over the shop door, and in the excise licences; and, down to the year 1834, all the goods supplied to the shop were purchased and paid for by or in the name of A. In that year it was agreed between A. and B., that the latter should thenceforward buy all goods that were required for the shop, and that the former should receive only 5 per cent. upon the amount of sales to the miners. After this new arrangement had been come to, B., who had several other shops, opened an account with a Bank at Holywell, and, on the failure of the Bank in 1839, there was a balance due to the bankers on that account exceeding 2,000*l*. There was no evidence to show that credit was in fact given to A. by the Bank, or that they were aware that his name had been placed over the shop door, or that they supposed him to be a partner at the time the debt was contracted.

In an action by the assignees of the bankers against A. and B., to recover the balance, the jury having negatived the existence of an actual partnership between A. and B., or that A. had, with his own permission, been held out as a partner, the COURT refused to disturb the verdict.

ASSUMPSIT for money paid, &c., by the bankrupts before their bankruptcy. The defendant Jones suffered judgment by default; the defendant Eyton pleaded *non assumpsit*, and several special pleas, which it is unnecessary to notice.

At the trial before Tindal, Ch. J., at the sittings in London after last Michaelmas Term, it appeared, that, in 1828, the defendant Eyton was concerned in a colliery at Mostyn, in Flintshire; and an agreement was entered into between him and Jones for opening a tally shop at Mostyn Quay (not far from the colliery), principally with *a view of supplying goods to the workmen at the [*33]
colliery. Eyton built the shop, and his name was placed over the door; licences to sell tea, &c., were taken out in his name; and the invoices for goods that were supplied to the shop, were made out in Eyton's name, who paid for the same. Jones managed the shop. The workmen at Eyton's colliery were supplied with goods from it, for which they settled at the colliery when their wages were paid, until the truck system was abolished in 1831. From

(1) So much of the case as turned on the question whether the receipt by the defendant of a percentage of the gross amount of the sales constituted him a partner is now omitted, as being of no importance since *Cox* v. *Hickman* (1860) 8 H. L. C. 268, and the Partnership Act, 1890 (53 & 54 Vict. c. 39, s. 2).—J. G. P.

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that time Eyton's workmen made their payments at the shop once a fortnight. Jones paid over to Eyton the principal part of the money taken at the shop, as he paid for the goods, but reserved sufficient for such small payments as were usually made at the shop. Eyton received for his own use 7*l.* per cent. on the amount of all sales to his workmen; and Jones had all the rest of the profits of the concern, from whatever source derived. In 1834, a change was made in the arrangements between Eyton and Jones. The latter was thenceforth to buy in his own name all goods supplied to the shop, and receive payment for all goods sold; and Eyton was to receive 5*l.* per cent., instead of 7*l.* per cent., on the amount of sales to his workmen. Eyton objected to his name remaining over the door; but Jones said, that, if he was not allowed to retain it, he could not pay the 5*l.* per cent.; and the name remained over the door till October, 1840, when a fire occurred, which put an end to the business. In 1834, when Jones began to buy goods, he opened an account with the bankrupts, who were bankers at Holywell. The Bank failed in 1839, and at that time there was a balance exceeding 2,000*l.* due to it on that account. Besides the shop at Mostyn Quay, Jones, after 1834, opened three others at other places, which he carried on in his own name, and on his own account; and he supplied them with goods from the shop at Mostyn Quay.

[*34] There was no evidence to show that credit was in *fact given to Eyton by the bankers, or that they knew that his name had appeared over the door of the shop at Mostyn Quay, or in the licences, or that they ever supposed him to be a partner. Two individuals were in Court who had been in the employ of the Bank during the currency of the account, the one as manager, the other as clerk; but they were not called as witnesses, the plaintiffs resting their case solely upon the evidence of Jones.

On the part of the plaintiffs, it was insisted that they were entitled to recover against Eyton the balance due to the bankrupts at the time of their bankruptcy, on the ground that he was either an actual partner with Jones in the shop at Mostyn Quay, by taking a share of the proceeds, or had been so held out as a partner, with his own permission, as to enable Jones to pledge his credit.

The learned Judge left it to the jury to say—first, whether there had been a sharing of profit and loss between Eyton and Jones after the account was opened with the Bank in 1834, so as to constitute an actual partnership between them; secondly, whether Eyton had

been, by his own permission, held out as a partner, and his credit pledged to the Bank. POTT v. EYTON.

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The jury, answering both these questions in the negative, returned a verdict for the defendants.

Sir T. Wilde, Serjt., in Hilary Term last, obtained a rule *nisi* for a new trial, on the ground that the verdict was against the evidence.

Channell, Serjt., in Easter Term, showed cause. * * *

Sir T. Wilde, Serjt. (with whom was *Archbold*), in support of the rule. * * * [35]

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the COURT— recapitulating the facts (*ut suprà*, pp. 271—2): [38]

On this state of facts, it was contended for the plaintiffs, that they were entitled to recover the balance against Eyton, as having been in partnership with Jones. I left it to the jury to say whether there was a sharing of profit and loss between Eyton and Jones after the account was opened; and, if not, whether Eyton was, by his own permission, held out as a partner, and credit given to him by the bankrupts. The jury answered both questions in the negative, and returned a verdict for the defendant. In Hilary Term, a rule *nisi* for a new trial, on the ground that the verdict was against the evidence, was granted; which rule in the course of the last Term *was fully argued. Our judgment was deferred, in order that we might carefully examine the evidence given at the trial; and, having done so, we cannot find any ground for disturbing the verdict. [*39]

There was no evidence to show that credit was in fact given to Eyton, or that the bankers knew that his name was over the door of the shop at Mostyn Quay, or that they supposed him to be a partner. One person who had been manager, and another who had been a clerk, in the Bank, were in Court; and, if they could have given such evidence, they would no doubt have been called as witnesses. We must assume, therefore, that credit was given to Jones alone; and, if Eyton is to be made liable, that must be on the ground of an actual partnership between himself and Jones.

[His Lordship then dealt with the question whether there was an actual partnership by reason of the defendants' taking a share of the profits, and concluded:] It appears to us, that, in the present case, the payment to Eyton was in the nature of commission on certain sales supposed to be effected through his influence over his [40]

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workmen, and was not sufficient to render him, as a matter of legal inference, liable as a partner; and in so far as it was a question of fact, it was disposed of by the jury.

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This view of the subject renders it unnecessary to consider [*41] whether Eyton, if a partner in the shop at *Mostyn Quay, would have been liable on the banking account.

Upon the whole, we are of opinion that the verdict was right, and that the rule for a new trial must be discharged.

Rule discharged.

1846. *May* 25.

[58]

PRYCE *v.* BELCHER (1).

(3 C. B. 58—93; S. C. 15 L. J. C. P. 305; 4 Dowl. & L. 238.)

In case against a returning officer, for refusing to admit the plaintiff's vote at an election of a borough member, the second count—after stating the writ and precept, and that the plaintiff was a burgess and on the register—proceeded to allege that he tendered his vote for one of the candidates; that it was the duty of the defendant, so being such returning officer, to allow such vote to be entered and recorded and cast up in the poll-books; that he was requested so to do; but that he, contriving and wrongfully and fraudulently and wilfully and maliciously intending to injure and damnify the plaintiff, and to hinder and disappoint and deprive him of the benefit of his right and privilege aforesaid, instead of entering and recording the plaintiff's vote in the poll-books, to the end and intent aforesaid, refused so to receive the same, or to admit and allow the same to be so entered and recorded, to the end and intent aforesaid; but, on the contrary thereof, caused the vote of the plaintiff to be entered in the column of votes tendered in the poll-books, and at the close of the poll refused to reckon, include, and cast up, and did not reckon, &c., the plaintiff's vote among the votes given for that candidate; whereby the plaintiff was deprived of the benefit of his right to vote at that election: *Semble*, that the count disclosed a *primâ facie* cause of action.

The third count—after stating the writ and precept, that the plaintiff was a burgess and on the register, and that he tendered his vote—alleged that it was the duty of the defendant, as returning officer, to enter the vote on the poll-books without entering into or allowing a scrutiny; but that the defendant, knowing the premises, but contriving and wrongfully, fraudulently, wilfully, and maliciously intending to injure and damnify the plaintiff, and to delay him in the exercise of his privilege of voting, and deprive him of the benefit of his said privilege, wrongfully ordered and allowed a scrutiny to be held with regard to the plaintiff's vote, and his right and qualification to vote, and wrongfully took upon himself to adjudge and determine, at and after such scrutiny so ordered and allowed, that the plaintiff was not entitled to give, and had no qualification enabling him to give, his vote at that election; whereby the plaintiff was delayed,

(1) See this case on the argument of a rule to enter a verdict for the plaintiff with nominal damages, the jury at the trial having negatived malice: 4 C. B. 866. See also a somewhat similar case on the Ballot Act, 1872 (35 & 36 Vict. c. 33), *Pickering* v. *James* (1873) L. R. 8 C. P. 489, 42 L. J. C. P. 217.—J. G. P.

hindered, and obstructed in the exercise of his said privilege of voting, and a burgess was elected for that Parliament, the plaintiff's vote being so hindered and obstructed, &c.: Held, that this count also disclosed a *primâ facie* cause of action—inasmuch as it was possible that the delay arising from the holding of a scrutiny (which is prohibited by the 6 & 7 Vict. c. 18, s. 82) might have had the effect of preventing the plaintiff from exercising his right of voting, and, if so, that the action would be maintainable, the act of the defendant being wrongful, and having caused a particular damage to the plaintiff.

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CASE, against the defendant as returning officer for the borough of Abingdon, for not allowing the plaintiff to vote at an election for a member of Parliament, although on the register of voters.

* * * * *

The second count stated, that, before &c., and after the passing and coming into operation of the Act of Parliament in the first count mentioned, the defendant was mayor of the borough of Abingdon, which borough, before &c., was, and is now, a borough that returned and returns one member to serve in Parliament; that, to the defendant, as mayor of the said borough, by virtue of his said office of mayor, of right belonged the execution of any writ or precept for the election of a member to serve in Parliament for the said borough, which should be delivered to him, so being such mayor as aforesaid, and to be, and officiate as, returning officer at such election: that, on &c., a certain writ of our lady the Queen issued out of the Court of Chancery of our said lady the Queen, directed to the then Sheriff of Berkshire, and that such writ was and is in the same terms and to the same purport and effect as the writ in the said first count mentioned; that the said writ afterwards, and before the committing of the grievances, &c., to wit, on &c., in the said county of Berks, was delivered to one J. B. Monck, Esq., the Sheriff of the same county of Berks, to be executed in due form of law; that, by virtue of the said writ, the said J. B. Monck afterwards, and before the said committing, &c., to wit, on &c., made *his certain precept in writing under the seal of him the said J. B. Monck of his office of Sheriff of the county of Berks aforesaid, directed to the mayor of Abingdon aforesaid; that the said precept was and is in the same terms, and to the same purport and effect, as the precept in the said first count mentioned; that, by virtue of the said precept, and by virtue of the writ aforesaid, the said burgesses of the said borough of Abingdon, being in that behalf duly forewarned, to wit, on &c., at &c., aforesaid, before him the defendant, so being mayor and returning officer as aforesaid, were assembled to elect a burgess for the said borough, according

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[*66]

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to the exigency of the writ and precept aforesaid; and, during that assembly, to that intention, and before such burgess, by virtue of the writ and precept aforesaid, was elected, to wit, on &c. last aforesaid, at &c. aforesaid, he the plaintiff then being, and the plaintiff averred that he then was, a burgess of the borough aforesaid, and the name of the plaintiff being then inserted, and then standing and being, and the plaintiff averred that his name then was inserted and then stood and was, in the register of voters then in force for the said borough, to wit, the register of all persons entitled to vote in the election of a member to serve in Parliament for the said borough, made and formed according to the provisions of the statutes in that case made and provided, and the name of the plaintiff then standing and being, and the plaintiff averred that his name then did stand and was, No. 216 in the said register of voters then in force for the said borough as aforesaid; that the plaintiff, then being, and the plaintiff averred that he then was, entitled to give his vote for the choosing of a burgess of the said borough, according to the exigency of the writ and precept aforesaid, before him the defendant, so being mayor and returning officer as aforesaid, to whom there and then it did duly belong to take *and allow [*67] the vote of him the plaintiff of and in the premises, was ready, and he the plaintiff then and there offered, to give, and then and there tendered, his vote for choosing James Caulfield, Esq., a burgess for that Parliament, by virtue of, and according to the exigency of, the writ and precept aforesaid,† and the vote of him the plaintiff then and there of right ought have been received and admitted, and allowed to be entered and recorded on the poll-books of the said election, by the defendant, so being then and there mayor and returning officer as aforesaid, to the end and intent, that, when he the defendant, so being such returning officer as aforesaid, should, after the final close of the poll at the said election, cast up the number of votes as they should appear on the said poll-books, and should openly declare the state of the poll, and make proclamation of the member chosen, according to the statutes in that case made and provided, the said vote of him the plaintiff should be reckoned, included, and cast up by him the defendant, so being such returning officer as aforesaid, among the number of votes so to be cast up as aforesaid, and in order to the making of the said declaration and proclamation as aforesaid, as having been given, admitted, and allowed for choosing the said James Caulfield a burgess for that Parliament; that the defendant, so being there and then returning

officer as aforesaid, was then and there requested to receive and admit, and allow to be entered and recorded on the poll-books of the said election, the vote of him the plaintiff, to the end and intent, that, when he the defendant, so being such returning officer as aforesaid, should, after the final close of the poll at the said election, cast up the number of votes as they should appear on the said poll-books, and should openly declare the state of the poll, and make proclamation of the member chosen as aforesaid, the vote of him the plaintiff should be *reckoned, included, and cast up by him the [*68] defendant, so being such returning officer as aforesaid among the number of votes so to be cast up as aforesaid, and in order to the making of the said declaration and proclamation as aforesaid, as having been given, admitted, and allowed for choosing the said James Caulfield, Esq., a burgess for that Parliament: nevertheless, the defendant, being then and there mayor and returning officer as aforesaid, well knowing the premises, but contriving and wrongfully, fraudulently, and wilfully, and maliciously intending to injure and damnify the plaintiff in this behalf, and wholly to hinder and disappoint and deprive him of the benefit of his right and privilege aforesaid, of and in the premises, did then and there, instead of so receiving and admitting and allowing to be entered and recorded on the poll-books of the said election the vote of the plaintiff, to the end and intent aforesaid, did then and there, when the plaintiff so tendered his vote as aforesaid, and so requested him the defendant to receive the same, and to admit and allow the same to be entered and recorded as aforesaid, to the end and intent as aforesaid, wholly refuse so to receive the same, or to admit and allow the same to be so entered and recorded, to the end and intent as aforesaid; but, on the contrary thereof, did then and there cause and procure the vote of the plaintiff to be entered within a certain space or column of the said poll-books, which space or column was and is headed with the words, "For whom tendered," and the entry of any vote within which space or column indicates and signifies, and the plaintiff averred that the entry of his vote within the said space or column did indicate and signify, either that the name of the plaintiff had been omitted from the register of voters then in force for the said borough, in consequence of the decision of the barrister who had revised the lists from which such register had been formed, or *that the vote of some other person had already [*69] been received and allowed to be entered and recorded on the poll-books of the said election, as being registered in respect of the same

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qualification as that by virtue of which the plaintiff then claimed to vote, and that therefore the plaintiff was not entitled, when he the defendant, so being such returning officer as aforesaid, should, after the final close of the poll at the said election, cast up the number of votes as they should appear on the said poll-books, and should openly declare the state of the poll, and make proclamation of the member chosen as aforesaid, to have the said vote of him the plaintiff reckoned, included, and cast up by him the defendant, so being such returning officer as aforesaid, among the number of votes so to be cast up as aforesaid, and in order to the making of the said declaration and proclamation as aforesaid, as having been given, admitted, and allowed for choosing the said James Caulfield a burgess for that Parliament: and the plaintiff further said, that, when he the defendant, so being such returning officer as aforesaid, did, after the final close of the poll at the said election, cast up the number of votes as they appeared on the said poll-books, and did openly declare the state of the poll, and make proclamation of the member chosen, according to the statutes in that case made and provided, he the defendant did then wholly refuse, neglect, and omit to reckon, include, and cast up, and did not then reckon, include, and cast up, among the number of votes so cast up, and, in openly declaring the state of the poll, he the defendant did wholly refuse, neglect, and omit to reckon and include among the number of votes given for choosing the said James Caulfield, Esq., a burgess for that Parliament, then declared by him, so being such returning officer as aforesaid, as and for the true state of the poll in that behalf, and the defendant did not then so reckon *and include among the said number of votes, and in the state of the poll so then and there openly declared as aforesaid, the said vote of him the plaintiff; and a burgess of that borough was elected for that Parliament, and proclamation was made of a member chosen, without any vote of him the plaintiff being so reckoned, included, and cast up as aforesaid; whereby the privilege of the plaintiff in that behalf was wholly injured, enervated, and destroyed, and he the plaintiff was wholly deprived of the benefit of his right to vote at the said election, and to have his said vote received and admitted and allowed to be entered and recorded on the said poll-books, and to have the same reckoned, included, and cast up by the defendant, so being such returning officer as aforesaid, among the number of votes so cast up after the close of the poll as aforesaid, and to have the same reckoned and included in the declaration by him the defendant, so

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being such returning officer as aforesaid, of the state of the poll, among the number of votes given, admitted, and allowed for choosing the said James Caulfield a burgess for that Parliament.

The third count was similar to the second, down to the obelus (1), p. 276; it then proceeded as follows: and it then and there became and was the duty of the defendant to enter the said vote of the plaintiff so tendered by him the plaintiff as aforesaid, upon the poll-books of the said election, without entering into or allowing any scrutiny by or before him the defendant, so being such returning officer as aforesaid, with regard to such vote: nevertheless, he, the defendant, being then and there mayor and returning officer as aforesaid, well knowing the premises, but contriving, and wrongfully, fraudulently, wilfully, and maliciously intending to injure and damnify him the plaintiff in that behalf, and further to vex, harass, and delay the plaintiff in the exercise of his privilege of voting, and to deprive him of the benefit *of his said privilege of and in the [*71] premises, did there and then wrongfully order and allow a scrutiny to be held before him the defendant, so being such returning officer as aforesaid, to wit, at the Guildhall in the said borough, with regard to the vote of him the plaintiff, so tendered by him the plaintiff as aforesaid, and with regard to the right and qualification of him the plaintiff to give his vote, and to have the said vote admitted and allowed; and did further wrongfully take upon himself to adjudge and determine, at and after such scrutiny so ordered and allowed and held as aforesaid, that the plaintiff was not then entitled to give, and had no qualification enabling him to give, his vote at the said election, and that he was not then entitled to have the same admitted and allowed, contrary to the provisions of the said Act of Parliament, and to the statutes in that case made and provided; whereby the plaintiff was not only then wrongfully vexed, harassed, delayed, hindered, and obstructed in the exercise of his said privilege of voting, but was then wholly deprived of the benefit of his said privilege, and a burgess of that borough was elected for that Parliament, the vote of him the plaintiff being so hindered and obstructed, and without any vote of him the plaintiff then and there by virtue of the writ and precept aforesaid; and also by means of the premises, the plaintiff was otherwise greatly injured and damnified: to the damage of the plaintiff of 500*l.*, &c. * * *

To the second count the defendant demurred, assigning for [72]

(1) Substituted for an asterisk found in the original report, asterisks being used in this edition to mark the original paging.

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causes: that no sufficient or any cause of action was thereby disclosed, and that it was not therein or therefrom apparent, that the plaintiff had sustained any damage by reason of anything therein alleged or set forth; that it was consistent with every allegation in that count, that the plaintiff did in reality vote, and have his vote received and recorded, at the said election, or, at least, that there was nothing in that count which, with apt, convenient, or sufficient certainty or precision, excluded the possibility of the plaintiff's having so voted, and had his said vote duly admitted and recorded, thereat; that the count did not with any sufficient certainty, show that the tortious act therein charged was wilful or malicious, or that the defendant had any means of avoiding, or could have avoided the same, or that the plaintiff had sustained any legal damage therefrom; that the insertion of the plaintiff's name in the column complained of in that count might have been, for all that appeared to the contrary, a matter in itself altogether innocent and legal, and out of which no cause of action could or did originate, and might have arisen wholly from mistake or inadvertency either of the defendant or others, and that it was not stated therein, nor was it to be concluded therefrom, that such insertion was wilful or malicious; that, for aught that appeared to the contrary, the plaintiff's vote was allowed and received and recorded at the said election; that it did not sufficiently appear by averment that an election was held, or that the plaintiff had, or could have, in any way been prejudiced or damnified; and that the count was not sufficiently specific and certain, but was throughout too general, and it was only by inference, deduction, and conjecture, that any tort or cause of action could be traced or discovered therein, &c.

[*73] Demurrer to the third count, assigning for causes: *that it disclosed no sufficient or any cause of action; that it nowhere therein appeared, either expressly or by implication, that the plaintiff did not vote at the election in that count mentioned; that, supposing the alleged scrutiny to have been held, it was not sufficiently shown that the effect of such scrutiny was, or could have been, prejudicial to the plaintiff's vote; that the nature of the alleged scrutiny ought to have been shown; that it was consistent with every allegation in that count that the alleged scrutiny consisted of nothing more than the inquiries directed to be made, and the questions put, under and by virtue of the Act of Parliament in that count mentioned; that, if the scrutiny complained of was really an illegal scrutiny, all the facts and

circumstances attending and incidental to it should have been distinctly set forth with special and proper averments in that behalf; that it was not shown in and by that count that the scrutiny complained of prevented the plaintiff from subsequently voting at the same election, or that the plaintiff did not in fact vote and have his vote duly received, admitted, and recorded at the said election; that no damage in law to the plaintiff was sufficiently or precisely shown in or by that count, nor did it sufficiently or precisely appear that the defendant was guilty of any act of omission or commission maliciously or wilfully or knowingly, or that the plaintiff had sustained any injury or wrong by reason of the premises; and that the count was in other respects too vague, general, loose, uncertain, and insufficient.

* * * * *

The demurrers were argued in Easter Term last. [76]

Talfourd, Serjt., for the defendant:

* * As to the second count, the question is whether it discloses any cause of action. In *Ashby* v. *White* (1), it was determined by the House of Lords, that a man who has a right to vote at an election for members of Parliament, may maintain an action against the returning officer for maliciously refusing to admit his vote; though his right was never determined in Parliament, and though the persons for whom he offered to vote were elected. But malice is an essential ingredient to support such an action, and must be expressly alleged: *Harman* v. *Tappenden* (2); *Drewe* v. *Coulton* (3); *Milward* v. *Sargeant* (4); *Cullen* v. *Morris* (5). * * The second count here does use words, in the first instance, which, if they overrode the whole allegation, might amount to a sufficient statement of malice: but, in alleging what the defendant, as returning officer, did, it does not charge that the act was done wilfully and maliciously: it merely alleges that the defendant refused to receive the plaintiff's vote, but caused it to be entered in the column of votes tendered, and that he omitted to reckon it among the number of votes at the close of the poll. It may have been omitted accidentally, or, for any thing that appears to the contrary, the defendant may have made an error in the casting up of the votes. [78] [81]

The third count charges the defendant with having, as returning

(1) 2 Ld. Ray. 938; 6 Mod. 46; 1 Salk. 19; 3 Salk. 17; Lord Holt, 524.
(2) 6 R. R. 340 (1 East, 555).
(3) 6 R. R. 346, *n.* (1 East, 563, *n.*).
(4) 6 R. R. 350, *n.* (1 East, 567, *n.*).
(5) 20 R. R. 742 (2 Stark. N. P. C. 577).

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officer, wrongfully ordered a scrutiny with regard to the plaintiff's vote. There is no allegation that the vote was rejected, or that the plaintiff persisted in requiring his vote to be recorded. The proviso in sect. 79, before referred to, deprives the party of his right to vote, though on the register, if he has not continued to reside in the borough, or within seven miles thereof. Section 81 enacts, that no inquiry shall be permitted at the time of polling, as to the right of any person to vote, except—whether the voter is the same person whose name is on the register, and whether he has already voted at that election: and sect. 82 enacts, that "no scrutiny shall hereafter be allowed, by or before any returning officer with regard to any vote given or tendered at any such election." The scrutiny here spoken of, is not an inquiry at the poll, but after its closing: that alleged in the third count may be the merely asking the questions prescribed by sect. 81.

(CRESSWELL, J.: The returning officer is prohibited by sect. 81 from putting to the voter any other questions than those referred to; and by sect. 82 it is enacted, that it shall not be lawful to reject
[*82] any vote tendered by *any person whose name is on the register, except by reason of its appearing to the returning officer, upon putting such questions as aforesaid, or either of them, that the person claiming to vote is not the person described on the register, or has previously voted: the officer is not to reject the vote by reason of the voter's having ceased to reside in, or within the prescribed distance of, the borough; and yet, by sect. 79, the party in such case is not entitled to vote!)

It certainly is impossible to reconcile these various provisions. It is clear, however, that the third count discloses no cause of action whatever.

* * * * *

[83] *Kinglake*, Serjt.:

The second count sufficiently discloses a cause of action, in the defendant's refusal to receive and to record the plaintiff's vote. The sixty-eighth section of the 2 Will. IV. c. 45, which regulates the mode of conducting the election, requires the poll-clerks, at the close of the poll, to deliver the poll-books, inclosed and sealed, to the returning officer, who is to cast up the number of votes, and openly declare the state of the poll, and make proclamation of the member or members chosen. The instant a returning officer refuses to receive the vote of a person who is on the register, the offence is

complete. The plaintiff complains that his name was inserted by the defendant in the column appropriated, under sect. 59, to votes tendered by persons whose names are not on the register. Here, the plaintiff's name was on the register; and the returning officer had no authority to reject his vote, provided he was ready to answer the two questions mentioned in sect. 81. *The count, therefore, [*84] upon the face of it, discloses a specific grievance, arising from the wilful and wrongful act of the defendant. * * It may well be doubted, whether any averment of malice is necessary at all. Lord HOLT, at least, in *Ashby* v. *White*, inclined to think it was not. * * If malice be necessary, the second count does contain a sufficient averment of malice: *Rex* v. *Phillips* (1); *Rex* v. *Woodfall* (2).

The third count states, that the plaintiff, being entitled to vote, tendered his vote for the candidate named, that it was the duty of the defendant, as returning officer, to enter the plaintiff's vote on the poll-books without scrutiny, but that he, wilfully and maliciously, intending to injure the plaintiff, and delay him in the exercise of his privilege of voting, wrongfully allowed a scrutiny to be held with regard to the plaintiff's vote and qualification, and wrongfully adjudged, upon such *scrutiny, that the plaintiff was not entitled to [*85] vote and had no qualification; whereby the plaintiff was hindered and deprived of his privilege, and a burgess was returned without the vote of the plaintiff.

(ERLE, J.: It does not follow from what is alleged in the third count, that the defendant did not record the plaintiff's vote at the time it was tendered.)

The count in substance alleges that the plaintiff's vote was disallowed. The holding a scrutiny, which is expressly prohibited by the 82nd section of the 6 & 7 Vict. c. 18, gives a right of action, notwithstanding the vote should be afterwards recorded. And the 97th section enacts, "that every sheriff, undersheriff, clerk of the peace, town-clerk, secondary, returning officer, clerk of the Crown, postmaster, overseer, or other person, or public officer, required by this Act to do any matter or thing, shall, for every wilful misfeasance, or wilful act of commission or omission, contrary to this Act, forfeit to any party aggrieved, the penal sum of 100*l*., or such less sum as the jury, before whom may be tried any action to be brought for the recovery of the before-mentioned sum, shall consider

(1) 8 R. R. 511 (6 East, 464). (2) 5 Burr. 2667.

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just to be paid to such party, to be recovered by such party, with full costs of suit, by action for debt in any of her Majesty's superior Courts at Westminster: provided always, that nothing herein contained shall be construed to supersede any remedy or action against any returning officer, according to any law now in force." An action will lie for the doing of anything that is prohibited by an Act of Parliament.

(CRESSWELL, J.: To whom?)

To the party aggrieved.

(CRESSWELL, J.: That opens the whole argument. Was this plaintiff a party grieved?)

The obstruction and refusal of his vote was a grievance, a legal damage.

(TINDAL, Ch. J.: To entitle a party to maintain an action of this
[*86] sort, must he not show that he has sustained some actual *sensible damage? In Comyns's Digest (1), it is said, that, "in all cases, where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages." "But (2) an action upon the case does not lie, where there is not any temporal damage.")

It is not necessary to show, that the plaintiff has sustained any actual damage: it is enough, that the defendant has unlawfully obstructed him in the exercise of a legal right. [He cited *Schinotti* v. *Bumsted* (3) and *Taylor* v. *Henniker* (4).]

(CRESSWELL, J.: In that case, the crops distrained were kept for some months.)

In *Weller* v. *Baker* (5), *The Tonbridge Dippers'* case, where it was held than an action on the case would lie against the defendant for
[*87] usurping the office of a dipper, not having been duly *chosen at the homage, the COURT say that "an action upon the case will lie for a possibility of a damage and injury." *Marzetti* v. *Williams* (6) and *Blofeld* v. *Payne* (7), also show that there may be a legal damage to sustain an action, without any actual damage.

(1) Tit. "Action upon the Case," (A.).
(2) *Ib.* (B. 1).
(3) 6 T. R. 646.
(4) 12 Ad. & El. 488.
(5) 2 Wils. 414.
(6) 35 R. R. 329 (1 B. & Ad. 415).
(7) 38 R. R. 270 (4 B. & Ad. 410).

(ERLE, J.: All these are cases of violation of private rights. In the case of non-repair of a highway, the being delayed in carrying goods to market has been held not to be such a specific injury as to give a right of action to an individual.)

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This count charges a violation of the peculiar and private privilege of the plaintiff. * * *

Talfourd, Serjt., in reply, prayed leave to withdraw the demurrer to the second count, and to plead thereto; and, as to the third count —without impugning the general principle that an action will lie against a public officer, in respect of a private injury resulting to an individual from a violation of a public duty, though no palpable or substantial damage be shown—he submitted, that here there was no specific allegation of damage or injury to the plaintiff that could form the subject of an action; for, that it was perfectly consistent with all that was alleged in the count, that the defendant received and recorded the plaintiff's vote, and held a scrutiny or investigation at a subsequent period. [88]

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the COURT:

The questions arising upon the plea to the first count, and upon the second count of this declaration, were disposed of upon the argument, by the defendant's being allowed to amend the plea, and to withdraw his demurrer, and plead over to the second count; the only remaining question, therefore, is, whether the third count, which is specially demurred to, is open to objection.

The third count sets out a writ to the Sheriff of Berkshire, and a precept from the sheriff to the defendant, being mayor of Abingdon, to cause a burgess to be elected for the borough of Abingdon; by virtue of which the burgesses of Abingdon were assembled to elect a burgess for the borough of Abingdon, and that, during *that assembly, and before such burgess was elected, the plaintiff, being a burgess of the borough, and the name of the plaintiff being in the register of voters, and standing No. 216 in the list of voters, and the plaintiff being entitled to give his vote for the choosing of a burgess before the defendant, being the mayor and returning officer, to whom it belonged to take and allow such vote, the plaintiff was ready and offered to give his vote for choosing James Caulfield, Esq., a burgess for that Parliament; and it was the duty [*89]

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of the defendant to enter the vote of the plaintiff on the poll-books, without entering into or allowing any scrutiny before him with regard to such vote: nevertheless, the defendant, wilfully and maliciously intending to injure the plaintiff, and to vex, and harass, and delay the plaintiff in the exercise of his privilege of voting, and to deprive him of the benefit of his said privilege, did wrongfully order and allow a scrutiny to be held before him the said defendant, so being such returning officer, with regard to the vote of the plaintiff so tendered by him as aforesaid, and with regard to the right and qualification of him the plaintiff to give his said vote, and to have the said vote admitted and allowed; and did further wrongfully take upon him to adjudge and determine, after such scrutiny, that the plaintiff was not then entitled to give, and had no qualification enabling him to give, his vote at the said election; whereby the plaintiff was not only wrongfully vexed, harassed, delayed, hindered, and obstructed in the exercise of his said privilege of voting, but was then wholly deprived of the benefit of his said privilege, and a burgess of that borough was elected for that Parliament, the vote of him the plaintiff being so hindered and obstructed, and without any vote of him the said plaintiff.

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On the part of the defendant, it was contended, that the words following the word "whereby" could not be *considered as being an averment of matter of fact, but merely matter of conclusion or inference drawn from the matters previously alleged, and that the preceding matter did not disclose with due certainty any cause of action, it not being alleged that the scrutiny was held during the election, nor that the vote of the plaintiff was not entered on the poll-books, and reckoned up with the others.

On the part of the plaintiff, it was contended, that the holding of a scrutiny by the returning officer being expressly prohibited by the Act, 6 & 7 Vict. c. 18, s. 82, the action would lie for holding the scrutiny, though no damage resulted to the plaintiff; for which *Blofeld* v. *Payne* (1), *Taylor* v. *Henniker* (2), and *The Tonbridge Dippers'* case (3) were cited: and it was also contended, that, if damage was necessary to be alleged, there was a sufficient allegation of damage to the plaintiff.

No cases were cited to show whether the matter alleged after the word "whereby" is to be considered as amounting, on demurrer, to a sufficient averment of matter of fact or not; nor have we found

(1) 38 R. R. 270 (4 B. & Ad. 410).
(2) 12 Ad. & El. 488.
(3) *Weller* v. *Baker*, 2 Wils. 422.

any decision on the point; though, in the case of *Colson* and *Perry* (1), the point was incidentally discussed. In that case, the plaintiff declared, that Queen Elizabeth, being seised of the manor of S., granted him thirty acres, parcel of the manor, by copy, and granted four acres, parcel of the said manor, to the defendant, and alleged that the copyholders of the said thirty acres have at all times used to have common for certain cattle, from the 1st of August till All Saints' Day, in the four acres; and shows that the defendant, on the 1st of May, inclosed the said four acres with hedges and ditches, whereby he could not *have his common &c. The defendant [*91] pleaded Not guilty; and the verdict was found for the plaintiff. It was moved to arrest the judgment for not alleging the continuance of the inclosure after the 1st of August. All the Judges agreed, that, after verdict, the judgment should not be arrested: but DODRIDGE, J., said that the *per quod* "esteant le inclosurer del'(2) plea" does not amount to an averment; the *per quod* is "un ellation" and inference out of the preceding declaration, and will not amount to an averment, for, it is conclusion, and not the matter of the action; but he agreed, that, after verdict, the declaration is good. But LEY, Ch. J., said that the *per quod* amounted to an averment.

It is to be observed, that the matter subsequent to the *per quod* was held in that case to be a sufficient averment, after verdict, not only of what was directly stated, but of a matter not stated, but only to be collected by inference, namely, that the inclosure of the four acres continued after the 1st of August. The allegation in question might, perhaps, be open to a special demurrer on that ground; but it does not follow from thence that the words following the *per quod*, in a declaration of this nature, are, in all cases, to be considered as matter of conclusion and inference only: on the contrary, the course of pleading shows that they are sometimes to be looked upon as allegations of matters of fact. In Rastell (3), is a precedent of an action by a master for the beating of his servant, with no allegation of the loss of service, except under the *per quod*. That the loss of service is a material fact requiring to be proved, is clear. It is said in *Mary's* case (4), "If my servant be beat, the master shall not have an action for this battery, unless the battery is so great that by reason *thereof he loses the service [*92] of his servant; but the servant himself, for every small battery,

(1) 2 Roll. Rep. 379.

(2) The words "field, the" appear to be necessary to complete the sentence.

(3) Rastell's Entries, fo. 613, pl. 10.

(4) 9 Co. Rep. 113.

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shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of the servant, but by reason of a *per quod*, viz. *per quod servitium &c. amisit*, so that the original act is not the cause of his action; but the consequent upon it, viz. the loss of his service is the cause of his action; for, be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action." So, in the same case, it was said: "For every feeding by the cattle of a stranger, the commoner shall not have an assise, nor an action on the case, as his case is, but the feeding ought to be such *per quod* the commoner, &c., common of pasture &c. for his cattle &c. *habere non potuit, sed proficuum suum inde, per totum id tempus, amisit* &c.: so that, if the trespass be so small that he has not any loss, but sufficient in ample manner remains for him, the commoner shall not take them *damage feasant*, nor have any action for it." And a little lower it is said: "In the case at Bar, the lord of the soil shall have an action for trespass done in the waste or common, as an immediate trespass to him, but the commoner shall not have an action but by consequence, viz. if the trespass be such *per quod proficuum communiæ suæ &c. amisit*, or that he could not have his common in so beneficial a manner as he had before."

It has, indeed, been since considered that the mere invasion of the commoner's right may furnish a ground of action against a stranger; but still the doctrine so laid down in *Mary's* case, is applicable to the present question; for, as the COURT in that case held the action maintainable, on the ground that it contained the allegation *per quod proficuum communiæ suæ &c. amisit*, it follows that they considered the matter alleged after the *per quod* to be a sufficient averment of a material fact: see Hearne, 125. So, in case of a nuisance to a highway, *whereby the plaintiff has received a particular damage, the precedents show that the damage, which is the cause of action, may be alleged under the *per quod*, or (what does not seem materially to differ) under the words *ratione cujus*, &c.

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Another ground of objection urged for the defendant, was, that the count was defective, in not showing how the damage stated after the *per quod* resulted from the holding of a scrutiny, which, for any thing that appeared, might have been held after the election was finished and the return made; and, if the matter which follows the *per quod* were to be looked upon as being matter of inference and conclusion only, it might well be urged that it was an inference not legitimately drawn from the premises; but, if it is to be

considered, as we think is, as an averment of a matter of fact, it will be sufficient if the damage in question might by possibility have resulted from the unlawful act of holding the scrutiny; and it is clearly possible that the delay arising from the holding of a scrutiny might have had the effect of preventing the plaintiff from exercising his right of voting; and, if such were the fact, there is no doubt the action would be maintainable, the act of the defendant being wrongful, and having caused a particular damage to the plaintiff.

As the defendant has obtained leave to amend his pleading in relation to the other counts, he ought to have leave (if he desires it) to withdraw his demurrer to this count, and to plead to it.

Judgment accordingly.

WALBANK *v.* QUARTERMAN.

1846. *May* 25.

(3 C. B. 94—96.)

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If an attorney causes warrants directed to a sheriff to be directed to a particular sheriff's officer for execution the attorney is liable for the fees allowed on taxation for the execution of process (1).

DEBT, for work and labour by the plaintiff and his servants for the defendant, at his request. Plea, never indebted.

At the trial, before Erle, J., at the sittings in London after the last Term, it appeared that the plaintiff, who was an officer of the Sheriffs of London only, sought to recover from the defendant, an attorney, the amount of certain fees alleged to be due to him for executing warrants on process directed to the Sheriffs of London and Middlesex, the warrants having been, at the defendant's instance, directed respectively to the plaintiff and to one Hamber, who was an officer of the Sheriff of Middlesex, and with whom it was suggested, but not proved, that the plaintiff was in partnership. It being objected that, so far as related to the writs directed to the Sheriff of Middlesex, Hamber should have sued, or at all events, should have joined in the action, the plaintiff's claim was ultimately limited to three guineas, for the execution of three warrants from the Sheriffs of London; and for this sum a verdict was taken for the plaintiff, subject to leave reserved to the defendant to move to enter a nonsuit, or a verdict for him, on the ground that he was not personally responsible for these fees.

Byles, Serjt., now moved accordingly. He submitted that the

(1) Explained and distinguished in *Royle* v. *Busby* (1880) 6 Q. B. Div. 171, 50 L. J. Q. B. 196.—J. G. P.

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attorney was not liable, but that the action should have been brought against the client, by analogy to the cases of fees to messengers in bankruptcy, in respect of which the petitioning-creditor is liable, and not *the attorney: *Hartop* v. *Juckes* (1); *Hart* v. *White* (2); and expenses of witnesses: *Robins* v. *Bridge* (3). * * *

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(MAULE, J.: The case of a bailiff is much more like that of the officer of the Court, than that of a witness. The inconvenience would be prodigious if it were held that the officer must look to the client for his fees: and there is no inconvenience in the other course.)

[96] TINDAL, Ch. J.:

If authorities were necessary in such a case as this, enough are to be found in the books. In *Townshend* v. *Carpenter* (4), it was expressly ruled that a sheriff's officer employed by an attorney to make arrests on mesne process issued at the suit of his clients, may sue the attorney for the fees usually allowed for such arrests on the taxation of costs by the Master, though such fees exceed the sum allowed to the sheriff and bailiff by the 23 Hen. VI. c. 10. And this ruling was confirmed by the Court of King's Bench in *Foster* v. *Blakelock* (5), where ABBOTT, Ch. J., said: "I perfectly agree with what has been stated to show that the sheriff cannot maintain an action for fees beyond those which are given by statute. Here, the bailiff could claim no fee beyond the 4*d.* allowed by the 23 Hen. VI. against the party arrested, but the prohibition extends to him only. The question is therefore open, whether, if an officer be specially employed to make an arrest, it may not be presumed that the party so employing him, gives him to understand that he will pay such sum as the Court, upon the taxation of costs, is in the habit of allowing. I think that such an understanding may very fairly be presumed. Then, of whom is the officer to receive this sum? Undoubtedly he may claim it from the attorney by whom he is employed, and is not bound to look to the party in the cause, of whom he knows nothing."

MAULE, J.:

It can scarcely need authorities to prove that the attorney is the

(1) 2 M. & S. 438.
(2) Holt, N. P. C. 376.
(3) 49 R. R. 531 (3 M. & W. 114).
(4) Ry. & M. 314; 2 Car. & P. 118.
(5) 29 R. R. 258 (5 B. & C. 328; 8 Dowl. & Ry. 48).

party liable to the officer. The case of a witness is altogether different.

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The rest of the Court concurred.

Rule refused.

BEARD *v.* EGERTON AND OTHERS.

1846. *May* 27.

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(3 C. B. 97—132; S. C. 15 L. J. C. P. 270; 10 Jur. 643.)

A patent granted to a British subject, in his own name, for an invention communicated to him by a foreigner, the subject of a State in amity with this country, is not void, although the patent be in truth taken out, and held by the grantee, in trust for such foreigner.

In such case, the grantee is the true and first inventor within this realm, within the statute 21 Jac. I. c. 3.

In case for an alleged infringement of a patent so granted, the defendant pleaded, that, by an agreement made in France, between the original inventor and the King of the French, the former, for the considerations therein mentioned, assigned the invention to the French Government, and that, by virtue of that agreement, and by the laws of France, the invention became vested in the King of the French in right of his Crown, who thereby became entitled, by the laws of France, to vend and publish the invention, as well in that country as in Great Britain and Ireland, and in any other country or place where he should think fit, without any licence from the inventor—concluding, "wherefore the said letters-patent were and are void," &c.: Held, that the plea was bad in substance, inasmuch as it contained no denial of the allegation that the patentee was the true and first inventor within this realm, which is all that is necessary to sustain the validity of the letters-patent, in respect of the granting thereof.

Held, also, that the circumstance of the original inventor having, for a valuable consideration, parted with his interest in the discovery to a person in France, was no bar to his right to take out a patent for the same invention in this country.

A further plea contained an additional allegation that the King of the French had openly published and made known the invention, and the manner of performing the same, to the people of France, for the use and benefit of that people, and of all other nations and people in the world, as a free gift and benefaction for the benefit of all mankind, without limitation or restriction; whereby, according to the laws of France, the defendants became and were entitled to use, exercise, and vend the said invention in any country or place, at their free will and pleasure, without the leave or licence or hindrance of the original inventor, &c.: Held, that this plea afforded no answer to the action.

The title described the patent to be for "a new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura:" Held, that this was sufficiently precise and certain.

CASE, for the infringement of a patent. The declaration stated, that, before and at the time of the making of the letters-patent, and of the committing of the grievances by the defendants, as hereinafter mentioned, Miles Berry was the true and first inventor of the

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working or making of a certain manner of new manufacture within this realm, to wit, a certain invention of a *new or improved [*98] method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura, and that such invention others at the time of the making of the said letters-patent did not use; that thereupon her Majesty Queen Victoria, on the 14th of August, in the third year of her reign (1839), by her letters-patent, bearing date at Westminster the day and year last aforesaid, under the Great Seal &c., for herself, her heirs and successors, did give and grant unto Berry, his executors, administrators, and assigns, her especial licence, &c., that Berry, his executors, &c., and every of them, by himself and themselves, or by his and their deputy or deputies, servants, or agents, or such others as Berry, his executors, &c., should at any time agree with, and no others, from time to time, and at all times thereafter during the term of years therein expressed, should and lawfully might make, use, exercise, and vend the said invention within that part of her United Kingdom of Great Britain and Ireland called England, her dominion of Wales, and town of Berwick-upon-Tweed, and also in all her colonies and plantations abroad, in such manner as to Berry, his executors, &c., or any of them, should, in his or their discretion, seem meet; and that he, Berry, his executors, &c., should and lawfully might have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention, for and during the term of years therein and in that declaration after mentioned, to have, hold, exercise, and enjoy the said licence, &c., thereinbefore granted, unto Berry, his executors, &c., for and during and unto the full end and term of fourteen years from the date of the said letters-patent, &c., according to the statute in such case made and provided: and, to the end that he, Berry, his executors, &c., and [*99] every of them, might have and enjoy *the full benefit and the sole use and exercise of the said invention, according to her gracious intention thereinbefore declared, her said Majesty did by the said letters-patent, for herself, her heirs and successors, require and strictly command all and every person and persons, bodies politic and corporate, and all other her subjects whatsoever, of what estate, quality, degree, name, or condition soever they might be within the said part of her United Kingdom, &c., that neither they nor any of them, at any time during the continuance of the said term of fourteen years thereby granted, either directly or indirectly, should

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make, use, or put in practice the said invention, or any part of the same, so attained unto by Berry as aforesaid, or in any wise counterfeit, imitate, or resemble the same, or should make or cause to be made any addition thereunto or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors, devisor or devisors thereof, without the licence, consent, or agreement of Berry, his executors, &c., in writing under his or their hands and seals, first had and obtained in that behalf, upon such pains and penalties as could or might be justly inflicted on such offenders for their contempt of that her Royal command; and further to be answerable to Berry, his executors, &c., according to law, for his and their damages thereby occasioned: that the said letters-patent were, amongst others, upon this express condition, that, if Berry should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be inrolled in her said Majesty's High Court of Chancery, within six calendar months next and immediately after the date of the said letters-patent, then the said letters-patent, and all liberties and advantages whatsoever thereby granted, should utterly cease, determine, *and become [*100] void, any thing thereinbefore contained to the contrary thereof in anywise notwithstanding; as by the record of the said letters-patent, remaining inrolled of record in her said Majesty's High Court of Chancery, reference being thereunto had, would more fully and at large appear. Averment, that Berry did afterwards, and within six calendar months next and immediately after the date of the said letters-patent, by an instrument in writing, to wit, a specification, under his hand and seal, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed; and did afterwards, and within six months next and immediately after the date of the said letters-patent, to wit, on the 14th of February, in the said third year of the reign of her said Majesty (1840), cause the said instrument in writing to be inrolled in her said Majesty's High Court of Chancery; as by the record of the said specification, remaining inrolled of record, reference being thereunto had, fully appeared. The declaration then alleged an assignment by Berry of all his interest in the patent to the plaintiff, by indenture of the 23rd of June, 1841; that the plaintiff thereby then became and was, and thence had been, entitled to the said

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privileges, authorities, benefit, profits, and advantages of the said letters-patent. Breach—that the defendants, well knowing the premises, but contriving, &c., after the making of the said letters-patent, and after the inrolment of the said specification and the making of the said indenture as aforesaid, and within the said term of fourteen years in the said letters-patent mentioned, to wit, on the 24th of June, 1841, and on divers other days and times between that day and the commencement of the suit, and within that part of the United Kingdom of Great Britain and Ireland called England, wrongfully, unlawfully, and unjustly, without the leave or licence, and against the will of the plaintiff, did make, use, exercise, and vend the said invention, to the benefit, use, and enjoyment whereof *the plaintiff had been and was so entitled as aforesaid, in breach of the said letters-patent, and of the privileges to which the plaintiff had been and was entitled as aforesaid; and that the defendants, well knowing the premises, but further contriving, &c., on &c., without the leave, &c., of the plaintiff, did put in practice the said invention, &c.; and that the defendants, well knowing the premises, but further contriving, &c., on &c.; without the leave &c. of the plaintiff, did make, use, and put in practice a part of the said invention, &c.; and that the defendants well knowing the premises, but further contriving, &c., on &c., did imitate the said invention, &c.; and that the defendants, well knowing the premises, but further contriving, &c., on &c., did make certain additions to, and subtractions from, the said invention, to the benefit, use, and enjoyment whereof the plaintiff had been and was so entitled as aforesaid, and did thereby pretend themselves to be the inventors and devisors thereof, in breach of the said letters-patent, and of the privileges to which the plaintiff had been and was so entitled as aforesaid: that, by means of the committing of the said several grievances by the defendants as aforesaid, the plaintiff had been and was greatly injured, and had lost and been deprived of divers great gains and profits which he might and otherwise would have derived from the said invention and letters-patent, and in respect whereof he had been and was entitled to such privileges as aforesaid, and had been and was otherwise damnified, &c.

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Fifth plea, that, long before the making of the letters-patent in the declaration mentioned, to wit, on the 1st of January, 1839, one Daguerre had invented the said new or improved method of obtaining the spontaneous reproduction of all the images received in the

focus of the camera obscura, in the declaration mentioned, and the said Daguerre and one Niepce, before the making of the said letters-patent, and at the time of *their employing the said Miles Berry, and communicating the said invention to him as thereinafter mentioned, and from thence until and at the time of making the said letters-patent, had knowledge of the said invention, and of the nature thereof, and in what manner the same was to be performed, and used, exercised, and practised the same in a certain foreign country, to wit, the kingdom of France; that Daguerre and Niepce were and are aliens, born in foreign parts, out of the allegiance of our lady the Queen, and within the allegiance of a foreign State, to wit, the said kingdom of France, and were, at and during all the times aforesaid, resident and domiciled in the last-mentioned kingdom; that they, being so resident and domiciled as aforesaid, and such aliens as aforesaid, and so using and practising the said invention as aforesaid, before the making of the said letters-patent, to wit, on the 1st of June, 1839, retained and employed Berry as their agent to procure such letters-patent as in the declaration mentioned, to be granted by our lady the Queen to him, Berry, in his own name, but upon trust for the use and benefit of Daguerre and Niepce, and not of Berry; that Berry then accepted of such retainer and employment, and, in order to enable him to obtain the letters-patent for the purpose aforesaid, Daguerre and Niepce, before the making of the letters-patent, to wit, on &c. last aforesaid, communicated to Berry the nature and particulars of the said invention, and in what manner the same was to be performed, and he then and thereby, and by no other means, first became and was possessed of the knowledge thereof; that thereupon, to wit, on &c. last aforesaid, Berry brought and introduced the knowledge of the said invention, and of the manner of performing the same, into the said United Kingdom, and was the first person who had received or brought in or into the said United Kingdom the knowledge of the said invention, and of the manner of performing the same; that *Berry was no otherwise the true and first inventor of the said invention, than by having such communication made to him as aforesaid, and by so becoming possessed of the knowledge of the said invention as aforesaid, and by his being the first person in the said United Kingdom who acquired or brought in or into the same the knowledge of the said invention, and of the manner of performing the same as aforesaid; that the said invention having been so communicated to him as aforesaid, Berry, being a subject of the

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Queen, afterwards, to wit, on the day and year in the declaration first mentioned, in pursuance of the said retainer and employment, and as such agent of Daguerre and Niepce as aforesaid, obtained and procured the letters-patent in the declaration mentioned to be granted to him as therein mentioned, upon trust for the use and benefit of Daguerre and Niepce, so then being such aliens and resident and domiciled as aforesaid, and not for the use or benefit of him, Berry; that, until the making of the indenture of assignment in the declaration mentioned, he, Berry, always held the said letters-patent in trust for the use and benefit of Daguerre and Niepce, so being such aliens and domiciled as aforesaid, and no otherwise; and that therefore the said letters-patent were and are void. Verification.

To this plea the plaintiff demurred, assigning for causes, that the plea neither traversed, nor confessed and avoided, any material allegation in the declaration; that it confessed, without avoiding, the causes of action in the declaration, inasmuch as it expressly admitted that the invention was new within this realm, and Berry the true and first inventor thereof, within the statute, and impliedly that all the other allegations of the declaration were true and sufficient, and yet did not allege any matter or thing in avoidance of the allegations and causes of action in the declaration; that it [*104] was argumentative, in this, that it was an argumentative *denial of the novelty of the invention within this realm, or that Berry was the true and first inventor within the statute, or of both those propositions; that it was double, in this, that it attempted in and by one and the same plea to put in issue two material facts, to wit, that the invention was new within this realm, and that Berry was the true and first inventor thereof within this realm, within the statute; that it was tricky, ambiguous, double, multifarious, and uncertain, in this, that it nowhere in or by the plea appeared whether it was intended for an argumentative denial of both or of one or other, and, if of one only, of which of the material facts above mentioned, that is to say, of the novelty of the invention within the realm, and that Berry was the true and first inventor thereof within this realm, or whether it was intended to avoid the causes of action in the declaration alleged, and by the plea confessed and admitted, on the ground that such letters-patent as in the declaration alleged, could not be held in trust at all, or that they could not be taken out or held in trust for an alien, or on some other and what ground, and also that the plea tended to an

immaterial issue, inasmuch as, if the invention was new within the realm, and Berry was the true and first inventor within this realm, then it was wholly immaterial whether, when, how, to what extent, and by whom the same was or might have been invented, discovered, or made known in parts beyond the seas, or whether, in what manner, to what extent, and upon what terms and conditions, if any, such invention or discovery might by the inventor, or any other person, have been communicated to Berry; that the plea, being substantially a traverse, ought to have concluded to the country, and not with a verification; that it did not appear in or by the plea, nor was it possible with sufficient or any certainty to infer or collect therefrom, whether it was intended *therein and [*105] thereby to deny some material allegation of the declaration, and, if any, what, or whether it was intended to allege new matter in avoidance of the causes of action in the declaration stated and alleged, and, if so, what new matter, or whether it was intended to raise a question of fact to be tried by a jury, and, if so, what question, or a question of law to be determined by the Court, and, if so, what question, &c.

Joinder.

Sixth plea, that Daguerre having invented the invention in the declaration mentioned, and Daguerre and Niepce having knowledge of the said invention, and of the nature thereof, and in what manner the same was to be performed, and having used, exercised, and practised the same in France, as in the fifth plea mentioned, they, Daguerre and Niepce, afterwards, and before the making of the said letters-patent, to wit, on the 1st of June, 1839, retained and employed Berry as their agent, for the purpose, and on the terms, in the fifth plea in that behalf mentioned; that Berry then accepted of such retainer and employment; that, in order to enable him to obtain the letters-patent as such agent, they, Daguerre and Niepce, before the making of the said letters-patent, to wit, on &c., communicated to Berry the nature of the invention, and in what manner the same was to be performed, and he then and thereby, and by no other means, first became and was possessed of the knowledge thereof; that Berry was the true and first inventor of the invention mentioned in the declaration, in the way and sense, and by the means mentioned and explained in the fifth plea, and not in or by any other way, sense, or means whatsoever; that Berry, being a subject of the Queen, afterwards, to wit, on the day and year in the declaration first mentioned, in pursuance of his

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said retainer and employment, and as such agent as aforesaid, obtained and procured the said *letters-patent to be granted to him as in the declaration mentioned, on such trust as in the fifth plea mentioned, and, until the making of the indenture of assignment in the declaration mentioned, always held the said letters-patent on such trust as aforesaid; that, before Berry applied for or obtained the said letters-patent, and while Daguerre and Niepce had such knowledge of the invention and of the manner of performing the same as aforesaid, to wit, on the 14th of June, 1839, by a certain agreement duly made in France, between M. Duchatel, the Secretary of State of Louis Philippe, then King of the French, for the Home Department of France, duly authorized in that behalf, of the one part, and Daguerre and Niepce, then being subjects of that kingdom, and resident therein, of the other part, Daguerre and Niepce assigned and made over to the said Secretary of State, on behalf of the said Government, a certain process of one M. Niepce, sen., with its improvements by Daguerre, and also the last process of Daguerre, for fixing the images of the camera obscura, including therein the invention in the said letters-patent mentioned, and thereby bound themselves to place in the hands of the Minister of the Home Department of the said Government a sealed packet containing the exact and complete history and description of the said process, including the said invention; and it was thereby agreed that M. Arago, a member of the French Chamber of Deputies, and of the Academy of Sciences, who then already had knowledge of the said process, should previously verify all the writings in the said deposit, and should certify their correctness; that the deposit should not be opened, nor the description of the process given to the public, till after the adoption of the bill therein mentioned, and then Daguerre should, if required, operate in the presence of a commission named by the said Secretary of State; and by the said *agreement Daguerre made over in addition, and engaged to give in like manner information in, the process of painting and optic which distinguished his invention of the diorama; and it was thereby agreed that he should be bound to publish all the improvements which, from time to time, he might make in each and all of the said inventions; and, as the price of the rights so given up as aforesaid, the said Minister for the Home Department of the said Government thereby engaged to demand from the Chambers of Peers and of Deputies, being two of the legislative bodies of the said kingdom of France, for Daguerre

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[*107]

an annual pension for life of 6,000 francs, and for Niepce an annual pension for life of 4,000 francs; and they, Daguerre and Niepce respectively thereby agreed to accept such pensions respectively; and it was thereby further agreed, that, in case the said Chambers should not pass, during the then present Session, the bill granting the said pensions, that agreement should become null and void; and the said deposits should be returned to Daguerre and Niepce unopened; and that that agreement should be registered on payment of one franc: that, by virtue of that agreement, and of the laws of France, the invention in the declaration mentioned then became and was the property of Louis Philippe, so then being King of the French as aforesaid, in right of his Crown, subject, however, to the said provision for making void the said agreement in that behalf above mentioned, and remained and continued the property of the said Louis Philippe, in right of his Crown, until and at and after the time of the making of the letters-patent in the declaration mentioned; that, after the making of the said agreement, and in pursuance thereof, and before the granting of the letters-patent, to wit, on the 15th of June in the year aforesaid, the said Secretary of State of the said Government did demand from the said Chambers of Peers and Deputies the pensions for Daguerre *and Niepce mentioned in the said agreement in that behalf, and [*108] presented a bill to the said Chamber of Deputies for approving the said agreement, and granting the said pensions to Daguerre and Niepce according to the said agreement; and that such bill, approving the said agreement, and granting the said pensions, afterwards, and during the said Session of the said Chambers mentioned in the said agreement, and before the granting of the said letters-patent, to wit, on the 12th of August, 1839, duly passed the said Chambers of Peers and Deputies, and received the assent of Louis Philippe, then King of the French, and then and thereby became and was, and still remained, a law of the said kingdom of France; that, by reason of the premises, the said King of the French, upon the passing of the said bill into a law, as aforesaid, became and was, and thence continually had been and was, entitled by the laws of his said kingdom, by himself and his agents, and his subjects of the said kingdom, to use, exercise, vend, and publish the said invention, as well in the said kingdom of France, as in the United Kingdom of Great Britain and Ireland, and in any other country or place where the said King should think proper to permit or authorize the same, without the hindrance or molestation by, or

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licence from Daguerre and Niepce, or either of them, or any of their agents, or the assigns of them or their agents; wherefore the said letters-patent had been and were void, and of no effect. Verification.

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Demurrer to the sixth plea, assigning causes substantially the same as those assigned in the demurrer to the fifth plea. Joinder.

Seventh plea, that Daguerre having invented the said invention, and having, together with Niepce, had knowledge thereof, and of the manner of performing the same, and having exercised and practised the same in manner and form as in the fifth plea

[*109] mentioned, and *Berry having been so retained and employed, and having accepted such retainer and employment, as in that plea mentioned, and Berry having first become possessed of the knowledge of the said invention, as in that plea mentioned, and being such true and first inventor only as in that plea mentioned and explained, he, Berry, also as such agent, afterwards, to wit, on the day and year in the declaration first mentioned, in pursuance of his said employment, obtained and procured the said letters-patent to be granted to him in trust, and held the same in trust, in manner and form as in the fifth plea mentioned; that, before Berry applied for or obtained the said letters-patent, to wit, on the day and year in the said sixth plea in that behalf mentioned, the said agreement and assignment therein mentioned was made in France, between the said M. Duchatel, the said Secretary of State of the said King of the French, duly authorized in that behalf, and Daguerre and Niepce, so then being subjects of that kingdom and resident therein, in manner and form as in the said sixth plea mentioned; that by virtue of such agreement and of the laws of the said kingdom of France, the invention in the declaration mentioned thereupon then became and was the property of the said King of the French, in right of his Crown, subject to the said provision for making void the said agreement, and remained and continued the property of the said King of the French, in right of his Crown, until and at the several times of the making of the said letters-patent, and of the publication and dedication of the said invention hereinafter mentioned; that the said Secretary of State of the said King of the French having demanded the said pensions, and presented the said bill to the said Chamber of Deputies, and the said bill having passed the said Chambers of Peers and Deputies, and received the assent of the said King of the French, in manner and form as in the said sixth plea alleged, the said bill thereupon then became and was, and still

remained, a law of the *said kingdom of France: and, by reason of the premises, the said King of the French, by the laws of the said kingdom, upon the passing of the said bill into a law, became and was entitled, in right of his Crown, to publish, bestow, and dedicate the said invention, and the right of using, practising, and vending the same, and to grant such licence, permission, and authority as thereinafter mentioned to have been done by him, and so remained and continued until and at the several times thereinafter mentioned; that the said King of the French being so possessed of the said invention, and so entitled as aforesaid, he the said King, in right of his Crown, after the making of the said agreement and assignment, and the passing of the said bill into a law as aforesaid, and long before the making of the said assignment from Berry to the plaintiff, to wit, on the 19th of August, 1839, in the said kingdom of France, openly published and made known the said invention, and the manner of performing the same, to the people of France, for the use and benefit of that people, and of all other nations and people in the world, and openly and publicly bestowed and dedicated the said invention, and the right of using, practising, and vending the same, as a free gift and benefaction upon, to, and for the use of all mankind, without limitation or restriction, and gave, published, and granted his full and free and Royal licence, permission, and authority, to all persons whatsoever, in any nation, to use, practise, and vend the said invention at their free will and pleasure; whereby, according to the laws of France, the defendants then became and were, and ever since had been, entitled to use, exercise, and vend the said invention in any country or place, at their free will and pleasure, without the leave or licence or hindrance of Daguerre and Niepce, or either of them, or of any of their agents, or any of the assigns of them or their agents; wherefore, the defendants, at the said *times when &c., committed the supposed grievances in the declaration mentioned, as they lawfully might for the causes aforesaid. Verification.

[*110]

[*111]

Demurrer to the seventh plea, assigning causes substantially the same as those assigned in the demurrer to the fifth plea. Joinder.

Tenth plea, that the title and description of the invention in the declaration mentioned, was and is expressed in the said letters-patent in the words following, and in no other manner; (that is to say,) "a new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera

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obscura;" and that therefore the said letters-patent had been and were void in law. Verification.

Demurrer to the tenth plea, assigning for causes, that it neither traversed nor confessed and avoided any material allegation in the declaration; that it confessed the causes of action in the declaration alleged, and every part thereof, without in any way avoiding the same, or alleging any matter or thing whatsoever in excuse, justification, or discharge of the acts and grievances in the declaration alleged, and in and by that plea admitted to have been committed by the defendants; that it was insufficient, in this, to wit, that it was an argumentative denial that the invention was the subject-matter of letters-patent; that it nowhere appeared in or by that plea, nor could it be inferred therefrom with sufficient or any certainty, what was the invention for which the said letters-patent were granted; that it was circuitous and argumentative, in this, to wit, that, if it at all answered the matters in the declaration contained and alleged, it did so by a circuitous and argumentative denial of the sufficiency of the specification in the declaration alleged to have been inrolled, and of Berry's compliance with the proviso in that behalf in the said letters-patent contained; that, being virtually
[*112] a traverse, *the plea ought to have concluded to the country, and not with a verification; that it tended to an immaterial issue, neither traversing any material allegation of the declaration, nor stating any fact upon which a material traverse could be taken; that it was double, uncertain, dubious, and ambiguous, and also argumentative and circuitous, and tended to delay the issue, in that it did not in any wise thereby or therefrom appear whether it was intended therein and thereby to deny the sufficiency of the specification in the declaration alleged to have been inrolled, and of Berry's compliance with the proviso in that behalf in the said letters-patent contained, or to deny the correspondency of the title and the invention thereby and thereunder described, claimed, and granted, with the said specification and the invention therein and thereby described and claimed, or to deny both of the last-mentioned propositions, or to allege or deny some other, and, if so, what, matter or thing; and that, if it was intended in and by that plea to deny either of the two last-mentioned propositions, then such denial should have been made by an appropriate traverse, concluding to the country, and whereupon issue might have been taken; that, if it was intended in and by the plea to deny both of the two last-mentioned propositions, then it was double, as offering two several

answers to the causes of action in the declaration alleged; that it was uncertain, dubious, and ambiguous, in this, moreover, that it did not in or by the plea appear, nor was it possible with sufficient or any certainty to infer or collect therefrom, whether it was intended therein or thereby to deny some material allegation of the declaration, and, if any, what, or whether it was intended to allege new matter in avoidance of the causes of action in the declaration stated, and, if so, what new matter, or whether it was intended to raise a question of fact to be tried by a jury, and, if so, what *question, or a question of law to be determined by the Court, and, if so, what question, &c. Joinder. [*113]

The demurrers came on for argument in Easter Term last.

Sir T. Wilde, Serjt. (with whom were *Ogle* and *Webster*), in support of the demurrers:

The fifth plea in substance states that one Daguerre was the true and first inventor of the invention the infringement of which is complained of, that he and one Niepce used, exercised, and practised the same in a foreign country, to wit, in France, that Daguerre and Niepce were aliens born and resident in France, that they employed Berry, as their agent, to procure the letters-patent in the declaration mentioned, that, in order to enable him to obtain the letters-patent, Daguerre and Niepce communicated to Berry the nature and particulars of the invention and in what manner the same was to be performed, that Berry was no otherwise the true and first inventor than by having such communication made to him as aforesaid, and by his being the first person in the United Kingdom who acquired or brought in or into the same the knowledge of the said invention and the manner of performing the same, and that Berry obtained the letters-patent and held the same in trust for Daguerre and Niepce, so being such aliens, and not for his own use or benefit. The plea is a mere argumentative traverse of the allegation that Berry was the true and first inventor, which is a material and indispensable allegation.

(ERLE, J.: The first introducer of a new manufacture into the kingdom, is an inventor within the statute of James. The question is, whether an alien is within the rule.)

According to the special circumstances, an introducer may or may not be an inventor within the statute. The plea is open to the same remark, in so far as it is designed to raise the question of novelty.

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Another defence intended to be presented by this plea is, that a *patent cannot be obtained by one person in trust for another. A
[*114] further defence presented, is, that it cannot be obtained in trust for an alien. * * There is no authority for saying that a patent may not be held in trust: and the circumstance of the cestui que trust being an alien can make no difference. * * *

(CRESSWELL, J.: The Crown may grant a licence to an alien to hold lands.)

[115] * * The circumstance of the invention being well known and in common use in a foreign country, is no bar to the validity of a patent here: the man who first makes it known within this realm is the first and true inventor within the statute of James. [He cited *Edgeberry* v. *Stephens* (1), *Stead* v. *Williams* (2), and *Darcy* v. *Allin* (3).]

[116] Many of the foregoing remarks apply equally to the sixth and seventh pleas. The sixth plea in substance states, that, prior to the grant of these letters-patent, the original inventor assigned the benefit of his invention to the King of the French; and it is assumed that he is thereby estopped from the exclusive right to practise it in this country. How can a patent granted to the first introducer of a new manufacture into England be affected by any contract the party may have entered into in a foreign country? * * *

[117] *Channell*, Serjt. (with whom were *W. R. Grove* and *J. Brown*), *contrà*:

[118] * * The plaintiff here, upon the face of his declaration, brings himself within the words of the statute [21 Jac. I. c. 3], alleging himself, generally, to be the true and first inventor. But, taking the declaration and the fifth plea together, it appears that Berry is not the true and first inventor in the literal sense of the words, but that he claims to be an importer or introducer of the invention in such a sense as to entitle him, within the statute, as explained by the decided cases, to call himself an inventor. Assuming, then, that a first importer of a new manufacture may take out a patent in this country as an inventor, and may declare in this

(1) 2 Salk. 447.
(2) 7 Man. & G. 818; 8 Scott, N. R. 449.
(3) 11 Co. Rep. 84 (set out, 1 Webster, P. C. 1); Noy, 178 (set out, 1 Webster, P. C. 5; cited, *ib.* 29, 411).

general form, the cases would seem to show that he must at least be a meritorious importer. The substance of the fifth plea is, that Daguerre was the inventor, that he and one Niepce practised the invention in France, and that, they being *aliens, [*119] the patent was taken out by Berry in trust for them. The merit of the invention belongs to Daguerre, and not to Berry, the patentee. [He cited *Boulton* v. *Bull* (1), *Chappell* v. *Purday* (2), and *The Clothworkers of Ipswich* (3).] At common law, the King could not grant a monopoly, except for an adequate consideration; which consideration was, merit in the grantee, and utility to *the [*120] public.

(CRESSWELL, J.: If a foreigner communicates to an Englishman some useful invention known only abroad, the latter may take out a patent for it here: but what merit does he possess to entitle him to the grant?)

In that case, the disclosure of the invention would have been made to the patentee for his own personal benefit. In the present case, however, Berry is neither an inventor nor an importer. He has no interest in the subject-matter of the patent. He is a mere agent. Assuming, though the point has never been solemnly determined, that a grant of a patent to a foreigner would be good, it ought to be taken out in the name of the party really interested. * * It is submitted *that Berry was not a meritorious importer of this [*121] invention, and, consequently, not an inventor within the meaning of the statute; and that, if Berry and Daguerre and Niepce are to be identified in interest, the patent is open to the objection that it was not taken out by and in the name of the true inventor. * * *

With regard to the sixth and seventh pleas, it is not meant to be contended that the law of France has any extra-territorial operation. * * The patent is taken out by Berry as agent for Daguerre [122] and Niepce, for an invention, their interest in which they had previously assigned for a valuable consideration to a third person. Such a person clearly has not that degree of interest in the subject-matter as will enable him to sustain a patent.

(TINDAL, Ch. J.: A man may take out a patent in this country and in France also for the same invention. What more have these parties done?)

(1) 3 R. R. 439 (2 H. Bl. 491).
(2) 58 R. R. 357 (12 M. & W. 303).
(3) Godbolt, 252.

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The inventor having received a valuable consideration for the entire abandonment of the benefit of his discovery to all the world, he can no more be permitted to set up an exclusive privilege in this country than he could in France. Suppose, instead of disposing of the invention to the King of the French, Daguerre and Niepce had sold it to an Englishman, and had afterwards taken out a patent in this country; could they have restrained their vendee from the use of the invention here?

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(TINDAL, Ch. J.: If the assignment made by Daguerre and Niepce to the King of the French was such as to preclude them from taking out a patent in England, that might be a good answer. That, however, does not appear to be the case.)

[123] * * The tenth plea was intended to raise the question of the validity of the patent as dependent on its title. The patentee might have been entitled to a patent for a new method of producing a known manufacture, or for an improvement therein: but the title should show with reasonable precision whether the patent is taken out for a new manufacture, or merely for a new or an improved method of producing known results—whether the patentee means to claim entire novelty for his invention, or to limit his claim to some improvement in an old method.

(CRESSWELL, J.: If part of the method be new, so as to produce a result that as a whole is new, surely it may be called a new or improved method. If the method be altogether new, may it not be properly called an improved method? They seem to be convertible terms.)

Sir T. Wilde, Serjt., in reply:

The argument in support of the fifth plea amounts to this, that Berry, though the person who first introduced a new manufacture into this country, is not a meritorious inventor within the statute 21 Jac. I. c. 3. It is but an argumentative traverse of the allegation in the declaration that Berry was the true and first inventor.

(ERLE, J.: The argument of my brother *Channell* is, that this plea is not a traverse of the allegation that Berry was the true and first inventor, because he is, in a certain sense, an inventor; but

that it confesses the invention, and *avoids it, by showing circumstances whence it is sought to be inferred that Berry is not a meritorious inventor.) [*124]

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* * It is perfectly clear that the Crown may, if it think fit, grant a patent to an alien. * * * [126]

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the COURT: [127]

The plaintiff declared in case for the infringement of a patent granted to Miles Berry, of which patent the plaintiff was assignee. And the questions before us arise upon the fifth, sixth, seventh, and tenth pleas to this declaration.

The fifth plea states, in substance, that, before the granting of the letters-patent, one Daguerre had invented the new and improved method which was the subject of the letters-patent, and that he and one Niepce, before and at the time of granting the same, had knowledge of, and practised the said invention in France; that Daguerre and Niepce were aliens born out of the allegiance of the Queen, and were at the time resident and domiciled in France; that they retained and employed Miles Berry, as their agent, to procure the letters-patent to be granted to him in his own name, but upon trust for their use and benefit, and not for himself; and that he accepted such retainer. The plea then goes on to state, that, to enable him to obtain such letters-patent, they communicated to him the nature and particulars of the said invention, and he thereupon introduced the knowledge of the invention into the United Kingdom, and was the first person who brought it there; and the plea then alleges "that Miles Berry was no otherwise than as aforesaid the true and first inventor of the said invention in the said declaration mentioned." It then states that Berry, being a subject of our lady the Queen, under such retainer, obtained the letters-patent to be granted to him upon trust for Daguerre and Niepce, so being aliens and resident and domiciled as aforesaid, and not for the use or benefit of himself, and, until the making of the assignment to the plaintiff, had so always held them; "wherefore," the plea concludes, "the letters-patent are void."

The plaintiff demurred specially to this plea; but we think it unnecessary to advert to the causes assigned by him for demurrer, as we think the plea bad in substance. [128]

The defendants contended, that, upon the facts disclosed in this

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plea, the letters-patent are void, upon one of two grounds, viz. either that Berry was not the true and first inventor within the meaning of the statute of James; or that a patent taken out in England by an Englishman in his own name, in trust for foreigners residing abroad, is void in law.

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As to the first objection, it was not denied, on the part of the defendants, that a person who has learned an invention abroad, and imported it into this country, where it was not used or known before, is the first and true inventor within the statute. The cases decided before the statute prove that grants by the Crown to persons who have brought any new trade into the realm, were good at common law: see the case of *Monopolies* (2), and the case of *The Clothworkers of Ipswich* (2). And the exception contained in the 6th section of the statute, in favour of grants of privilege for the sole working of any new manufacture within the realm, was made in affirmance of the common law, introducing no other alteration than the restriction in point of time for which such grants might extend. And, further, the case of *Edgeberry* v. *Stephens*, which was decided long after the statute was passed, is an express authority that the statute "intended to encourage new devices useful to the kingdom; and, whether learned by travel or by study, is the same thing."

But the argument on the part of the defendants has been, that Berry was not a person who imported this invention into England, within the meaning of the statute. It was argued, that, to come [*129] within the statute, the person *who takes out the patent should be the meritorious importer, not a mere clerk or servant or agent, to whom the communication was made for any special purpose, by the foreign inventor, as, for the purpose of enabling him to take out the patent for the benefit of such foreigner. No authority is cited for such distinction. So far as the public are concerned in interest, no such distinction is necessary. Berry is an Englishman, to whom the invention is communicated by a foreigner residing abroad; and Berry first brings the invention into England, and makes it public there. So far, therefore, as relates to the interest of the public, Berry has all the merit of the first inventor. If he has been guilty of any breach of faith in his mode of obtaining the communication, or in the mode of using it in England, he may or may not be made responsible to his employers abroad; but such misconduct seems to have no bearing upon the question, as between

(1) *Darcy* v. *Allin*, Noy, Rep. 178; 11 Co. Rep. 84.
(2) Godbolt, 252.

him and a stranger (1), whether the patent is void or valid. Indeed, it appears upon the plea itself that no fraud was committed upon his employers; for, it is expressly stated in the plea, that he was directed to take out the patent in his own name, in trust for them, and that in fact he had so done, and had held it for a certain time for their benefit.

The invalidity of the patent must therefore depend, if at all, upon the second ground of objection pointed out, viz. that it was taken out by Berry in his own name, but in trust for aliens residing abroad. Now, in support of this objection also, no authority whatever was cited. In the case of *Bloxam* v. *Elsee* (2), the point was raised at Nisi Prius, whether a patent could be taken out in trust for an alien enemy; but it became *unnecessary to decide even that [*130] question, when the case came before the Court. The case before us does not state that Daguerre and Niepce are alien enemies: indeed, we may take judicial notice that there is no war between France and England: and we see no reason or principle which should prevent an *alien amy* if the Crown thought proper, from receiving such a grant, either in his own name, or in the name of another in trust for him. In the case of *Chappell* v. *Purday* (3), the COURT in their judgment assume it to be clear in point of law that a foreigner may hold a patent, if the Crown chooses to grant it to him. We think, for these reasons, that the fifth plea cannot be supported (4).

The sixth plea, after making the several statements contained in the fifth, proceeds to allege, in substance, that, before the grant of the patent, Daguerre and Niepce, by an agreement made in France, between the Secretary of State for the Home Department of the King of the French and themselves, for the considerations therein mentioned, assigned to such Secretary, on behalf of the Government (amongst other things), the invention mentioned and described in the letters-patent, and that, by virtue of such agreement, and by the laws of France, the said invention became the property of the King of the French in right of his Crown, who thereby became entitled, by the laws of his said kingdom, to vend and publish the said invention, as well as in the kingdom of France, as in the United Kingdom of Great Britain and Ireland, and in any other country or place where he should think proper, without any licence from Daguerre

(1) It was not suggested that the patent was invalid on the ground of a deceit having been practised on the Crown by the suppression of the trust.

(2) 30 R. R. 275 (6 B. & C. 169).

(3) 69 R. R. 698 (14 M. & W. 318).

(4) See now s. 4 of the Patents Act, 1883 (46 & 47 Vict. c. 53).—J. G. P.

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and Niepce: and this plea concludes, as the last, that the letters-patent are therefore void.

To this plea also there is a special demurrer; but, without adverting to the causes assigned, it is sufficient to say we think this plea
[*131] also is bad in substance. *The only additional fact, besides those stated in the former plea, is, that, before the granting of the letters-patent, the inventors in France had assigned the invention to the King of the French, who became entitled to make it public in France. The plea contains no statement that he had actually published it in France: but, even supposing the plea to have stated it had been publicly known and exercised in France, we cannot think it would have made any difference as to the validity of a patent taken out in England. But the plea contains no denial of the allegation in the declaration, that Berry was the true and first inventor, within this realm, of an invention which others at the time of making the letters-patent did not use. And this allegation contains all that is necessary to support the validity of the letters-patent in respect of the granting thereof.

One argument advanced by the defendants was, that the original inventors in France, having, for a valuable consideration, parted with their discovery to a person in France, could not come to England and take out a patent here. No authority, again, is cited in support of this position, and it is contrary to common experience; as it is well known that the same persons have patents for the same invention, at the same time, in both countries.

There is nothing in the agreement under which the invention was sold in France, to restrain the original inventors from applying for a patent in England: such a condition might, and probably would, have been inserted, if such had been the intention of the parties: and, at all events, whatever the case might have been as between the parties to the agreement, it is not in the power of the defendants, who are perfect strangers to it, to set up such an objection under this plea, which rests upon the grant of the letters-patent
[*132] being absolutely *void. We think, for these reasons, the sixth plea must be overruled.

We have come to the same conclusion as to the seventh plea, which differs from the last only in this respect, that it alleges the King of the French to have openly published and made known the said invention, and the manner of performing the same, to the people of France, for the use of that people, and of all other nations and people in the world, as a free gift and benefaction for the use of all

mankind; and the plea then proceeds to allege, not that the letters-patent are void, as in the former pleas, but that the defendants thereby became entitled to use the invention in any country, without the leave or licence of the plaintiff. But we think it a sufficient answer to say, that the letters-patent were not void, but, on the contrary, were valid, for the reasons given in our judgment on the two former pleas; whence it follows, as a necessary consequence in law, that the invention cannot be used in this country in direct violation of the valid grant of the Crown, without the licence of the grantee.

As to the tenth plea, it is sufficient to remark that we think the objection to the title of the patent is answered by reference to the decided cases of *Neilson* v. *Harford* (1), and *Nickels* v. *Haslam* (2).

We therefore think the judgment of the Court must be given, on the several pleas above mentioned, for the plaintiff.

Judgment for the plaintiff (3).

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(3 C. B. 176—180; S. C. 15 L. J. C. P. 234.)

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A., by a deed, in which it was recited that he was seised in fee, mortgaged to B. in fee. Indorsed on this deed was a memorandum, signed by C. "that, by an indenture of surcharge, bearing date, &c., the within premises were charged by me, the purchaser of the equity of redemption thereof, with the payment of the further sum of 325*l.* and interest:"

Held, that this amounted to an admission by C. that he came in under A., and that he was therefore bound by the recital that bound A.

THIS was an action of ejectment brought to recover possession of thirty-two acres of land in the county of Somerset. The declaration contained three *demises: the first, by William Gaisford; the second, by William Colmar; and the third, by Benjamin Colmar. [*177]

The cause was tried before Erle, J., at last Spring Assizes at Taunton. On the part of the lessor of the plaintiff, a deed was put in, bearing date in August, 1828, whereby one Sanders, who was assumed to be seised in fee of the whole thirty-two acres,

(1) 8 M. & W. 806.

(2) 7 Man. & G. 378; 8 Scott, N. R. 97.

(3) The issues were tried before Wilde, Ch. J., and a special jury, at the London sittings after T. T. 1847, when a verdict was found for the plaintiff upon all the issues, except one raising a question as to the sufficiency of the description in the specification, on which issue the verdict was taken for the defendant, leave being reserved to the plaintiff to move to enter a verdict for himself.

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mortgaged sixteen acres to one Protheroe for a term of 1,000 years. It was then proposed to put in a deed purporting to be an assignment of this term by Protheroe to Gaisford; but, being insufficiently stamped, this deed was rejected.

The plaintiff then put in an indenture of the 21st of May, 1829, by which Sanders conveyed the whole thirty-two acres to William Colmar, by way of mortgage in fee: the effect of this deed being, to make William Colmar first mortgagee in fee of sixteen acres, and second mortgagee in fee of the other sixteen acres. The deed contained a recital that Sanders was seised in fee in possession. Indorsed on this deed was the following memorandum, dated the 12th of May, 1832, and signed by the defendant:

"Memorandum, that, by an indenture of surcharge, bearing date the 5th day of May instant, the within premises were charged by me William Stone, the purchaser of the equity of redemption thereof, with the payment of the further sum of 325*l.* and interest from the said 5th day of May."

The indenture referred to in this memorandum was not produced. But it was contended, that, as Sanders would be bound by the recital in the deed of the 21st of May, 1829, the defendant was equally bound, by virtue of the indorsement thereon, which showed him in possession of the equity of redemption under Sanders; and so the objection arising from the 1,000 years term appearing to be outstanding in Protheroe, was removed.

[178] The learned Judge being of this opinion, a verdict was taken for the lessor of the plaintiff, on the second demise, leave being reserved to the defendant to move to enter a verdict for him, if the Court should be of opinion that the jury ought to have been told to limit the verdict to sixteen acres.

Channell, Serjt., in Easter Term last, accordingly obtained a rule *nisi*. He referred to *Slatterie* v. *Pooley* (1), *Howard* v. *Smith* (2), *Trimlestown* (*Lord*) v. *Kemmis* (3), and *Carpenter* v. *Buller* (4).

Manning, Serjt. (with whom was *F. Bailey*), now showed cause:

It is conceded that Sanders is bound by the recital contained in the deed of the 21st of May, 1829, by which he covenants and declares, that, at the time of executing that deed, he was possessed

(1) 55 R. R. 760 (6 M. & W. 664).
(2) 60 R. R. 506 (3 Man. & G. 254; 3 Scott, N. R. 574).
(3) 57 R. R. 135 (9 Cl. & Fin. 784).
(4) 58 R. R. 680 (8 M. & W. 209).

of the fee in the entire thirty-two acres, and that the incumbrance by Protheroe has in some way or other been destroyed. And the memorandum signed by the defendant is an admission or declaration by him that he is the purchaser of the equity of redemption of Sanders: *Slatterie* v. *Pooley*. A recital that binds Sanders, is equally binding upon one who is in privity with, or comes in under, him.

Channell, Serjt. (with whom was *Fitzherbert*), in support of the rule:

William Colmar was party to the deed of the 21st of May, 1829, upon which the memorandum was indorsed; but he was no party to the memorandum; neither did the defendant come in under him. William Colmar not being estopped by the supposed *admission contained in that memorandum, it cannot operate by way of estoppel against the defendant, for want of mutuality. [*179]

(MAULE, J.: It is not put on the ground of estoppel, but rather as an admission by one claiming under the mortgagor.)

It may be, according to the case of *Slatterie* v. *Pooley*, that that which cannot operate as an estoppel, may bind the party as a declaration or admission.

(MAULE, J.: It appears that the defendant comes in under Sanders, the mortgagor: can he be in a better situation than Sanders? The memorandum surely is evidence from which the jury might and ought to infer that the equity of redemption therein spoken of, is the equity of redemption of the premises referred to in the deed upon which it is indorsed.)

If the memorandum does not operate by way of estoppel, it cannot be received as a declaration or admission, because the deed of the 5th of May, 1832, which is referred to and might have explained it, was not put in.

TINDAL, Ch. J.:

This case turns upon the legal effect of the indenture of mortgage of the 21st of May, 1829, and of the memorandum thereon indorsed, of the 12th of May, 1832. The indenture appears to be a mortgage in fee of the thirty-two acres by Sanders to William Colmar; and it contains a recital that Sanders was seised thereof in fee. After that recital, it would clearly not be competent to

DOE d. GAISFORD v. STONE.

the mortgagor to set up, as against the mortgagee, any preceding estate which he himself had created. It is said, that the defendant, being no party to this deed, and there being no estoppel binding on William Colmar, there is none binding the defendant. This, however, is not exactly a case to which that doctrine applies: the memorandum operates, not by way of estoppel, but as a declaration or admission by the defendant that he has no better title than Sanders, of whose equity of redemption in the premises purporting [*180] *to be conveyed by the deed, he states himself to be the purchaser. I think he could have no more right than Sanders had, to set up the title of Protheroe under the former mortgage, and, therefore, that the direction was correct.

COLTMAN, J.:

It appears to me also, that the memorandum in question amounts to an admission that the defendant came in under Sanders: and, if so, that brings it to the ordinary case of a tenant let in by a mortgagor, who, equally with the mortgagor, is estopped from setting up against the mortgagee a title created by a prior mortgage. I therefore think the verdict right.

MAULE, J.:

This is the common case of mortgagor and mortgagee. When the mortgagor is out of possession, and it can be shown that the party who is in, came in under him, he is treated as being in privity with him, and is estopped from setting up a defence that would not be open to the mortgagor. The defence here, as to sixteen acres, was, the term outstanding in Protheroe. The recital in the deed of the 21st of May, 1829, that Sanders, the mortgagor, was seised in fee, was evidence against him that the former term had ceased: and the defendant stands in the shoes of Sanders, by his admission in the memorandum. I therefore think the learned Judge properly abstained from telling the jury to limit their verdict to the other sixteen acres.

CRESSWELL, J.:

I am of the same opinion. I think there was abundant evidence of title in William Colmar to the whole thirty-two acres. The memorandum showing that the defendant came in under William Colmar, he had no more right to insist upon the prior mortgage to Protheroe, than Sanders could have had.

Rule discharged.

REYNOLDS AND OTHERS *v.* FENTON.

1846.
May 29.

(3 C. B. 187—193; S. C. 16 L. J. C. P. 15.)

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[187]

In assumpsit on a judgment or decree of the Tribunal of Commerce at Brussels, the defendant pleaded, that he was not at any time served with any process issuing out of that Court, at the suit of the plaintiffs, for the causes of action upon which the said judgment or decree was obtained, nor had he at any time notice of any such process, nor did he appear in the said Court to answer the plaintiffs:

Held, bad, inasmuch as the plea did not show that the proceedings against the defendant in the Belgian Court were so conducted as to deprive the defendant of the opportunity of defending himself therein.

ASSUMPSIT, on a foreign judgment.

The first count of the declaration stated, that, before and at the time of the making of the promise by the defendant next thereinafter mentioned, to wit, on &c., the defendant was indebted to the plaintiff in 1,000*l.* under and by virtue of a certain judgment or decree before then, to wit, on &c., made and pronounced in and by a certain lawful Court in and of certain parts beyond the seas, to wit, in and of the kingdom of Belgium, to wit, the Tribunal of Commerce in and of the city of Brussels, in Belgium aforesaid, in and concerning a certain suit or action then depending in the same Court at the suit of the now plaintiffs against the now defendant, whereby the Court aforesaid did then order and adjudge the defendant to pay to the plaintiffs a certain sum, to wit, 6,808 francs, 9 centimes, of current money of the said kingdom of Belgium, and also a certain other sum, to wit, 837 francs, 8 centimes, of like current money, together with lawful interest upon the above-mentioned sums respectively, which interest, at the time of the making of the promise of the defendant next thereinafter mentioned, amounted to a further sum, to wit, 500 francs, of like current money; and also a certain other sum, to wit, 29 francs, 32 centimes, of like current money, being the costs of the plaintiffs of and in the said action or suit, by the said Court ordered and adjudged to be to them paid by the defendant, exclusive of and besides the costs of the said judgment, and of the giving notice thereof to whom it might concern, in *due form of law, which [*188] last-mentioned costs, at the time of the making of the promise of the defendant next thereinafter mentioned, amounted to a further large sum, to wit, 200 francs of the like current money; and by and through which same judgment or decree the defendant became, and at the time of the making of the promise of the defendant next thereinafter mentioned was, liable to pay to the

REYNOLDS v. FENTON.

plaintiff a further sum, to wit, 200 francs, of like current money, for certain other costs, expenses, and disbursements of them the plaintiffs, by the plaintiffs lawfully and necessarily paid and incurred for, upon, and in respect of the said action or suit, and in and about the perfecting of the said judgment, and in order to the obtaining of the fruits thereof; which last-mentioned costs, expenses, and disbursements were, before the making of the defendant's said promise, duly and legally ascertained, and were, at the time of the making of the said promise, by the law of Belgium aforesaid, incidental to the said judgment or decree, and due, payable, and recoverable under and by virtue of the same, and were such, that, by the last-mentioned law, execution might, at the time last aforesaid, lawfully have been had of and for the same, under and in respect and by virtue of the said judgment or decree; which judgment or decree was, on the day and year first aforesaid, and still remained, in force and unsatisfied; and the defendant then was and remained liable to pay the plaintiffs the said several sums of current money of Belgium aforesaid, by virtue and in respect thereof, and which several sums of current money as aforesaid were together of great value, to wit, of the value of the above mentioned sum of lawful money of this realm; and thereupon the defendant, in consideration of the premises, theretofore, and before the commencement of this suit, to wit, on the day and year first aforesaid, promised the plaintiffs to pay

[*189] them the said sum of *lawful money of this realm on request; yet the defendant had not paid the same, or any part thereof, though often thereunto requested.

Plea to the first count, that, although the judgment or decree in that count mentioned, was in fact obtained by the plaintiffs against the defendant, he the defendant was not at any time served with any process issuing out of the said Tribunal of Commerce in and of the city of Brussels, in the kingdom of Belgium in that count mentioned, at the suit of the plaintiffs, for the causes of action upon which the said judgment or decree was obtained as aforesaid; nor had he at any time notice of any such process, nor did he the defendant at any time appear in the said Court to answer the plaintiffs in the said suit or action in which the said judgment or decree was so obtained as in the count mentioned. Verification.

To this plea the plaintiff demurred generally, and the defendant joined in demurrer.

Channell, Serjt., in support of the demurrer (1) :

The facts stated in this plea do not show that the judgment declared on was contrary to natural justice, or contrary to the practice of the Belgian Court: it is not stated that the defendant was not domiciled, or never was resident, in Brussels, so as to bring it within the principle of the cases of *Buchanan* v. *Rucker* (2), *Douglas* v. *Forrest* (3), and *Smith* v. *Nicolls* (4). *Cowan* v. *Braidwood* (5) is precisely in point. * * It is consistent with this plea, [191] that the defendant may have had property within the jurisdiction of the foreign Court, or an agent there.

(CRESSWELL, J.: The defendant does not say that he had no knowledge of the proceedings.)

Ferguson v. *Mahon* (6) is rather inconsistent with the decisions in this Court. There, in debt on a judgment in the Court of Common Pleas in Ireland, the defendant pleaded, that, though the said judgment was in fact obtained by the plaintiff against the defendant, the defendant was not at any time arrested upon, or served with, any process issuing out of the said Court at the suit of the plaintiff, for the cause of action upon which the said judgment was obtained as aforesaid, nor had he at any time notice of any such process, nor did he at any time appear in the said Court to answer the plaintiff in the said action in which the judgment was so obtained: and that was held a good defence.

(TINDAL, Ch. J.: The plea in this case is almost identical with that.

MAULE, J.: I take the distinction between that case and the present to be this: the Court there could take judicial notice that the law of Ireland is the same as the law of this country with regard to the commencement of the suit by process; but, how do we know that there may not be a good commencement of a suit in Belgium by verbal summons?)

(1) The point marked for argument was, that it did not appear by the plea, that the judgment was obtained or made by fraud, or without jurisdiction, or in a manner repugnant to natural justice.

(2) 9 R. R. 531 (1 Camp. 63).

(3) 29 R. R. 695 (4 Bing. 686; 1 Moo. & P. 663).

(4) 50 R. R. 658 (5 Bing. N. C., 208; 7 Scott, 147).

(5) 56 R. R. 561 (1 Man. & G. 882; 2 Scott, N. R. 138).

(6) 52 R. R. 301 (11 Ad. & El. 179; 3 P. & D. 143).

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Talfourd, Serjt., *contrà*:

Where the declaration on a foreign judgment omits to state that the defendant was domiciled in the country at the time the proceedings were had against him, or that he possessed property there, it is *primâ facie* enough to allege in the plea, as here, that [*192] the defendant never was served with *or had any notice of process issuing out of the Tribunal the judgment of which the plaintiff seeks to enforce; and it is for the plaintiff to reply any facts that may give the foreign Court jurisdiction. All the authorities tend to show that it is competent to a defendant in such a case to plead that he never was summoned, and never had notice of the proceedings. In *Ferguson* v. *Mahon*, Lord DENMAN says, that, although an Irish judgment is a record for certain purposes, "the inquiry is still open, not indeed into the merits of the action, or the propriety of the decision, but whether the judgment passed under such circumstances as to show that the Court had properly jurisdiction over the party; and, when it appears, as here, that the defendant has never had notice of the proceeding, or been before the Court, it is impossible for us to allow the judgment to be made the foundation of an action in this country."

(TINDAL, Ch. J.: The plea does not so allege. It is quite consistent with the defendant's having stood by, cognizant of every step. *Primâ facie* it must be taken that the proceedings are regular.)

In *Buchanan* v. *Rucker* (1), Lord ELLENBOROUGH says: "It is contrary to the first principles of reason and justice, that, either in civil or criminal proceedings, a man should be condemned before he is heard." And in *Cavan* v. *Stewart* (2), the same learned Judge says: "It is perfectly clear, on every principle of justice, that you must either prove that the party was summoned, or at least that he was once on the island." *Becquet* v. *M'Carthy* (3), is to the same effect.

(MAULE, J.: If the plea had alleged, that the defendant never was served with any process, or summoned, so as to be able to defend, it might have been good. But here the defendant merely [*193] says that the plaintiff did not in the Belgian *Court adopt a particular course of proceeding. Can we say that it is contrary to

(1) 9 R. R. 531 (1 Camp. 63; *S. C.* 9 East, 192).

(2) 1 Stark. N. P. C. 525.

(3) 36 R. R. 803 (2 B. & Ad. 951).

natural justice, that a party shall be fixed with a judgment in a foreign Court who has never been served with process? Or, in other words, can we hold that the issuing of process out of a foreign Court is essential to natural justice?)

Primâ facie, this plea does state all that is requisite to show that the defendant had no means of being heard in the foreign Court.

TINDAL, Ch. J.:

The plea is clearly bad. It does not show, substantially, that the defendant had no means of being present in the Belgian Court whilst the proceedings were going on against him therein.

MAULE, J.:

For the reasons suggested, I think this plea clearly cannot be sustained.

The rest of the Court concurred.

Talfourd, Serjt., then prayed, and obtained, leave to amend, on the usual terms.

Rule accordingly.

DOE D. BAILEY AND OTHERS *v.* FOSTER.

(3 C. B. 215—229; S. C. 15 L. J. C. P. 263.)

1846. *June* 2.

[215]

By a memorandum of agreement, dated the 23rd of June, 1842, made between A., as agent for and on behalf of the churchwardens of the parish of St. M. (not naming them), of the one part, and B. of the other part, it was agreed (provided a licence could be obtained from the lord of the manor, and upon B. putting the premises into repair) that the churchwardens should grant a lease to B. for twenty-one years from Midsummer Day then next, under the clear yearly rent of 30*l.*; such lease to contain covenants for payment of rent and taxes, and to repair, insure, not to commit waste, &c., and all other usual and proper covenants, &c.; and B. agreed to accept such lease, and execute a counterpart, &c., and that, until such lease and counterpart should be granted, the said yearly rent should be payable and recoverable by distress or otherwise, in like manner as if such lease and counterpart had been executed:

Held, that this instrument was properly stamped as an agreement (1).

Held, also, that the tenancy thereby created, whether a tenancy from year to year (which the Court thought it was), or a tenancy at will, was properly put to an end to by a notice to quit and deliver up possession, given by persons acting as agents for C. and D. who were churchwardens

(1) But by s. 75 of the Stamp Act, 1891, an agreement for a lease is charged with the same duty as if it were an actual lease.—J. G. P.

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at the time the agreement was made and B. let into possession; notwithstanding the notice purported also to have been given on behalf of the churchwardens and overseers in office when the notice was served, and did not state to whom the possession was to be delivered up.

EJECTMENT, for a messuage and land situate at Walthamstow, in the county of Essex.

The declaration contained four demises, each being laid on the 25th of June, 1845, the first, by Robert Bailey and Richard Bedford Allen, churchwardens, and George Collard and Alfred Janson, overseers, of the parish of St. Mary, Walthamstow; the second, by James Pistor; the third, by Charles Webber and John Budd; the fourth, by John Stoker and Robert Bailey.

The cause was tried before Alderson, B., at the last Assizes for the county of Essex. It appeared that the premises in question had been held by the defendant under the following agreement, which when produced bore a 20s. agreement stamp:

"Memorandum of agreement made this 23rd of June, 1842, between H. F. Gadsden, as agent for and on behalf of the churchwardens of the parish of St. Mary, Walthamstow, in the county of
[*216] Essex, of the one part, *and John Foster, of Rotherfield Street, Islington, in the county of Middlesex, of the other part:

"The said H. F. Gadsden hereby agrees (provided a licence can be obtained from the lord of the manor in which the hereditaments and premises hereinafter particularly mentioned are situate, but without any right in the said John Foster, his executors, administrators, or assigns, to require the sanction of the Poor-law Commissioners, or the board of guardians of the union in which the said parish is comprised, and upon the said John Foster putting the said messuage or tenement, buildings, and premises, into a good and tenantable state of repair,) that the said churchwardens shall grant and execute, or cause or procure to be granted and executed, unto the said John Foster, his executors, administrators, and assigns, a lease of all that piece or parcel of land lying and being in Walthamstow aforesaid, heretofore (with other land and buildings thereon belonging to Sir R. Fitzwygram) in the occupation of Mr. Saltmer, and late of Mr. Brown, and now unoccupied; and also all that messuage or dwelling-house and appurtenances standing and being thereon (except timber and timber-like trees growing thereon, and except the tenant's fixtures in and about the same, for the removal of which the said Mr. Saltmer is to be at liberty to enter upon the premises as may be necessary, provided the said John Foster, his executors, administrators, or assigns,

shall not become the purchaser thereof) to hold to the said John Foster, his executors, administrators, and assigns, for the term of twenty-one years from Midsummer Day next, at and under the clear yearly rent of 30*l.*, payable quarterly, free from all taxes, tithes, or rent-charges in lieu of tithes, and all deductions whatsoever, except income and property-tax; such lease to contain covenants for payment of rent and taxes, to repair and keep in repair, not to use the *said agreed-to-be-demised messuage or [*217] tenement other than as a private dwelling-house, to insure the premises in 500*l.* at the least, and the usual power to enter and see to state of repairs, to cut and carry away timber, and to re-enter on non-payment of rent or non-performance of covenants; and all other usual and proper covenants, clauses, provisoes, and agreements: And the said John Foster hereby agrees to accept such lease and execute a counterpart thereof (such lease and counterpart to be prepared by the solicitor to the said parish), and to pay the expense thereof, and of and relating to such licence so to be obtained as aforesaid, and of this agreement, the said churchwardens hereby agreeing to allow to the said John Foster, his executors, administrators, or assigns, the sum of 3*l.* 15*s.* out of the first quarter's rent payable in respect of such premises; and that, until such lease and counterpart shall be granted, the said yearly rent shall be payable and recoverable, by distress or otherwise, in like manner as if such lease and counterpart had been executed. As witness," &c.

It appeared that a draft lease had been prepared and sent to the defendant's solicitors, who returned it with an intimation that the defendant did not then require a lease to be executed, but that, whenever a lease was executed, it must be a legal and valid instrument.

On the part of the defendant, it was objected that the above instrument should have been stamped with a 30*s.* lease stamp; or, if it amounted to no more than an agreement, that, inasmuch as it was stamped after the 7 & 8 Vict. c. 21, came into operation, it should have been impressed with the 2*s.* 6*d.* stamp imposed by that statute. Upon this point the learned Baron reserved to the defendant leave to move to enter a nonsuit.

The plaintiff then put in a notice to quit, dated the 21st of November, 1844, by John Stoker and Robert *Bailey, who were [*218] proved to have been at that time churchwardens of the parish of St. Mary, Walthamstow.

It was thereupon objected, for the defendant, that there was no

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evidence that the premises were parish property, or that the requisites of the statute 59 Geo. III. c. 12, s. 17, had been complied with; and that, at all events, the notice should have been given by the churchwardens and overseers, and should have so described them.

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The plaintiff then gave in evidence the following notice to quit, signed by Messrs. Hindman and Howard, the attorneys for the lessors of the plaintiff; but it did not appear that they were authorized in writing by the persons on whose behalf the notice was stated to be given, to give such notice:

"We, the undersigned, as agents for and on behalf of Charles Webber and John Budd, late churchwardens of the parish of St. Mary, Walthamstow, Essex, and John Stoker and Robert Bailey, the present churchwardens of the said parish, and Edward Wigram and Samuel Taylor, the present overseers of the poor of the same parish, do hereby require you to quit and deliver up possession, on the 24th day of June next, of all that messuage, tenement, or dwelling-house, with the yard, garden, hereditaments, and appurtenances to the same belonging, situate and being in Church Hill Lane, Walthamstow aforesaid, and now in your occupation. Dated this 24th of December, 1844."

For the defendant it was objected, that this notice was defective, inasmuch as it did not state to whom the premises were to be delivered up: and that there was no demise in the declaration to which it could apply.

[*219] It was then contended, on behalf of the plaintiff, that *no notice to quit was necessary, half a year's rent being in arrear, and no sufficient distress on the premises: as to this, however, the proof failed. Certain acts of waste committed by the defendant were then proved.

To obviate the infirmities of the other parts of the case, the lessors of the plaintiff then sought to rely on the demise by James Pistor. For this purpose, they put in an examined copy of the court-roll of the manor of Walthamstow, containing an admittance of one William James Pistor to certain tenements, parcel of the manor, on the 9th of January, 1822, "in trust for the poor of the parish of Walthamstow."

It was objected, for the defendant, that this copy was inadmissible for want of a stamp. This objection, however, was overruled.

The evidence to identify the premises mentioned in this admittance

with those which were the subject of this action, and also to identify the William James Pistor therein named with the James Pistor, the party demising, was extremely slight. The learned Baron, however, submitted that question to the jury, who found that the premises were the same, and that the William James Pistor in the admittance, and the James Pistor in the declaration, were one and the same person. The learned Baron thereupon allowed the declaration to be amended (1), notwithstanding the counsel for the defendant declined to admit the lease, entry, and ouster, in the declaration so amended. There was no application to amend the consent-rule.

It was insisted, on the part of the defendant, that, as against Pistor, there had been an adverse possession of more than twenty years; and that, at all events, he had acquiesced in the holding by the defendant, and that *such holding could not be determined [*220] without a demand of possession.

A verdict was entered generally for the lessors of the plaintiff.

Byles, Serjt., in Easter Term last, obtained a rule *nisi* to enter a verdict for the defendant, or a nonsuit, pursuant to the leave reserved, or for a new trial.

Channell, Serjt. (with whom was *Bovill*), now showed cause:

The instrument in question was a mere agreement for a future lease, and was therefore properly stamped with an agreement stamp. If it were held to be a lease, it would operate as a forfeiture of the lessors' estate, the licence of the lord of the manor being necessary: and that is a circumstance that will not be lost sight of in construing the instrument. * * The question is, [223] whether the relation of landlord and tenant was created at the moment the agreement was executed. If not, the payment of rent under a distress would not create a tenancy.

The multiplicity of demises in this declaration was occasioned by a doubt, which, from recent cases (2), appears to have been well founded, whether the statute 59 Geo. III. c. 12, s. 17, applies to copyholds (3).

(1) "*Dubitante meipso*," said his Lordship in his report to the Court.

(2) See *Allason* v. *Stark*, 48 R. R. 493 (9 Ad. & El. 255); *Gouldsworth* v. *Knights*, 63 R. R. 619 (11 M. & W. 342); *In re Paddington Charities*, 9 Sim. 629.

(3) As to that section, see now the Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 5 (2) (c) and 19 (7), as regards rural parishes.—J. G. P.

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The first demise is laid in the names of the persons who filled the offices of churchwardens and overseers of the parish of St. Mary, Walthamstow, at the date of that demise; the second, in the name of the supposed legal owner of the copyhold interest; the third, in the names of those who were churchwardens at the date of the agreement under which the defendant entered; and the fourth, in the names of those who were churchwardens at the time the notice to quit was given. * * *

[224] The defendant was let into possession by Webber and Budd, the then churchwardens. He could not dispute their title. And his tenancy—a tenancy from year to year upon the terms of that agreement—was properly put an end to by the notice to quit given on the 24th of December, 1844. The validity of that notice is not at all affected by the circumstance of the agents by whom it was given, professing to act also as agents for the then churchwardens and overseers, who were no parties to the original agreement. It might have been objectionable, had the premises been described in the notice as being held under the several persons named.

Byles, Serjt., in support of the rule:

Assuming the instrument in question to be a mere agreement for a lease, it appears upon the face of it that the churchwardens were dealing with property in which they might have an equitable, but in which they clearly had no legal, interest; and that they were dealing with it as property held by them in their official, and not in their personal, capacities. They contract to procure a lease to be granted by the person having the legal interest. Under this contract, Foster never became tenant to Webber and Budd.

(TINDAL, Ch. J.: Having been let into possession by Webber and Budd, is it competent to him to deny their title?)

[*225] The notice does not state to whom the possession *is required to be delivered up.

(MAULE, J.: Let the defendant walk out: no doubt the right parties will take possession.)

Then, the instrument of the 23rd of June, 1842, is a demise, and not a mere agreement. *Pinero* v. *Judson* (1) comes the nearest to this of any of the reported cases. * * *

(1) 31 R. R. 388 (6 Bing. 206; 3 Moo. & P. 497). See 15 M. & W. 601.

(TINDAL, Ch. J.: It was uncertain at the time who would be the lessor: therefore it was agreed that in the meantime things should go on as if the defendant was tenant to Webber and Budd.)

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There is no authority to justify the construction of this instrument otherwise than as a demise.

TINDAL, Ch. J.:

I am of opinion that the plaintiff is entitled to recover upon the third demise. I am also of opinion that the memorandum of the 23rd of June, 1842, was an agreement only; and therefore there is an end to the question as to the sufficiency of the stamp. The present instrument differs materially from that produced in *Pinero* v. *Judson*. There, the defendant was to lay out money upon the premises, and to pay rent, and to hold, until the lease should be executed, "subject to the covenants above mentioned." A more formal lease was to be executed when circumstances required it. Here, however, the parties were evidently doubting who should be the real lessor; and in the meantime, until that point could be settled, the holding was to be under the subordinate agreement. To whom was the defendant to pay rent? To the persons who let him into possession: and, although in the agreement they are called "the churchwardens of the parish of St. Mary, Walthamstow," it was well known who they were. Those persons having let the defendant into possession, the right, inasmuch as they could not claim the premises as a corporation, never shifted from them; and, when they gave the defendant a notice to quit, he was bound to obey it. *Having come into possession under them, it was not competent to him to dispute their title.

[*227]

COLTMAN, J.:

I also think the demise by Webber and Budd may be sustained. The instrument in question was clearly an agreement, and no lease. If a lease, it must have been a lease for twenty-one years; which would have created a forfeiture of the estate. The parties evidently did not mean that. They all knew the difficulty of making a valid lease: and therefore it was understood that the defendant should, in the meantime, be let in as tenant upon the terms of the agreement, during so long a time as might be mutually agreed, that is, until the tenancy should be put an end to by a notice to quit. It has been suggested that the title of Webber and Budd is gone. That, however, is not so: whatever

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title they had, they still have, the property not passing to their successors in office as a corporation. Their title, by estoppel against the defendant, is as good as ever it was. I therefore think Webber and Budd were entitled to determine the defendant's holding by a notice to quit, and that they have so done.

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MAULE, J.:

I also think the demise by Webber and Budd was proved. The agreement purports to be made by one Gadsden, as agent for and on behalf of the churchwardens of the parish of St. Mary, Walthamstow (not naming them), of the one part, and Foster, of the other part: and it is agreed (provided a licence can be obtained from the lord of the manor, and upon Foster putting the premises in good repair,) that the churchwardens shall grant a lease to Foster for twenty-one years from Midsummer Day then next, under the clear yearly rent of 30*l.*; such lease to contain covenants for payment of rent and taxes, and to repair, insure, not to commit waste, &c.; and all other usual and proper covenants, &c.; and Foster agrees to
[*228] accept such lease, *and execute a counterpart, &c.; and that, until such lease and counterpart shall be granted, the said yearly rent shall be payable and recoverable, by distress or otherwise, in like manner as if such lease and counterpart had been executed. The introduction of these latter words clearly shows that the parties did not intend the instrument to operate as a lease. The uncertainty also of who might turn out to be the real landlord, affords another reason for thus construing it. *Pinero* v. *Judson* was a totally different case. There, the parties intended that the instrument they were executing should be a lease. I think a tenancy from year to year was created between Foster and the persons who let him into possession; and that such tenancy was sufficiently put an end to by the notice to quit, notwithstanding the mention therein of the present churchwardens and overseers. And, if this were not a tenancy from year to year, but a tenancy at will or at sufferance, the relation was sufficiently ended by the notice.

CRESSWELL, J.:

I am of the same opinion, though free to admit that I have had some difficulty in coming to that conclusion. The instrument in question is not a lease: clearly not a lease for twenty-one years. A lease was to be granted upon the performance of certain conditions precedent—the consent of the lord of the manor being

DOE d. BAILEY v. FOSTER.

obtained, and the repairs being done by the defendant. Upon the proper construction of the instrument itself, and the intention of the parties, it clearly is only an agreement for a lease. It appears that the defendant got into possession under certain persons who are called churchwardens of the parish. The circumstance of their not being named, is of no importance: *Francis* v. *Doe* d. *Harvey* (1). He comes in under those persons, either as tenant from year to *year, or at sufferance: and, coming in under them, [*229] he is estopped from denying their title: *Doe* d. *Johnson* v. *Baytup* or *Baytrup* (2). Supposing it to be a tenancy from year to year, there is no proof of a tenancy under any but the persons who let the defendant in; no proof that their title, whatever it might be, had expired. The doctrine of estoppel clearly applies, whether the tenancy was from year to year, or at will or sufferance (3): in the one case, there was a sufficient demand of possession; in the other, a sufficient notice to quit.

Rule discharged (4).

PIGGOT *v.* THE EASTERN COUNTIES RAILWAY COMPANY (5).

1846. *June* 2.

(3 C. B. 229—243; S. C. 15 L. J. C. P. 235.) [229]

In case against a Railway Company, for so negligently managing and conducting an engine, that certain premises of the plaintiff adjoining the line, were destroyed by fire emitted from the engine, evidence is admissible for the purpose of showing that other engines belonging to the Company, upon other occasions, in passing along the line, threw sparks or ignited matter to a sufficient distance to reach the building in question—without showing the precise circumstances under which this occurred.

The fact of premises being fired by sparks emitted from a passing engine, is *primâ facie* evidence of negligence on the part of the Company, rendering it incumbent on them to show that some precautions had been adopted by them, reasonably calculated to prevent such accidents (6).

CASE. The declaration stated, that the plaintiff was lawfully possessed of a certain cart-lodge of great value, to wit, of the value

(1) 51 R. R. 616 (4 M. & W. 331).

(2) 3 Ad. & El. 188; 4 Nev. & M. 837.

(3) "There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is always by right, and tenant at sufferance entereth by a lawful lease, and holdeth over by wrong." Co. Litt. 57 b. There seems to have been no tenancy at sufferance here.

(4) *Quære*, whether the memorandum itself did not create an immediate tenancy from year to year, convertible, by the execution of the lease, into a term for twenty-one years?

(5) And see *Vaughan* v. *Taff Vale R. Co.* (1860) 5 H. & N. 679, 29 L. J. Ex. 247, Ex. Ch.; *C. P. R. Co.* v. *Roy* [1902] A. C. 220, 71 L. J. P. C. 51.

(6) On this point compare *Smith* v. *London and South-Western Railway Co.* (1870) L. R. 5 C. P. 98, L. R. 6 C. P. 14, 40 L. J. C. P. 21.—J. G. P.

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of 100*l.*, then standing upon *certain land of the plaintiff, situate in the parish of Boreham, in the county of Essex, and near to a certain railway there then used by the defendants for the purpose of driving and propelling, from time to time, in and along the same, certain steam-carriages and steam-engines, containing fire and igneous matter, to wit, in the parish aforesaid, &c.; that the defendants were also then, to wit, on &c., in &c., aforesaid, possessed of a certain steam-carriage and steam-engine, containing fire and igneous matter, which was then driven and propelled in and along the said railway, near to the said cart-lodge of the plaintiff, and was then under the care and management of the defendants, who were then and there managing and conducting the same; yet that the defendants then and there so carelessly, negligently, and unskilfully managed and conducted their said steam-carriage and steam-engine, and the said fire and igneous matter then therein contained as aforesaid, and used and applied so little care, precaution, and skill, in and about the keeping, holding, and retaining of the said fire and igneous matter in and upon the said steam-carriage and steam-engine, and in and about the providing, applying, and using the fit, proper, and necessary means and appliances for keeping, holding, and retaining the said fire and igneous matter in and upon the said steam-carriage and steam-engine, and in and about the guarding, hindering, and preventing the said fire and igneous matter from escaping, passing, and flying from and out of the said steam-carriage and steam-engine, that, by and through the carelessness, negligence, unskilfulness, and improper conduct of the defendants in that behalf, and by and through the want of care, precaution, and skill of and in the defendants, in and about the keeping, holding, and retaining the said fire and igneous matter in and upon the said [*230]

[*231] *steam-carriage and steam-engine, and in and about the providing, applying, and using the fit, proper, and necessary means and appliances for keeping, holding, and retaining the said fire and igneous matter in and upon the said steam-carriage and steam-engine, and in and about the guarding, hindering, and preventing the said fire and igneous matter from escaping, passing, and flying from and out of the said steam-carriage and steam-engine, divers sparks and particles of the said fire, and divers portions of the said igneous matter, then and there escaped, passed, and flew from and out of the said steam-carriage and steam-engine of the defendants, in and upon the said cart-lodge of the plaintiff; and that, by

means thereof, the said cart-lodge, then being of the value aforesaid, then became ignited and set on fire, and was thereupon, and by means of the premises, then and there wholly burnt, consumed, and destroyed; and, by means of the premises aforesaid, ten stables, ten cow-houses, ten pig-sties, ten granaries, ten other cart-lodges, ten other sheds, and ten other outbuildings of the plaintiff, then being of great value, to wit, of the value of 1,000*l.*, and also divers goods and chattels, to wit, one hundred yards of palings, one hundred yards of fences, twenty gates, &c., of the plaintiff, then being of great value, to wit, of the value of 500*l.*, and then respectively being in and upon and contiguous to the first-mentioned cart-lodge, then and there became ignited and set on fire, and were thereupon and by means of the premises then and there wholly burnt, consumed, and destroyed; and also, by means of the premises aforesaid, the plaintiff was then and there forced and obliged to pay, lay out, and expend divers sums of money, in the whole amounting to a large sum of money, to wit, 100*l.*, in and about the extinguishing and putting out of the said fire which so *burnt, consumed, and destroyed the said cart-lodge, goods, and [*232] chattels; and also, by means of the premises, the defendant had paid, laid out, and expended divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of 1,000*l.*, in and about the hiring, providing, erecting, and procuring temporary stables, &c. &c. goods and chattels necessary for temporarily replacing the several premises so burnt, consumed, and destroyed as thereinbefore mentioned, in order to enable the plaintiff to carry on and conduct his lawful and necessary affairs by him to be carried on and conducted; and also, by means of the premises, the plaintiff had been greatly hindered and prevented from carrying on and conducting his said affairs and business; to the plaintiff's damage of 2,000*l.*, &c.

The defendants pleaded Not guilty.

The cause was tried before Alderson, B., at the last Assizes for the county of Essex, when the following facts appeared in evidence: The plaintiff was the occupier of a farm called Porter's farm, abutting upon the Eastern Counties Railway, in the parish of Boreham, about midway between Witham and Chelmsford. On the 27th of August last, between the hours of twelve and one, at noon, the thatch of a cart-lodge or shed in the plaintiff's farm-yard, distant about forty-five feet from the nearest line of rails, was, immediately after the passing of the mail-train from London to

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Colchester, observed to be on fire; and, notwithstanding every exertion, on the part of the plaintiff and those in his employ, to extinguish it, the fire communicated with several other farm-buildings and farming implements, and totally destroyed them. At the time of the accident there was a strong wind blowing from the direction of the railway towards the plaintiff's premises; and
[*233] the *train was proceeding at an ordinary speed, viz., twenty-five miles an hour.

In order to show that the fire was probably caused by sparks or particles of ignited coke emitted from the funnel or chimney, or from the fire-box of the engine by which the train was being propelled, the plaintiff's counsel proposed to ask a witness whether he had not on other occasions observed sparks or ignited matter to proceed from engines of the defendants passing along the line adjoining the plaintiff's farm.

It was objected, on the part of the defendants, that this was not a proper question, inasmuch as it was not competent to the plaintiff in this case to prove the emission of sparks or ignited matter from other engines, passing the spot on other occasions, without showing them to have been under the care of the same driver, driven at the same speed, with the same number of carriages and passengers, and of the same construction as the engine in use at the time of the accident.

On the part of the plaintiff, the case of *Aldridge* v. *The Great*
[*234] *Western Railway Company* (1) was relied on *as an authority that

(1) 3 Man. & G. 515; 4 Scott, N. R. 156; 1 Dowl. N. S. 247. That was an action upon the case against a Railway Company, for so carelessly and improperly managing and directing an engine on their railway, by their servants, that sparks flew from the engine upon a stack of beans standing
[*234, n.] in an adjoining field, belonging to the plaintiff, whereby the stack was destroyed. A case stated for the opinion of the Court, under the statute 3 & 4 Will. IV. c. 42, s. 25, alleged that the engines used upon the railway, were such as were usually employed on railways for the purpose of propelling the trains and carriages thereon, and that the engine from which the sparks that set fire to the stack in question flew, was used at the time in the ordinary manner, and for purposes authorised by the Act of Parliament incorporating the Company. And the Court of Common Pleas held, that the facts stated were not sufficient to enable them to infer negligence on the part of the Company, so as to justify the directing of the entry of a verdict for the plaintiff; but that they did not *show such an absence of negligence as to warrant the directing of the entry of a nonsuit. The special case was thereupon withdrawn, in order that the parties might go on to trial.

In the course of the argument, it was contended, for the plaintiff, that the facts showed the defendants to have been guilty of negligence; for, that, as it appeared that the engine was liable to emit sparks, they were bound to take care that such sparks

evidence was admissible to show that the engines in use upon this railway were so constructed, and generally so used, as to emit sparks,—for the purpose of establishing a case of negligence against the Company.

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The learned Baron being of opinion that the question might properly be put, the witness stated, that he had frequently seen pieces of ignited coke fall from the lower part of the engine (the fire-box), but not from the chimney, the day-light rendering it difficult, if not impossible, to see sparks issuing thence. Other witnesses also proved that they had frequently seen sparks and small particles of coke, about the size of a hazel nut or a walnut, proceed from the chimneys of the Company's engines when passing along the line at dark, and fall in an ignited state on to the plaintiff's premises, near the buildings in question; and that it sometimes happened that pieces of ignited coke falling from the fire-box on to the driving wheels of the engine, were thrown by them to a considerable distance.

Professor Farey, and other persons practically acquainted with the construction and the working of the engines generally in use on railways, stated, that the emission of sparks or particles of ignited matter from *the top of the chimney might, in a great [*235] measure, be prevented by a cap or covering of wirework, or by the insertion of a perforated metal plate placed horizontally at the chord of the arch of the smoke-box, so as to intercept the particles escaping through the smoke-tubes—certain tubes that are placed in the lower part of the engine, between the fire-box and the smoke-box, the inside diameter of which tubes was described to be about an inch and a half—though it was admitted, that this would, to a certain extent, impede the draught, and, consequently, diminish the power of the engine. They, however, stated, that this might be remedied, or the emission of sparks altogether prevented, by employing engines of such power that they need not be worked to their utmost capacity. They also stated, that, in their judgment, to produce the injury here complained of, the engine used on the occasion in question must have been worked to its utmost; and that the danger arising from the emission of sparks might be

did no harm. TINDAL, Ch. J., thereupon observed: "If the case had gone to trial, and the plaintiff had proved that the engines had frequently set fire to stacks, that would have shown negligence; but it does not appear that such an accident had ever happened before." And MAULE, J., added: "The case does not state that sparks had ever previously come from the engine."

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entirely prevented by shutting off the steam on passing a spot where danger was to be apprehended.

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On the part of the defendants, the driver and fireman who had charge of the engine at the time of the accident, and other persons, were called to prove that the engines of the Company were of the best construction, and of adequate power; and that, on the occasion in question, all practicable care had been taken to prevent accidents from fire; the driver and fireman stating, that, in passing the plaintiff's farm, the steam had been shut off, there being a considerable incline (about 1 in 330) at that spot, as well as a sharp curve, and a pair of points at the lower part, in passing which, more than ordinary attention and care were requisite. They also condemned the use of caps and perforated plates, as operating injuriously upon the working of the engine, by *preventing the free escape of the waste steam, and thereby diminishing the draught.

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The learned Baron, in leaving the case to the jury, told them, that the Company, in the working of their engines, were bound to use all reasonable means to prevent accidents, and not to tax them beyond their power; and that the emission of ignited particles in the way described by the plaintiff's witnesses, was some evidence that the engine in question was overworked.

The jury returned a verdict for the plaintiff. The amount of damages was referred.

April 17.

Shee, Serjt., having, in Easter Term last, obtained a rule *nisi* for a new trial, on the grounds that the answer to the question objected to at the trial was improperly received, and that the verdict was against the weight of evidence—the learned Judge reported to the Court, that he held the evidence admissible for the purpose of ascertaining whether or not sparks or ignited particles of coke could be thrown to so great a distance from the line as the spot in question.

Channell, Serjt. (with whom was *Bovill*), now showed cause:

The declaration charges negligence in the largest and most comprehensive form, whether in the management of the engine or in its construction or quality. It clearly was competent to the plaintiff to show, by such means as were within his power, the nature and character of the engines in general use upon the defendant's line, the better to enable the scientific witnesses to state

whether or not the injury complained of could have been caused in the way suggested, or whether some precautionary measures might not have been adopted to insure the safety of property traversed by their railway. The evidence was offered, not for the purpose of showing, as a fact, that the plaintiff's premises *were fired by a spark from the particular engine, but merely to show that the engines in use by the defendants habitually emitted sparks in a manner likely to cause such an injury. And the testimony of Professor Farey, and the witnesses who followed him, clearly established the fact, that, if the engine in question had been well constructed, and was in efficient working order, it must on this occasion have been taxed beyond its power; and that some one of the precautions suggested, viz. the cap on the chimney, the perforated plate in the smoke-box, or shutting off the steam on approaching a place where danger was to be apprehended, might have prevented the destruction of the plaintiff's property. The charge of negligence involves knowledge on the defendants' part of the defective construction or condition, or the improper driving of their engines. If sparks were frequently seen projected to a great distance on either side of the line, surely that is a circumstance which the jury are to take into their consideration in ascertaining the existence or the absence of negligence. [He cited *Webb* v. *Smith* (1).] In the case of a prosecution for forgery, evidence of what the prisoner did at other times and in other places, is admissible for the purpose of ascertaining the intent: and such evidence is clearly admissible to show knowledge, where knowledge is material.

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(TINDAL, Ch. J.: The evidence now in question was admissible for the purpose for which the learned Judge reports to us that he received it, viz. to ascertain whether or not sparks, such as those described, could be emitted from the engines used by the Company, to the distance represented.

MAULE, J.: It clearly proved the possibility of such a thing happening; and for that purpose it was admissible.)

The verdict was fully warranted by the evidence. It was abundantly shown that no precautions whatever had been taken by the Company to mitigate or avert the danger arising from their mode of working their engines. It was shown that engines of

(1) 4 Bing. N. C. 373; 6 Scott, 147.

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adequate power, moderately worked, would be comparatively harmless. There was enough to justify the conclusion, either that the defendants' engine was insufficient, or that it was overworked; in either of which cases the defendants would in point of law be guilty of negligence.

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Shee, Serjt. (with whom was *Lush*), in support of the rule:

The declaration is in the common form, imputing negligence and want of due care on the part of the driver of the engine on the particular occasion: there is no complaint of imperfect construction of the defendants' engines generally.

(MAULE, J.: The charge is, that the Company omitted to do that which they were in law bound to do, viz., so to use their engines as not to injure the property or the rights of their neighbours. It is quite indifferent to the plaintiff what may have been their negligence on other occasions than that in question.)

Using engines of the best and most approved construction, and of a power adequate to the work imposed upon them, the defendants have used all reasonable and practicable care to prevent damage being done by them to property situate near the line; and consequently they are not liable. The evidence showed that the engines of the defendants are similar to those in use on nearly all the other railways: and the result of it is, that the cap, or the perforated plate, spoken of by some of the plaintiff's witnesses, as a means of preventing the emission of sparks, is virtually impracticable; and that the greatest possible care will not at all times prevent accidents of this sort.

(MAULE, J.: The evidence, I think, shows that it is perfectly practicable to adopt precautions that will render such accidents next to impossible—by travelling at a rate of speed, or with a load, proportioned to the power of the engine.)

The evidence that was objected to was clearly inadmissible, and tended most materially to mislead the jury. It was offered for purpose of showing, that, on other occasions, other engines belonging to the Company—not proved to have been of the same power or the same construction, or driven by the same person, or at the same rate of speed, or drawing the same weight—had been seen to emit sparks. * * *

TINDAL, Ch. J.:

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I am of opinion that this rule must be discharged. The defendants are a Company intrusted by the Legislature with an agent of an extremely dangerous and unruly character, for their own private and particular advantage: and the law requires of them that they shall, in the exercise of the rights and powers so conferred upon them, adopt such precautions as may reasonably prevent damage to the property of third persons through or near which their railway passes. The evidence in this case was abundantly sufficient to show that the injury of which the plaintiff complains was caused by the emission of sparks, or particles of ignited coke, coming from one of the defendants' engines; and there was no proof of any precaution adopted by the Company to avoid such a mischance. I therefore think the jury came to a right conclusion, in finding that the Company were guilty of negligence, and that the injury complained of was the result of such negligence. There are many old authorities to sustain this view; for instance, the case of *Mitchil* v. *Alestree* (1), for an injury resulting to the plaintiff from the defendant's riding an unruly horse in Lincoln's Inn Fields; that of *Bayntine* v. *Sharp* (2), for permitting a mad bull to be at large; and that of *Smith* *v. *Pelah* (3), for allowing a dog, known to be accustomed to bite, to go about unmuzzled. The precautions suggested by the witnesses called for the plaintiff in this case, may be compared to the muzzle in the case last referred to. The case of *Beaulieu* v. *Finglam*, in the Year Books (4), comes very near to this. There, the defendant was charged, in case, for so negligently keeping his fire as to occasion the destruction of the plaintiff's property adjoining. The duty there alleged was—"quare, cum secundum legem et consuetudinem regni nostri Angliæ, hactenus obtentam, quod quilibet de eodem regno ignem suum salvò et securè custodiat, et custodire teneatur, ne per ignem suum dampnum aliquod vicinis suis eveniat:" and there was no suggestion that it was necessary to define the particular sort of negligence that was complained of. And, with respect to the evidence that was objected to, I think it clearly was admissible for the purpose for which it was received, viz. to ascertain the possibility of fire being projected from the engine to such a distance from the railway as the building in question. Whether or not it was admissible for any other purpose, it is unnecessary to inquire.

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(1) 1 Vent. 295.
(2) 1 Lutw. 90.
(3) 2 Stra. 1264.
(4) P. 2 Hen. IV. fo. 18, pl. 5.

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COLTMAN, J.:

I am of the same opinion. It appears, from the report of the learned Judge, that the evidence in question was admitted, not for the purpose of showing a general habit of negligence on the part of the Company, but to show that the injury might have been caused in the way suggested. It appears to me that the jury might reasonably infer that the fire was occasioned by sparks from the engine, and that the fact of the buildings being fired by sparks emitted from the defendants' engine, established a *primâ facie* case of negligence, which called upon them [*242] to show that they had adopted some *precautions to guard against such accidents. None, however, appeared to have been attempted.

MAULE, J.:

I also am of opinion that this rule should be discharged. It was obtained on two grounds: first, that certain evidence was improperly received at the trial; secondly, that the evidence did not warrant the verdict. The evidence objected to was, that other engines used on the defendant's line, of the same description as that which was said to have caused the injury here, had on various other occasions been seen to throw particles of ignited matter to a distance from the line as great or greater than the spot in question. The matter in issue was, whether or not the plaintiff's property had been destroyed by fire proceeding from the defendants' engine: and involved in that issue was the question whether or not the fire could have been so caused. The evidence was offered for the purpose of showing that it could: and for that purpose it was clearly material, and admissible. As to the other point, it appears that the plaintiff was possessed of certain farm buildings adjoining the railway, and that, in consequence of the sort of management adopted by the Company, fire was thrown from a passing engine upon those buildings, and destroyed them. I am far from saying that it is impossible that this could have occurred without negligence on the part of the Company. But it at least affords a strong presumption of negligence, in the absence of evidence to show that something had been done by the Company to lessen the chances of danger. It appeared that no steps of that sort had been taken, and that the Company might have in a great measure prevented the emission of ignited matter, by using guards of wire, or perforated plates, as suggested by Professor Farey, or by employing engines of larger

power. Upon the whole, I think the verdict would have been wrong had it been the other way.

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CRESSWELL, J.:

I am entirely of the same opinion, upon both points.

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Rule discharged.

TEMPEST AND ANOTHER *v.* KILNER.

1846. *June* 4.

(3 C. B. 249—253.)

[249]

The buyer of shares in a projected railway under a contract to be completed at a future date may recover as damages for the non-delivery, the difference between the price agreed on and the market price on the day on which the sale should have been completed; but he is not entitled to damages in respect of a further advance of price taking place afterwards.

ASSUMPSIT. The declaration stated, that, on the 18th of July, 1844, the plaintiffs, at the request of the defendant, bargained and agreed to buy of the defendant, and the defendant then bargained and agreed to sell to the plaintiffs, a certain interest or share of him, the defendant, in a certain Company or partnership undertaking, for constructing a railway from the parish of Ashton-under-Lyne, near Manchester, in the county of Lancaster, to the parish of Kirkheaton, near Huddersfield, in the county of York, to wit, 100 shares in the said Company or partnership undertaking, at a certain price in that behalf, to wit, 15*s.* premium, for each and every share, that is to say, 15*s.* for each and every share, in addition to such sum or sums as at the time of the transfer by the defendant to the plaintiffs, should have *been paid to the said [*250] Company or partnership in respect of the said shares and each of them; that, on &c. last aforesaid, in consideration thereof, and that the plaintiffs, at the request of the defendant, then promised the defendant to accept, within a reasonable time, a transfer of the said interest or shares, and to pay for the same at the rate or price aforesaid, the defendant then promised the plaintiffs, within a reasonable time, to transfer the said interest or shares to them the plaintiffs; that, although a reasonable time for the said transfer of the said interest or shares had long elapsed before the commencement of the suit, and the defendant, long before the commencement of the suit, and after a reasonable time from the making of the said agreement and promise had elapsed, could and might and ought to have transferred the same to the plaintiffs, upon payment

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of the price thereof after the rate aforesaid; and although the plaintiffs had always, from the said time of the making of the said agreement and promise, been ready and willing to accept the transfer of the said interest and shares of him the defendant, and to pay for the same at and after the rate in that behalf aforesaid, whereof the defendant, during all the time aforesaid, had notice, and although the plaintiffs, after the lapse of a reasonable time for the transfer of the said interest or shares of the defendant, to wit, on the 1st of November, 1844, requested the defendant to transfer the said interest or shares to them the plaintiffs, and then tendered and offered to pay for the same at and after the rate in that behalf aforesaid: yet the defendant did not nor would, when so requested as aforesaid, transfer, and had not up to that time transferred, to the plaintiffs the said interest or shares of him, the defendant, in the said Company or partnership undertaking, but had neglected and refused so to do; and that, by reason thereof, the plaintiffs had [*251] lost divers great gains and profits which *might, and otherwise would, have accrued to them from the transfer of the said interest or shares to them as aforesaid, &c.

The defendant pleaded: first, *non assumpsit;* secondly, that the plaintiffs were not always, from the time of the making of the agreement and promise, ready and willing to accept the transfer of the said interest and shares of him the defendant, and to pay for the same at and after the rate in the declaration in that behalf mentioned, *modo et formâ* (1); thirdly, that, before any breach of the promise, the plaintiffs discharged the defendant from performing the agreement, &c.

The cause was tried before Patteson, J., at the last York Assizes, when the facts appeared to be as follow: On the 18th of July, 1844, the defendant contracted to sell to the plaintiffs 100 shares in a projected railway, to be called the Huddersfield and Manchester Railway, at a premium of 15*s.* per share. At the time of the contract the defendant had only a letter of allotment, entitling him to become a shareholder; there being no shares or scrip then in existence. On the 12th of August, the defendant refused to complete the contract. Scrip was issued in October. The Act incorporating the Company was not passed until the 21st of July, 1845.

On the part of the defendant, it was objected that the contract

(1) To this plea there was a demurrer, upon which the plaintiffs, in Michaelmas Term, 1845, obtained judgment (see 2 C. B. 300).

was void, being within the seventeenth section of the statute 29 Car. II. c. 3, inasmuch as the memorandum of the bargain did not disclose the price. In answer to this objection, the plaintiffs' counsel referred to *Humble* v. *Mitchell* (1), where it was held that shares *in a joint-stock Banking Company are not goods, wares, and merchandises, within the seventeenth section of the Statute of Frauds, nor an interest in land within the fourth section. [*252]

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It was then insisted that the contract was not proved; the contract declared on being for the sale of shares, whereas the document produced (the letter of allotment) showed that there were none at that time in existence. To this it was answered, that it did not lie in the mouth of the defendant to contend that the things which he had contracted to sell as shares, were not strictly and properly so called.

A verdict was found for the plaintiffs, damages 150*l*., being the difference in value of the shares between the date of the contract and the day of issuing the scrip; leave being reserved to the defendant to move to enter a nonsuit, or to reduce the damages to 25*l*., the difference in value between the date of the contract and the 12th of August, when the defendant first refused to complete the contract (2).

Byles, Serjt., accordingly, in Easter Term last, obtained a rule *nisi*.

Talfourd, Serjt. (with whom was *Cleasby*), now showed cause:

It was not competent to the defendant, who, at the time of entering into the contract, treated and dealt with the letters of allotment as "shares," afterwards to turn round and insist that no such things as shares were then in existence. In the 7 & 8 Vict. c. 110, s. 3, the Act for the registration of joint-stock Companies, the word "share" is adopted by the Legislature as descriptive of an interest of this kind.

(MAULE, J.: That provision *has reference only to the sense in which particular words are used in that Act: it does not purport to give a general signification to the words themselves. The question [*253]

(1) 52 R. R. 318 (11 Ad. & El. 205; 3 P. & D. 141).

(2) Leave was reserved to the plaintiffs to amend the declaration, if necessary, by substituting for "shares" the words "scrip, or representative of shares."

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here is, whether the term "share" does not accurately describe the article the one party intended to buy and the other to sell.)

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Then, as to the damages—the jury have properly assessed the amount the plaintiffs are entitled to recover, provided the defendant's breach of contract took place only at the time when he first became enabled to perform his engagement, by delivering scrip, viz. in October, 1844.

Byles, Serjt., in support of the rule, was not called upon by the Court.

TINDAL, Ch. J.:

There was a complete breach of the contract when the defendant, on the 12th of August, declined to perform it. He was bound then to deliver the document with reference to which the parties were dealing. I think the plaintiffs are not entitled to damages beyond that day: they had no right to lie by until the concern became profitable. The rule must be made absolute to reduce the damages to 25*l*.

MAULE, J.:

I am of the same opinion. The contract was to be performed within a reasonable time from the 18th of July, by the delivery of that which the parties at that time mutually had in their contemplation.

The rest of the Court concurring,

Rule absolute accordingly.

1846. *June* 5.

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THATCHER *v.* SIR RICHARD ENGLAND, KNT. (1).

(3 C. B. 254—266; S. C. 15 L. J. C. P. 241.)

The defendant, who had been robbed of jewellery, published an advertisement, headed "30*l*. reward," describing the articles stolen, and concluding thus: "The above sum will be paid by the adjutant of the 41st Regiment, on recovery of the property, and conviction of the offender, or in proportion to the amount recovered."

A., a soldier, on the 10th of June, informed his serjeant that B. had admitted to him that he was the party who had committed the robbery, and the serjeant gave information at the police-station. On the 14th, the plaintiff, a police-constable, learning from one C. that B. was to be met with at a certain place, went there and apprehended him. The plaintiff,

(1) *Tarner* v. *Walker* (1867) L. R. 2 Q. B. 301, 36 L. J. Q. B. 112; *Bent* v. *Wakefield Bank* (1878) 4 C. P. D. 1.

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by his activity and perseverance, afterwards succeeded in tracing and recovering nearly the whole of the property, and in procuring evidence to convict B.:

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Held, that the plaintiff was not, but (per TINDAL, Ch. J., and CRESSWELL, J.) that A. was, the party entitled to the reward.

THIS was an action of assumpsit tried before Coleridge, J., at the Kent Summer Assizes in 1845, when a verdict was found for the plaintiff, damages 25*l.*, subject to the opinion of the Court upon a special case; it being agreed that the Court should have the same powers as a jury in drawing conclusions from the facts stated.

The declaration alleged, that, on the 26th of April, 1844, certain goods and chattels, the property of the defendant, to wit, &c., &c., and which said goods and chattels were of great value, to wit, of the value of 200*l.*, had been and were feloniously stolen from the officers' quarters of the Infantry Barracks at Canterbury, in the county of Kent; that thereupon the defendant caused and procured a certain advertisement, hand-bill, or placard to be printed and published, headed "30*l.* reward," whereby, after stating that the said goods and chattels had been so stolen as aforesaid, the defendant did promise and undertake that the said sum of 30*l.* should and would be paid by the adjutant of her Majesty's 41st Regiment, on recovery of the said property of the defendant, and conviction of the offender, or in proportion to the amount recovered, to such person as should cause the offender to be apprehended and convicted, and *the said property to be recovered: Averment, that [*255] the plaintiff did cause the said offender, to wit, one William Warren, to be apprehended for the said felony, and that the said William Warren was afterwards, and before the commencement of the suit, to wit, at the General Sessions of the peace holden in the city and borough of Canterbury, on the 1st of July, 1844, aforesaid, in due course of law tried for the said felony, and was, upon the said trial, upon and by means of the evidence and information of the plaintiff, found guilty thereof, and duly sentenced to be punished according to law for his said offence, and the said property of the defendant so stolen as aforesaid was thereby then recovered by the defendant: Breach—that neither the adjutant of the said 41st Regiment, to wit, one James Eman, nor the defendant, had paid to the plaintiff the said sum of 30*l.*, or any part thereof. There was also a count upon an account stated.

The defendant pleaded: first, *non assumpsit* to the first count; secondly, to the first count, that he, the defendant, did not cause

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or procure the said advertisement, hand-bill, or placard to be printed or published, in manner and form &c., concluding to the country; thirdly, that the plaintiff did not cause the said offender to be apprehended, in manner and form, &c., concluding to the country; fourthly, that the plaintiff did not cause the said offender to be convicted, in manner and form, &c., concluding to the country; fifthly, that the said property was not recovered, in manner and form, &c., concluding to the country; sixthly, that the plaintiff did not cause the said property to be recovered, in manner and form, &c., concluding to the country; seventhly, *non assumpsit* to the second count.

Upon each of these pleas issue was joined.

The plaintiff is, and at the time of the transaction in question was, a policeman of Canterbury; and the defendant is, and at the [*256] said time was, the colonel of *the 41st Regiment of Infantry, at that time quartered at Canterbury. On the 26th of April, 1844, the defendant was robbed of certain articles of jewellery hereinafter set forth, and immediately gave directions to one Serjeant Newton, for the printing and publication of the following advertisement or hand-bill.

"30*l.* Reward.

"Stolen from the officers' quarters of the Infantry Barracks, Canterbury, on the night of April 26th, 1844, the following articles, viz. one diamond ring (four large diamonds); one old family ring (male portrait, large, set in small diamonds); one purple topaz large ring, set in small diamonds; one turquoise (blue) gold ring; one French enamel ring; money to the amount of 3*l.*; one flat Geneva watch (gold), with short gold chain, and long hair chain.

"The above sum will be paid by the adjutant of the 41st Regiment, on recovery of the property, and conviction of the offender, or in proportion to the amount recovered."

The articles were stolen by William Warren, who was apprehended, and was tried and convicted at the July Sessions for the city of Canterbury, in 1844, and received sentence of transportation for the offence.

On the 10th of June, 1844, one Fitzgerald, a private soldier, came to and informed Serjeant Newton, of the 41st Regiment, that William Warren had asked him to lend him some money to enable him to go to London, to dispose of the property he had stolen from Sir Richard England. Up to that time, no suspicion had attached to Warren. Serjeant Newton thereupon, on the same

day, gave information of this fact to the superintendent at the police-station, but did not then see the plaintiff. Early in the morning of the 14th of June, a person of *the name of Pickering gave information to a police-officer of the name of Epps where Warren was to be found: but Epps did not arrive in time to find him at the place named by Pickering. At a late hour on the same day, the plaintiff received information that Warren was at a certain public-house in Canterbury, and immediately proceeded thither, taking with him two other policemen as his assistants. These parties finding Warren at a certain other public-house in Canterbury, seized him; and, after much resistance, the plaintiff searched him, and took from him the diamond ring and the old family ring mentioned in the above advertisement, together with two pawnbrokers' duplicates, relating, the one, to the Geneva watch, the other, to the purple topaz ring, both also mentioned in the advertisement. The plaintiff immediately apprehended Warren, took him to the station-house, and gave him in charge; and, on the following day gave information of the above facts to the magistrates of Canterbury, and applied to them for a remand of the prisoner to the 20th of June, to enable him, the plaintiff, to go to London, and trace the stolen property mentioned in the pawnbrokers' duplicates. The plaintiff then obtained two summonses for the attendance of witnesses at Canterbury; and, on the 20th of June, again appeared before the said magistrates, having brought with him from London a pawnbroker, who produced before the magistrates the said purple topaz large ring, and also the foreman of another pawnbroker, who produced the flat Geneva watch and gold key mentioned in the other duplicate. The plaintiff also produced the old family ring, and the diamond ring. The pawnbroker and the foreman then respectively identified William Warren as the person who had pledged the topaz ring and watch with them on the 10th of June: and the articles in question were all identified by the *defendant as being his property, and as having been stolen from him on the previous 26th of April.

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The plaintiff incurred much trouble and expense in bringing together the witnesses for the prosecution. The plaintiff, and witnesses by his direction, appeared and gave their evidence, at the trial, to the effect above stated. It formed no part of the ordinary duty of the plaintiff, as a policeman, to make a journey to London in search of evidence against Warren. All the property stolen from the defendant was recovered and restored to him, with

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the exception of the turquoise (blue) gold ring, money to the amount of 3*l.*, the short gold chain, and the long hair chain, mentioned in the advertisement. The value of the property so recovered and restored, was 85*l.* 15*s.*, and that of the articles not recovered amounted to about 9*l.*

The adjutant mentioned in the advertisement, one James Eman, by the direction of the defendant, refused to pay the plaintiff the sum of 30*l.*

The jury, in answer to two questions of the learned Judge, found specially first, that the plaintiff did not give the first information as to the party committing the robbery; secondly, that the plaintiff was most active, and mainly instrumental, in procuring the recovery of the property, and the conviction of Warren; and they found a verdict for the plaintiff, damages 25*l.*

The question for the opinion of the Court is, whether the plaintiff is entitled to recover all or any, and if any, then what, part of the sum of 30*l.* And the Court is to direct on what issues, and for which party, the verdict is to be entered, or, if necessary, to direct a *nolle prosequi*, or a nonsuit, to be entered. And, as the whole of the declaration and pleas are not literally stated in the case, either party is to be at liberty to refer to them at length.

[259] *Shee*, Serjt. (with whom was *Horne*), for the plaintiff (1):

[*260] The question is, whether the circumstance of *the plaintiff's not

(1) The points marked for argument were as follow:

For the plaintiff: "That, according to the true construction of the defendant's promise, the latter became bound to pay the sum of 30*l.* to any person through whose evidence and information, and by whose means and activity, the property stolen should be substantially recovered, and the offender convicted; that, if part only of the property should be recovered, and the offender convicted, then the defendant became bound to pay to any person through whose evidence and information, and by whose means and activity, such part should be recovered, and the offender convicted, a portion of the said sum of 30*l.*, bearing such proportion to the entire sum of 30*l.* as the value of the property recovered might bear to the value of the whole property stolen; that the plaintiff, having been most active, and mainly instrumental, by his evidence and information, in recovering substantially the whole of the property, and procuring the conviction of Warren, was entitled to the whole sum of 30*l.*, or, at the least, to a part thereof, although he was not the party who gave the first information; that the fact, as to who gave the first information, was only material as one ingredient in the inquiry as to who procured the recovery of the property, and the conviction of Warren; that, under the terms of the defendant's promise, Fitzgerald was not entitled to the reward of 30*l.*, or any part thereof; and that the plaintiff was entitled, upon the facts stated in the case, and found by the jury, to have the verdict entered for him upon all the issues."

For the defendant: "That the plaintiff was not entitled to recover

having given the first information as to the party who committed the robbery, though he is found to have been active, and mainly instrumental, in procuring the recovery of the property and the conviction of the offender, disentitles him to claim the reward. [He cited *Williams* v. *Carwardine* (1), *Lancaster* v. *Walsh* (2), *England* v. *Davidson* (3), and *Smith* v. *Moore* (4), and pointed out that in all those cases the reward was offered to a certain person.] Here, however, there is no distinct specification of the party with [261] whom the advertiser contracts. Nothing is said about information. The substance of the contract is, that the promised reward will be paid to the party by whose means the stolen property is recovered and the offender convicted.

(MAULE, J.: To the exclusion of the person who gives the information that leads to that result?)

Yes. All that the advertiser had in view, was, the recovery of the property, and the conviction of the offender. The person whose exertions produced those results, was the person with whom the advertiser contracted.

(TINDAL, Ch. J.: Had Fitzgerald, the man who gave the information to Serjeant Newton, no claim to the reward?)

the whole or any part of the reward offered by the defendant, because the facts stated and found on the case, did not bring the plaintiff within the terms or the legal effect of the advertisement; that the first count of the declaration ascribed a different effect to the advertisement than was consistent with its proper and legal construction; that, if the plaintiff's construction of the advertisement were adopted, several other persons might sue the defendant for a part of the reward, according to the value of the property recovered through their agency; that, as it was admitted in the case, and expressly found by the jury, that the plaintiff was not the party who gave the first information which led to the conviction of Warren, the plaintiff was not the person entitled to sue; that, as there was a distinct traverse, in the fifth plea, of the allegation in the first count, that the whole property was recovered, when in fact only part was recovered, the defendant was entitled to the judgment of the Court; that, if the plaintiff was entitled to recover any portion of the reward, *he should have [*260, n.] alleged that part only of the property was recovered, and that he sought to recover only a proportion of the 30*l.*, and not the whole of that sum; that the recovery of the whole of the property was a condition precedent to the plaintiff's or any other party's, right to sue for the reward, or any part of it; that, if any party was entitled to the reward, Fitzgerald was the individual in whom the right vested, and who ought to have sued; and that, from the uncertain and ambiguous terms of the advertisement, no liability attached to the defendant."

(1) 38 R. R. 328 (4 B. & Ad. 621; 1 Nev. & M. 418; 5 Car. & P. 566).

(2) 51 R. R. 441 (4 M. & W. 16).

(3) 52 R. R. 522 (11 Ad. & El. 856; 3 P. & D. 594).

(4) 68 R. R. 746 (1 C. B. 438).

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Clearly not. What he said and did resulted in nothing. Pickering's information was equally fruitless.

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(CRESSWELL, J.: In apprehending Warren, the plaintiff did no more than his duty. The journey to *London certainly was more than could be required of him. But still, the question is, whether that brings him within the terms of the advertisement.)

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The plaintiff, by his exertions alone, brought about the recovery of the property, and the conviction of the offender; and, unless the advertisement amounts to a mere honorary engagement, he is clearly entitled to recover.

Channell, Serjt. (with whom was *Petersdorff*), for the defendant, was not called upon.

TINDAL, Ch. J.:

It is very unfortunate that this advertisement was not penned with more accuracy and certainty; for its ambiguity has led to much useless expense. The only question, however, for us is, who is the person to whom the reward is properly payable. The advertisement, after describing the articles stolen, prefacing it with "30*l.* reward," says: "The above sum will be paid by the adjutant of the 41st Regiment, on recovery of the property, and conviction of the offender, or in proportion to the amount recovered." It is altogether silent as to the person to whom the money is to be paid. What, then, is the proper construction of the advertisement? and who is the party legally entitled to the reward? It appears to me that the money is to be paid to the person who was the original and meritorious cause of the recovery of the property and the conviction of the offender; that is, to the person who first communicated the information that ultimately led to both. Upon the statement submitted to us, and the finding of the jury thereon, the present plaintiff is not that party. He did nothing until the 14th of June. Fitzgerald had previously, viz. on the 10th of June, communicated to Serjeant Newton that Warren was the culprit; and Serjeant Newton on the same day gave information at the police-station. On *the 14th, a person named Pickering informed Epps, a police-officer, that Warren was to be met with at a certain place; but he was not taken at that time. At a later hour on the same day, the plaintiff, in consequence of information received by him, proceeded to a public-house in Canterbury where Warren was,

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and took him into custody. The plaintiff thus succeeded in recovering a portion of the property; and he afterwards did good service in tracing and recovering almost the whole of it, and in procuring Warren to be convicted. But clearly he is not the party who first gave the information which produced that result. Nor is Pickering. Had it not been for the communication made by Fitzgerald, neither the one nor the other would have been at all contributory to such recovery and conviction. The clue once found, the plaintiff, in apprehending Warren, did no more than his ordinary duty, and what any other constable would have done on the like information. I therefore think a nonsuit must be entered.

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COLTMAN, J.:

It seems to me that we ought to construe engagements of this sort strictly as legal, and not as mere honorary engagements. The question here is, who is the person entitled to sue for this reward. The plaintiff must, to maintain this action, show that he is solely entitled. Upon the facts presented to us, I think it is impossible to come to that conclusion. The plaintiff has not, as it seems to me, so good a claim as Fitzgerald. Possibly, an action might have been maintained by the two.

MAULE, J.:

The facts stated do not support the contract alleged in the declaration. Advertisements of this sort generally specify the person to whom the reward is to be paid; and thence arises a legal obligation to pay the money. The omission disables me in this *case from finding out, with any reasonable certainty, with whom [*264] the contract is made. The inference I should be inclined to draw, is, that the advertiser intended that the reward should be paid among such persons as should give information and assistance in the recovery of the property, and the conviction of the offender, in proportion to the importance and value of their respective services. It is difficult to put a value on information: it is not like work and labour, which has been accepted, and is to be paid for on a *quantum meruit*. The difficulty the defendant is placed in here, is one of frequent occurrence. It often happens that there is no one individual who gives information that is in itself useful; but that several persons give different pieces of information, the whole of which combined leads to the apprehension and conviction of the offender. One man discovers who he is, another where he is likely

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to be met with at a particular time, and so on. The advertiser should, in terms, bind himself to part with the sum offered, leaving it to be divided amongst the persons whose activity and address procure the desired result, in such proportions as some responsible person—the mayor, or the clerk of the peace, for instance—should in his discretion think fit. There being here a total absence of statement of the person to whom the reward is to be paid, and the plaintiff having failed to make out, even by inference, that he is the party intended, I think the contract is not correctly described in the declaration, and, therefore, that judgment of nonsuit must be entered.

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CRESSWELL, J.:

I also am of opinion that the plaintiff has failed to make out a case to entitle him to the reward claimed. The advertisement is couched in extremely loose terms: it neither specifies the person to
[*265] whom, nor the particular service for which, the money is *to be paid. It may well be doubted, therefore, whether the contract is properly described in the declaration. Assuming, however, that the contract is properly declared on, there is a plea that the plaintiff did not cause the offender to be apprehended. Upon the facts stated, I think the plaintiff did not cause Warren to be apprehended. The police were set in motion by the information of Fitzgerald. Fitzgerald, therefore, was the person who caused Warren to be apprehended. It is true, the plaintiff's was the hand by which Warren was arrested; but he was merely acting as a peace-officer, upon information originally coming from Fitzgerald. Then, did the plaintiff cause Warren to be convicted? He gave evidence, it is true: so did the pawnbroker. It cannot be, that the reward is payable to all those who take a share in the transaction. In like manner, the plaintiff did not solely cause the property to be recovered. Fitzgerald, at least, contributed most materially. The case, in some of its circumstances, is remarkably like that of *Lancaster* v. *Walsh*. There, the advertisement was as follows: "20*l*. Reward. Whereas, on Saturday night last, two Bank of England notes (describing them), and other moneys, were stolen from the person of Mr. R. Walsh, of Halifax, on his way home: whoever will give information by which the same may be traced, shall, on conviction of the parties, receive the above reward, on application to the said R. Walsh." It appeared that one Brigg, the deputy constable of Bradford, had, on the 1st of August, received information from one Clark, that one Dyson had confessed to him

that he was a party to the robbery. Before Clark's communication to Brigg, one Illingworth, the constable of Wakefield, had discovered that the stolen notes had been cashed at the Wakefield Bank, and had taken into custody the parties who presented them for payment, who, however, were not the actual robbers. On the *4th of August, [*266] the plaintiff gave the defendant information of Dyson being a party to the robbery. On the 5th, Brigg verbally communicated to Illingworth the information he had received; and, on the 14th, Dyson, who had absconded in the mean time, was apprehended by Brigg, and was arraigned for the robbery at the next York Assizes, when he pleaded guilty. Upon this evidence, PATTESON, J., left it to the jury to say whether any information had been given, previously to that given by the plaintiff, which could lead to the tracing of the notes to the party who stole them; expressing his opinion that the person entitled to the reward, was he who gave information, whereby the property was traced to the offenders, not he who merely traced where it was. The jury having found for the defendant, the COURT refused to disturb their verdict; holding the direction correct.

I think no reflection can fairly be made on Colonel England for not submitting to the claim of this plaintiff.

Judgment of nonsuit.

COOPER *v.* SHEPHERD (1).

1846. *June* 6.

(3 C. B. 266—274; S. C. 15 L. J. C. P. 237; 4 Dowl. & L. 218.)

[266]

A recovery in trover and payment of the damages vests the property in the chattel in the defendant as against the plaintiff.

In trover by A. against B. for a bedstead, B. pleaded a former recovery by A. in trover for the same identical bedstead against C.; averring that the conversion by C. for which that action was brought, was a conversion not later in point of time than the conversion mentioned in the declaration against B., and that, before the conversion in that declaration mentioned, C., being possessed of the bedstead, sold it to B., who paid him for the same, and received it under such sale, and that the taking under such sale was the conversion complained of in the declaration against B.: Held, that this plea was a good answer to the action.

TROVER, for a bedstead, one hundred pieces of wood, and one hundred pieces of iron.

Pleas: first, Not guilty; secondly, not possessed; thirdly, as to so much of the declaration as related *to the bedstead therein [*267]

(1) Explained and distinguished in *Brinsmead* v. *Harrison* (1871) L. R. 6 C. P. 584; 40 L. J. C. P. 190, S. C. L. R. 7 C. P. 547; 41 L. J. C. P. 190. —J. G. P.

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mentioned, that the plaintiff long before the commencement of the suit to wit, on &c., in the Court of our lady the Queen of the Bench of Westminster, before &c., impleaded one Benjamin Willomatt in an action of trover, for converting, to wit, on the day and year in the declaration in that action mentioned, that is to say, on the 4th of July, 1844, among other goods and chattels in the declaration in that action mentioned, the same identical bedstead in the declaration in this action and in the introductory part of this plea above mentioned; that such proceedings were thereupon had in the said Court in that action, that, afterwards, and before the commencement of this suit, to wit, on &c., the plaintiff, by the consideration and judgment of the said Court, recovered in the said action against Willomatt 75*l.* for his damages which he had sustained on occasion of the converting by Willomatt of the said bedstead, and of the other goods and chattels in the declaration in that action mentioned; and also 126*l.* for his costs and charges by him about his suit in that behalf expended; whereof Willomatt was convicted; as by the record and proceedings thereof, still remaining in the said Court of our lady the Queen of the Bench aforesaid, at Westminster aforesaid, more fully and at large appeared: that, after the recovery of the said judgment against Willomatt as aforesaid, and before the commencement of this suit, to wit, on &c., Willomatt fully paid and satisfied to the plaintiff the said several sums of 75*l.* and 126*l.*, in form aforesaid recovered against him, and the plaintiff then took and received the same of and from Willomatt in full satisfaction of the said judgment; that the said damages, so far as the same were estimated, assessed, recovered, paid, and received as aforesaid in respect of the said bedstead, were estimated and assessed, and were recovered and paid and received as aforesaid, as and for, and in respect of, and as the full value of, the said bedstead, and not
[*268] *otherwise, and were and amounted in fact to the full value of the said bedstead; that the said conversion of the said bedstead by Willomatt, for which the said action against Willomatt was brought, and in respect of which the said damages were estimated, assessed, recovered, and paid and received as aforesaid, was a conversion not later in point of time than the conversion above complained of against the defendant; that, just before and at the time of the conversion of the said bedstead by the defendant above complained of against him, the said bedstead being then in the possession of Willomatt, he, Willomatt, to wit, on the day and year above mentioned, sold and delivered the same to the defendant at and for

a certain reasonable price in that behalf, to wit, the sum of 10*l*., and the defendant then paid to Willomatt, who then accepted and received of and from him the defendant a large sum of money, to wit, 10*l*., as and for, and in full satisfaction and discharge of, the said price of the said bedstead as last aforesaid, and the defendant then had and took and received the said bedstead of and from Willomatt to and for his the defendant's own use, and as and for his own, under and by virtue of such sale and delivery as aforesaid; and that the having, taking, and receiving of the same by the defendant as aforesaid was the same conversion of the said bedstead as was above complained against him the defendant. Verification.

Special demurrer, assigning for causes: that it does not appear in or by the plea that the judgment recovered against Willomatt, and the payment and satisfaction to the plaintiff of the damages recovered by him, has any application to the cause of action and conversion to which the plea is pleaded; that it does not appear in or by the plea, that the conversion by Willomatt, in respect of which the plaintiff recovered against him as therein mentioned, was after the plaintiff was possessed of the said bedstead as in the declaration mentioned, or *that the plaintiff was not lawfully possessed of the said bedstead between the time of the said conversion by Willomatt and the said conversion by the defendant, or that Willomatt was possessed of and held the said bedstead under and by force of the said conversion by him at the time when he sold the same to the defendant; that a recovery against Willomatt of damages for one conversion of the said bedstead, was no reason or cause in law why the plaintiff should not recover damages against the defendant for another and different conversion of the same bedstead, the same being the plaintiff's property at the time of the last-mentioned conversion; and that the defendant, by not denying, admitted that the said bedstead was the property of the plaintiff at the time of the conversion thereof by him; that the plea argumentatively and by inference denies that the plaintiff was lawfully possessed of the said bedstead, as alleged in the declaration, and gives the plaintiff no colour to maintain his action against the defendant in respect of the said bedstead; that the plea concludes with a verification, instead of to the country; and that it does not appear in or by the plea, that the recovery against Willomatt was before the said conversion by the defendant, or that the said payment by Willomatt was before the said conversion by the defendant.

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Joinder in demurrer.

Dowling, Serjt., in support of the demurrer, submitted that the plea was bad, inasmuch as it admitted the plaintiff's property in the chattel, and admitted the conversion thereof by the defendant, and did not avoid the effect of such admission; or, that, if the plaintiff's possession was thereby traversed, it was traversed argumentatively only.

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Talfourd, Serjt. (with whom was *Hawkins*), *contrà*:

[*270] The plea sets up a recovery by the plaintiff, in respect *of the same identical chattel, in a former action of trover against Willomatt (1), from whom the present defendant purchased it. A judgment in trover changes the property, and vests it in the tort-feasor, by relation to the time of the conversion complained of: *Adams* v. *Broughton* (2); *Bishop* v. *Viscountess Montague* (3); * * *Unwin* v. *St. Quentin* (4). The plea is good, either as giving colour to the plaintiff, or as a special plea of satisfaction of the very conversion here complained of.

(CRESSWELL, J.: The plea seems studiously framed to show that the conversion in this case is a different conversion from that complained of in the former action.)

Dowling, Serjt., in reply:

The title of the plaintiff, and the conversion by the defendant, are both confessed; and it is sought to avoid the effect of that confession by means of the judgment recovered against Willomatt at some indefinite time before the conversion by the defendant. There is no allegation that the conversion by Willomatt, and the conversion mentioned in this declaration, are identical.

(ERLE, J.: At the time of the recovery of the judgment in the former action, the title of Willomatt was complete.)

Upon this plea, it must be taken that the property in the chattel is still in the plaintiff. In *Unwin* v. *St. Quentin*, the title admitted was avoided by matter accruing subsequently to the colourable title of the plaintiff. Here, the effect of the admission is sought to be avoided by matter antecedent.

(1) See *Cooper* v. *Willomatt*, 68 R. R. 798 (1 C. B. 672).
(2) 2 Stra. 1078.
(3) Cro. Eliz. 824.
(4) 11 M. & W. 277.

(CRESSWELL, J.: It certainly is not shown that the transfer from Willomatt to the defendant was anterior to the judgment obtained in the former action.)

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The COURT suggested, that the defendant had better amend; but *Talfourd*, Serjt., elected to take judgment on the plea. [271]

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the COURT:

The plaintiff declared, in trover, for converting his bedstead; and the defendant, besides pleas of the general issue, Not guilty, and a denial of the plaintiff's possession, pleaded in bar of the action, as follows, viz., that the plaintiff, before the commencement of this suit, recovered judgment in an action of trover brought against one Willomatt, for the conversion by him of this same identical bedstead, and received from Willomatt the amount of the damages and costs on such judgment, the damages, so far as related to the bedstead, having been assessed, and having been received by the plaintiff, as the full value of the bedstead, and, in fact, amounting to such value. The plea then states, that the conversion by Willomatt, for which that action was brought, was a conversion not later in point of time than the conversion in the declaration mentioned; and that, before the conversion in the declaration mentioned, Willomatt, being possessed of the said bedstead, sold it to the defendant, who paid him for the same, and received it under such sale; and that the taking under such sale is the conversion complained of in the declaration. So that the plea amounts, in substance, to this, that Willomatt took and converted this bedstead, and, whilst he had it in his possession, the defendant bought it of him, and paid him for it; and that the plaintiff has recovered from Willomatt, and has received from him the payment of, damages for such conversion, being the full value of the bedstead.

To this plea, there is a special demurrer; and the *argument before us has been, that the plea is bad, either upon the ground, that, if taken as a traverse of the plaintiff's possession, it is argumentative only; or, if taken as a confession, there is no avoidance. [*272]

But we think the plea is not objectionable upon either of these grounds. The plaintiff, in trover, where no special damage is alleged, is not entitled to damages beyond the value of the chattel he has lost; and, after he has once received the full value, he is

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not entitled to further compensation in respect of the same loss: and, according to the doctrine of the cases which were cited in the argument, by a former recovery in trover, and payment of the damages, the plaintiff's right of property is barred, and the property vested in the defendant in that action. See *Adams* v. *Broughton* (1), and Jenkins (2), where it is laid down: "A., in trespass against B. for taking a horse, recovers damages; by this recovery, and execution done thereon, the property in the horse is vested in B. *Solutio pretii emptionis loco habetur.*"

Now, the present plea ought, as it appears to us, to be construed as alleging a sale by Willomatt to the defendant before the plaintiff recovered judgment against Willomatt. And, if the plea be so construed, it would be a confession of a cause of action, avoided by matter subsequent, viz. by the recovery of satisfaction for the same cause of action from another; for, the damage to the plaintiff is the cause of his action, and the loss of the chattel is that damage; and, though the conversion by the defendant is different from the conversion by Willomatt, and may make either the one or the other liable to the plaintiff, at his election, yet satisfaction from one is a defence for the other. Thus, in *Bird* v. *Randell* (3), the recovering
[*273] from a servant damages for *leaving the service of his master, was a bar to an action against the defendant for seducing the servant to leave his master's service; because the loss of the service was a damage, and that damage was compensated for in the first action. But, if, on the other hand, the plea be construed to allege the sale to the defendant to be after the recovery by the plaintiff from Willomatt, still the plea, as to this point, may be sustained, as giving, what has been called in modern cases, implied colour to the plaintiff; for, it admits that the plaintiff had, at one time, a right of property, but shows that right to be barred by the matter of the plea. Like the case of a plea, to an action of trover, of sale to the defendant in market overt; or of the taking by the defendant for wreck, or for waif; which pleas may be pleaded in trover or trespass: *Comyns* v. *Boyer* (4): and see also *Leyfield's* case (5); *Unwin* v. *St. Quentin* (6).

And, as to the further objection, that, if the plea contained a confession of the cause of action, it did not also contain an

(1) 2 Stra. 1078. See the case more fully reported, Andrews, 18.
(2) 4th Cent., Ca. 88.
(3) 3 Burr. 1345.
(4) Cro. Eliz. 485.
(5) 10 Co. Rep. 90 b.
(6) 11 M. & W. 277.

avoidance thereof, inasmuch as it did not certainly appear that the possession by Willomatt, in respect of which the plaintiff recovered, continued till the sale by him to the defendant; and that it was consistent with the plea, that the plaintiff might have acquired the property a second time, and Willomatt might have again wrongfully taken it from him before the sale by him to the defendant; we think that the possession in Willomatt which is first alleged in the plea, and which became rightful by the recovery in trover, and payment of the damages, must be taken to have continued when the sale to the defendant took place, inasmuch as nothing appears to the contrary. The plea alleges, in effect, that Willomatt took possession, *and that, being possessed, he sold to the defendant: [*274] and, although it would have been more certain if it had been pleaded that he, being so possessed, sold; still it appears to us sufficiently certain in its present form, on the principle that no change in the possession is to be presumed. We therefore think that judgment ought to be given for the defendant.

Judgment for the defendant.

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1846. *June* 8.

(3 C. B. 299—312; S. C. 15 L. J. C. P. 251.)

[299]

The actual earning of freight under a charter-party, is not a condition precedent to the right of the ship-broker to his commission for procuring the execution of the charter.

A., a ship-broker, procured a charter-party to be made between B., a ship-owner, and C., under which the owner contracted to bring home a cargo of guano, and the merchant agreed to pay freight at the rate of 4*l.* 15*s.* per ton, to be reduced to 4*l.* 12*s.* 6*d.* if the ship did not arrive off Cork or Falmouth on or before a given day. There was no express engagement on the part of C. to ship a cargo: Held, that A. was entitled to recover from B., upon a *quantum meruit*, for his work and labour in procuring the charter to be executed, without showing the arrival of the vessel on or before the day mentioned, and notwithstanding only a very small quantity of guano had been shipped, and a small amount of freight actually earned; that the amount of compensation due to him was a question for the jury; and that, in estimating such compensation, they were properly guided by evidence of what was customary in similar cases.

THIS was an action of assumpsit for work and labour &c., by the plaintiff, at the defendant's request, as a ship-broker, in and about causing and procuring certain persons trading under the firm of Hills and Aldridge to enter into a charter-party with the defendant, for the use and hire of a vessel called the *West Indian*, and in and about drawing, &c., divers charter-parties for the defendant, and

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for commission and reward, &c. There was also a count upon an account stated.

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Pleas: first, except as to 4*l.*, *non-assumpsit*; secondly, as to that sum, payment into Court.

The cause was tried before Tindal, Ch. J., at the sittings in London after the last Term. It appeared, that, on the 21st of [*300] September, 1844, in consequence of the *plaintiff's introduction, the following memorandum of charter was entered into between the defendant and Messrs. Hills and Aldridge:

"It is agreed, &c., that the ship shall proceed direct to Ichaboe, and there load a full and complete cargo of guano, by the ship's boats and tackle, and by the labour of the crew, not exceeding what she can reasonably stow and carry, over and above her tackle, &c., and, being so loaded, shall therewith proceed to Cork or Falmouth for orders, which are to be in waiting at both ports, whether to discharge there or at a safe port in the United Kingdom, or so near thereto as she may safely get, and deliver the same on being paid freight at and after the rate of 4*l.* 15*s.*, British sterling, per ton; and which freight the said merchants bind themselves to pay for every ton of guano so delivered at the port of discharge; restraint of Princes and rulers, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, always excepted: the freight to be paid, one third on arrival at the port of discharge, and the balance by an approved bill on London, at three months' date: And it is further agreed, that, should the ship not arrive off Cork or Falmouth on or before the 30th of April, 1845, the rate of freight be only 4*l.* 12*s.* 6*d.* Penalty for non-performance of this agreement, 2,000*l.*"

Witnesses called on the part of the plaintiff proved, that the commission usually paid to ship-brokers for procuring charter-parties, was 5 per cent. upon the amount of freight; and that, upon outward freight, the broker was entitled to his commission immediately: and it was attempted to be proved that the commission on freight of homeward cargoes was payable on the execution of the charter-party; but this failed, none of the witnesses [*301] being able to state an instance of a memorandum *in this particular form. On the part of the defendants, it was insisted that the commission was payable only upon freight actually earned.

The quantity of guano procured for the ship was so small, that,

assuming the defendant's view to be well founded, the sum paid into Court was sufficient to cover the plaintiff's commission.

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It did not distinctly appear when the vessel arrived at her port of discharge; but it was assumed that she had arrived some time before the commencement of the action. * * *

At the close of the plaintiff's case, his Lordship was called upon to direct a nonsuit, on the grounds that * * the right to commission only arose upon freight actually earned; and that, as the amount of freight to be earned depended on the quantity of cargo brought home, as well as upon the period of the ship's arrival at her port of discharge, no action could be maintained until that was ascertained. [302]

A verdict was found for the plaintiff, damages 115*l.* 12*s.*; leave being reserved to the defendants to move to enter a nonsuit, if the Court should be of opinion that either of the above objections was well founded.

Manning, Serjt., accordingly, on a former day in this Term, obtained a rule *nisi* for a nonsuit, upon the points reserved; or for a new trial, on the ground that * * the verdict was against the weight of evidence.

Kinglake, Serjt. (with whom was *M. Smith*), showed cause:

* * The plaintiff was clearly entitled to the customary commission of 5 per cent. on the stipulated freight, as soon as the charter-party was executed: *Broad* v. *Thomas* (1); *Read* v. *Rann* (2). There is no ground for the suggestion that the payment of the broker's commission is conditional upon the actual earning of freight by the ship, or that the right does not attach until her arrival at her port of discharge. [304]

Manning, Serjt. (with whom was *Warren*) in support of the rule:

There could not have been, under this charter-party, any adjustment of the amount of freight until the arrival of the *West Indian* at her port of discharge, or until the 30th of April, 1845, had passed. It was uncertain what quantity of guano would be brought home, the merchants not binding themselves to ship any; and it was uncertain whether the freight should be at the rate of 4*l.* 15*s.*

(1) 33 R. R. 399 (7 Bing. 99; 4 Moo. & P. 732).

(2) 34 R. R. 473 (10 B. & C. 438).

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per ton, or 4*l.* 12*s.* 6*d.* Consequently, the amount of commission remains *in dubio*, and no such promise as that alleged in the declaration can be implied by law.

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(TINDAL, Ch. J.: The plaintiff, at all events, may claim commission on the lower amount of stipulated freight. All the witnesses agreed that the broker is entitled to his commission upon the execution of the charter-party.)

There were only two distinct instances proved of the payment at the outset, of commission upon homeward freight; and one of them was a case where the parties had an account between them, and it was settled voluntarily; the other was a case where the broker was also agent for the ship, and so was enabled to compel a
[*305] premature *payment of the commission.

(MAULE, J.: Do you mean to contend, that, if the vessel had been lost on her homeward voyage, no commission would have been payable, because freight was not actually earned?)

That would depend upon the terms of the charter-party.

(MAULE, J.: Assume a charter-party in the ordinary form,—which would not entitle the owner to freight unless earned.)

Probably that could not successfully be contended. It never could have been the intention of these parties, that the customary freight spoken of by the witnesses should be payable absolutely, upon a charter-party framed like this. And there was no evidence whatever to support a *quantum meruit*. * * *

The verdict was clearly against the evidence; for, though the witnesses who were called to prove the custom, stated upon their examination in chief that the commission was payable on the execution of the charter-party, it turned out, upon cross-examination, that the universal practice had been to pay commission on
[*306] freight *outwards at once, but to pay commission on homeward freight after the arrival of the vessel.

(TINDAL, Ch. J.: All the witnesses who spoke to that, stated that the delay was only matter of courtesy.)

To say that what is admitted to be matter of uniform practice is not matter of right, but of courtesy, is to give effect to the wishes of the witness against his testimony. At all events, the evidence

did not satisfactorily establish a custom to pay the broker's commission on homeward freight, before the termination of the homeward voyage.

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TINDAL, Ch. J.:

It appears to me that the verdict in this case ought not to be disturbed. With respect to that part of the rule which prays for a nonsuit, the objection is, that the plaintiff is not entitled to recover, by reason of uncertainty as to the amount upon which the commission was to be calculated, as well as uncertainty as to the period of the ship's arrival. The plaintiff brings his action for work and labour as a ship-broker. In reality the action is brought upon a *quantum meruit*. The plaintiff claims to be entitled to recover the amount of commission that is usually paid under similar circumstances. In proving what is customary, it is not to be expected that the evidence will tally in all the instances: there may be many cases in which the terms of the particular charter-party do not precisely accord with the one under consideration. The general result of the evidence in this case was, that the broker obtaining a charter, is entitled to a commission of 5 per cent. upon the stipulated freight. It is difficult, perhaps, rigorously to apply this sort of evidence; but, at all events, it is a measure for the guidance of the jury in exercising their discretion. Then, with regard to the uncertainty as to the amount of freight; it is admitted that the broker's right to commission is not to depend upon the fact of the ship earning freight; and it is also admitted that the broker's claim is not liable *to be cut down by the loss of the vessel, or by [*307] her failure to get a cargo. If so, the plaintiff's right to recover cannot depend upon a nice calculation as to what cargo might have been brought home. So, also, as to the amount of freight the owners would be entitled to receive, if the vessel should arrive off Cork or Falmouth on or before the 30th of April, 1845. The plaintiff would, at all events, be entitled to commission on the lesser amount. I can see no legal objection to the maintenance of the action; nor do I perceive anything unreasonable in the allowance of 5 per cent. There was no evidence called to prove it excessive: in truth, it has been tried again and again, and allowed. * * *

As to the last ground upon which the rule was moved, viz. that [308] the verdict was against the weight of evidence, I can only say, that, in my opinion, the evidence was all one way, and that there is no pretence whatever for disturbing the verdict.

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COLTMAN, J.:

I am of the same opinion. This is, in truth, an action for work and labour by the plaintiff in procuring the charter-party to be made. Evidence was given on the part of the plaintiff to show that the commission was payable upon the execution of the charter-party: and the contention on the part of the defendant was, that the commission on homeward freight was not earned until the arrival of the vessel. The amount of freight might depend upon the quantity of guano brought home; but not so the amount of
[*309] commission, *unless it can be made out that no commission on freight is payable unless and until freight is actually earned: and that is not pretended. The evidence of custom, therefore, affords reasonable means for estimating the proper rate of commission. * * *

MAULE, J.:

I also am of opinion that this rule should be discharged. It was insisted, on the part of the defendant, that the plaintiff was not entitled to maintain the action, his right to commission being dependent upon the amount of freight to be earned on the homeward voyage; and, as no homeward freight was earned, no commission was payable. This argument is based upon a misapprehension of the facts. It appears that the plaintiff was employed by the defendant to procure a homeward freight for his ship, and that he performed that work. An action being brought for compensation, it was necessary for the plaintiff to lay before the jury some evidence as to the proper amount he was entitled to for his commission. For this purpose he called several witnesses. Upon cross-examination, some of these witnesses seemed to think
[*310] that the charter-party *in this case was not precisely in the terms in which charter-parties are ordinarily framed. It does not, however, follow, that therefore the plaintiff is not entitled to some compensation for his trouble in procuring its execution. It is said, that the stipulated payment here was not properly freight. The question, however, is not whether this is in strictness freight—though it would seem from the case of *Devaux* v. *I'Anson* (1) that it may be so called—but what compensation the plaintiff is entitled to receive for procuring the execution of this charter-party. The witnesses showed that the usual and reasonable amount of compensation was about that found by the jury. The plaintiff was

(1) 50 R. R. 786 (5 Bing. N. C. 519; 7 Scott, 507).

clearly entitled to something; and I think the jury might very properly take into their consideration what had usually been done in similar cases, though the terms of the charter-parties in those cases may have differed from those of the present. When it was conceded that the right to commission might arise, notwithstanding no freight might be earned, in consequence of the loss of the ship, or from any other cause, it appeared to me that there was an end of the argument. If the broker's right to commission were to depend upon the arrival of the vessel and the quantity of cargo, he would be *pro tanto* an insurer, not only against perils of the sea, but also against the chance of a cargo not being put on board. That shows that the argument that would make the payment of freight contingent, has no foundation in reason or convenience. * * *

I also think the verdict was quite in accordance with the evidence. [311]

CRESSWELL, J.:

I am entirely of the same opinion. With respect to the grounds of nonsuit reserved, I have nothing to add. * * *

Rule discharged.

HOLLIER *v.* LAURIE, CHAPMAN, AND TODD (1).

1846. *June* 12.

(3 C. B. 334—344; S. C. 15 L. J. C. P. 294; 4 Dowl. & L. 205.)

[334]

Goods seized by the sheriff under a *fi. fa.* against A., out of the Court of Exchequer, were claimed by B., to whom they were restored upon the establishment of her right upon an issue directed, at the sheriff's instance, under the Interpleader Act. B. afterwards brought trespass against the sheriff (2), for breaking and entering her house, on the occasion of the seizure: This Court refused to stay the proceedings, holding the relief and protection afforded to the sheriff by the 1 & 2 Will. IV. c. 58, s. 6, to be confined to disputed claims to the goods seized, or to their proceeds.

And, *semble*, that, if the proceeding in this Court were a violation of the interpleader order, the application for relief should have been made to the Court in which the interpleader took place.

ON the 7th of March last, a writ of *fi. fa.* issued out of the Court of Exchequer, at the suit of the defendant Todd, against one Charles Maggi, indorsed to levy 20*l.* 2*s.* 7*d.*, &c., and a

(1) Distinguished in *Winter* v. *Bartholomew*, 11 Ex. 704, 25 L. J. Ex. 62; explained in *Smith* v. *Critchfield*, 14 Q. B. D. 873, 54 L. J. Q. B. 366. The Interpleader Act (1 & 2 Will. IV. c. 58) was repealed, subject to certain reservations, by 46 & 47 Vict. c. 49, ss. 3 and 7; and see now R. S. C. Ord. LVII.—J. G. P.

(2) The execution-creditor was made a co-defendant; upon what ground, it does not appear.

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warrant was granted thereupon by the other defendants, as Sheriff of Middlesex. The officer entered residence of Maggi to make a seizure. The plaintiff, a lodger, having claimed part of the goods, the officer, on the 12th, took out a summons under the Interpleader Act. The summons was attended on the 14th, by the attorneys for the claimant, the execution-creditor, and the sheriff, when the following order was made by CRESSWELL, J.:

"Upon hearing, &c., I do order, that, upon payment of the sum of 30*l.* into Court by the said claimant, within a week from this date, or upon her giving, within the same time, security, to the satisfaction of one of the Masters, for the payment of the same amount by the said claimant according to the directions of any rule of Court or Judge's order to be made herein, and upon payment to the said sheriff of the possession money from this date, the said sheriff do withdraw from the possession of the goods and chattels seized by him under the writ of *fi. fa.* issued herein: And I do further order, that, unless such payment shall be made, or
[*335] such *security be given, within the time aforesaid, the said sheriff do proceed to sell the said goods and chattels, and pay the proceeds of the sale, after deducting the expenses thereof, and the possession money from this date, into Court, to abide further order herein: And I do further order that the parties do proceed to the trial of a feigned issue in the Court of Exchequer, in which the said claimant shall be plaintiff and the said execution-creditor shall be defendant; and that the question to be tried shall be, whether the goods, at the time of the seizure, were the property of the claimant: And I further order that such issue shall be prepared and be delivered by the plaintiff therein within ten days from this date, and be returned by the defendant therein within a week, and shall be tried at the first sitting in next Term in Middlesex: And I reserve the question of costs, and all other questions, until after the trial of the said issue."

The claimant, having, in pursuance of this order, paid into Court the sums therein mentioned, duly delivered an issue, which came on to be tried, before Alderson, B., at the second sitting in the last Term, when a verdict was found for the plaintiff, Todd, the execution-creditor, appearing in Court in person, admitting that the goods in question were the property of the claimant, and denying that he had authorised any proceedings to be taken in his name under the interpleader rule. The following order was

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afterwards, on the 1st of May, made by PLATT, B., upon reading the affidavit of the plaintiff's attorney, and by consent of the sheriff:

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"I do order that the sum of 30*l.* paid into Court in this cause, pursuant to the order of CRESSWELL, J., and dated the 14th of March, 1846, be paid out of Court to Mary Hollier, the claimant in the said order named, or to her attorney; and that the plaintiff (Todd) pay to said Mary Hollier, and the Sheriff of Middlesex, their *costs of and occasioned by the interpleader application, and also [*336] the costs of the said Mary Hollier of, and occasioned by, and incident to, the issue by the said order directed to be tried, and the costs of this application to be taxed, including 1*l.* 10*s.* paid by the said claimant to the Sheriff of Middlesex for possession money, the said issue having been tried, and a verdict found for the plaintiff therein."

The costs of Mary Hollier were afterwards taxed at 35*l.* 6*s.* 2*d.*, and duly demanded of Todd; but, by reason of his extreme poverty, she was unable to obtain them.

The present action was brought by Mary Hollier against the Sheriff of Middlesex and Todd, the execution-creditor, for the alleged trespass in breaking and entering the rooms in her occupation, and seizing her goods, under colour of the writ against Maggi.

Channell, Serjt., on behalf of the sheriff, on a former day in this Term, obtained a rule *nisi* to stay the proceedings, as being an evasion of the interpleader order.

Byles, Serjt., now showed cause:

The statute 1 & 2 Will. IV. c. 58, s. 6, authorises the Court or a Judge to stay the proceedings in any action brought by a claimant in respect of goods seized by the sheriff; but it relates solely and entirely to the seizure of the goods. Here, the claimant has succeeded, under the interpleader rule, in establishing her right to the goods. But, besides seizing her goods, the sheriff broke and entered her dwelling-house: this was a distinct and substantive act of trespass, in respect of which she has a clear right of action. * * *

Sir T. Wilde, and *Channell*, Serjts., in support of the rule: [337]

The intention of the statute 1 & 2 Will. IV. c. 58, was, to afford substantial protection to public officers in the execution of their

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duties. * * The sheriff having in this case, in the execution of the process of this Court, seized certain goods, a third party lays claim to them; whereupon the sheriff obtains an order under the statute, under which the goods are, upon terms, restored to the claimant, and an issue is directed, and eventually the claimant's right is established. She now brings an action for an alleged trespass incidental to the seizure of the goods under the execution. This is precisely one of the difficulties against which the statute intended to protect the sheriff. When the claimant appeared before the Judge to support her claim to the goods, if she had intended to reserve to herself a right of action against the sheriff for the trespass committed in making the seizure, she should have asked the Judge to make a special order to that effect.

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(CRESSWELL, J.: Could the Judge compel the execution-creditor to be defendant in an action of trespass for breaking and entering the rooms?)

Probably not. The interpleader order, however, has defined the rights of the parties; and it is as much an abuse of the process of the Court to proceed in this way, as it would be, after a rule for staying the proceedings in an action in one Court, to bring a fresh action in another.

(CRESSWELL, J.: Suppose the sheriff, under colour of an execution against the goods of A., enters the house of B., and there seizes goods belonging to C., would the sheriff, by an interpleader rule, obtained in respect of C.'s claim to the goods, deprive B. of his right to complain of the trespass done to him?)

Probably not. But here the action is brought by the party claiming the goods, and not, as in the case supposed, by a third person. The sheriff has acted *bonâ fide*, and the act complained of is inseparably connected with the duty he had to perform. If the sheriff is not protected under circumstances like the present, the [*339] provisions of the statute will in most *cases as regards him be perfectly nugatory.

(COLTMAN, J.: The sheriff might justify the entry into the rooms, if it turned out that the goods found there were the property of the execution-debtor: *Semayne's* case (1).

(1) 5 Co. Rep. 91.

TINDAL, Ch. J.:

It appears to me that this case does not fall within the provisions of the Interpleader Act, and that we have no authority to stay the proceedings. The plaintiff had originally two causes of action: the one, for breaking and entering her apartments; the other, for seizing her goods. As to the latter, the 1 & 2 Will. IV. c. 58, has applied a remedy; the sheriff having, under the sixth section of that statute, obtained a Judge's order for an issue to determine their ownership. But, with respect to the other subject-matter of complaint, the statute is altogether silent, and therefore affords the sheriff no protection. The law, as laid down by, and to be deduced from, *Semayne's* case, is, that the sheriff may enter the house of a third person under an execution against goods, the outer door being open, but that he does so at his own proper peril, for, he is only justified if goods of the debtor are found there (1). In a case like this, where the goods seized are goods of a lodger in the house of the debtor, the sheriff runs very little risk, provided he act honestly and civilly; the jury, in the exercise of their discretion, would visit his mistake very leniently, and it is in his power to avoid the costs by paying into Court a sufficient sum to compensate for the damage actually done. I think the plaintiff clearly has a right to bring her action; and that we should be arrogating to ourselves an authority we do not possess, if we were to interfere to stay her proceedings. *The statute, as it seems to me, only intended to provide for cases [*340] of daily occurrence, claims set up by third persons to goods taken in execution. The case, however, of the sheriff entering the wrong house—and this is the same as if it had been the separate house of the plaintiff; being her *domus mansionalis* (2)—is not one of very frequent occurrence; and I cannot think it is one to which the statute ever meant to apply a remedy. I therefore think this rule must be discharged.

COLTMAN, J.:

It appears to me also that the sheriff is not entitled to the relief he seeks. I do not see that, in bringing this action, the plaintiff has been guilty of any violation of the order of my brother CRESSWELL. The Court of Exchequer is the proper tribunal to vindicate its own, if any contempt of its rule or order has been committed.

(1) And see *Cooke* v. *Birt*, 15 R. R. 652 (5 Taunt. 770); *Johnson* v. *Leigh*, 16 R. R. 614 (6 Taunt. 247; 1 Marsh. 565).

(2) See *Sheers* v. *Brooks*, 3 R. R. 857 (2 H. Bl. 120).

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That which the Interpleader Act was intended to remedy, was, the inconvenience to which sheriffs and others were sometimes put, by claims being set up by strangers to goods seized in execution; it never was intended to relieve them from the consequences of improperly entering the house of one man to seize the goods of another. Whether the circumstances will afford the sheriff a defence, it is not necessary to discuss.

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MAULE, J.:

I also think this rule must be discharged. In the first place, it appears to me that this Court has no jurisdiction in the matter under the Interpleader Act. There is no doubt, under the terms of the Act, where an action is brought, and a third party sets up a claim, the defendant having no interest in the subject-matter, the application must be made to the Court in which the action is brought. So, [*341] in the case *of the sheriff, where a claim is made to goods seized, the sheriff must make his application to the Court out of which the process issues. Here, the process issued out of the Court of Exchequer. It is clear, therefore, that any application in the matter of the interpleader must be made to that Court. It is true, that by the subsequent Act of 1 & 2 Vict. c. 45, power is given to the Judges of all the Courts to act indiscriminately at Chambers: but that does not extend the jurisdiction under the Interpleader Act: there still can be only one Interpleader Court. Any application, therefore, in the matter of the interpleader rule in this case, can only be addressed to the Court of Exchequer, or to some Judge acting at Chambers under the powers of the statute last referred to. Where sufficient ground is laid for it, this Court, however, has, by virtue of its general jurisdiction, power to stay proceedings. Possibly, if application were made to the Court of Exchequer, to stay the proceedings as being a violation of the interpleader rule, that Court might make an order that would be binding upon the parties; and, though that Court might have no power to carry such order into execution, this Court might give effect to it by staying the proceedings, in the exercise of its general superintending power over its suitors. Supposing, therefore, that this action had been brought in violation of an interpleader order duly made under the powers conferred by the statutes, I incline to think that the application for relief should have been made to the Court of Exchequer, or to a Judge at Chambers exercising the jurisdiction of a Judge of that Court by virtue of the 1 & 2 Vict. c. 45.

Further, however, I think this is not a case within the Interpleader Act at all; because I think the spirit and object of that Act was, not to relieve all classes of persons from all sorts of legal difficulties, but a much more hopeful thing, viz. to afford relief in particular cases, by *extending to the common law Courts a jurisdiction that had been found convenient in courts of equity, that is, where a man is willing to do or omit what he is called upon to do, by one party, and to omit, by another, and confesses his liability to one or other of them, to relieve him from the hardship of disputing with both, and allow the parties really interested to contest the matter between themselves. The sheriff is in a position analogous to that of such a defendant. The execution-creditor requires him to execute the process of the Court against the goods of his debtor: having seized certain goods which he believes to be the goods of the debtor, the sheriff is met by the claim of a third party, who insists that the goods are his, and that he will hold the sheriff responsible for seizing them. That is, in effect, the recital of the 1 & 2 Will. IV. c. 58, s. 6; and the enactment limits it to the case of any claim "made on any goods or chattels taken, or intended to be taken, in execution under any such process, or to the proceeds or value thereof." In a subsequent part of the clause, it is true, power is given to the Court to make "such rules and decisions as shall appear to be just, according to the circumstances of the case;" but that means according to the circumstances of the case in which the Act confers the jurisdiction. To extend those words to cases in which jurisdiction is not previously given, would be to give them too large a latitude: it would be making the superstructure much wider than the foundation. It is quite clear that an action for breaking and entering the house of a third party, in the execution of process, is no more within the contemplation of this Act than an assault and battery of the party would be. It cannot be said that the damages in such an action are something as to which the sheriff doubts who is entitled to them. He is here charged as a wrongdoer: there is nothing to interplead about; nobody but himself is interested *in the result, or liable for the consequences. It is conceded, that, if the breaking and entering the house had been the sole cause of complaint, the Interpleader Act would have been out of the question. It would be somewhat singular if the situation of the plaintiff should be prejudiced by the circumstance of her having sustained an accumulation of wrongs.

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In every view, therefore, I think the rule is answered.

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CRESSWELL, J.:

I am of the same opinion. The intention of the Legislature, as it seems to me, was, to afford relief to the sheriff only in cases where claim is made to goods seized under process, and not where compensation is sought for a trespass. In the case of goods, the claimant, if his claim be well founded, is compensated for their seizure, by having them restored to him: but, for a trespass in breaking and entering his house, it is only by recovering damages that he can be compensated. A Judge before whom the parties appear under an interpleader summons, has no power to make the execution-creditor take upon himself any responsibility for breaking and entering the claimant's house. The mischief recited and intended by the Act to be remedied, is confined to the difficulty in ascertaining the true ownership of the goods; and it is to that alone that the order is confined. The protection of the sheriff is not to be extended beyond relief from the difficulties recited. The earlier sections of the 1 & 2 Will. IV. c. 58, show the class of cases to which the Act was intended to apply: in s. 1, the only actions mentioned are, assumpsit, debt, detinue, and trover—all showing that disputes relating to goods alone are contemplated, where the defendant is a mere stakeholder, claiming no interest himself. If any thing beyond a claim to goods, or their proceeds, is involved,
[*344] the Act does not apply. In *Lawrence* *v. *Matthews* (1), the declaration containing a count in case as well as a count in trover, COLERIDGE, J., held that no relief could be afforded under the Act.

Rule discharged, with costs.

1846. *July* 6.

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(3 C. B. 349—379; S. C. 16 L. J. C. P. 28.)

Testator devised lands to his son for life, with remainders in strict settlement to his issue; remainder to the testator's grandson A., for life, remainder in strict settlement to his issue; "and, for default of such issue, then to the use of my grandchildren B., C., D., and E. (brothers and sisters of my grandson A.), if they shall happen to be living at the time of his decease, for their lives and the life of the survivor of them, to take as tenants in common, and not as joint-tenants; and, from and after their several deceases, and the decease of the survivor of them the said B., C., D., and E., to the use of the first and all and every the son and sons of the body and bodies of my said grandchildren, severally and successively and in remainder, one after another, as they and every of them shall be in priority of birth and seniority of age, and of the several and respective

(1) 5 Dowl. P. C. 149.

heirs of the body and bodies of all and every such son and sons issuing, the elder of such sons and the heirs of his body, being always preferred and to take before the younger of them and the heirs of his and their body and bodies, to take as tenants in common, and not as joint tenants;" and, for want or in default of such issue, to all and every the daughter and daughters of the four grandchildren, in like manner: "and, in case either of my said grandchildren B., C., D., and E., shall happen to die leaving no issue behind him, her, or them, then my will and meaning is, that all and singular the premises herein lastly devised, shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten, in manner aforesaid; and, on failure of issue of either of their bodies lawfully begotten, then I give, devise, and bequeath the same premises to the use of the children of my brothers F. and G." &c.

The testator's grandson C. survived his brothers and sisters, and entered into possession, the testator's son, and his grandson A., having both died without issue:

Held, that C. took an estate for life only; the effect of these words, "shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten in manner aforesaid," being, to bring the lands, in the event to which the clause in which they were found applied, within the preceding clause, which gave life estates to the grandchildren, with remainders in tail to their sons and daughters; and there being no other part of the will to which the words of reference, "in manner aforesaid," could be applied.

THIS was an action of ejection, brought to recover certain estates situate in the several parishes of Llanellen and Llanover in the county of Monmouth. *The demise in the declaration was laid on [*350] the 1st of November, 1843.

The following case, under a Judge's order, and by consent, was stated for the opinion of this Court:

Thomas Morgan, being seised in fee simple of the estates in question, duly made and executed his will, bearing date the 26th of November, 1795; and, after thereby devising the estates in question (situate in Llanellen and Llanover) to his son Samuel Morgan (since deceased, without issue), for his life, without impeachment of waste, with a limitation to trustees in the said will named, and their heirs, during his life, upon the usual trusts to support contingent remainders, and a charge of an annuity of 20*l.* to the testator's daughter Ann Llewelin (since deceased) for her life; with remainder, from and after the decease of the said Samuel Morgan, to the first and all and every the son and sons of the said Samuel, severally and successively and according to seniority, in tail general; with remainder to the use of all and every the daughter and daughters of *the said Samuel, in tail general, and, if more [*351] than one, as tenants in common, with cross-remainders between them, in tail general; with the remainder to the use of the testator's grandson Thomas Llewelin (also since deceased, and

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without issue), for his life, without impeachment of waste: and, from and after his decease, to the use of the first and all and every the son and sons of him the said Thomas Llewelin, successively and according to seniority, in tail general; with remainder to the use of all and every the daughter and daughters of the said Thomas Llewelin, in tail general, and, if more than one, as tenants in common, and with cross-remainders between them in tail general—the testator proceeded in the words following:

"And, for default of such issue, then to the use of my grandchildren William Llewelin, Samuel Llewelin, Alice Llewelin, and Hannah Llewelin (brothers and sisters of my said grandson Thomas Llewelin), if they shall happen to be living at the time of his decease, for and during the term of their natural lives and the life of the survivor of them, to take as tenants in common, and not as joint-tenants; and, from and after their several deceases, and the decease of the survivor of them the said William Llewelin, Samuel Llewelin, Alice Llewelin, and Hannah Llewelin, to the use and behoof of the first and all and every the son and sons of the body and bodies of my said grandchildren, William, Samuel, Alice, and Hannah, lawfully to be begotten, severally and successively and in remainder, one after another, as they and every of them shall be in priority of birth and seniority of age, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs of his body lawfully issuing, being always preferred and to take before the younger of them, and the heirs of his and *their body and bodies lawfully issuing, to take as tenants in common, and not as joint-tenants; and, for want or in default of such issue, to the use of all and every the daughter and daughters of the bodies of my said grandchildren, William, Samuel, Alice, and Hannah, lawfully to be begotten, and the heirs of the bodies of such daughters respectively lawfully issuing, the daughters of each of my said grandchildren, William, Samuel, Alice, and Hannah, if more than one, to take as tenants in common, and not as joint-tenants; and in case of the death and failure of issue of any one or more of the said daughters of my said grandchildren, all and every the share and shares of her or them so dying, when and so often as it shall so happen, shall go, remain, and enure to the survivor and survivors and other and others of the said daughters, and the heirs of the body and bodies of such surviving and other daughter and daughters respectively, such surviving daughters, if more than one, to

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take also in equal parts and shares as tenants in common, and not as joint-tenants; and, if all such daughters but one shall die without issue, or if there shall happen to be but one daughter of the body of my said grandchildren lawfully to be begotten, then to the use of such only surviving daughter, and the heirs of her body lawfully issuing: And, in case either of my said grandchildren, William, Samuel, Alice, and Hannah, shall happen to die leaving no issue behind him, her, or them, then my will and meaning is, that all and singular the premises herein lastly devised, shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten, in manner aforesaid; and, in failure of issue of either of their bodies lawfully begotten, then I give, devise and bequeath the same premises to the use of the children of my brothers Charles Morgan and James Morgan, in manner following, *that is to say, two third parts of the said premises unto the [*353] children of Charles Morgan, and one third part thereof to the children of James Morgan, and their lawful issue, their heirs and assigns for ever, share and share alike; and to and for no other use, intent, or purpose whatsoever."

The testator, by his said will, then devised a certain other estate, called Long Barns, to his said grandson William Llewelin, for life, without impeachment of waste, with a limitation to the trustees therein named and their heirs, during his life, upon the usual trusts to support contingent remainders; with remainder, immediately after the death of the said William Llewelin, to the use of his first and other sons, successively and according to seniority, in tail general—remainder to the use of all and every the daughter and daughters of the said William Llewelin, in tail general, and, if more than one, as tenants in common, with cross-remainders between them in tail general.

And, in failure of or in default of any such issue, the said testator also devised in the words following:

"To the use and behoof of the brothers and sisters of him the said William Llewelin then living, and the heirs of their bodies lawfully issuing, share and share alike, to take as tenants in common, and not as joint tenants; and, from and after the several deceases of his brothers and sisters, and their lawful issue, and the survivor of them, then I give, devise, and bequeath the last-mentioned premises to the use of the children of my brothers Charles Morgan and James Morgan, and their lawful issue, and their heirs and assigns for ever, in like manner and form as the premises

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hereinbefore devised to them in remainder; and to and for no other use, intent, or purpose whatsoever."

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[*354] The testator, by his said will, then devised another *estate at Guielog to his grandson Samuel Llewelin, for his life, without impeachment of waste, with a limitation to the said trustees, and their heirs, during his life, upon the usual trusts to support contingent remainders; with remainder, immediately after the death of the said Samuel Llewelin, to the use of his first and all and every other his son and sons successively and according to seniority, in tail general; with remainder to the use of all and every his daughter and daughters, in tail general, if more than one, as tenants in common, with cross-remainders between them in tail general: and the said testator then proceeded in the words following:

"And, in failure of or in default of any such issue, to the use and behoof of the brothers and sisters of my grandson Samuel Llewelin then living, and the heirs of their bodies lawfully issuing, share and share alike, to take as tenants in common, and not as joint-tenants; and, from and after the several deceases of his brothers and sisters, and their lawful issue, and the survivor of them, then I give, devise, and bequeath the said last-mentioned premises to the children of my two brothers, Charles and James Morgan, their heirs and assigns for ever, in like manner and form as the premises hereinbefore devised to them in remainder."

The testator also then devised an estate at Abergavenny to his granddaughters Alice Llewelin and Hannah Llewelin, for their lives, as tenants in common, without impeachment of waste, with a limitation during their lives to the said trustees, and their heirs, upon the usual trusts to support contingent remainders; with remainder, from and immediately after the decease of his said granddaughters Alice and Hannah, and the decease of the survivor of them, to the use of the first and all and every the son and sons of the body and bodies of his same granddaughters, severally and successively and according to seniority, in tail general; [*355] *with remainder to the use of all and every the daughter and daughters of his same granddaughters, in tail general, and, if more than one, as tenants in common, and with cross-remainders between them in tail general.

And the said testator then proceeded in the words following:

"And, in case either of my said granddaughters Alice and Hannah shall happen to die, leaving no issue behind her, then my will and meaning is, that all and singular the premises herein lastly devised, shall go and remain to the survivor of them, and the

heirs of her body lawfully to be begotten, in manner aforesaid; and, in failure of the issue of either of their bodies lawfully begotten, to the use and behoof of the brothers of them the said Alice and Hannah then living, and the heirs of their bodies lawfully issuing, share and share alike, to take as tenants in common, and not as joint-tenants; and, from and after the several deceases of their brothers and their lawful issue, and the survivor of them, then I give, devise, and bequeath the same premises to the use of the children of my brothers Charles and James Morgan, their heirs and assigns for ever, in like manner and form as the premises hereinbefore devised to them in remainder."

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And the said testator then also devised another estate, called Park (subject to an annuity mentioned in the will), to his grandson Thomas Llewelin, for his life, without impeachment of waste, with a limitation to the said trustees, and their heirs, during his life, upon the usual trusts to support contingent remainders; with remainder, immediately after the death of the said Thomas Llewelin, to the use of his first and all and every his son and sons successively, according to seniority, in tail general; with remainder to the use of all and every his daughter and daughters in tail general; and, if more than one, as tenants in common, and with cross-remainders *between them in tail general. The testator then [*356] proceeded, in the words following:

"And, in failure of or in default of any such issue, to the use and behoof of the brothers and sisters of the said Thomas Llewelin, then living, and the heirs of their bodies lawfully issuing, share and share alike, to take as tenants in common, and not as joint-tenants; and, from and after the several deceases of his brothers and sisters, and their lawful issue, and the survivor of them, then I give, devise, and bequeath the last-mentioned premises to the use of the children of my brothers Charles and James Morgan, their heirs and assigns for ever, share and share alike, and to and for no other use, intent, or purpose whatsoever, in like manner and form as the premises hereinbefore severally devised to them in remainder."

The testator then, by his said will, after giving powers of leasing to his son, grandsons, and granddaughters, as therein mentioned, and making certain specific and pecuniary bequests out of his personal estate, gave, devised, and bequeathed all the rest and residue of his real and personal estate, whatsoever and wheresoever, whereof he should die possessed, unto his grandson Thomas Llewelin, subject to the payment of the testator's just debts and funeral

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expenses; to hold to him the said Thomas Llewelin, his heirs and assigns for ever. And he appointed him sole executor of his will.

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(An entire copy of the will was set out in an appendix to the case, to which copy either party was to be at liberty to refer on the argument of the case.)

The testator died on the 11th of June, 1797, leaving his said son Samuel Morgan, his heir-at-law, and his said grandchildren, Thomas, William, Alice, and Hannah Llewelin, him surviving.

The testator's son Samuel Morgan died in 1803, a bachelor, and
[*357] intestate as to any reversion in fee, or *other interest, if any, in the estates in question which descended to him as undisposed of by the said will. He left his sister Ann Llewelin, widow, his heir-at-law.

The said Ann Llewelin died in December, 1841, intestate, leaving the said Samuel Llewelin (one of the testator's grandsons) her eldest surviving son and heir-at-law.

The testator's grandson Thomas Llewelin died in September, 1829, a bachelor and intestate, and leaving his surviving brother, the said Samuel Llewelin, also his heir-at-law.

Before this period, the testator's grandson William Llewelin, and his granddaughters Alice and Hannah Llewelin, had all died without having had any issue, viz. William in the year 1815, Alice in the year 1823, and Hannah in the year 1810.

Samuel Llewelin, the only surviving grandchild, entered into possession of the estates on the death of Thomas Llewelin, in 1829.

In the year 1838, the said Samuel Llewelin executed disentailing deeds, under the Act for abolishing fines and recoveries (1), viz. indentures of lease and release (and which were afterwards duly inrolled according to the said Act); and by such indentures he bargained and sold and released and conveyed the estates in question unto William Woodhouse Secretan, and his heirs, to the use of himself the said Samuel Llewelin, his heirs and assigns for ever.

By his will, dated the 25th of June, 1840, and duly made and attested, the said Samuel Llewelin devised all his real estate to the defendants, as tenants in common in fee, and died a bachelor on the 9th of September, 1842, leaving the lessor of the plaintiff, Hannah Woodall, his heir-at-law.

[358] (A copy of the will of Samuel Llewelin was also contained in the appendix to the case, and either party was to be at liberty to refer to it on the argument.)

Charles Morgan, the next eldest brother of the testator Thomas

(1) 3 & 4 Will. IV. c. 74, s. 3.

Morgan (and who had died some years before the date of the said will), had a daughter named Hannah, his only child, who married Thomas Lewis, and died intestate, in the year 1810, leaving an only child, Hannah, one of the lessors of the plaintiff, the wife of William Woodall, one of the lessors of the plaintiff, and mother of the defendant Thomas Lewis Woodall.

James Morgan, the other brother of the testator Thomas Morgan, died in 1808, and had one child only, James Jones Morgan, one of the lessors of the plaintiff, who was born in the year 1775, and is the father of the defendant James Jones Morgan the younger.

It is contended, on the part of the plaintiff, that, on the death of Samuel Llewelin, a bachelor, Hannah Woodall, one of the lessors of the plaintiff, became entitled to two undivided thirds, in tail; and James Jones Morgan, one of the lessors of the plaintiff, to the remaining undivided third, in tail. And, if the Court shall be of this opinion, it is agreed that a judgment shall be entered for the plaintiff accordingly.

But it is contended, on behalf of the defendants, that the lessors of the plaintiff did not become so entitled. And, if the Court shall be of this opinion, it is agreed that judgment shall be entered for the defendants.

The case was argued in Michaelmas Term last.

Channell, Serjt. (with whom was *Talfourd*, Serjt.), for the plaintiff (1):

Under the will of Thomas Morgan, the *testator's grandson, Samuel Llewelin, took an estate for life only. The true construction [*359]

(1) The points respectively marked for argument, were as follow:

For the plaintiff: That Samuel Llewelin took only as tenant for life, and that, on his death, a bachelor, Hannah Woodall, one of the lessors of *the plaintiff, became entitled to two undivided thirds, and James Jones Morgan, one of the lessors of the plaintiff, to the remaining undivided third of the estates in question.

For the defendants: 1. That Samuel Llewelin was tenant in tail:

2. That the ultimate dispositions over, through and under which the lessors of the plaintiff claimed, were void for uncertainty; and, consequently, that Samuel Llewelin became absolutely entitled to the property, by descent, either from the testator's son and heir-at-law Samuel Morgan, or from his grandson and residuary devisee Thomas Llewelin:

3. That, if not so void, then that the limitations to the children of Charles and James Morgan, were contingent remainders; and that the limitation as to two third parts of the premises to the children of Charles Morgan, failed of effect, by the death of Hannah Morgan, the only child of the said Charles Morgan, before such remainder came into possession or became vested: [*359, *n.*]

4. That, if not so void, the limitation to the children of Samuel Morgan, and also that to the children of Charles Morgan, if it had not previously failed, as before mentioned, were destroyed

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of the will of Thomas Morgan, is, that the four grandchildren of the testator, William, Samuel, Alice, and Hannah Llewelin, took estates for life, with cross-remainders between them, remainder to their issue in tail, such issue taking as purchasers.

(COLTMAN, J.: Do you say that all the issue are to take jointly?)

As to that, there is some difficulty. But, if each of the grandchildren had died leaving a son, each of such sons would have taken a fourth, as tenant in common in tail with his cousins. It will be contended on the part of the defendants, that the words "and in case either of my said grandchildren, William, Samuel, Alice, and Hannah, shall happen to die leaving no issue behind him, her, or them, my will and meaning is, that all and singular the premises [*360] herein lastly devised, shall go and remain to *the survivor of them, and the heirs of his or her body lawfully to be begotten, in manner aforesaid"—in the events which have happened, created an estate-tail in Samuel Llewelin. But the words "in manner aforesaid" show the testator's intention that the survivor should take subject to the previous limitation, the language of which is somewhat different from that last referred to: he did not mean to alter or to interpret, but only to refer to, the previous disposition: and under that the grandchildren clearly took for life only: *Cursham* v. *Newland*(1). [He cited *Watson* v. *Foxon*(2), and *Livesey* v. *Harding*(3).] Here, [*361] there is no *necessity to resort to cross-remainders by implication, because cross-remainders are expressly given. The testator clearly did not intend that the children of his brothers should take any interest, until after a failure of issue of all the four grandchildren.

Byles, Serjt. (with whom was *H. G. Jones*, Serjt.), for the defendants:

At the time of the testator's death in 1797, the state of his family was this: He had one son, Samuel, and a daughter, Ann, who was married and had five children, Samuel, Thomas, William, Alice, and Hannah. The son of the testator died in 1803. The daughter died in 1841. Of her children, Hannah died in 1810, William in 1815, Alice in 1823, and Thomas in 1829. Samuel, who survived, entered into possession of the property, and in 1838, executed

by the descent to Samuel Llewelin of the reversion or remainder in fee from the testator's son and heir, or from his grandson and residuary devisee; or, if not so destroyed, they were destroyed by the execution, by Samuel Llewelin, of the disentailing deeds of 1838.

(1) 2 Bing. N. C. 58; 2 Scott, 105.
(2) 2 East, 36.
(3) 1 Russ. & My. 636.

disentailing deeds, limiting the estate to himself in fee-simple. He died in 1842, having by his will devised his estate to the defendants as tenants in common in fee. The question for the consideration of the Court, is, whether Samuel Llewelin, under the will of his grandfather, Thomas Morgan, in the events which have happened, took an estate in fee, or for life only. After the devise to his four grandchildren, for life, with remainders in tail to their sons and daughters, the testator proceeds—"And, in case either of my said grandchildren, William, Samuel, Alice, and Hannah, shall happen to die, leaving no issue behind him, her, or them, then my will and meaning is, that all and singular the premises herein lastly devised, shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten, in manner aforesaid."

William and Hannah Woodall clearly have no title. Hannah was the daughter of Charles Morgan, the next eldest brother of the testator, Thomas Morgan; and she died in 1810, and therefore was not living at the death *and failure of issue of the four grandchildren [*362] living at the date of the will.

(MAULE, J.: What do you say to the other lessors of the plaintiff?)

If Samuel Llewelin took for life only, then they will be entitled, the one set to two thirds, the other to one third of the estate.

Samuel Llewelin, however, clearly took an estate-tail. The words used "to the survivor of them, and the heirs of his or her body lawfully to be begotten," are the formal and proper words to create an estate-tail. The burthen of showing that they were intended to have a contrary meaning, rests upon the other side. The question is, whether the word "heirs" is to be taken as a word of purchase or of limitation. The leading case in modern times upon this subject, is that of *Lees* v. *Mosley* (1). [He also cited *Poole* v. *Poole* (2), *Douglas* v. *Congreve* (3), *Goodright* v. *Pullyn* (4), *Coulson* v. *Coulson* (5), *Sayer* v. *Masterman* (6), and *Papillon* v. *Voice* (7).] Here, it is con- [369] tended, that, inasmuch as there are children mentioned in a former part of the will, who are to take as purchasers, therefore, by virtue of the words "in manner aforesaid," the successors, under the devise in question, must also take as purchasers. Assuming that to

(1) 41 R. R. 348 (1 Y. & C. 589).
(2) 3 Bos. & P. 620.
(3) 4 Bing. N. C. 1; 5 Scott, 223.
(4) 2 Ld. Ray. 1437, cited 1 Fearne, Cont. Rem., 10th edit. 160.
(5) 2 Stra. 1125.
(6) Amb. 344.
(7) 2 P. Wms. 471.

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be so, much stronger words have been expunged in order to avoid doing violence to the rule in *Shelley's* case (1). [He cited *Doe* d. *Candler* v. *Smith* (2), *Doe* d. *Cock* v. *Cooper* (3), *Pierson* v. *Vickers* (4), and *Jesson* v. *Wright* (5).]

[370] (TINDAL, Ch. J. : Regard being had to the contingencies that have happened, the first and last parts of the will exactly fit the case of the grandson, Samuel Llewelin.)

In the earlier part of the will, parties are named who are to take by descent, as well as others who are to take by purchase; why should the words in the devise in question "in manner aforesaid," be referred to the latter, rather than to the former? Reading those words with reference to the whole will, they are just as consistent with the one construction as with the other. They may have been intended to have reference to elder sons taking before younger, or they may mean that the daughters should take undivided interests. There can be no cross-remainders with reference to estates for life. It is only by reason of the events that have happened, that there is

[*371] *any thing equivocal in this will. The burthen lies on the other side, to show that the technical words are not to prevail.

Channell, Serjt., in reply :

It is not denied that the Court may strike out words that are wholly repugnant to and inconsistent with the general intention apparent from the whole will. The words "in manner aforesaid," in this devise, however, are not inconsistent with the general intention of the testator, but rather in furtherance of it. In the first place, he intended his son to take; that failing, his intention was that his grandson, Thomas Llewelin, should take; and, in default of the limitation to Thomas Llewelin taking effect, then that the four grandchildren, William, Samuel, Alice, and Hannah, should take, for their lives, and the life of the survivor, as tenants in common. It is by no means clear that cross-remainders may not be implied in the case of life-estates. * * *

Cur. adv. vult.

[372] COLTMAN, J. (6), delivered the judgment of the COURT :

The question in this case is, whether, in the events which have

(1) 1 Co. Rep. 93.
(2) 4 R. R. 521 (7 T. R. 531).
(3) 6 R. R. 264 (1 East, 229; 2 J. P. Smith, 163).
(4) 7 R. R. 760 (5 East, 548; 2 J. P. Smith, 160).
(5) 21 R. R. 1 (2 Bligh, 1).
(6) Tindal, Ch. J., was absent, by reason of illness.

happened, Samuel Morgan took an estate tail, or an estate for life only, under the will of Thomas *Morgan, in certain lands in the parishes of Llanellin and Llanover, in the county of Monmouth : if he took an estate for life only, the plaintiff, if in tail, the defendant, is entitled to judgment. [*373]

The will, after devising the lands in question to the testator's son Samuel Morgan, for life, with remainders in strict settlement to his issue, with remainder to the testator's grandson, Thomas Llewelin, with remainder in strict settlement to his issue, devises as follows : " And, for default of such issue, then to the use of my grandchildren William Llewelin, Samuel Llewelin, Alice Llewelin, and Hannah Llewelin (brothers and sisters of my said grandson Thomas Llewelin), if they shall happen to be living at the time of his decease, for and during the term of their natural lives, and the life of the survivor of them, to take as tenants in common, and not as joint-tenants; and, from and after their several deceases, and the decease of the survivor of them the said William Llewelin, Samuel Llewelin, Alice Llewelin, and Hannah Llewelin, to the use and behoof of the first and all and every other the son and sons of the body and bodies of my said grandchildren William, Samuel, Alice, and Hannah, lawfully to be begotten, severally and successively and in remainder, one after another, as they and every of them shall be in priority of birth, and seniority of age, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs of his body lawfully issuing, being always preferred and to take before the younger of them and the heirs of his and their body and bodies lawfully issuing, to take as tenants in common, and not as joint-tenants; and, for want or in default of such issue, to the use of all and every the daughter and daughters of the bodies of my said grandchildren, William, Samuel, Alice, and Hannah, lawfully to be begotten, *and the heirs of the bodies of such [*374] daughters respectively lawfully issuing, the daughters of each of my said grandchildren, William, Samuel, Alice, and Hannah, if more than one, to take as tenants in common, and not as joint-tenants; and, in case of the death and failure of issue of any one or more of the said daughters of my said grandchildren, all and every the share and shares of her or them so dying, when and so often as it shall so happen, shall go, remain, and enure to the survivor or survivors, and other and others of the said daughters and the heirs of the body and bodies of such surviving and other

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daughter and daughters respectively, such surviving daughters, if more than one, to take also in equal parts and shares as tenants in common, and not as joint-tenants; and, if all such daughters but one shall die without issue, or if there shall happen to be but one daughter of the body of my said grandchildren lawfully to be begotten, then to the use of such only surviving daughter and the heirs of her body lawfully issuing: and, in case either of my said grandchildren, William, Samuel, Alice, and Hannah, shall happen to die leaving no issue behind him, her, or them, then my will and meaning is, that all and singular the premises herein lastly devised shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten, in manner aforesaid; and, in failure of issue of either of their bodies, lawfully begotten, then I give, devise, and bequeath the same premises to the use of the children of my brothers, Charles Morgan and James Morgan, in manner following, that is to say, two third parts of the said premises unto the children of Charles Morgan, and one third part thereof to the children of James Morgan, and their lawful issue, their heirs and assigns for ever, share and share alike."

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The devise to the four grandchildren and their issue consists of two clauses or parts; the first giving life-estates *to the four grandchildren, with remainders in tail to their sons and daughters, in language which leaves no doubt as to the estates which it gives to the grandchildren being for life only, and the estates to their sons and daughters being to them as purchasers in tail. The second clause is in these terms: "And, in case either of my said grandchildren, William, Samuel, Alice, and Hannah, shall happen to die leaving no issue behind him, her or them, then my will and meaning is, that all and singular the premises herein lastly devised, shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten, in manner aforesaid."

For the defendant, it was insisted, that, this last clause, being a devise (in the events which have happened) to the survivor, and the heirs of his body lawfully begotten, gave the survivor an estate-tail: while, for the plaintiff, it was contended, that, though the words "to the survivor, and the heirs of his or her body," are found in this clause, and would give an estate-tail, if unconnected with any thing to give them a different effect, they are found in connexion with words going before and coming after, which show them to be mere words of reference to the preceding clause, giving an estate for life, with remainders to sons and daughters as

purchasers; so that the effect of the words "shall go and remain to the survivor, and the heirs of his or her body lawfully to be begotten, in manner aforesaid" is, to bring the lands, in the event to which the second clause applies, within the preceding clause, which gives life-estates to the grandchildren, with remainders in tail to the sons and daughters.

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And we think this is the true construction of the clause. Such construction is supported by an examination of the sense of the particular words used: it is more consistent with the intention of the testator than *that contended for by the plaintiff, and is supported by the authority of decided cases. The clause was probably intended to supply a deficiency, or remove a doubt, arising on the first clause, as to the persons who should take, in the event of one or more of the grandchildren dying without leaving issue; and the words with which it commences, "my will and meaning is," are properly introductory of an explanatory or supplemental clause. The words "in manner aforesaid" are necessarily connected, by grammatical construction, with the words "shall go and remain," and with the intermediate words "to the survivor, and the heirs of his or her body lawfully begotten as aforesaid." The words "in manner aforesaid," taken in this connexion, are an express reference to some manner of going and remaining before mentioned, by which an estate could go and remain to a grandchild and his or her heirs lawfully to be begotten; and there is no such manner of going and remaining in any preceding part of the will, except the first clause, which gives estates to the grandchildren for life, and to their sons and daughters in tail, which, though not, in words, a devise to the heirs of the bodies of the sons and daughters, is a devise which may not improperly be described as one to the heirs of the bodies of the sons and daughters, inasmuch as those who would take under it are the same persons, and would take in the same order of succession, and for the same extent of interest.

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The defendant's construction treats the words "in manner aforesaid" as something inoperative, and without any effect, in the meaning of the will, which, on this construction, is the same as if they were left out; whereas, the construction of the plaintiff gives them the appropriate effect of saving a long repetition of the detailed limitations to which they refer. "It is always desirable," says Lord ELLENBOROUGH, in the case of *Meredith* *v. *Meredith* (1), in commenting on the words "as aforesaid," "if possible to give

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(1) 10 East, 510.

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effect to all the words of a will, and particularly where it enables the Court to give a uniform and consistent sense to the whole will."

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It is also worthy of remark, that the words "lawfully begotten," are, in the first clause, applied to the sons and daughters who take as purchasers, and not to their heirs, who are described as "heirs of their bodies lawfully issuing," or simply as "heirs of their bodies," without the words "lawfully to be begotten." And, throughout the will, it will be found that the words "lawfully to be begotten," which occur a great many times, are applied to sons and daughters taking as purchasers, and not to heirs, with the exception of the clause in question, and the analogous clause in the devise of the Abergavenny estate to Alice and Hannah, in which, as in that in question, the words "in manner aforesaid" are used to refer to a preceding clause similar to the first clause of the devise in question.

With respect to the intention of the testator, it is evident that the construction which gives an estate-tail, is repugnant to the intention carefully expressed in the words of the first clause, giving an estate-tail in the whole to an only daughter, which immediately precedes the second clause, and inconsistent with the general plan of the testator, as shown by the devise to his son Samuel, the two devises to Thomas, the devise to William, and that to Samuel, the grandson; in all of which, the first taker has a life interest only.

There are several decided cases which support the construction which we have adopted, and none, that we are aware of, that are [*378] opposed to it. In *Lisle* v. *Gray* (1), *A. covenanted to stand seised to the use of E., his son, for life; and, after his decease, to the use of the first son of the body of E., and the heirs male of the body of such first son; and, for default of such issue, to the use of the second son of the body of E., and the heirs male of the body of such second son; and, for default of such issue, to the use of the third son of the body of E., and the heirs male of the body of such third son; and, for default of such issue, to the use of the fourth son of the body of E., and the heirs male of the body of such fourth son; and so, severally and respectively, to every of the heirs male of the body of the said E., and the heirs male of the bodies of such heirs male, according to their ages and seniorities:

(1) 2 Lev. 223; Sir T. Jones, 114; Sir T. Raym. 278, 302, 315; Pollexf. 582; 2 Shower, 7; 1 Freem. 462; 2 Atk. 91; Eq. Cases Abr. 183.

and it was held, by the King's Bench and Exchequer Chamber, that E. took an estate for life only, notwithstanding the express limitation to the heirs male of his body. In *Lowe* v. *Davies* (1), a devise was to Benjamin Jevon and his heirs lawfully to be begotten, that is to say, to his first, second, third, and every son and sons successively, lawfully to be begotten of the body of the said Benjamin, and the heirs of the body of such first, second, third, and every other son and sons successively, lawfully issuing: it was held, that Benjamin took an estate for life, and not in tail; and that the clauses which followed the limitation to the heirs of the body of Benjamin, were explanatory of what heirs of the body of Benjamin the devise meant. And in *Meredith* v. *Meredith* (2), the words "as aforesaid" were held "to draw down and incorporate" the words in a former clause. The two former of these cases were cited, and not denied, in the case of *Jesson* v. *Wright* (3): and they are examples (as we think the present case is,) *of the rule stated [*379] by Lord ELDON in that case (4), that the words "heirs of the body" "will yield to a clear particular intent that the estate should be only for life; and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible and unequivocal."

In the present case, the words "shall go and remain in manner aforesaid," import a clear and distinct reference to the first clause of the devise, which draws it down, and incorporates it with the second: and the clauses so incorporated show an intelligible and unequivocal particular intent, that a grandchild taking under the second clause shall, like those who take under the first, have an estate for life only.

For these reasons, we are of opinion that the judgment must be for the plaintiff.

Judgment for the plaintiff.

(1) 2 Ld. Ray. 1561. And see *S. C.* somewhat differently reported, by the name of *Law* v. *Davis*, Barnardiston's Rep. in B. R. 238; 8 Vin. Abr. 258.
(2) 10 East, 503.
(3) 21 R. R. 1 (2 Bligh, 1).
(4) 21 R. R. 37 (2 Bligh, 53).

1846.
July 6.
Nov. 17.

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(3 C. B. 380—403; S. C. 16 L. J. C. P. 39.)

The mere relation of principal and factor confers, ordinarily, an authority to sell at such times and for such prices as the factor may, in the exercise of his discretion, think best for his employer: but, if he receive the goods subject to any special instructions, he is bound to obey them.

The authority, whether general or special, is revocable.

Quære, whether the factor's authority to sell can be revoked after he has made advances upon the credit of the goods consigned to him, his authority then being coupled with an interest?

In assumpsit, the declaration stated that the plaintiffs had consigned wheat to the defendants, who were corn factors, for sale on account of the plaintiffs; that the defendants then promised the plaintiffs to obey and observe the lawful orders and directions of the plaintiffs to be given by them to the defendants in regard to the sale and disposal of the wheat, and that, although the plaintiffs ordered the defendants not to sell below a certain price, and although the same was a lawful order and direction in that behalf, yet the defendants, not regarding their promise, sold at a less price.

Plea, that, after the delivery of the wheat to the defendants, they became and were under advances to the plaintiffs in respect thereof; that they gave the plaintiffs notice that they required to be repaid such advances, and that in default they should sell the wheat and repay themselves; and that, although a reasonable time had elapsed, the plaintiffs did not repay them such advances; whereupon the defendants, for the purpose of reimbursing themselves, sold the wheat for the best prices that could then be obtained for the same, &c.:

Held, that the plea was bad in substance, there being nothing in the transaction disclosed upon the record, from which it could be inferred that it was part of the contract that at any time the wheat should be forfeited, or the defendant's authority to sell enlarged, so as to enable them to sell for repayment of advances, without reference to its being for the interest of the principals to sell at that particular time, and for that price (2).

ASSUMPSIT. The declaration stated that the defendants, before &c. were, and still are, corn-factors, and carried on, and continue to carry on, the trade and business of a corn-factor, at Liverpool; that, on &c., in consideration that the plaintiffs, at the special instance and request of the defendants, had consigned and delivered to the defendants, to wit, as such factors as aforesaid, a cargo of wheat for and on account of the plaintiffs, to wit, for certain reasonable commission and reward to be paid by the plaintiffs to the defendants in that behalf, they the defendants undertook, and

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then faithfully promised *the plaintiffs to obey and observe the lawful orders and directions of the plaintiffs, to be given by them to the defendants, in regard to the sale and disposal of the said

(1) See the same case after amendment of pleadings, 5 C. B. 895.

(2) Judicially cited in *Donald* v. *Suckling* (1866) L. R. 1 Q. B. 585, 608, 35 L. J. Q. B. 232.—J. G. P.

wheat by the defendants for the plaintiffs. Averment, that, although the defendants, as such factors, then had and received the said cargo of wheat for the purpose, and upon the terms aforesaid; and, although the defendants, afterwards, to wit, on &c., sold and disposed of a certain small quantity, to wit, twenty bushels, parcel of the said cargo of wheat; and although afterwards, to wit, on &c., the defendants sold and disposed of another quantity, to wit, six hundred bushels, then being other parcel of the said cargo of wheat, at and for a certain price, to wit, at the rate or price of 6*s.* 4*d.* for each and every of the said last-mentioned bushels of wheat; and, although, afterwards, and after such last-mentioned sale, and whilst the residue of the said cargo of wheat remained in the hands of the defendants as such factors unsold, to wit, on &c., the plaintiffs ordered and directed the defendants, to wit, as such factors as aforesaid, not to sell any more of the said cargo of wheat under 7*s.* per bushel, and then only to the extent of a certain portion thereof, to wit, to the extent of 1,600 to 2,400 bushels, and although the same order and direction was then a lawful order and direction in that behalf, and the defendants then, and long before any of the sales thereinafter mentioned, had due notice of such order and direction, and could and might and ought to have obeyed and observed such order and direction, yet the defendants, not regarding their said promise and undertaking, but contriving and intending, &c., did not obey or observe the said order and direction of the plaintiffs so given by them to the defendants in respect of the said residue of the said cargo of wheat as aforesaid, but then wholly neglected and refused so to do, and wrongfully and injuriously *sold and disposed of the whole of the said residue of the said cargo of wheat at and after the rate of much less than 7*s.* for each and every bushel thereof, that is to say, &c. (alleging a variety of sales) and afterwards, to wit, on &c., the defendants wrongfully and injuriously sold and disposed of divers, to wit, 5,375 bushels, being the remainder of such residue, at and after the rate of 6*s.* for each and every bushel thereof, contrary to the said order and direction of the plaintiffs so by them in that behalf given to the defendants as aforesaid, and contrary to the duty of the defendants as such factors as aforesaid in that behalf: Further, averment, that, although after the giving of the order and direction aforesaid, and after the violation thereof by the defendants, and whilst the remainder thereinbefore lastly specified of the said residue of the said cargo of wheat, to wit, the said

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quantity of 5,375 bushels thereof, remained in the hands of the defendants, as such factors, unsold, to wit, on &c., the plaintiffs ordered and directed the defendants, to wit, as such factors as aforesaid, not to sell the said remainder of the said residue of the said cargo of wheat, or any part thereof, to wit, without further directions from the plaintiffs in that behalf; and that, although the last-mentioned order and direction was then a lawful order and direction in that behalf, and the defendants then, and long before the sale thereinafter mentioned, had due notice of such last-mentioned order and direction, and could and might and ought to have obeyed and observed the same, yet the defendants, further disregarding their said promise, &c., wrongfully and injuriously sold and disposed of the said remainder of the said residue of the said cargo, without any further directions from the plaintiffs in that behalf, contrary to the last-mentioned order and direction of the plaintiffs, &c.: By reason of which said several premises the plaintiffs had sustained great loss, &c.

[383] There was a second count in the same form, relating to another cargo of wheat.

Third plea: that, after the said cargo of wheat in the first count mentioned had been so consigned to the defendants as such factors, and before the alleged breaches of promise, to wit, on &c., the defendants, as such factors as aforesaid, became and were under advances to the plaintiffs in respect of the said consignment of the said cargo of wheat in the said first count mentioned, to a large amount, to wit, to the amount of 3,000*l.*, and which said sum so advanced by the defendants, as such factors as aforesaid, to the plaintiffs, was then due and payable by the plaintiffs to the defendants, and which said advances the defendants had come under by reason of their having accepted divers bills of exchange for the plaintiffs, and at their request, against, and on the security of, the said cargo, before the giving of any of the said orders, to wit, on &c.; that thereupon, afterwards, and before the committing by the defendants of any of the said alleged breaches of promise, they, the defendants, gave notice to the plaintiffs that they, the defendants, required the said sum of money so advanced by the defendants, as such factors as aforesaid, in respect of the said consignment of the said cargo of wheat, to be repaid to them, the defendants, by the plaintiffs, and that, if the plaintiffs did not repay to them, the defendants, the said sum of money, they, the defendants, should sell the said whole of the residue of the said cargo of wheat,

and out of the money to be produced at such sale, should repay themselves the said sum of money advanced by the defendants as in that plea aforesaid; that, although, after they, the defendants, had given to the plaintiffs the said notice in that plea mentioned, and, before the committing by the defendants of any of the said alleged breaches of promise, a reasonable time for the plaintiffs *to have [*384] repaid to the defendants the said sum of money so advanced by the defendants as in this plea aforesaid, had elapsed, yet the plaintiffs did not nor would repay to the defendants the said sum of money, or any part thereof, but wholly neglected and refused so to do, and the whole of such sum, at the time, &c., remained due and unpaid; and that, for the purpose of repaying to them, the defendants, the said sum of money, it was absolutely necessary for them, the defendants, to sell the whole of the residue of the said cargo of wheat in the said first count mentioned; wherefore the defendants, at the several times when &c. in the said first count mentioned, for the purpose of reimbursing and repaying to them, the defendants, the said sum of money so advanced by the defendants as in that plea aforesaid, sold the said residue of the said cargo of wheat at the said prices in the said first count mentioned, the same being the best prices which could then be obtained for the said residue of the said cargo of wheat, and with the moneys produced by the said last-mentioned sales, being a less amount than the amount of the said advances, did then repay and reimburse to them, the defendants, so much of the said sum so advanced by the defendants to the plaintiffs as aforesaid, as the said money so produced as aforesaid were sufficient to repay and reimburse, as they lawfully might, &c.

Fourth plea: that, before and at the time of the giving of the notice by the defendants to the plaintiffs, &c., the plaintiffs were indebted to the defendants in a large sum of money, to wit, the sum of 3,000*l.*, for advances before then made by the defendants as such factors as aforesaid, to the plaintiffs, in respect of and against consignments of goods before then made by the plaintiffs to the defendants, as such factors as aforesaid, for the purpose of such goods being sold and disposed of by the defendants, as such factors as aforesaid, for the *plaintiffs, and, by reason of the plaintiffs [*385] being so indebted to the defendants as in that plea aforesaid, the defendants, as such factors as aforesaid, before and at the time &c., had a lien upon the said residue of the said cargo of wheat, in the first count mentioned, and upon the proceeds of the said residue of the said cargo of wheat, after the same was sold, for the said sum

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of money so due and owing from the plaintiffs to the defendants as in that plea aforesaid; and had a right to have the said last-mentioned sum of money paid and satisfied to them, the defendants, out of the said proceeds of the said cargo of wheat in the said first count mentioned; that thereupon, they, defendants, after the plaintiffs had become, and whilst they were, so indebted to the defendants as in that plea aforesaid, and before the said alleged breaches, to wit, on &c., gave notice to the plaintiffs, &c.: concluding as in the third plea.

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To these pleas, as also to two others, viz. the eighth and ninth, which were similar pleas to the second count, the plaintiffs demurred specially. The grounds of demurrer to the third and eighth pleas were: that it is not an inference of law that the defendants, under the circumstances in those pleas stated, were, as factors, entitled to sell the wheat in the first count mentioned, contrary to the orders and directions of their principals, the plaintiffs; that the defendants could only obtain the power so to sell, by reason of some agreement with the plaintiffs in that behalf; and that such agreement, if made subsequently to the promise in the first count mentioned, should have been expressly pleaded; that they were an argumentative traverse of the promise in the first count mentioned, and bad as amounting to the general issue; that they were uncertain, as leaving it doubtful whether the defendants meant to admit the promise in the first count mentioned, or to qualify and so deny the same; that

[*386] it was either no answer in law *to the first count, or was, at most, an informal and untechnical traverse of the allegation that the orders and directions in the first count mentioned, were lawful orders and directions; that it was double, in relying, not only on the advances, but on an absolute necessity in fact for selling; that the facts creating such necessity should have been specially set forth; that the allegation of absolute necessity was uncertain, and too indefinite, and, if intended to be relied on as a material allegation, it should have been more explicit; and that, in its present indefinite form, the plaintiffs could not safely take issue on such allegation.

The grounds of demurrer to the fourth and ninth pleas were the same as the above, with this addition—that the defendants ought to have shown with more particularity the right which they alleged they had to have their debt paid and satisfied out of the proceeds of the said wheat; and that the pleas were uncertain, in not showing distinctly whether such right simply resulted from the defendants' general lien as factors, or whether such right was acquired otherwise.

Channell, Serjt. (with whom was *Taprell*), in support of the demurrers: SMART v. SANDARS.

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The third plea sets up a right in the defendants to sell the wheat in question at lower prices than those at which they were directed by the plaintiffs to sell, by reason of the plaintiffs' omitting, in a reasonable time after notice to them, to repay the defendants the amount of advances made by them to the plaintiffs upon the security of the wheat; and it goes on to allege that it was absolutely necessary for the defendants to sell the whole residue of the wheat for that purpose, and that they sold it for the best price that could be obtained. The fourth plea sets up a lien on the wheat for advances, and justifies the sale for the purpose of repaying the defendants such advances, the *plaintiffs failing to repay them in a reasonable [*387] time after notice. These pleas are clearly bad in substance as well as in form. The declaration alleges a duty and a promise on the part of the defendants, as factors, to obey and observe the lawful orders and directions of the plaintiffs in regard to the sale and disposal of the wheat. The defendants, by their pleas, do not deny that they received the wheat on the terms which are stated in the declaration. If they rely on a right of sale, they rely on something that is substantially matter of contract. The plea, therefore, amounts to *non assumpsit*.

(MAULE, J.: It is an argumentative denial that the order alleged in the declaration, was a lawful order in that behalf.)

If the defendants had been under advances, and the plaintiffs had ordered them not to sell, but at an extravagant price, that would not have been a lawful order. * * The defendants, as factors, clearly had a general lien on this wheat for their advances. A lien is, however, strictly speaking, matter of evidence only. It is a right to hold in pledge, but not to sell: *Dufresne* v. *Hutchinson* (1); *Raleigh* v. *Atkinson* (2). * * *

Byles, Serjt. (with whom was *Crompton*), *contrà*: [390]

The pleas in question are good, as well in substance as in *form. Goods having been consigned to a factor for sale, by whom [*391] money has been advanced upon them, it is not competent to the principal, after notice from the factor that he shall sell the goods unless the money advanced by him is repaid, to recall the authority of the latter to sell at the best market,—the authority being coupled

(1) 3 Taunt. 117. (2) 55 R. R. 764 (6 M. & W. 670).

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with an interest, and therefore irrevocable. [He referred to Story on Agency, s. 371, and *Brown* v. *M'Gran* (1).] The mere relation of principal and factor clothes the latter with the right to sell for the best price; and it is not competent to the principal to revoke
[*392] that authority where advances have *been made by the factor on the credit of the consignment.

(CRESSWELL, J.: All that Story says, is, that, where goods are consigned, the factor having a general discretion to sell, the principal cannot recall the authority without repaying the advances. Here, however, the declaration alleges the wheat to have been consigned to the defendants upon a promise by them to obey and observe the lawful orders and directions of the plaintiffs, to be given by them to the defendants in regard to the sale and disposal of the wheat by them. That is altogether a different contract.)

[He cited *Gaussen* v. *Morton* (2), and *Walsh* v. *Whitcomb* (3).] In Story on Bailments, it is laid down, in general terms, that a pledge
[395] implies a right of sale (4). * * This question was mooted in *Warner* v. *M'Kay* (5), and PARKE, B., intimated an opinion that the factor might sell to reimburse himself for advances. The result of the authorities seems to be, that, where there is a general consignment for sale, the moment advances are made, the law engrafts upon the contract a condition to the effect stated by Story. Where a contract is made subject to a condition, the plaintiff may declare upon the contract, without noticing the condition: the defendant may plead it: *Smart* v. *Hyde* (6).

(MAULE, J.: You have not pleaded the condition here: if the condition is implied in the declaration, the objection that the plea amounts to *non assumpsit*, is answered.)

Then it is said that there is no traverse of the lawful orders; that, however, would be to traverse a mere legal inference. If the pleas are good in substance, they are also good in point of form.

Channell, Serjt., in reply. * * *

Cur. adv. vult.

[397] COLTMAN, J. (in the absence of TINDAL, Ch. J.), now delivered the judgment of the COURT:

This was an action of assumpsit, in which the plaintiffs declared,

(1) 14 Peter's Rep. 480.
(2) 34 R. R. 558 (10 B. & C. 731; 5 Man. & Ry. 613).
(3) 2 Esp. N. P. C. 565.
(4) 2nd edit. p. 206, s. 308.
(5) 1 M. & W. 597.
(6) 58 R. R. 867 (8 M. & W. 723).

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for that whereas the defendants were and are corn-factors at Liverpool, and heretofore, to wit, on the 23rd of June, 1842, in consideration that the plaintiffs, at the request of the defendants, had consigned and delivered to them, as such factors, a cargo consisting of 8,563 bushels of wheat, to be sold and disposed of by the defendants, as such factors, for and on account of the plaintiffs, for reasonable commission and reward to be paid by the plaintiffs to the defendants in that behalf, the defendants promised to obey and observe the lawful orders and directions of the plaintiffs, to be given by them to the defendants, in regard to the sale and disposal of the wheat; that the defendants afterwards sold and disposed of a small part of the wheat at 6*s.* 4*d.* per bushel, and that, although the plaintiffs ordered them not to sell any more for less than 7*s.* per bushel, yet the defendants sold for lower prices. There was a second count, in the same form, respecting another cargo of wheat.

The defendants pleaded, thirdly, to the first count, that, after the cargo of wheat therein mentioned, had been so consigned to the defendants, as such factors, and before the committing of the alleged breach of promise, to wit, on &c., the defendants, as such factors, became, and were under advances, to the plaintiffs in respect of the said consignment of the said cargo of wheat, to a large amount, to wit, to the amount of 3,000*l.*, and which said sum so advanced to the plaintiffs was then due and payable by the plaintiffs to the defendants, and which advances the defendant had come under by reason of their having accepted divers bills of exchange for the plaintiffs, and at their request, against, and on the security of, the said cargo, before the giving of any of *the orders [*398] in the said first count mentioned; that, afterwards, and before the committing of the alleged breach of promise, the defendants gave notice to the plaintiffs that they required the said sum of money, so advanced by them as such factors, to be repaid to them, and that, if the plaintiffs did not repay them, they, the defendants, should sell the whole of the residue of the said wheat, and, out of the money produced by such sale, should repay themselves the money advanced; that a reasonable time for repayment elapsed, and that the plaintiffs did not repay the advances; and that, for the purpose of repaying to them, the defendants, the money so advanced, it was absolutely necessary for the defendants to sell the whole of the residue of the said wheat; wherefore, for the purpose of reimbursing and repaying to them the sums advanced, they sold the residue of the wheat, for the prices in the first count of the

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declaration mentioned, the same being the best prices which could be obtained for the same; and that the proceeds were not sufficient to repay to the defendants the whole of the money advanced by them.

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The fourth plea stated that the plaintiffs were indebted to the defendants, as factors, for advances against other consignments, and that they had a lien upon the wheat in question for such advances, and a right to have them repaid out of the proceeds of the wheat: it then stated notice and non-payment, and the sale of the wheat, as before.

Similar pleas were pleaded to the second count.

To each of these pleas there was a demurrer. In that to the first of them, many special causes of demurrer were assigned: that it was an argumentative traverse of the promise, and bad as amounting to the general issue; for, that, in answer to an averment in the declaration that the defendants promised to obey the lawful orders [*399] of the plaintiffs, the defendants by that *plea professed to show that they only promised to obey such orders as should not be inconsistent with the right which they claimed, to sell, in order to repay advances; that it was uncertain whether they meant to admit or deny their promise, as in the first count mentioned; that, if they meant to insist that the advances gave them a subsequent authority to disobey the plaintiffs' orders, such authority should have been pleaded as the result of an express agreement, and should not have been left as a mere inference of law, &c.

On the argument of this demurrer, several objections in point of form were urged against the plea; and also, that it was bad in substance, which, of course, was the most important question. In order to answer it, let us inquire what are the relative positions of principal and factor for sale. From the mere relation of principal and factor, the latter derives an authority to sell at such times and for such prices as he may, in the exercise of his discretion, think best for his employer; but, if he receives the goods, subject to any special instructions, he is bound to obey them; and the authority, whether general or special, is revocable. This was not denied, on behalf of the defendants: but it was contended, that, where a factor has advanced money on goods consigned to him for sale, the authority to sell is irrevocable, because coupled with an interest. That may be true; but it was incumbent on the defendants to maintain also, that, on the failure of the principal to repay such advances within a reasonable time after demand, the authority of the factor is enlarged, and that he has an absolute right to sell at

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any time for the best price that can be obtained, without regard to the interests of the principal, and without regard to the nature of the authority originally given. No case was cited in which this point appears to have been decided in an English Court. In *Warner* v. *M'Kay*, it was incidentally mentioned; *and, as far as any opinion of the Judges can be collected from the report, it would seem that PARKE, B., thought a factor might sell to pay advances, and that Lord ABINGER was of a different opinion: and, certainly, nothing which then passed can be treated as an authority for our guidance in this case. But we were referred to a passage in Story's Law of Agency, in his chapter "On the Right of Lien of Agents," where he says: "In certain cases where he has made advances, as factor, it would seem to be clear that he may sell to repay those advances, without the assent of the owner (*invito domino*), if the latter, after due notice of the intention to sell for advances, does not repay him the amount:" and for this he cites a decision in the Supreme Court of Massachusetts, and refers also to *Pothonier* v. *Dawson*. The latter was not an instance of goods placed in the hands of a factor for sale, but of a party in whose hands goods were deposited to secure the repayment, at a time agreed upon, of money lent. In that case, GIBBS, Ch. J., says: "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But, when goods are deposited by way of security to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade." And he proceeds to say, that, from the nature of the transaction, it might be inferred that the contract was that the lender might sell, and repay himself, if the borrower failed to repay the money at the time agreed upon. We were also referred to Story on Bailments, chapter "On Pawns and Pledges" (1), where the rule of law is said to be, that, "if a pledge is not redeemed at the stipulated time, it may be sold by the pawnee, to repay himself." But the relation of *principal and factor, where money has been advanced on goods consigned for sale, is not that of pawnor and pawnee. The goods are delivered for sale on account of, and for the benefit of, the principal, and not by way of security, to indemnify against a lien, although they operate as such security, the factor having a lien upon them, or upon their proceeds when sold, for the amount of his claim against the principal. The authority of the factor, whether general

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[*401]

(1) Section 308.

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or special, may become irrevocable when advances have been made: but there is nothing in the transaction from which it can be inferred (to adopt the language of GIBBS, Ch. J.) that it was part of the contract, that, at any time, the goods should be forfeited, or the authority to sell enlarged, so as to enable the factor to sell at any time for repayment of advances, without reference to its being for the interest of the principal to sell at that time, and for that price. Nor can we find any principle in the law by which, independently of contract, such authority is given. On this ground, it appears to us that the third plea is bad, in substance; and it is unnecessary to consider whether this power claimed by the factor is to be considered as an enlargement of his original authority by some rule of law, as arising from some implied condition annexed to the original contract; in which case it would be very doubtful whether it ought not to be treated as a denial of the contract as laid in the declaration, and therefore bad as amounting to the general issue.

For the reasons above given, we think that the third plea is bad; and the other special pleas are open to the same objections. Our judgment must, therefore, be for the plaintiffs.

Judgment for the plaintiffs.

Nov. 17.

[*402]

Crompton, in the following Michaelmas Term, on the part of the defendants, obtained a rule *nisi* for leave to *amend the pleas as to which judgment had been pronounced on demurrer, and also those upon which issue was taken, for the purpose of showing that the sale had been beneficial to the plaintiffs.

Channell, Serjt., and *Taprell*, showed cause. * * *

Crompton, in support of the rule:

It is quite clear that the Court has power to amend, if satisfied that the case is a fit one for the exercise of its discretion. The

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*amendment here proposed has become necessary in consequence of the judgment of this COURT being in conflict with the American authorities upon which the defendants had relied.

(MAULE, J., referred to Lord CAMPBELL'S judgment in *Brandão* v. *Barnett* (1), in which the decision of the Exchequer Chamber, overturning that of this Court (2), was reversed.)

(1) 69 R. R. 204 (12 Cl. & Fin. 787, 3 C. B. 519).

(2) 6 Man. & G. 630; 8 Scott, N. R. 301.

All that the defendants wish to show here, is, that the sale was not made improvidently.

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(MAULE, J.: It certainly seems to me to be a very strong thing to amend the pleas demurred to, after judgment delivered on the demurrer. I think, however, the defendants should have leave to add a plea.)

After some further discussion, the COURT gave leave to the defendants to add two pleas to each count, upon payment of costs.

Rule accordingly (1).

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1846. *July* 6.

(3 C. B. 425—436.)

[425]

Where letters-patent were granted for improvements in apparatus for the manufacture of certain chemical substances, and the jury found that the apparatus was not new, but that the patentee's mode of connecting the parts of that apparatus was new, the COURT directed the verdict to be entered for the defendant upon an issue taken upon the novelty of the invention.

CASE, for an alleged infringement by the defendant of a patent, granted to the plaintiff on the 11th of March, 1839, for "Improvements in apparatus for the manufacture of sulphate of soda, muriatic acid, chlorine, and chlorides."

Pleas: first, Not guilty; secondly, that the plaintiff was not the true and first inventor; thirdly, that the alleged invention was not new; fourthly, that the alleged invention was not properly described in the specification; fifthly, that the manufacture was not the

(1) The added pleas, after the averment of notice to the plaintiffs that the defendants required to be repaid their advances, contained an allegation, that, "at the time when the defendants gave the plaintiffs the said notice in this plea mentioned, and from thence continually until and at the several times when the defendants so sold the said residue of the said cargo of wheat as in the said first count mentioned, the defendants believed it to be, and it was, for the benefit and advantage of the plaintiffs that the said residue of the said cargo of wheat should be sold; and the sales of the said residue of the said cargo of wheat in the said first count mentioned were beneficial advantageous sales for the plaintiffs, and were made by them the defendants in the exercise of a sound discretion, as such factors for sale as aforesaid, for the benefit of the plaintiffs, and at such times and for such prices as they the defendants, in the exercise of a sound discretion as such factors as aforesaid, thought it best for the plaintiffs that the said residue of the said cargo of wheat should be sold:" wherefore, &c.

To these added pleas the plaintiffs demurred specially. [See 5 C. B. 895.—J. G. P.]

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subject of a patent; sixthly, that a material part of the alleged invention was not an improvement.

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The cause was tried before Coltman, J., at the sittings at Westminster, after last Hilary Term.

It appeared that the apparatus formerly in common use for the making of sulphate of soda, was, a brick reverberatory furnace, consisting of but one chamber, with a fire at one end, which, striking against the roof of the chamber, was reflected down to the floor; the gas and smoke passing out at the other end. There being two different stages in the manufacture of the article—the decomposing of the raw material, salt, and the roasting or finishing—each requiring a different degree of temperature, inconvenience and delay resulted from the whole process being carried on in the same furnace.

Prior to the date of the plaintiff's patent, viz. on the 18th of October, 1836, one Lutwyche obtained a patent for "Improvements in the construction of apparatus used in the decomposition of common salt, and in the mode or method of working or using the same." By his specification, Lutyche stated, amongst other things, as follows: "These improvements are designed to prevent the muriatic acid gas from escaping into the atmosphere during the decomposition of the salt; which is effected by condensing such gas in suitable apparatus. It is also intended to carry on the process or manufacture in a more advantageous manner than it can be done by the apparatus now in common use, at the same time saving a large portion of the gas so condensed, in the form of muriatic acid. The apparatus usually employed for the decomposition of common salt with sulphuric acid, consists either of iron cylindrical retorts, or of open furnaces composed of brickwork. When the former is used, the heat is applied externally by a fire under the bottom of the iron retort; and the object to be gained in this mode, beyond the making of the sulphate of soda, is, to collect the muriatic acid, which is effected by receiving the gas evolved during the operation into double-necked jars or carboys, connected together at their upper parts, and to the retort, by earthenware pipes, with proper luted joints. But, where the latter mode is used, the principal object is, to obtain the salt cake or sulphate of soda of a better quality, and in a more perfect state, than when made in close iron vessels; by which process the fire and flame are allowed to play directly upon the materials under operation, and the gas is allowed to escape up the chimney into the atmosphere. Imperfect decomposition of the salt, impurity of the acid, and difficulty of

[*426]

condensation, attend the first of these methods: and, by the second process of operation, viz. decomposing in the open or reverberatory furnace, the immense volumes of muriatic acid gas and other deleterious vapours, which are disengaged or discharged into the atmosphere, become a public nuisance.

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"The improved construction of the apparatus for the *decomposition of common salt, and the condensation of the muriatic gas, consists, first, in a novel and peculiar construction of closed oven, or decomposing chamber, with its fireplaces and flues composed chiefly of bricks and mortar. Within this oven, or decomposing chamber, there are two beds or floors, one about six inches lower than the other, and over them is formed an arch of fire-bricks, or of fire-tiles, placed obliquely, which arch separates the oven or chamber from the fire, and prevents the flame and smoke coming into contact with the materials under operation, but admits of sufficient heat for the purpose of decomposition. By this arrangement, the muriatic acid gas evolved from the salt and sulphuric acid, is separated from the smoke and gaseous products arising from the combustion of the fuel, and consequently is the more easily condensed." [*427]

After particularly describing the apparatus and the process, by references to the drawings annexed to the specification, the patentee concludes: "Having thus described the nature of my invention, and the manner of carrying the same into effect, I would remark that I do not confine myself to the exact form and dimensions of the decomposing furnace shown in the drawing, or in the construction of the arches, &c. But I claim as my invention, the improved construction of decomposing furnace, with the mode of applying the fire through a medium of fire-bricks, fire-tiles, or other fit and proper materials, in the manner as before described; thus separating the muriatic acid gas from the smoke and gaseous products arising from the combustion of the fuel," &c.

The plaintiff's specification, which was put in, began with the following statement: "Instead of the brick furnaces hitherto employed for the decomposition of common salt, and for its conversion into sulphate of soda, I have found that iron retorts, constantly maintained *at an elevated temperature, may be advantageously substituted for that purpose, and the muriatic acid disengaged therefrom, effectually condensed by the receivers hereafter to be described." The specification then proceeded to describe the drawings annexed. The material parts of the descriptions were [*428]

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as follows: "Fig. 1 exhibits an elevation, and partly a section, of three furnaces or retorts of cast iron. A. No. 1 is a section of a furnace set in brickwork. On the bottoms of A. Nos. 1 and 2 are laid flat iron plates, about an inch thick and five feet square, to protect the bottoms from the sudden changes of temperature caused by the introduction of the sulphuric acid. A. No. 2 is an elevation of a similar furnace without its brickwork. The furnaces A. A. may be named the decomposing furnaces, and B. the roasting or finishing furnace. Common salt is thrown on the bed of the furnaces A. A., through the doors C. C. The bottoms of the doors are elevated six inches above the bottoms of the furnaces, to guard against the flowing over of sulphuric acid. Each door has a sliding shutter, with an aperture at its lowest part, to permit the constant stirring of the materials. As soon as the furnaces and the salt contained therein are raised to a heat of 290° to 300° Fahrenheit, the proper proportion of sulphuric acid is added through pipe D. I prefer acid of 1.750 specific gravity. On the first addition of the acid, the workman commences with his rake, and keeps constantly stirring the materials till they become solid. At this stage, the sulphate of soda is collected in front of the door, and pushed forward into the roaster B. through the inclined plane door E. A second workman spreads the sulphate over the bottom of the roaster, and continues working it till all the gas is expelled, when it is drawn from the furnace into iron wheel-barrows, through the door F. It will be necessary to maintain the roaster B. at a heat uniformly approaching

[*429] *redness. As the above operation proceeds, the muriatic gas expelled from the salt, passes from each furnace, through their respective branch pipes G. G. G., into the main pipe H., and from H. it passes through pipe K. into first receiver. Fig. 2 is a plan of the three furnaces, showing the branch pipes that attach them to the main pipe, and the connexion of the main pipe with first receiver."

The specification then proceeded:

"I do not claim the exclusive use of iron retorts; but I do claim as my invention, iron retorts worked in connexion with each other as above described, and also iron retorts constantly worked through a door open, or partly open, while the process is going forward, the draft of the chimney drawing in a portion of the external air, with the muriatic acid, into the receivers: neither do I claim the exclusive use of receivers filled with glass or pebbles; but I claim the use of receivers so arranged that the acid can pass from one to the

other, or can be cut off at pleasure, when strong acid is required. I do not claim earthen stills as my invention, but I do claim, for my exclusive use, earthen stills with leaden heads, encased in iron, heated by the circulation of hot water, saline solutions, or by steam. I further claim my mode of changing the lime receivers, by which lime already in part saturated with chlorine, is exposed to the strongest gas, and the remnant of the gas is exposed to a surface of fresh lime. It will thus be perceived, that the receivers will be discharged alternately, and that the receiver which is stronger during one process, will be the weaker during the next."

On the 12th of December, 1844, the plaintiff, by leave of the *Attorney-General*, entered the following disclaimer, pursuant to the statute 5 & 6 Will. IV. c. 83, s. 1:

"I, the said J. C. Gamble, do hereby declare, that, in compliance with the proviso contained in the said *letters-patent, I duly inrolled [*430] a specification of my said invention, in the proper office belonging to the High Court of Chancery, part of which said specification is in the words following, that is to say, 'I do not claim the exclusive use of iron retorts; but I do claim as my invention iron retorts worked in connection with each other as above described, *and also iron retorts constantly worked through a door open, or partly open, while the process is going forward, the draft of the chimney drawing in a portion of the external air, with the muriatic acid, into the receiver.*' And I do hereby further declare, that, although I did not intend the words underlined (in italic) in the preceding paragraph to extend to any other retorts than the iron retorts described and shown in my specification, viz. iron retorts worked in connexion with each other, in which the process is commenced in one retort, and finished in another retort; yet I have been informed by my legal advisers that the above-mentioned words have a doubtful meaning, and may be construed to extend to any iron retorts; for which reason, I am desirous to disclaim in my said specification the words in the claim thereof above referred to. And, for the reason aforesaid, I, the said J. C. Gamble, do hereby disclaim and omit in the claiming part of my said specification, the words '*and also iron retorts constantly worked through a door open, or partly open, while the process is going forward, the draft of the chimney drawing in a portion of the external air, with the muriatic acid, into the receivers;*' which words are underlined in the extract from my said specification hereinbefore referred to."

It appeared that the defendant had used, in the manufacture of

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sulphate of soda, two chambers, the one, composed of brick, for the decomposing, and the other, of iron, for the roasting or finishing process; the two being connected in a way similar to that described [*431] in the *plaintiff's specification, and each chamber being heated by a separate furnace. Evidence was also given on the part of the plaintiff, that the use of two chambers connected in the manner before described, and heated with separate furnaces, was unknown before the date of his patent.

On the part of the defendant, two witnesses stated that they had seen the manufacture of sulphuric acid carried on, the one at Berwick-upon-Tweed, the other at Manchester, by means of two separate chambers connected together by a spout about twelve feet long, through which the salt, when partially decomposed, was passed from the decomposing to the finishing chamber: and it was insisted, that, the exclusive use of iron retorts being disclaimed by the plaintiff, and confessedly old, and the use of brick not being claimed, the defendant had been guilty of no infringement of the plaintiff's alleged invention, even if it were new. The learned Judge told the jury that they must find for the plaintiff, if they should be satisfied that the apparatus and process used by the defendant, were a mere colorable variation from those described by the plaintiff's specification; subject to the question of novelty.

The jury found for the plaintiff on the first, fourth, fifth and sixth issues; and, as to the issues joined on the second and third pleas, they found "that the alleged invention of the use of two chambers, with separate furnaces, was not new, but that the plaintiff's mode of connecting them was new." Leave was reserved to either party to move to enter the verdict for him on this special finding; and also to the defendant to move to enter a nonsuit, or a verdict for him on the first issue also, if the Court should be of opinion that the use of two chambers, the one of iron, the other of brick, could not be an infringement of the plaintiff's patent right.

[432] *Channell*, Serjt., accordingly, in Easter Term last, obtained a rule *nisi* to enter a verdict for the plaintiff on the second and third issues.

Talfourd, Serjt., also obtained a rule *nisi* to enter the verdict for the defendant on the first, second, third, and sixth issues, or for a nonsuit, or a new trial on the ground that the finding of the jury was not warranted by the evidence.

Talfourd, Serjt. (with whom was *Webster*), on a subsequent day in the same Term, showed cause against the plaintiff's rule, and was heard in support of the cross-rule.

Channell, Serjt. (with whom was *Cowling*), was heard on the other side.

Cur. adv. vult.

COLTMAN, J. (in the absence of TINDAL, Ch. J.), now delivered the judgment of the COURT:

This was an action on the case for infringing the plaintiff's patent granted for "Improvements in apparatus for the manufacture of sulphate of soda, muriatic acid, chlorine, and chlorides."

The defendant pleaded Not guilty; that the plaintiff was not the inventor; that the alleged invention was not new; and several other pleas, which it is not necessary to mention.

At the trial, before me, it was proved by the plaintiff, that the apparatus commonly used for making sulphate of soda, was, a brick reverberatory furnace, consisting of a single chamber, with a fire at one end of it. The fire struck against the roof of the chamber, and was reflected down to the floor; and the smoke and gas passed out at the other end of the chamber. There *was also a patent [*433] called Lutwyche's patent, which was also a single chamber, one part of the floor of which was higher than the other. The whole was heated by the same furnace; and, when the materials had been decomposed on the lower part of the chamber, they were removed to the raised part, where the heat near the fire was greater than at the other end of the chamber, and there dried or roasted.

The plaintiff, in his specification, stated: "Instead of the brick furnaces hitherto employed for the decomposition of common salt, and for its conversion into sulphate of soda, I have found that iron retorts, constantly maintained at an elevated temperature, may be advantageously substituted for that purpose, and the muriatic acid disengaged therefrom effectually condensed by the receivers hereafter described." He then, by words and drawings, described his apparatus as consisting of two iron retorts, each having a separate furnace, one for decomposing the salt, and the other for roasting or finishing the sulphate of soda; and the materials, when decomposed, were to be pushed from one retort into the other along an inclined plane by which they were connected together. The specification then proceeded thus: "As the above operation proceeds, the muriatic gas expelled from the salt, passes from each furnace,

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through their respective branch pipes, into the main pipe, and from that pipe, through another, into the first receiver." This part of the apparatus was also explained by drawings. At the end of the explanation, the plaintiff thus described his claim: "I do not claim the exclusive use of iron retorts, but I do claim, as my invention, iron retorts worked in connexion with each other, as above described: neither do I claim the exclusive use of receivers filled with glass or
[*434] pebbles; but I claim the use of receivers so arranged that the *acid can pass from one to the other, or can be cut off at pleasure, when strong acid is required."

The defendant had used, for making sulphate of soda, two chambers, one of iron, and one of brick, connected by an opening through which the materials, when decomposed in one, could be pushed into the other, for roasting or finishing; each chamber being heated by a separate furnace.

For the plaintiff, a good deal of evidence was given to show, that, until his patent was obtained, the use of two chambers with separate furnaces had not been known: but the defendant proved that a person at Berwick had previously used them, connected by a spout ten or twelve feet long, through which the materials, when partially decomposed, ran from one to the other, in which the soda was roasted or finished; and a similar process was proved to have been carried on by a manufacturer at Manchester in a similar way.

The jury found for the plaintiff on the issue of Not guilty; and, as to the issues joined on the second and third pleas, they found "that the alleged invention of the use of two chambers with separate furnaces was not new, but that the plaintiff's mode of connecting them, was new."

Each party had leave to move to have the verdict entered in his favour on this special finding; and the defendant had leave to move to have the verdict entered in his favour on the first issue also, if the use of two chambers, one of iron, and the other of brick, could not be an infringement of the plaintiff's patent right; and, in Easter Term, cross rules were accordingly granted.

The latter question was very little argued; and we are clearly of opinion that the verdict for the plaintiff on the issue of Not guilty must stand; for, the essence of the plaintiff's improvement in making sulphate of soda was, the use of two chambers with separate
[*435] furnaces *for the two stages of the process; so that both could be kept in action at the same time, at the different temperature required for each stage: and that principle is equally acted upon, and the

same advantage gained, whether both chambers are of iron, or one is of iron and one of brick. The material of which the chambers are composed, not being of the essence of the invention claimed, the patent right might be invaded, although the chambers used by the defendant were not of the material mentioned in the plaintiff's specification.

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The other question depends upon what is the true nature of the plaintiff's claim as an inventor. If he claimed the use of two chambers, with separate furnaces, as part of his invention, the jury have said that it was not new, and the verdict should be entered for the defendant; otherwise, for the plaintiff. It seems to us that no reasonable doubt can be entertained as to the claim made by the plaintiff. After describing by words and drawings the apparatus which he used, he claimed as his invention "iron retorts worked in connexion with each other, as above described." It was contended, on behalf of the plaintiff, that the meaning was, that he claimed the use of two retorts worked in connexion with the whole of the apparatus for condensing the muriatic acid gas. But the words of the specification are, "in connexion with each other," not in connexion with the condensing apparatus: and he afterwards goes on to claim, as his, the particular arrangement of receivers which he had previously described.

We can give no other meaning to this than that the plaintiff claimed, as part of his invention, the use of two chambers with separate furnaces, worked in connexion with each other, so that the materials might be decomposed in one, and then removed to, and roasted or finished in, the other; and that the plaintiff understood such to be *the nature of his claim, appears clearly from [*436] the disclaimer he has entered in this case; in which, after disclaiming certain words in his description of his claim, he says: "I further declare, that, though I did not intend the words to extend to any other retorts than the iron retorts described in my specification, viz. iron retorts worked in connexion with each other, in which the process is commenced in one retort and finished in another; yet I have been informed the words may be construed to extend to any iron retorts; for which reason I am desirous to disclaim." And this was the nature of the claim which the plaintiff endeavoured at the trial to establish by evidence.

The jury having found that the evidence did not establish it, the verdict on that special finding must be entered for the defendant.

Rule accordingly.

1846.
June 16.

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CLIFT AND ANOTHER *v.* ELIZA SCHWABE (1).

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(3 C. B. 437—481; S. C. 17 L. J. C. P. 2; 2 Car. & K. 134.)

A. effected a policy on his own life, subject, amongst others, to the following condition—that "every policy effected by a person on his or her own life should be void, if such person should commit suicide, or die by duelling or the hands of justice."

A. died in consequence of having voluntarily, and for the purpose of killing himself, taken sulphuric acid, but under circumstances tending to show that he was at the time of unsound mind.

In an action by the administratrix of A. upon the policy, the defendants pleaded that A. did commit suicide, whereby the policy became void; and at the trial the Judge directed the jury, "that, in order to find the issue for the defendants, it was necessary that they, the jury, should be satisfied that A. died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent; that the burthen of proof, as to his dying by his own voluntary act, was on the defendants; but, that being established, the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence."

Held, upon a bill of exceptions, that this direction was erroneous; for, that the terms of the condition included all acts of voluntary self-destruction, and, therefore, that, if A. voluntarily killed himself, it was immaterial whether he was or was not at the time a responsible moral agent—*dissentientibus* POLLOCK, C. B., and WIGHTMAN, J.

ASSUMPSIT, upon a policy of assurance.

[The declaration set out five policies of assurance, each for 999*l*., effected by Louis Schwabe in his lifetime on his own life. Each policy contained the following condition, amongst others:]

[441] Every policy effected by a person on his or her own life shall be void, if such person shall commit suicide, or die by duelling or the hands of justice; but, if any policy effected by a person on his or her own life shall afterwards be actually assigned to any person or persons by way of mortgage, or for the benefit of any creditor or creditors, or charged with any sum or sums for the benefit of any mortgagee or mortgagees, or creditor or creditors, and the person on whose life the assurance shall have been effected shall commit suicide, or die by duelling or the hands of justice, then the policy so assigned or charged shall not be void to the extent of the principal sum or sums and interest secured by the assignment or charge; or, if any policy effected by any person on his or her own life shall afterwards be absolutely assigned to a purchaser for valuable consideration, in any transaction (except that of settlement upon or after marriage, or any other occasion), and the person on whose life the assurance shall have been effected

(1) Cp. *Horn* v. *Anglo-Australian Life Co.* (1861) 30 L. J. Ch. 511.

shall commit suicide, or die by duelling, or by the hands of justice, then the policy so assigned shall continue in full force, notwithstanding such suicide or death.

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[The declaration then averred the death of Louis Schwabe whilst the said policies were in full force and effect and that satisfactory proof thereof was given to the defendants below; the grant of letters of administration with the will annexed to the plaintiff; notice to the defendants below, and the non-payment of the five sums of 999*l.* each.]

The defendants below pleaded as follows: "that, though true it [445] is, that the said several policies of insurance in the declaration mentioned were so made, and that the defendants promised as in the declaration is mentioned, and that the said Louis Schwabe died as in the said declaration also is alleged; yet, for plea to the said declaration, the defendants say, that, after the making of the said several policies and the said promises respectively, to wit, on the 10th of January, 1845, the said Louis Schwabe did commit suicide; whereby the said policies respectively became and were void; and this the defendants are ready to verify" &c.

Upon this plea, issue was taken and joined.

The cause came on for trial before Cresswell, J., at the Liverpool Summer Assizes in 1845.

On the part of the defendants below, it was proved that Louis [446] Schwabe, the assured, on the 10th of January, 1845, voluntarily took and swallowed a quantity of sulphuric acid, sufficient to occasion death, for the purpose of killing himself, and that he died on the following day, by reason of the taking and swallowing of such acid; and the witnesses who gave such evidence, on cross-examination by the plaintiff's counsel, gave evidence tending to show that Louis Schwabe, when he took the sulphuric acid, was of unsound mind.

The learned Judge thereupon directed the jury, that, in order to find the said issue for the defendants, it was necessary that they, the jury, should be satisfied that Louis Schwabe died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent; that the burthen of proof as to his dying by his own voluntary act, was on the defendants, but, that being established, the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence.

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To this direction, the counsel for the defendants below excepted, insisting that the learned Judge ought to have charged the jury, as matter of law, that, if Louis Schwabe voluntarily took the sulphuric acid, for the purpose of destroying life, being conscious of the probable consequences of the act, and having, at the time of so taking it, sufficient mind to will to destroy life, he had committed suicide, within the meaning of the sixth condition of the policy.

The jury returned a verdict for the plaintiff below, damages 5,140*l.* 18*s.* 9*d.* Judgment having been entered up for that sum, and costs, the defendants below brought a writ of error. The exceptions came on for argument in the Exchequer Chamber on
[*447] the 4th of December, *1846, before Pollock, C. B., Parke, B., Alderson, B., Patteson, J., Rolfe, B., Wightman, J., and Coleridge, J.

Sir F. Kelly, Solicitor-General (with whom were *Martin* and *Unthank*), for the plaintiffs in error (1):

The learned Judge was clearly wrong in the construction put by him upon the words of the condition in question, "every policy effected by a person on his or her own life, shall be void, if such person shall commit suicide, or die by duelling or the hands of justice." The words "shall commit suicide" do not possess any definite technical meaning; the real question is, what was the meaning of the contracting parties—whether the office intended to provide against an event of frequent occurrence, or merely against the crime of felonious self-slaughter. The law upon the subject recently underwent very full discussion in the case of *Borradaile* v.
[448] *Hunter* (2). * * It may be conceded, that the word "suicide," in the sense in which it is here used, does not embrace self-killing by accident, or unintentional self-destruction. But there is nothing

(1) The point marked for argument on the part of the plaintiffs in error, was, "that, according to the true construction of the expression in the sixth condition of the several policies 'shall commit suicide,' if the assured by his own voluntary act put himself to death, intending, at the time of committing the act, to cause his own death, and being conscious that such would be the probable effect of the means employed by him for that purpose, the condition attached, and the several policies became forfeited, although, at the time of so killing himself, he might be of unsound mind, and incapable, by reason of such unsoundness, of distinguishing between right and wrong; and that the jury ought to have been directed accordingly."

(2) 63 R. R. 428 (5 Man. & G. 639; 5 Scott, N. R. 418).

in the context to restrain it to a felonious killing. Suicide may be felonious or otherwise, according to the circumstances, just as homicide may be felonious, or excusable, or justifiable. [The case would not be within the condition of the policy if the assured was not in a state of mind to know the consequences of his act.] Insurance offices do not guarantee a man's sanity. [449].

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(POLLOCK, C. B.: It would be easy for them to say so.)

[He referred to the judgment of MAULE, J., in *Borradaile* v. *Hunter* (1), and read the passage ending: "This principle of construction requires, and accounts for, the exclusion from the operation of the condition of those cases, falling within the general sense of its words, to which it is admitted not to apply—such as those of accident and delirium."]

(POLLOCK, C. B.: Delirium is not inconsistent with the existence of intention. The question is, whether, in order to exclude the case from the condition, there must not be an entire absence of will or intention and understanding. If the party is not a responsible moral agent, can the act be said to be his act? (2).) [450]

ERSKINE, J., in delivering his opinion in *Borradaile* v. *Hunter* (3), says: "Looking simply at that branch of the proviso upon which the issue was raised, it seems to me that the only qualification that a liberal interpretation of the words, with reference to the nature of the contract, requires, is, that the act of self-destruction should be the voluntary and wilful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose, is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself."

(POLLOCK, C. B.: The effect of that *dictum* seems to be this; that the act must be the voluntary act of the party, as opposed to

(1) 63 R. R. at p. 435 (5 Man. & G. 653).

(2) His Lordship referred to *Erskine's* defence of the prisoner, in *Hadfield's* case, Howell's State Trials, vol. xxvii. pp. 1281, 1307, in terms of the highest eulogy.

(3) 63 R. R. pp. 438, 439 (5 Man. & G. pp. 657, 658).

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involuntary, and that it must be the act of a being sufficiently intelligent to know what he is *doing.)

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If the party voluntarily ended his life, knowing that such would be the consequence of the act he was committing, and intending to produce that result, it is quite immaterial, in the construction of this condition, whether he was or was not a responsible moral agent.

(POLLOCK, C. B.: How can intention be predicated of a man *non compos mentis*?)

[He cited *Garrett* v. *Barclay* (1), *Kinnear* v. *Borradaile* (2), and *Kinnear* v. *Nicholson* (3).]

(POLLOCK, C. B.: Mr. Justice ERSKINE seems to have considered the difference of expression to be important: for, he says (4): "When I find the terms 'shall commit suicide,' that have been popularly understood and judicially considered as importing a criminal act of self-destruction, exchanged for terms not hitherto so construed, it may, I think, be fairly inferred that the terms adopted were intended to embrace all cases of intentional self-destruction, unless

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it can be collected from the immediate context, that the *parties used them in a more limited sense." Two of the Judges, therefore, in that case, would have been in favour of the plaintiff, if the words of the condition had been the same as those here used.)

If the act be intentional, though the result of a perverted will, it is still suicide within the meaning of this policy. * * *

J. Henderson (with whom were *Knowles* and *Crompton*), for the defendant in error:

The main question in this case is, what is the true construction of the words "shall commit suicide," as used in this instrument.

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If *they necessarily import an act of criminality, the direction of the learned Judge to the jury cannot be impeached. The word "suicide" is a word of comparatively modern introduction. Most of our text-writers use it as synonymous with *felo de se*. [They

(1) 63 R. R. 431, *n.* (5 Man. & G. 643 (*a*); 5 Scott, N. R. 422).

(2) 63 R. R. 432, *n.* (5 Man. & G. 644 (*b*); 5 Scott, N. R. 424).

(3) 63 R. R. 432, *n.* (5 Man. & G. 644 (*c*), 645 (*a*); 5 Scott, N. R. 425).

(4) 63 R. R. p. 440 (5 Man. & G. p. 660).

cited Hale's Pleas of the Crown (1), Coke's Institutes (2), and Blackstone's Commentaries (3).]

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(ALDERSON, B.: *Felo de se* no doubt is included in suicide; but the question is whether the expression here used is confined to criminal suicide or *felo de se*.) [454]

* * In the eye of the law, an insane person can have no will or intention. The civil law, it is true, makes a distinction between *demens* and *furiosus*; but the law of England knows no degrees of insanity. "The law," as was observed by Sir J. JEKYLL, in *The Duchess of Cleveland's* case (4), "will not measure the sizes of men's capacities, so as they be *compotes mentis*."

(POLLOCK, C. B.: If a man is *non compos mentis*, he is beyond the reach of the law. How can it be predicated of one insane person that he is capable of willing *to do an act, and of another that he is not? The imperfection of language compels us to use expressions that are very inapt. [*455]

ALDERSON, B.: An insane person is one who has no dominion over his will (5).)

The argument on the other side, that the policy is avoided, if the assured, at the time of committing the act which terminated so fatally, had mind enough to know what he was about, and to contemplate and intend the consequence that resulted, suggests a distinction which the law repudiates.

(PARKE, B.: Lord Hale distinctly points out the degrees of insanity (6).)

The learned Judge in this case adopted the test suggested by the opinion of the majority of the Judges delivered to the House of Lords, in answer to the questions arising out of *M'Naghten's* case (7). If any doubt arises from the ambiguity of the instrument, the inconvenience must be borne by the assurers, whose language it is. * * *

(1) C. 31, pp. 411, 412.
(2) 3 Inst. C. 8, p. 54.
(3) 4 Bl. Com. 189.
(4) Cited, Howell's State Trials, vol. xxvii. p. 1310.
(5) An insane person, *demens* (*qui ex parte tantum mentis errore discitur*), frequently exercises dominion over the will under the influence of hope and fear. The definition appears to be more applicable to the case of the *furiosus* (*qui mentis ad omnia lumine caret*).
(6) 1 Hale, P. C. c. 4, p. 29.
(7) 59 R. R. 85 (10 Cl. & F. 200; 8 Scott, N. R. 595).

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Sir F. Kelly, Solicitor-General, in reply:

[456] Lord Hale treats both suicide and homicide as including a killing *per infortunium*. As well might it be said that homicide, in the abstract, can only mean felonious homicide, as that suicide can only mean *felo de se*. * * *

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(POLLOCK, C. B.: Suicide *per infortunium* is clearly not intended by this policy. Hale's view excludes suicide by a reasonable man.)

The whole extent of the doctrine laid down by Hale, is, that a man who is *non compos mentis*, cannot be *felo de se*.

Cur. adv. vult.

[457] There being a difference of opinion amongst the Judges who were present at the argument, their judgments were given *seriatim*, as follows:

WIGHTMAN, J.:

I am of opinion, upon the best consideration I can give to this case, that the direction of the learned Judge to the jury upon the trial of the cause was right, and that the deceased Louis Schwabe did not, under the circumstances found by the jury, commit suicide, within the meaning of the policy of assurance upon his life. The exception or proviso in the policy is in these terms: "Every policy effected by a person on his own life shall be void if such person shall commit suicide, or die by duelling or the hands of justice." The defendants below pleaded that Schwabe, whose life was insured by himself, did commit suicide; which was denied by the plaintiff in the action. The evidence was, that the deceased voluntarily took poison in sufficient quantity to cause death, for the purpose of killing himself, but that he was, when he took the poison, of unsound mind. The learned Judge told the jury, that, to find a verdict for the defendants below, they must be satisfied that the deceased died by his own voluntary act, being then able to distinguish between right and wrong and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent. To this direction a bill of exceptions was tendered, it being contended on behalf of the defendants, that it was sufficient to entitle them to a verdict, if the deceased had sufficient mind to intend to kill himself, and to know that the poison would probably have that effect, and that he took the poison with that intent, though he might be unable to distinguish between right and wrong, or to appreciate the nature and quality of the act

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he was doing, so as to be a responsible moral agent. The question therefore is, whether by the word "suicide," *as used in the policy, a criminal killing of himself, such as could only be committed by a responsible moral agent, was intended; for, if it was, the direction of the learned Judge and the verdict of the jury were right, otherwise not. [*458]

The term "suicide" has no technical or legal meaning: it is derived from the Latin: but the compound word "*suicidium*," from which the English word is said to be derived, is not to be found in any Latin dictionary or glossary, that I have met with (1). It is admitted that the word is not to be understood in the largest sense of which it is capable, as that would include an accidental or unintentional killing of himself. We must, therefore, consider the ordinary meaning of the word in the English language, and connect such ordinary meaning with the apparent object and intent of the proviso in the policy in which it occurs. In all the English books in which it occurs, legal or other, it is almost invariably used to denote a criminal act. In Johnson's Dictionary, "suicide," when used as denoting an act, is said to mean, "self-murder," "the horrid crime of destroying oneself;" and, when used as denoting a person, is said to mean a "self-murderer." In Webster's Dictionary the same meaning is given: and so in Rees's Encyclopædia, and in the Encyclopædia Britannica. Blackstone, in the 4th volume of his Commentaries, p. 189, uses the term "suicide" as meaning a *felo de se*. He says: "As the suicide is guilty of a double offence, one spiritual, and the other temporal, the law has ranked it amongst the highest crimes." Innumerable instances might be given to show that the word "suicide" is almost invariably used in the English language in a criminal sense, and that such is the meaning of the word in its general and ordinary acceptation. If that *be so, is there any thing in the policy, or the terms of it, to show that it is used in the proviso in question, not in the general and ordinary sense, but in another, of which it is capable, though unusual. [*459]

The word is used in a disqualifying proviso, by which, under certain circumstances, the insurance and the premiums paid are forfeited, and the benefit of the policy lost. The usual rule is, to look strictly at the terms of such provisoes, and not to extend them beyond their ordinary meaning; but, in the present case, if the ordinary meaning of the term "suicide" were more uncertain than

(1) *In suicidium* appears to have been used for *in succidium, i.e. in subsidium*: Ducange, *in Verbis*.

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it seems to be, the terms used in the proviso itself, in connection with it, tend to show the sense in which the insurers, whose word it is, intended it should be used. The policy is to be void, if the person "shall commit suicide, or die by duelling or by the hands of justice." The three excepted modes of death are classed together in one exception or proviso, and two of them are unquestionably the consequences of crime: and, if the maxim *noscitur a sociis* applies, it strongly tends to show that the third is used in a criminal sense also. In *Borradaile* v. *Hunter* (1), which was cited upon the argument, ERSKINE, J., who agreed with the majority of the Judges, says, as one of the grounds for his judgment in that case, "When I find the terms, 'shall commit suicide,' that have been popularly understood and judicially considered as importing a criminal act of self-destruction, changed for terms not hitherto so construed, it may, I think, be fairly inferred that the terms adopted were intended to embrace all cases of intentional self-destruction, unless it can be collected from the immediate context, that the parties used them in a more limited sense." And the Lord Chief Justice TINDAL, in his judgment in the same case, says: "If [*460] the exception had run in the terms 'shall die *by suicide, or by the hands of justice, or in consequence of a duel,' surely no doubt could have arisen that a felonious suicide was intended thereby." I refer to these passages in the judgments of these learned Judges, as showing their understanding of the meaning of the term "suicide," when used in such an exception, and in connection with such other terms as occur in the present case.

I forbear to speculate upon the probable object of the insurers in introducing such a proviso. It can hardly be because such modes of death as these excepted, are events not to be calculated upon; for, there is no doubt but that the probabilities of such events are as well calculated as any other; and, moreover, those modes of death are not excepted where the policies are for the benefit of others. It may be that the exception in case of suicide was introduced to meet the case of a person insuring his life with the intention of committing suicide, in order to benefit his family; or, it may be that the insurers were influenced by some higher motive, and wished to check such modes of death as those excepted. Either of these objects would seem to indicate that the word suicide was used in its ordinary sense, importing a crime. But, as no satisfactory result can be drawn from such a speculation, it is better to

(1) 63 R. R. 428 (5 Man. & G. 639; 5 Scott, N. R. 418).

judge of the case merely by the ordinary sense of the language used in connection with the other terms which are used along with it. Upon the whole, then, it seems to me that there is nothing in this case to show an intention on the part of the insurers to use the word "suicide" in a more extended sense than that which is ordinarily and popularly attributed to it; and that, on the contrary, the context shows that it was their intention to use it in the ordinary and popular sense, and that they have so used it; and, consequently, that the direction of the Judge was correct, and that the defendant in error is entitled to judgment.

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ROLFE, B.: [461]

The question in this case is very short. Louis Schwabe, in the year 1836, insured his own life for 999*l.*, in an office of which the plaintiffs in error were the directors liable to be sued for money becoming due on the policies of insurance. The policy by which the 999*l.* was insured, contained a clause in these words: "Every policy effected by a person on his own life, shall be void, if such person shall commit suicide, or die by duelling or the hands of justice." Schwabe died in 1845, and the defendant in error obtained letters of administration, and then sued the plaintiffs in error in action of assumpsit for the 999*l.* secured by the policy. The plaintiffs in error pleaded that Louis Schwabe did commit suicide, whereby the policy became void. On this issue was joined. The issue was tried before my brother CRESSWELL, at the Liverpool Summer Assizes last year; and, on the part of the plaintiffs in error, witnesses were called to prove that Schwabe's death was caused by his having voluntarily, and for the purpose of killing himself, swallowed a quantity of sulphuric acid; and the same witnesses also gave evidence tending to show, that, at the time of his so swallowing the said sulphuric acid, Louis Schwabe was of unsound mind. My brother CRESSWELL, in summing up the case to the jury, told them, that, in order to find the issue for the plaintiffs in error, they must be satisfied that Schwabe died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act he was doing, so as to be a responsible moral agent. To this ruling the plaintiffs in error have excepted; and we have therefore to say whether that ruling was right; and this depends on the meaning of the words in the policy "shall commit suicide." If they mean, shall destroy his own life under circumstances which will make

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him a "*felo de se*," then the ruling was right: if they *mean merely "shall intentionally kill himself," then the ruling was wrong.

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The word "suicide" is not, as it appears to me, a word of art, to which any legal meaning is to be affixed different from that which it is popularly understood to bear. The authorities referred to by the defendant in error, as showing that suicide means the felonious taking away of a man's own life, do not at all bear out his proposition. Lord Hale, indeed, in the thirty-first chapter of his Pleas of the Crown, Vol. I., p. 411, certainly speaks of *felo de se* and suicide, as convertible terms, and defines both the one and the other as being, where a man of the age of discretion, and *compos mentis*, voluntarily kills himself. But it appears to me plain from the whole context of the passage in question, that Lord Hale did not understand that he was giving a definition of the term "suicide," except that it was often used to mean the same thing as *felo de se*; and this seems manifest from the fact, that, what in the passage in question he calls suicide, he a few lines above designates as *homicidium sui ipsius*. Now, there can be no doubt but that a man who takes away the life of another, commits homicide, even though the act was justifiable, or may have happened entirely "*per infortunium*," and was, therefore, not criminal at all; see Hale, P. C. c. 39. And, therefore, taking suicide as meaning the same thing as homicide of one's self, it seems to follow, that, in the opinion of Lord Hale, neither guilt nor moral responsibility is necessarily involved in its legal definition.

The passage to which we were referred in 4 Bla. Com. 189, seems strongly to show that suicide does not, in the opinion of that learned Judge, necessarily include the notion of moral responsibility. The learned commentator, after stating that the party who destroys himself is not *felo de se*, unless he was in his senses, adds,

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that coroners' juries are apt to push this principle too *far, and to hold that the very act of suicide is evidence of insanity. It is plain that the word "suicide" is there used as designating the mere act of self-destruction; otherwise, the passage would be insensible.

The only other authority referred to, in which the word "suicide" occurs, is the recent case of *Borradaile* v. *Hunter* (1), which was an action, like this, on a policy of insurance, in which was a stipulation making it void, not, as in this case, if the party should commit suicide, but, if he should "die by his own hands." There, a majority of the Court held that the assured, having intentionally

(1) 63 R. R. 428 (5 Man. & G. 639; 5 Scott, N. R. 418).

destroyed himself, though he was at the time incapable of distinguishing between right and wrong, the policy was void. TINDAL, Ch. J., differed from the rest of the Court; and, at p. 668 (1) of his judgment, the following passage occurs: "The expression 'dying by his own hand,' is in fact no more than the translation into English of the word of Latin origin 'suicide:' but, if the exception had run in these terms—'shall die by suicide, or by the hands of justice, or in consequence of a duel,' surely no doubt could have arisen that a felonious suicide was intended thereby." This, though it certainly shows that TINDAL, Ch. J., would, from the context, have interpreted the word "suicide" in this policy as he did the words "die by his own hands," in *Borradaile* v. *Hunter*, as referring only to cases of self-destruction perpetrated by persons of sound mind, yet shows also that he did not think that to be the necessary or natural meaning of the word "suicide," standing alone. The distinction between felonious suicide and suicide not felonious, taken and observed on by that learned Judge, seems conclusively to show, that, in his opinion, suicide did not necessarily, *ex vi termini*, import a criminal act, and therefore the *act of a responsible moral agent; [*464] and in the same case, near the bottom of p. 658 (2), ERSKINE, J., speaks of criminal suicide, showing that he took the same view of the meaning of the word "suicide" as was taken by the LORD CHIEF JUSTICE. All these authorities seem to me to favour my interpretation of this word.

But, after all, our decision must rest entirely on what is the ordinary meaning of the term. In my opinion, every act of self-destruction is, in common language, described by the word "suicide," provided it be the intentional act of a party knowing the probable consequence of what he is about. This is, I think, the ordinary meaning of the word; and I see nothing in the context enabling me to give it any but its ordinary signification.

For these reasons, I think that a *venire de novo* must be awarded.

PATTESON, J. (3):

The sole question is, what is the true meaning of the words "commit suicide," in the policy in question.

It is argued, first, that these words have a technical meaning, and import a felony.

(1) 63 R. R. 446.
(2) 63 R. R. 439.
(3) Coleridge, J., was absent. He had heard the argument, and concurred in opinion with the majority of the Judges.

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No authority is cited for this position: no case in which the finding of a jury that A. had "committed suicide," has been held equivalent to a finding that A. had "murdered himself," or that A. was "a felon of himself." I apprehend that the word "*murdravit*" was as necessary in a case of *felo de se*, as in the case of the murder of another person; and, unless some records could be found, or some decisions of the Courts, in which the word "suicide" has been held to have the same meaning as "self-murder," I am at a loss to know what ground there is for saying that the words "commit suicide" have any technical meaning.

[465] It is argued, secondly, that the words, in their ordinary acceptation, import felony.

Now, the word "suicide," literally translated, means only "killing himself or herself:" the circumstances attending the act manifestly cannot affect the literal meaning of the word.

Reference is made to Hale's Pleas of the Crown (1), where Lord Hale, in speaking of the different kinds of murder, speaks of suicide —*felo de se*. No doubt, he does; but he is treating of criminal suicide only; and he nowhere intimates that the word "suicide" in itself imports criminal suicide. Johnson's Dictionary, and Richardson's Dictionary, are also referred to: but they are of very little weight when the Court is considering what the parties to a contract mean by the words they have used. The word "commit" is said always to be used in a bad sense: be it so; but, how does that prove that it communicates the quality of felonious to the word "suicide?" No suicide is good or meritorious; it must always be spoken of in a bad sense, however pitiable, or, one may hope, excusable, the circumstances of it may be.

But it is argued, thirdly, which is the true question, that a felonious suicide only is pointed at by this policy, and that this appears by the words themselves, and by the context.

Now, the words themselves are large enough to embrace all self-destruction, as well as self-murder: not indeed, as was admitted in *Borradaile* v. *Hunter*, to embrace cases of mere accident, or of insanity extending to unconsciousness of the act done, or of its physical consequences; because such cases, although comprehended in the very words themselves, cannot be considered to have been

[*466] in the contemplation of the contracting *parties; but clearly embracing an act of self-destruction committed by a person who was aware of the probable consequence of the act, and intended

(1) Cap. 31, p. 411.

that consequence to follow. The context in this case, as in *Borradaile* v. *Hunter*, is, "or die by duelling or the hands of justice," except that, in that case, the words were, "die by his own hands, or by the hands of justice, or in consequence of a duel," so that the verb "die" applied to all the members of the sentence, whereas, here, the words "commit suicide" are complete as a sentence, without any word taken from the other part. I do not know that this makes any difference. It is true, that the other two modes of death appear to be connected with felony: yet I apprehend that the actual felony is no part of the cause of exception from liability. If it were, it would be competent to the plaintiff to prove that the deceased, although dying by the hands of justice, was, in truth, innocent of the crime for which he suffered; in the same manner as it is, no doubt, competent to an executor to traverse an inquest of *felo de se*, found upon view of the body of his testator, by a coroner's jury; or, that the deceased, although killed in a duel, had fired his pistol in the air, and never contemplated shooting at his opponent. Such defences would surely be excluded; for, the words of the exception are express—"die by the hands of justice," whether justly or not, "or by duelling," whether it were felony or not. It seems, in truth, that the exception is not framed with reference to the commission of any felony or crime; but to guard against the time for payment of the sum insured being accelerated by the voluntary act of the party interested in the money. It is equally so accelerated by voluntary act, if the deceased knew the consequences of his act, and intended them to follow, whether he was sane or under some delusion as to the moral *quality of the [*467] act done. That the voluntary act of the party interested, and not the felony, is the thing contemplated by the exception, is further apparent from this circumstance, that the clause in the policy goes on to do away with the exceptions altogether, when the deceased has parted with all interest, either for himself or his family, by assigning the policy, and, where the deceased has mortgaged or charged it for the benefit of creditors, to do away with the exception to the extent of the sum secured; yet felony would be committed in those cases just as much as if the policy had not been assigned.

I do not inquire into the reason of this qualification of the exception in the policy, whether it has any thing to do with the removal from the deceased of temptation to destroy himself when he has parted with his interest, or not; or whether it is inserted as an inducement to those who want to raise money, to effect policies at

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this office; or what other reason may be conjectured. It is sufficient, for my purpose, that it tends to show that the contracting parties did not regard the commission of felony, as such, in their contract.

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Upon the whole, I am of opinion that the words "commit suicide" mean only "kill himself;" and that the true question to be put to the jury is that which was put by ERSKINE, J., in *Borradaile* v. *Hunter*—whether the deceased knew the probable consequences of his act, and did that act voluntarily, intending such consequences to follow; and that no question should be put as to the act done being criminal or not.

It follows, that, in my opinion, the judgment must be reversed, and a *venire de novo* awarded.

ALDERSON, B.:

I also am of opinion that there ought to be a *venire de novo* in this case; and I shall say but a very few words upon the points raised.

[*468] The true principle governing cases of this sort seems *to be very well laid down by my brother MAULE in *Borradaile* v. *Hunter*. The words in question seem to me in this case to have their proper construction, when taken as including all cases of voluntary self-destruction. They do not apply to cases in which the will is not exercised at all; as, where death results from accident or delirium; but where the self-destruction is voluntary, although the will may be perverted. It seems to me, therefore, that the argument arising out of the peculiar use of the word "suicide" in this contract, is fallacious; and that the word is often used in its most extended sense, that, namely, which has been assigned to it on behalf of the plaintiffs in error. For instance, to take so common a book as the Encyclopædia Britannica, under the head of "Suicide," I find this observation: "The general causes of suicide are twofold—insanity, and crime." So that the word "suicide" has often, in its ordinary acceptation in the English language, that enlarged sense; and it is not, therefore, to be confined to cases of criminal intention alone. Then, reliance is placed upon the words in the company of which the word "suicide" is found in the policy—"death by duelling or by the hands of justice." I doubt, however, whether that argument carries the case much further. Suppose a person insured were to die in a duel, I do not conceive it would be competent to his representatives to say that he was insane at the time. Cases may easily be suggested, in which a duel might be fatal, and yet not felonious; such as, a duel in the course of war, or the like.

The case, however, has been so fully gone into by those learned Judges who have immediately preceded me, that I shall do no more than express my concurrence with their judgments.

PARKE, B.:

The question in this case may be very shortly stated. By the terms of the policy, all the conditions *and regulations indorsed, are [*469] incorporated in it; and one of those, the sixth, is, that every policy effected by a person on his own life, shall be void, if such person shall commit suicide, or die by duelling or the hands of justice: and there is a plea, that the intestate did commit suicide.

On the trial, my brother CRESSWELL told the jury, "that, in order to find the said issue (1) for the defendants, it was necessary that the said jury should be satisfied that Schwabe died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent; that the burthen of proof as to his dying by his own voluntary act, was on the defendants, but, that being established, the jury must assume that he was of sane mind, and a responsible moral agent; unless the contrary should appear in evidence."

The question is, whether this direction was correct. I agree with the majority of the Judges who have preceded me, that part of the direction, viz. that as to the necessity of his being a responsible moral agent, was wrong; for I think, that, according to the proper construction of this policy, if the intestate voluntarily killed himself, it was immaterial whether he was then sane or not.

This being a written contract between the parties, the construction of it belongs to the Court; and the Court must adopt the usual rules, and construe the provisos or conditions, as well as the other parts of the instrument, according to the ordinary meaning of the language used; except that terms of art, or technical words, must be understood in their proper sense, unless the context controls or alters their meaning: ancient words may be explained by contemporaneous usage; *and words which have acquired a peculiar sense, [*470] by usage, in particular districts, occupations, or trades, must be read (the usage being found by the jury) in their acquired sense.

Here, there is no occasion for any of these exceptions in construing this instrument. The two latter are inapplicable; and there is no ground for saying that the word "suicide" is a legal technical term,

(1) The issue joined on the second plea.

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or word of art. An inquisition stating that the deceased committed suicide, would be clearly informal and bad. Nor have we a decision of any Court on the meaning of these precise words, by which we should consider ourselves bound. The case of *Borradaile* v. *Hunter* (1) certainly is not such; nor can the intimation of the opinion of the Lord Chief Justice TINDAL, by way of illustration of his argument, as to the meaning of the expressions now under consideration, have the same effect as a decision.

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The whole question resolves itself into an inquiry as to the sense of words used in the ordinary language of the present day, the instrument to be construed bearing date in the year 1836; and we are all perfectly competent to form an opinion upon such a subject, and need not refer to lexicographers, or authors, ancient or modern. If the case depended on the explanation given by dictionaries, the result, nevertheless, would be the same. Johnson, indeed, explains the word "suicide" by "self-murder, the horrid crime of self-murder"—which, no doubt, it includes; Webster, as both "self-murder" and "the act of designedly destroying oneself," and adds, to constitute suicide, the person must be of years of discretion, and refers to Blackstone, inaccurately (2); for, the passage [*471] in that author (3) applies to [a] *person being *felo de se*; Richardson, who states them to be words of modern formation, as "the slaying of himself, or self-murder." But the question does not depend upon the opinion of such authors; for, though they are authorities, they are not conclusive: the case turns on the meaning of the vernacular language which we now use, and I must own that I feel no doubt as to the import of the expression "commit suicide." In ordinary parlance, every one would so speak of one who had purposely killed himself, whether from *tædium* of life, or transport of grief, or in a fit of temporary insanity. To die by his own hands, or to commit suicide, seems to me to be all one, and to apply to all cases of voluntary self-homicide; and I do not see any reason why a different sense to the ordinary one should be attributed to these words in this instrument: on the contrary, I see very good ground for believing that they are used in their ordinary sense, in order to avoid the consequence which would have followed the adoption of such words as "committing felony of himself," or "self-murder;" as it may

(1) 63 R. R. 428 (5 Man. & G. 639; 5 Scott, N. R. 418).

(2) Except upon the supposition that the author considered "suicide" and "felonious self-destruction,"—as was, in this case, contended by the plaintiff below,—to be, in truth, convertible terms.

(3) Vol. IV. p. 189.

be well supposed that juries would, in favour of the family of the deceased, take the same lax view of the evidence as coroners' juries generally do.

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I think that the judgment ought to be reversed, and a *venire de novo* awarded.

POLLOCK, C. B.:

I regret that I differ from the majority of the Court who have already delivered their opinions: but as, after the fullest deliberation, I feel compelled to come to the conclusion that the direction of my brother CRESSWELL to the jury at the trial, was correct in point [of] law, and that the plaintiff below is entitled to our judgment, it is my duty, with whatever reluctance and hesitation, to state my own view of the case, and the reasons upon which that conclusion is founded.

The question, in point of form, has been so clearly *stated already, [*472] that it is unnecessary to state it again; but, in substance, it is, what is the meaning of the words "commit suicide" in the policy in question?—does the expression mean and include that the party was *compos mentis*? that he was a responsible being, capable of distinguishing right from wrong,—as stated by my brother CRESSWELL? or, is the expression applicable to a person who intentionally produces his own death (that is, uses the means of destruction, with a knowledge of the effects they will produce, and with the intention of producing them), but whose understanding, or judgment, or will, is so perverted by disease that he has ceased to be responsible criminally for his conduct?—in short, who is insane (possibly) upon every other point but the physical effects of using a deadly weapon, or the result of applying adequate means to produce the destruction of life?

In considering the question, every thing turns on the meaning of the words as ordinarily occurring in the English language and in English authorities, and especially in books written on law or morals.

Now, what is the meaning of the word "suicide," merely as an English word, according to the best authorities? Does it mean the killing of one's self, in the same way as "homicide" means, simply, the killing of a human being—whether by accident, negligence, or in self-defence? or, does it imply a criminal taking away of one's own life?

The word is of modern origin: it does not occur in the Bible, or in

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any English author before the reign of Charles II.; probably, not till after the reign of Anne. As far as I have been able to trace it, it first occurs as an English word in Hale's Pleas of the Crown.

[*473] Hale was a Judge during the Commonwealth (1), and died in *1676. His work was published in 1736. It is not in Hawkins, first published in 1716; but it is to be found in Blackstone. These, as legal authorities, will be adverted to presently; but I wish to notice first the authorities not legal.

The meaning assigned to the word by Johnson, in his Dictionary, is, "self-murder—the horrid crime of destroying one's self—a self-murderer;" and he gives no other signification. In Richardson's Dictionary it is, "the slayer of himself;" also, "the slaying of himself—self-murder." In the Dictionnaire Universel of the French language, published in 1771, it is said that the word was introduced into the French language by the Abbé Desfontaines; and a quotation is given from his works, where it is manifestly used in the sense given to it by Johnson. Desfontaines was born in 1685, and died in 1745.

In the year 1644, was published with the works of John Donne (the poet), Dean of St. Paul's, who died in 1631, his "*βιαθανατος*, a Declaration on that Paradox or Thesis that self-homicide is not so naturally Sin, that it may never be otherwise." The word "suicide" does not occur in this work; from which it may be presumed that it was not then in general use, and perhaps was not in use at all.

In 1785, Archdeacon Paley published his work on "The Principles of Moral and Political Philosophy." The third chapter of book iv. is on "Suicide." Throughout that chapter the word is used as denoting the act of a reasonable, moral, and responsible agent; and in no other sense.

In 1790, Charles Moore, M.A., rector of Cuxton, in Kent, published "A full Enquiry into the Subject of Suicide; to which are added (as being closely connected with the subject,) two Treatises on Duelling and Gaming." Page 4 contains the

[*474] following passage: "There *are points, then, to be settled, and exceptions to be made, previous to a general charge of guilt on all who put a sudden end to their own lives. For, though every person who terminates his mortal existence by his own hand, commits suicide, yet he does not therefore always commit murder, which

(1) He was also Chief Baron (1660), and Chief Justice of the Common Pleas (1671), after the Restoration.

alone constitutes its guilt. Some distinction is necessary in regard to a man's killing himself, as it would be had he killed another person; which latter he may do either inadvertently or legally, and therefore, in either case, innocently, and without the imputation of being the murderer of another. When a man kills himself inadvertently or involuntarily, it comes under the legal description of accidental death, or *per infortunium*; but, as to his doing it legally, the law allows of no such case. The only instance of innocence which it allows to the commission of voluntary suicide, is in the case of madness; when a man, being deemed under no moral guidance, can be subject to no imputation of guilt on account of his behaviour to himself or others."

In the Encyclopædia Britannica, the explanation of the word "suicide," is, "the crime of self-murder," or "the person who commits it." There is a treatise on law, in the Encyclopædia Metropolitana, in which suicide is spoken of: it is in the 2nd volume of pure sciences (1), "On Offences against Self." Speaking of the cases where society may interfere to prevent or punish, the writer says: "This observation applies to suicide—the greatest offence a man can commit against himself."

These are all the lay authorities I think it necessary to refer to. But there are legal authorities, which, if unopposed by other and greater authorities, I should deem binding and conclusive upon the subject, in a court of law.

Hale, in the work already alluded to, defines *felo de se*, or suicide, [475] to be "where a man of the age of discretion, and *compos mentis*, voluntarily kills himself, by stabbing, poison, or any other way." Judge Blackstone, in his Commentaries, first published in 1765—1768, uses the word in connection with self-murder, and in the same sense as Hale (2). In Burn's Ecclesiastical Law, first published in 1760, it is said (3): "By the rubric before the burial office, persons who have laid violent hands upon themselves, shall not have that office used at their interment. And the reason thereof given by the canon law, is, because they die in the commission of a mortal sin: and therefore this extendeth not to idiots, lunatics, or persons otherwise of insane mind, as, children under the age of discretion, or the like. So also not to those who do it involuntarily, as, where a man kills himself by accident; for, in such case, it is not their crime, but their very great misfortune." The 4 Geo. II. c. 52, relates only

(1) Page 711.
(2) See 4 Bl. Com. p. 189
(3) Tit. "Suicide."

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to *felo de se:* but the editor says, "Suicides are to be buried in the churchyard at night; but no service is to be performed over them." In Jacob's Law Dictionary, in the edition of 1772, under title "Suicide," reference is made to title "Self-murder;" where it is said that "self-murder is ranked amongst the highest crimes, being a peculiar species of felony—a felony committed on one's self. The party must be in his senses, else it is no crime. In this, as well as all other felonies, the offender must be of the age of discretion, and *compos mentis;* and, therefore, an infant killing himself, under the age of discretion, or a lunatic during his lunacy, cannot be a *felo de se.*" Blackstone says (1): "Self-murder, the pretended heroism, but real cowardice, of the stoic philosophers, who destroyed themselves, to avoid those evils which they had not *fortitude to endure, [*476] though the attempting it seems to be countenanced by the civil law (2), yet was punished, by the Athenian law, with cutting off the hand which committed the desperate deed (3). And also the law of England wisely and religiously considers that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence—one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for—the other temporal, against the King, who hath an interest in the preservation (4) of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony—a felony committed on one's self. A *felo de se,* therefore, is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as, if, attempting to kill another, he runs upon his antagonist's sword; or, shooting at another, the gun bursts, and kills himself (5). The party must be of years of discretion, and in his senses, else it is no crime."

It should seem, therefore, that the word has never been used by law writers, except in the sense of a criminal taking away of one's own life: at least, I am not aware of any instance in any law writer, of its use in any other sense.

(1) See 4 Bl. Com. p. 189.

(2) "*Si quis impatientiâ doloris, aut tædio vitæ, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum.*" Dig. lib. 49, tit. 16, l. 6. And see Bynkershoek, Observ. Jur. Rom. lib. 4, c. 4. Περὶ Αὐτοχειρίας.

(3) Pott. Antiq. b. i. c. 26.

(4) Rather, in the retention of each of his subjects, for the benefit of himself and his other subjects; as, otherwise, the rule *unusquisque potest renuntiare juri pro se introducto,* would seem to apply.

(5) 1 Hawk. P. C. 68; 1 Hale, P. C. 413.

It may be presumed that the word is of legal introduction, and was perhaps first taken from the law writers by Archdeacon Paley. It has since become a *word of general use: but I am not [*477] aware of any authority by which it can be shown that it has lost the meaning to express which it was originally framed, or adopted from some other language. And I think it is clear, that, although it may possibly sometimes admit, in modern times, of a more loose and vague interpretation, it certainly may mean self-destruction by a person *compos mentis*, and morally responsible for his acts: and the question is, whether that meaning is or is not what was intended by the parties to this contract.

Now, in this policy, I find it coupled with the word "commit;" the expression is, "commit suicide." The meaning of "commit," in Johnson (with reference to this use of the word) is, "to perpetrate —to do a fault—to be guilty of a crime;" and "perpetrate" is, to commit, to act—always in an ill sense. There is no material difference in Richardson. If, therefore, it be admitted, as I think it must, that one meaning of "suicide" imports not merely an act, but a criminal act, the use of the expression "commit suicide" is some, and I own I think a strong, reason for believing that the parties to this contract used the word in that sense.

The sentence also in which it is found, may throw some light on the matter. It is coupled with death by duelling or by the hands of justice: and the condition is not—if the party shall die by suicide, but, if he shall "commit suicide." I think this imports some deliberate criminal act, and not an act the result of insanity, which leaves him intelligence enough to know the means of death, but without any moral control over his actions.

Again, does the nature of the instrument itself supply any argument either way? The object of such a policy is, generally, to make provision for the family of the insurer; and he would naturally desire to include all risks. It is admitted that he is protected, not only against the common chances of death by disease, but *against [*478] accident, or mere negligence of the grossest kind. He may even be the immediate cause of his own death by a deadly weapon, provided he be so insane as to be utterly unconscious of what he is doing. But, according to the argument for the defendants below, if he retains a glimmering of reason just enough to enable him to seek to produce death by competent means—it matters not whether he be lost to all moral sense, and for any other act or crime a complete madman; his policy is forfeited.

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I own I cannot, from the nature of the contract, believe that this was what the parties intended. A man anxious to provide for his family, would, among the possible calamities of life that might terminate it, anticipate madness as one: and, whether it prostrated his intellect altogether, or produced delusion, or destroyed only a part of his faculties, would make no difference. The language used in the agreement between the parties, does not necessarily exclude this risk. I think, therefore, as against the office, the risk ought to be included.

Examining the question upon more general principles, I am induced to come to the same conclusion. In the eye of the law, with reference to crime, a man is either *compos mentis* and responsible, or he is *non compos mentis* and irresponsible. Physiologically, no doubt, it is otherwise: and the gradations are perhaps imperceptible, from the highest perfection of intellect, to the darkest obscuration of the mind. But, in point of law, as soon as it is ascertained that a person (to use the language of my brother CRESSWELL in directing the jury) has lost his sense of right and wrong, it matters not what else of the human faculties or capacities remain; he ceases to be a responsible agent; and, in my judgment, can no more commit suicide than he can commit murder.

[*479] Lastly, the views taken by the defendants' counsel *appear to me to be opposed to all the principles of sound philosophy which can be applied to the subject.

It is admitted, of course, that the office would be liable, if death ensued from any of the ordinary casualties of life, even resulting from the act of the party insured; provided the act were not done with the intention to kill. The act of a raving madman, or of a patient under the influence of disease, is protected by the policy, if the consequences are not foreseen and intended. So, if insanity should produce delusion, and deprive a man of the use of the ordinary senses, and the party should mistake a deadly weapon for an instrument of music, and fancy he was playing upon it, when he was destroying his own life; this would not be committing suicide within the proviso of the policy. But, what is the delusion, instead of applying to a pistol, or other instrument of death, applied to the man himself? Supposed he believed he was Marcus Curtius, and ought to leap into a gulf? or that he was one of the Decii, and must sacrifice himself for the benefit of his country? or, what, if he fancied himself an apostle, and that it became his duty to die the death of

a martyr? What sound philosophy is there in taking a distinction between a delusion about a pistol, and a delusion in respect of the man against whom it may be directed? or, what distinction, in point of good sense, can be taken between physical blindness, in consequence of which the party insured walks into a well, and intellectual or moral blindness, which, leaving him the use of his senses, and a knowledge of the physical consequences of his acts, has deprived him of all judgment which should control and govern his acts, and of all sense to perceive their moral consequences?

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It may be said, that, when the delusion extends to the character, office, or condition of the party, so that he mistakes his identity, he does not mean to kill himself, and in such a case the office would be liable. *But, how far is this to be carried? Suppose, under a [*480] delusion, he believed he had committed a crime for which he ought to put himself to death, and that this was the result of insanity—is this a mistake of his identity? and how is a Judge to direct a jury so as to steer clear of the difficulties that would thus arise? In my opinion, such subtleties as these ought to find no place in the decision of such a question as the present, in which is involved (from the present extensive practice of life-insurance) the peace, the happiness, and security of thousands of families. Some simple, clear, and safe rule ought to be laid down as to a subject in which the public is so deeply interested.

In my judgment, if death be the result of disease—whether by affecting the senses or the reason—the insurance office is liable under this policy. Whether the privation of reason be total or partial, whether it produce delusion of one kind or another—whether it affects sensation, apprehension, memory, judgment, or will, or any of the moral and intellectual powers which constitute our nature—if the act be not the act of a sane responsible creature, but is the result of any delusion or perversion, whether physical, intellectual, or moral, it is not the act of the man: and, to hold otherwise, seems to me a departure from the simplicity of the law, and to be repugnant to sound philosophy, which is the spirit of all law, and on which all law ought to be founded.

I will only add, that I have not adverted to the case of *Borradaile* v. *Hunter*, because the expression in that case, "shall die by his own hand," is so different from the expression in this case, "commit suicide," that that decision is no authority on the point arising here.

CLIFT v. SCHWABE. [481]

The opinion of the majority of the learned Judges who were present at the argument being in favour of the plaintiffs in error, a *venire de novo* was awarded (1).

Judgment accordingly (2).

IN THE HOUSE OF LORDS.

1846.

[519]

BRANDÃO *v.* BARNETT AND OTHERS.

(3 C. B. 519.)

[THIS case is also reported in 12 Clark & Finnelly, 787; see 69 R. R. 204.]

IN THE COURT OF COMMON PLEAS.

1846. *Nov.* 18.

[540]

THOMPSON AND OTHERS *v.* E. J. LACK.

(3 C. B. 540—553; S. C. 16 L. J. C. P. 75.)

A release to one of two sureties who had entered into a joint and several covenant to pay an annuity, in default of payment by the grantor, was accompanied by a proviso, that such release should not prejudice the right of the grantee to enforce its payment against the grantor and the other surety, or either of them: Held, that the proviso restrained the operation of the release, and that the liability of the co-surety was not affected by such release (3).

COVENANT. The declaration stated that theretofore, and in the lifetime of the said John Springall, to wit, on the 11th of October, 1834, by a certain indenture then made between John Lack of the first part, the defendant and Charles Parry Lack of the second part,

(1) The case proceeded no further; the office agreed to return the premiums received, with interest at 4 per cent., amounting to 967*l.* 9*s.* 7*d.*, and to bear their own costs. An offer to the same effect had been made before action, but rejected.

(2) "Suicide" appears to be a word introduced to supply the want of a legal term to denote the act of the *felo de se*. Legal and popular writers, when treating of this offence, have been almost unavoidably led to consider the proximate act of excusable self-destruction, or *quasi*-suicide; and have done so without formally disclaiming the use of a term which, though in some sense technical, is not a word of art. The term, in addition to its primary and ordinary signification, has thus acquired the secondary meaning applied by the Court to the construction of this policy.

(3) Two other points were argued and decided, neither of which is now of importance. One, on demurrer to the second plea, that s. 25 of 7 & 8 Vict. c. 96 (repealed) was not retrospective; the other as to the proper conclusion of the replication to the last plea. The pleas, argument and portions of the judgments relating to these points are omitted.—J. G. P.

and the said John Springall of the third part—*profert*—the said John Lack, for the considerations therein mentioned, did give, grant, &c., unto Springall, one annuity or clear yearly sum of 37*l.* to be paid during the term of ninety-nine years, to commence, &c., if John Lack should so long live; to have the said annuity of 37*l.* unto Springall, his executors, administrators, and assigns, during the said term of ninety-nine years, to commence as aforesaid, if John Lack should so long live, to be paid at &c., by four equal quarterly payments, &c., in every year; that it was agreed that the defendant and the said C. P. Lack should respectively guarantee the payment thereof and of such proportionable part thereof as in the said indenture mentioned, and all costs, charges, and expenses to be incurred or occasioned by reason of any default in payment thereof, or of any part thereof; *that, in pursuance of the last-recited [*541] agreement, they the defendant and C. P. Lack, did, in and by the said indenture, for themselves, their heirs, &c., and each of them did thereby for himself, his heirs, &c., covenant with Springall, his executors, &c., by the said indenture, that, if John Lack, his heirs, &c., should make any default in payment of the said annuity of 37*l.*, or any part thereof, and such proportionable part thereof as aforesaid, then that the defendant and C. P. Lack, their heirs, &c., or some or one of them, should and would, from time to time, immediately after any such default should be made as aforesaid, well and truly pay unto Springall, his executors, &c., the said annuity of 37*l.*, and all arrears thereof, and such proportionable part thereof as aforesaid. Breach: that, after the making of the said indenture, and in the lifetime of the said John Lack, who is still living, and during the said term of ninety-nine years, and after the death of Springall, to wit, on the 11th of January, 1846, a large sum of money, to wit, the sum of 74*l.*, of the said annuity, for two years of the said term then last elapsed, became due from the said John Lack to the plaintiffs as executors as aforesaid; yet the said John Lack had not paid the said sum of 74*l.*, or any part thereof, but therein had failed and made default, of all which the defendant had always had notice; yet neither of them, the defendant or C. P. Lack, as sureties for the said John Lack, had paid the same, or any part thereof, and the said sum of 74*l.* still remained in arrear, contrary to the said indenture, and the said covenant of the defendant in that behalf. * * *

Third plea: that, after the making of the said indenture in the [542] declaration mentioned, and whilst the same was in full force and

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virtue, and in the lifetime of Springall in the declaration mentioned, and before any portion of the said sum in the declaration mentioned, and claimed to be due and payable from the defendant, became due and payable, and before the commencement of this suit, to wit, on the 11th of January, 1844, an indenture was made between William Thompson of the first part, Springall of the second part, and C. P. Lack, in the declaration and in the said indenture of covenant mentioned, of the third part—*profert*—whereby Springall, for the considerations therein expressed, acquitted, released, exonerated, and for ever discharged C. P. Lack, in the declaration mentioned, of and from the payment of the said annuity or yearly sum of 37*l.* in the said indenture of covenant in the declaration mentioned, granted, and of and from the performance of the joint and several covenants therein contained in the said indenture of covenant in the declaration mentioned, on the part of the said C. P. Lack, and from all claims and demands of Springall,

[*543] deceased, against the *said C. P. Lack in respect thereof; and that the said indenture of release, and the release therein contained, and thereby made, were made without the consent or knowledge and against the will of the defendant. Verification. * * *

The plaintiffs prayed that the indenture might be inrolled; by which indenture—after reciting the grant of an annuity of 27*l.* to one William Thompson, and the grant of the annuity in question, and that E. J. Lack (the defendant) and J. Lack had made default in payment of the said annuities, and that C. P. Lack had paid up all arrears of Thompson's annuity to the 18th of December then last, and of the annuity in question to the date of those presents;

[*544] *and also reciting that C. P. Lack had applied to Thompson and Springall to release him from his covenants respectively contained in the said indentures of grant of annuity, and all claim and demand of them the said Thompson and Springall respectively against him in respect thereof, on payment by the said C. P. Lack unto Thompson and Springall of 259*l.* 5*s.*, which they had agreed to do, subject, nevertheless, and without prejudice, to the respective rights of Thompson and Springall, to enforce the payment of their said several annuities as against E. J. Lack and John Lack: it was witnessed, that, in consideration of 259*l.* 5*s.* to Thompson and Springall paid by C. P. Lack, Thompson (as to and concerning only the said annuity of 27*l.*) did remise, release, &c., and Springall (as to and concerning only the said annuity of 37*l.*), did remise, release, &c., C. P. Lack, his heirs, &c., from the payment

of the said several annuities or yearly sums of 27*l.* and 37*l.* by the said therein-before in part recited indentures of grant of annuity granted, and of and from the performance of the joint and several covenants contained in the said several indentures, or in either of them, on the part of the said C. P. Lack, his heirs, executors, &c. and from all claims and demands of them, Thompson and Springall respectively, and their several and respective heirs, &c., against him in respect thereof: Provided always, nevertheless, and it was thereby agreed between the said parties, that nothing therein contained should extend, or be construed to extend, to, or prejudice, the respective rights of the said Thompson and Springall, and their respective executors, administrators, and assigns, to enforce the payment of the said several annuities of 27*l.* and 37*l.* respectively, as against the said E. J. Lack, and John Lack, or either of them, their or either of their heirs, executors, &c.

The plaintiffs then demurred generally to the third plea.

Joinder in demurrer (1). [545]

* * * * *

Dowling, Serjt., for the plaintiffs: [546]

* * With respect to the third plea, the answer attempted to be thereby set up, is, a release to a co-surety of the defendant. It must be admitted that, generally speaking, where a release is given to one, it will operate as a discharge to all. But here, the proviso annexed to the release prevents the discharge of the defendant. The effect of such proviso is, to limit the release to C. P. Lack alone, and to leave J. Lack and the defendant subject to the same liability as before. In the older authorities, it seems to *have [*547] been considered that a release is so powerful that nothing could affect or restrain its operation; but the more recent cases look to the intention of the parties. Lord Coke, commenting upon a section in Littleton (2), says: "Here, by this section, it is to be understood, that when divers doe a trespasse, the same is joynt or severalle at the wil of him to whom the wronge is done, yet, if he release to one of them, all are discharged; because his own deed

(1) The following points were marked for argument on the part of the plaintiffs:

"A matter of law intended to be argued in support of the demurrer, is, that the deed in question does not operate, in point of law, to discharge the defendant from his covenant.

"The plaintiffs will contend that the deed by which their testator covenanted not to sue the defendant's co-surety, but expressly reserved the liability of the principal and the defendant, did not operate as a release of the defendant from his covenant."

(2) Co. Litt. 232 a.

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shall be taken most strongly against himself." But, where a release was given by the plaintiffs to A., one of two partners, with a proviso that it should not prejudice any claims which the plaintiffs might have against B., the other partner; and that, in order to enforce the claims against B., it should be lawful for the plaintiffs to sue A. either jointly with B. or separately; and, in an action against A. and B., this release having been pleaded by A., and set out on *oyer* in the replication, with an averment that the action was prosecuted against A. jointly with B. for the purpose of enabling the plaintiffs to recover moneys due to them from B. and A., either out of the joint estate of B. and A., or from B. or his separate estate; the COURT, in effect, held that the action might be maintained, by overruling a demurrer to the replication: *Solly* v. *Forbes* (1). *Cocks* v. *Nash* (2) is also in point.

(WILLIAMS, J.: Did not that case turn entirely on the point whether you could vary a deed by parol?)

It shows that the intention of the parties is to be looked at, and not the mere words of the release. *Payler* v. *Homersham* (3) also establishes that the general words of a release may be restrained by a particular recital. So, in the present case, the proviso
[*548] *must be incorporated with the release, and the whole read together. * * *

Channell, Serjt., for the defendants:

[549] * * With respect to the third plea, it is clear that a release to one of two covenantors, although the covenant, as here, is joint and several, is a release to both: 2 Wms. Saund. 47 gg, note (1) (4). The principle is further established by *Cheetham* v. *Ward* (5) and *Nicholson* v. *Revill* (6), and the ground of it is, that the debt is thereby extinguished.

(MAULE, J.: If that principle be the correct one, then a release to one of two parties severally bound only, would be a release to both. It is only when they are also jointly bound that the reason given in Co. Litt. 232 a applies; for, where one is released from

(1) 22 R. R. 641 (2 Brod. & B. 38).
(2) 35 R. R. 547 (9 Bing. 341).
(3) 16 R. R. 516 (4 M. & S. 423).
(4) 6th ed. Note to *Fowell* v. *Forrest* (citing *Clayton* v. *Kynaston*, 2 Salk. 573; 2 Roll. Abr. 412 (G.), pl. 4, 5). And see 2 Wms. Saund. 6th ed., p. 47 gg, n. (*d*); 18 Vin. Abr. 352.
(5) 4 R. R. 741 (1 Bos. & P. 630).
(6) 43 R. R. 460 (4 Ad. & El. 675; 6 Nev. & M. 192).

his joint liability, the other is released from his; and *the latter, being released from his joint liability, is also released from his several liability. The question is, whether you cannot release the joint liability, and except from the release the several liability.) [*550]

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Undoubtedly the authority of *Solly* v. *Forbes* was recognised by Lord ELDON in *Ex parte Gifford* (1). But, in *Nicholson* v. *Revill*, the Court of King's Bench declare their dissent from the expressions used in *Ex parte Gifford*, which, they say, "seem to lay it down that a joint-debtee (2) might release one of his debtors; and yet, by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them."

(MAULE, J.: It does not appear that the attention of the Court of King's Bench was called to *Solly* v. *Forbes*. Do you say, that, where there is a joint and several liability, it is impossible to release the one without releasing the other?)

It is necessary in this case so to contend.

(MAULE, J.: That is opposed to the authorities.)

With regard to the replication to the last plea, it is difficult to distinguish this case from *Richardson* v. *Tomkies*.

WILDE, Ch. J.:

* * With respect to the third plea, the question is, what is the [551] effect of the deed which is therein described as a release? Are you at liberty to separate that which professes to be a release, from the proviso? or must you take them both together, and say what is their entire effect? It seems to me, that you must look at the whole of the deed; and that raises the point, whether a party may give a qualified release. *Solly* v. *Forbes* is a decision that you may give such a release; and, although in *Nicholson* v. *Revill* there are to be found expressions used by Lord DENMAN, in delivering the judgment of the COURT, inconsistent with that view, it seems to me that those expressions are more of the nature of *obiter dicta* than those attributed to Lord *ELDON in *Ex parte Gifford*. In the latter [*552] case, Lord ELDON decided, in conformity with the principle

(1) 6 R. R. 53 (6 Ves. Jr. 805).

(2) The term "joint-debtee" is here used to designate a debtee of joint-debtors, not, according to its more usual acceptation, a co-debtee.

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established by *Solly* v. *Forbes*, which I consider is a decisive authority, that a release may be qualified, and prevented operating as a discharge of a co-surety (1). The question here is, whether the release in this deed is qualified, and reserves the remedy against the defendant. It is admitted that the intention of the parties is clear; and strong grounds should be laid before the Court to induce it not to give effect to the deed according to such intention. I see nothing in the present case to prevent us from deciding in conformity with *Solly* v. *Forbes*. Generally speaking, a release of one, will operate as a discharge to all. Therefore, in *Nicholson* v. *Revill*, the plaintiff having received a sum of money from one of the parties to a promissory note, and having erased his name from the instrument, it was held, that such erasure operated as a release to the other parties thereto; and what was necessary for the decision of that case, was in accordance with the general principle. I am of opinion that this was a qualified release, and did not discharge the co-surety. I think, therefore, the general demurrer sustainable by the deed as set out on *oyer*. * * *

Our judgment, consequently, must be for the plaintiffs on the whole record.

[553] COLTMAN, J.:

* * With respect to the plea setting up a release, it is argued that the proviso is to be regarded as repugnant, and therefore void. That, however, is not the way in which the question is to be considered; but the whole of the deed should be looked at in order to see the intention of the parties; which admits of no doubt. * * *

MAULE, J.:

* * The question as to the third plea turns on the construction of the deed, which releases C. P. Lack, but provides "that nothing therein contained shall extend to prejudice the rights of Thompson and Springall to enforce the payment of the annuities as against the defendant." Now, inasmuch as it is possible to give operation

(1) A similar distinction prevails in the Roman law: "In his qui ejusdem pecuniæ exactionem habent in solidum, vel qui ejusdem pecuniæ debitores sunt, quatenus alii quoque prosit aut noceat pacti exceptio, quæritur: et in rem pacta omnibus prosunt quorum obligationem dissolutam esse ejus qui paciscebatur interfuit: itaque debitoris conventio, fidejussoribus proficiet." "Nisi hoc actum est *Ut dumtaxat a reo non petatur, a fidejussoribus petatur*: tunc enim fidejussor exceptione non utetur." Dig. lib. 2, tit. 14, l. 21, § 5, and l. 22.

to both clauses without prejudicing the defendant, or increasing his liability, I think that construction is to be adopted which will leave the plaintiffs their remedy against the defendant, and, consequently, that this plea also is bad. * * *

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WILLIAMS, J., concurred.

Judgment for the plaintiffs.

DOE D. BENJAMIN GOODYEAR BLOMFIELD *v.* THE REV. CHARLES EYRE (1).

1846. *Nov.* 23.

[557]

(3 C. B. 557—580; S. C. 16 L. J. C. P. 64.)

A. being seised of copyhold lands, in contemplation of her marriage with B., surrendered the same, to the intent that the lord might re-grant the same to the use of A. until the solemnization of the marriage: and, from and after the marriage, to the use of B. for life; and, after his decease, to A. and her assigns for life; and, after her decease, to the use of such child and children of the body of A. by B. to be begotten, and for such estate, &c., charged with any sum or sums for any other of their children, as A. should by deed or will limit, devise or appoint, &c., and, in default of appointment, to the use of all the children of the marriage, in equal shares; and, in default or failure of such children, then, from and after the decease of B., to the use of A., her heirs and assigns for ever.

The marriage took place, and two sons having been born, A., by a will, referring to the power, gave, devised, and appointed the premises to her eldest son C., his heirs and assigns for ever, from and after the decease of B., upon condition that he should pay to his brother D., the second son, 200*l*., within one year after the decease of B., or on D. attaining the age of twenty-one. The will then proceeded: "but, in case it shall happen that neither of my sons aforesaid shall be living at the decease of B., then I do give, devise, direct, and appoint, the said copyhold messuage, &c., unto E. (the father of B.), his heirs and assigns," in trust for sale.

Subsequently to the date of the will, there were four other children born of the marriage. A. died without altering her will. C. and D. died before their father, B.:

Held, that the appointment by A. was not void by reason of its having been made by her during coverture, notwithstanding the original surrender contained no express dispensation with the disability arising from coverture.

But, held, that the appointment was void, by reason of the subsequent limitation to E., the grandfather; for, that the estate or interest given to C., the son, by the former part of the will, was not less subject to be defeated in consequence of the gift over being to a person incapable of taking, than if it had been to a person who was properly an object of the power.

THIS was an action of ejectment, which came on for trial before Coleridge, J., at the Summer Assizes for the county of Essex, in

(1) Affirmed in the Exchequer Chamber, 5 C. B. 713. Distinguished in *Jones* v. *Davies* (1880) 28 W. R. 455. Followed in *Hurst* v. *Hurst* (1882) 21 Ch. Div. 278, 51 L. J. Ch. 417, 729.—J. G. P.

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1845, when a verdict was found for the plaintiff, subject to the opinion of the Court on the points stated in the following case:

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Before and at the time of the surrender to uses hereinafter mentioned, Mary Sida was seised in her demesne as of fee, at the [*558] will of the lord of the manor of Overhall *and Netherall in the county of Essex, according to the custom of the said manor, of the tenements, with the appurtenances, in the declaration mentioned, the same then and still being part and parcel of the same manor, and a customary tenement thereof, demised and demisable by copy of the court-rolls of the said manor, by the lord of the said manor, or by his steward of the court of the said manor for the time being, to any person or persons willing to take the same, in fee-simple, or otherwise, to hold of the lord of the said manor, at the will of the lord, according to the custom of the said manor.

By the immemorial custom of the manor, the youngest son of any person dying seised of any descendible estate in any of the copyhold tenements thereof, is the customary heir of his father, and succeeds, as such heir, to the tenements of which his father dies seised.

Mary Sida, being so seised and in possession of the said customary tenements, with the appurtenances, did, on the 2nd of August, 1764, by the rod, duly surrender out of her hands into the hands of the lord of the said manor, by the hands and acceptance of William Chaplin, gentleman, in the place of the lord's bailiff, and in the presence of D. Sida and J. Blomfield the elder, two copyhold or customary tenants in the manor, they witnessing the same according to the custom of the manor, the said tenements, with the appurtenances, to the intent that the lord should thereupon regrant all and every the said surrendered messuage, lands, tenements, hereditaments, and premises, with their appurtenances, to and for the several uses and purposes hereinafter mentioned and expressed of and concerning the same, that is to say, to the use and behoof of the said Mary Sida, her heirs and assigns, until a marriage intended should be had and solemnized between her the said Mary [*559] Sida and John Blomfield the younger; and, from *and after the solemnization of the said intended marriage between the said John Blomfield the younger and Mary Sida, then to the use of the said John Blomfield for and during his lifetime; and, from and after his decease, to the use of the said Mary Sida, his intended wife, and her assigns, for and during her lifetime; and, from and after her decease, to the use of such child or children of the body of the

said Mary by the body of the said John Blomfield, her said intended husband, to be begotten, and for such estate or estates, or other interest, and in such parts, shares, and proportions, manner and form, charged and chargeable with any sum or sums of money for any other of their children, as she the said Mary, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of, and attested by, two or more witnesses, or by her last will and testament in writing, to be by her signed, sealed, and published, as such, in the presence of and attested by three or more witnesses, shall or may limit, declare, devise, direct, or appoint; and, for want of such limitation, declaration, devise, direction, or appointment, and until such limitation or declaration, devise, direction, or appointment shall be so made and executed, and the estate or estates, or other interest, to be raised and created thereby as aforesaid, shall respectively commence and take effect, to the use of all and every the children, or of the child, if but one, of the body of the said Mary, by the body of the said John Blomfield, her said intended husband, to be begotten, in equal shares and proportions (if more than one such child), and to take as tenants in common, and not as joint-tenants, and of the heirs of the several and respective bodies of such children lawfully issuing; and, if there should be but one such child, to the use of such only child, and the heirs of his or her body lawfully issuing; and, for want and in default or failure of such children, or of one such child of the *body of the said Mary, by the body of the said John [*560] Blomfield, her said intended husband, so to be begotten, then, and from and after the decease of him the said John Blomfield, to the use and behoof of the said Mary, his said intended wife, and of her heirs and assigns, for ever, and to or for none other use, intent, or purpose whatsoever.

On the 9th of August, 1764, the said Mary Sida intermarried with the said John Blomfield; and John Blomfield and Mary his wife continued from thence during their respective lifetimes, and John Blomfield until his death, in possession of the premises, with the appurtenances.

On the 30th of May, 1765, the said surrender to uses was duly presented by the homage, at a court of the lord of the manor, according to the custom thereof. On the 11th of November, 1765, John Blomfield, the eldest child of the marriage, and the father of the lessor of the plaintiff, was born.

On the 14th of November, 1766, William Blomfield, the second

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child of the marriage, being the William Blomfield mentioned in the will hereinafter mentioned, was born.

On the 5th of January, 1767, there being then no other children of the marriage save as aforesaid, Mary Sida made her last will and testament in writing, which was signed, sealed, and published by her as such will and testament, in the presence of and attested by three credible witnesses; which will was as follows:

"I, Mary Blomfield, wife of John Blomfield the younger, of Dedham, in the county of Essex, according to and in pursuance of the power reserved to me the said Mary in and by a certain surrender of the manor of Overhall and Netherhall, in Dedham, dated the 2nd of August, 1764, made and passed by me the said [*561] Mary by the name of Mary Sida, spinster, upon my then *intended marriage with the said John Blomfield, of all that messuage or tenement called Southfield House, and twelve acres of land and pasture, more or less, thereunto belonging, with the appurtenances, in Dedham aforesaid, and held by copy of court-roll of the said manor, and also of all other the lands and tenements of me the said Mary then held by copy of court-roll of the same manor, with the appurtenances: Now, as concerning the said copyhold premises, with their appurtenances, accordingly, I, the said Mary Blomfield, do hereby make, publish, and declare this my last will and testament, in the manner following, that is to say, I give, devise, direct, and appoint, all and singular the aforesaid copyhold messuage, lands, tenements, meadows, pastures, hereditaments, and premises, with their appurtenances, unto my son John Blomfield, and to his heirs and assigns for ever, from and after the decease of my husband, John Blomfield, as aforesaid: but, nevertheless, upon this condition, that the said John Blomfield shall pay to my other son, William Blomfield, the sum of 200*l.* of lawful money of Great Britain, within one year and a day after the decease of my husband, John Blomfield aforesaid, in case that my son William Blomfield be then living and twenty-one years; but, if he should then be under the age of twenty-one years, then my will is, that the above said 200*l.* shall be paid him by my son John as soon as he comes to the age of twenty-one years: But, in case it shall happen that neither of my sons aforesaid shall be living at the decease of the said John Blomfield, my husband, then, and in that case happening, I do, by this my will, give, devise, direct, and appoint all and every the aforesaid copyhold messuage, lands, tenements, meadows, pastures, hereditaments, and premises, with their appurtenances, unto my

father-in-law John Blomfield, the elder, of Dedham, in the county of Essex, his heirs and *assigns, in trust, nevertheless, and to the intent and purpose, that the said John Blomfield the elder, his heirs and assigns (as soon as may be after the decease of the said John Blomfield, my husband), shall absolutely sell and dispose of all and singular the aforesaid copyhold messuage, lands, and tenements, meadows, pastures, hereditaments, and premises, with their appurtenances, and surrender or cause the same to be surrendered unto any person or persons, and their heirs for ever, who shall be willing to purchase the same premises, with their appurtenances, at and for a valuable price or consideration or purchase-money for the same premises; and I will, order, give, direct, and appoint such purchase-money, so to be made and arise upon the absolute sale of the premises as aforesaid, to be applied and paid unto the several persons, and in the manner next hereinafter mentioned, that is to say, to my aunt Mrs. Frances Holman the sum of 50*l.*, part of the purchase-money; to my uncle Mr. William Chaplin the sum of 50*l.*, more part thereof; to my cousin Richard Chaplin (son of the said William Chaplin) the sum of 50*l.*, more part thereof; to my cousin Chaplin Holman, the sum of 50*l.*, more part thereof; to my mother-in-law Mrs. Jane Blomfield, the sum of 50*l.*, more part thereof; to Mrs. Mary Blomfield, Mrs. Sarah Blomfield, Mrs. Jane Blomfield, Mrs. Hannah Blomfield, and Mrs. Rebecca Blomfield, the five sisters of the said John Blomfield, my husband, to each and every one of them the sum of 50*l.*, more part thereof: And, as to the residue and remainder of such purchase-money to arise and be made upon sale of the said copyhold premises as aforesaid, I give, devise, bequeath, direct, and appoint the same unto my said father-in-law John Blomfield the elder, and to his use and disposal. And I, the said Mary Blomfield, do hereby ratify and confirm this to be my last will and testament as concerning the above copyhold premises so by me surrendered *as above mentioned, with the intent that the lord of [*563] the manor above said shall regrant the same premises, with their appurtenances, as directed and appointed by this my said will and testament. Also, I give and bequeath all that my estate which came to me by the death of my late uncle Mr. Daniel Sida, to my beloved husband John Blomfield, to his heirs and assigns, for ever. In witness," &c.

The surrender in the said will mentioned, of the 2nd of August, 1764, and the property therein also first mentioned, were and are

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the surrender to uses hereinbefore mentioned, and the premises in the declaration mentioned. The estate in the said will mentioned as having come to Mary Blomfield by the death of her said uncle Daniel Sida, is another and different property.

On the 16th of March, 1767, the said John Blomfield and Mary, his wife, were, at a court of the lord of the manor, according to the custom thereof, duly admitted to the said customary tenements, with the appurtenances, pursuant to the said surrender to uses, of the 2nd of August, 1764, to hold the same to the uses and in the manner mentioned in the said surrender.

On the 6th of July, 1767, William Blomfield, the second son of the said marriage, died.

There were afterwards five other children of the marriage, namely, William (the second of that name), Mary, Samuel, Henry, and Sarah, some of whom are still living.

On the 19th of June, 1782, Mary Blomfield died, without revoking or altering her said will.

On the 27th of December, 1782, administration with the will annexed was duly granted to John Blomfield, the husband of Mary Blomfield.

On the 3rd of February, 1801, John Blomfield the younger, the eldest son of the said John and Mary, was, at a court of the lord of
[*564] the said manor, admitted, *according to the custom of the manor, to the reversion or remainder in fee immediately expectant on the death of John Blomfield, his father, in and to the aforesaid premises, to hold to him the said John Blomfield the son, his heirs and assigns, immediately from and after the decease of John Blomfield the father, pursuant to the said surrender and will of Mary Blomfield, his mother, deceased.

On the 26th of June, 1814, John Blomfield the younger, intermarried with Elizabeth Goodyear, the mother of the lessor of the plaintiff. On the 18th of July, 1820, Benjamin Goodyear Blomfield, the lessor of the plaintiff, was born, and was the youngest son of the said John Blomfield the younger.

On the 20th of July, 1820, John Blomfield the younger, the son of the said Mary, the testatrix, and the father of the lessor of the plaintiff, died intestate, in the lifetime of his father, John, the husband of the said Mary, leaving the lessor of the plaintiff, his youngest son and customary heir by the immemorial custom of the said manor, him surviving.

On the 6th of September, 1820, John Blomfield, the husband of

the said Mary, and grandfather of the lessor of the plaintiff, died, having been, until his death, in possession of the premises. After the death of John Blomfield, the husband of the said Mary, and on the 21st of February, 1821, at a court-baron then held for the said manor, the homage presented the said surrender of the 2nd of August, 1764, and the marriage of the said Mary Sida and John Blomfield; and that there was issue of the said marriage six children, to wit, the said John, William, Mary, Samuel, Henry, and Sarah; and that the said Mary Blomfield (formerly Mary Sida) died in the lifetime of her husband, without having made any appointment or disposition, by deed or will, of the said premises, leaving six children *her surviving; and that John and Henry, [*565] two of the said children, had died in the lifetime of John Blomfield, their father; and that, on the 1st of November then last, at a court then held, the death of John Blomfield, the father, had been presented, and the first proclamation made, and, at another court, held on the 1st of December then last, the second proclamation had been made.

The case then stated the admittance, at the same court, of William Blomfield, May Fitch, Samuel Blomfield, and Sarah Rouse (sons and daughters of John Blomfield and Mary his wife), and also of Mary Blomfield (daughter of Henry Blomfield, deceased), respectively, to one sixth of the premises, pursuant to the surrender of the 2nd of August, 1764.

Between the months of February, 1821, and March, 1823, Mary Blomfield, the only child and heiress-at-law of Henry Blomfield (the son), married one Kidd, and afterwards, and before March, 1823, died without leaving issue.

At a court holden for the manor, on the 18th of March, 1823, the homage presented the admission (as above) of Mary Kidd, late Mary Blomfield (the daughter of Henry Blomfield), and her death; and thereupon Samuel Blomfield, youngest son and heir-at-law of John and Mary Blomfield, formerly Mary Sida, the said Mary Kidd having died without issue, was admitted to one sixth part of, or share in, the said premises, to hold to him, Samuel Blomfield, his heirs and assigns.

In the year 1824, the present defendant purchased the interest of all the said parties in the premises, except the interest of the lessor of the plaintiff, Benjamin Goodyear Blomfield. On the 14th of December, 1824, a deed of covenant was executed (a copy of which accompanied the case); and afterwards, on the *14th of December, [*566]

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1824, a surrender was made, and recovery suffered, in pursuance of the said deed of covenant; and the defendant was thereupon admitted to the premises, except the share of the said Benjamin Goodyear Blomfield, accordingly, to hold to him, his heirs and assigns, for ever, according to the custom of the said manor, and entered into the possession thereof, and continued in the possession or enjoyment of the same until the present ejectment was brought in the beginning of the year 1845.

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There was a custom in the manor to appoint guardians. Mr. W. C. Rouse was appointed guardian of the lessor of the plaintiff.

In the year 1825, a lease was also granted by Rouse, who purported to act as the guardian of the lessor of the plaintiff, to the defendant, of the one seventh share of the lessor of the plaintiff in the premises; which lease had expired before the ejectment was brought.

The declaration in this ejectment contained two demises in the name of the said Benjamin Goodyear Blomfield, viz. one on the 1st of January, 1825, and the other on the 1st of September, 1841.

The defendant defended the ejectment, as landlord, for six sevenths of the property.

On the trial, lease, entry, and ouster, and possession, were admitted, as to six sevenths of the property; but the defendant's counsel contended that the lessor of the plaintiff was not entitled to recover such six sevenths on the following grounds: first, because the appointment by the said Mary was made in the lifetime of her husband, and the said surrender to uses of the 2nd of August, 1764, contained no dispensation of the coverture of the said Mary; secondly, that the appointment by the said Mary in and by her said will, was void for excess, in attempting to benefit persons not objects
[*567] of the power created by the said surrender; thirdly, that *the said John Blomfield, the father of the lessor of the plaintiff, was to take under the said appointment only in the event of his being alive at the death of his father, whom he did not survive; or, that any interest he would otherwise have taken, was divested or defeated by his death in his father's lifetime; lastly, that there was no surrender to the uses of the said will.

If, on all or any of the said grounds, the Court are of opinion that the lessor of the plaintiff was not entitled to the said six sevenths of the property in question, the verdict for the plaintiff is to be set aside, and a verdict entered for the defendant; if otherwise, it is to stand for the plaintiff.

Any of the surrenders, admittances, or other documents mentioned in the case, are to be referred to, if necessary. The Court are to be at liberty to draw any inferences from the facts stated; and, if either party shall so desire, the facts are to be stated in the form of a special verdict, which is to be entered accordingly.

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Channell, Serjt. (with whom was *Willes*), for the plaintiff:

The first question is, whether the deed giving the power of appointment to Mary Sida, authorised an appointment by her during coverture. It is submitted that the words "notwithstanding her coverture," or "whether covert or sole," were not necessary; or, if necessary, that they may be inferred; for, unless the power could be exercised during coverture, it could only be available in the event of Mrs. Blomfield's surviving her husband; and this can hardly be said to be consistent with the intention of the parties. In *Driver* d. *Berry* v. *Thompson* (1), it was held, that, if a copyhold be surrendered *to such uses as a *feme covert* shall by will or [*568] codicil appoint, a paper purporting to be a will, though made by her living her husband, is a good execution. The words, the absence of which will be relied on here, were also wanting there.

(MAULE, J.: But there were the words, "at any time thereafter," &c.)

* * The surrender was of the estate of the wife; and it would [*569] be most materially and unwarrantably cutting down the evident intent of the surrenderor, to hold that the power could only be well executed by her when sole.

The next question is, whether the appointment is void for excess, in attempting to benefit persons not properly objects of the power. An appointment is not necessarily void because some of its limitations are incapable of being supported. [He cited *Doe* d. *Nicholson* v. *Welford* (2), *Hewitt* v. *Lord Dacre* (3), *Adams* v. *Adams* (4) and *Brudenell* v. *Elwes* (5).]

It will be said that John Blomfield the son did not, under this [571] appointment, take an absolute estate in fee, but only on the contingency of his surviving his father. The words "from and after the decease of my husband," do not limit the time of vesting of the estate, but refer only to the period of enjoyment. The intention of

(1) 13 R. R. 592 (4 Taunt. 294).
(2) 54 R. R. 537 (12 Ad. & El. 61).
(3) 44 R. R. 296 (2 Keen, 622).
(4) Cowp. 651.
(5) 6 R. R. 310 (1 East, 442; 7 Ves. Jr. 382).

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the appointor was, to benefit her son John and his issue, and at the same time to benefit his brother William. If the interest of John Blomfield was not a vested interest, William would lose his 200*l.*, unless his brother John survived his father.

(MAULE, J.: The words are express, that, "in case it shall happen that neither of my sons aforesaid shall be living at the decease of the said John Blomfield, my husband," the estate shall go over.)

The leaning of the Courts has always been to construe estates to be vested, if it be possible: *Wrightson* v. *Macauley* (1). The circumstance of the husband's having a life estate here, accounts for the insertion of the words "from and after the decease of my husband." The subsequent limitations, being void, may be considered as being out of the will altogether.

(CRESSWELL, J.: It is difficult to say that the limitation over is to be excluded, when it is a question of construction upon the whole intent of the will.)

[*572] As to the last point, it can hardly arise; for, the instrument, *if operative at all, operates in the nature of a will.

Talfourd, Serjt. (with whom was *Bovil*), for the defendant:

The argument resolves itself into two points: first, whether the power in question was well executed, being executed during coverture, and there being no express dispensation with the disability of coverture; secondly, whether John Blomfield, the son, took a vested estate, or, if vested, whether it was not divested by his death and that of his brother William during the life of the father.

1. This is not the case of a power purely collateral; it is a power coupled with an interest; all the estates failing, the ultimate limitation is to the wife in fee. That distinguishes the present case from *Driver* d. *Berry* v. *Thompson*, and other cases, where it has been held that a married woman may, without express words of dispensation, exercise a power notwithstanding her coverture. * * *

[574] 2. There is an undoubted excess in the execution of this power, the grandfather not being in any degree an object of the settlement. It is not disputed, that, where a certain quantity of interest is disposed of under a power, and it is sought to dispose of the rest in

(1) 69 R. R. 679 (14 M. & W. 214).

a manner not warranted by the power, the execution may be good *pro tanto*. But, here, that which vitiates the execution is engrafted upon and forms part of it. [He cited *Sadler* v. *Pratt* (1), *Denn* d. *Radclyffe* v. *Bagshaw* (2), *Alexander* v. *Alexander* (3) and *Routledge* v. *Dorril* (4).] Here, the attempt to benefit the grandfather forms part and *parcel of the appointment: and, though the attempt is [*575] abortive, it cannot operate to supply a new intention in the appointor. If John Blomfield the son took a vested interest, the conditional limitation to the grandfather could not take effect.

(MAULE, J.: It may have been a vested interest, subject to be devested on the happening of the contingency adverted to. The question is, whether that estate is defeated by the subsequent limitation, though such subsequent limitation cannot itself take effect.)

The estate is given to John Blomfield, the son, expressly and only upon the supposition that the appointor can give it contingently to the grandfather. Her obvious intention was, to give the estate to her son John, only in the event of his surviving his father, coupling that with an event over which her power did not extend; and therefore she has not given it to him at all.

Channell, Serjt., in reply:

If the wife's right to exercise the power during coverture, is to depend upon the intention of the husband, there is strong reason here to assume that he intended that it should be so exercised. As to the second point, no doubt could have arisen had John Blomfield the son, survived his father: and the argument on the part of the defendant must be the same as if John were now living. As to the third point, the argument on the other side is, that the estate did not vest in John, or that, if vested, it was devested, in the events that have happened, by the conditional limitation. But it is submitted that the interest could not be devested by a conditional limitation that is void. * * The subsequent limitation never [576] took effect at all; and therefore the former estate remains. It is important to bear in mind that the will of Mrs. Blomfield was made when two children of the marriage only existed. It was under that supposition that the power was executed.

Cur. adv. vult.

(1) 35 R. R. 102 (5 Sim. 632).
(2) 3 R. R. 2 (6 T. R. 512).
(3) 2 Ves. Sen. 640.
(4) 2 R. R. 250 (2 Ves. Jr. 357).

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COLTMAN, J., now delivered the judgment of the COURT (1):

This case, which was heard before the late Lord Chief Justice Tindal, my brothers Maule and Cresswell, and myself, was an ejectment brought for the recovery of six sevenths of certain copyhold lands, of which one Mary Sida was formerly seised in fee at the will of the lord of the manor of Overhall and Netherhall, and which she had, on the 2nd of August, 1764, surrendered, to the intent that the lord should regrant the same to the use of Mary Sida, until a marriage intended should be solemnized between her the said Mary Sida and John Blomfield the younger; and, from and after the solemnization of the marriage, to the use of John Blomfield, for life; and, after his decease, to the said Mary Sida
[*577] and her assigns for her life; and, after her decease, to the *use of such child and children of the body of Mary Sida by the said John Blomfield to be begotten, and for such estate and estates or other interests, and in such parts, shares, and proportions, manner, and form, charged and chargeable with any sum or sums of money for any other of their children, as she, the said Mary, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more witnesses, or by her last will or testament in writing, to be by her signed, sealed and published as such, in the presence of, and attested by, three or more witnesses, shall or may limit, declare, devise, direct, or appoint; and, in default of appointment, to the use of all the children of the marriage, in equal shares; and, in default of children, to the use of the said Mary, her heirs and assigns, for ever.

The marriage took place on the 9th of August, 1764. In November, 1765, John Blomfield, the eldest son of the marriage, was born; and in November, 1766, William, the second son of the marriage, was born.

On the 5th of January, 1767, there being then no other children of the marriage, the said Mary Blomfield made her will, signed, sealed, and published in the presence of, and attested by, three witnesses; and thereby gave, directed, and appointed the said copyhold lands unto her son, John Blomfield, and to his heirs and assigns for ever, from and after the decease of her husband John Blomfield, but, nevertheless, on condition that the said John

(1) His Lordship intimated that it was to be considered as the judgment of MAULE and CRESSWELL, JJ., and himself; the late Chief Justice not having expressed any opinion upon the case.

Blomfield should pay to her other son, William Blomfield, 200*l.*, within a year and a day after the decease of her husband, in case her son William Blomfield were then living and twenty-one years of age; but, if he should then be under the age of twenty-one, the said 200*l.* should be paid him by her son John as soon as he should come to the age of twenty-one years. But, in case it should happen that neither of her sons *aforesaid should be living at the [*578] decease of her husband, then and in that case she by that her will gave, devised, directed, and appointed all the said copyhold lands to her father-in-law, John Blomfield the elder, of Dedham, on certain trusts therein mentioned.

On the 16th of March, 1767, the said John Blomfield and Mary, his wife, were duly admitted to the said copyhold lands, pursuant to the surrender, to hold the same to the uses and in the manner mentioned in the said surrender. On the 6th of July, 1767, William Blomfield, the second son of the marriage, died. There were afterwards five other children of the marriage. In June, 1782, Mary Blomfield died, without having altered her will. On the 20th of July, 1820, John Blomfield, the son of Mary, the testatrix, died; and, on the 6th of September in the same year, John Blomfield, the husband, died. The lessor of the plaintiff is the youngest son, and customary heir, of John Blomfield, the eldest son of the marriage; and, as such, claimed the entirety of the said copyhold lands, as having been effectually appointed to John Blomfield, the son, in fee.

On behalf of the defendant, the claim of the plaintiff was resisted, on the ground that, the original surrender not containing any express clause empowering Mrs. Blomfield to make an appointment during coverture, the appointment was void on that ground. But we are of opinion that this objection is not valid. In Sir Edward Sugden's treatise on Powers (1), it is said: "It has long been firmly settled, that a married woman may execute a power, whether appendant, in gross, or simply collateral;" and, although a doubt has been expressed, in Preston on Abstracts (2), as to the correctness of this position, we are of opinion that the authorities referred to by Sir Edward Sugden, bear out his statement.

But it was further objected, on behalf of the defendants, that the [579] appointment was void, being made to persons to whom there was no power to appoint. On the part of the plaintiff, it was admitted, that, as far as there was an estate limited to John Blomfield,

(1) 7th ed. vol. i. p. 184. (2) Vol. i. p. 340.

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the father-in-law, the appointment was invalid; but that an appointment might be good as to part, though void as to other part, as in *Doe* d. *Nicholson* v. *Welford* (1): and here it was said that the appointment to John Blomfield, the son, in fee, in the first instance, was within the power, and therefore valid; and that it ought not to be considered as invalidated by the subsequent appointment to one not within the limits of the power.

It may be admitted, that, where that part of the appointment which is within the power, can be separated from that which is excessive, so as to leave the good part wholly unaffected and independent of that which is bad, so much as is within the power may be supported, though the remainder is rejected; but the case appears to us to be otherwise when the extent and effect of so much as is within the power is greater or less, according as the remainder is valid or invalid. In the present case, it is contended that there is a good appointment in fee to John, the son: but the validity of this appointment in fee will depend on the validity or invalidity of the other branch of the appointment. If the appointment in this case had been to the younger children of the marriage, upon the contingency of the two elder sons dying before their father, such an appointment would have been free from objection: but, in that case, the estate given in the first instance to John, would be subject to a contingency by which it would be liable to be defeated; and the estate or interest given to John, the son, by the actual appointment, is not less subject *to be defeated in consequence of the gift over being to a person incapable to take, than if he had been capable. Taking this appointment as a whole, the intention was not to give John a fee, absolute at all events, but only in case he or William, his brother, survived the father. These considerations show that the effect of the appointment to John, the son, cannot be disconnected from the consideration of the validity or invalidity of the subsequent appointment to the father-in-law, but that the one is dependent on the other.

[*580]

It may be observed, that, in the present case, the lessor of the plaintiff is not entitled to recover the six-sevenths in dispute, unless John Blomfield, the son, took an absolute estate in fee under the appointment; and that it is immaterial to the present question whether the appointment was wholly void, in consequence of its being mixed up with, and dependent upon, that part of the

(1) 54 R. R. 537 (12 Ad. & El. 61).

appointment which was not within the power, or whether John Blomfield, the son, took an interest under the appointment, but one which was liable to be defeated on the happening of the contingency of both the elder sons dying in the lifetime of the father. In either way of viewing it, the claim under the appointment to John, the son, as a present existing interest, cannot, we think, be sustained: and the property, under the events which have happened, will go in the same way as if no appointment had been made.

Our decision on this point renders it unnecessary to say anything with respect to the other objections urged against the validity of the appointment.

Judgment for the defendant.

PANNELL *v.* SIR JOHN BARKER MILL, BART., AND HENRY POWELL.

1846. *Nov.* 19.

[625]

(3 C. B. 625—639; S. C. 16 L. J. C. P. 91.)

In trespass for breaking and entering the closes of A., (the plaintiff,) it was pleaded that B., (the defendant,) being seised in fee of the closes, and of the manor of M., whereof the closes were parcel, demised the closes to C. for ninety-nine years; and that, afterwards, by indenture made between B. of the one part, and C. of the other part, C. granted to the defendant the sole and exclusive right to pursue, kill, and take all birds of warren at any time during the term in and upon the closes, together with free liberty to enter the closes, and therein to pursue, kill, and take the birds of warren in and upon the same, at any time, at his free will and pleasure; and so justified entering upon the closes for the purpose of pursuing therein birds of warren. A. craved *oyer* of the indenture, and demurred to the plea. The indenture appeared to be a demise of the closes by B. to C., "except, and always reserved out of that demise unto B., &c., all timber trees, &c., and also except and reserved all royalties whatsoever to the premises belonging or in any wise appertaining:"

Semble, that this clause created an exception or reservation, and was not properly pleadable as a grant.

But, held, that, at all events, it did not amount to a grant by C. of a liberty to B. to enter upon the closes for the purpose of pursuing, killing, and taking birds of warren.

TRESPASS, for breaking and entering two closes of the plaintiff, situate in the parish of Milbrook, in the county of Southampton, respectively called the Orchard and Hill Pasture, and treading down, &c., the strawberries, &c., there then growing, &c.

Third plea, as to all the trespasses in the declaration mentioned, except as to subverting and spoiling the earth and soil of the said several closes, that, long before the several times when &c., or any

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of them, Sir Charles Mill, Bart., was seised, in his demesne as of fee, of and in, amongst other things, the said closes in which &c., and also of the lordship and manor of Milbrook, of the demesne lands of which manor the said several closes in which &c. then were, and still are, part; that, being so seised, he afterwards, to wit, on the 4th of June, 1829, duly made and published his last will and testament in writing, &c., and thereby, amongst other things, gave and devised the said several closes in which &c., with
[*626] the appurtenances, and also the said *lordship and manor of Milbrook, with the appurtenances, to the defendant Sir J. B. Mill, for the term of his natural life; and also by his said will gave to the said Sir J. B. Mill power and authority to grant leases of the said several closes in which &c.: that the said Sir Charles Mill afterwards, and before the said several times when &c., or any of them, to wit, on the 26th of February, 1835, died so seised of and in the said several closes in which &c., with the appurtenances, as aforesaid, and of the said lordship and manor of Milbrook, with the appurtenances, without altering his said will as to the said devise of the said several closes in which &c., to the defendant Sir J. B. Mill; whereupon and whereby the said Sir J. B. Mill then became and was and continued seised in his demesne as of freehold for the term of his natural life, of and in the said several closes in which &c., with the appurtenances, and of and in the said lordship and manor of Milbrook, with the appurtenances: that thereupon afterwards, and before the said several times when &c., or any of them, to wit, on the 28th of July, 1845, he the said Sir J. B. Mill, being seised in his demesne as of freehold for the term of his natural life of and in the said several closes in which &c., with the appurtenances, and of and in the said lordship and manor of Milbrook, with the appurtenances, did, under and by virtue of the estate and interest of him the said Sir J. B. Mill in the said several closes in which &c., with the appurtenances, and also under and by virtue of the power and authority given to him by the said will of the said Sir C. Mill in that behalf, grant and demise unto Charles Bridger, his executors, &c., amongst other things, the said several closes in the declaration mentioned, to have and to hold the same unto him the said Charles Bridger, his executors, &c., from thenceforth for and during the term of ninety-nine years, if Capron
[*627] Bridger, Osmer Bridger, *and Arthur Bridger, or any or either of them, should so long live: that afterwards, to wit, on the said 28th of July, 1845, the said Charles Bridger entered and took possession

of the said several closes in which &c., as tenant to the said Sir J. B. Mill, under and by virtue of the last-mentioned grant and demise: that afterwards, to wit, on &c. last aforesaid, by a certain indenture then made by and between the said Sir J. B. Mill of the one part, and the said Charles Bridger of the other part—*profert*—the said Charles Bridger did, amongst other things, grant unto the said Sir J. B. Mill and other the person or persons for the time being entitled in reversion or remainder immediately expectant upon the determination of the term so granted by the said Sir J. B. Mill as above in this plea mentioned, the sole and exclusive right to pursue, kill, and take all birds of warren at any time during the said term being in and upon the said several closes, or any of them, together with free liberty for himself, themselves, and his and their servants, to enter into and upon the said several closes in which &c., or any part thereof, and therein to pursue, kill, and take the birds of warren in and upon the same, at any time, at his and their free will and pleasure: that afterwards and during the continuance of the said demise from the said Sir J. B. Mill, to the said Charles Bridger, and of the term aforesaid, and whilst the said Capron Bridger, Osmer Bridger, and Arthur Bridger were, and each of them was, in full life, and at the said several times when &c., the said several times being, and each of them being, at proper seasons of the year in that behalf, he the said Sir J. B. Mill, under and by virtue of the said grant, and in exercise of the said several rights so conferred thereby as aforesaid, and the said Henry Powell, as his servant, and by his command, did enter into and upon the said several closes in the declaration mentioned, for the purpose of pursuing *and killing and taking thereon, and did pursue, kill, and take therein, divers, to wit, ten birds of warren, to wit, partridges, and in so doing did unavoidably a little tread down, crush, and injure the produce, grass, and herbage of the plaintiff then there growing and being, doing no unnecessary damage to the same, as they lawfully might for the cause aforesaid; which were the several trespasses in the introductory part of the plea mentioned. Verification, and prayer of judgment, if &c.

[*628]

The plaintiff craved *oyer* of the indenture in the third plea mentioned, and demurred generally—the point intended to be relied on in support of the demurrer, being, that the deed, as set out on *oyer*, does not show the grant alleged in the plea.

The indenture in question was an indenture of lease, whereby the defendant Sir J. B. Mill granted, demised, limited, and appointed

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unto Charles Bridger, his executors, administrators, and assigns, certain premises therein described, and alleged to be situate in the manor and parish of Milbrook, in the county of Southampton, "together with all ways, paths, passages, waters, watercourses, easements, emoluments, profits, advantages, and appurtenances whatsoever to the said demised premises belonging or appertaining (except and always reserved out of this demise, unto the said Sir J. B. Mill, and other the person or persons for the time being entitled to the said premises hereby demised, in reversion or remainder immediately expectant upon the determination of the term hereby granted, all timber trees and trees likely to become or fit for timber, with the tops and boughs thereof, and the bodies of all pollards now or hereafter standing, growing, or being upon the said demised premises, or any part thereof, with full and free liberty for the persons or person who under the limitations of the aforesaid will, may, for the time being, be entitled in that behalf, [*629] and all others by *them or him duly authorized, but not further or otherwise, at all times to fell, cut, take, and carry away the same at his or their will and pleasure; and also except and reserved all royalties whatsoever to the said premises belonging, or in any wise appertaining): " *habendum*, for ninety-nine years, if Capron Bridger, Osmer Bridger, and Arthur Bridger, children of the said Charles Bridger, or any or either of them, should so long live, &c. The indenture also contained the following amongst other covenants: "And also that it shall and may be lawful to and for the said Sir J. B. Mill, and his assigns, and other the person or persons for the time being entitled as aforesaid, from time to time during the continuance of this demise, to commence and prosecute any action or actions, or lay information, in the name or names of him the said Charles Bridger, his executors, administrators, and assigns, or his or their tenants, being occupiers of the said demised premises, or any part thereof, against all and every person or persons who shall trespass on any of the lands hereby demised, for the purpose or by means of hunting, coursing, shooting, or sporting thereon, he the said Sir J. B. Mill, his heirs and assigns, or other the person or persons for the time being entitled as aforesaid, bearing and paying all the costs and expenses attending every such action, prosecution, or information, and indemnifying the said Charles Bridger, his executors, administrators, and assigns, or his or their tenants as aforesaid, and every of them, therefrom."

Joinder in demurrer.

Channell, Serjt. (with whom was *Barstow*), in support of the demurrer:

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The words of exception in the lease to Bridger do not confer the licence or authority claimed by the plea, which, to be an answer to the action, must show, not only an exclusive right to the game, but also *a right to enter upon the plaintiff's land for the purpose [*630] of pursuing and killing it. The words are, "except and reserved all royalties whatsoever to the said premises belonging, or in any wise appertaining." Assuming "royalties" to be tantamount to "free warren," it would be free warren appendant or appurtenant; and there is no allegation in the plea that there was any free warren appendant or appurtenant. [He cited *Bowlston* v. *Hardy* (1) and *Morris* v. *Dimes* (2).] Assuming therefore, that this exception [631] amounts to a grant of free warren, it is a grant of free warren in gross; which will not sustain the plea. The case of *Pickering* v. *Noyes* (3), however, is an authority to show that the words of reservation here do not amount to a grant of free warren.

Sir T. Wilde, Serjt. (with whom were *Manning*, Serjt. and *Fitzherbert*), *contrà*:

The case of *Pickering* v. *Noyes* does not touch the present. All that was decided there was, that the deed produced in evidence did not sustain the fifth plea. Here, the question is, what was the intention of the parties, and whether it can be carried into effect by the operation of the exception of all royalties, as a grant of free warren appendant or appurtenant. A right of free warren is properly described by the word "royalties": *Keble* v. *Hickeringill* (4); 22 & 23 Car. II. c. 25, s. 2; 4 & 5 W. & M. c. 23, s. 4. There are many authorities to show that the words of a grant are not to be taken in their strictly legal sense, without regard to the intention of the parties. [See *Parkhurst* v. *Smith* d. *Dormer* (5), *Hill* v. *Grange* (6), *Devaux* v. *J'Anson* (7), and the cases cited in *Hinchliffe* v. *Lord Kinnoul* (8).] It is by no means unusual to [632] reserve a right of sporting in this way.

(TINDAL, Ch. J.: Would minerals be excepted by the word "royalties?")

(1) Cro. Eliz. 547.
(2) 40 R. R. 395 (1 Ad. & El. 654).
(3) 28 R. R. 430 (4 B. & C. 639; 7 Dowl. & Ry. 49).
(4) 11 R. R. 273, *n.* (11 Mod. 74, 131).
(5) Willes, 327.
(6) Plowden, 170.
(7) 50 R. R. 786 (5 Bing. N. C. 519; 7 Scott, 507).
(8) 50 R. R. 579 (6 Scott, 650).

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The import of the word might be restrained by the other words of the deed.

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(TINDAL, Ch. J.: You would exclude the tenant from sporting. Nothing short of a grant of free warren would do that.)

Probably not.

(MAULE, J.: You certainly would not give full effect to the [*633] exception, unless you so construed *it.)

That a reservation or exception like this is pleadable as a grant, is clear from the cases of *The Durham and Sunderland Railway Company* v. *Walker* (1) and *Wickham* v. *Hawker* (2).

Channell, Serjt., in reply:

In *The Durham and Sunderland Railway Company* v. *Walker*, the words of reservation were held to constitute not properly an exception, but to give the lessors an easement newly created by way of grant from the lessee. So also, in *Doe* d. *Douglas* v. *Lock* (3), a reservation and exception of the liberty of hawking, hunting, fishing, and fowling, was held to be not properly an exception or reservation, but a privilege granted.

(MAULE, J.: You must show that it is impossible, in any state of circumstances, that the deed can support the plea as a grant.)

In *Barlow* v. *Rhodes* (4), where one seised in fee of premises, and of the soil over which a way, not of necessity, has been used by the occupier of them, grants those premises, "with all ways, roads, &c., to the same belonging, or in any wise appertaining," no way will pass unless legally appurtenant, or unless it appears from the grant itself that the parties meant to use the word in a sense more extended than the legal one. *Pickering* v. *Noyes* is a distinct authority to show that "royalties" will not include "free warren."

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the COURT:

This case, which was argued before the late Lord Chief Justice Tindal, my brothers Maule and Cresswell, and myself, was an

(1) 57 R. R. 842 (2 Q. B. 940).
(2) 56 R. R. 623 (7 M. & W. 63).
(3) 41 R. R. 496 (2 Ad. & El. 705).
(4) 38 R. R. 653 (3 Tyr. 280; 1 Cr. & M. 439).

action of trespass, for breaking and *entering the closes of the plaintiff, and doing damage there. The defendant pleaded, thirdly, that Sir Charles Mill, Bart., was seised in his demesne as of fee of [*634] the closes in which &c., and also of the manor of Milbrook, of the demesne lands of which manor the said closes in which &c. were and are part; and that he (Sir Charles Mill) devised the said closes in which &c., with the appurtenances, and also the manor of Milbrook, with the appurtenances, to the defendant, Sir John Barker Mill, for life; and, by his will, gave the said Sir John Barker Mill power to grant leases of the said closes in which &c., and died seised; whereupon Sir John Barker Mill became and was, and still was seised in his demesne as of freehold, for life, of and in the closes in which &c., with the appurtenances, and of the manor of Milbrook, with the appurtenances; and that Sir John Barker Mill, under and by virtue of his estate and interest in the said closes in which &c., and under and by virtue of the power given him by the will of Sir Charles Mill, granted and demised to Charles Bridger, his executors, administrators, and assigns, the said several closes in the declaration mentioned, for ninety-nine years, if Capron Bridger, Osmer Bridger, and Arthur Bridger, or any or either of them, should so long live; that Charles Bridger entered; and that afterwards, by an indenture made between Sir John Barker Mill of the one part, and Charles Bridger of the other part, the said Charles Bridger granted to Sir John Barker Mill, and other the person or persons for the time being entitled in reversion or remainder immediately expectant upon the determination of the term so granted as above mentioned, the sole and exclusive right to pursue, kill, and take all birds of warren, at any time during the said term, in and upon the said several closes, together with free liberty for himself, themselves, and his and their servants, to enter into and upon the said several closes in *which &c., or any part thereof, and therein [*635] to pursue, kill, and take the birds of warren in and upon the same, at any time, at his and their free will and pleasure: and so justified entering upon the said closes for the purpose of pursuing therein birds of warren.

The plaintiff craved *oyer* of the indenture. By that indenture, made between Sir John Barker Mill of the one part, and Charles Bridger of the other part, Sir John Barker Mill, for the considerations therein mentioned, granted, demised, limited, and appointed to Charles Bridger, his executors, administrators, and assigns, divers lands and tenements therein particularly mentioned, then in the

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tenure of John Pannell, "except and always reserved out of the demise, to Sir John Barker Mill, and other the person or persons for the time being entitled to the said premises thereby demised, in reversion or remainder immediately expectant upon the determination of the term thereby granted, all timber trees and trees likely to become or fit for timber, with the lops and boughs thereof, and the bodies of all pollards standing, growing, and being upon the said demised premises, or any part thereof, with full and free liberty for all the persons or person who, under the limitations of the will of Sir Charles Mill, might, for the time being, be entitled in that behalf, and all others by them or him duly authorized, but not further or otherwise, at all times to fell and take and carry away the same, at his or their will and pleasure; and also except and reserved all royalties whatsoever to the said premises belonging, or in any wise appertaining, to have and to hold the demised premises, with their appurtenances (except as before excepted), for ninety-nine years, if Capron Bridger, Osmer Bridger, and Arthur Bridger, or any of them, should so long live, yielding and paying the yearly rent of 3*s.* 6*d.* After various provisions not necessary to be specified, is the following proviso, viz. that it shall [*636] be *lawful for the said Sir John Barker Mill and his assigns, and other the person or persons for the time being entitled as aforesaid, from time to time, during the continuance of the demise, to commence and prosecute any action or actions, or lay informations, in the name or names of him the said Charles Bridger, his executors, administrators, and assigns, or his or their tenants being occupiers of the said demised premises, or any part thereof, against all person or persons who shall trespass on any of the lands thereby demised, for the purpose or by means of hunting, coursing, shooting, or sporting thereon; he said Sir John Barker Mill, his heirs and assigns, or other the person or persons for the time being entitled as aforesaid, bearing and paying all the costs and expenses attending every such action, prosecution, or information, and indemnifying the said Charles Bridger, his executors, administrators, and assigns, or his or their tenants, and every of them, therefrom.

The deed having been set out on *oyer*, the plaintiff demurred to the third plea.

The question arises on these pleadings, whether the indenture which is set out on *oyer*, does, in legal effect, amount to a grant such as is set out in the plea.

On the part of the defendant, the case of *Wickham* v. *Hawker* (1), was relied on, to show, that when a conveyance of lands contains the words "excepting and reserving to the grantors, their heirs and assigns, liberty to come upon the land, and hawk, hunt, fish, and fowl," as such a liberty cannot amount to an exception or a reservation, the clause will operate as a grant by the party to whom the land is conveyed. And it was said that the word "royalty" was a proper description of a right of free warren; for which *Keble* v. *Hickeringill* (2) was cited, in which the COURT is reported to have said that *the word "royalty" signified free warren; and, although [*637] there can be no grant of a right of free warren by a subject, *ut res magis valeat quam pereat*, it shall be construed to be a grant of a liberty to enter on his land and kill birds of warren. And the case of *Parkhurst* v. *Smith* (3) was cited, where it is said, that the construction of deeds ought to be favourable, and as near to the apparent intent of the parties as possibly may be, and the law will permit: that too much regard is not to be had to the natural and proper signification of words and sentences, to prevent the simple intention of the parties from taking effect; for, that the law is not nice in grants, and therefore it doth often transpose words contrary to their order, to bring them to the intent of the parties. And *Hill* v. *Grange* (4) was cited to the same purpose. And it was said, that here there could be no doubt but that the parties intended that Sir John Barker Mill and his assigns should have a right to enter on the land for the purpose of sporting, as otherwise the clause authorising him to prosecute trespassers in the name of the tenant, but at his own expense, would be idle; for, no one can be supposed to be willing to incur expense in preserving the game and prosecuting trespassers, unless he had the right of shooting the game when preserved.

The present case, however, is distinguishable from that of *Wickham* v. *Hawker*, as in that case the clause excepting and reserving the liberty to hunt, &c., could not by possibility operate as an exception or a reservation. In the present case it is not so; for, a royalty may by law be appurtenant to land, as in this very case of warren; a man may have warren in his own land, or in that of another man, by prescription: Bro. Abr. tit. Warren, pl. 2. And in the case of *Bowlston* v. *Hardy* (5), *it is said, a warren is [*638]

(1) 56 R. R. 623 (7 M. & W. 63).
(2) 11 R. R. 273, *n.* (11 Mod. 74).
(3) Willes, 332.
(4) Plowd. 170.
(5) Cro. Eliz. 547.

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not parcel nor any member of a manor, but it may be appertaining, but that is by prescription. And it is said in Dyer (1), and in the Year Book (2), that a man may have warren in the land of another as appendant to his manor; and if the manor is granted *cum pertinentiis*, the warren will pass.

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In the case under consideration, the words "except and always reserved, all royalties," &c., may have their proper effect of creating an exception; and the reason for holding their legal effect to be that of a grant by the grantee of the estate, fails.

But, passing this by, there is another reason why the construction contended for by the defendant ought not to be adopted. It is not enough for the defendant to make out a possible intention favourable to his view: he must show a reasonable certainty that the intention is such as he suggests. In the case of *Wickham* v. *Hawker*, the intention of the parties was clear and express; but in the present case, there is no such clear indication of intention. Mr. Bridger might be willing to consent that the name of his tenants should be used to prevent trespasses on his land; and yet, if he had been asked whether he was willing to grant a liberty to Sir John Barker Mill and his assigns to sport, at their free will, over the land, he might have refused.

Upon the whole, therefore, we think, that, if we take the words "except, and always reserved, all royalties," as amounting to an exception, they must be taken to be the words of Sir John Barker Mill, not a grant by the grantee, Mr. Bridger. If, on the other hand, they cannot be taken to be an exception or reservation, still they cannot be considered as amounting to a grant by Mr. Bridger
[*639] of the liberty of entering on the lands for the *purpose of shooting, unless we could see clearly that such was his intention in the words made use of.

This is to be considered as the judgment of my brothers MAULE and CRESSWELL and myself; the opinion of the late LORD CHIEF JUSTICE not having been declared.

Judgment for the plaintiff.

(1) Page 30, *n.* (209).

(2) In *Stile* v. *The Abbot of Tewkesbury*, T. 8 Hen. VII. fo. 4. *Quære*, whether the words are those of VAVISOR, J., *obiter*, or are those of the reporter.

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(3 C. B. 685—701; S. C. 4 Dowl. & L. 438; 16 L. J. C. P. 6.)

[685]

The grantee of part of the grantor's reversionary interest in the whole of the property in which a particular estate—as a term of years—has been created, is an assignee of the reversion within the 32 Hen. VIII. c. 34; but the grantee of the whole reversionary interest in part of the property is not such an assignee.

A. in February, 1840, demised to B. for twenty-one years as from Christmas then last; B. in January, 1841, demised to D. for three years, and, in April, 1842, demised to E. for the whole of B.'s term, less one day:

Held, that E. was an assignee of the reversion of the premises demised, within the statute and could avail himself of a breach of condition by re-entry.

TRESPASS. The declaration stated that the defendants, on the 6th of February, 1844, and on divers other days &c., with force and arms, broke and entered a certain dwelling-house of the plaintiff, situate in the parish of St. Mary, Lambeth, in the county of Surrey, and then made a great noise and disturbance therein, and stayed and continued therein making such noise and disturbance for a long space of time, to wit, &c.; and then forced and broke open the door of the plaintiff of *and belonging to the said dwelling-house, and [*686] damaged and spoiled the lock belonging to the said door, wherewith the same was then fastened, of great value, to wit, of the value of 5*l.*; and also, during the time aforesaid, to wit, on the said 6th of February, 1844, with force and arms, seized and took divers goods and chattels of the plaintiff, to wit, &c. &c., of the value, &c., and divers other articles of the plaintiff then being in the said dwelling-house, being of great value, to wit, &c., and carried away and retained the same: that by means of the several premises the plaintiff and his family, during all the time aforesaid, not only were greatly disturbed and annoyed in the peaceable possession of the said dwelling-house of the plaintiff, but also the plaintiff was during all that time hindered from carrying on his lawful business therein, and during all that time lost and was deprived of the use and benefit of the said dwelling-house, and of the said goods and chattels; and by means thereof the plaintiff, for and during the time aforesaid, lost and was deprived of the profits, benefits, and advantages which might, and otherwise would, have arisen and accrued to him from the possession, use, occupation, and enjoyment of his said messuage; and other wrongs, &c.

The defendants Burroughes and Berkeley pleaded jointly, and the defendant Leader severally: first, Not guilty; secondly, that

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the plaintiff was not, at either of the said times when &c., possessed of the dwelling-house in the declaration mentioned, in manner and form as was therein alleged; concluding to the country; thirdly, that the said goods and chattels were not, at the said time when &c., nor were nor was any of them, the goods and chattels of the plaintiff; concluding to the country.

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Upon each of these pleas issue was joined.

[687] Burroughes and Berkeley further pleaded: fourthly, as to all the trespasses except retaining the goods, that before any of the times when &c., to wit, on the 6th of February, 1840, one William Morton, being seised in fee of the dwelling-house in which &c., by indenture then made between the said W. Morton of the one part, and one Charles Leader of the other part (*profert*), the said W. Moreton demised unto C. Leader the dwelling-house in which &c., to hold the same unto the said C. Leader, his executors, &c., from thence for and during and until the expiration of a certain term not yet expired, to wit, until the full end and term of twenty-one years from the 25th of December then last; as by the said indenture would appear; by virtue whereof Leader then entered into and became and was possessed of the demised premises for the said term; and that, being so possessed, Leader afterwards, and before any of the said times when &c., to wit, on the 23rd of April, 1842, did, by indenture then made between Leader of the one part, and the defendant Burroughes of the other part (*profert*), demise the premises to the defendant Burroughes, to hold the same unto &c., for and during all the residue of the said term so to him Leader granted as aforesaid, wanting one day, as by the last-mentioned indenture would appear: that, the defendant Burroughes being so possessed, the plaintiff, claiming title to the said dwelling-house in which &c., under colour of a certain charter of demise pretended (1) to be thereof made to him by Morton, for the term of his natural life, before the making of the demise by Morton to Leader as aforesaid, whereas nothing of or in the said dwelling-house in which &c., ever passed by virtue of that charter, afterwards, and

[*688] before any of *the said times when &c., and during the continuance of the aforesaid several times, to wit, on the first of the said days in the declaration mentioned, entered into the said dwelling-house, and was thereof possessed: that thereupon Burroughes, in his own right, and Berkeley as his servant, and by his command, at the

(1) *Quære*, whether this non-assertion of an actual charter does not vitiate the colour and make the plea bad.

said several times when &c., entered into and upon the said dwelling-house in the declaration mentioned, and in which &c., in and upon the plaintiff's possession thereof, as being the dwelling-house of the defendant Burroughes: that, because the said goods and chattels in the declaration mentioned, before the said time when &c., had been wrongfully and injuriously put and placed, and were then wrongfully in the said dwelling-house, incumbering the same, and doing damage there to the defendant Burroughes, he, Burroughes, and Berkeley as his servant, and by his command, at the said time when &c., seized and took the said goods and chattels, so being in the said dwelling-house, and so incumbering the same as aforesaid, and removed and carried away the same to a small and convenient distance, to wit, in the parish aforesaid, and there left the same for the use of the plaintiff, doing no unnecessary damage to the same on the occasion aforesaid, as they lawfully might for the cause aforesaid; and that such were the same supposed trespasses in the introductory part of the plea mentioned, and whereof the plaintiff had above complained. Verification.

To this fourth plea the plaintiff replied, that, before the said times when &c., and before the making of the said indenture between Leader and Burroughes as in the said fourth plea mentioned, and while Leader was possessed of the said term as in that plea mentioned, to wit, on the 19th of January, 1841, Leader, being possessed as aforesaid, demised the said dwelling-house in which &c., with the appurtenances, to one H. Finnis, from *thenceforth for a [*689] certain term, to wit, for the term of three years, then next following, and fully to be complete and ended; by virtue whereof Finnis entered into and upon the said dwelling-house in which &c., with the appurtenances, and was thereof possessed for the last-mentioned term; that Finnis, being so possessed as aforesaid, and during the continuance of the said last-mentioned term, and before the said times when &c., to wit, on the 11th of August, 1843, by a certain assignment in writing, signed by Finnis, bargained, sold, assigned, transferred and set over unto the plaintiff the last-mentioned term, and all the right, title, and interest of Finnis therein then to come and unexpired; that, by virtue of that assignment, the plaintiff afterwards, to wit, on the day and year last aforesaid, entered into the said dwelling-house, and became and was possessed thereof, and continued so thereof possessed from thence until the defendants Burroughes and Berkeley afterwards, and during the continuance of the said assignment, to wit, at the said time when &c., of their own

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wrong, broke and entered the said dwelling-house, and committed the said several trespasses in the introductory part of the said fourth plea mentioned, and to which the said fourth plea was pleaded, in manner and form as the plaintiff had above thereof complained. Verification.

Rejoinder: That the demise in the said replication mentioned was made by Leader, and accepted by Finnis, upon certain terms and agreements, and subject to certain conditions, that is to say, upon the terms and conditions (amongst others) that Finnis, his heirs, executors, administrators, and assigns, should and would, and Finnis did, upon the making and acceptance of the said demise, for himself, his executors, administrators, and assigns, promise and agree with and to Leader, his executors, administrators, and assigns, that he, Finnis, his executors, administrators, and assigns, should

[*690] and would, *during the said term, keep the said premises in tenantable repair, and paint, in a proper and workmanlike manner, the wood and iron work of the said premises, where necessary to be done for the preservation thereof, and that, if he, Finnis, his executors, administrators, and assigns, should not properly keep and perform the said agreement, it should be lawful for Leader, his executors, administrators, or assigns, to re-enter into the demised premises, and to re-possess and enjoy the same as in his or their first and former estate; that Leader did not, nor would, nor did nor would the plaintiff, nor did nor would any other person, keep the said premises in tenantable repair during the said term, but, on the contrary thereof, Leader, after the making of the indenture in the said defendant's said fourth plea lastly mentioned, and before the making of the said assignment in the replication mentioned, and the plaintiff after the making of the said assignment, wrongfully suffered and permitted the same premises to be, and the same were at the time of the making of the said indenture, and from thence continually until and at the said times when &c., ruinous, prostrate, and in great decay, and in bad and untenantable condition for want of needful and necessary reparations, contrary to the form and effect, true intent and meaning of the said agreement—wherefore the defendants entered, as in the said plea is alleged, for breach of the said condition, and in order that Burroughes might re-possess and enjoy the same premises. Verification.

To this rejoinder the plaintiff demurred specially, assigning for causes: that the rejoinder neither traversed nor confessed and avoided the replication to which it was pleaded; that it afforded no answer to the replication, in this, that it set forth an agreement

by and between Leader, his executors, administrators, and assigns, and Finnis, his executors, administrators, and assigns, and the defendants Burroughes and Berkeley then endeavoured to take advantage, in the rejoinder, of the said agreement; *whereas it appeared, by the plea of the defendants Burroughes and Berkeley by them fourthly above pleaded, that Burroughes was not an assignee of Leader, but an under-lessee; that the agreement set forth in the rejoinder gave only to Leader, his executors, administrators, and assigns, an authority to re-enter; that, whereas the defendants Burroughes and Berkeley, in their fourth plea, alleged that they entered in right of the defendant Burroughes, and in the rejoinder alleged that they entered, in order that the defendant Burroughes might re-possess and re-enjoy the premises in the rejoinder mentioned, that the said two defendants did not show by the said rejoinder any authority whatever in them, or in either of them, to enter on the premises in the rejoinder mentioned, for breach of the said condition or otherwise; that no authority was shown, in the said rejoinder, for any one to re-enter except by the enforcement of their legal remedy, if any, by ejectment; that it was not shown, in or by the rejoinder, that the premises were out of repair, inasmuch as it was therein alleged that Leader and the plaintiff suffered the premises to be out of repair, but not that Finnis suffered them to be out of repair, and, for any thing that appeared in the rejoinder, Finnis may have put and kept the premises in repair and tenantable condition; and that the plaintiff could not take any material issue on the said rejoinder, or on any part thereof. Joinder in demurrer.

[*691]

Pearson, in support of the demurrer:

The main question here is, whether the defendant Burroughes was an assignee within the meaning of the 32 Hen. VIII. c. 34. * * *Whitton* v. **Peacock* (1) is a distinct authority to show that Burroughes was not such an assignee of the reversion as that statute contemplated. * * Here, as in that case, there is no privity of contract that can be assigned over in this way. It was upon this principle that it was held, in *Holford* v. *Hatch* (2), that a landlord cannot maintain an action of covenant for rent, against an undertenant. [He cited *Brewer* v. *Hill* (3), *Chaworth* v. *Phillips* (4), and Co. Litt. 215 a.]

[*693]

(1) 2 Bing. N. C. 411; 2 Scott, 630.
(2) 1 Doug. 183.
(3) 3 R. R. 596 (2 Anstr. 413).
(4) Sir F. Moore, 876.

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(MAULE, J., referred to *Isherwood* v. *Oldknow* (1). There, a devise was, to the use of H. J. for life, without impeachment of waste, &c.; remainder to the use of the plaintiff for life, with power to make leases for two or three lives, &c., or for the term of twenty-one years, so as there were reserved the best rent, without taking any sum or sums of money or other thing for, or in lieu of, a fine. H. J., by indenture of the 15th of October, leased for fourteen years, to be computed, as to the meadow land, from the 13th of February then last, the pasture land from the 25th of March last, and the messuage from the 25th of May last, under a yearly rent, payable to the lessor and such other person as should be entitled to the freehold and inheritance, half-yearly, on the 11th of November and 25th of March, the first payment to be made on the 11th of November next ensuing; and the lessee covenanted with the lessor, his heirs and assigns, for payment to the lessor and such other

[*695]

person, &c., of the rent at the days *and times, &c.; and it was held that the plaintiff, after the death of H. J., was an assignee within the statute 32 Hen. VIII. c. 34, and might maintain covenant against the lessor for rent arrear after the death of H. J., and during the continuance of the term.)

In that case, the remainder-man had the same quantity of estate that the tenant for life had.

(MAULE, J.: The case has always been considered as having much extended the rights of assigns of reversions. * * *

[696]

The declaration charges an entry *vi et armis*. *Newton* v. *Harland* (2), and the authorities cited in that case, show that a landlord is not justified in a forcible expulsion of a tenant who holds over after the expiration of his term.

(COLTMAN, J.: The averment that the alleged trespass was committed *vi et armis*, it seems, is mere form, importing nothing more than that the act was done with a sufficient degree of force to enable the defendants to obtain possession: *Harvey* v. *Brydges* (3).

WILDE, Ch. J.: The landlord may enter, provided he does it peaceably: *Taunton* v. *Costar* (4).)

That is expressly negatived here. * * *

(1) 16 R. R. 305 (3 M. & S. 382).
(2) 56 R. R. 488 (1 Man. & G. 644; 1 Scott, N. R. 474).
(3) 69 R. R. 718 (14 M. & W. 437; 3 Dowl. & L. 55).
(4) 4 R. R. 481 (7 T. R. 431).

Dowling, Serjt., *contrà*:

Burroughes is an assignee of the reversion within the 32 Hen. VIII. c. 34. [He cited Co. Litt. 215 a, *Palmer* v. *Thorpe* (1), Bacon's Abridgment (2), *Smith* v. *Stapleton* (3), and *Fitch* v. *Vaughan* (4); and argued that attornment not being now necessary, the effect of these authorities is to show that Burroughes is an assignee of the reversion within the statute.] He clearly was so during the subsistence of the underlease to Finnis.

(MAULE, J.: You insist that an assignee of part of the reversion, is an assignee of the reversion within the meaning of the statute.) [698]

That is the contention. [He referred to Selwyn's Nisi Prius (5).]

Pearson, in reply:

None of the authorities cited for the defendant meet this case. The lessor retains a day: the grantee, therefore, has not the same estate that he had pending the underlease, as in *Whitton* v. *Peacock*.

WILDE, Ch. J.:

The principal question in this case is, whether the defendant Burroughes was assignee of the reversion expectant on the determination of the lease granted by Leader to Finnis, and by Finnis assigned to the plaintiff. Upon the authorities, I think it is quite clear that he was such assignee within the statute 32 Hen. VIII. c. 34. It appears that Morton, the owner of *the fee, [*699] by indentures of the 6th of February, 1840, demised the premises to Leader for twenty-one years from the 25th of December then last; that Leader, on the 19th of January, 1841, demised them to Finnis for three years; and that Leader, on the 23rd of April, 1842, demised to Burroughes for the whole of his, Leader's, term, except one day. That the demise of the reversion expectant on the determination of the lease under which the plaintiff claimed, was an assignment of the reversion within the statute, none of the authorities cited induce me to doubt. Most of them are applicable to assignments of the reversion of part of the property. It is clear that an assignee of part of the reversion, in that sense, cannot take advantage of a condition broken. But here, the whole reversion

(1) Cro. Eliz. 152.
(2) Tit. Leases and Terms for Years (N).
(3) Plowd. 426, 433.
(4) Noy, 153.
(5) 9th ed. p. 485, *n.* (27)

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came to the defendant. It seems to me, therefore, that the demurrer assigning for cause that the plea does not show the defendant possessed of the reversion, fails. This also disposes of the objection as to the absence of privity of contract.

It is said that the defendant Burroughes had no right to enter; and that the allegation in the declaration, that that which is complained of was done with force and arms, distinguishes this case from *Newton* v. *Harland*, and that class of cases. The words "with force and arms," however, clearly have not, as is shown by the case of *Harvey* v. *Brydges*, the effect imputed to them. Formerly a doubt was entertained whether a landlord was justified in entering and expelling the tenant on the expiration of his term. But that doubt has been set at rest ever since the case of *Taunton* v. *Costar*, subject, of course, to any question of excess. Upon the whole, therefore, it seems to me, that, when the defendant says he was assignee of the reversion, and entered in respect of that reversion for condition broken, he gives a substantial answer to the action.

[*700] The objection that the rejoinder is a departure from *the plea, is altogether unfounded: the plea sets out the lease under which Burroughes claims, and the rejoinder, which merely shows that his title under that lease is not repelled by that which is alleged in the replication, is clearly in maintenance of the plea.

COLTMAN, J.:

I think this is an extremely clear case. The doctrine laid down in Co. Litt. 215 a, "that, where the statute speaks of grantees and assignees of the reversion, that an assignee of part of the state of the reversion may take advantage of the condition," has never been departed from. Lord Coke explains the meaning of the passage by the following instances: "As, if lessee for life be, &c., and the reversion is granted for life, &c.: so (which is exactly this case), if lessee for years, &c., be, and the reversion is granted for years, the grantee for years shall take benefit of the condition." In the next resolution, the distinction adverted to by the LORD CHIEF JUSTICE is pointed out, viz. "that a grantee of part of the reversion shall not take advantage of the condition: as, if lease be of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire, and against common right."

The other points are already sufficiently answered.

MAULE, J.:

The main point attempted to be discussed in this case has already been expressly decided by *Matures* v. *Westwood*, *Chaworth* v. *Phillips*, and the passages cited from Co. Litt. 215 a. They establish that the grantee of part of the reversion, is an assignee within the statute 32 Hen. VIII. c. 34; but that the grantee of the whole reversion in part of the thing demised, is not. The words of the statute of themselves seem to me to be perfectly clear and unambiguous; and I *should have entertained no doubt, if there had been no case upon the subject: but, seeing that the point was settled nearly two hundred years ago, it would be idle further to argue it. I will not unnecessarily lengthen the case by adverting to the other grounds of demurrer, which also appear to me to have been well disposed of.

[*701]

V. WILLIAMS, J., concurred.

Judgment for the defendants.

Pearson asked leave to amend; but the COURT refused to grant it.

FULLER *v.* FENWICK.

1846. *Nov.* 24.

(3 C. B. 705—714; S. C. 16 L. J. C. P. 79.)

[705]

The Court will not set aside, or refer back, an award for an objection in point of law not apparent on the face of it: as, upon a suggestion that the arbitrator improperly treated as a penalty that which was, by the express contract of the parties, stipulated and ascertained damages.

So, whether it is the award of a professional, or of a lay arbitrator.

COVENANT by lessor against lessee. The declaration stated, that, on the 19th of April, 1841, by a certain indenture then made between the plaintiff of the one part and the defendant on the other part, the plaintiff did demise, &c., unto the defendant a certain messuage or tenement, buildings, and pieces and parcels of land, particularly mentioned and described in the said indenture, &c., *habendum* to the defendant his executors &c.: that the defendant did, in and by the said indenture, covenant with the plaintiff, that he the defendant would, during the term in the said indenture mentioned, manage, farm, crop, and cultivate the lands thereby letten, according to the four-course system of husbandry (peas and beans, twice well hoed, not to be deemed crops), and would not sow any part thereof with colewort-seed (unless fed off), or sow any part

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thereof with hemp-seed, carraway-seed, coriander-seed, or teazle-seed; and would make yearly, during the said term, one fourth part of the arable lands by the said indenture letten, a good fallow (the tenant being allowed to sow sheep-feed among the wheat stubbles), or otherwise pay unto the plaintiff 20*l.* an acre per annum for every acre of the said arable lands which should be used, farmed, or tilled contrary to the true intent and meaning of the said covenant, and so in proportion for any greater or less quantity than an acre, over and above the rent reserved by the said indenture, and to be paid therewith, or to be recovered by the plaintiff as ascertained and liquidated damages, &c., &c. That, by virtue of the demise, the defendant entered, and became possessed, &c. Breach, first, that, after the making of the indenture, and during
[*706] the term *aforesaid, and whilst the defendant was so possessed of the said demised lands and premises, with the appurtenances, and every part thereof respectively, to wit, on the day of the commencement of the tenancy, and on divers other days and times between that time and the said determination thereof, he the defendant did not manage, farm, crop, and cultivate the lands thereby letten, according to the said four-course system of husbandry, and did not make one fourth part of the said arable lands in any year of the said term a good fallow, or pay unto the plaintiff 20*l.* an acre per annum for every acre of the said arable lands which were used, farmed, or tilled contrary to the true intent and meaning of the said covenant in that behalf, nor any sum of money in proportion, for any greater or less quantity than an acre, over and above the rent reserved by the said indenture; but, on the contrary thereof, after the making of the said indenture, and during the whole of the said term, that is to say, for four years from the making of the said indenture, which had elapsed before the commencement of the suit, managed, used, tilled, farmed, cropped, and cultivated a large part, to wit, one hundred acres of the said arable lands, in each and every year of the said term, contrary to, and on other and very different and less beneficial systems of husbandry than, the said four-course system of husbandry, and on very pernicious systems of husbandry, and contrary to the true intent and meaning of the said covenant in that behalf; and had not at any time paid unto the plaintiff 20*l.* per annum in respect of each of the last-mentioned acres of the said arable lands so used, farmed, and tilled contrary to the true intent and meaning of the said covenant in that behalf, although a large sum of money, to wit, 8,000*l.*, for and in respect

of each of the same acres, and over and above the rent reserved by the said indenture, had, before the commencement *of the suit, and after the expiration of the said term become, and was, and continued to be due and owing from the defendant to the plaintiff, for and in respect of such last-mentioned acres, at the said rate of 20*l.* an acre of such acres per annum, during such years as last aforesaid: and that, although, after the making of the said indenture, and during the said term, the defendant made in each year of the said term a fallow of a certain part of the said arable lands, to wit, one hundred acres thereof, yet that every part thereof so made a fallow as aforesaid was not made a good fallow, but, on the contrary thereof, was, during all the time aforesaid, made a bad fallow, contrary to the said covenant in that behalf. The declaration assigned three other breaches, and concluding with averring, that, by means of the premises, and of the said several breaches of covenant by the defendant, the plaintiff had been put to great costs and expenses of his moneys, to wit, to the amount of 100*l.*, in repairing and reinstating the said farm and premises; and had been, by reason of the premises, and not otherwise, forced and obliged to relet the same at a much less and lower rent, to wit, at a rent of 100*l.* per annum lower than he otherwise, and, but for the breaches of covenant above assigned, and the impoverished and bad state and condition consequent upon, and incidental thereto, he could, and might, and would have done, and had been and was otherwise injured, &c. [*707]

After setting out the indenture upon *oyer*, the defendant pleaded, amongst other pleas, to the first breach, that he did, from time to time, and at all times after the making of the said indenture, and during the said term thereby granted, manage, farm, crop, and cultivate the lands thereby letten, according to the said four-course system of husbandry, and did make one-fourth part of the said arable lands in each year of the said term a good fallow, *according to the true intent and meaning of the said indenture; and, to the second breach, that he did, from time to time, and at all times after the making of the said indenture, and during the said term thereby granted, make, in each year of the said term, the said acres of the said arable land in the said supposed breach of covenant secondly assigned, a good fallow, according to the true intent and meaning of the said indenture, concluding to the country. [*708]

By a Judge's order, made by consent, on the 21st of August, 1846, the cause was referred to the award of a barrister, in whose

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discretion were to be the costs of the cause and of the reference and award. The order of reference contained a clause, that, "in the event of either of the said parties disputing the validity of the said award so to be made and published as aforesaid, or moving the Court to set the same aside, the Court should have power to remit the matters thereby referred, or any or either of them, to the reconsideration of the said arbitrator."

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The arbitrator made his award on the 31st of October, 1846, as follows:

"Whereas, &c., &c., now, I, the said arbitrator, having taken on myself the said reference, and having heard the evidence adduced before me on behalf of the said parties by their respective counsel and attorneys, and having duly and maturely weighed and considered the same, do, in pursuance of the said partly-recited order, award, order, and adjudge, that, as to the first issue joined between the parties in the said action, the defendant did not, from time to time, and at all times, after the making of the indenture in the defendant's plea set out, and during the term thereby demised, manage, farm, crop, and cultivate the lands thereby letten, according to the four-course system, in manner and form as he in his plea to the [*709] first breach in the declaration in *the said cause assigned, hath alleged; and I assess the damages due to the plaintiff for the said breach of covenant, at 1*l.* 15*s.* (A second, third, and fourth issue were determined in favour of the plaintiff.) And, as to the last issue, I find the same in favour of the plaintiff, in whose favour I also determine the said cause. And I do further order and award, that (each of them) the said plaintiff and defendant shall respectively bear and pay his own costs of the said cause, and that the plaintiff shall pay to the defendant the costs incurred by him in this reference, and shall bear and pay his own costs of the said reference, and shall further pay the costs of this my award."

Worlledge, for the plaintiff, moved to set aside the above award, on the ground of an alleged "perverse mistake of law" on the part of the arbitrator, in treating the 20*l.* an acre as a penalty, instead of liquidated damages, or ascertained rent. The affidavits upon which the motion was founded, stated, that evidence was given by the plaintiff before the arbitrator, of a distinct breach of covenant on the part of the defendant, in cropping a portion of the demised land, consisting of seven acres, contrary to the four-course system of husbandry; that no evidence was offered in answer, nor was

there any attempt, by cross-examination, to rebut the plaintiff's case in this respect; and that it was distinctly submitted to the arbitrator by the plaintiff's counsel, that the 20*l.* mentioned in the covenant of the lease, and thereby covenanted to be paid by the defendant for every acre of the arable land which should be used, farmed, or tilled contrary to the covenant, was not in the nature of a penalty, but of liquidated and ascertained damages; and the arbitrator was requested to look into the authorities upon the subject; but that the arbitrator had either made his award in haste, and without duly considering the *point, or had mistaken the law. [*710] It also appeared from the affidavits, that a considerable body of evidence was given as to the other issues, that the case was closed (at Bury St. Edmunds) at seven o'clock in the evening of the 28th of October, and that notice of the award being ready was delivered in London on the 31st.

[He argued that the arbitrator had been guilty of misconduct in treating as a penalty what was properly recoverable only as liquidated damages.]

(WILDE, Ch. J.: There are numerous decisions showing that the Court will not withdraw the matter from the Judge whom the parties have themselves selected. It is always competent to reserve *points of law for the opinion of the Court, if the parties [*711] choose so to stipulate, rather than confide in the judgment and discretion of the arbitrator. Formerly, the Courts were in the habit of setting aside awards for misreception, or improper rejection, of evidence by the arbitrator; but of late it has been clearly settled that the decision of the arbitrator in this respect is final.)

This is not like the case of *Pinkerton* v. *Caslon* (1), where the attention of the arbitrator was not called to the particular claim: here, it is distinctly sworn that the point was made, and the arbitrator was requested to consider it. * * *

WILDE, Ch. J.:

The question as to how far the Court will interfere to correct the mistake of an arbitrator in fact or in law, has been presented in every possible shape. In some of the cases the discussion has proceeded upon a supposed difference, where a matter of law was in question, between a lay and a professional arbitrator. Lord ELLENBOROUGH first (2), and, subsequently, all the Judges, repudiated any

(1) 2 B. & Ald. 704.

(2) 17 R. R. 419. In *Sharman* v. *Bell*, 5 M. & S. 504.

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such distinction, holding, that, where the parties have thought fit to withdraw from the decision of the ordinary tribunals, and have selected their own Judge, they must be content to abide his judgment. The question has also been discussed in cases where some point of law has suddenly arisen in the course of the inquiry, and where, [*712] though *the matter was present to the mind of the arbitrator, but little time was afforded for consideration; and the Courts have said, that whether the arbitrator was a professional man or a layman, they would not inquire whether his conclusion was right or not, unless they could, upon the face of the award, distinctly see that the arbitrator, professing and intending to decide in accordance with law, had unintentionally and mistakenly decided contrary to law. The question, therefore, is, whether we can, from what appears on the face of this award, come to the conclusion that the arbitrator has decided this case in violation of some known principle of law. I am unable to trace the course of reasoning by which the arbitrator came to the conclusion he did. There is nothing on the face of the award to show that he has done wrong. Without, therefore, intending to cast any doubt upon the general doctrine laid down in the cases cited, as to the proper construction of the covenant in question, it is enough to say that we are precluded, by the frame of the award, from interfering.

It is to be observed that these rules tend to create great delay and expense, and to defeat, in many cases, the object of the parties; having obtained the decision of the tribunal which they themselves have chosen, they have but little ground of complaint if its judgment should happen to be erroneous.

COLTMAN, J.:

It is not necessary on this occasion to express any opinion as to whether the plaintiff was entitled to receive 20*l.* per acre for the breach of the defendant's covenant, or whether that was a matter to be compensated in damages. If that were the point to be determined here, it might require more consideration. But I agree with the LORD CHIEF JUSTICE, that the award does not, upon the face of it, show that the arbitrator has made any mistake in point of law; and [*713] we cannot assume *it from what is presented to us in the affidavits. I therefore think there should be no rule.

MAULE, J.:

I also think that no rule should be granted in this case. If the

case had been left to follow the ordinary course, it would have been decided, as to the facts, by a jury, and, as to the law, by the Judge, with an ultimate appeal to a court of error. The parties, for some reason, thought fit to withdraw the case from that mode of trial, and to refer the whole to an arbitrator, thinking, probably, that the facts would be more conveniently ascertained, and the law more conveniently determined by one from whose judgment there was no appeal, and that an arbitrator would, in the particular case, be a better judge of the facts than a jury, and of the law than the Court. It is quite true that it is sometimes advantageous to have a matter decided by a person possessing the smallest possible knowledge of law. These considerations have, in modern times, induced the Courts to deal much more liberally with awards than was formerly their practice, and, generally speaking, to hold them to be final, unless some substantial objection appears upon the face of them. There is nothing upon the face of this award to show that the conclusion the arbitrator has come to is not a perfectly just and right one. I cannot say that the arbitrator may not have been quite right in assessing the damages for the breach of covenant at the sum he has awarded, instead of assessing them at the rate of 20*l.* per acre. This is not like the case of *Farrant* v. *Olmius*. There the covenant was simply a covenant to pay an additional rent of 50*l.* for every acre that should be ploughed up; whereas, here, the complaint is, not simply that the defendant did not pay the additional rent, but, in the alternative, that he did not cultivate the land according to a given system, or pay the 20*l.* *an acre. In such a [*714] case, it may or may not be imperative on a jury to assess the damages at the 20*l.* an acre, and an arbitrator may be forgiven if he decide according to what occurred to him to be the justice of the case.

V. WILLIAMS, J., concurred.

Rule refused.

1846. *Nov.* 25.

HAMBIDGE *v.* DE LA CROUÉE AND FRANÇOIS (1).

(3 C. B. 742—745; S. C. 4 Dowl. & L. 466; 16 L. J. C. P. 85.)

[742]

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One partner has no implied authority to consent to an order for a judgment in an action against himself and his co-partner.

Though the Court will, in general, where a defendant is prejudiced by the act of an attorney in acting for him without authority, leave him to his remedy against the attorney, if solvent; that rule does not apply, where the defendant is in custody by reason of the unauthorised act, or where the plaintiff or his attorney is party to the wrong.

THE defendants carried on business in partnership as merchants, in the city of London, until November, 1844, when such partnership was dissolved.

On the 6th of April, 1846, the plaintiff sued out, and caused the defendant De la Crouée to be served with, a writ of summons in an action against the two defendants, for 48*l.* 19*s.* 6*d.*, alleged to be due from them to him for commission. De la Crouée immediately called at the office of the plaintiff's attorney, and, without having any authority from François, who had not been served with, or had any notice or knowledge that such writ had issued, signed a written consent, on behalf of François and himself, to an order for staying the proceedings on payment of the debt and costs by instalments; the attorney who entered the appearance and acted in the matter being introduced to De la Crouée for that purpose by the plaintiff's attorney. On the 17th of September, François was arrested upon a *testatum ca. sa.* at the suit of the plaintiff, for 57*l.* 5*s.* and interest.

[743]

Upon affidavits stating the above facts, and also suggesting that the plaintiff and De la Crouée were trading together in partnership, and that the proceedings were collusive and designed to defraud François, the latter obtained from ERLE, J., the following order: "That the appearance entered for the defendant François jointly with De la Crouée, at the suit of Hambidge, and all subsequent proceedings, be set aside for irregularity, with costs, to be taxed and paid by Hambidge; that the defendant François be discharged out of the custody of the Sheriffs of London as to this action, if within four days the sum of 57*l.* 5*s.* be paid into Court by the defendant François; that the said sum shall be paid to the plaintiff, in case the Court shall make a rule absolute for setting aside this order as to the discharge of the defendant François, and he shall not be rendered to gaol within four days after such

(1) See *Munster* v. *Cox* (1885) 10 App. Cas. 680, 55 L. J. Q. B. 108.—J. G. P.

decision; and that, if there be no rule, or the rule be discharged, or the defendant be rendered as above, the said sum be paid out to the defendant François, or to his attorney."

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Ball, on behalf of the plaintiff, on a former day, obtained a rule *nisi* to set aside the above order.

He submitted, upon the authority of *Brutton* v. *Burton* (1), where it was held that a warrant of attorney under seal, executed by one person for himself and his partner, in the absence of the latter, but with his consent, is a sufficient authority for signing judgment against both, that De la Crouée might lawfully bind his partner by a consent to a Judge's order; and, of an *Anonymous* case in Salkeld (2), and *Stanhope* v. *Firmin* (3), that the *remedy of François, if any, was against the party who alleged to have improperly assumed to act as his attorney in the matter, in the absence of any evidence that such attorney was insolvent.

[*744]

Wise showed cause, insisting that the order was well made; for, that one partner had no authority to bind the other, who had not been served with process, by a consent to a judgment against both, after the dissolution of the firm.

(WILDE, Ch. J.: One partner clearly has no right, without the express consent of his co-partner, to confess a judgment against him.)

Allen, Serjt., and *Ball*, who were called on to support the rule, conceding, as a general principle, that one partner could not bind the firm by his unauthorised consent to a Judge's order, submitted that François should be left to his remedy against the attorney who had acted in the improper manner suggested.

WILDE, Ch. J.:

In some cases, no doubt, where a party is aggrieved by one assuming, without authority, to appear and act as his attorney, he is left to pursue his remedy against him. Here, however, the plaintiff is not entirely free from blame; his attorney being the person who introduced De la Crouée to the other attorney, for the express purpose of getting his late partner fixed with the supposed debt, by confessing a judgment in the action against both. Besides,

(1) 1 Chitt. R. 707.
(2) 1 Salk. 88.
(3) 3 Bing. N. C. 301; 4 Scott, 39; *S. C.* 5 Dowl. P. C. 357, per nom. *Stanhope* v. *Eavery*.

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the party being in custody, the case differs materially from those in which the Courts have thought that complete justice might be done in the way suggested.

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COLTMAN, J., concurred.

MAULE, J.:

[*745] One of two partners cannot bind the *other by consenting to a reference: *Stead* v. *Salt* (1). He may release debts, because he has authority to receive them. Where the proceedings are, upon the face of them, regular, and the attorney who has acted, has acted without authority, and is in solvent circumstances, the Courts have said that they would leave the party to his remedy against him. So, here, if, instead of a *ca. sa.*, the execution had been by *fi. fa.*, and the attorney solvent, François might have had his remedy against him. But, being in custody under a *ca. sa.*, how is he to be compensated in that way for the loss of his liberty? We should not, in such a case, be doing complete justice, if we abstained from interfering.

V. WILLIAMS, J., concurred.

Rule discharged, with costs.

1846.
Jan. 31.
May 4, 22, 29.
June 6.
Nov. 9, 25.

REG. *v.* HENRY WILLIAM HEMSWORTH.

(3 C. B. 745—754.)

[745]

A party attached for contempt in not performing an award, and sentenced to imprisonment for a definite period, is not, by undergoing such imprisonment, exonerated from the performance of the award.

And, *semble*, that an action upon the award may be maintained at the same time.

Course of proceeding for enforcing performance of an award by attachment.

BY a Judge's order (afterwards made a rule of Court), dated the 23rd of May, 1843, and made in a cause wherein Henry William Hemsworth was plaintiff, and Thomas Henry Brian defendant, it was ordered that the cause, and all other matters in difference [*746] between the *parties, should be referred to an arbitrator, who, by his award, made on the 23rd of March, 1844, directed, amongst other things, as follows:

"And I further award, order, and direct that the said H. W. Hemsworth shall, on the 1st of April next, at, &c., pay unto the

(1) 28 R. R. 602 (3 Bing. 101; 10 J. B. Moore, 389).

said T. H. Brian, or his attorneys, for the use of the said T. H. Brian, the sum of 17*l.* 7*s.* 5*d.*: And I further award, order, and direct that the said H. W. Hemsworth shall, on the 30th of March instant, deliver up unto the said T. H. Brian, his executors, administrators, or assigns, the following warrants of wine and brandy, namely, a warrant for one hogshead of port wine, numbered 2,260, now or lately lying in the East Vault, London Docks, and marked B. No. 2 (here followed a description by marks and numbers of several casks of wine and one hogshead of brandy): And I further find that the said H. W. Hemsworth is in possession of certain wines in bottle, the property of the said T. H. Brian, consisting of, &c. &c.: And I further award, order, and direct that the said H. W. Hemsworth shall, on the 30th of March instant, deliver up all the said wines in bottle to the said T. H. Brian, or his servants or agents authorised, by writing under his hand, to receive the same: And I further award, order, and direct, that, if default be made by the said H. W. Hemsworth, his executors, administrators, or assigns, in payment of the said sum of 17*l.* 7*s.* 5*d.* to the said T. H. Brian, his executors, administrators, or assigns, or to his said attorneys, at the time in that behalf herein by me appointed, or, if the said H. W. Hemsworth, his executors, &c., shall not, on the 30th day of March instant, deliver up to the said T. H. Brian, his executors, &c., the said wine-warrants and brandy-warrant, and the said wines in bottle, hereinbefore directed by me to be delivered up, then and in either of the said cases, after making this my award a rule of her Majesty's Court of *Common Pleas (1), the [*747] said T. H. Brian may immediately proceed by attachment, or otherwise, for the recovery of the said sum of 17*l.* 7*s.* 5*d.*, and of the possession of the said wine-warrants and brandy-warrant and wines in bottle, or either of them, as the case may require."

In Hilary Term, 1845, a rule for an attachment against Hemsworth was made absolute, for non-payment of the 17*l.* 7*s.* 5*d.*, and non-delivery of the wine and brandy-warrants and wines in bottle, with the exception of the warrant for the hogshead of port wine, numbered 2,260, as to which the demand was insufficient (2). Hemsworth was arrested on the 29th of July, upon a writ of attachment issued pursuant to this rule.

On the 9th and 12th of September, 1845, Hemsworth and J. F.

(1) The Judge's order, not the award, would be made a rule of Court.

(2) See *Hemsworth* v. *Brian*, 1 C. B. p. 131.

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Lackersteen and J. B. Huntington, his bail, entered into recognisances that Hemsworth should appear and answer interrogatories, when filed: Hemsworth was at the same time sworn before Platt, B., at Chambers, to answer such interrogatories, when filed.

The interrogatories were filed on the 23rd of December, 1845. Notice thereof was given to Hemsworth on the 9th of January, 1846. On the 15th, he attended before Coltman, J., at Chambers, for the purpose of being sworn to his answers thereto; but that learned Judge declined to swear him, on the ground that he had already been sworn before Platt, B. On the 16th, Hemsworth went before Master Ray to make answer; but, in consequence of the non-attendance of the prosecutor's attorney, and an objection taken by Hemsworth, that he ought to have been sworn in Court, and not before a Judge at Chambers, nothing was done.

On the 31st,

1846. *Jan.* 31.

[748]

Byles, Serjt., on behalf of Hemsworth, obtained a rule calling upon Brian to show cause why the bail should not be discharged and the recognisance cancelled, and why Hemsworth should not be discharged from the alleged contempt, and why the interrogatories should not be taken off the file, for irregularity. It was insisted that Hemsworth should have been sworn in Court, and that the interrogatories could not properly be filed until after he had been so sworn.

May 4.

Talfourd, Serjt., who showed cause, suggested a doubt whether this was a case in which the party was entitled to have interrogatories filed at all. * * *

(ERLE, J.: The rule *nisi*, the rule absolute, and the affidavits used in support and in opposition thereto, disclose all the circumstances. I must confess I do not see the use of interrogatories in such a case.)

Byles, Serjt., in support of his rule, urged that there had been great and unnecessary delay on the part of the prosecutor. * * *

The COURT said that the only irregularity had been on the part of Hemsworth himself; that he should have come before the Court to be sworn in the first instance; and that much of the delay had been the result of the objections urged by himself before the Master: and the rule was discharged with costs.

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On the 22nd of May, Hemsworth appeared in Court, and was sworn to answer the interrogatories. By his answers *thereto filed on the 27th, he admitted that he had been duly called upon to perform the award, and had omitted to do so: but excused himself, as to the non-payment of the money, on the ground of his bankruptcy, and, as to the non-delivery of the wine and brandy-warrants and the wine in bottles, that the former were in the custody of the Commercial Bank, who claimed to have a lien upon them, and that the latter was in the possession of his assignees. *May* 22. [*749]

On the 29th of May, upon motion, the COURT ordered that it be referred to Master Ray, to examine the matters of the interrogatories and answers, and to report thereon to the Court. *May* 29.

On the 6th of June, the Master made his report, finding, in substance, that Hemsworth was in contempt for non-performance of the award, and that his excuses for such non-performance were insufficient. *June* 6.

The COURT thereupon directed that the matter should stand over until Monday, the 8th, when Hemsworth was ordered to attend, with his bail; and, on that day, a further order was made by the COURT, by the consent of the parties, and the bail, "that the matters of the said prosecution, the recognisances above mentioned, and of the said Master's report, be, and the same are, hereby enlarged to the first day of next Term."

Accordingly, on the first day of this Term, the parties again attended, Hemsworth appearing in person, and the prosecutor by counsel. *Nov.* 2.

Hemsworth's affidavit filed in mitigation sought to impeach the validity of the award, on the ground of alleged misconduct on the part of the arbitrator; and stated, that a *fiat* in bankruptcy issued against him in March, 1844; that the messenger of the court of bankruptcy took possession thereunder of all his property and effects, including all the goods and chattels mentioned in the award, and thereby directed to be given up to Brian, with the exception of the wine and brandy-warrants mentioned in the award, which were in the possession of the Commercial Bank of London at the time of his bankruptcy, and held by them for money claimed to be due by him to the Bank; that the assignees under the *fiat* also claimed the warrants, subject to the lien of the Commercial Bank; that the alleged contempt, for and in respect of which he was arrested as [750]

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aforesaid, was not wilful on his part, but that, for the causes aforesaid, he had been and still was unable to perform or obey the award; that, since the issuing of the attachment against him, he had made repeated offers of compromise, which Brian had rejected; that Brian having attempted to prove under the *fiat* in respect of his claim under the award, the Commissioner declined to receive such proof, but offered to go into the original transactions if Brian would forego the award, which Brian agreed to do; and that the Commissioner thereupon went into the inquiry, and came to the conclusion that the award had been improperly made.

The affidavits on the other side stated, that the wines in bottle mentioned in the award, had not [been] taken by the assignees under the *fiat*, they having abstained from taking these wines, by reason of Hemsworth's statement that he had no beneficial interest in them, but held them only as trustee for Brian, and, consequently, that the same had always remained in the possession and under the
[*751] control of Hemsworth, and that he had since *either sold them or placed them in the hands of his father; that Hemsworth had offered to pay Brian 200*l.* and his costs, in satisfaction of his demand, or to deposit the whole amount claimed by Brian, provided the latter would consent to a second reference; that Hemsworth's statement before the Commissioner under the *fiat*, showed that he had considerable property beyond what would satisfy all his creditors; that Brian's costs in this matter amounted to nearly 200*l.*; and that an offer had been made by a solicitor, at a meeting of Hemsworth's creditors, to advance, upon the security of a certain reversionary interest which he possessed, a sum sufficient to pay all his debts in full, but that Hemsworth had not taken any steps to avail himself of that offer, but had been making various attempts to compromise with his creditors upon easier terms.

Hemsworth, in person, prayed for time to answer these allegations: but, the COURT holding that he was not entitled to it, he referred to *Ex parte Laurence* (1), to show that the contempt must be wilful, in order to render a party liable to be visited with punishment; and he contended that this being positively and distinctly negatived by his affidavit, he was entitled to be discharged on payment of a nominal fine.

Talfourd, Serjt., and *Phipson*, *contrà*, insisted that the question, whether the contempt was wilful or not, was concluded by the

(1) 2 Dowl. P. C. 230.

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Master's report; and that neither the answers to the interrogatories, nor the statements in Hemsworth's affidavit, in any degree purged his contempt; inasmuch as this merely stated circumstances which, if true, only went to the merits of the award, the validity of which it was now too late to impeach.

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WILDE, Ch. J.: [752]

The affidavits clearly show that the prisoner has no valid excuse for not performing the award. He is, therefore, in contempt. Let him be brought up on Monday next; and, in the meantime, we will look further at the affidavits, and consider the proper course to be adopted under the circumstances.

Cur. adv. vult.

The prisoner being now brought up, *Nov.* 9.

Talfourd, Serjt., suggested that the judgment of the Court must be specific, imposing a definite fine or imprisonment, or both.

WILDE, Ch. J.:

Having heard and attentively considered all that has been urged on either side, the Court is prepared to exert its authority for the enforcing of the prosecutor's rights under the award. The prisoner will, therefore, stand committed until the last day of Term, when he will be brought up to receive sentence. In the meantime, the Court will require to be furnished with affidavits showing the value of the wines in question.

The following rule was thereupon drawn up:

"Upon reading, &c., the said Henry William Hemsworth (now present here in Court) is, by the Court here, adjudged in contempt: it is therefore ordered that the said Henry William Hemsworth be committed to the custody of the Keeper of the Queen's Prison for the contempt aforesaid; and it is further ordered, that the said Keeper, or his deputy, do bring the said Henry William Hemsworth to the Bar of this Court on the 25th day of November instant, then and there to receive the judgment of this Court for his said contempt."

Affidavits were accordingly produced on this day. Those filed on the part of the prosecutor stated the value of the wine and brandy-warrants mentioned in the award (exclusive of the warrant for the excepted hogshead of port wine), and of the wine in bottles, *Nov.* 25. [753]

REG. v. HEMSWORTH.

to be 368*l.* 9*s.* On the part of Hemsworth, it was sworn that the utmost value did not exceed 200*l.*

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WILDE, Ch. J.:

The non-performance of the award is not a single act of contempt which will be purged by a definite period of imprisonment: but the prisoner may, at the expiration of the term for which the Court upon this occasion sentences him, if the award shall then remain unperformed, be again brought up to answer for his continuing contempt. Nor will he thereby, as I conceive, be relieved from an action upon the award.

It is evident, from the statements contained in the several affidavits, that the prisoner can, if he pleases, perform this award: and his not doing so is a wilful and pertinacious contempt of the authority of the Court. With a view, therefore, to compel him to act justly towards the prosecutor, the sentence of the Court is, that he be imprisoned in the Queen's Prison for the space of two years from this date, unless he shall sooner comply with the terms of the award. If he thinks fit for so long a time to withhold the property of the prosecutor, he may consider himself the author of his own imprisonment. This commitment, therefore, will enure until the sum awarded and the costs, are paid, and the warrants and wine are delivered up, or their value paid.

The following rule was thereupon drawn up:

"Upon reading, &c., the said Henry William Hemsworth (now present here in Court), being brought to the Bar of the Court by the Keeper of the Queen's Prison, in pursuance of the last-
[*754] mentioned rule, is by *the Court here adjudged in contempt: It is thereupon ordered that the said Henry William Hemsworth, for the contempt aforesaid, be imprisoned in the custody of the Keeper of the Queen's Prison for the space of two years from the date hereof; and that the said Henry William Hemsworth be remanded to the custody of the said Keeper, to be by him kept in safe custody in execution of this judgment."

VAUGHAN *v.* HANCOCK.

(3 C. B. 766—769; S. C. 16 L. J. C. P. 1.)

1846. *Nov.* 5.

[766]

The plaintiff agreed to let a house to the defendant, and to sell him certain furniture and fixtures therein, and to make certain alterations and improvements in the house; and the defendant agreed to take the house, and to pay for the furniture and fixtures and alterations: Held, that this was an agreement relating to an interest in land, within the fourth section of the Statute of Frauds.

ASSUMPSIT. The declaration stated, that, in consideration that the plaintiff would let to the defendant, as yearly tenant, a certain messuage, &c., and would sell to the [defendant], for a certain sum of money, certain furniture and fixtures then being in and upon the said messuage, and would make certain improvements and alterations therein, according to the desire and to *the approbation of [*767] the defendant, he the defendant then promised that he would become the tenant of the plaintiff, and would take the said furniture at a reasonable price, and would pay to the plaintiff a reasonable price for the said alterations and improvements: Averment, that the plaintiff was ready and willing to let the messuage, and then tendered the same to the defendant, and was then ready and willing to sell the said furniture and fixtures to the defendant, and did then make the said alterations and improvements in the said messuage, &c., the same amounting to the sum of 12*l.* 10*s.*; but that the defendant would not then become the tenant, &c., nor take the said furniture and fixtures, or pay a reasonable price for the same, nor would he pay the said sum of 12*l.* 10*s.*, or any part thereof, for the said alterations and improvements.

Plea, *non assumpsit.*

The cause came on for trial before Erle, J., at the last Bristol Assizes. The plaintiff sought to prove the contract alleged in the declaration by oral testimony: but it was objected on the part of the defendant, that, being a contract relating to lands, it could only be sustained by written proof; and the cases of *The Earl of Falmouth* v. *Thomas* (1) and *Mechelen* v. *Wallace* (2) were cited.

The learned Judge nonsuited the plaintiff, giving him leave to move to enter a verdict of 12*l.* 13*s.* 4*d.*, if the Court should be of opinion that the case was not within the fourth section of the Statute of Frauds.

(1) 38 R. R. 584 (1 Cr. & M. 89).

(2) 45 R. R. 669 (7 Ad. & El. 49; 2 N. & P. 224).

VAUGHAN v. HANCOCK.

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[*769]

Crowder now moved accordingly:

The cases cited at the trial do not govern this. * * The contract is divisible, and, on the pleadings, it is divided. There would be a perfectly good consideration *left, if all were expunged except that part which related to the alterations and improvements.

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(MAULE, J.: The letting of the house was clearly the material part of the consideration for the contract.)

No doubt the taking of the house was part of the inducement to the defendant's entering into the contract: but the question is, whether the three branches of the contract may not be severed.

WILDE, Ch. J.:

I cannot see the smallest ground for doubting that the plaintiff was properly nonsuited in this case. The principal subject-matter of the agreement was the occupation of the premises. It was with a view only to that, that the defendant contracted to pay for the improvements and alterations, which were obviously desirable to him only in connection with his occupation of the house. The consideration was entire, for the letting of the house with the alterations. *Mechelen* v. *Wallace* is a distinct authority.

The rest of the Court concurring—

Rule refused.

1847. Jan. 13.

[776]

LANE *v.* DIXON.

(3 C. B. 776—791; S. C. 16 L. J. C. P. 129.)

A. hired of B. certain rooms in the house of B., at a yearly rent, with the privilege of putting a brass-plate, with A.'s name engraved thereon, upon the front door, there to remain so long as A. should continue to occupy the apartments. The rent being in arrear, B. removed the brass-plate from the door, and refused to allow the plaintiff to have access to the apartments.

In trespass, charging that B. broke and entered the apartments of A., and expelled him therefrom, and removed the plate, and seized and converted his goods, B., amongst other pleas, pleaded that A. was not possessed of the brass-plate:

Held, that the facts warranted the jury in finding that B. was guilty of breaking and entering the apartments; that the removal of the plate was properly treated as a substantive trespass, having been pleaded to as such; and that, in the absence of evidence to show that it was affixed to the freehold, it must be assumed to be a chattel only.

TRESPASS. The declaration stated that the defendant, on the 14th of June, 1846, and on divers other days and times between that day and the commencement of this suit, with force and arms,

broke and entered certain rooms and apartments of the plaintiff, in and parcel of a certain dwelling-house, situate, &c., and then ejected, expelled, put out, and amoved the plaintiff and his family and servants from the possession, use, occupation, and enjoyment of the said rooms and apartments, and kept and continued them so ejected, expelled, put out, and amoved, for a long space of time, to wit, from thence hitherto; and also, during the time *aforesaid, to wit, on [*777] the day and year first aforesaid, removed and took a certain brass-plate of the plaintiff, containing engraved thereon the name of the plaintiff, off and from the outer door of the said dwelling-house, and kept and continued the said brass-plate so removed and taken as aforesaid, for a long space of time, to wit, from thence hitherto; and also, during the time aforesaid, to wit, during the time first aforesaid, seized and took certain furniture, papers, goods, and chattels, to wit, &c. &c., of great value, to wit, of the value of 1,000*l.*, and kept and detained the same from the plaintiff for a long space of time, to wit, to the commencement of the action, and converted and disposed thereof to his own use: By means of which several premises, not only the plaintiff, for and during all that time, lost and was deprived of the use and benefit of the said rooms and apartments, but also he the plaintiff was, during all that time, hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business, and had been forced and obliged to lay out and expend, and had laid out and expended, a large sum of money, to wit, the sum of 50*l.*, in and about the procuring and providing himself with other rooms and apartments, and other furniture, papers, goods, and chattels, in the room and place of the same so taken, detained, and converted as aforesaid; and also he the plaintiff was thereby greatly exposed and injured in his credit and circumstances; and other wrongs, &c.

The defendant pleaded, first, Not guilty.

Secondly, as to the breaking and entering the said rooms and apartments in the declaration mentioned, that the said rooms and apartments were not, nor were nor was any or either of them, at the said times when &c., or at any or either of them, the rooms or apartments, or room or apartment of the plaintiff, *modo et formâ*, concluding to the country.

Thirdly, as to the same trespass, that one John Johnson, before [778] any of the said times when &c., to wit, on the 26th of September, 1845, was seised in his demesne as of fee of and in the said rooms and apartments in which &c., and of and in the remainder of the

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said house in the declaration mentioned, with the appurtenances, and, being so thereof seised, afterwards, and before any of the said times when &c. in the declaration mentioned, to wit, on the day and year last aforesaid, by a certain indenture then made between Johnson of the one part, and the defendant of the other part—*profert*—Johnson demised the said rooms and apartments in which &c., together with the remainder of the said house, to the defendant, to have and to hold the same to the defendant from the 29th of September, 1845, for and during and unto the full end and term of twenty-one years from thence next ensuing, determinable, nevertheless, as in the indenture mentioned, *prout patet*, &c.; that by virtue of that demise, the defendant afterwards and before any of the said times when, &c., and after the said 29th of September, 1845, to wit, on the 30th of September, 1845, entered into and upon the said rooms and apartments in which &c., and the remainder of the said house, and became and was possessed thereof for the said term so to him thereof granted as aforesaid; † that, the defendant being so possessed, the plaintiff, claiming title to the said rooms and apartments in which &c., with the appurtenances, under colour of a certain charter of demise pretended to be thereof made to him by Johnson, for the term of his natural life, before the making of the said demise by Johnson to the defendant as aforesaid, whereas nothing of or in the said rooms and apartments in which &c., or any part thereof, ever passed by virtue of

[*779] that charter, afterwards, and before each of *the said times when &c., and during the continuance of the said term so demised to the defendant as aforesaid, to wit, on the several days in the declaration mentioned, entered into and upon the said rooms and apartments in which &c., with the appurtenances, and was thereof possessed at each of the said times when &c.; that thereupon, the defendant, at each of the said several times when &c., entered into and upon the said rooms and apartments in the declaration mentioned, and in which &c., in and upon the plaintiff's possession thereof, as being the rooms and apartments of the defendant, doing no unnecessary damage to the plaintiff on the occasion aforesaid; which were the same alleged trespasses in the introductory part of the plea mentioned, and whereof the plaintiff had above thereof complained against him. Verification.

Fourthly, as to the removing and taking the said brass-plate off and from the outer door, that the plaintiff was not possessed of the said brass-plate, *modo et formâ*, concluding to the country.

Fifthly, as to the same trespass, that the defendant, at the time of the affixing of the said brass-plate to the said outer door, as thereinafter mentioned, and from thence until and at the time when the same was so removed and taken off and from the said outer door, was possessed of the said outer door; that, before the same was so removed and taken, as in the declaration mentioned, to wit, on the 1st of January, 1846, he, the plaintiff, by the permission of the defendant, affixed the said brass-plate to the said outer door, upon certain terms just before the time of the so affixing the same, to wit, on &c. last aforesaid, agreed to by the plaintiff and defendant, that is to say, on the terms that the defendant might remove and take the said brass-plate off and from the said outer door whenever he the defendant should so please; that the said brass-plate continued so affixed to the said outer door, upon the terms aforesaid, *until and at the said time when &c., as in the declaration [*780] mentioned, the defendant removed and took the same off and from the said outer door; that, at the said time when &c., as in the declaration mentioned, the said terms then still remaining in full force, he the defendant removed and took the said brass-plate off and from the said outer door, because he the defendant then, at the said time, pleased so to remove the same off and from the said outer door, as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff on the occasion aforesaid; which was the same trespass, &c. Verification.

The sixth plea, as to the breaking and entering the said rooms and apartments at the first of the said times when &c. in the declaration mentioned, and as to the seizing and taking the said furniture, papers, goods, and chattels in the declaration mentioned, after stating the demise by Johnson to the defendant, and the entry of the latter thereunder, as in the third plea, down to the asterisk (1), proceeded to aver, that, being so possessed, the defendant, at the commencement of the said term so to him therein granted as in that plea mentioned, and before the first of the said times when &c., to wit, on the 30th September, 1845, demised to the plaintiff the said rooms and apartments in which &c., to have and to hold the same thenceforth to the plaintiff at the will of the defendant, at and under the weekly rent of 19*s.* 3*d.*, payable weekly, that is to say, on every Monday in every week while the said tenancy should so continue; that, by virtue of the last-mentioned demise, the plaintiff, at the time of the making thereof, and before the first

(1) Page 486, line 17. A † is substituted in the present reprint.

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of the said times when &c., to wit, on &c. last aforesaid, entered into and upon the said rooms and apartments in which &c., and became and was possessed thereof for the said estate to him thereof granted as aforesaid, the reversion thereof belonging to the defendant for all the residue of the term so to him granted

[*781] *by Johnson; that the plaintiff so then continued to be such tenant to the defendant as last aforesaid, for a long time, to wit, from the making of the said demise to the plaintiff until and at the first of the said times when &c. in the declaration mentioned; that afterwards, during the said tenancy of the plaintiff, and while the reversion belonged to the defendant as aforesaid, to wit, on the 12th of January, 1846, and before the first of the said times when &c., a large sum of money, to wit, 14*l.* 18*s.* 9*d.*, of the rent aforesaid, for fifteen weeks of the said tenancy of the plaintiff, ending on the day and year last aforesaid, and then last elapsed, became and was due and payable to the defendant, and at the said first of the said times when &c. was in arrear and unpaid; wherefore the defendant, during the continuance of the said term so to him granted as aforesaid, and of the said estate of the plaintiff, and while the reversion so belonged to the defendant, at the first of the said times when &c., the outer door of the said rooms and apartments then being open, did, in the daytime, enter into and upon the said rooms and apartments in which &c., for the purpose and in order to seize, and did then seize, take, and distrain the said furniture, papers, goods, and chattels in the declaration mentioned, as and for a distress for the said rent so due and in arrear as aforesaid, and which were then liable to be distrained as and for such distress, and which at the time of the said distress were in and upon the said rooms and apartments, and carried away and impounded the same as such distress as aforesaid, as he the defendant lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff on the occasion aforesaid; which were the same alleged trespasses in the introductory part of the plea, &c. Verification.

The plaintiff joined issue on the first, second, fourth, and fifth pleas. To the third plea he replied that Johnson, before any of the

[*782] said times when &c. in the *declaration mentioned, and before the indenture in the third plea mentioned, to wit, on the 30th of August, 1845, demised the said rooms and apartments to the plaintiff, to have and to hold the same to the plaintiff, &c., from thence unto and until the 29th of September, 1845, aforesaid, and thence from year to year; that, by virtue of that demise, the plaintiff

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entered and continued possessed of the said rooms and apartments, until the defendant, at the said times when &c., of his own wrong, broke and entered the said rooms and apartments in which &c. in the said third plea and in the declaration mentioned; and that the defendant unlawfully became possessed thereof, and unlawfully committed the trespasses in the introductory part of the said third plea mentioned, in manner and form as the plaintiff had above thereof complained against him. Verification. And he traversed the demise alleged in the sixth plea.

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The cause was tried before Erle, J., at the last sitting at Westminster, in Trinity Term last. The facts were as follows: In August, 1845, the plaintiff, a medical practitioner, hired from one Johnson certain rooms in Bury Street, St. James's, at a rent of 50*l.* a year, with the privilege of putting a brass-plate with his name engraved thereon, upon the front door, there to remain so long as he should continue to occupy the apartments. In September, Johnson demised the whole house to the defendant, for twenty-one years. On the 15th of January, 1846, the rent being unpaid, the defendant removed the plaintiff's brass-plate from the door, and refused to allow the plaintiff to have access to his apartments. It appeared that the defendant let the whole of the house in separate apartments: but there was no direct evidence that the defendant had actually entered the plaintiff's rooms. This action was commenced early in February, 1846.

On the part of the defendant, it was insisted that the charge of breaking and entering the plaintiff's rooms *was not proved, and that [*783] the removal of the brass-plate was mere aggravation.

The jury returned a verdict for the plaintiff, by the direction of the Judge severing the damages, 10*l.* for the breaking and entering, and 20*l.* for the removal of the brass-plate; leave being reserved to the defendant to move to enter a verdict for him, or a nonsuit, if the Court should be of opinion that there was no evidence of a breaking and entering, and that the removal of the brass-plate was not a substantive trespass.

Byles, Serjt., in Trinity Term, obtained a rule *nisi* accordingly, and also for a new trial, on the ground that there was no evidence to justify the verdict.

Wilkins, Serjt., and *G. T. White*, now showed cause:

There clearly was evidence to go to the jury of a breaking and

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entering the rooms; for, it is not to be supposed that the defendant refused the plaintiff access to them for the mere purpose of keeping them empty. As to the plate, the plaintiff did not part with the possession of it, by placing it, with the landlord's assent, on the outer door. Its removal was as much a substantive act of trespass as the removal of a pier-glass from the walls of the apartments.

(MAULE, J.: The wall would be demised to the tenant for all the purposes for which he might legitimately use it. Here, there is nothing more than a licence to affix the plate to the door. The difficulty, however, is, that there is a distinct issue joined on the possession of the plate.)

It may be that the transaction amounts to a demise of so much of the door as was necessary to fix the plate on. In *Welch* v. *Nash* (1), in trespass for breaking and entering a close and cutting [*784] &c. rails of the plaintiff, it *was held that the defendant could not justify, under the general issue, the cutting the posts and rails, though erected on the defendant's own land; there being no question raised as to the property remaining in the plaintiff. The present case is altogether different from *Taylor* v. *Cole* (2), as explained in *Bush* v. *Parker* (3).

Byles, Serjt., and *Pashley*, in support of the rule:

The charge of breaking and entering the plaintiff's rooms was not sustained by the mere proof of the plaintiff being obstructed and refused access to them. The case is very like that of *Hartley* v. *Moxham* (4). * * *

(MAULE, J.: Probably there was no exclusive possession in that case: the position of the plaintiff might have been like that of a lodger at an inn; having a mere easement of sleeping in one room, [*785] and eating and drinking in another; in *which case, the refusing him access to the goods, would not be a trespass.)

That which is complained of here is a mere obstruction or exclusion of the plaintiff from the exercise of a right of way. In *Wells* v. *Ody*, MAULE, B., suggested that both case and trespass might be maintained. In *Raine* v. *Alderson* (5), there were two actions; and both verdicts were sustained.

(1) 9 R. R. 478 (8 East, 394).
(2) 1 R. R. 706 (3 T. R. 294).
(3) 1 Bing. N. C. 72; 4 Moo. & Sc. 588.
(4) 61 R. R. 359 (3 Q. B. 701).
(5) 4 Bing. N. C. 702; 6 Scott, 691.

(MAULE, J.: No doubt, if the plaintiff has sustained two actionable injuries, he may have two distinct remedies.)

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As to the brass-plate, it must be assumed, on the evidence, that it was attached to the door in the usual way, and thereby affixed to the freehold; and, if so, its removal by the defendant could not be a trespass. In *Stocks* v. *Booth* (1), it was said by BULLER, J., that trespass would not lie for disturbing the plaintiff in his possession of a pew in a church; because, as was said by DALLAS, Ch. J., in *The Duke of Newcastle* v. *Clark* (2), the plaintiff had not the exclusive possession, the possession of the church being in the parson.

(MAULE, J.: I suppose that means that the plaintiff had not any possession.)

The case might have been different, if trover had been brought; for, one may qualify, though not increase a tort: 2 Wms. Saund. 47 bb, and the cases there cited. Assuming that the plate was not permanently fixed to the freehold, it would be a mere chattel; and trespass will not lie for the simple receiving of a chattel. [They cited Bro. Abr. Trespass, pl. 216 (3), Comyns's Digest (4), *Bennett* v. *Alcott* (5), and *Kavanagh* v. *Gudge* (6).]

(WILDE, Ch. J.: *Woodward* v. *Walton* (7) seems to show that trespass is maintainable for the seduction of a daughter.) [787]

In the recent case of *Grinnell* v. *Wells* (8), an action upon the case was held to be the proper remedy for an injury of that sort. * * *

WILDE, Ch. J.:

One ground upon which this rule was moved, is, that there was no evidence to go to the jury, in support of so much of the declaration as alleges a trespass to the plaintiff's rooms, and ejecting him therefrom, and seizing his goods. The evidence offered, was, that the plaintiff had taken apartments in the house in question, for a

(1) 1 R. R. 244 (1 T. R. 428).
(2) 20 R. R. 583 (2 J. B. Moore, 666).
(3) Citing M. 21 Hen. VII., fo. 39, pl. 48, which is transcribed *verbatim* Fitz. Abr. Tresp. pl. 245.
(4) Tit. Trespass, (B. 5).
(5) 2 T. R. 166. See 31 R. R. 667, *n.*
(6) 7 Man. & G. 316; 7 Scott, N. R. 1025.
(7) 2 Bos. & P. N. R. 476.
(8) 66 R. R. 835 (7 Man. & G. 1033).

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certain term; and that, before that term had expired, the defendant refused to permit the plaintiff to have access to them. It appears to me that that was competent evidence to submit to the jury, and that it afforded a reasonable foundation for a verdict for the plaintiff. The period of time during which the plaintiff was excluded, the nature of the property, and the other surrounding circumstances, were all proper to be taken into the account in determining whether or not it was to be presumed that the defendant broke and entered the rooms. It appeared that the apartments in question were open, and that the defendant took advantage of the temporary absence of
[*788] the plaintiff, to fasten the outer *door, and so exclude the plaintiff from his lodgings. Considering that the whole house was let out in separate suites of apartments, and that the defendant refused to permit the plaintiff to return to the rooms, what is the reasonable intendment of the use to which the defendant would put them? Out of Court, no one would for a moment doubt that he would at once enter them for his own occupation or for the purpose of letting. All the circumstances were proper to be submitted to the jury, and could not properly be withheld from them: and I see no ground for saying that the inference they have drawn was incorrect. The first ground of the motion, therefore, fails.

The second ground of complaint is as to the removal of the brass-plate from the outer door. It is quite clear that this brass-plate was a chattel; and therefore the possession followed the right of property, unless there were circumstances to alter or control it. It seems to have been a part of the contract of hiring, that the plaintiff was to be at liberty to put his name on the door, and to continue it there so long as he should occupy the apartments. If, then, the plate was the property of the plaintiff, and was placed upon the outer door under such a contract, what is there in the evidence to affect his right of action? Did it appear that the plate had ever been delivered to the defendant, or that there was any bailment? Not at all. All that appeared, was, that the plate was rightfully on the door, and that the defendant wrongfully removed it. The removal might amount to a distinct and substantive trespass, or to mere aggravation, according to circumstances. In the declaration it is complained of as a substantive trespass. How does the defendant treat that? If the removal of the plate was aggravation only, he was not bound to plead to it. He, however, takes a distinct issue on the possession of the plate. The parties, therefore, go down to trial, treating this as a substantive act of trespass to a

chattel in *the possession of the plaintiff. If the defendant had meant to contend that the plate was so fixed to the freehold as to have ceased to be a chattel, he should have shown how it was in fact fastened. The course of pleading necessarily threw the plaintiff off his guard. Both parties having from the beginning to the end treated the brass-plate as a distinct chattel, I am clearly of opinion that it was not competent to the defendant to change his ground. *Welch* v. *Nash* is a very analogous case. It was an action for breaking and entering certain closes, and breaking down and destroying gates, posts, rails, &c. of the plaintiff. The main question was, whether the justices had power, under the general Highway Act, 13 Geo. III. c. 78, to stop up an old way before a new one had been set out. The defendant contended, under the general issue, that the posts, being fixed on the defendant's land, became his property. But the COURT said that the defendant made it part of his complaint that the plaintiff had put his posts and rails on the defendant's land across the highway; and the case reserved showed that the posts and rails were meant to be stated as the property of the plaintiff: and therefore that the cutting them could not be justified under the general issue. The brass-plate in this case having been treated as a distinct and independent chattel, and being capable of being so fastened to the door as to retain that character, I am of opinion that the jury were justified in so dealing with it, and that their verdict was right.

[*789]

On both grounds, therefore, I think the rule should be discharged.

MAULE, J.:

I am of the same opinion. As to the first point, the evidence is to be looked at with reference to the subject-matter in respect of which the trespass complained of was committed. The plaintiff complains that the defendant broke and entered his rooms, *and ejected and expelled him therefrom. The evidence was, that the plaintiff, being tenant of certain rooms in the defendant's house, and seeking to be let in, the defendant unlawfully kept him out. That clearly was evidence whence a jury might reasonably and properly infer that the defendant did, in fact, enter and take possession of the plaintiff's rooms. It cannot be assumed that the defendant never went into the rooms himself.

[*790]

As to the brass-plate, it was throughout treated as a chattel: and no doubt it was so fixed as to be capable of being removed without injury to the door. The property, therefore, not being divested out

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of the plaintiff, the verdict was founded upon evidence that might fairly lead the jury to such a conclusion. As to the conversion of the plate being aggravation only, that argument is not now open to the defendant; it having been treated in the pleadings, as well as at the trial, as a substantive trespass.

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CRESSWELL, J.:

I also am of opinion that this rule should be discharged. With respect to the trespass of breaking and entering the plaintiff's apartments, there was, I think, abundant evidence to warrant the jury in inferring that the defendant had entered and resumed possession. The case is widely different from *Hartley* v. *Moxham*: there, it was quite clear that the defendant never touched the goods at all; he merely locked the door of the room they were in, and kept the key: but here, there was evidence from which the jury were at liberty to infer that the defendant had actually entered and kept possession of the rooms.

With respect to the removal of the brass-plate, it was pleaded to, and throughout the cause treated, as a substantive trespass. No question was made as to whether it was a thing affixed to the freehold or not. It is, therefore, too late now to urge that point. There
[*791] was *nothing like a bailment. There was no delivery of the plate to the landlord, to be re-delivered upon request, or otherwise. The substance of the contract was, that the plaintiff was to be allowed to have the custody of it in a particular place. I see no reason for disturbing the verdict as to that. After all, whether the removal of the plate was a substantive trespass, or aggravation only, is mere matter of form: the plaintiff would equally be entitled to damages in either view.

V. WILLIAMS, J.:

I am of the same opinion. It is contrary to common sense to say that there was nothing to leave to the jury in this case. And I think the jury were well warranted in inferring that the defendant did enter and take possession of the rooms in question.

It is unnecessary to decide whether or not trespass could be maintained for the removal of a chattel permanently fixed to the freehold. The general rule undoubtedly is, *Quicquid plantatur solo, solo cedit.* But that point was not raised at the trial: and, on the pleadings, the brass-plate was treated, as we must now assume it to be, as an independent chattel. If so, it is quite clear that the

plaintiff had both the right of possession and the right of property. If he himself had taken it off the door and sold it, no one would have had a right to complain. *Kavanagh* v. *Gudge* was quite a different case: that which was treated as aggravation there might have been made the subject of a new-assignment: here, it is difficult to say that the plaintiff might have new-assigned as to the plate. *Griffiths* v. *Dunnett* (1) shows that a plea addressed to matter of aggravation merely, is bad; and it does not lie in the mouth of the defendant to say that he has pleaded a bad plea. Had it been necessary I should have had no hesitation in saying that this was properly the subject of an action of trespass.

Rule discharged.

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NORTON *v.* SEYMOUR AND AYRES (2).

1847. *Jan.* 15.

[792]

(3 C. B. 792—794; S. C. 16 L. J. C. P. 100.)

If there be not a recognised firm name one partner may for firm purposes sign the individual names of himself and his copartners, which evidence is admissible to charge a person with being a partner.

ASSUMPSIT. The first count was upon a promissory note purporting to be made by "Thomas Seymour and Sarah Ayres." There were also counts for goods sold and delivered, work and labour, and money found due upon an account stated.

The defendant Seymour suffered judgment by default. The other defendant pleaded, to the first count, that she did not make the note, and, to the rest of the declaration, *non assumpsit*.

The cause was tried before the Undersheriff of Surrey on the 15th of December last. The note was produced. It began, "Two months after date, we promise to pay," &c., and was signed "THOMAS SEYMOUR, SARAH AYRES"—in the handwriting of Seymour.

It appeared that the defendant Ayres had formerly resided and carried on business at the place at which the goods in respect of which the note was given had been supplied. In order to show that she was a partner with [Seymour], the plaintiff called a witness who deposed to a conversation with her upon the subject of the note, in which conversation she admitted that she was a partner with Seymour. A circular and invoice issued by Seymour were then put in; the circular stating that the

(1) 7 Man. & G. 1002; 8 Scott, N. R. 836.

(2) See s. 23 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61, s. 23), and s. 6 of the Partnership Act, 1890 (53 & 54 Vict. c. 39).—J. G. P.

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business would in future be carried on in the names of Seymour and Ayres, and the invoice being headed "Seymour and Ayres."

[*793] It was objected, on the part of the defendant Ayres, *that this circular was not admissible to charge her, there being no evidence to connect her with it. The undersheriff, however, received it.

It was then submitted, that, assuming that a partnership subsisted between them, Seymour had no authority to bind Ayres by a bill or note signed otherwise than with the name of the firm.

This objection also was overruled; and it was left to the jury to say whether or not there was a partnership.

The jury returned a verdict for the plaintiff, damages 131*l.* 1*s.* 3*d.*

Fortescue, on behalf of the defendant Ayres, now moved for a new trial, on the grounds of improper reception of evidence, and misdirection:

The circular was clearly inadmissible.

(CRESSWELL, J.: There was evidence for the jury before that document was put in.

MAULE, J.: If evidence for any purpose, the circular could not be excluded.)

It was allowed to go to the jury as evidence of the alleged partnership: it could not have been offered for any other purpose.

(MAULE, J.: It might have been evidence of an authority to Seymour to sign notes in the names of Seymour and Ayres.

WILDE, Ch. J.: It was also material as tending to confirm the witness who spoke to the conversation.)

At all events, it is quite clear, that, if Seymour had authority to bind the defendant Ayres by signing notes or bills, the signature should have been in accordance with the circular, "SEYMOUR AND AYRES;" for, one partner has no authority to bind another except by the name of the firm: *Kirk* v. *Blurton* (1).

WILDE, Ch. J.:

[*794] It does not appear to me that there is any ground laid for granting a rule in this case. The *circular was clearly admissible.

(1) 60 R. R. 729 (9 M. & W. 284).

It might bear on the case in two or three ways. It was proved that the defendant Ayres had said, when called on, that she considered herself a partner; and that the business was carried on in her name jointly with that of Seymour, and at the place where it had formerly been carried on by her, and where she had resided. The case cited does not sustain the objection to the form of the note. The circular stated that the business would in future be carried on in the names of Seymour and Ayres; and the note was signed in the names of Seymour and Ayres, with the addition of their respective christian names. *Kirk* v. *Blurton* was a totally different case. There, the bill was accepted in a name which did not purport to be that of the firm, and therefore it could not be considered as having been issued for the purposes of the firm.

MAULE, J.:

I agree, that, in this case, no rule should be granted. As to the form of the note, it is to be observed that it is signed by Seymour in the name of himself and the other member of the firm. Suppose there was no authority so to sign it, other than the general authority conferred by the partnership, I should hesitate to say that one of two partners could not bind the other by signing the true names of both, instead of the fictitious name. That, however, is not the question here. The circular states that the business will in future be carried on in the names of Seymour and Ayres; that is, in the names of the two persons mentioned, whatever those names may be. "Thomas Seymour" is the name of the one, and "Sarah Ayres" that of the other. There is, therefore, sufficient evidence of a special authority to sign the note in those names, if such special authority were necessary.

CRESSWELL, J., and V. WILLIAMS, J., concurred.

Rule refused.

DAVIES, DEMANDANT; LOWNDES, TENANT (1).

(3 C. B. 808—831.)

1847. *Jan.* 15, 16, 29.

[808]

The lien of an attorney attaches upon money received by way of compromise; though the verdict and judgment be against his client.

THIS was a writ of right (2), which, for a third time, came on for trial at the Bar of this Court on the 17th of December last,

(1) Judicially cited in *Ross* v. *Buxton*, 42 Ch. D. 190, 196, 58 L. J. Ch. 442.—J. G. P.

(2) See *S. C.* on bill of exceptions to ruling of the COURT on the second trial, 64 R. R. 783, and Preface vii.—J. G. P.

DAVIES v. LOWNDES.

when, by consent of counsel for the respective parties, a verdict was taken and judgment thereupon entered up for the tenant; the tenant, by the like consent, entering into a rule for payment
[*809] "to Mr. G. W. F. Cook, the said demandant's present *attorney on record," of the sum of 5,000*l.* within a month.

Manning, Serjt., on the first day of this Term, obtained a rule calling upon Cook to show cause why one John Richards should not be substituted for Cook as the demandant's attorney in this cause.

[The rule was subsequently discharged, and]

[819] *Manning*, Serjt., on the 19th instant, again obtained a similar rule, upon the affidavit of the demandant herself, and that of one William Jones, an attorney of this Court. * * *

[821] *C. Jones*, Serjt., now showed cause. * * *

[823] *Manning*, Serjt., in support of the rule, was not called upon.

Per CURIAM:

We think it now sufficiently appears that the application to substitute Richards as the attorney in this cause in lieu of Cook, is made with the knowledge and under the sanction of the demandant, and therefore that this rule should be made absolute, saving any lien that Cook may justly have for costs due to him.

Rule absolute accordingly.

Jan. 15.

Scott, on behalf of Henry Clarke, one of the former attorneys for the demandant in this cause, on the 15th instant, obtained a rule calling upon the demandant and tenant respectively, upon notice of that rule to be given to their respective attorneys (1), to show cause why it should not be referred to one of the Masters to ascertain the amount of the lien, if any, of Clarke, upon the sum of
[*824] 5,000*l.* agreed by the rule of Court of the 17th of *December, 1846, to be paid by the tenant to Cook, the demandant's then attorney, as and for a compromise of this action, as against the said demandant; and why the tenant, or his attorneys, should not pay to Clarke the amount of such lien when so ascertained as aforesaid; and why, in the mean time, the tenant and his attorneys should

(1) The service of the rule upon Cook, who did not appear in opposition thereto, was held sufficient to call upon him for an answer.

not be restrained from paying, and the demandant and her said attorney, Cook, from receiving, the said sum of 5,000*l.*, or any part thereof, without first paying to Clarke the amount of such lien; or why the tenant, or his attorneys, should not pay the 5,000*l.* into the hands of the Masters of this Court, to abide the further order of the Court.

The affidavit upon which the motion was founded, stated that Clarke, was on the 22nd of October, 1844, duly retained as the attorney for the demandant in this cause, in the place of Messrs. Davies & Son, who had for some time had the conduct of the suit; that Clarke continued to act as the attorney for the demandant down to the 13th of March, 1846, when the following order was made by CRESSWELL, J.: "*Davies* v. *Lowndes*. By consent of Mr. Henry Clarke, I do order that Mr. Gustard be appointed attorney for the demandant herein, instead of the said Mr. Clarke, without prejudice to the said Mr. Clarke's lien for costs, &c.;" that, after the cause had been compromised, Clarke applied to Cook for an undertaking to pay his costs out of the 5,000*l.*, which Cook declined to give; and that Clarke had made out and duly delivered his bill of costs, charges, and disbursements, to the demandant.

Jan. 29.

Against this rule cause was now shown by *Martin*, and *Channell*, Serjt., on behalf of the tenant, and by *Manning*, Serjt., on behalf of the demandant. The opposition of the latter was founded upon the affidavits of John Bowen and of Cook.

[825]

Bowen, in his affidavit, stated, that, upon the order being made for substituting Gustard as the demandant's attorney in lieu of Clarke (the 13th of March, 1846), the latter applied to Bowen, as agent of the demandant, to accept in his favour, in the demandant's name, two bills, dated that day, one for 1,000*l.*, the other for 1,778*l.* 4*s.* 4*d.*, payable two months after date; that Bowen accepted the bills under the power of attorney held by him (dated the 7th of March, 1846), and delivered them to Clarke; that it was agreed between Bowen, as such agent, and Clarke, that they (the bills) should be taken and accepted by Clarke in satisfaction of all claims of Clarke upon the demandant for or in respect of his costs, charges, expenses, and disbursements as attorney in this cause; and that the two bills so taken and accepted by Clarke, were still retained by him.

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Cook, in his affidavit, stated, that he was appointed attorney for the demandant by a Judge's order, dated the 28th of October, 1846; that he afterwards received the bulk of the papers in the cause from Messrs. Davies & Son; that he received other papers from Gustard; that he never received any papers from Clarke, nor had he any notice of Clarke's lien when he received the papers from Davies & Son and Gustard; that he had no notice of Clarke's lien until the 17th of December, 1846, after the cause had been compromised; that one Scott, a client of Clarke's, informed him (Cook) that he (Scott) had paid Clarke all his actual expenses in the cause, receiving bills from Bowen at the rate of 500*l.* for every 100*l.* advanced: that Clarke had informed the deponent to the same effect; and that it was his intention to obtain his full costs, in order to repay Scott; that the payment of the 5,000*l.* into Court would be injurious to the demandant, by reason of the delay, and the possibility of other liens being sought to be attached to it; that the deponent had laid out large sums in conducting the cause; [*826] that *he had not yet made out his bill, and was therefore unable to state the amount, but believed it would considerably exceed 1,000*l.* (1).

Martin, and *Channell*, Serjt.:

By the rule of the 17th of December, 1846, the tenant, for whom a verdict was found by the Grand Assize, is ordered to pay 5,000*l.*, to Cook, the demandant's attorney, within a month. Since that rule was made, claims have been made on behalf of five different parties, viz. Gustard, Davies & Son, Clarke, and Cook, who had, at various times, acted as attorneys for the demandant in the cause, and Richards, her present attorney. The tenant is ready to pay the money into Court, or to dispose of it in any way the Court may direct.

(WILDE, Ch. J.: The order to pay the money to the attorney is, *primâ facie*, an order to pay it to the demandant. At the present moment, all we have to deal with is the application of Mr. Clarke that his lien may have effect.)

Manning, Serjt., for the demandant:

Clarke's lien never attached to the fund in question; and, if he ever had a lien, he has lost it by receiving negotiable securities in

(1) This affidavit had been made by Cook whilst he was attorney in the cause, and was now used by Richards, the substituted attorney.

satisfaction of his demand. The 5,000*l.* is not a sum recovered in the cause. It is a mere bonus or gratuity given by the tenant, who has obtained a verdict in the cause, to the demandant: and the mere circumstance of the payment being secured by a rule of Court does not in any degree alter the character of the transaction.

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(MAULE, J.: The lien of the attorney arises out of an implied contract. If the parties had entered into a special contract, the attorney would of course have stipulated for payment of his costs out of any fund that *might be realized, whether by a verdict and judgment or by a compromise. The honesty of the case certainly is, that the attorney's lien should attach upon money that is the fruit of his labour and skill, more particularly where he has taken up the cause of a poor person.)

[*827]

At all events, the lien is destroyed by the taking of security: [*Cowell* v. *Simpson* (1) and *Chase* v. *Westmore* (2).]

(MAULE, J.: Does Bowen state that the bills are paid?)

He does not: he merely states that they *are still retained by Clarke.

[*828]

(WILDE, Ch. J.: They are long over-due: of course, they are unpaid.)

A shipowner taking bills for freight, loses his lien.

(WILDE, Ch. J.: A landlord does not lose his right to distrain for arrears of rent, by taking a bill or note for the amount.)

The right of distress is the higher security, and therefore does not merge in the lesser.

(CRESSWELL, J., referred to *Dixon* v. *Yates* (3). There, D. bought of Y. forty-six puncheons of rum lying in the warehouse of Y. at Liverpool, and sold them to C., who was a clerk of Y., but carried on business for himself. D. gave C. an invoice, specifying the marks and numbers of each puncheon, and took his acceptances for the price. The rum, and the samples which had been taken, remained in Y.'s warehouse. The invariable mode of delivering goods sold while they are in warehouses at Liverpool, is by the

(1) 10 R. R. 181 (16 Ves. 275).
(2) 17 R. R. 301 (5 M. & S. 180).
(3) 39 R. R. 489 (5 B. & Ad. 313; 2 Nev. & M. 177).

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vendor's giving a delivery order to the vendee. D. was asked by C. for delivery orders, but declined giving any except for two or three puncheons, which C. received. C. [marked] coopered, and gauged the casks. While the bills were running, C. sold twenty-six of the puncheons to K., who paid for them, and who, by C.'s permission, without the knowledge of D., gauged and coopered the casks in the warehouse of Y., and marked them with his initials. C. gave an invoice to K., stating the marks and numbers of the casks, and by whom the rum was bonded. C. also, while the bills were running, sold eighteen puncheons of the rum to two other parties, to whom he gave similar invoices, and samples, and who afterwards obtained three of the puncheons, on a delivery order signed by themselves, but not by D. They paid C. for the whole. The bills given by C. for the price of the forty-four puncheons,

[*829] *were dishonoured. And it was held, upon a special case, whereby it was agreed that the Court should be at liberty to draw from the facts any inference that the jury might have drawn, that C. never had acquired the actual possession of the rum, and, on his dishonouring his acceptances, D. had a lien on it for the price; and that C.'s sub-vendees could not claim against D. the rum which remained undelivered to them.

WILDE, Ch. J.: The order for changing the attorney, which is dated on the day the two bills are alleged to have been drawn and accepted, expressly reserves the lien of Clarke. That seems to negative the inference drawn by Bowen.)

The order would, of course, be drawn up in the ordinary form.

(WILDE, Ch. J.: This order is not in the usual form; the usual order provides for payment of the attorney's bill.)

Scott, in support of his rule, relied on *Stevenson* v. *Blakelock* (1). * * *

(WILDE, Ch. J.: We feel no doubt that Clarke's lien attaches upon the fund in question, and we think it is not extinguished by the

[*830] taking of securities that have turned out to be worthless. *We think, however, the affidavit should have shown the amount of Clarke's claim: in this respect it is defective.)

It is sworn that the bill has been delivered: the amount cannot be

(1) 14 R. R. 525 (1 M. & S. 535).

material, seeing that the rule merely asks that effect may be given to Clarke's lien, when ascertained by taxation. DAVIES v. LOWNDES.

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(WILDE, Ch. J.: You ask to have the whole 5,000*l.* paid into Court. Surely you cannot be entitled to that, when you do not show that you have a lien to the extent of 5*l.*

Manning, Serjt., admitted that the bill had been delivered, and that the amount claimed was 718*l.* 5*s.* 10*d.*)

WILDE, Ch. J.:

Let that sum be paid into Court by the tenant, there to remain to abide the result of a taxation of Clarke's bill, Clarke giving credit, on such taxation, for any sums received by him from or on account of the demandant.

Rule absolute accordingly (1).

Martin, for the tenant, asked for his costs of showing cause, to be paid out of the fund. [831]

WILDE, Ch. J.:

In right, no costs are given.

PATER *v.* BAKER.

1847. *Jan.* 13, 15, 16.

(3 C. B. 831—870; S. C. 16 L. J. C. P. 124; 11 Jur. 370.)

[831]

In case against a surveyor of highways, appointed under the 7 & 8 Vict. c. 84 (2), for the following words alleged to have been spoken by him at a public auction, in reference to certain unfinished houses at a place called Agar Town, which the plaintiff had put up for sale: "My object in attending this sale is, to inform purchasers, if there be any here present,

(1) The rule of the 17th of December, 1846, for payment of the 5,000*l.* to Cook, was afterwards, in consequence of other claims being set up on the fund, amended by an order of MAULE, J., at Chambers, made by consent. The amended rule directed "that the tenant do and shall forthwith pay to Gustard the sum of 250*l.*, to Messrs. Davies & Son the sum of 700*l.*; and that he do and shall forthwith pay into Court the sum of 1,600*l.* to cover the lien claimed by Cook, and also the sum of 718*l.* 5*s.* 10*d.* to cover the lien claimed by Clarke; and that, out of the said last-mentioned sum, there be paid out of Court to Clarke the amount of his bill, as soon as the same shall have been ascertained by the Master; and that the tenant shall forthwith pay the residue of the said sum of 5,000*l.*, amounting to the sum of 1,731*l.* 14*s.* 2*d.*, to the said demandant."

Cook's claim was afterwards satisfied by paying him 800*l.*, and Clarke's bill was taxed at about 400*l.* Several other payments having been made in satisfaction of liabilities incurred by the demandant, in the result, she returned to Wales with about 500*l.*

(2) "For regulating the Construction and the Use of Buildings in the

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that I shall not allow the houses to be finished or occupied, until the roads are made good in Agar Town. I have no power to compel any one to make the roads; but I have power to stop the buildings until the roads are made. If there shall be any purchasers, they will have to keep the carcasses in their unfinished state until the roads are made."

Malice is not to be inferred from the circumstance of the defendant having acted upon an incorrect view of his duty, founded upon an erroneous construction of the statute.

CASE, for words in the nature of slander of title.

The declaration stated that the plaintiff, before and at the time of the committing of the grievances by the defendant thereinafter mentioned, was possessed, for the residue of a certain term of years then to come and unexpired, to wit, the term of twenty-one years, of divers, to wit, twelve unfinished houses, with the appurtenances, [*832] *situate, lying, and being in a certain place called Agar Town, wherein divers roads were then marked out and unfinished, which said place then was, and now is, parcel of the parish of St. Pancras, in the county of Middlesex, and then did and still does form part of a certain division or district for the administration, and within the operation, of an Act made and passed in the eighth year of her Majesty [Queen] Victoria, intituled "An Act for regulating the construction and use of buildings in the metropolis and its neighbourhood," called the district of the parish of St. Pancras, and which houses then were approached by, and adjoined to, a certain roadway, of the width, quality, and description, required by the said Act, that is to say, of such width as would admit to one of the fronts thereof, of a scavenger's cart of the ordinary size of such carts; the said houses then being of the class described in the said Act as the first class: that the plaintiff, before and at the time of the committing of the grievances thereinafter mentioned, was desirous of selling his said estate and interest in the said houses by public auction, and, for that purpose, the plaintiff, before and at the time of the committing of the said grievances, to wit, on the 2nd of March, 1846, caused his said estate and interest therein to be advertised for, and the same were then put up and exposed to, sale by public auction, at a certain house, to wit, the "Camden Arms," within the said parish and district of St. Pancras, by one James Kennedy, as the auctioneer

Metropolis and its Neighbourhood." The material sections of the Act are summarised in the judgment of WILDE, Ch. J., *post*, pp. 514—518. The Act was repealed by 18 & 19 Vict. c. 122, s. 109, and several later Acts. This case was judicially cited in *Steward* v. *Young* (1870) L. R. 5 C. P. 122, 39 L. J. C. P. 85, and *Wren* v. *Weild* (1869) L. R. 4 Q. B. 730, 38 L. J. Q. B. 327.—J. G. P.

and agent of the plaintiff, in order that the same might be then sold for the plaintiff: that, before and at the time of the said putting of the said houses up for sale, the defendant was, and filled the office of, one of the surveyors appointed in pursuance of the said Act, for the said district within which the said houses then were so built: yet that the defendant, well knowing the premises, but contriving, and falsely and maliciously intending *to injure the plaintiff, and to [*833] cause and induce the persons attending the said exposure to sale, to believe and apprehend that there was no such roadway to one of the fronts of the said houses, as required by the said Act, and to interrupt the said sale, and to hinder and prevent the plaintiff from selling or disposing of his said estate or interest in the same, and to cause the plaintiff to lose and be deprived of divers great gains, which he might, and otherwise would, have reaped and derived from the said sale, and to lose and be deprived of the expenses attending the said exposure to sale, and to which he the plaintiff had then been put in procuring the said estate to be so advertised for and exposed to sale, and to cause the same to be sold for a much smaller price than the said houses otherwise, but for the committing the grievances thereinafter mentioned, would have realised and produced, and to vex, harass, and oppress the plaintiff; to wit, on the day and year aforesaid, wrongfully, injuriously, falsely, and maliciously, and without any reasonable or probable cause, and under colour of his said office, and under the false and malicious pretence of executing the same, attended, and was present at, and upon, such exposure to sale of his the plaintiff's said estate and interest of and in the said houses, and at the place aforesaid, and then, upon such exposure to sale, and before the said estate and interest had been put up for sale, falsely and maliciously, under colour and pretence of executing his said office, in the presence and hearing of divers liege subjects of our said lady the Queen, then and there assembled and present, and attending the said sale for the purpose of bidding for, and purchasing, the said houses, spoke and published of and concerning the plaintiff, and of and concerning the said houses with the appurtenances, and the plaintiff's said estate and interest therein, the false, scandalous, slanderous, *and malicious [*834] words following: "My object (meaning, his the defendant's object) in attending this sale, is, to inform purchasers, if there be any here present, that I (meaning, the defendant) shall not allow *purchasers (meaning, persons who then might be disposed to purchase at the said sale the said houses of the plaintiff so exposed for sale as*

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aforesaid,) (1) to be finished or occupied, until the roads are made good in Agar Town (meaning, the said district called Agar Town aforesaid): I (meaning the said defendant,) have no power to compel any one to make the roads (meaning, the roads in Agar Town aforesaid); but I (meaning the defendant) have power to stop the buildings (meaning, that he, the defendant, had power, under and by virtue of his being such district surveyor under the said statute, to prevent the said unfinished houses from being finished,) until the roads (meaning the said roads in Agar Town aforesaid,) are made: If there shall be any purchasers (meaning, purchasers of the said houses of the plaintiff at the said sale), they will have to keep the carcasses (meaning the said houses in their then unfinished state,) until the roads (meaning the roads aforesaid) are made." And the plaintiff further said, that the defendant, further intending as aforesaid, afterwards, to wit, on the day aforesaid, at the place aforesaid, and just before the commencement of the said putting up for sale of the said houses, in the presence and hearing of the said subjects so assembled at the said putting up for sale for the purpose of bidding for and purchasing the said houses, spoke and published the false, malicious, and slanderous words following of and concerning the said houses, with the appurtenances, and the plaintiff's said estate therein: "Gentlemen, I am not come here as a purchaser, but to inform the company (meaning, the subjects aforesaid who were then there assembled at the said intended sale,) that the
[*835] roads *(meaning the roads aforesaid) must be made good, or I will stop the communication with the buildings" (meaning the said houses of the plaintiff): That, by means of the committing of the said several grievances by the defendant as aforesaid, one John Turner, &c. &c., and divers other of the said liege subjects of our said lady the Queen, who were so present at, and upon, the said exposure to sale as aforesaid, and who were then about to be, and become, purchasers of the estate and interest of the plaintiff, and who might, and would otherwise, have bid for and purchased the same, were then induced to believe and apprehend that there was no sufficient roadway to one of the fronts of the said houses, as required by the said Act; that thereby, and by means of the said

(1) At the trial, ERLE, J., allowed the declaration to be amended under 3 & 4 Will. IV. c. 42, s. 23, by substituting for the words in italics the words "the houses," leave being reserved to the defendant to move to enter a nonsuit if the Court should think such amendment not warranted by the statute. So much of the argument and judgments as relate to this point are omitted.—J. G. P.

several grievances, the said several persons and last-mentioned subjects were deterred and prevented from bidding for, and becoming the purchasers of, the said estate and interest of the plaintiff, and then and from thenceforward had respectively wholly declined to purchase the same; that thereby the plaintiff was then hindered and prevented from selling, and disposing of, his said estate and interest, and had thereby not only lost and been deprived of all the advantages and emoluments which he might and would have derived and acquired from the sale thereof, but had been forced and obliged to pay, lay out, and expend divers large sums of money, to wit, 100*l.*, in and about the said exposure to sale, and the expenses incidental thereto, &c.

The defendant pleaded, first, Not guilty; secondly, as to the speaking and publishing such and so many of the words in the declaration mentioned, as alleged and implied that the said roads in Agar Town aforesaid were not made good, and that there was no such roadway to one of the fronts of the said houses of the plaintiff as required by the said Act of Parliament in the declaration mentioned, that, before and at the said *several times when &c. in [*836] the declaration respectively mentioned, the said roads in Agar Town aforesaid were not, and had not been, made good, but, on the contrary thereof, were then in a bad and imperfect state, and unfit for use and for the purposes of traffic; and that there was not then any such roadway to one of the said fronts of the said houses, of the width, quality, and description required by the said Act of Parliament; and that therefore the defendant, so being such surveyor as aforesaid, at the several times when &c. in the declaration respectively mentioned, spoke and published the words in the introductory part of the plea mentioned and referred to, as he lawfully might, for the cause aforesaid. Verification.

The plaintiff joined issue on the first plea, and replied *de injuriâ* to the second.

The cause was tried before Erle, J., at the sittings at Westminster after last Trinity Term. The plaintiff is a solicitor. The defendant is the district surveyor for the parish of St. Pancras, under the Metropolitan Buildings Act, 7 & 8 Vict. c. 84. The plaintiff had acted as steward or agent for a gentleman named Agar, who possessed considerable property in the neighbourhood of Camden Town, which had been laid out for building, and which was known by the name of Agar Town. Prior to the passing of the statute above referred to, the plaintiff had built, amongst others, four

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houses in a place called Durham Street, Agar Town; and, subsequently to the passing of the Act, he commenced the building of eight more, in a place called Winchester Terrace; all the houses being of the description called in the Act fourth-rate houses of the first class, and all situate within the district of St. Pancras.

About the middle of January, 1846, the plaintiff advertised for sale on the 2nd of March his interest in the four finished houses in Durham Street, and in the eight carcasses in Winchester Terrace.

[837] On the 27th of February, the plaintiff received from the defendant the following notice:

"Metropolitan Buildings Act,
"7 & 8 Vict. c. 84, s. 14, sched. (M.)

"To Mr. John Pater, and to whomsoever else it may concern.

"I, the undersigned, being the surveyor appointed to the district of the parish of St. Pancras, in the county of Middlesex, do hereby give you notice that the eight fourth-rate houses now in progress, and belonging to you, situate in Winchester Terrace, Agar Town, are not conformable to the statute, in the portions thereof under mentioned; and I require you, within forty-eight hours from the date hereof, to amend the same. Dated, &c.

(Signed) "HENRY BAKER."

"Irregularities referred to.

"1. The ridge-pieces, rafters, and other timbers being placed within three inches of the face, side, and back of the flues, where the substance of brickwork is less than 8 inches.

"2. The drains not having been properly built and made good.

"3. There being no roadway either to the houses, or to the inclosure about them, of such width as will admit, to one of the fronts, of the access of a scavenger's cart."

On the morning of the 2nd of March, just before the sale commenced, the defendant, addressing the persons present in the auction room, spoke, according to the evidence of the first witness, the following words: "My object in attending the sale, is, to inform purchasers, if there are any present, that I shall not allow the houses to be finished until the roads are made good. I have no

[*838] power to compel the purchasers to complete *the roads; but I have power to prevent them from completing the houses until the roads are made good." A second witness stated the words to be as follow: "I came here, not as a buyer, but to tell purchasers, if there be any here, that I will not allow purchases to be completed,

till the roads are made good in Agar Town." And a third witness, who was the plaintiff's foreman, stated them to be in substance: "I cannot allow the houses to be finished until the roads are made." PATER v. BAKER.

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In consequence of the defendant's interruption, only two of the houses were sold; the price they realised being 35*l.* each, whereas, according to the evidence of the auctioneer, they might reasonably have been expected to produce 65*l.* each. The only witness who stated that he was deterred from bidding, was one of the plaintiff's tenants.

On the 7th of March (which was two days after the commencement of this action), the following information under the statute was laid against the plaintiff by the defendant:

"Information. *Pater* ats. *Baker*, D. S.

"Metropolitan Buildings Act, 7 & 8 Vict. c. 84.

"Information of Henry Baker, district surveyor of the parish of St. Pancras, against John Pater, for irregular building:

"Whereas, John Pater, of &c., pursuant to notice duly given to me, the undersigned, and dated the 20th day of October now last past, has proceeded to build, *and has built and covered in, eight [*839] certain buildings of the fourth rate of the first or dwelling-house class, situate in Winchester Terrace, Agar Town, in the said parish, but has not constructed the said buildings, and used the ground on which they stand, according to the provisions and regulations of the 7 & 8 Vict. c. 84, called the Metropolitan Buildings Act: And whereas due notice has been served upon the said John Pater, a copy of which notice is hereunto annexed, dated the 27th day of February now last past: And whereas, after the expiration of such last-mentioned notice, I proceeded to inspect the work, and found that the irregularities complained of had not been wholly amended, particularly as to the want of a roadway to the said houses, as required to be made by schedule (K.) of the said Act: Now, I, the surveyor duly appointed to the district of the parish of St. Pancras, in the county of Middlesex, do hereby give information of such irregular work to the official referees appointed under the said Act, and request them to proceed to hear the matter. As witness my hand, this 7th day of March, 1846.

(Signed) "HENRY BAKER."

"To the official referees of
metropolitan buildings."

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On the 16th of March, the official referees attended to view the premises. They found that the first objection had been removed by the plaintiff within the forty-eight hours; that the second objection had also been since removed by a trifling alteration in the drains; and, as to the third, they were of opinion that the terms of schedule (K.) had been satisfied by leaving a space of the required width, and that it was not necessary that it should be a completely made road,—or, in the language of their award, which was made on the 28th of March, "that, inasmuch as there is at
[*840] least one roadway *leading from the King's Road up to and along the fronts of the houses in question, which, although rough and unfinished, is of such width as will admit to such houses of the access of a scavenger's cart, the said houses are not, in respect of the roadway thereto, contrary to the said Act."

The defendant, who was present when the official referees were viewing the premises, in answer to an inquiry addressed to him by one of the plaintiff's witnesses, as to why he pursued Mr. Pater, observed—"I pursue Mr. Pater because he is the agent of Mr. Agar, the ground-landlord, whom I cannot get at." And, on a subsequent occasion, when remonstrated with for the course he had adopted with regard to Mr. Pater, the defendant said: "Then, let him withdraw his action."

On the part of the defendant, it was insisted that malice was the gist of an action of this sort—*Smith* v. *Spooner* (1)—and that there was no evidence whatever to go to the jury, that what had been done by the defendant, was done with a malicious intention to injure the plaintiff; but that, on the contrary, all the evidence showed that the defendant was acting in the honest and *bonâ fide* belief, though it might be an erroneous belief, that he was doing no more than it was his duty, under the Act, to do.

The learned Judge was inclined to think that the mere leaving a space of the required width for a roadway, was not a compliance with the direction contained in schedule (K.). And he left it to the jury to say, whether they thought the defendant had acted in the *bonâ fide* belief that he was pursuing his duty under the statute, or whether they would infer, from his subsequent declara-
[*841] tions and conduct, that the course taken *by him with reference to the sale, was dictated by a malicious intention to inflict an injury on the plaintiff.

The jury returned a verdict for the plaintiff, damages 18*l.* 12*s.*,

(1) 12 R. R. 645 (3 Taunt. 246).

leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence of malice to go to the jury.

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Channell, Serjt., in Michaelmas Term last, accordingly obtained a rule *nisi* to enter a nonsuit, upon the two points reserved.

Keating and *Dowdeswell* showed cause:

Enough of the words charged were proved, to sustain the action, without reference to the amendment made at the trial. The substance of the slander was, that the plaintiff, in erecting the houses in question, had so conducted himself as to enable the defendant, in the exercise of the powers conferred upon him by the statute 7 & 8 Vict. c. 84, to prevent the carcasses being finished; and that was proved. The defendant's objection pointed to the alleged insufficiency of the roadway leading to the houses. The only provision of the Act as to roads, is that contained in schedule (K.), which declares that "with regard to every building of the first class, every such building must be built with some roadway, either to it or to the inclosure about it, of such width as will admit to one of its fronts of the access of a scavenger's cart of the ordinary size of such carts." This, in terms, requires, not a perfect road, that shall be paved or laid with gravel, or granite, or any other material ordinarily *used for making roads: but merely a roadway, [*842] a space of a given width which may be used as a road. The avowed object of the defendant was, not to cause the particular roadway to be made good, but to apply the screw to the plaintiff, in order to enforce what the defendant thought fit to consider a due construction of all the roads of Agar Town. There is no clause of the Act giving the defendant the power he assumed to have.

(CRESSWELL, J.: Might not the surveyor be very excusable for having mistaken the nature and extent of the powers given to him by this complicated Act of Parliament?)

His mistake has operated a very serious injury to the plaintiff: and the language used by him at the meeting of the official referees, and also when subsequently remonstrated with for his persecution of the plaintiff, clearly showed that he was not solely actuated by a *bonâ fide* and honest desire to perform his duty as surveyor. If he were acting *bonâ fide*, why did he suffer the plaintiff to incur all the

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expense of the sale before he gave notice of his objection? There clearly was a case for the jury. * * *

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Jan. 13, 15.

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Channell and *Byles*, Serjts., and *Badeley*, in support of the rule:

In order to sustain this action, it was necessary for the plaintiff to prove actual malice: *Hargrave* v. *Le Breton* (1); *Pitt* v. *Donovan* (2); *Smith* v. *Spooner* (3); *Toogood* v. *Spyring* (4); *Malachy* v. *Sloper* (5). In this the evidence clearly failed. The conduct of the defendant had reference solely to his official character, and evinced nothing more than a desire properly to discharge the onerous and complicated duties which the Act imposes upon him. All he meant, was, that, until the roads were made as he conceived the Act required that they should be, he would withhold his official sanction to the houses being considered finished. * * *

Cur. adv. vult.

[851] WILDE, Ch. J.:

The rule in this case prays that a nonsuit may be entered or a new trial granted. At the trial before my brother Coltman, certain objections were taken, which, if well founded, entitled the defendant to a nonsuit. Leave was accordingly reserved to him to move that a nonsuit might be entered; and, though some doubt has been entertained as to the precise grounds upon which such leave was reserved, it appears to us that it must be taken to have been co-extensive with the objections that properly went to a nonsuit.

The action is in the nature of an action for slander of title. The declaration alleges that the plaintiff was possessed of an unexpired

[*852] term in certain unfinished houses *situate in a place called Agar Town, wherein divers roads were then marked out and unfinished; that the place in question was part of a certain district for the administration, and within the operation, of the Building Act, 7 & 8 Vict. c. 84; that the said houses were approached by, and adjoined to, a certain roadway of the width, quality, and description required by the Act; that the plaintiff was desirous of selling his interest in the houses by public auction, and had accordingly advertised and put up and exposed the same to sale; and that the defendant, who filled the office of surveyor for the district within

(1) 4 Burr. 2422.
(2) 14 R. R. 535 (1 M. & S. 639).
(3) 12 R. R. 645 (3 Taunt. 246).
(4) 40 R. R. 523 (1 Cr. M. & R. 181; 4 Tyr. 582).
(5) 43 R. R. 621 (3 Bing. N. C. 371; 3 Scott, 723).

which the houses were situate, contriving, and falsely and maliciously intending, to injure the plaintiff, and to cause and induce the persons attending the sale to believe and apprehend that there was no such roadway to one of the fronts of the said houses as required by the Act, and to interrupt the sale, and to hinder and prevent the plaintiff from selling or disposing of his said estate or interest in the same, and to cause the plaintiff to lose and be deprived of divers great gains which he might, and otherwise would, have reaped and derived from the said sale, and to lose and be deprived of the expenses attending the said exposure to sale, &c., and to cause the said estate to be sold for a much smaller price than the said houses otherwise, but for the committing the grievances thereinafter mentioned, would have realised and produced, and to vex, harass, and oppress the plaintiff, wrongfully, injuriously, falsely, and maliciously, and without any reasonable or probable cause, and under colour of his said office, and under the false and malicious pretence of executing the same, attended, and was present at, and upon, such exposure to sale of his said estate and interest in the said houses, and then, upon such exposure to sale, and before the said estate and interest had been put up for sale, falsely and maliciously, under colour and pretence of executing his *said office, in the presence and hearing of divers [*853] liege subjects present and attending the said sale for the purpose of bidding for and purchasing the said houses, spoke and published certain words, to the effect that he had authority, as such district surveyor, to prevent the houses from being finished until the roads in Agar Town were made pursuant to the Act. The defendant pleaded Not guilty, and a justification as to a portion of the words, on the ground that there was not such roadway to one of the fronts of the said houses, of the width, quality, and description required by the Act. At the trial, witnesses were called, who proved that the houses were put up for sale; that the defendant had, before the day of sale, told certain persons that he would attend for the purpose of warning buyers that they must purchase subject to the inconveniences that resulted from the non-completion of the roads; and that the defendant accordingly did attend the sale, and there used expressions to the effect that he had power to prevent the houses from being finished or occupied, until the roads were completed. It appearing that there was a variance between the evidence given and the words set out in the declaration, the plaintiff asked leave to amend the statement. The learned Judge was of opinion that

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he had power, under the statute, to allow the amendment: and, he accordingly did so, by substituting for the words in italic in the first count, the words "the houses,"—reserving it to the Court to say, whether or not the amendment was one that was authorised by the statute; and the cause proceeded upon the footing of the record having been so amended.

It is not necessary to the decision of this case that we should enter upon the discussion of this point. But, at the same time, having considered the matter, it may be convenient to state my view of it. * * *

[855] Looking at the record in its amended shape, the next question is, whether there was evidence that was proper to be submitted to the jury to show that the defendant had acted maliciously. It seems to have been admitted,—and, indeed, it could not well have been denied,—that proof of actual malice was requisite to sustain the action. The declaration is framed with reference to that view of the law. On the part of the defendant it has been insisted, that, not only was there no evidence that would warrant the jury in inferring actual malice, but that there was none that the Judge was warranted in submitting to them. In determining this question, regard must be had to the situation of the defendant. He was not a mere volunteer, impertinently and intrusively interfering with another man's concerns, having no duty or obligation of any sort imposed upon him. He was a surveyor appointed under an Act of Parliament to perform duties of a very important character, to see that all persons employed in constructing buildings in the district for which he acted, duly conformed to the provisions of the Act. In considering this point, it will be necessary to refer to several parts of the statute. It is intituled "An Act for regulating the construction and the use of buildings in the metropolis and its neighbourhood." The preamble recites, amongst other things, that, "forasmuch as in many parts of the metropolis, and the neighbourhood thereof, the drainage of the houses is so imperfect as to endanger the health of the inhabitants, it is expedient to make provision for facilitating and promoting the improvement of such drainage;" that, "forasmuch as by reason of the narrowness of streets, lanes, alleys, and the want of a thoroughfare in many places, the due

[*856] ventilation of crowded neighbourhoods is often impeded, *and the health of the inhabitants thereby endangered, and, from the close contiguity of the opposite houses, the risk of accident by fire is extended, it is expedient to make provision with regard to the

streets and other ways of the metropolis, for securing a sufficient width thereof;" and that "forasmuch as great diversity of practice has obtained among the officers appointed in pursuance of the said Acts (1) to superintend the execution therof in the several districts to which such Acts apply, and the means at present provided for determining the numerous matters in question which constantly arise, tend to promote such diversity, to increase the expense, and to retard the operations of persons engaged in building, it is expedient to make further provision for regulating the office of surveyor of such several districts, and to provide for the appointment of officers to superintend the execution of this Act throughout all the districts to which it is to apply, and also to determine sundry matters in question incident thereto, as well as to exercise, in certain cases, and under certain checks and control, a discretion in the relaxation of the fixed rules, where the strict observance thereof is impracticable, or would defeat the object of this Act, or would needlessly affect with injury the course and operation of this branch of business." The first section then provides that the Act shall come into operation, as to the districts and the officers to be appointed in pursuance thereof, on the 1st of September, 1844, and as to the buildings, streets, and other matters, on the 1st of January, 1845. The second section gives a definition or statement of the sense in which certain terms and expressions used in the Act are to be understood; amongst others, the word "street" is to include "every square, circus, crescent, street, road, place, row, mews, *lane, or place along which carriages can pass, or [*857] are intended to pass, and that whether there be or be not, in addition to the carriage-way, a foot-way, paved or otherwise;" the words "already built," used in reference to buildings, are to apply to "buildings built before the 1st of January, 1845, or commenced before that day, and covered in and rendered fit for use within twelve months thereafter," and, used in reference to streets, and alleys, to "all streets or alleys made or laid out before that day, and which shall be formed and rendered fit for use within twelve months thereafter;" and the words "hereafter to be built," used in reference to buildings, are to apply to "all buildings to be built or commenced after the 1st of January, 1845, or which, being commenced, shall not be covered in within twelve months thereafter," and, used in reference to streets and alleys, to "all streets or

(1) *I.e.*, the statutes wholly or in part repealed by that Act, viz. the 14 Geo. III. c. 78, 50 Geo. III. c. 75, and 3 & 4 Vict. c. 85.

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alleys not laid out before the said 1st of January, or which, being laid out, shall not be rendered fit for use within twelve months thereafter." It is within the latter description that the property now in question falls, neither the houses nor the road having been completed within the prescribed period. The eighteenth section, for the purpose of more effectually enforcing the observance of the provisions of the Act, enacts, "with regard to any buildings, drains, &c., which shall be hereafter built, rebuilt, enlarged, or altered within the limits of this Act, contrary to the provisions hereof, so far as relates to the removal thereof,—that, if the same be not built, rebuilt, enlarged, or altered in the manner and of the materials, and in every other respect according to, and in conformity with, the several rules and directions which are in this Act particularly specified, and if any person build or begin to build, &c., or alter, &c., or use or cause to be used, any part of any [*858] ground or building, projection, drain, or other *thing, contrary thereunto; and if in either of such cases it so appear by the certificate of the official referees, then the said building, projection, drain, or other thing, or such part thereof so irregularly built or begun to be built, or so irregularly altered or begun to be altered, or so used, shall be deemed a nuisance; and thereupon it shall be the duty of the surveyor, and he is hereby directed, to summon the builder before any two justices of the peace:" and the clause goes on to provide for the mode of proceeding, and the removal of buildings, &c., so declared nuisances. By section 52, for the purpose of making provision concerning streets and other ways of the metropolis, it is enacted, "with regard to such streets and other ways hereafter formed, so far as relates to securing a sufficient width thereof, that, from the passing of this Act, all the conditions, regulations, and directions contained in the schedule (I.) to this Act annexed, shall be duly observed and performed; and that, if any person offend in respect thereof, he shall be liable to all the penalties and forfeitures by this Act imposed in respect of any buildings, either built contrary thereto(1) or without due notice to the surveyor appointed in pursuance of this Act to inspect such buildings" (2). By the schedule which is here referred to, "every street (excepting any mews) must be of the width of forty feet at the least; but, if the buildings fronting any street be more than forty feet high from the level of the street, then such street must be of a width equal at the least to the height

(1) See section 18. (2) See section 13.

of the buildings above such level." And in schedule (K.) is the following provision with regard to buildings of the first class: "Every such building must be built with some roadway, either to it or to the inclosure about it, of such width as will admit, to *one of its fronts, of the access of a scavenger's cart, of the ordinary size of such carts." What is meant by "roadway" here,—whether it means a road properly formed and capable of being used as such, or whether this provision should be complied with by building on the edge of a ploughed field,—may be matter of doubtful speculation. The 68th section, which professes to enumerate the functions and duties of the surveyor, requires him "to see that all the rules and directions of the Act are well and truly observed in and throughout his district." By section 71 he is required to make a solemn declaration of official fidelity, before entering upon the duties of his office. The seventy-seventh section, which regulates the surveyor's fees, provides, that, "if the work in respect of which such fee shall become payable, have not been done in every respect agreeably to the directions of this Act, then it shall not be lawful for any surveyor to receive such fee. By receiving his fee, therefore, the surveyor in effect certifies that in his judgment the buildings are completed in conformity with the Act. Section 79 imposes penalties on the surveyor, if he shall be guilty of extortion, or "if at any time he wilfully neglect his duty, or behave himself negligently or unfaithfully in the discharge thereof." Under this provision, the surveyor would undoubtedly be liable to a penalty for suffering any houses in his district to be built otherwise than in conformity with the Act. Sections 80, 81, and 82 respectively relate to the appointment of the official referees, their functions, and the course of proceeding to put them in motion. The 108th section, which regulates actions against persons acting under the Act, contains words not usually found in Acts of Parliament: it begins, "and for regulating proceedings against persons acting in pursuance of this Act, be it enacted, with regard to any action or suit against any person in *respect of any act or thing done or intended to be done in pursuance of this Act, so far as relates to the limitation thereof, and to the notification thereof to the offending party, and to the venue thereof, and to the pleadings therein, and to the evidence of the matters thereof, and to the verdict therein, and to the judgment of the Court thereon, and to the costs of such action, and to the recovery of such costs," and then it goes on to provide that no such action shall be brought after the expiration

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of six months next after the fact committed, that the defendant shall have twenty-one days' notice of action, that the venue shall be laid in London or Middlesex, and that the defendant may plead the general issue, and give the Act, and the special matter, in evidence.

It appears that the defendant, in his capacity of surveyor under this Act, insisted that the houses in course of building by the plaintiff, were not constructed in conformity with the Act, inasmuch as there was no finished roadway of the width required by schedule (K.), and asserted that he had power under the statute to stop the completion of the buildings until such roadway was properly constructed. The learned Judge was of opinion that the mere leaving a space of the required width was not a due compliance with that provision, but that there must be a formed road. Whether this be or be not the true construction, it is not necessary to determine. The charge against the defendant is, that he asserted a right to prevent the completion of the buildings. In cases of this sort, there is always much danger of mistake on the part of those who are called to prove the words spoken. Here, there was some discrepancy in the evidence of the three witnesses who were examined: but, looking at the whole of it, I incline to think the defendant must be taken to have meant this—that, inas-

[*861] much as the houses were subject *to inspection, and could not be considered completely finished unless so certified by him as district surveyor, he would not, by receiving his fee, allow or admit that they were completed, until a proper roadway was made thereto in conformity with the Act. Even assuming that he meant to assert a right to stay the actual progress of the builder,—and some of the expressions used by him seem to be consistent with that view,—still the question is whether there was anything in it that could properly be submitted to the jury as evidence of malice; whether the defendant was actuated by a malicious intention to injure the plaintiff, and was not acting under a mere misconception of the power and authority vested in him by the statute.

One of the leading authorities upon this subject, and one that has never been upon any occasion impugned, is the case of *Pitt* v. *Donovan* (1). That was an action for slander of title, conveyed in a letter to a person about to purchase an estate of the plaintiff, imputing insanity to Y., from whom the plaintiff purchased it, and stating that the title would therefore be disputed, *per quod* the proposed purchaser refused to complete. It appeared at the trial

(1) 14 R. R. 535 (1 M. & S. 639).

that the defendant was a trustee under the marriage settlement of Y., and had married his sister; that, under the marriage settlement, a term of years in the estate in question was vested in the defendant as trustee for securing to Mrs. Y. her jointure; and that the defendant's wife was heir-at-law to her brother Y., in the event of his dying without issue. After a lengthened inquiry into the sanity of the plaintiff, and his competency to execute a conveyance, GRAHAM, B., left the question to the jury upon the evidence, stating to them, in the course of his summing-up, "that, in order to maintain the action, some malice must be fixed on the defendant, that is, the act must be injurious, and proceeding from an improper motive; *that, if the evidence satisfied them as men of good sense and good understanding, that Mr. Y. was insane, or if the defendant entertained a persuasion that he was insane, upon such grounds as would have persuaded a man of sound sense and knowledge of business, then the defendant would be entitled to a verdict." A verdict having been found for the plaintiff, Lord ELLENBOROUGH, in making absolute a rule for a new trial, on the ground of misdirection, says: "I cannot help thinking that the point which was peculiarly for the consideration of the jury, and on the event of which this case ought to depend, was not left to them correctly, and that it ought, therefore, to be presented to the consideration of another jury; and that point is, whether the defendant made the statement *bonâ fide*, and under an honest impression of its being the truth, or whether he made it maliciously, and for the purpose of slandering the title of the person that was about to convey his estate. The learned Judge has given us the terms in which he left the case to them, 'that they were to consider the question, and to judge on the whole of the evidence.' No doubt of that. 'That the gist of the action was malice.' Undoubtedly it was so. 'Not malice in the worst sense: but it was enough that the act done was wrongful, and done under circumstances that marked an intention to do an injury: and that would depend, not on the circumstance whether he believed it to be true, but whether his belief was such as a man of sound mind, or a man of sense and knowledge of business, would have formed.' Now, that is what he was not justified in saying; for, with reference to the competency or incompetency of Mr. Y., certainly the question in this cause does not depend on that (1); for, if what the defendant has written

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(1) Alluding to a part of the summing up (omitted by Lord ELLENBOROUGH), which left the fact of insanity to the jury.

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be most untrue, but *nevertheless, he believed it, if he was acting under the most vicious of judgments, yet, if he exercised that
[*863] judgment *bona fide*, it will be a justification to him in this case. Whether his belief be such as a man of sound sense and knowledge of business would have formed, is not the question; the opinion which a rational man would have formed on such a subject might be that Mr. Y. was competent; but that the jury must arrive at their conclusion in this case through the medium of malice or no malice in the defendant." His Lordship afterwards adds: "I am aware that there are many things reprehensible in the letters, but they are no slander of the title, if the defendant believed them. They contain disrespectful and improper passages, such as may perhaps be libellous on the person of the party whom they concern; but they are rather a confirmation of his belief that there was an objection existing against the man, on the ground of his incompetency to do the act, and that it was proper to make it to the person with whom he was corresponding. I should be very sorry if it were supposed, from the result of this motion, that there is the least imputation on the gentleman who is the plaintiff in this cause. There is not any ground for saying that he has conducted himself with any view to his own interest in this transaction; on the contrary, he has conducted himself rather delicately and nicely. But the question does not turn upon his conduct; and this is a case the decision of which is to govern other cases where the question of slander of title may occur; in which case the *bona fides* of the communication, and not whether a man of rational understanding would have done so and so, is the question to be canvassed. A man of intemperate passions, or of weak understanding, or a man acting under an erroneous impression, may be carried further than a man of more mature judgment; but still he would
[*864] not be liable to *an action of slander of this sort." Every sentence of that judgment is deserving of the utmost attention: and BAYLEY and DAMPIER, JJ., delivered opinions to the same effect, holding the proper question to be, malice or no malice, and that the defendant had such a degree of interest in the subject-matter as to prevent his being looked upon in the light of a stranger.

Let us, then, see whether there was any ground upon the evidence, whence it might or ought to have been left to the jury to infer that the defendant made the statement he did under the influence of malice, in the sense necessary to sustain the action. In the first place, the defendant was not a mere intruder: he was a

person to whom was confided the duty of seeing the provisions of a most important Act, properly attended to. The sale had been advertised for six weeks; and it is said that the defendant, therefore, had ample time, and was bound, to intimate his objection earlier than he did. Suppose he might, does the fact of his omission to do so furnish any ground for inferring malice? But it appeared, that, on the 27th of February, which was three days preceding the day of sale, the defendant did give the plaintiff notice of what he considered to be infractions of the Act. It is to be observed, too, that all the witnesses appeared to be more or less connected with the plaintiff; that two of the houses were sold; and that the only witness who stated that he was deterred by the defendant's threat from bidding at the sale, was, at the time of the trial, a tenant under the plaintiff. Next, it appears that the only objection stated by the defendant in the sale-room, was, as to the insufficiency of the roadway. If maliciously disposed, he might then have urged another objection, viz. as to the insufficiency of the drains; for, it appeared, that, between the date of the notice and the 16th of March, the day on which the defendant's information was heard before the official *referees, the plaintiff had caused [*865] that defect to be remedied. The only other piece of evidence that was relied on as showing malice, was the remark made by the defendant in the presence of the official referees. When asked by a friend of the plaintiff's, "Why do you pursue Mr. Pater?" adopting the language of the question, the defendant answered, "The reason I pursue him, is, because he is steward and collector for Mr. Agar; and, as I cannot attack Mr. Agar, I attack Mr. Pater." What was a proper motive on the part of a person in the defendant's position? Why, to obtain a due and faithful observance of the Act. What is the motive the defendant assigns? He says, in effect, "I am desirous of getting the roads in Agar Town completed: I have but one mode of enforcing that, viz. by stopping the buildings: and you, Mr. Pater, being the agent of Mr. Agar, the ground-landlord, are the most proper person for me to pursue for that purpose." It is not shown that the defendant had, or could have, any feeling of personal hostility against the plaintiff: and the ground assigned by him for selecting the plaintiff, is perfectly consistent with good faith. What was said afterwards as to the plaintiff's withdrawing his action, can hardly be relied on as showing that the defendant was acting from personal and vindictive motives. Whether, therefore, the roadway was or was

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not properly set out within the meaning of the Act, whether it was the defendant's duty to take steps to get the road put into an efficient state, or whether he had any power or authority under the Act to interfere at all, is not the question here. We must be satisfied that there was legal evidence to warrant the jury in inferring malice. The absence of authority in the defendant to act as he did, is relied on by the plaintiff as a circumstance from

[*866] which the jury might be justified in inferring malice. *But, was it so clear that the Act did not warrant the assumption of right claimed by the defendant? I must confess I have entertained some doubt, though I incline to think that the buildings might be held to be completed, although the roadway were left in an unfinished state. It is to be observed, however, that the Act, which had but recently passed, had not been the subject of any judicial decision; and that the defendant is not a lawyer. I am unable, therefore, to bring myself to the conclusion that the defendant had no probable cause for adopting the construction he did, though it might not be a strictly correct one. But, even if he had no probable cause for so construing the Act, I am clearly of opinion that the circumstances were not such as to warrant an inference of malice. There was an entire absence of any expressions of ill-will towards the plaintiff, or of any remarks unconnected with the supposed performance of the defendant's duty under the Act. All seems to have been done in the honest and *bonâ fide* belief that it was in pursuance of his duty.

For these reasons, I am of opinion that the rule for entering a nonsuit should be made absolute.

MAULE, J.:

I concur with the Lord Chief Justice in thinking that the amendment made at the trial was properly made, and that (the declaration being so amended) there was no case to go to the jury for the plaintiff. His Lordship having gone so fully into the matter, and having stated so clearly the way in which the question arises, it is scarcely necessary for me to add a word.

[868] * * The remaining question is, whether there was evidence to go to the jury upon the general merits of the case,—any evidence of express malice. This is an action for slander of title, which is a sort of metaphorical expression. Slander of title may be of such a nature as to fall within the scope of ordinary slander. Slander of title ordinarily means a statement of something tending to cut down the extent of title, which is injurious only if it is false. It is

essential, to give a cause of action, that the statement should be false; and therefore falsehood is given in evidence under Not guilty, since the new rules. It is essential also that it should be malicious: not, as Lord ELLENBOROUGH observes in *Pitt* v. *Donovan* (1), malicious in the worst sense; but with intent to injure the plaintiff. If the statement be true, if there really be the infirmity in the title that is suggested, no action will lie, however malicious the defendant's intention might be. The jury may infer malice from the absence of probable cause; but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice; neither does the existence of probable cause afford any answer to the action. Suppose one having an infirm title to property which he is going to sell, or to make the subject of a settlement, and another, moved by spite and malice, discloses *what he believes [*869] to be a defect, though the information afterwards turns out to be untrue, and injury results to the former; in that case, an action would lie, the statement being false and malicious, and injurious to the plaintiff. Unless he shows falsehood and malice and an injury to himself, the plaintiff shows no case to go to the jury. If, therefore, we are of opinion that there was no evidence of malice, it is unnecessary to decide whether or not the defendant's statement was false, and consequently unnecessary for us to determine what is the proper construction of the Act. We must assume that the defendant thought he had power to stop the buildings. If he had such power, however malicious his conduct, no case could be made against him. If he had no such power, then alone can the question of malice become material. The construction I should put upon the Act, is, that the defendant had not the power he assumed to have, and that a "roadway" does not necessarily mean a complete or made road. The Act, however, is not free from doubt. Assuming, then, that the defendant had not the power he said he possessed, I agree with the Lord Chief Justice in thinking that there was no evidence to go to the jury that he was actuated by malice. He was not a stranger to the transaction. It was his duty to interfere. He is to decide on the nature and extent of his powers; and he must take care that he does not stop short of his duty. It must be borne in mind, that, of all questions that are presented for judicial decision, none are so difficult as those that arise upon Acts of Parliament. Surely, then, in dealing with a statute of confessedly doubtful and difficult construction, malice is not to be inferred from

(1) 14 R. R. 535 (1 M. & S. 639).

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mere mistake. Where a man has no pecuniary motive, and the Act is equivocal, the charitable presumption is, that he is not actuated by bad motives.

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[870] For these reasons, I am of opinion that the rule for entering a nonsuit must be made absolute.

CRESSWELL, J.:

I am entirely of the same opinion. The amendment made at the trial, being of a matter not material to the merits of the case, was properly made. * * *

With respect to the other point, it may be doubtful whether the defendant took a correct view of the duty imposed upon him by the 7 & 8 Vict. c. 84. But there is nothing in the evidence to show that he did not honestly and *bonâ fide* believe his construction of the Act to be a correct one. There is nothing at all to justify an inference of malice. No reasonable man could infer it: and therefore there was nothing to be left to the jury.

V. WILLIAMS, J.:

I am of the same opinion. I think we should materially infringe upon the rule that requires a plaintiff in an action of this sort to give evidence of malice, if we were to hold that there was any thing here that could properly be submitted to the jury. I never saw a case so utterly bare of circumstances to warrant an inference of malice.

Rule discharged.

1847. *Jan.* 19.

LEE *v.* SIMPSON.

(3 C. B. 871—884; S. C. 16 L. J. C. P. 105; 4 Dowl. & L. 666; 11 Jur. 127.)

[871]

In an action upon the Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 15), s. 2, for penalties for the representation of a dramatic piece of the plaintiff's at a "place of dramatic entertainment," without his consent, it is sufficient to describe the offence in the words of the Act.

An introduction to a pantomime,—that is, the only written part of the entertainment,—is within the protection of the Act.

To constitute the offence, it is not necessary to show, nor need the declaration aver, that the defendant knowingly invaded the plaintiff's right (1).

DEBT, for penalties under the Dramatic Copyright Act, 3 & 4 Will. IV. c. 15 (2).

(1) Applied in *Reg.* v. *Prince* (1875) L. R. 1 C. C. R. 154, at p. 163; 38 L. J. M. C. 8.—J. G. P.

(2) Extended to dramatic pieces and dramatic representations, by the 5 & 6 Vict. c. 45, ss. 20, 21. [Sec. 15, amended by 51 & 52 Vict. c. 17, s. 1. —J. G. P.]

The declaration stated, that, after the passing of the 3 & 4 Will. IV. c. 15, intituled "An Act to amend the laws relating to dramatic literary property," the plaintiff was the author of, and did compose, a certain dramatic entertainment called "Princess Battledore, or Harlequin Shuttlecock," and that he was and still is the proprietor thereof, and as such had and has the sole liberty of representing the said dramatic entertainment; and that, within twelve calendar months next before the commencement of the suit, and whilst the plaintiff was such author and proprietor, the defendant, on twenty-three several occasions, to wit, on &c. &c., and without the consent in writing of the plaintiff, so being such author and proprietor as aforesaid, did cause the said dramatic entertainment to be represented at a certain place of dramatic entertainment, called the "Theatre Royal, Liverpool," in the county of Lancaster, contrary to the form of the statute, &c.; whereby he the defendant became *and was liable to pay to the plaintiff, for [*872] each such representation, not less than 40*s.*, or the amount of the benefit or advantage arising from each of such representations, or the injury sustained by the plaintiff thereupon, whichever should be the greater damages: and the plaintiff averred that 40*s.* was the greatest damages recoverable by him according to the statute, in respect of each of such representations, &c.

Plea, *nil debet*, "by statute."

The cause was tried before Coltman, J., at the first sitting at Westminster in this Term.

The venue, which was originally laid in Middlesex, had been changed to Liverpool, and restored to Middlesex upon the ordinary undertaking on the part of the plaintiff to give material evidence in that county.

It appeared, that, in the year 1838, the plaintiff wrote an introduction to a pantomime called "Princess Battledore, or Harlequin Shuttlecock." The work was composed at the plaintiff's residence in Surrey. It existed only in manuscript. The representation by the defendant took place at a theatre at Liverpool, where it was performed twenty-three nights. The defendant had purchased the pantomime in 1843 from one De Hays, in the *bonâ fide* belief that De Hays was the author of it. * * *

The learned Judge ruled that the plaintiff had given sufficient [873] evidence to satisfy the undertaking.

It was further objected, on the part of the defendant, that the statute 3 & 4 Will. IV. c. 15, did not extend to the protection of

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pantomimes, which are not dramatic entertainments as ordinarily understood; that it did not apply to the performance of a part of a work; and that, to render the defendant liable to the penalties imposed by the Act, it was incumbent on the plaintiff to show that the offence was knowingly committed.

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The learned Judge overruled these objections; and the jury returned a verdict for the plaintiff for 46*l*., being 40*s*. for each performance.

M. D. Hill now moved for a nonsuit, on the ground that the undertaking to give material evidence in Middlesex, had not been complied with, or for a new trial, on the other grounds urged at the trial; and also to arrest the judgment, on the ground that the declaration did not allege the performances complained of to have been public performances. * * *

[874] The first section of the 3 & 4 Will. IV. c. 15, gives the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, the sole liberty of representing it, or causing it to be represented, at any place of dramatic entertainment in any [*875] part of *the British dominions. * * Pantomimes are not mentioned in this Act, though they are mentioned in the twenty-third section of a statute which is *in pari materiâ*, viz. the 6 & 7 Vict. c. 68: and they clearly do not fall within the description of "dramatic entertainments." The Act, being penal, is to be construed strictly. [He cited *Rex* v. *Handy* (1) and *Gallini* v. [877] *Laborie* (2).] This Act only protects integral and complete works. Suppose a dramatic piece, the joint production of two dramatists, like the works of Beaumont and Fletcher, were represented without authority, how would the penalty be divided?

The intention of the Act was, to protect authors against offenders. Can a man be an offender, who honestly buys an article that is not purchasable in market overt? The same construction must be put upon this Act as if the penalty had been 500*l*., or transportation. *Actus non facit reum, nisi mens sit rea* (3). [He cited *Rex* v. *Marsh* (4) and *Earl Spencer* v. *Swannell* (5).]

[878] As to the arrest of judgment. There are many cases in which a description of the alleged offence, in a declaration or a conviction, in the precise words of the statute creating the offence, will not be enough. * * *

(1) 6 T. R. 286.
(2) 2 R. R. 581 (5 T. R. 242).
(3) 3 Inst. 107.
(4) 2 B. & C. 717; 4 Dowl. & Ry. 260.
(5) 49 R. R. 546 (3 M. & W. 154)

WILDE, Ch. J.:

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The Court is of opinion that no rule should be granted in this case. The first point made, is, that the plaintiff ought to have been non-suited, inasmuch as he had failed to comply with his undertaking to give material evidence in the county of Middlesex. * * * [880]

The next point insisted on was, that the production in question—a pantomime—is not within the protection of the Act. The statute professes to protect "any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author or his assignee." It is said that pantomimes are not expressly mentioned in the Act, and that this is not an entire work; and a difficulty has been suggested as to the recovery and apportionment of penalties for representing a play, the joint production of two dramatists. That, however, is not the case now before us: for, it is not correct to say that the work in question is not an entire piece. It does not *appear that the author proposed to add any thing to it. It was complete as far as he was concerned: and, indeed, so far perfect was it, that the defendant played it precisely as the plaintiff had composed it. It was intended merely as an introduction to what is called, in theatrical parlance, "the comic business," the tricks of the pantomime. That it was valuable property, is shown by the defendant's buying it. As far as we can collect the meaning of the statute, it seems to us to be a dramatic piece, of the description the Act was meant to protect. [881] [*882]

Then, it is said, that the defendant, who appeared to have *bonâ fide* purchased the work from one De Hays, in ignorance of the plaintiff's right, is not an offender, and consequently is not liable in this penal action. Whether the Act is penal or not, it has but one object in view, viz. to protect the author, by inflicting a forfeiture on persons guilty of piracy. The second section enacts that, "if any person shall, contrary to the intent of the Act, or right of the author, &c., represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits of the Act, any such production as aforesaid, or any part thereof, every such offender shall be liable, for each and every such representation, to the payment of an amount not less than 40*s.*, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to

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the true intent and meaning of the Act, to be recovered, together with double costs of suit, by such author or other proprietors, in any Court having jurisdiction in such cases in that part of the United Kingdom, &c., in which the offence shall be committed." The difficulty of taking the account at Nisi Prius, of the benefit [*883] *arising to the one party, or the loss to the other, from the representation, would render the Act altogether illusory if the penalty were to be regulated solely by that: therefore the statute has very wisely given the author the option of suing for the 40*s.* penalty. The object of the Legislature was, to protect authors against the piratical invasion of their rights. In the sense of having committed an offence against the Act, of having done a thing that is prohibited, the defendant is an offender. The plaintiff's rights do not depend upon the innocence or guilt of the defendant. It seems to us, therefore, that this pantomime is within the protection of the Act, that the now defendant is an offender, and that the allegation and proof of a *scienter* were not necessary to entitle the plaintiff to such protection. The statute would altogether fail to effect its object, if it were necessary to show that the defendant had a knowledge of the plaintiff's right of property.

The motion in arrest of judgment is equally without foundation. The statute prohibits the representation, without the consent of the author or proprietor, "at any place of dramatic entertainment." The Legislature clearly meant places where dramatic entertainments are represented to which the public are admitted. And what the Legislature meant in the statute, the plaintiff must be taken to have meant in his declaration. The declaration substantially alleges that the defendant, in violation of the statute, has, without his consent, caused his piece to be exhibited at a place of dramatic entertainment; and that allegation is sustained by showing a public representation in a licensed theatre. There is no suggestion now that the evidence did not sustain the charge. Several cases were cited for the purpose of showing that it is not always sufficient to describe an offence in the words of the statute creating it. They [*884] all, however, were cases of summary convictions by *courts of limited jurisdiction. I apprehend that the rule which governs cases of that description has no application here.

For these reasons we think that the defendant is not entitled to a rule upon either of the grounds upon which he has relied.

Rule refused.

TOWNE *v.* CAMPBELL.

1847. *Jan.* 26.

(3 C. B. 921—924; S. C. 16 L. J. C. P. 128.)

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[921]

The only evidence of the terms on which apartments were hired, consisted of the following receipt: "Received of P. L. C. one hundred and twenty-six pounds, for rent of furnished house from the 8th of May to the 1st of August instant," and a correspondence about the return of the key: Held, that the jury were warranted in inferring that the hiring was weekly, and not quarterly.

Semble, per COLTMAN, J., that, if the hiring had been quarterly, a quarter's notice would have been necessary.

Quære, whether in the absence of evidence of a contract or usage requiring notice to quit, a notice is necessary to determine a weekly hiring of furnished apartments.

ASSUMPSIT for the use and occupation of a dwelling-house, with a count upon an account stated.

Pleas: First, except as to 189*l*., *non assumpsit*; secondly, as to 126*l*., payment before action brought; thirdly, as to 63*l*. a tender. Issue thereon.

The cause came on for trial as an undefended cause, before Coltman, J., at the last sitting at Westminster, in the present Term. The action was brought to recover a quarter's rent of a furnished house at Hyde Park Corner. The defendant had originally hired the house for three lunar months. There was no evidence of the terms of the hiring, other than what could be inferred from the following receipt, signed by the plaintiff:

"August 10th, 1846. Received of P. L. Campbell, Esq., one hundred and twenty-six pounds, for rent of furnished house from the 8th of May to the 1st of August instant."

The defendant continued to occupy until the 21st of August, when Mrs. Campbell wrote to him, desiring him to send for the key. The plaintiff, however, claimed to be entitled to rent for a second quarter, upon the terms indicated by the above receipt.

The learned Judge told the jury that the question for them to consider, was, whether they could infer from the evidence produced before them that the hiring was a quarterly (1) or a weekly hiring. If the former, his Lordship *said, the plaintiff was entitled to a quarter's rent (2); if the latter, he was perhaps entitled to a week's notice to quit, and it would be for them to say whether such notice had been given or not. Mrs. Campbell's letter of the 21st of August,

[*922]

(1) The hiring for three lunar months, and the language of the receipt, would seem to point rather to a weekly, or a monthly tenancy, a quarterly.

(2) And see *Kemp* v. *Derrett*, 14 R. R. 828 (3 Camp. 510).

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he observed, was not a formal notice, but it was an offer to give up the premises, and furnished some evidence, under the circumstances, that a notice had been given.

The jury found that the tenancy was weekly, and that there had been due notice to quit. A verdict was accordingly entered for the defendant on the first two issues, and for the plaintiff on the third, with 1*s.* damages.

Lush, for the plaintiff, now moved for a new trial on the ground of misdirection, and also that the verdict was against evidence:

There was no evidence to warrant the jury in coming to any other conclusion than that the hiring was quarterly.

(COLTMAN, J.: There was no evidence to show what the hiring was: it only appeared that the defendant occupied for a given period, for which he paid 120 guineas, and that he afterwards held over for a few weeks.)

There was, at all events, no evidence to show that the tenancy was weekly. No weekly payments were ever made. Nor was there anything to warrant the inference suggested that a notice to quit had been given. The letter of the 21st of August was a mere offer to return the key.

(CRESSWELL, J.: The case of *Huffell* v. *Armistead* (1) seems to be an authority to show that no notice to quit is necessary at all in the case of a weekly tenancy. PARKE, B., there says: "Upon the question of the necessity of a notice to quit, the law is clearly settled that a yearly tenancy cannot be determined without half a [*923] year's notice. But that rule *cannot be applied to a weekly taking; for, the effect of it would be to show that a half-week's notice was necessary to put an end to such a tenancy. I am not aware that it has ever been decided, that, in the case of an ordinary monthly or weekly tenancy, a month's or a week's notice to quit must be given. The cases that have been cited (2) are not authorities in support of this proposition. A tenant who enters upon a fresh week may be bound to continue until the expiration of that week, or to pay the week's rent; but this is a very different thing from giving a week's notice to quit. The proposition contended for is this, that, if a

(1) 48 R. R. 756 (7 Car. & P. 56).
(2) *Doe* d. *Parry* v. *Hazell*, 1 Esp. N. P. C. 94, and *Roe* d. *Peacock* v. *Raffan*, 6 Esp. N. P. C. 4.

tenant commences a new week without giving notice, he is to be considered as contracting to hold, not only for that week, but also for the following week. I am of opinion, in the absence of any evidence to prove a usage to that effect, that, in point of law, a week's notice to quit is not implied as a part of the contract, in the case of an ordinary weekly taking.")

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It was put to the jury there to say whether or not it was part of the contract between the parties that the tenancy should be put an end to without a week's notice. The learned Judge in this case, however, did not so put it to the jury.

MAULE, J.:

I am of opinion that no rule ought to be granted in this case. It was left to the jury to say whether the tenancy proved was a weekly tenancy, and whether it had been put an end to by a proper notice to quit. They found both these questions in the affirmative. The question now is whether that conclusion was warranted by the evidence. I think it was. The plaintiff gave no evidence to show a quarterly hiring; *and, regard being had to the subject-matter of [*924] the contract, I think it was by no means unreasonable to infer that the tenancy was weekly. If so, the plaintiff should have given some evidence to show that it was part of the contract that a week's notice to quit should be given. This he did not do: and it is not at all an unusual thing to hire furnished apartments by the month or the week without any stipulation for notice. Besides, it may well be doubted whether there was not some evidence to show that a notice to quit had been given.

Upon the whole, I see no ground to object either to the summing up or to the conclusion to which the jury came.

The rest of the COURT (1) concurring,

Rule refused.

SCOTT AND ANOTHER *v.* BERKELEY (2).

1847. *Jan.* 27.

(3 C. B. 925—937; S. C. 16 L. J. C. P. 107.)

[925]

In 1837 several parties associated together to form a joint-stock Company, engaged offices, clerks, &c., and circulated prospectuses containing the defendant's name as a director. The defendant attended meetings and received summonses from October, 1837, to March, 1838, but ceased

(1) COLTMAN, CRESSWELL, and V. WILLIAMS, JJ.; Wilde, Ch. J., being absent.

(2) Judicially cited in *Portal* v. *Emmens* (1876) 1 C. P. D. 201, 664, 45 L. J. C. P. 305, and *Kipling* v. *Todd*

SCOTT v. BERKELEY

to attend the one and receive the other after that time, though the Company continued to meet till March, 1839. On the 31st July, 1838, an Act passed forming and regulating the Company, in which the defendant and several other parties, and all other persons who should take shares, were united into a Company. In a deed prepared from instructions given in November, 1837, the defendant's name was set forth as a director, and a seal placed on the deed for his signature; but he never executed the deed.

On the 6th November, 1843, judgment in an action commenced on the 15th April, 1840, was signed against the Secretary of the Company, upon which judgment a *scire facias quare executionem non* issued against the defendant:

Held, on a special case under which the Court were at liberty to draw such inferences as a jury ought to have drawn, that the foregoing facts did not sufficiently show that the defendant was a member of the Company at the time when the judgment was obtained.

SCIRE FACIAS quare executionem non against the defendant as a member of "The India-Steam-Ship Company," upon a judgment obtained against the secretary.

The writ and declaration stated that the plaintiffs recovered against Henry Manning, the Secretary of a certain Company called "The India-Steam-Ship Company," constituted by an Act of Parliament passed in the year 1838, for forming and regulating a Company to be called "The India-Steam-Ship Company," and who was summoned as the nominal defendant for the said Company, the sum of 35,006*l.* 1*s.* 9*d.* for damages for non-performance of a contract made by the Company with the plaintiffs and one Robert Sinclair, deceased, and that the defendant was a member of the Company at the time of the recovering and giving of the judgment.

The defendant pleaded, that, at the time of the recovering and giving of the said judgment, he was not a member of the said Company. At the trial before Tindal, Ch. J., at the sittings at Guildhall after Trinity Term, 1845, a verdict was taken for the plaintiffs, subject *to the opinion of the Court, upon the following case:

[926]

In the year 1837, several gentlemen associated themselves for the purpose of forming a Company, to be called "The India-Steam-Ship Company," for the establishment of a communication by steam vessels between this country and India, by way of the Cape of Good Hope, and between this country and Australia. They engaged apartments at No. 7, Pall Mall, upon the outer windows of which the title of the Company was announced in

(1878) 3 C. P. Div. 350, 47 L. J. C. P. 617. As to the procedure of *scire facias quare executionem non*, see Lindley on Companies, 6th ed. vol. i. p. 395, and for the modern practice, R. S. C. Ord. XLII. r. 23.—J. G. P.

large letters; they furnished there a board-room for the directors; they engaged clerks, a messenger, porter, and other servants; appointed a solicitor to the Company, auditors, agents, and bankers, and issued and publicly circulated prospectuses. The prospectus commenced as follows: "Prospectus of The India-Steam-Ship Company by the Cape of Good Hope. Capital 500,000*l.*, in shares of 50*l.* each. Directors—Capt. Sir J. Ross, C.B., Royal Navy, Chairman, Augustus Manning, Esq., Chalk Hill House, Kingsbury, Deputy-Chairman, the Honourable Craven Berkeley, M.P. (the defendant), Spring Gardens. (Then followed the names of other gentlemen whose names were also subsequently inserted with that of the defendant in the Company's Acts as hereinafter mentioned.) The prospectus went on to give the names of the auditors, engineers, agents, bankers, and solicitors; and, after pointing out the objects and advantages of the scheme, proceeded as follows: "The articles and rules may be seen, and information may be had of the Secretary, at the Company's Office, 7, Pall Mall, to whom applications for shares are to be addressed; and also to the solicitor, No. 4, New Bridge Street, Blackfriars."

In the course of the months of October, November, and December, 1837, and January, February, and March, 1838, the defendant, from time to time, attended as a *director at the board-room in Pall [*927] Mall; and summonses to attend the meeting of directors, together with all papers issued by the board, and prospectuses, were delivered, from time to time, in official envelopes by the messenger and porter at the places of abode of the several persons named in the prospectus as directors, including that of the defendant in Spring Gardens. The messenger did not leave papers or summonses at the defendant's residence after March, 1838, and the defendant did not attend at the board after that time. On the 31st of May, 1838, the Act passed for forming the said "India-Steam-Ship Company" (1 & 2 Vict. c. xcvii.). By that Act, it was, among other things, enacted, that Sir John Ross, the Honourable Craven Berkeley (the defendant), Thynne-Howe Gwynne, Thomas-James Barrow, Charles-Spencer Bunyan, Edward Walpole, and William Hopson, Esquires, and all and every such person or persons, body and bodies politic, corporate or collegiate, who should be, or might from time to time become, a proprietor or proprietors of any share or shares in the undertaking thereby established, and their respective successors, executors, administrators, and assigns, should be, and they were thereby, united into a Company by the name of "The India-Steam-Ship Company."

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The defendant was a member of the House of Commons at the time of the passing of this Act; but there was no evidence to show that he was personally aware of the passing of the Act, or of its contents. On the 30th of July, 1839, Mr. Manning, the Secretary, presented for inrolment in the High Court of Chancery, a list purporting to be a memorial of the names and descriptions of the Secretary, and of the several persons being members of the said Company, in the form for that purpose expressed in the schedule to the said Act annexed; and such memorial was inrolled upon the [*928] oath of the said Mr. Manning *on the last day before the expiration of twelve calendar months next after the passing of the Act. It was sworn to and inrolled against the advice and against the protest of the solicitor to the Company, on the ground that the inrolment was a fraud, because the Company was not formed, and that Manning had no authority. The defendant's name was not in this memorial. No other memorial was ever inrolled. The last meeting of directors, previous to this inrolment, was on the 6th of March, 1839. From that time they ceased to meet. In the Company's deed, prepared by the solicitor from instructions given by the directors in November, 1837, Mr. Berkeley's name is set forth as a director: a seal was placed on the deed for his signature, and his name was written, in pencil, opposite to the seal for that purpose. He never executed the deed. Fifty shares were required for the qualification of a director. The directors were constituted by themselves. No shares were actually issued. About 1,200 were subscribed for. The plaintiffs are the surviving partners of the firm of Scott, Sinclair & Co., ship-builders at Greenock, in Scotland. On the 6th of November, 1843, judgment was issued in an action commenced on the 13th of April, 1840, the record whereof was to form a part of the case. The plea in the record mentioned was withdrawn in the *bonâ fide* belief that there was no defence to the action; and thereupon, and by order of a Judge and consent of the parties, judgment was entered by confession upon the 6th of November, 1843, for 35,006*l.* 1*s.* 9*d.*, the amount then due from the Company to the plaintiffs under the contract aforesaid. No execution had been had; but, by payments made, the debt due to the plaintiffs is reduced to 21,658*l.* 8*s.* 4*d.*, which is still due, with interest from 31st of May, 1841.

The question for the opinion of the Court, is, whether, under the above circumstances, the defendant was a member of the Company [*929] at the time of the giving and *recovering of the said judgment.

If so, execution is to issue against the defendant for a sum to be agreed upon. If not, a verdict is to be entered for the defendant. And it is agreed that the pleadings and the Company's Act, and a copy of the memorial, and the before-mentioned record, are to form a part of the case; and that the Court shall be at liberty, if they shall be so pleased, to draw such inferences as they think that a jury ought to have drawn.

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Greenwood (with whom was *Shee*, Serjt.), for the plaintiff:

The first (1) section of the Act of Parliament forming the Company, constitutes the defendant an actual member thereof. * * In addition to the positive declaration of an Act of Parliament, the [930] defendant is stated in the case to have attended meetings of the Company for six months, and to have allowed his name to be circulated in prospectuses as a director. It will be argued that the Company never had a legal existence, inasmuch as the capital was not subscribed for; and *Dickinson* v. *Valpy* (2) will be cited. The principle established there is inapplicable to the present case. * * In this case, however, there is nothing future, so far as regards the directors; for, with respect to them, the Company was completely formed. *Nockels* v. *Crosby* (3), and *Bourne* v. *Freeth* (4), will also be relied upon, but are likewise distinguishable. * * The existence of the Company did not depend on the capital's

(1) By the 1st section of the Act (1 & 2 Vict. c. xcvii.) certain persons including the defendant) and all other persons who should become proprietors of shares, were united into a Company, by the name of "The India-Steam-Ship Company."

By the 6th section, it was enacted, that, from and after the passing of the Act, all actions, &c., by and against the said Company, should and might be commenced by and against the Secretary for the time being, &c.

By the 9th section, that a memorial of the names and descriptions of the several persons being members of the said Company (in the form for that purpose expressed in the schedule hereunto annexed,) shall be inrolled, upon oath, in the Court of Chancery within twelve calendar months from the passing of the Act; and, when any person or persons shall cease to be a member or members of the said Company, a memorial thereof shall, in like manner, be inrolled as aforesaid, &c.

By the 10th section, that, until such memorial as first hereinbefore mentioned shall have been inrolled, no action shall be brought by the said Company under the authority of the said Act; and all the members whose names are expressed in any inrolment made in pursuance of the said Act, shall be liable to all actions, judgments, &c., &c., until a memorial of their having ceased to be members shall have been inrolled.

By the 11th section, that execution upon any judgment obtained against the Secretary of the said Company, may be issued against any members for the time being of the said Company, &c.

(2) 34 R. R. 348 (10 B. & C. 128).

(3) 27 R. R. 497 (3 B. & C. 814).

(4) 33 R. R. 275 (9 B. & C. 632; 4 Man. & Ry. 512).

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being raised; for, the Company was constituted by the Act. * * It will next be contended that the true name of the defendant was
[931] not inserted in the Act: but it does not signify whether he is misnamed or not, so long as his identity is clearly made out.

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(MAULE, J.: The case affirms that the defendant's name is Craven Berkeley. We must take it, as the case stands, that there was a misnomer of him in the Act, by the insertion of the name Fitzhardinge, of which he does not choose to take advantage. I do not think there is anything in this point.)

It will next be argued that the defendant's name was not contained
[932] in the memorial which was inrolled. * * The Court will treat the memorial as wholly inoperative.

(MAULE, J.: No means are pointed out in the Act whereby persons who have ceased to be members of the Company before the inrolment of the memorial, are to make that fact known, unless it be by such memorial. Is it not some evidence that the parties named in it are the members of the Company, and no other persons?)

It is obvious that the memorial was not intended to release any original member from liability; for, if so, by inrolling it, all the members who were possessed of any property might be relieved from the debts of the Company.

(CRESSWELL, J.: Does it appear when this debt was incurred?)

That is not distinctly shown, as it is laid under a *videlicet*.

(CRESSWELL, J.: I suppose that the object of the memorial, is, to enable persons dealing with the Company to know to whom they give credit.)

That may be so; but, in the interval, until the memorial is inrolled, to whom are they to look but the persons named in the Act? It does not follow, however, even after the inrolment of a memorial, that parties give credit to the persons inrolled as members, and not to the original projectors. So far as giving credit is concerned, it cannot be said that the memorial is to supersede all other evidence, and that the prospectus and Act are to be entirely left out of consideration. A question may arise

whether the memorial is of any validity, having been inrolled when not one-fifth part of the capital was subscribed. * * *

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(MAULE, J.: What do you mean by an invalid memorial? One that would not be evidence against the parties inrolled?)

Yes.

(V. WILLIAMS, J.: The Act does not say that all persons shall be liable whose names are inrolled; but all members.)

It is clear, that, if a party could show that he was not a member of the Company, the memorial would not conclude him. Can the shareholders be said to be members until the capital is subscribed? It is a question whether any persons can be called members of the Company unless such capital has been subscribed.

(MAULE, J.: Do you say that no memorial could be inrolled, because the whole capital had not been subscribed?)

No memorial could be inrolled so as to make those inrolled alone liable to be sued. Here, the defendant is liable as an original projector. By the Act the Company was formed. The contract on which the action was brought was entered into by the Company, and the plaintiff has taken proceedings against the Secretary as enjoined by the sixth section of the Act.

The only question remaining, is, whether the defendant was a member of the Company. If so, he did not cease to be a member by his name being omitted out of the memorial.

(CRESSWELL, J.: You say that the memorial neither put him in nor out of the Company.)

Suppose the whole capital had been subscribed for within a month after the passing of the Act, and the names of the shareholders had been registered in the books, it is clear that they would have been liable on a contract entered into by the Company, although no memorial had been inrolled.

(CRESSWELL, J.: How do you say that the defendant could cease to be a member of the Company; for, he could not sell his shares, as none were issued?)

He might have great difficulty to get rid of the character.

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(CRESSWELL, J.: Could not the other members agree to release him?

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MAULE, J.: Parties may agree to cease to be partners.)

But not so as to get rid of an antecedent liability.

(MAULE, J.: We do not know that this was an antecedent liability. Is not the inrolling of the memorial some evidence that the defendant and the rest of the Company had agreed that he should cease to be a member? The affirmative is on you. Can you infer, that, being a member in March, 1838, he was a member in November, 1843, that is, upwards of five years and four months subsequently to there being any evidence of his being a member. He has not acted as a member since March, 1838, and the rest of the Company have treated him as not being a member. You are suing the defendant under the positive enactments of the Act; and the question is, whether the defendant was a member at the time of judgment obtained: whether he was a member at the time of the contract, is a different question.)

If the plaintiff shows a time when the defendant was a member, the *onus* is cast on him to prove that he had ceased to be so at the time of the judgment. It is by no means a necessary consequence, that, because the members ceased to meet, the Company ceased to exist; or that, because some of the directors ceased to attend, they ceased to be members of the Company.

Lastly, it will be contended that the defendant never was a proprietor of shares. There is, however, nothing to limit the liability, under the Act, to shareholders. * * *

[935] *Channell*, Serjt. (with whom was *Talfourd*, Serjt.), after intimating that he gave up the point as to the misnomer of the defendant in the Act, was stopped by the COURT.

MAULE, J. (1):

The only question in this case, is, whether the defendant was a member of the Company on the 6th of November, 1843, when the judgment was signed. That question is to be made out in the affirmative by the plaintiff; and there are facts on both sides for the Court, which is placed in the situation of a jury. It appears,

(1) Wilde, Ch. J., was absent on account of indisposition.

that, in 1837, several parties associated together to form the Company; that they engaged offices, and issued prospectuses containing the name of the defendant as one of the directors; and that, between October, 1837, and March, 1838, he from time to time attended the board-room in that capacity. He conducted himself as a director of the Company; and I am of opinion he was such director down to March, 1838. From that time he no longer treats the Company as one of which he is a member; for, he no longer attends the meetings, which is evidence, though not conclusive, that he had ceased to be a director of the Company. Down to March, he was, through the messenger, treated by the rest of the Company as a member; but, although the directors continued to meet until March, 1839, the messenger ceased to deliver papers or summonses to him. That fact is evidence that the rest consented that the defendant should no longer be a member of the Company. On the 31st of May, 1838, the Act passed. That Act certainly is evidence that the defendant, at the *time of its passing, [*936] was a member of the Company; and perhaps it is more than evidence, and makes him a member on that day. But it was competent for him and the rest of the directors to agree that he should cease to be a member of the Company; and it did not require an Act of Parliament or a deed for that purpose; for, the partnership might be dissolved by parol. Another circumstance showing that the rest of the Company no longer considered the defendant a member of the Company, is, that a deed of partnership was prepared from instructions given in November, 1837; and, though his name is put in the deed, he never signs it, nor does it appear that it was ever tendered to him for execution. With respect to the memorial, if it is to be taken as evidence in the case, its effect is, that the Secretary, acting, it is to be presumed, under the directions of the Company, does not treat him in it as a member; and there could be no reason for not inrolling his name therein, if he had in reality continued to be a member of the Company. Whether the memorial was a valid one or not, it still forms part of the conduct of the rest of the Company. If you exclude it, then you have the fact that the defendant is not treated as a member subsequently to March, 1838. On the other hand, there is the Act of Parliament, constituting him a member in May, 1838. But, giving whatever force you please to the Act, still, in my judgment, it is outweighed by the subsequent conduct of the rest of the Company. I cannot, therefore, on the facts before us,

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satisfactorily arrive at the conclusion that the defendant, on the 6th of November, 1843, was a member of the Company.

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CRESSWELL, J.:

The question is, whether the Court is satisfied, on the facts stated in the special case, that the defendant was a member of the Company on the 6th of November, 1843. The question is not [*937] whether credit *was given to him, or with whom the contract was made; but whether he was at that time a member of the Company. If that fact is not established to our satisfaction, sitting here as a jury, we ought to find our verdict for him. There is certainly strong evidence that at one time he was a member of the Company; but it cannot be said that the Act of Parliament constituting him a member, required that he should be released by an instrument of as high a nature, or by deed. The fact of the defendant's attending meetings and receiving summonses up to a certain time, and then ceasing to attend the one and to receive the other, and the fact of his not executing the deed, are strong circumstances to show that it had been mutually agreed between him and the rest that he should no longer be a member of the Company.

V. WILLIAMS, J.:

I am of the same opinion. I agree with the rest of the Court that the *onus* lay on the plaintiff, to shew that the defendant was a member of the Company at the time of judgment obtained. Whether the plaintiff could have recovered against the defendant had he been sued in the ordinary form as a partner, is a question which is not before us, and which we are not called upon to decide.

Postea to the defendant.

1847. *Feb.* 1.

[976]

BLAKE *v.* PHINN.

(3 C. B. 976—981; S. C. 16 L. J. C. P. 159.)

A. paid a deposit upon a contract for the purchase of the lease, &c., of a public-house. It being afterwards discovered that the house was comprised with another in an original lease, under which the lessor had a right to re-enter for breach of covenants, in respect of either house: Held, that A. was not bound to accept the title with an indemnity, but might recover back the deposit, with the expenses incurred in investigating the title.

THIS was an action brought to recover back the sum of 50*l.* paid by the plaintiff to the defendant as a deposit on a contract for the

purchase of the lease and goodwill &c. of a public-house called "The Lamb and Flag," situate at Clerkenwell Green, Middlesex, together with the sum of 4*l.* 19*s.* 2*d.*, for expenses incurred by the plaintiff in investigating the title thereto.

By the agreement, which bore date the 1st of October, 1846, the defendant, in consideration of 50*l.* paid by the plaintiff by way of deposit, and in part of the sum of 1,050*l.*, the consideration agreed on between the parties, and of the residue of such purchase-money to be paid as thereinafter stipulated, agreed "that he and all other necessary parties would, on or before the 22nd of October *then [*977] instant, assign unto the said H. E. Blake, her executors, administrators, and assigns, or to such persons as she should appoint, all that messuage, tenement, or public-house, called 'The Lamb and Flag,' situate in Clerkenwell Green, in the parish of St. John, Clerkenwell, in the county of Middlesex, with the yard, outbuildings, and appurtenances thereunto belonging, for the residue of a term of years for which the said E. T. Phinn then held the same under a lease thereof granted, of which term forty years were then unexpired, subject to the yearly rent of 85*l.*, and to the covenants in such lease contained (the same, nevertheless, being only the usual and ordinary covenants contained in the leases of public-houses), and free from all incumbrances: and the said E. T. Phinn agreed to deliver to the said H. E. Blake the possession of the said messuage or tenement and premises, on or before the 22nd of October, clear of all rent, taxes," &c., &c.: and, for the consideration aforesaid, "the said H. E. Blake agreed to accept such assignment, and to pay to the said E. T. Phinn the sum of 1,000*l.*, being the residue of the purchase-money agreed to be given by her for the said messuage or public-house," &c., on the execution of the said assignment, &c. "Provided always, nevertheless, that the said E. T. Phinn shall not be obliged or compelled to produce, prove, or show the lessor's title to the said premises, or any part thereof, or his right to it, or to produce or prove any deeds or documents of title, or copies or extracts from any deeds or documents, anterior to the said lease, notwithstanding any recital or mention in the said lease, of such deeds or documents."

The declaration, after setting out the agreement, and alleging payment of the deposit, proceeded to aver, that, in consideration of the premises, and that the plaintiff then promised the defendant to observe and perform the agreement in all things on her, the plaintiff's, *part to be observed and performed, the defendant promised that [*978]

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he the defendant would observe and perform the said agreement in all things on his, the defendant's, part to be observed and performed, and that he, the defendant, if requested by the plaintiff so to do, would, in due and convenient time to enable the agreement so made between the defendant and the plaintiff as aforesaid to be performed and completed on or before the 22nd of October, 1846, deduce and make, or cause to be deduced and made, to the plaintiff, a good and sufficient title to the said messuage or tenement and premises in the agreement mentioned, and thereby agreed to be assigned, enabling the defendant to assign the said messuage or tenement and premises to the plaintiff free from all incumbrances, pursuant to the said agreement, so far as such title could be deduced and made without it's being necessary for the defendant to produce, prove, or show the lessor's title to the said premises, or any part thereof, or his right to it, or to produce or prove any deeds or documents of title, or copies or extracts from any deeds or documents, anterior to the lease in the said agreement mentioned; that the plaintiff was always, from the time of making the agreement until and upon the said 22nd of October, 1846, and from thence until the commencement of the suit, ready and willing to accept from the defendant and all other necessary parties, an assignment of the said messuage or tenement and premises, free from all incumbrances, pursuant to the said agreement, and to pay to the defendant, pursuant to the said agreement, the said sum of 1,000*l.* in the agreement mentioned, &c., and to perform and fulfil in all other respects the said agreement on the part of her the plaintiff,—of all which the defendant afterwards, to wit, on &c., had notice; that, although the plaintiff had always, from the time of making the agreement, in all things on her the plaintiff's *part to be observed and performed, observed and performed the said agreement, and although the said 22nd of October, 1846, had elapsed long before the commencement of the suit; yet the defendant had disregarded his said promise, in this, that he the defendant did not nor would, in due and convenient time to enable the said agreement so made between the defendant and the plaintiff as aforesaid to be performed and completed on or before the said 22nd of October, 1846, or at any other time either before or since, deduce or make, or cause to be deduced or made, to the plaintiff a good and sufficient title to the messuage or tenement and premises in the said agreement mentioned, and thereby agreed to be assigned, enabling the defendant to assign the same to the plaintiff free from all incumbrances,

[*979]

pursuant to the said agreement, so far as such title could be deduced and made without it's being necessary for the defendant to produce, prove, or show the lessor's title to the said premises, or any part thereof, or his right to it, or to produce or prove any deeds or documents of title, or copies or extracts from any deeds or documents, anterior to the lease in the said agreement mentioned, although he the defendant was, after the making of the said agreement, and before the commencement of the suit, and in due, reasonable, and convenient time to enable the defendant so to do, and to enable the agreement to be performed and completed on or before the said 22nd of October, 1846, to wit, on &c., requested by the plaintiff so to do; but, on the contrary thereof, he the defendant had hitherto neglected and refused so to do: that, by reason of the said premises, the plaintiff had not only lost and been deprived of all the benefit and advantage which would have accrued to her the plaintiff from the completion of the said agreement by the defendant, but had also incurred and been put to great costs, charges, and expenses, amounting, to wit, *to 300*l.*, in and about the negotiating and agreeing for the purchase of the said messuage or tenement and premises from the defendant as aforesaid, and in and about the investigation of the title of the defendant to assign the same, &c. [*980]

Pleas: First, *non assumpsit;* secondly, that the defendant, at the time and in manner so agreed between the plaintiff and the defendant, did deduce a good and sufficient title to the messuage or tenement and premises in the said agreement mentioned, according to the form and effect of the said agreement, and of the said promise of the defendant—concluding to the country. Issue thereon.

At the trial before Coltman, J., at the first sitting in Middlesex, in this Term, it appeared that the public-house which was the subject of the contract, had originally been demised, together with an adjoining messuage, and a piece of ground, by the trustees of one Daniel Williams, to one James Mills, by an indenture of the 31st of March, 1830, for a term of which forty years were unexpired at the date of the agreement in question; that, on the 5th of May, 1832, Mills granted an underlease of one of the houses to one James Beeson, for the whole of his term wanting twenty-one days; that, Mills becoming bankrupt in 1831, his assignees assigned the whole of the premises to one Finch, subject to the underlease to Beeson; and that, by divers mesne assignments, the public-house in question came to the defendant. Upon discovering this state of

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the title, the plaintiff's solicitor objected that no valid title could be made by the defendant to the public-house, inasmuch as, the covenants in the original lease embracing both houses, the purchaser of the public-house might be evicted for a breach of covenant on the part of Beeson, or his assignee.

[*981] It was insisted, on the part of the defendant, that this *was not such a defect of title as to justify a purchaser in declining to complete; and that it was not competent to the plaintiff to prove the contents of the leases, without calling the subscribing witnesses in the usual way.

The learned Judge overruled the objections, and directed a verdict for the plaintiff for the amount of the deposit, and 4*l.* 19*s.* 2*d.*, the expense incurred by the plaintiff in the investigation of the title; leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that either objection was well founded.

C. Jones, Serjt., on a former day in this Term, moved accordingly.

He submitted, that, whatever might be the rule in equity, the evidence disclosed a perfectly good title at law; and that the contents of the deeds were not properly proved by the mere statement of the clerk of the plaintiff's solicitor, refreshing his memory by extracts made by him from the deeds when produced to him for inspection by the brewers in whose hands they were deposited, and from the memorial of the underlease inrolled at the register office for Middlesex.

Cur. adv. vult.

MAULE, J.:

We think that the objection to the title was a valid one, and consequently that the plaintiff was entitled to recover back the deposit and the expenses she had been put to in investigating the title.

With respect to the other objection, that the contents of the deeds were not well proved, we think there is no foundation for it.

Rule refused.

IN THE COURT OF EXCHEQUER.

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SIBREE *v.* TRIPP (1).

1846. *Jan.* 15, 16.

[23]

(15 Meeson & Welsby, 23—38; S. C. 15 L. J. Ex. 318.)

The plaintiff deposited with the defendant the sum of 500*l.* for the purpose of a speculation in foreign stock, and the defendant signed the following memorandum: "BRISTOL, August 14, 1843. Memorandum.—Mr. S. has this day deposited with me 500*l.*, on the sale of 10,300*l.*, 3*l.* per cent. Spanish, to be returned on demand:" Held, that this was not a promissory note, and did not require a stamp as such.

To an action for 1,000*l.* money had and received, and 1,000*l.* due on an account stated, the defendant pleaded, as to 500*l.*, parcel of the sum in those two counts mentioned, that the account was stated of and concerning the said sum of 500*l.*, parcel &c., in the first count mentioned, and no other; that, after the said causes of action arose, the plaintiff commenced, in the Tolzey Court of Bristol, an action of debt for the recovery of the said sums of 500*l.* and 500*l.*; that the defendant disputed the said supposed debt, and denied that he owed or was liable to pay it, or that the plaintiff could recover it; and thereupon, to terminate the said dispute and difference, and the claim and demand of the plaintiff in the said action, and finally to determine the same, the plaintiff and defendant agreed that the said action should be settled by the defendant making and delivering to the plaintiff three promissory notes, for payment to the plaintiff, or order, of the sums of 125*l.*, 125*l.*, and 50*l.*, and that the plaintiff should accept and receive the same in satisfaction and discharge of the said sums of 500*l.* and 500*l.*, and all damages and costs, and that the plaintiff should discontinue the said action. Averment, that the defendant made and delivered to the plaintiff the said three promissory notes, and that the plaintiff accepted the same in full satisfaction and discharge of the said sums of 500*l.* and 500*l.*, and the damages and costs, &c. The replication denied the making of the agreement stated in the plea.

The defendant proved, in support of this plea, that the plaintiff had sued him in the Tolzey Court for the 500*l.*, when it was agreed between them that the defendant should give, in settlement of the action, three promissory notes, two for 125*l.* each, and one for 50*l.*, payable to the plaintiff or his order, which he did; and the following memorandum was then indorsed by the plaintiff's attorney on the writ served in that action: "This action is settled by the defendant giving three promissory notes, viz. one at three months, 125*l.*; one at four months, 125*l.*; and one at twelve months, 50*l.*; upon payment of which, I undertake to deliver to F. S., Esq., (the defendant's attorney), the several papers in my possession in reference to this action.—J. P. H." The defendant paid the two notes for 125*l.* each when due, but refused payment of the note for 50*l.*:

Held, first, that the above plea was a good answer to the action in point

(1) Foll. *Goddard* v. *O'Brien* (1882) 9 Q. B. D. 37; *Bidder* v. *Bridges* (1887) 37 Ch. D. 406, 419, 57 L. J. Ch. 300; dist. *Foakes* v. *Beer* (1884) 9 App. Ca. 605, 613, 54 L. J. Q. B. 130.—A. C.

SIBREE v. TRIPP.

of law; for that the acceptance of a negotiable security may be in law a satisfaction of a debt of a greater amount.

Secondly, that the plea was proved by the giving of the promissory notes in pursuance of the agreement, and that it was not necessary to show that they were all paid at maturity.

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ASSUMPSIT. The first count was upon a promissory note for 50*l.*; [*24] the second and third counts were for money *had and received, and on an account stated, the sum laid in each of them being 1,000*l.*

The defendant pleaded (with *non assumpsit* and other pleas), fifthly, as to the sum of 500*l.*, parcel of the sum in the second and last counts mentioned, that the account stated in the last count was stated of and concerning the said sum of 500*l.*, parcel &c., in the said second count mentioned, and no other; that, after the said causes of action as aforesaid arose, the plaintiff commenced, in the Tolzey Court of Bristol, an action of debt against the defendant, for the recovery of the said sums of 500*l.* and 500*l.*; that the defendant disputed the said supposed debt, and denied that he owed or was liable to pay the same, or that the plaintiff could recover it; and thereupon, to terminate the said dispute and difference, and the claim and demand of the plaintiff in the said debt and action, and finally to determine the said action, the plaintiff and defendant agreed that the said action should be settled by the defendant making and delivering to the plaintiff three promissory notes in writing, by which the defendant should promise to pay to the plaintiff, or order, the sums of 125*l.*, 125*l.*, and 50*l.* respectively, and that the plaintiff should accept and receive the same in full satisfaction and discharge of the said sums of 500*l.* and 500*l.*, and all damages and costs, and that the plaintiff should discontinue the said action. Averment, that the defendant made and delivered to the plaintiff the said three promissory notes, and that the plaintiff accepted the same in full satisfaction and discharge of the said sums of 500*l.* and 500*l.*, and the damages and costs, &c. Verification.

Replication, that no such agreement was ever made *modo et formâ* &c.; on which issue was joined.

At the trial, before Pollock, C. B., at the London sittings after last Trinity Term, it appeared that this action was brought to recover the sum of 50*l.* due upon a promissory note, and also the sum of 500*l.*, which had, in August, 1843, been deposited by [*25] the plaintiff with the defendant for *the purpose of a speculation in Spanish stock. At the time of the deposit, the following memorandum was given by the defendant to the plaintiff:

"BRISTOL, August 14th, 1843.

"MEMORANDUM.—Mr. Sibree has this day deposited with me 500*l.*, on the sale of 10,300*l.*, 3*l.* per cent. Spanish, to be returned on demand.

"JAMES T. TRIPP."

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On this document being tendered in evidence, stamped with an agreement stamp, it was objected for the defendant that it amounted to a promissory note, and required a stamp accordingly. The LORD CHIEF BARON overruled the objection, and received the paper in evidence.

The defendant then proved, in support of his plea, that an action had been brought against him by the plaintiff in the Tolzey Court at Bristol, for the recovery of the sum of 500*l.*; when it was agreed between them that the defendant should give, in settlement of the action, three promissory notes, two for 125*l.* each, and the third for 50*l.*, payable to the plaintiff or his order, which he accordingly did; and the following agreement was thereupon indorsed by Mr. Hinton, the plaintiff's attorney, upon the process served on the defendant:

"This action is settled by the defendant giving three promissory notes, viz. one at three months, 125*l.*; one at four months, 125*l.*; and one at twelve months, 50*l.*: upon payment of which several promissory notes, I undertake to deliver to Foskett Savery, Esq., (the defendant's attorney) the several papers and letters in my possession in reference to this action.

"January 6th, 1844. "J. P. HINTON."

The two promissory notes for 125*l.* each were paid when due; but the third, for 50*l.*, was refused payment by the defendant, on the ground of its not having been indorsed. The present action was thereupon brought.

Upon these facts, it was contended, on behalf of the plaintiff, *that the fifth plea was not proved; for that, in order to support [*26] that plea, it was necessary to prove, not only that the notes were given in satisfaction of the debt, but also that they had been paid. The LORD CHIEF BARON was of opinion that the plea was proved, and accordingly directed a verdict for the defendant on that issue, giving the plaintiff leave to move to enter a verdict for him for 200*l.* In Michaelmas Term last,

Butt obtained a rule to show cause why the verdict should not

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be entered for the plaintiff accordingly, or why there should not be judgment for the plaintiff notwithstanding the verdict on the above issue.

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Jervis and *Hoggins* now showed cause:

This plea is a good answer to the action, and was fully proved at the trial. The proof was, that the former action was settled by giving the three promissory notes; and it was not necessary, in order to prove the plea, and to establish a good defence to this action, to show that they were paid at maturity. The plaintiff, by that agreement, got certain negotiable securities for his debt; if they were not duly paid, he had the right to sue upon them. Suppose any of the notes to have been negotiated by the plaintiff, and not paid by the defendant to the holder at maturity: would the plaintiff be entitled to maintain the present action, and the holder of the note at the same time have a right to sue the defendant upon it as maker? If the plaintiff meant to make the settlement of his claim dependent upon the payment of the promissory notes, he ought to have worded the agreement accordingly, and said "by the defendant giving and paying," &c.; whereas he states that the action is settled by the giving of the notes. It is true that it is only on payment of the notes that the papers in the cause are to be delivered up; but that may well have been in order to preserve evidence of the consideration for the notes, in case it became necessary to enforce them.

[*27] But, secondly, the document given in evidence by the *plaintiff amounted to a promissory note, and required a stamp accordingly. On this point they cited *Brooks* v. *Elkins* (1), *Waithman* v. *Elsee* (2), *Shenton* v. *James* (3), and *Ellis* v. *Mason* (4).

Butt and *Taprell*, in support of the rule:

First, as to the stamp. It is not every agreement for the repayment of a sum of money that amounts to a promissory note. This is merely a memorandum of acknowledgment of the deposit of money, with an agreement to restore the sum deposited: it is not the case of a loan of money. *Melanotte* v. *Teasdale* (5) is an authority against this objection.

(PARKE, B.: I am disposed to think that this paper imports

(1) 46 R. R. 505 (2 M. & W. 74).
(2) 1 Car. & K. 35.
(3) *Id.* 137.
(4) 7 Dowl. P. C. 598.
(5) 67 R. R. 572 (13 M. & W. 216).

a return in specie of the thing deposited, in which case it certainly is not a promissory note; but then there would be a question whether an action for money had and received would lie. However, it will be better first to consider the other point in the case.)

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Secondly, the agreement proved by the defendant does not support the plea. The reasonable meaning of that agreement is, that it is not to operate in satisfaction of the debt, unless the notes are duly paid: *Maillard* v. *Duke of Argyll* (1); and, the notes having been paid in part only, the plaintiff has a right to sue for the residue of the money. The notes were not taken in absolute satisfaction, but only conditionally upon their being all paid when due. This is shown by the provision for retaining the original securities and vouchers until payment of the notes. In *Sard* v. *Rhodes* (2), the defendant pleaded, in answer to a declaration by the indorsee of a bill of exchange for 43*l.* against him as the acceptor, that the drawer made his promissory note for 44*l.*, and delivered it to the plaintiff in full satisfaction *and discharge of [*28] the bill sued on. The plaintiff replied, that the note for 44*l.* was not paid when due, and still remained unpaid. It was held that the plea was good, and the replication bad; but that was on the ground that the note was alleged in the plea, and admitted by the replication, to have been given in satisfaction and discharge of the bill; and PARKE, B., says, "If it had been averred that the promissory note was given for and on account of the bill, it might have been different." A bill given merely to take up a former bill or note, or in lieu thereof, and not paid when due, unless the jury find it to have been given in satisfaction, does not affect the remedy on the original bill or note: *Goldslade* v. *Cotterell* (3); see *Ex parte Bartlett* (4), *Lumley* v. *Musgrave* (5). And the settlement of the action does not at all import the extinguishment of the original cause of action, but only the suspension of the remedy: *Watters* v. *Smith* (6), *Field* v. *Robins* (7).

Lastly, this plea is substantially bad, and the plaintiff is therefore entitled to judgment *non obstante veredicto*. The plea confesses a debt, and seeks to avoid it by an alleged accord and satisfaction; but in truth it is a mere plea of a promise to pay a smaller sum of money in satisfaction of a larger, which, according to all the

(1) 6 Man. & G. 40; 6 Scott, N. R. 938.
(2) 1 M. & W. 153.
(3) 2 M. & W. 20.
(4) 7 Ves. 597.
(5) 4 Bing. N. C. 9.
(6) 36 E. R. 385 (2 B. & Ad. 889)
(7) 47 E. R. 499 (8 Ad. & El. 90).

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authorities, is no answer to the declaration. If it had been a gift of a chattel in satisfaction, that would been different. It is true the plea states the debt to have been disputed on the former occasion, but that cannot destroy the effect of the present admission of it. To make the plea a good answer, it ought to have averred that there was an alleged debt, or a mere disputed claim; as it stands, the averment of the debt being disputed is idle and immaterial. On this part of the case, they cited Com. Dig., [*29] "Action on the Case," (F. 8); *Cumber* *v. *Wane* (1), *Heathcote* v. *Crookshanks* (2), *Fitch* v. *Sutton* (3), *Greenwood* v. *Ledbitter* (4), *Thomas* v. *Heathorn* (5), *Down* v. *Hatcher* (6), and *Newhall* v. *Holt* (7).

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POLLOCK, C. B.:

The motion of *Mr. Butt* in this case was to enter a verdict for the plaintiff on the issue joined on the fifth plea, or for judgment, notwithstanding the verdict found for the defendant on that issue. With respect to the first part of the motion, it involves these two points: first, whether the plaintiff's case was made out by the memorandum proved in evidence; and, secondly, if it was, whether the answer given by the defendant was available to put an end to the plaintiff's right of action. If the paper proved by the plaintiff amounted to a promissory note, the issue ought to remain as found for the defendant. On consideration of the authorities cited, it appears to me that the memorandum did not amount to a promissory note. It is difficult to lay down a rule which shall be applicable to all cases; but it seems to me that a promissory note, whether referred to in the statute of Anne or in the text-books, means something which the parties intend to be a promissory note. We cannot suppose that the Legislature intended to prevent parties from making written contracts relating to the payment of money, other than bills and notes; and this appears to me to be merely an instrument recording the agreement of the parties in respect of a certain deposit of money, the consideration of which is stated in the memorandum itself, and to be rather an agreement than a promissory note.

The second question is, whether the agreement proved by the defendant put an end to this action. (His Lordship read the [*30] agreement, and the fifth plea.) The only question *now is,

(1) 1 Stra. 426.
(2) 2 T. R. 24.
(3) 5 East, 230.
(4) 12 Price, 123.
(5) 2 B. & C. 477.
(6) 50 R. R. 359 (10 Ad. & El. 121).
(7) 55 R. R. 758 (6 M. & W. 662).

whether, as matter of evidence, this plea was sustained in proof; and that turns on the true construction of this indorsement upon the writ in the Tolzey Court of Bristol. We are to put the best construction upon it that we can, and to see whether the intention of the parties was, that the action should cease, and the debt should be extinguished; or whether the plaintiff reserved to himself the right, in case the promissory notes were not paid when due, of suing on the original consideration. It appears to me that the proper construction is, that the parties intended that the action should be settled, and that the plaintiff should have a lien on the papers, in order to give the defendant a greater reason for promptness of payment; but that the notes were given in satisfaction of the debt, and that the giving of the notes alone constituted that satisfaction. The words of the agreement seemed to import, that, on the giving of the notes, the plaintiff was to look to them as constituting his remedy, and the defendant to them as constituting his liability. If it were otherwise, then, on the slightest *laches* as to one of the notes, though all the others were paid when due, and that one the day after, the whole arrangement would be void. On this point, therefore, as matter of evidence, I am of opinion that the plea was proved.

The other part of the rule is to enter judgment for the plaintiff *non obstante veredicto*, on the ground that the giving of these notes could not in point of law be a satisfaction of a liquidated claim for a larger amount. If the case of *Cumber* v. *Wane* were law, and a binding authority upon us, undoubtedly we could not come to a conclusion in favour of the defendant. That case was one of assumpsit for 15*l.*, to which the defendant pleaded that he gave the plaintiff a promissory note for 5*l.* in satisfaction, and that the plaintiff received it in satisfaction: and it was held, on writ of error, after judgment for the plaintiff, that the plea was ill. It does not appear from the report, whether the note was payable presently, or whether it was negotiable or not. The *facts are not sufficiently [*31] stated to make it a binding authority. PRATT, Ch. J., says, in delivering the judgment of the COURT, "As the plaintiff had a good cause of action, it can only be extinguished by a satisfaction he agreed to accept; and it is not his agreement alone that is sufficient, but it must appear to the Court to be a reasonable satisfaction; or at least the contrary must not appear, as it does in this case. If 5*l.* be, as is admitted, no satisfaction for 15*l.*, why is a simple contract to pay 5*l.* a satisfaction for another simple contract of three times the value? In the case of a bond, another has never

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been allowed to be pleaded in satisfaction, without a bettering of the plaintiff's case, as by shortening the time of payment." From the latter part of the judgment I must, with every respect for the great authority of that learned Judge, express my dissent. Undoubtedly at that time it was not law; for in *Pinnel's* case (1) it was laid down as clear matter of law, that, in the case of a bond for 500*l.*, due on the first of January, if the obligee accepted 100*l.* in satisfaction the day before, he was at liberty to do so; and the Court never inquired whether the satisfaction was reasonable; they left it to the agreement of the parties. However, it does not appear, in the case of *Cumber* v. *Wane*, that the promissory note was negotiable, and therefore that the plaintiff had any benefit from it. The marginal note of that case—"Giving a note for 5*l.* cannot be pleaded as a satisfaction for 15*l.*"—was expressly denied to be law by Lord ELLENBOROUGH, in argument in *Heathcote* v. *Crookshanks*, and BULLER, J., referred to a case of *Hardcastle* v. *Howard*, in which it had been so denied to be law. But whether the case of *Cumber* v. *Wane* has been overruled or not, it appears to me that it cannot be sustained as an authority that the acceptance of a negotiable security may not be a satisfaction of a claim to a larger amount. *Sard* v. *Rhodes* is a distinct authority that the acceptance of a [*32] negotiable security may be pleaded in satisfaction of a simple *contract debt for a like amount: and the only question is whether the same doctrine is applicable where the original claim was for a larger amount. I think it is. It is admitted, that if there had been an acceptance of a chattel in satisfaction of the debt, the Court would not examine whether that satisfaction was a reasonable one, but merely whether the parties came to that agreement; and the acceptance of a negotiable security appears to me to be of the same nature. Again, if a claim is *bonâ fide* disputable, *Longridge* v. *Dorville* (2) is an authority to show that the party may be barred by the acceptance of a much less sum in satisfaction of it. Here the demand is apparently for a liquidated amount; but under the count for money had and received, that amount may be very disputable: and the plea avers, that in the former action the defendant disputed the said supposed debt, and denied that he owed or was liable to pay it, and thereupon, to terminate the dispute and difference &c., the plaintiff and defendant agreed that the action should be settled by the giving of the promissory notes. If so, that was an admission by the plaintiff that the claim was so far disputable as to justify

(1) 5 Co. Rep. 117. (2) 5 B. & Ald. 117.

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him in coming to such an agreement. Upon the whole, I am of opinion that this plea is a good answer to the action, and that it was proved at the trial, and therefore that this rule ought to be discharged.

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PARKE, B. :

I am also of opinion that this rule ought to be discharged. The first question is, whether this plea was proved. (His Lordship read it.) The issue upon that is, that no such agreement was made as is mentioned in the plea ; that is, no agreement to give and accept these promissory notes in satisfaction of the debt. The LORD CHIEF BARON decided at the trial that the plea was proved, reserving for the opinion of the Court the question on the construction of the agreement. When *Mr. Butt* moved for *this rule, I certainly was [*33] strongly impressed with the idea that this agreement amounted only to a suspension of the remedy, and not to a satisfaction of the debt ; but after hearing the present argument, and on full consideration of the case, I have come to the same conclusion as my LORD CHIEF BARON, that the parties meant it to be a final extinguishment of the debt. The agreement is in these terms : (His Lordship read it.) As to the first part of it I have no doubt : it is a settlement not only of the action, but of the claim. The settlement of an action *primâ facie* means the settlement of the cause of action. And unless the notes were to be substituted as the remedy, the agreement would be of this extraordinary nature, that, if any one of them were not paid at maturity, the whole debt would become due. The reasonable construction therefore is, that it was to be an absolute settlement of the debt, and that the only future liability should be upon these notes. Then comes the second part of the agreement, on which my doubt arose ; namely, that, upon payment of the several promissory notes, the plaintiff undertook to deliver up the papers and letters in his possession in reference to the action. But I think that may well be explained in the manner in which *Mr. Jervis* explained it, that it would be desirable to keep some evidence of the original consideration, in case the notes were not paid. Upon the whole instrument, therefore, it appears to me that the real meaning of the parties was, to put an end to the action, and for the larger sum claimed in it to substitute a smaller, secured by three promissory notes.

The next question is, whether, if proved in fact, this is a good plea in law ; and I am of opinion that it is. I will consider it in the way

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proposed by *Mr. Butt*, striking out the averments as to its being a disputed debt. It is clear, if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder. But the gift of a thing of uncertain value may be a [*34] satisfaction *of any sum due on a simple contract. If the contract be by bond or covenant, it can be determined only by something of an equal or higher nature; but upon a mere simple contract, it is clear that the debtor may give anything of inferior value in satisfaction of the sum due, provided it be not part of the sum itself. Littleton thus lays it down (s. 344): "Also, in case of feoffment in mortgage, if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such thing, in full satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if he had received the sum of money, though the horse or other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in full satisfaction." The same doctrine is laid down in *Pinnel's* case. It is clear, if the creditor had the money itself, he might buy with it a thing of however inferior value, and that contract would be good: so he may accept the same thing in satisfaction of the whole sum, and that contract is good. In the case of a bond or contract under seal, it is different. "The obligor or feoffor cannot, at the time appointed, pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater: but if the obligee or feoffee do at the day receive part, and thereof make an acquittance under his seal in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole" (1). *Eodem ligamine quo ligatum est dissolvitur.* Again, a sum of money payable at a different time is a good satisfaction of a larger sum payable at a future day: Com. Dig. Accord, (B 2). In the present case (supposing it a liquidated demand), the satisfaction is by giving a different thing, not part of the sum itself, having different properties. It may be of equal value, but that we cannot enter into: it is sufficient that the parties have so agreed. The [*35] case of *Andrew* *v. *Boughey* (2) is an authority in support of this view. There the declaration was for delivering 373 lbs. of bad wax, upon an assumpsit for 400 lbs. of good and merchantable wax, stating half the price to have been paid in hand, the rest to be paid upon a day agreed on. To this the defendant pleaded, that, before the

(1) Co. Litt. 212 b.

(2) Dyer, 75 a.

time appointed for the delivery of the residue of the wax, "the plaintiff and defendant did agree, that if the defendant would deliver immediately to the plaintiff one cake of wax weighing 20 lbs., the defendant would accept that in recompense, as well for the aforesaid 373 lbs. as for the residue which was to be delivered; and pleaded this executed in certain, with the acceptance by the plaintiff accordingly:" and this plea was held a good answer. The COURT say, that "the bar seemed good enough, for the effect and substance of the action is, that the defendant hath not performed his bargain, *scil.*, with good and merchantable wax, according to his undertaking; but that it was corrupted and mixed as above, and deceitful; for which the plaintiff has received satisfaction and recompense by the cake, and his own acceptance, although it were not of one hundredth part of the value of his loss, yet by his own accord and agreement this injury is dispensed with; and in all actions in which nothing but amends is to be recovered in damages, there a concord carried into execution is a good plea." It seems to me that this reasoning applies to the present plea, because here a different thing, of uncertain value, is delivered in satisfaction of the debt.

The cases of *Cumber* v. *Wane* and *Thomas* v. *Heathorn* have been referred to. The reasoning of PRATT, Ch. J., in the former case is certainly not correct; for we cannot inquire into the reasonableness of the satisfaction. But there it did not appear that the note was a negotiable one; and the point now before the Court was not made. In *Thomas* v. *Heathorn*, it does not appear to have been a case of accord *and satisfaction: although the bill accepted by the [*36] defendant was a negotiable security, it does not appear that it was given by way of accord and satisfaction.

As to the other question, whether the statement in this plea, that it was a disputed debt, makes the plea a good answer, I think that is very doubtful, because it does not state that it was disputable on fair and reasonable grounds. This question was considered in the case of *Wilkinson* v. *Byers* (1), in which it was held, that, where an action has been commenced for an unliquidated demand, payment by the defendant of an agreed sum in discharge of such demand, was a good consideration for a promise by the plaintiff to stay proceedings and pay his own costs. LITTLEDALE, J., there went further than the rest of the Court, and expressed his opinion, that, even in the case of a liquidated demand, the same promise, made in consideration of the payment of such sum, might be enforced in an

(1) 1 Ad. & El. 106; 3 Nev. & M. 853.

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action of assumpsit, where the agreement was such that the Court would stay proceedings if the plaintiff attempted to go on. He referred to a case of *Reynolds* v. *Pynhowe* (1), where a declaration in assumpsit, "that whereas the defendant had recovered 5*l.* against the plaintiff, in consideration of 4*l.* given him by the plaintiff, the defendant assumed to acknowledge satisfaction of that judgment before such a day, and that he had not done it," was held good, on the ground that it was a benefit to the defendant to have the money without suit or charge. On the authority of that case, LITTLEDALE, J., held, that if there was a dispute as to a liquidated debt, the payment and acceptance of a smaller sum might be a good satisfaction. The rest of the Court, however, did not go upon that ground, and therefore I do not rest my judgment upon this point. But, for the reasons I have already stated, I think this plea is good, and that there ought not to be judgment for the plaintiff *non obstante veredicto.*

[37] With respect to the question as to the stamp, it is unnecessary to express any opinion upon it; but I think this document did not require a stamp except as an agreement. This is not a contract to pay money, but a deposit of money, and the identical money is to be returned.

ALDERSON, B.:

As to the question relating to the stamp, we must look at it as it arises on the face of the instrument itself, and I think it bears the construction put upon it by my brother PARKE. Then as to the main points in the case, I agree in thinking that here the original debt was discharged merely by the giving of the promissory notes, and that the plaintiff was remitted to his only remaining remedy, namely, upon those notes, and had lost his original right of suing upon the original memorandum. If we did not put this construction upon the agreement, we should certainly do great injustice, because, by the non-payment of any one of the notes on the very day it became payable, the whole money would become due. That is so strong a circumstance as makes one hesitate to come to such a conclusion; and the literal meaning of the agreement does not require us to do so; for the latter words of it may very well be consistent with the construction we put upon it; the papers being retained, in order, if any doubt arose as to the sufficiency of the consideration when the notes were put in suit, to show its nature, in order to enforce them with greater certainty. I think, therefore, that the

(1) Cro. Eliz. 429.

plea is proved. Then the next question is, is the plea a good one? I consider this as a liquidated demand. Then is there a good answer to it? The suggested answer is, that the defendant gave certain promissory notes of a smaller amount, and the plaintiff accepted them in satisfaction and discharge of that demand. It is undoubtedly true, that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand ought to be paid, is payment only in part; because it is not one bargain, but two: namely, payment of part, and an agreement, *without consideration, to give up the residue. The Courts might very well have held the contrary, and have left the matter to the agreement of the parties; but undoubtedly the law is so settled. But if you substitute for a sum of money a piece of paper, or a stick of sealing-wax, it is different, and the bargain may be carried out in its full integrity. A man may give in satisfaction of a debt of 100*l.*, a horse of the value of five pounds, but not five pounds. Again, if the time or place of payment be different, the one sum may be a satisfaction of the other. Let us, then, apply these principles to the present case. If for money you give a negotiable security, you pay it in a different way. The security may be worth more or less: it is of uncertain value. That is a case falling within the rule of law I have referred to. But here there is the further circumstance, that the payment was in discharge of a debt then under litigation, by means of a negotiable security, which takes away that litigation. On these grounds, I am of opinion that this plea is good.

[*38]

PLATT, B.:

I am of the same opinion. With respect to the objection, that this document was inadmissible for want of a stamp, I think we must look to the instrument only in determining that question; and it seems to me quite clear, on the face of the instrument itself, that it is an agreement to return a deposit of money in a particular event. It is, therefore, not a promissory note. With respect to the other points, I agree with the rest of the Court, for the reasons which they have stated, that the fifth plea is a good answer to the action in point of law, and that it was proved in point of fact.

Rule discharged.

1846.
Jan. 16.

FRITH *v.* ROTHERHAM (1).

(15 Meeson & Welsby, 39—48; S. C. 15 L. J. Ex. 133.)

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[39]

A bond conditioned for the payment to bankers of all such sums of money, not exceeding in the whole 1,000*l.*, which from time to time should be and remain due from the obligor to the bankers on the balance of his account current, together with such interest and commission as should be due to the said bankers, and all customary and incidental charges for stamps, &c., requires a stamp only on the principal sum of 1,000*l.*

DEBT on bond, in the penalty of 2,000*l.* The condition of the bond (after reciting that the Chesterfield and North Derbyshire Banking Company had, on the application of the defendant, agreed to open an account with him, on his securing the several sums of money which might from time to time become due on the balance of his account to the said Company, &c.) was declared to be, that, if the defendant did or should well and truly pay, or cause to be paid, unto the trustees of the said Company, or the survivor of them, &c., to the use of the said Company, either alone or conjointly with any other person who might or should at any future time constitute the firm of the said Company, all and every such sum and sums of money, not exceeding in the whole the sum of 1,000*l.*, which from time to time should be and remain due and owing from the defendant to the said Company, either alone, or conjointly &c., on the balance of his account current with the said Company or such other persons &c., with respect to monies advanced by them to him the defendant, together with such interest and commission as should be due to the said Banking Company for the time being, or such other persons &c., and all customary and incidental charges for stamps, &c., the bond should be void, &c. The defendant pleaded *non est factum*.

The bond bore a stamp of 6*l.*, being the *ad valorem* duty on 1,000*l.* At the trial, before Rolfe, B., at the last Liverpool Assizes, it was contended for the defendant that the stamp was insufficient, and that, by reason of the stipulation for payment of interest and commission, and charges for stamps, it ought to have been impressed with a stamp of 25*l.* The learned Judge reserved the point, and the plaintiff had a verdict, damages 1,101*l.* 1*s.* 1*d.*; leave being reserved to the defendant to move to enter a nonsuit.

[40]

Martin now moved accordingly:

The point in this case depends upon the construction of the Stamp

(1) See now Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 86 (1) and 88.—A. C.

Act, 55 Geo. III. c. 184, Sched. pt. 1, tit. "Bond," clause 2, which is as follows: "Bond, &c., given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be: Where the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit, 25*l.*: and where the money secured, or to be ultimately recoverable thereupon, shall be limited to a certain sum, the same duty as on a bond for such limited sum." Here the whole amount secured, and recoverable by the obligees, is composed of the principal sum of 1,000*l.*, and of the sums which may become due for interest or commission, and for charges on stamps, which latter are uncertain and without any limit. It was decided in *Scott* v. *Allsopp* (1), and is now a settled doctrine, that the proper amount of stamp duty, in the case of a bond, depends, not upon the amount of the penalty, but upon the nature of the condition, and the amount secured by and recoverable upon the bond. And here the amount secured by and recoverable upon the bond is altogether unlimited. *Dickson* v. *Cass* (2) is expressly in point. There, a bond was given in a penalty of 2,000*l.*, the condition of which, after reciting that A. and B. had opened an account with D., E., F., and G., as bankers, and that the latter had agreed to discount bills, and pay in advance for A. and B. any sum not exceeding 1,000*l.*, was, that A. and B., and C. should satisfy and pay the bankers all such sums as they should advance on account of the accepting or paying any bills &c., together with such lawful charges and allowances for advancing and paying such bills as were usually charged by bankers in such cases, and interest: and it was held, that this, being a *bond to secure not only 1,000*l.*, but a further sum for the bankers' charges for commission, &c., required a 25*l.* stamp. [*41]

(PARKE, B.: That case is undoubtedly an authority for you, unless it is to be considered as overruled. I concurred in the judgment given in that case, but with some hesitation; and after the decision in *Doe* d. *Merceron* v. *Bragg* (3), I began to think our judgment was erroneous.)

It has never been expressly overruled. All the cases which have subsequently occurred were cited in *Barker* v. *Smark* (4), but

(1) 2 Price, 20.
(2) 1 B. & Ad. 343.
(3) 8 Ad. & El. 620; 3 Nev. & P. 644.
(4) 56 R. R. 801 (7 M. & W. 590).

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they relate to mortgage deeds, which often contain mere collateral stipulations for other things than the payment of money. Bankers' commission is purely money.

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(PARKE, B.: In order to require the larger stamp, it must be secured as money by the condition.)

A banker's commission is an understood and definite charge, and the payment of it clearly was part of the consideration for the taking of the bond.

(PARKE, B.: How is this commission "money thereafter advanced, lent, or paid, or due upon an account current?" It is a remuneration for labour. Nothing is due on the account current beyond the 1,000*l.* The Stamp Act does not apply to anything which is merely a remuneration for labour, but only to money advanced, lent, or paid, or due on an account current. Here all the money that is to be advanced, lent, or paid, or to become due on the account current, is limited by the 1,000*l.* It has already been decided that the interest is not to be taken into consideration in estimating the stamp duty.)

That was upon the other words of the Act, "definite and certain sum of money."

POLLOCK, C. B.:

I entertain no doubt whatever upon the point which is raised in this case. It is a clear principle, that the subject is not to be charged with any such duties, unless the Legislature has manifested its intention to impose them by clear and express words. And the [*42] meaning of *that part of the Stamp Act to which *Mr. Martin* has referred appears to me to be plain. I think its clear meaning is, that an *ad valorem* duty is to be charged upon the money secured, as limited not to exceed a certain sum; and referring back to the heading of the clause, the bond is to be one "given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be." Those are the words by which the bond to be taxed is described in the schedule; and according as its amount is limited or unlimited, the stamp duty is to be estimated. In the present case, special care has been taken

to give a limit of 1,000*l.*, as the sum which is to be secured by the bond. It is true, indeed, that further on in the condition, after the clause imposing that limit of 1,000*l.*, (which we all know would include interest and commission), there is a further provision, that the security of the bond is for that sum of 1,000*l.*, together with interest and commission. Whether that clause was inserted merely to exclude the notion that commission and interest should not be charged, and to give the Bank by express terms the right to recover them as well as all the other items of their account current, I do not know. I think it is extremely probable that these words, if they come to be examined, mean nothing more than that, on making up the account current, interest and commission were to be included in the account. But I am perfectly prepared to go along with the opinion thrown out by my brother PARKE, that the case of *Dickson* v. *Cass* was not well decided, and has been substantially overruled, as to this point, by subsequent cases, although not expressly mentioned. There were three points decided in *Dickson* v. *Cass*, and I am now only speaking of that for which it has been cited, namely, the first point. I think it quite right to say, that, having thus to deal with an apparently recognised decision in point, of the whole Court of Queen's Bench, if there were any real doubt whatever on *my mind upon the point, I should [*43] be disposed to grant a rule, in order to have it further discussed; but as, on the best consideration which I can give to the subject, it appears to me that if we were to do so, we should, when the case came on for argument, call on *Mr. Martin* to support his rule; and as he has already urged everything that could be urged in favour of the proposition for which he is contending, it would be a mere useless consumption of the time of the Court to grant a rule. In my opinion, therefore, the view of my brother PARKE, which he has expressed to-day, and which differs from that adopted by him, as he says with reluctance, in *Dickson* v. *Cass*, is the correct one; and that case must consequently be considered as overruled. If so, this bond is sufficiently stamped, and there is no occasion for any further time to be consumed in the discussion of the point.

PARKE, B.:

I am entirely of the same opinion with my LORD CHIEF BARON, and think there ought to be no rule. If there had been no decided cases on the construction of this statute, I should have considered it clear that the present bond was one which only required the

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ad valorem stamp, and not the higher duty imposed by the other clause of the schedule which has been referred to. For, look what the duty is imposed on; "every bond given as a security for the payment of any definite and certain sum of money," &c.: the tax is regulated by the amount of the money secured by the bond, and not by the amount of the penalty, whether it be a "definite and certain sum," or "money to be thereafter lent, advanced, or paid, or which may become due on an account current," &c. We come, therefore, to the first question: is the bond in this case a bond for the payment of a definite and certain sum of money? or is it a bond within the meaning of the subsequent clause, "given as a security for the repayment of any sum and sums of money lent, advanced, or paid, or which may become due on an [*44] account *current, together with any sum already advanced or due, or without, as the case may be, where the total amount of the money secured or to be ultimately recoverable thereupon shall be uncertain and without any limit," on which the schedule imposes a duty of 25*l.*; whereas, where the money secured or to be ultimately recoverable thereupon shall be limited not to exceed a given sum, the same duty only is charged as for a bond for such limited sum. In the condition of the bond in this case, there is a limit to the sum lent, advanced, paid, or due on an account current, which the bond was given to secure, and consequently, if the condition contained that clause alone, the duty should be for that limited amount; and here the bond bears a stamp exceeding that amount. The question then is, does this bond become liable to the higher duty, in consequence of any other circumstances connected with it? It is argued that it does, because it not only secures money to be lent, advanced, or paid, or which may remain due on the balance of the account current, but stipulates for something else to be paid, namely interest and commission, which is not money advanced, lent, or paid, or which necessarily becomes due on an account current. Now, supposing the bond to have been given for the principal and interest only, it has been held by this COURT, in the case of *Barker* v. *Smark*, that interest is not money lent, advanced, or paid, within the meaning of this part of the Stamp Act; and consequently that, where a bond is given to secure a sum of money with interest, the stamp is regulated solely by the amount of the principal sum; and the only question remaining is, does the addition of the right to charge commission make any difference? But how can it be said that commission comes under

any of the heads in respect of which the schedule imposes the fixed duty? It is not "money lent," it is not "money advanced," it is not "money paid," it is not "money due on an account current:" it is a remuneration for work and labour: and there is no clause in the statute which imposes an additional stamp on a bond *given to secure such remuneration. If, therefore, the point in this case were *res integra*, I should certainly say that this bond was not liable to any stamp duty beyond 6*l.*: and the question before us is reduced to this, has the authority of decided cases put a different construction on the statute? It must be admitted that the case of *Dickson* v. *Cass*, in which I myself concurred with considerable reluctance, is an authority against the view which we are now disposed to adopt; but I very early repented of my concurrence in that judgment, and am now satisfied that it was erroneous. Let us look to the course of the decisions since that of *Dickson* v. *Cass*. The first is *Doe* d. *Scruton* v. *Snaith* (1), which was decided on the analogous clause in the Stamp Act, relating to mortgages; and it was there held, that a mortgage deed for 3,000*l.*, with a power of sale to secure the principal and all expenses, with interest, was sufficiently stamped with a 9*l.* stamp, and did not require the 25*l.* stamp imposed by that schedule on every mortgage given as security for the repayment of a sum uncertain and unlimited in amount. It is true that the COURT distinguished *Dickson* v. *Cass* from the case before them; but it is clear that they did not approve of that decision. That case was followed by *Doe* d. *Jarman* v. *Larder* (2). There a term of years, determinable on lives, was mortgaged to secure a sum of 130*l.*, with power to the mortgagee to pay 70*l.* for a renewal, in case a life should drop; and it was held that the deed was sufficiently stamped with a 2*l.* stamp, notwithstanding there was a covenant by the mortgagor to procure a renewal, without any limit to the sum to be paid by him for that purpose. The COURT, in giving judgment, said, that a stamp on a mortgage within the meaning of the Act was a stamp on a security in the name of a mortgagor, and not merely on any covenant; and that a 25*l.* stamp was, therefore, not necessary in that case, *because no more than 70*l.* was to be advanced by the mortgagor after the first advance, and for anything which the mortgagor might fail to pay, the mortgagee's only remedy was on the covenant; on the premises mortgaged he had, in respect of such failure, no security at all. That case is not precisely in point, but it shows

[*45]

[*46]

(1) 8 Bing. 146; 1 Moo. & Sc. 230. (2) 3 Bing. N. C. 92; 3 Scott, 407.

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an endeavour made by the Court to get out of the doctrine of *Dickson* v. *Cass*. Since then there has been the case of *Paddon* v. *Bartlett* (1), where premises were mortgaged to trustees with power to sell, to secure the sum of 1,137*l.*, with interest: the deed then contained a clause, empowering the trustees, out of the proceeds of the sale, to pay and discharge the costs and expenses to be incurred in the execution and due performance of the trusts reposed in them, and also a reasonable sum of money by way of satisfaction for their trouble. Now there was a case, where, in addition to the principal, a further sum was secured by way of remuneration to the trustees; but the COURT, on that objection being taken, very shortly disposed of it, by saying that it lay on those who made the objection to show that a reasonable satisfaction to the trustees would raise the whole amount above 2,000*l.*; and although they distinguished the case from *Dickson* v. *Cass*, I can only say that they seemed very desirous to get out of it. We now come to *Doe* d. *Merceron* v. *Bragg* (2), which is the latest case on the subject, and where Lord DENMAN, with the rest of the Court of Queen's Bench, virtually overruled the authority of *Dickson* v. *Cass*. After all the previous cases had been cited, and the Court had taken time to consider, Lord DENMAN said, "The objection here was, that the mortgage deed was stamped only to the extent of the sum advanced, and did not cover the amount of taxes and rates which might be charged on the premises, and which the mortgagor covenanted to pay, and until payment of

[*47]

*which the proviso for redemption was not to operate. This amount is truly said to be uncertain and without limit; and hence the 25*l.* stamp is argued to be necessary, instead of the *ad valorem* stamp. The answer is, that to the amount of these taxes and rates the mortgagee is at all events entitled; that he required no stipulation in respect of them; and that the stamp is regulated by the amount advanced, or agreed to be advanced." The principle laid down in that decision I take to be the true one; that the stamp should be determined by the amount of the sum agreed to be secured, and not by any collateral stipulations which may be contained in the deed. If, therefore, the question before us were *res integra*, the construction of this statute ought to be as I have stated; and, looking at all the authorities, I think that the last of them has put the matter on its true ground, and consequently there ought to be no rule in this case.

(1) 2 Ad. & El. 9; 4 Nev. & M. 1. (2) 8 Ad. & El. 620; 3 Nev. & P. 644.

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I am of the same opinion. The words of the Stamp Act are, "as security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, &c., where the total amount of money secured shall be uncertain and without limit." Now "the total amount of money" means the amount secured as money. Here the amount of money secured is expressly limited by the bond. The obligee may no doubt also recover interest and commission; but they are not mentioned in the statute; the amount which is to regulate the stamp excludes them. Unless they were clearly included, the subject ought not to be taxed in respect of them; but they are expressly excluded. Commission is a compensation for labour, and is not money advanced, lent, paid, or due on an account current.

PLATT, B.:

I quite concur in the interpretation put by the rest of the Court upon the statute. It is remarkable *that the words are, "bond [*48] given for repayment of money." The word "repayment" cannot apply to commission or to interest: the only mode, therefore, of construing the clause, according to the ordinary interpretation of words, is to confine it to the principal sum which is intended to be secured, and which alone is to be repaid.

Rule refused.

THE ATTORNEY-GENERAL *v.* BOVET.

1846. *Jan.* 23.

(15 Meeson & Welsby, 60—75; S. C. 15 L. J. Ex. 155; 3 Dowl. & L. 492.)

[60]

In an information by the *Attorney-General* for penalties for a breach of the revenue laws, this Court has no jurisdiction, on motion by the defendant, either at common law or by statute, to direct a commission (1) to issue for the examination of witnesses abroad; nor will it stay the proceedings until the *Attorney-General* consents to the issuing of such commission.

THIS was an information filed by her Majesty's *Attorney-General* against Charles Bovet, to recover penalties amounting to 922*l.* 17*s.* 6*d.*, for causing to be entered for drawback a quantity of wine alleged to be of less value than the amount of such drawback. The defendant pleaded Not guilty, on which issue was joined; and notice of trial having been given,

Greenwood, in Michaelmas Term last, moved, on the part of

(1) See note to *Reg.* v. *Wood*, 56 R. R. 787, note (1).—A. C.

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the defendant, for a rule calling upon the *Attorney-General* to show cause why a commission should not issue for the examination of one Louis Clerc as a witness for the defendant. The motion was founded on an affidavit made by a clerk of the defendant's attorneys, which stated, " that Louis Clerc, of Fleurier, in the canton of Neufchatel, in Switzerland, is a material and necessary witness for the said C. Bovet on this information, as this deponent is advised and verily believes; and that the said C. Bovet cannot safely proceed to the trial of the said information without the evidence of the said L. Clerc; and further, that he is advised, and verily believes, that the said C. Bovet will be able to prove, on the trial of this information, by the evidence of the said L. Clerc, if a writ of commission for the examination of the said L. Clerc, at Fleurier as aforesaid, be permitted to issue, by whom the said quantity of wine, to which this information relates, was caused to be entered for drawback, and conclusively to establish that the same was not caused to be entered for drawback by the said C. Bovet, as alleged in this information." The affidavit then stated, that L. Clerc was not likely to return to this country until after the trial; that there was no intention to create delay; and that the defendant had a good defence to the information on the merits.

[61] At the suggestion of the COURT, the *Attorney-General* consented to a rule being granted to show cause " why a commission should not be issued out of and under the seal of this Court, for the examination, upon interrogatories, of L. Clerc, of &c., a material and necessary witness on the defendant's behalf, and why such examination, when so taken, should not be read as evidence on the trial of this cause."

The *Attorney-General*, the *Solicitor-General*, *Jervis*, and *J. Wilde*, now showed cause:

This application cannot be sustained. It is founded upon the provisions of the stat. 1 Will. IV. c. 22 (1), which, by the first section, extends the enactments of the 13 Geo. III. c. 63 (1), relating to the examination of witnesses in India, to all the foreign possessions of the Crown, and " to all actions depending in any of his Majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the Court to the Judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses

(1) See *Reg.* v. *Wood*, 56 R. R. 787, note (1).—A. C.

under a writ or commission issued in pursuance of the authority hereby given will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for." On moving for this rule, the case of *The Attorney-General* v. *Laragoity* (1) was cited, the circumstances of which were as follows: It was a question that arose out of the seizure, by the officers of the Customs, of a ship called the *San Juan Baptista*, charged with having been found armed for resistance, contrary to the statute, whilst belonging wholly or in part to a British subject, and with various other breaches of the navigation laws, some of which were laid to have been committed previously, and others subsequently, to the alleged transfer of her to the foreign subject, who was the *claimant under a purchase from the late British owner. On the [*62] information being filed, an application was made by the defendant for a commission to examine witnesses at Corunna. The Act of Parliament under consideration in that case was the Navigation Act, 13 & 14 Car. II. c. 11, which provided, "that in case the seizure or information shall be made upon any clause or thing contained in the late Act, entitled, 'An Act for encouraging and increasing of shipping and navigation,' then the defendant or defendants should, on his or their request, have a commission out of the High Court of Chancery to examine witnesses beyond the seas &c." Cause being shown against the rule, it was held, "that it would be departing from the common usage of the Court to grant the application;" and the COURT said, "Such motions might in future be made in every case, on a suggestion that material witnesses resided abroad. . . . The Crown has in all cases a right to a *vivâ voce* examination of the defendant's witnesses. There is, indeed, a case in Bunbury (2) of a commission having been granted by this Court, but that was made on the Navigation Act." The rule was therefore discharged, and the defendant then filed a bill on the equity side of this Court against the *Attorney-General*; and upon that bill, and upon the terms of the Navigation Act, he moved for and obtained a commission to examine witnesses at Corunna. Now, whether the equity jurisdiction of this Court in matters of revenue is still in existence or not, is a question of much difficulty and importance, which is at present under the consideration of the Court, and which it is unnecessary to enter upon on this occasion, because this is not the case of a bill filed. All the cases cited in *Laragoity* v. *The*

(1) 2 Price, 166, 172.

(2) *Jenkins* v. *Larwood*, Bunb. 13; *post*, p. 568.

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Attorney-General, in which commissions for the examination of witnesses had been directed, were cases where bills were filed; and many of them were cases under the navigation laws, in which, by the express provision of the 13 & 14 Car. II. c. 11, the party was [*63] entitled *to a commission. But this is an application which must be grounded, if at all, upon the stat. 1 Will. IV. c. 22; and that being so, the case of *Reg.* v. *Wood* (1) is a direct authority against it. It was there expressly held, that in an action at the suit of the Crown, the Court has no power, under the 1 Will. IV. c. 22, at the defendant's instance, to direct a commission for the examination of witnesses. PARKE, B., says, "There are no fewer than four decided objections to this application, on the face of the Act of Parliament. In the first place, upon the preamble, so much only of the 13 Geo. III. as relates to actions is incorporated in the Act; secondly, even supposing that the clause relating to indictments and informations is imported into it, that only gives a *mandamus*; thirdly, they must be indictments or informations for misdemeanours or offences committed abroad; and fourthly, the clause applies only to indictments and informations exhibited in the King's Bench." There is another case which probably will be relied on for the defendant, that of *Jenkins* q. t. v. *Larwood* (2). That was an application under the Navigation Act, and it was argued in support of it, that, inasmuch as a commission was by that Act to issue out of the Court of Chancery, this Court would, by analogy, have the same power, by reason of its equitable jurisdiction, on the same principle as where by statute analogous powers were held to be granted to different Courts of like jurisdiction, although one Court only was named. In that case, BURY, C. B., and PRICE, B., thought that the commission should go, not under the statute, but by virtue of the original jurisdiction. FORTESCUE ALAND, B., thought it might go even upon the statute; MONTAGUE, B., was of a contrary opinion on both points. But with respect to that case, it is enough to say that it occurred under the old practice of this Court, when all proceedings were instituted by *qui tam*. In truth, it was a suit between subject and subject, the party suing, by leave of the [*64] *Attorney-General*, by *qui* *tam*. Moreover, that case was cited, and not acted upon, in *The Attorney-General* v. *Laragoity*. Even were there no other objection, the Crown, not being expressly named, would not be bound by this Act of Parliament, although it might take advantage of it if it thought proper. But it is sufficient to say

(1) 56 R. R. 786 (7 M. & W. 571). (2) Bunb. 13.

that the case of *Reg.* v. *Wood* is a direct and recent decision of the Court against this application (1).

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Greenwood, in support of the rule:

The argument on the other side has proceeded altogether on the supposition that this application rests solely upon the stat. 1 Will. IV. c. 22, but that is not so; it is rather founded upon the general jurisdiction of the Court, at the common law, to grant such relief, which jurisdiction has been exercised in several cases. The proposition advanced on the part of the Crown is, that the Crown may have a commission to examine witnesses in Switzerland in support of this information for penalties, but that the defendant cannot, without the consent of the Crown, obtain the same means of defending himself against it. That is a proposition of an extraordinary nature, and in support of which no conclusive authority has been cited. On the contrary, it is submitted, that when, at the instance of the *Attorney-General*, this COURT at length decided, that, upon motion, the Crown might have an order for the examination of witnesses on interrogatories, it in truth decided in favour of the present application. In the case of *The Attorney-General* v. *Reilly* (2), which was an information *for a breach of the revenue laws, the [*65]
COURT, on motion by the *Attorney-General*, granted a rule for the examination of a witness in this country before the Queen's Remembrancer. It cannot be contended that there is any distinction between the case of an examination on interrogatories in this country, and an examination under a commission abroad; or that, if the Court has a jurisdiction to order an examination before the Remembrancer, it has not authority to direct the same examination by any other person. Unless, therefore, a distinction can be drawn between an application by motion on behalf of the Crown, and an application by motion on the part of a defendant, the case of *The Attorney-General* v. *Reilly* really is decisive of the present question. The arguments advanced on the part of the Crown in the different cases have not been very consistent with each other. In *Reg.* v.

(1) In the course of his argument, *Jervis* referred to two MS. cases, which he had taken from the Registrar's book, and written out in the margin of the case of *Attorney-General* v. *Laragoity*, at the time of the discussion in *Reg.* v. *Wood*. One was a case in the year 1816, in which a commission was granted in equity, on a bill filed for that purpose; the other was *Rex* v. *Arthur*, in which a commission was granted, and witnesses were examined under it before the Remembrancer, but the depositions, when tendered in evidence, were objected to and rejected, on the ground that the Court had no such jurisdiction.

(2) 67 R. R. 784 (13 M. & W. 676).

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Wood, it was argued that the proceeding was a civil and not a criminal one, and that the only course, in order to obtain a commission, was to file a bill. In *The Attorney-General* v. *Reilly*, the counsel for the Crown founded their argument upon the existence of a peculiar equitable jurisdiction in this Court, arising from the right of the Crown to collect its revenues, which might be exercised on motion. Now, again, it is argued, as in *Reg.* v. *Wood*, that the application must be by bill.

(PARKE, B.: The *Attorney-General* says the application may be by motion on the part of the Crown, for the collection of its revenues; but he says that this reason does not apply to a defendant.)

The object of the application is the production of evidence before the jury, which cannot be obtained by other means; and surely no distinction can exist in this respect between the case of the Crown and of the defendant. In the case of *The Attorney-General* v. *Laragoity*, when the original application by motion was refused, no authorities were brought before the Court, except the case in Bunbury; but afterwards, when the application was made upon bill filed, the COURT directed an inquiry to be made for precedents, [*66] and a *great number of them, from the year 1699 downwards were brought before the Court (1). One of them is the case of *Butts* v. *Hart* (2), in which the commission was granted, and, as it would appear, on motion; and there is no intimation whatever that any resort was had to the equitable jurisdiction of the Court. On the authorities thus collected and brought before them, the COURT, in the case of *Laragoity* v. *The Attorney-General*, acted, and allowed the commission to issue. It has been suggested that that decision proceeded upon the terms of the Navigation Act; but that could not be so, because that Act extends only to the Court of Chancery.

(PARKE, B.: It may have been thought that the equity side of this Court was included, the words "High Court of Chancery" being used only as an instance.)

The judgment of the COURT appears to have proceeded expressly upon the ground of its general common-law jurisdiction. The authority of this Court, it is there said, to grant commissions in such cases, "falls in with the general jurisdiction which belongs to it, of aiding by such means defendants at law, in cases where justice

(1) See them collected, 2 Price, 178 *et seq.* (2) 2 Price, 184.

and necessity require it." In *Jenkins* v. *Larwood*, again, the commission was granted on motion, and so it was understood in *The Attorney-General* v. *Reilly*, where PARKE, B., says, "The commission in the case of *Jenkins* v. *Larwood* seems to have issued from this Court as a court of revenue, and not as a court of equity, because it was on motion." There are, no doubt, cases of prerogative, where the Crown has peculiar rights superior to those of the subject, but it is submitted that this is not among them. In truth, this case may in one sense be considered as one between subject and subject, for the informer is entitled to half the penalty in case of conviction. At all events, the defendant contends that the Court has the same authority, in respect to the examination of witnesses, in a *matter between the Crown and the subject, as between subject [*67] and subject, an authority not founded upon any particular statute, but in the inherent jurisdiction of the Court, which is necessary for the fair and equal administration of justice.

The *Attorney-General*, in reply:

It is certainly of importance that this question should be settled, and the extent of the authority of the Court should be fully ascertained and established by a deliberate decision. There can be no doubt that the cases of *Reg.* v. *Wood* and *The Attorney-General* v. *Laragoity* are express authorities against such an application as this, if those decisions are to be adhered to: and it is obvious, that, if such applications are allowed to prevail, the proceedings of the Crown will in effect be stopped and paralysed in every information for breaches of the revenue laws. Much has been said of the "general common-law jurisdiction" of this Court: but, in truth, as a court of common law, this Court has inherently no greater authority to issue a commission for the examination of witnesses, than the other courts of common law in Westminster Hall; and if they, in common with this Court, had possessed such a jurisdiction, it is obvious that it would have been wholly unnecessary and superfluous to confer it upon them by statute. If, therefore, this Court has power, independently of the statute, so to act, it must be by reason of its equitable jurisdiction; and with respect to that, it is sufficient to say, that if the equitable jurisdiction of the Court in matters of revenue still remains to it, the proper course has not been taken here to call for the exercise of it. With respect to the cases referred to in *Laragoity* v. *The Attorney-General*, they are all cases, either upon the Navigation Act, or of application by bill.

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(PARKE, B.: There is the case of *Idle* v. *Westborne* (1), where the trial was postponed on payment *of costs, and the plaintiff to be at liberty to examine his witnesses, giving the defendant a note of them.)

That case is said to have occurred on the 19th of June, 1724, and therefore certainly might have been in Term; if not, it would clearly have been a proceeding by bill.

(ALDERSON, B.: The Court, in those days, sat three days in equity in Term.)

It does not at all appear from the report, in what way the matter came before the Court, or how the proceedings arose.

(PARKE, B.: In another of those cases, *Longman*, q. t., v. *Kemble* (2), this order is said to have been made: "Ordered, a commission *ret. sine delatione*, and the trial put off till the sittings after next Term; and that the defendant have a writ of delivery, by consent, on giving the usual security.")

The consent mentioned in that order may have had reference to the whole matter: at all events, the report does not show what was the nature of the proceeding, and at that time of day the proceedings in equity were by *qui tam*. With respect to the case of *The Attorney-General* v. *Reilly*, it is really no authority at all for the defendant. There the LORD CHIEF BARON, in granting the application, says, "We at present pronounce no rule as to the result of the examination at the trial. It appears to us that the question is not to be disposed of on motion. The officers of the Crown are to have the power of examining the witness, and the defendant will be at liberty to except to the reception of that evidence, in the same way as he would be allowed to do at the trial. The rule, therefore, will be absolute so far as relates to the examination."

(PARKE, B.: Before the late statute, it appears to have been the practice to stay the proceedings, unless the plaintiff would consent to the examination of the witnesses on interrogatories.)

But it is clear that the Courts had no authority, at common law, to direct a commission to issue for the examination of witnesses abroad.

(1) 2 Price, 180. (2) 2 Price, 181.

(PARKE, B.: No, unless by consent; but they used *all the powers they had in favour of the defendant, unless the plaintiff would consent. That may explain the cases which appear to have occurred on motion.) A.-G. v. BOVET. [*69]

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It is for this defendant to establish that the Court has a jurisdiction, either by common law or by statute, to issue a commission to examine witnesses out of its jurisdiction, or else that its equitable jurisdiction still subsists, and that by virtue of that jurisdiction he has a right to this relief on motion. No authority can be adduced in favour of either of these propositions, and therefore it is hoped, for the sake of preventing the Crown from being impeded in cases of this nature, where it is suing for the benefit of the public, that the present application will be refused.

(PARKE, B.: With respect to the case of *The Attorney-General* v. *Reilly*, that was decided as it was, merely because, if we had decided it against the Crown, there was no appeal; whereas, if it were decided in favour of the Crown, the witnesses might be examined on interrogatories, on the ground that it was part of the ancient jurisdiction of the Court that an examination might take place on interrogatories before an officer of the Court; and whether that was part of the ancient jurisdiction not taken away by the Act of Parliament, might afterwards be decided by a court of error.)

Moseley, amicus Curiæ, referred to a passage in Bracton (f. 107), where the doctrine was stated, that, unless the Courts have power to compel parties to comply with their orders, they have no jurisdiction: "Oportet et ille qui judicat, ad hoc quod rata sint judicia, habeat jurisdictionem ordinariam vel delegatam, et non sufficit quod jurisdictionem habeat, nisi habeat coertionem; quod si judicium suum executioni demandare non posset, sic essent judicia delusoria." And again, "Sunt enim causæ spirituales, in quibus judex secularis non habet cognitionem nec executionem, cum non habeat coertionem."

POLLOCK, C. B.: [70]

This is an application in a case in which the *Attorney-General*, on the part of the Crown, has filed an information against the defendant for penalties. No direct authority has been cited by the defendant in support of the application, although, if the Court had the power to grant it, there would scarcely have been an instance

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in which such an application would not have been made to the Court, to exercise its discretion on behalf of a defendant. It may be a very proper jurisdiction for the Court to possess; but if so, it must be conferred upon the Court by the Legislature. There is no case which authorises the Court so to act. All the cases in which the Court appears so to have interfered, have been either where bills have been filed on the equity side of the Court, or where there has been a consent. In the present case, where the *Attorney-General* is suing on the part of the Crown, I am clearly of opinion that the defendant has no right to stop the Crown from going on with the suit, until the Crown shall have consented to something which the Court has not the power to grant. In the case of *Calliand* v. *Vaughan* (1), the Court of Common Pleas declined to interfere to put off a trial, or use any indirect means to compel a party to consent to a commission for the examination of a witness in Scotland. The Court seemed to think that the plaintiff was entitled to stand upon the rights which belonged to him as a suitor in the Court; and Lord Chief Justice EYRE is there reported to have said: "The plaintiff thinks fit to stand upon his rights; he refuses to consent, and we are called upon for a decision. The question then is, whether the Court should, under the circumstances of this case, give the defendant till next Term to enable him to apply to a court of equity." But the COURT refused to interfere, even between subject and subject, to put off the trial, in order to compel the party to consent; which, in other words, is nothing more than this, *"We will not use a power which we have, for the purpose of indirectly exercising a power which we have not;" and that, as it appears to me, was a most proper and correct decision. *A fortiori*, in a case where the Crown is concerned,—in a matter of revenue,—it would be extremely improper to use any of the authority which undoubtedly belongs to the Court, for the purpose of indirectly coercing and compelling the *Attorney-General* to take a course which we have not the power to order him to take directly. With respect to the common-law jurisdiction of the Court to exercise this power, I have no doubt that that jurisdiction does not exist. I believe it will be found to be true, almost without exception, that the common law of England takes no notice of any other country, any other law, or any other usage than our own. It recognises, indeed, the residence of foreigners among us, but it takes no notice, apparently, of the law or the usages of any other country, and

[*71]

(1) 1 Bos. & P. 210.

nearly the whole of the common law seems to have been framed and established, as if there had been no other country in the world but England itself. I apprehend, therefore, that we have no common-law jurisdiction to send a commission into a foreign country, there to examine witnesses, nor any power there to administer an oath, the common law not recognising the authority of anybody out of this country to administer one. Upon that point I feel, upon principle, no doubt whatever. But the refusal of the rule may, with perfect safety, be put upon this ground,—that there really is no authority whatever to be found in the books for the exercise of this power on the part of the Court, and it is of such a description, that if it had belonged to the Court, the instances in which the application would have been made, and the practice established, would have been so numerous, and the circumstances under which such a commission would issue would have been so settled, that long ago, with reference to the issuing of such a commission, it would have been a branch of the law in this Court, established by a multiplicity *of [*72] decisions. Upon these grounds, both upon principle and upon authority, I am quite satisfied that we do not possess this jurisdiction, unless by its being on the equity side of the Court. Whether that equitable jurisdiction in matters of revenue still exists or not, is at this moment the subject of consideration in the Court; but with reference to the present application, that question does not arise. I am of opinion, therefore, that the rule should be discharged.

PARKE, B.:

I am of the same opinion. With respect to the right under the statute, it is perfectly clear, since the case of *Reg.* v. *Wood*, that the defendant has no such right, and the motion certainly cannot be sustained upon the ground that the statute gives him any. The only question is, then, whether he has any by the common-law jurisdiction of this Court. Whether he has any by equitable jurisdiction, is a matter upon which I pronounce no opinion, because, whether a bill would lie for the purpose of examining a witness for the defendant is a point which is not yet settled; but I am on the present occasion to ask myself the question, whether, at common law, the Court has such a jurisdiction as it is now asked to exercise. There is no doubt that Lord MANSFIELD in his time went considerable lengths to give a defendant the same relief in a court of law, which he would have upon a bill filed: he went so

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far as this, in a case mentioned by himself in *Mostyn* v. *Fabrigas* (1), "of a criminal prosecution of a woman who had received a pension as an officer's widow, and it was charged in the indictment that she never was married to him. She alleged a marriage in Scotland, but that she could not compel her witnesses to come up to give evidence. The COURT obliged the prosecutor to consent that the witnesses might be examined before any of the Judges of the Court of Session, or any of the Barons of the Court of Exchequer in [*73] *Scotland, and that the depositions so taken should be read at the trial: and they declared that they would have put off the trial of the indictment from time to time, for ever, unless the prosecutor had so consented." That certainly was going a great length,—to an extent, unquestionably, which has not been followed in modern times. I quite concur in the observations which my Lord has made upon the case in the Common Pleas, where that COURT refused to do indirectly what they had no power to do directly, viz. to put off the trial of a cause in order to compel the plaintiff to consent to the examination of witnesses under a commission. Now, that being so, let us see whether there are any precedents of such a proceeding as this in this Court. The case of *Laragoity* v. *The Attorney-General* is a case directly in point, because this Court, upon motion applicable to their common-law jurisdiction, refused to interfere. It has been observed with respect to that case, that several authorities were cited upon the argument on the equity side of the Court, and that if they had been brought before the Court at the time of the motion on the common-law side, the Court would probably have granted the application. Now, I have looked through those precedents, and there appear to be only two which give a colour of support to such an application. Taking the majority of them, they are cases in which a bill has been filed; but there are two in which it does not appear upon the order that a bill had been filed. Whether those two proceeded upon the ground that the plaintiff, or the Crown on behalf of the plaintiff, consented, does not distinctly appear. It may have been a matter perfectly agreeable to the Crown that such a commission should issue, and there certainly is not a single case of any interference on the part of this Court to stay the proceedings on the part of the prosecutor, where the Crown or the prosecutor was unwilling to consent. If that be so, there is no authority in support of this application; and I think the application ought to be dismissed, without considering whether

(1) Cowp. 174.

*this would be a fit case for the Court to interfere, if a bill in equity had been filed.

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ALDERSON, B.:

I am of the same opinion. I do not think we have any jurisdiction by the common law. No authority has been cited to induce me to come to that conclusion. One may very well understand all the cases mentioned in *Laragoity* v. *The Attorney-General;* my belief is, that they were all on the equity side; they were all cited in an equity case, and every one of them may have been such; though, from the short way in which they are reported, one is not quite certain what they were. The greater part of them were certainly upon bills filed; and with respect to the two in which that does not appear, if they were upon the common-law side, they are simply applications on the part of the defendant to put off the trial, and then the Court, upon his making that application, refused it, as well they might, unless he would consent to a commission issuing for the purpose of the examination of witnesses by the other side. But there there is a common-law jurisdiction,—there is the "coercion" which the learned gentleman has referred to, as well as the power of directing the thing to be done. I apprehend the "coercion" spoken of by Bracton is simply a coercion where the party is before the Court. If the one party who applies, and the other party who is against the rule showing cause, are both subject to the coercion of the Court, the Court have that coercion which gives them jurisdiction. It does not at all apply to witnesses who are the subject of a commission, because nobody can doubt, if two English subjects suing in this Court have a commission issued for the examination of witnesses in China, that will not give the Court coercion over the Chinese parties; the coercion exists only over the two contending parties before them. This, I apprehend, is the explanation of the difficulty which is suggested to the Court by the passage cited from Bracton. And with respect to the cases, it appears to me, *I confess, that they afford such reasons as satisfy me that we have no such jurisdiction as that which is now claimed.

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PLATT, B.:

I agree entirely in all the observations of my learned brothers, and will only add one or two words. In the case of *Reg.* v. *Wood*, it is remarkable that the learned counsel based the whole of his

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argument upon two statutes, namely, the 13 Geo. III. and the 1 Will. IV., never dreaming that there was an original jurisdiction in this Court, to which he might have referred, and might have saved himself the trouble of founding an argument upon those statutes. That likewise is the ground upon which the Court proceeded, and we can hardly suppose, if any such jurisdiction as this had ever been exercised, that the defendant should not have been able to have cited something to the Court, for the purpose of guiding them to that conclusion. But there is an absence of all such precedents. With respect to the passage cited from Bracton, it appears to me that the power of "coercion" cannot be taken so extensively as it is sought to be applied; for let us see whether it is true that the Court has a power of coercion co-extensive with its jurisdiction. The Court has power to direct the examination of witnesses abroad, under the statute of 1 Will. IV. Has it the power of compelling the witnesses to attend? Certainly not. So, until the late Act, although the Court had power to refer cases, they had no power of compelling witnesses to appear before the arbitrator. Therefore it does seem that that passage must be taken with some considerable limitation, in order to its being applied to any case that may be brought before the Court. It seems to me, I own, to be clear that the Court has no such jurisdiction as that which is contended for; and that being the case, this application cannot be maintained.

Rule discharged.

HART *v.* MILLS (1).

1846. *Jan.* 28.

(15 Meeson & Welsby, 85—87; S. C. 15 L. J. Ex. 200.)

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The defendant ordered of the plaintiff two dozen of port and two dozen of sherry, with the understanding, that, if it were not approved, he should return it. The plaintiff sent him four dozen of port and four dozen of sherry. The defendant was not satisfied with its quality, and returned the whole, except one bottle of the port and one dozen of the sherry, with a letter to the plaintiff, in which he stated that his order was for two dozen of each kind of wine; that he should not have refused to keep the four dozen if the quality had suited him, but that, as it did not, he returned the four dozen of port, *minus* one bottle, which he had tasted, and three dozen of the sherry: Held, that the defendant was liable only for the price of the wine he actually kept.

DEBT for goods sold and delivered, and on an account stated. Plea, except as to the sum of 2*l.* 17*s.*, parcel &c., *nunquam*

(1) Sale of Goods Act, 1893, s. 30 (2); *Cunliffe* v. *Harrison* (1851) 6 Exch. 903, 20 L. J. Ex. 325.

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indebitatus; as to that sum, payment into Court. At the trial, before the Secondary of London, it appeared that the action was brought to recover the sum of 17*l.* 14*s.*, on the following account:

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	£	*s.*	*d.*
"To four dozen old port, at 40*s.* per dozen .	8	0	0
Four dozen pale sherry, at 40*s.* per dozen .	8	0	0
Bottles, 28*s.*; hampers, 6*s.*	1	14	0
	£17	14	0"

It appeared in evidence that the defendant had ordered of the plaintiff two dozen of port and two dozen of sherry, with the understanding, that, if it were not approved by him, he should return it. On the following day, when it was delivered, the defendant accordingly, not being satisfied with its quality, returned the whole, except one bottle of the port and one dozen of the sherry, and sent with it the following letter to the plaintiff:

"GENTLEMEN,—My order to Mr. John Simmons (the plaintiff's traveller) was for two dozen of each, and not four: however, I should not have been particular about keeping the four dozen, if the quality had suited me. I beg leave to return you the four dozen of port, *minus* one bottle, which I tasted; as also three dozen of the sherry, as they neither suit my palate. I will call on you some day next week, and choose for myself the remainder of the order."

The plaintiff's witnesses stated that the wine was "good *sound wine." Upon these facts, the Secondary left the case to the jury, who found a verdict for the plaintiff, damages 1*l.* 3*s.* beyond the sum paid into Court; and leave was reserved to the plaintiff to move to increase the damages by the sum of 4*l.*, his counsel contending that the defendant was liable for two dozen of each kind of wine. [*86]

Burnie having obtained a rule accordingly,

Wordsworth now showed cause:

The defendant's order was for two dozen of each kind of wine, with the express understanding, that, if it was not such as he approved of, he might return it. That order was not complied with by the plaintiff, who supplied four dozen of each kind. The defendant was therefore at liberty to refuse the whole if he chose,

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and was bound to pay only for so much as he actually kept, viz. one dozen of the sherry and one bottle of the port, the price of which has been more than satisfied by the money paid into Court, and the damages recovered. The jury appear to have acted on the ground that the defendant ought to have taken the rest of the sherry, of which he retained one dozen. The case of *Champion* v. *Short* (1) is an authority to show, that, if a person orders several articles from a tradesman at the same time, although at distinct prices, he may consider the whole as forming one order, and is not bound to accept or pay for any particular article, unless the rest are furnished according to the contract. (He referred also to *Coleman* v. *Gibson* (2) and *Elliott* v. *Thomas* (3).)

Burnie, contrà:

This was an entire contract, which was fulfilled by delivery, and the defendant could not repudiate it as to part. He does not absolutely reject it.

[*87] (ALDERSON, B.: *How do you get over the difficulty, that you have not complied with *your* contract? The defendant orders two dozen of each wine, and you send four; then he had a right to send back all; he sends back part: what is it but a new contract as to the part he keeps? If you had sent only two dozen of each wine, you would be right; but what right have you to make him select any two dozen from the four?)

He affirms the contract as to the whole by the letter.

(ALDERSON, B.: No; that is a new contract. The jury ought in truth to have found a verdict for the defendant, for the money paid into Court covered the whole demand for which the defendant was liable. At present, you have been paid 4*l.* for thirteen bottles of wine.)

Per CURIAM (4):

Rule discharged.

(1) 10 R. R. 631 (1 Camp. 53).
(2) 42 R. R. 770 (1 Moo. & Rob. 168).
(3) 49 R. R. 558 (3 M. & W. 178).
(4) POLLOCK, C. B., ALDERSON, B., ROLFE, B., and PLATT, B.

THE ATTORNEY-GENERAL *v.* HALLETT (1).

1846. *Jan.* 23.

(15 Meeson & Welsby, 97—110; S. C. 15 L. J. Ex. 246; 3 Dowl. & L. 685.)

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An action of trespass *qu. cl. freg.* was brought in the Court of Common Pleas, to which the defendant pleaded pleas alleging that the *locus in quo* was within the limits of the forest of Waltham, that the Queen was seised in fee, in right of her Crown, of the forest, and justifying the trespasses as the servant and by command of the Queen. This COURT (after a two days' notice to, and hearing counsel on behalf of, the plaintiff) ordered the cause to be removed into the Office of Pleas of the Exchequer, by a rule absolute in the first instance, on the allegation of the *Attorney-General* that the profit of the Crown came in question in the cause; the plaintiff being put in the same state of forwardness as he was in the Court of Common Pleas.

THE *Attorney-General*, on the part of the Crown, moved to remove into the Office of Pleas of this Court the proceedings in a cause of *Hallett* v. *Vigne*, which had been commenced in the Court of Common Pleas. He did not move on affidavit, but applied for the order to remove the cause, as a matter of right, upon his own allegation, that the profit of the Crown came in question in it. According to the statement of the learned *Attorney-General*, the circumstances were as follows:

The cause of *Hallett* v. *Vigne* was an ordinary action of trespass *quare clausum fregit*. The defendant (who was not an officer of the Crown) pleaded to the action, first, that the Chief Justice in Eyre had granted to him the defendant a license to hunt, shoot, &c. in the forest of Waltham, in the county of Essex; that the *locus in quo* was within the limits of the forest; that certain fences set up by the plaintiff interfered with the defendant's rights therein, and that he committed the alleged trespasses for the purpose of removing those fences, &c. The second was *a plea of *liberum tenementum* [*98] in her Majesty, and stated, that the defendant, as her Majesty's servant, and by her command, entered &c. and pulled down the fences: the replication to this plea traversed the title of her Majesty, and an issue was joined thereon. The fourth plea was, that the *locus in quo* was within the limits of the forest of Waltham; that her Majesty was seised in fee, in right of her Crown, of and in the said forest; and that, the *locus in quo* being wrongfully inclosed and fenced in, the defendant, as the servant of her Majesty, and by her command, entered and pulled down the fences, &c. To this plea the defendant replied, that the close in which &c. was not the close,

(1) Approved, *Stanley* v. *Wild* [1900] 1 Q. B. 262, 69 L. J. Q. B. 318. Section 24 (5) of the Judicature Act, 1873, does not apply to the prerogative rights of the Crown: *A.-G.* v. *Constable* (1879) 4 Ex. D. 172, 48 L. J. Ex. 455. —A. C.

A.-G. v. HALLETT.

soil, and freehold of our lady the Queen. There were also new assignments, and the defendant was under terms to plead issuably thereto, and to take short notice of trial for the next Assizes for the county of Essex. In last Term, an information of intrusion was filed against the plaintiff in that action, Hallett, for an encroachment upon the Royal forest of Waltham; and the trespass which was the subject of the action was one alleged to have been committed by the defendant Vigne in abating that encroachment.

A two days' notice of this motion having been given to the plaintiff Hallett,

Montagu Chambers and *Willes* appeared on his part to oppose the application:

The prerogative of the Crown does not apply to this case, for this is not an action in which the title or profit of the Crown comes in question, so as to furnish any ground for the interposition of this Court. This is an ordinary action of trespass *qu. cl. freg.*, between subject and subject, in no way relating to the Queen's revenue. Nor is it like the case of an ejectment against the Crown, in which, no doubt, the Court (supposing that its equity jurisdiction in matters of revenue still exists) would grant an injunction to stay the proceedings. [*99] *But the Court will not interfere with the right of the subject to sue in another Court, unless there are precedents for such a course; and there is no precedent for removing into this Court the proceedings in an action between subject and subject, merely because, on a collateral issue raised by the defendant, the title of the Crown is set up as a defence to the action. In order to sustain the application, the *Attorney-General* is bound to show a general prerogative in the Crown to have the proceedings taken in this Court, whenever the title of the Crown to land incidentally comes in issue between subject and subject. It is submitted, further, that this Court has no peculiar jurisdiction in matters relating simply to the title of the Crown to land, though it is otherwise as to matters of revenue. But, at all events, the prerogative does not extend to such a case as this. It is an extraordinary doctrine, that when a party brings an action for breaking and entering a close of which he is possessed, and after he has proceeded, perhaps, up to the very point of trial, without the least intimation that the opposite party derives any right or authority from the Crown, he may be stopped by an allegation of some secret title in the Crown, and told that he ought to have sued in the Exchequer.

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(POLLOCK, C. B.: No, he may sue in any Court he pleases; but as soon as the Crown in fact asserts its title, and interposes to make itself a party in the cause, the case assumes a new aspect, and the Crown has a right to say the cause shall be tried in this Court.)

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The interests of the Crown may be equally protected, by the *Attorney-General's* demanding a trial at Bar in the Court in which the cause is depending.

(PLATT, B.: You contend, that, this being an ordinary action of trespass between subject and subject, the prerogative of the Crown does not apply: but there are authorities strongly against you upon that. There is the case of *Lamb* v. *Gunman* (1), which was an action of trespass, *brought by the plaintiff in the Court of King's [*100] Bench, for taking a quantity of wine, alleged to be the property of the plaintiff. The defendant justified, as servant of the Duke of Cleveland, the taking of two tuns of wine, for duties of prisage, under a grant from King Charles II. to the Duke's father; and that cause was removed into this Court. Again, in Hardres's Reports, (p. 176), there is this case: "Hammond was outlawed at the suit of another person, and lands in his possession were extended. A third person, that claimed a title to those lands, brought an action of ejectment for them, and pleaded to the inquisition; and an injunction was prayed for the King to stay proceedings at law, and it was denied; because, although a person outlawed cannot, after extent, prevent or avoid the King's title by any alienation, as appears by the 10 Hen. VII., yet the outlawry gives no such privilege to the possession of a disseisor, but that the disseisee may enter and bring his ejectment; for by the outlawry the King has a title only to the profits, and no interest in the land. But it was ordered, that the plea to the inquisition should be tried first, and that the ejectment should be brought in this Court, because the King's revenue was concerned.")

Those cases are distinguishable from the present. The latter was a case where there had been process on a judgment of outlawry; there was a writ of *capias utlagatum*, and an inquisition thereon, which was traversed by a person who claimed title to the lands which by the inquisition were found to be the lands of the outlaw. That traverse was the proper mode of trying whether the hand of the Crown should or should not be amoved from the lands;

(1) Parker, 143.

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so that the result of that traverse, and equally so of the ejectment, directly affected the interest of the Crown.

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(PLATT, B.: By the pleadings in this case, there is a direct question of the Crown's title: is not that enough?)

The finding of the issue one way or other will not affect the interest of the Crown; it will be binding only as between the parties, and
[*101] will be no estoppel as against *the Crown, so as to affect its title. In truth, the real question on these pleadings is, not whether the *locus in quo* is part of the soil and freehold of her Majesty, but simply whether the limits of the forest extend over the land on which these fences were made. There is no question raised as to the title to the soil and freehold of the forest; and the defendant is a mere licensee under a forest license, and not the officer and servant of the Crown.

(ALDERSON, B.: The issue on the fourth plea brings directly in question the title of the Crown; and if there be any one issue upon which the Crown may interfere at the trial of the cause, that is enough to warrant the application to have the cause tried in this Court.)

But the question raised by the plea is not one which will be disputed by the Crown; because it is not pretended that the Crown claims the plaintiff's land, but only claims that it is within the regards of the forest, which is a question not at all raised by the plea. On this ground, therefore, the profit of the Crown does not appear to come in question in the action, and so the prerogative of the Crown does not apply. In *Cawthorne* v. *Campbell* (1), which is the leading case on this subject, EYRE, C. B., states the prerogative as applying "where the matter of suit in another Court touches the profit of the King;" and says that then, on the prayer of the *Attorney-General*, the action is to be removed. And he then refers in the following terms to the case of *Lamb* v. *Gunman*: "That was an action between the Duke of Cleveland's bailiff and some other persons of the town of Rye, upon a demand of prisage of wine; and there was an issue joined upon this question, whether the town of Rye was entitled to be exempted from this claim of prisage. The King had a reversionary interest in the prisage, because it was granted to the Duke of Cleveland in tail; and in respect of this

(1) 1 Anstr. 205, *n.*

interest, it was held that the King had a right to desire that that cause might be removed into the Court of *Exchequer; and the cause was accordingly removed."

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(PARKE, B.: I am quite at a loss to see how you distinguish that case from the present: it seems to me to be exactly in point.)

That was an action brought against a revenue officer, and the question in it related directly to a branch of the King's revenue.

(PARKE, B.: Surely, whether particular land is within the regards of the forest of Waltham, touches the Queen's profit. Whether the right of the Queen extends over the *locus in quo*, is within the issue in this cause; and surely it is of great importance, as regards the revenue, whether the forest extends over one acre or five thousand; of just as much as the question in the case of *Lamb* v. *Gunman*, namely, whether the right to the prisage of wine, which existed over the kingdom generally, extended to the port of Rye. I do not see how you can draw any distinction between that case and the present.)

The distinction is, that that was a question relating to the duties of revenue, and not to the title to land.

(ALDERSON, B.: Lord Coke, in the 4th Inst., c. 11, p. 112, speaking of the profit of the King, says—"This profit is either immediate or mediate; immediate, as of lands, rents, franchises, hereditaments, debts, duties, accounts, goods, chattels, and other profits and benefits whatsoever due to the King; mediate, as, first, the privilege of the officers and ministers of the Court; for two things do principally support the jurisdiction of a Court, namely, the just preservation of the dignity of it, and the due attendance of the officers and ministers of the same, to sue and be sued in this Court." The only difference, therefore, between the privilege of the officer and the profit of the King is, that the one is called the immediate and the other the mediate jurisdiction.)

The defendant in this case is no officer of the Crown.

(ALDERSON, B.: The rule which is laid down is, that all questions touching the profit of the Crown are to be tried in this Court. Here the question is raised, whether the *locus in quo* is within the limits of the forest of Waltham. Can it be doubted that that is a matter

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*touching the profit of the Crown? Where an action is brought, in which the conduct of an officer of the Crown is brought into question, the matter, though in dispute in another Court, is brought here, because it is a matter which, mediately, touches the profit of the Crown, as regarding the due sustentation and support of its officers. The cases of officers, according to Lord Coke, are in truth cases touching the profit of the King; and it really seems impossible to distinguish those cases from the present.)

In Bac. Abr., Prerogative, (E. 7), where the cases are collected, it is said—"Where the King's revenue is concerned in the event of a cause, it shall be removed from any other Court where the action is brought, into the Office of Pleas of the Exchequer;" and the case of *Lamb* v. *Gunman* is then set forth, in the terms already referred to. And it will be found that all the cases there stated were actions referring directly to the ordinary revenue of the Crown, in the shape of monies, duties, or Customs; but there is nothing to show that the prerogative applies to cases in which the title of the Crown to land comes in question upon a mere collateral issue between subject and subject.

But secondly, there should at all events have been a rule to show cause. *The Attorney-General* v. *Kingston* (1) is a precedent for such a course. It will be said that here the plaintiff has had notice of the application; but it is not such a notice as would enable him to come properly prepared to resist it; it ought at least to have been a four days' notice, according to the practice. The object of the notice is, that the party may be heard upon it, which ought to be upon a reasonable notice.

(POLLOCK, C. B.: You are no doubt entitled to be heard; the only question is, whether the notice is to be a two days' or a four days' notice. Upon looking into my brother Manning's book (2), I find that four days' notice was usually given; but the authority there referred to is an *Anonymous* case in Anstruther, where all [*104] *that is said is "upon notice," not mentioning any time. The Queen's Remembrancer, however, certifies to us that the practice is two days' notice—one clear day; and that notice you have had.)

If, then, the Court determines to interpose to remove the action in this case, the question will be on what terms. According to the case in Anstruther, the rule should call on the defendant to appear

(1) 8 M. & W. 163. (2) Mann. Exch. Pr. 190.

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to accept a declaration, and to put the plaintiff in the same state of forwardness in this as he was in the other Court. The plaintiff will be obliged to give up his proceeding in the Common Pleas, and must sue out a fresh writ of summons in this Court, in order to commence the action in conformity with the requirements of the stat. 1 & 2 Vict. c. 110; and then he must deliver his declaration, and have the pleas delivered to him, and the replication and new assignments must be delivered to the defendant. The rule, therefore, ought to be in more special terms than before the statute of Victoria, when the practice was more loose.

(The *Attorney-General* suggested, that no terms ought to be engrafted on the rule; but that, if the Court would state the practice, it would be pursued.

POLLOCK, C. B.: The plaintiff ought certainly to be placed in the same state of forwardness. There must be a writ, otherwise no writ of error will lie.

PARKE, B.: The plaintiff must commence *de novo*, and by the statute he can only commence by writ, to which the defendant must appear, and the same pleadings are to be considered as the pleadings consequent upon that writ.)

The *Attorney-General*, the *Solicitor-General*, *Jervis*, and *W. F. Pollock*, appeared for the Crown, but were not called upon to argue.

POLLOCK, C. B.:

There is no doubt whatever in the mind of the Court, that in this case the rule must be made absolute as prayed. There has been some misapprehension, during the discussion, as to the nature of this proceeding. *It is an application on the part of the Crown, [*105] to remove into this Court an action commenced in the Common Pleas. Now it appears to have been the practice of the Court, (a practice from which we shall not depart, either now or on any other occasion), that such an application should be made on notice to the other party; but the proceeding in this Court is not by a rule to show cause; it is an application for a rule absolute in the first instance, only giving notice to the other side, in order that they may come in and be heard. Accordingly, the Court have heard, at considerable length (I do not say at a greater length than

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the importance of the case required), every thing that could be urged to induce the Court to refuse this rule. It is said, that this is an application which the Court ought not to entertain at all: and *Mr. Willes* also contended, for some time, that the defendant was entitled to be heard. Now, if by that it was meant that there ought to be a rule to show cause, and that he should be heard, in the ordinary way, by affidavits, and by showing cause, I think *Mr. Willes* was not well founded in that proposition: but if his meaning was, that the party ought to be heard, inasmuch as notice had been given with the view to his being heard, then I think he was perfectly right; and this being an application in a case in which the Crown does not appear to be interested as a party to the record, but where the Crown interposes to take up the case of the defendant, the defendant is really brought here on the part of the Crown, and is in Court for the purpose of obeying the directions of the Court. With respect to the substance and the merits of the case, I cannot distinguish this case in any way from those which have been referred to during the argument. If an act has been done by any person on behalf of the Crown, and that is made the subject of an action of trespass, it is a matter of course that the action should be moved into this Court, at the instance of the Crown, by rule absolute in the first instance. Then the parties

[*106] may be heard, no doubt, in the *same way that a party may be heard to show cause against a rule for an attachment, when the contempt is perfectly clear; but I apprehend, that, where an action of trespass is brought against a Queen's officer, and it is proposed, on the part of the law-officers of the Crown, to remove it into this Court, their right to do so is now so well established, that I should little expect such an application to be resisted. It is, in truth, a proceeding as little disputable as any ordinary motion which is founded on the well-known, established, and daily occurring practice of the Court. It is said, however, that this is an action between subject and subject, respecting a matter which relates to land, and not to a mere question of revenue; but I think that is at once answered by the practice. The action of ejectment is *primâ facie* an action merely between subject and subject, and relates to land, yet the prerogative of the Crown applies to that; and if the interest of the Crown is concerned, an action of ejectment may be removed into this Court. It may be said, however, that that does not amount to an authority, because the action does not go on; the reason of that is, that, in this Court, an action of ejectment will

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not lie against the Crown. The party must proceed by a petition of right. In an action of ejectment, we remove it, although we thereby actually extinguish the action; and therefore that is rather an *à fortiori* argument for removing this cause, which is sought to be removed for the express purpose of going on with it. But I refer to that only as an authority for saying that the prerogative of the Crown applies not only to matters of revenue, ordinarily so called, but also to a case where land is the matter in dispute. Then it is said that this action does not relate to the profits of the Crown,—that it does not touch the profits of the Crown. *Mr. Willes* took a very subtle distinction, founded upon the pleadings, viz., that the title of the Crown is admitted to the forest, but the dispute is whether this is part of the forest or not. If the contention be whether the forest actually includes within its bounds *a [*107] certain tract of country, it matters not whether it is one acre or five hundred—surely no one can say that the profit of the Crown is not touched, when we have an inquiry arising out of the pleadings, admitting the title of the Crown to the forest, but denying that the right of the Crown exists over the *locus in quo*, because it is not part of the forest where the right does exist; and, as has been suggested by my brother PARKE, if this is a question of boundary, the Crown is materially interested, although this is a suit between party and party; for this might become evidence hereafter against the Crown, as to what are the bounds of the forest in question, this being a right of a public nature. The general practice of the Court, then, being well established in cases of revenue, where the interest of the Crown is concerned, and being also well established in cases of land, by the course pursued in the case of an action of ejectment, what is there to prevent the application of the same rule to the present case? Does this case touch the profit of the Crown? It seems to me that it does. Does the title of the Crown come in question? Why, it comes immediately in question, as in the case referred to by my brother PARKE, and which appears to me to be directly in point. Then it is said we ought to impose certain terms. I think the *Attorney-General* is properly cautious in not permitting it (as far as he is able to prevent it) to be supposed that this rule is made absolute with any new terms. The rule is, however, to be made absolute with this understanding, that the plaintiff is to be placed, with reference to the proceedings in this Court, in a situation exactly the same in point of advancement as he was in the Common Pleas. The mode

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in which that is to be done, I own I should have thought would rather be a matter to be settled by the parties, or by the officer of the Court; but I think that, without any express direction of the Court, it carries with it a writ, if a writ be necessary; it carries every thing that is necessary to put the plaintiff in a position as favourable, and as far *advanced, and as safe as he was in the other Court. I believe I have now adverted to all the points that have been made; and it appears to me to be perfectly clear, that the Crown is entitled, in the ordinary way, to take from the jurisdiction of the Common Pleas the action that has been commenced there, and place it in this Court, in the same state of advancement as it was in the other Court. For these reasons, I am of opinion that the rule must be granted in the manner prayed by the *Attorney-General.*

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PARKE, B.:

I entirely agree with my LORD CHIEF BARON; and he has gone so fully into the case, that I think it quite unnecessary to add anything to what has fallen from him.

ALDERSON, B.:

I am quite of the same opinion. This is a matter that clearly touches the profit of the Crown; and really the whole arises out of this, that in ancient times it was, for the convenience of all parties, agreed that the Court of Queen's Bench should have certain peculiar jurisdictions, the Common Pleas certain other peculiar jurisdictions, and the Court of Exchequer certain others. Among the last, belonging to the Court of Exchequer, was assigned the jurisdiction in all those cases which touched the profit of the King; and in order to bring them here, this process must be adopted. It is not in truth any claim of prerogative adverse to the subject, because it belongs to the Crown. You cannot indict a person in the Exchequer or in the Common Pleas, nor can you bring a *quare impedit* in the Court of Queen's Bench, or in the Exchequer, unless the King himself be personally concerned: but the subject is as well off in the one Court as in the other.

PLATT, B.:

It appears to me to be clear from the pleadings in this case, that the motion of the *Attorney-General* ought to be successful. We find upon the pleadings, on the *fourth plea, a direct assertion on

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the part of the defendant of the right of the Crown, and a justification by him, under that right, of the acts which he is called upon to answer. To that it is replied, that the Queen has not the soil or freehold; does that raise no question of right in the Crown? Surely it raises a question of right, in the first place, whether the *locus in quo* is a parcel of the forest, and secondly, whether the Queen has the fee of that parcel of the forest. It seems to me that it plainly raises a question of the right of the Crown; and it is idle to talk of that not coming within the word "profit;" for what is the use of lands, except by reason of the profit which is derived from them? If the land be taken away, indirectly the profits of the Crown are taken away. It is a matter relating to the revenue of the Crown, for the profit of the Crown is undoubtedly in question. It has been said, that in cases of ejectment the Crown has not been allowed to carry on the proceedings in this Court. Is there not a very plain answer to that, viz. that it is the prerogative of the Crown not to be sued by writ? and it would be one of the most absurd proceedings in the world for the Crown to command itself. It is the prerogative of the Crown not to be sued by writ, and therefore another proceeding is adopted, called a petition of right, upon which, if it is successful, the direction of the Crown is "that right shall be done." *Hammond's* case appears to me directly in point. There an outlawry had taken place, and an inquisition issued; the party under that inquisition held the land, and the party disseised brought ejectment, and also traversed the inquisition, which he had the right to do, and then, upon application to this Court, that proceeding was allowed to go on, and the ejectment, which was *inter partes*, between the disseisee and disseisor, was directed to be removed into this Court; showing that the cases alluded to in the note in Anstruther are not applicable only to the case where the tenant of the Queen is the party in possession. If the Queen herself is in possession, no subject can maintain *ejectment against her; the only mode of proceeding is [*110] by petition of right. If the subject is in possession, claiming a right under the Crown, then the ejectment may be maintained; but, at the suggestion of the *Attorney-General* the proceeding would be brought into this Court.

Rule absolute.

1846.
Jan. 28.

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ALDER AND ANOTHER *v.* KEIGHLEY (1).

(15 Meeson & Welsby, 117—120; S. C. 15 L. J. Ex. 100.)

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B., being indebted to the defendant in the sum of 500*l.* for the price of goods sold to him, and being pressed for part payment of the debt, handed to the defendant a bill of exchange, drawn by himself, for 600*l.*, which the defendant agreed to discount, on the terms of retaining to his own use the sum of 100*l.* and the discount, and paying over the difference to B.: he, however, retained the bill, and paid no part of the proceeds over to B. B. shortly afterwards became bankrupt: Held, that his assignees were entitled to recover from the defendant the full amount of the bill, *minus* the 100*l.*, and such discount as the jury should find to be receivable by the defendant.

ASSUMPSIT. The declaration stated, that heretofore, and before the said John Birkhill became a bankrupt, to wit, on &c., in consideration that the said John Birkhill would indorse and deliver to the defendant a certain bill of exchange for the sum of 600*l.*, drawn by the said John Birkhill, the defendant promised the said John Birkhill to discount the said bill, he the defendant retaining to himself the sum of 100*l.* Breach, that the defendant did not discount the bill, &c. Plea, *non assumpsit.*

At the trial, before Rolfe, B., at the last York Assizes, the following facts were deposed to by the bankrupt, Birkhill: Before his bankruptcy, he was indebted to the defendant in the sum of 500*l.* for a quantity of peas sold to him, and, being pressed by the defendant for payment of 100*l.*, in part discharge of the debt, produced a bill drawn by him upon one Jackson for the sum of 600*l.*, which the defendant agreed to discount, on the terms of retaining to his own use the sum of 100*l.* and the discount, and paying over the difference to Birkhill. The defendant, however, retained the bill, and paid no part of the difference to Birkhill. Birkhill a short time afterwards became bankrupt, and the plaintiffs were appointed his assignees, and brought the present action to recover from the defendant the amount of the bill of exchange, *minus* the 100*l.* agreed to be retained, together with the discount. The defendant gave some evidence to show that the bill had been accepted for the accommodation of Birkhill. The learned Judge, in summing up, directed the jury, that if Birkhill was to be believed, the assignees, who stood in the same situation as the bankrupt, if solvent, would have stood in, were entitled to recover the 600*l.*, *minus* the 100*l.*

[*118] and *the discount. The jury found a verdict for the plaintiffs, damages 495*l.*, and the learned Judge reserved leave to the defendant to move to reduce the damages to 1*s.*

(1) Cited in *Hadley* v. *Baxendale* (1854) 9 Ex. 354, 23 L. J. Ex. 179.—A. C.

In Michaelmas Term last, *Baines* obtained a rule *nisi* accordingly, or for a new trial, on the ground of misdirection; against which

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Martin and *Archbold* now showed cause:

The ruling of the learned Judge was perfectly correct. The assignees of this bankrupt stood precisely in the same condition in which the bankrupt himself stood at the moment of the breach of contract. Now it is clear, that, if he had continued solvent, he would have been entitled to recover the whole amount of the bill. *Hill* v. *Smith* (1) is expressly in point to that effect.

(POLLOCK, C. B.: It is as if a man had agreed to buy and pay for a lottery ticket at a certain price, and then, when it turned up a blank, were to say that the seller was entitled only to nominal damages.)

Yes: it does not lie in the mouth of the defendant to say that he will not pay according to his contract, merely because a bankruptcy has intervened. His liability cannot be affected by subsequent circumstances, which might or might not have happened if the contract had been performed.

(ALDERSON, B.: If the defendant had agreed to buy a horse, and give 500*l.* for it, though the seller became bankrupt, must he not pay it? It is the same here, where he buys a bill of exchange.) * * *

Baines and *J. Henderson*, *contrà*:

It is not meant to be argued that the jury might not in this case give the whole sum of 500*l.* by way of damages, but that the learned Judge was wrong in telling them, that, in point of law, that sum was the measure of the damages. It was a question for them to *say, if they believed the evidence of the bankrupt, what amount [*119] of damages they would give. The case of *Hill* v. *Smith* is quite distinguishable. There a sum was paid over to the defendants in cash, to be applied in a particular way, and was misapplied by them. This is the case of a chattel, whose true value the jury are to estimate upon all the facts. The transaction is not to be viewed as a sale, but rather as a tortious obtaining of a bill of exchange,

(1) 12 M. & W. 618.

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which is the subject of trover. In such a case, its real value must constitute the true measure of damages. The contract found by the jury does not import a liability to liquidated damages. It is not a contract to pay a definite sum of money, but merely to discount a bill of exchange, *i.e.* to pay over the amount of the bill, subject to some uncertain deduction for discount. The Court cannot presume, as matter of law, what that would amount to; the law now imposes no limitation upon it.

(ROLFE, B.: All that I told the jury was, that the plaintiffs were entitled to recover the whole sum which the defendant undertook to pay over to Birkhill; *i.e.* the amount of the bill, less the 100*l.* and the discount; which they found to be 495*l.*)

POLLOCK, C. B.:

I think this rule ought to be discharged. With respect to the alleged misdirection, it was no more than this, that the learned Judge directed the jury, that, if they believed the witness, and found the contract to be as alleged in the declaration, the plaintiff was entitled to recover the amount of the bill, less the 100*l.* and the discount, leaving it to them to settle the question as to the amount of discount. The jury acted upon the principle of 5*l.* per cent. being the proper amount, and found a verdict for 495*l.* If this had been an action of trover for the bill, no doubt it would have been altogether a question for the jury as to the amount of damages. So, also, if it had been an accommodation bill, or the bankrupt's own bill. But this is not a case of trover, but of breach of contract. The defendant, according to the finding of the jury, promised to
[*120] deliver to *the bankrupt the amount of the bill, *minus* 100*l.* and the discount. The bankrupt would have to receive that sum, and his assignees are entitled to recover the same amount which he would have been entitled to receive, if he had continued solvent, by reason of the breach of contract. There is no substantial distinction between this case and that of *Hill* v. *Smith*; the question is, what was the contract, and was it broken by the defendant? No doubt, all questions of damages are, strictly speaking, for the jury; and, however clear and plain may be the rule of law on which the damages are to be found, the act of finding is for them. But there are certain established rules according to which they ought to find; and here there is a clear rule—that the amount which would have been received if the contract had been kept, is the measure of

damages if the contract is broken. I think, therefore, there was no misdirection in this case.

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ALDERSON, B.:

I am of the same opinion, that there was no misdirection. The learned Judge told the jury, that the amount of money which the defendant had agreed to pay to Birkhill, was the amount that was to be paid by him as damages. I think that was a perfectly correct direction; and with that direction he left the case to the jury, upon the credit they gave to Birkhill, upon whose evidence the discount to be paid certainly was the ordinary discount of 5*l.* per cent. The jury did believe Birkhill, and, that being so, the verdict is perfectly right.

ROLFE, B.:

I am of the same opinion. *Mr. Henderson* seems to suppose that the jury decided nothing as to the amount of damages. That is a mistake. They gave no opinion upon the principle of law laid down by me, but I certainly never meant to withdraw from them the question as to the amount of the discount; but, supposing Birkhill to be believed, all parties seemed to assume that the discount was to be the ordinary discount of 5*l.* per cent.

Rule discharged.

YOUNG *v.* SMITH.

1846. *Jan.* 26.

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(15 Meeson & Welsby, 121—136; S. C. 15 L. J. Ex. 81.)

The 26th section of the Joint Stock Companies Registration Act, 7 & 8 Vict. c. 110 (1), which prohibits the sale of shares, before complete registration, in any joint-stock Company formed after the 1st November, 1844, does not apply to Railway Companies requiring an Act of Parliament.

[THE report of this case, which has no application to any provision of the Companies Acts, 1862 to 1900, is omitted. The head-note is, however, retained in consequence of the citation in *Shaw* v. *Holland*, *post*, p. 596.]

(1) Repealed by Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205; for the position since that Act of Companies registered under the repealed Joint Stock Companies Acts, see ss. 209, 210.—A. C.

1846.
Feb. 10.

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SHAW *v.* HOLLAND.

(15 Meeson & Welsby, 136—146; S. C. 15 L. J. Ex. 87.)

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The Leeds and Bradford Railway Company was incorporated by Act of Parliament before the 1st of November, 1844. After that day, the Company resolved to undertake the formation of an extension line of railway from the Leeds and Bradford Railway at Shipley, to Colne. A Parliamentary contract was duly entered into accordingly, which recited, "that it had been deemed expedient that a railway should be made by the Leeds and Bradford Railway Company from Shipley to Colne, in extension of and uniting with the Parliamentary line of the Leeds and Bradford Railway." An Act of Parliament was accordingly obtained, intitled, "An Act of Parliament to enable the Leeds and Bradford Railway Company to make a Branch from Shipley to Colne." The shares in this line were allotted and offered to the shareholders in the Leeds and Bradford line; but there were, at the time of the passing of the Act, shareholders in the extension line who were not shareholders in the Leeds and Bradford line: Held, that the shareholders in the Shipley and Colne Railway did not constitute a Company, the formation of which was commenced after the 1st day of November, 1844, within the meaning of the stat. 7 & 8 Vict. c. 110, s. 2(1).

In an action for the non-delivery of shares on a given day, pursuant to contract, the proper measure of damages is the difference between the contract price and the market price on the day when the contract was broken.

In this case, which was tried before Rolfe, B., at the Summer Assizes at York, 1845, a rule had been obtained, calling upon the plaintiff to show cause why the verdict found on the issues raised
[*137] on the 3rd and 4th pleas should *not be set aside, and a verdict entered thereon for the plaintiff, unless the parties agreed to a special case being stated for the opinion of this Court. The parties thereupon agreed to the following case.

This action is brought by the purchaser upon a contract for the sale of fifty "New Bradford Extension" shares. The defendant, by his first two pleas, denied the making of the contract, and the readiness and willingness of the plaintiff to perform it. The third plea was as follows: "And for a further plea in this behalf, the defendant says, that the said Company or partnership undertaking in the declaration mentioned was, before and at the time of the making of the said contract in the declaration mentioned, and from thence hitherto, a joint-stock Company, within the meaning of, and answering to the definition in that behalf given in and by a certain statute passed, &c., (7 & 8 Vict. c. 110); and that the formation of the said Company was commenced after the 1st day of November, A.D. 1844, to wit, on the 6th day of November, A.D. 1844. And the defendant says, that the said contract in the declaration

(1) See *ante*, p. 595, note (1).

mentioned was and is a contract for the sale by the defendant to the plaintiff of certain shares in the said Company, to which said shares he the defendant, at the time of the making of the said contract, claimed to be entitled. And the defendant further says, that the said Company had not, before or at the time of the making of the said contract, obtained a certificate of complete registration, according to the provisions of the said Act in that behalf made:" concluding with a verification. And the fourth plea was as follows: "And for a further plea in this behalf, the defendant says, that the said Company or partnership undertaking in the declaration mentioned was, before and at the time of the making of the said contract in the declaration mentioned, and from thence hitherto, a joint-stock Company, within the meaning of and answering to the definition in that behalf given in and by the said statute in the said plea mentioned, and that the formation of the said *Company was commenced after the 1st day of [*138] November, A.D. 1844, to wit, on &c. And the defendant says, that the said contract in the declaration mentioned was and is a contract for the sale by the defendant to the plaintiff of certain shares in the said Company, to which said shares he the defendant, at the time of the making of the said contract, claimed to be entitled. And the defendant further says, that he the defendant had not, before or at the time of the making of the said contract, been duly registered as a member of the said Company in the registry office by the said statute provided for the registration of joint-stock Companies, according to the provisions of the said statute in that behalf made." Verification. Issue was taken by replying *de injuriâ* to each of these pleas.

The cause was tried before Rolfe, B., at the York Summer Assizes, 1845, and the jury returned a verdict for the plaintiff on the first and second issues, and for the defendant, by the direction of the learned Judge, on the third and fourth issues, with an assessment of the damages at 675*l.*, subject to the opinion of the Court as to the finding on the third and fourth issues, and as to the amount of damages.

The following was the note or contract made by the broker:

"3rd February, 1845.

"Sold to Mr. Joseph Shaw, on account, fifty shares in the New Bradford Railway; to be paid on or before the 30th of March, at 14*l.* 12*s.* 6*d.* per share, net."

SHAW v. HOLLAND.

The shares in question were scrip for shares in a projected line of railway from Shipley to Colne, called "The Leeds and Bradford Extension Railway," and were issued by the parties and under the circumstances hereinafter stated.

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The Leeds and Bradford Railway Company is constituted by the stat. 7 & 8 Vict. c. 59, and is thereby authorised to make a railway from Leeds to Bradford. On the 15th of July, 1844, at a meeting of the directors of that Company, it was resolved [*139] that an advertisement should be *inserted in the papers, stating that the engineer had been instructed to make a survey from Keighley to Shipton, and that Mr. Martin should be engaged to survey the line from Shipley to Keighley. An advertisement was inserted in the newspapers in compliance with this resolution. At a meeting of the directors of that Company, held on the 12th of August, 1844, a deputation of persons interested in this extension line waited upon the directors, when the directors of that Company resolved that an account of the traffic should be taken between Shipley and Shipton; and Mr. Murgatroyd undertook to engage some person for that purpose. It was also resolved, that Mr. Martin's tender should be accepted for surveying the line from Shipley to Shipton. At a meeting held on the 26th of August, 1844, a deputation from the town of Haworth attended, who expressed a wish that a branch railway should be made from Haworth to join this line at Keighley; when they were informed that this Company would propose to obtain power in the next Session of Parliament to make it. At a general meeting of the Company, held on the 28th of August, 1844, the directors presented a report to the meeting, the following passage from which has reference to the proposed line: "The directors pledged the Company, when in committee, to extend the line from Shipley to Keighley; and further considerations have induced them to decide on going forward to Shipton and Haworth. These extensions cannot fail to be remunerative to the Company, as well as advantageous to the districts through which they pass; and it is hoped they will facilitate a junction with the Lancashire railways. Some other railways are under consideration, particularly to Halifax, and down the Cleckheaton Valley, and will be brought before the shareholders at a future opportunity."

At a meeting of the directors, held on the 9th of September, 1844, Messrs. Martin and Fox attended with plans and sections of the extension line from Shipley to Shipton and Haworth, and

it was resolved that a cheque for 200*l.* *be paid to them on account. At a meeting of the directors, held on the 4th of November, 1844, it was resolved, "that a special general meeting should be called on Wednesday, the 28th November then instant, for the purpose of considering the expediency of, and, if thought fit, sanctioning an application to Parliament in the ensuing Session, for an Act for enabling the said Company to make a railway from Shipley, in the West Riding of the county of York, to Colne, in the county palatine of Lancaster, with a branch from Keighley to Haworth, in the said West Riding; and also for the purpose of considering in what manner the necessary capital for the construction of the said proposed line and branch should be raised." A special general meeting of the Company was accordingly held on the 28th of November, 1844, in pursuance of the above resolution, at which the following resolutions were come to: "First, that it is expedient that this Company should undertake the formation of an extension line of railway from the Leeds and Bradford Railway at Shipley, to Colne, with a branch to Haworth; that the directors of the Company be, and they are hereby authorised to take all proceedings that they may consider desirable, with a view of applying to Parliament in the next Session for an Act authorising the construction of the above railways, or any part of them. Secondly, that, in order to raise funds for the purposes aforesaid, an additional capital of 500,000*l.* be raised, by the creation of 8,000 shares at 50*l.* each, and 8,000 shares of 12*l.* 10*s.* each, and that such shares be offered in the first place to the proprietors who shall be registered in the books of the Company on the 30th of November instant, in the proportions of one 50*l.* and one 12*l.* 10*s.* share for every 50*l.* share, and that a deposit of 5*l.* per cent. be paid thereon to the bankers, Messrs. B. & Co., Leeds, or to the Bradford Banking Company, on or before the 21st of December then next." On the 6th of November, the Leeds and Bradford Company advertised in the *Leeds Intelligencer* and *Mercury* notice of the *intended application to Parliament for an Act to make a railway from Shipley to Colne, with a branch to Keighley; and on the 16th of November they advertised in the same papers notice of the intended application to Parliament, for an Act to extend it by a branch from Keighley to Haworth. The shares mentioned in the above resolutions were accordingly issued, and were all offered and allotted to shareholders in the Leeds and Bradford Railway Company, and came out at a

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premium. There were shareholders in the extension line when the Act authorising it was passed, not shareholders in the original line of the Leeds and Bradford. The contract in the present case was for the sale of fifty shares in the proposed extension line. There was no provisional registration of any Company for making the extension line. A Parliamentary contract, dated and signed on the 2nd of January, 1845, was entered into as required by the Standing Orders of Parliament, a copy of which, signed by the attornies on both sides, may be referred to, and made part of this case. Keighley is on the line of railway from Bradford to Colne, for which application was made to Parliament, in pursuance of the above resolutions, and for which an Act was obtained, which received the Royal assent on the 30th of June, 1845. The Leeds and Bradford Company obtained their Act for their line on the 14th of July, 1844. No certificate of complete registration had been obtained by any Company or persons for making the said railway at the time of the making of the contract in question in this cause, nor had the defendant been registered as a shareholder in any Company for the shares in question.

The foregoing are the agreed facts in the cause. A question also arises as to the amount of damages. The jury assessed the damages at 675*l.*, but leave was reserved to move to reduce them to 450*l.* It was proved, that, on the 10th of March, 1845, the price was such as to make a difference upon the fifty shares, amounting [*142] to 450*l.* On *the 3rd of March, 1845, the plaintiff caused the following letter to be written to the defendant's brokers:

"HUDDERSFIELD, March 3rd, 1845.

"GENTLEMEN,—I beg to give you notice, that I am prepared to take up the fifty New Bradfords I purchased of you on the 3rd of February last; and if those scrips are not delivered to me on or before the 10th instant, I shall buy them in against you, and debit you with the difference.

"Yours respectfully,

"JOSEPH SHAW."

The learned Judge told the jury that he did not consider the damages limited by the price within the time specified by that letter, and that the question of damages was for them; and that they were as near as they could to place the plaintiff in the position he would have been in if the defendant had performed his contract. They returned a verdict for 675*l.*; but the verdict was to be reduced

to 450*l.*, if the Court should be of opinion that that sum was in point of law the proper measure of damages, and that the learned Judge ought to have so directed the jury.

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Cleasby, for the plaintiff, in the first place relied upon the decision in *Young* v. *Smith* (1); but, it being intimated by the COURT that they should not hear the question in that case re-argued in this Court, and that the only way of impeaching that decision was by writ of error, and therefore the only question which ought now to be disposed of was, whether this was a Company formed after the 1st of November, 1844; he proceeded to argue, that this was not a Company the formation of which was commenced after the 1st of November, 1844. * * *

Secondly, with respect to the amount of damages, he urged that [144] the period from the 10th of March, when the contract was broken, to the 30th, the day on which others were bought in by the plaintiff against the defendant, could not be considered an unreasonable time for the purchaser to take to make up his mind as to the re-purchase; and cited *Stewart* v. *Cauty* (2), where it was held, that, in an action for the non-acceptance of railway shares, the proper measure of damages was the difference between the price of the shares on the day when they ought to have been accepted, and on the day when they were re-sold, such re-sale being within a reasonable time.

(PARKE, B.: In the present state of things, we all know very well that half a day might be a reasonable time to allow for the purchase of shares.)

Knowles, contrà. * * *

PARKE, B.: [145]

In this case no question arises on the construction of the 26th section of the 7 & 8 Vict. c. 110. If the decision of this COURT upon that section, in the case of *Young* v. *Smith* (1), is to be questioned, it must be in a court of error. The only question here is, whether this is the case of a new Company, formed after the 1st day of November, 1844; and I think it is quite clear that it is not. The 8 & 9 Vict. c. xxxviii., was not intended, and does not purport, to incorporate a new Company; it only extends the powers of an existing corporation, by enabling them to do what they had not

(1) See *ante*, p. 595.—A. C. (2) 58 R. R. 654 (8 M. & W. 160).

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power to do before, namely, to construct an extension line of railway, and for that purpose to raise capital by the creation of new shares, instead of by mortgage, or in some other way. It is said that the Shipley and Colne line was to be constructed for a different object, and not to benefit the shareholders in the Leeds and Bradford Company. But, although that Company is incorporated by the first Act, the right to the profits is the right of the individuals, who from time to time compose the Company: the corporation is seised of the corporate property, and the individuals have their share of the profits or loss of the undertakings. The Company remains the same, though the undertakings are different.

With respect to the amount of damages, I was at first disposed to think that this was like the case of an action for not replacing stock, in which the measure of damages is the difference of price on the day on which it ought to have been replaced, and on the day of the trial; but, upon consideration, I think it more resembles the case of an action for the non-delivery of goods. In the case of *Gainsford* v. *Carroll* (1), which was an action for not delivering goods on a given day, the COURT held, that it was not like the case of a loan of stock, where the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether; [*146] for that the plaintiff, having his money in his *possession, might purchase the like goods the very day after the contract was broken; and therefore that the true measure of damages was the difference between the price agreed upon and the market price of the goods at the time the contract was broken. Here the plaintiff had his money in his own possession, and might have gone into the market and bought other shares as soon as the contract was broken. The question therefore is, when it was broken. Now the plaintiff, by his letter of the 3rd of March, gave the defendant until the 10th of March to deliver the shares; and he is not, therefore, entitled to calculate the damages with reference to any amount the shares might have sold for subsequently to the 10th.

Our judgment, therefore, will be, to direct that the verdict on the 3rd and 4th pleas be entered for the plaintiff, and that the damages be reduced from 675*l.* to 450*l.*

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule accordingly.

(1) 26 R. R. 495 (2 B. & C. 624).

DOE D. THE MARQUIS OF BUTE *v.* GUEST, BART.

1846. *Jan.* 21.

(15 Meeson & Welsby, 160—166.)

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A. agreed to let, and B. to take a piece of land, with liberty to build thereon such warehouses, glasshouses, kilns, houses for workmen, and other erections necessary for carrying on the business of a glass manufactory, as he should think fit, for sixty-one years, at a certain rent; and B. agreed to pay the rent, to build in a substantial manner, and not to use the premises for any other purpose than a glass manufactory during the term. A lease and counterpart to be executed in conformity with the agreement, in which should be inserted all usual covenants: Held, that this agreement did not warrant the insertion in the lease of an affirmative covenant by the lessee, that he would carry on the business of a glass manufactory on the demised premises during the term.

THIS action was brought to recover back from the defendant the land and premises mentioned in the following agreement:

"Memorandum of an agreement made the 24th day of June, 1824, between David Stewart, of Great Russell Street, in the county of Middlesex, the agent for and on the behalf of the Most Honourable John Crichton Stewart, Marquis of Bute and Earl of Dumfries, of the one part, and Josiah John Guest, of Dowlais, in the county of Glamorgan, ironmaster, and William Jones, of Cardiff, in the same county, miller, of the other part, as follows:

"Lord Bute agrees to grant to Messrs. Guest and Jones, who agree to take of his Lordship, all that piece or parcel of land on the east side of and fronting the towing-path of the Cardiff canal, and part of the Cardiff moors, in the parish of St. Mary, Cardiff, in the said county of Glamorgan, containing in front, next the said towing-path, and at the back or east part, 300 feet, and being in depth on the north and south side thereof 436 feet, the same being 400 feet from the north side of Sir William Smith's coal-yard there; with *full power and liberty to build thereon such and so many ware- [*161] houses, glasshouses, storehouses, kilns, dwelling-houses for workmen, not exceeding five to each cone, and other erections necessary for the purpose of carrying on a glass manufactory, as they shall think fit; to hold from this day, for the term of sixty-one years, at the clear yearly rent of 31*l.* 10*s.*, to be paid quarterly, the first quarterly payment to be made on the 29th day of September next. Messrs. Guest and Jones agree to pay the rent free from all taxes, rates, and deductions whatsoever; they further agree not to use the premises for any other purpose than a glass manufactory during the term; they also agree, at their own cost, to execute all the buildings and works erected on the premises in a good, substantial, and workmanlike manner, having power from time to time to alter the

DOE d. MARQUIS OF BUTE v. GUEST.

buildings for the purposes of the trade; the buildings so altered, or as originally erected, so to be kept and delivered up by Messrs. Guest and Jones, in good and sufficient repair. Lord Bute to have power to resume the possession of such part of the premises as he may require for any improvement he may wish to make, either for the enlarging the canal, or otherwise for the improvement or removal of it, giving Messrs. Guest and Jones a quantity of land equal to that resumed, adjoining on the east side of the said piece or parcel of ground hereby agreed to be let, and of equal width, and paying them such a sum for the improvements they may have made as arbitrators mutually chosen, or their umpire, shall award. A lease and counterpart to be entered into in conformity with this agreement, wherein shall be inserted all usual covenants, clauses, and provisoes. This agreement is entered into subject to Lord Bute's approbation. As witness the hands of the parties.

"Signed by the said DAVID STEWART and WM. JONES, in the presence of WM. BIELL. } BUTE. { "D. STEWART. "For GUEST and Self, "WM. JONES."

[162] Shortly after the execution of this agreement, it was arranged that the defendant should be the sole lessee, and he accordingly took possession under the agreement.

The ejectment was brought upon an alleged breach of the agreement on the part of the defendant. It was subsequently agreed upon to refer the action, and the following order of reference was drawn up. (The case then set out an order of reference made in the cause, whereby it was ordered that all further proceedings in the action should be stayed, and that it should be referred to a conveyancer, being a barrister, and to be named by the *Solicitor-General* for the time being, to settle the terms of the lease to be granted by Lord Bute to the defendant, under the terms of the above-mentioned agreement; and that Lord Bute should execute such lease so to be settled, and that the defendant should accept it, and execute a counterpart thereof, and give to Lord Bute his personal indemnity against any claim of the said William Jones, or any person or persons claiming under him.) Application was made to the *Solicitor-General* for the time being to appoint a barrister to settle the terms of the lease mentioned in the above order; and Mr. —— was chosen by the *Solicitor-General* for that purpose. The following is a copy of the lease approved of by Mr. ——, as the form in which it is his intention to award that the lease should be executed:

(The case then set out the draft lease, in which was contained the following covenant on the part of the defendant:)

"And further, that he the said Sir J. J. Guest, his executors, administrators, and assigns, shall and will at all times during the said term (of sixty-one years) hereby granted, use, exercise, and carry on, or cause and procure to be used, exercised, and carried on, in and upon the said demised premises, the trade and business of a glass manufactory, and shall not nor will at any time during the said term use the said premises or any part thereof, or permit or suffer the *same or any part thereof to be used, for any other [*163] purpose than a glass manufactory, without first obtaining the license or consent in writing of the said Marquis of Bute, his heirs or assigns, under his or their hand or hands." There was also a proviso for re-entry by the lessor, his heirs and assigns, in case (amongst other things) the said Sir J. J. Guest, his executors, administrators, or assigns, should not at all times during the said term, use, exercise, and carry on, or cause or procure to be used, exercised, and carried on on and upon the demised premises, the trade and business of a glass manufactory.

The defendant contends, that the covenant contained in the lease, binding him to carry on during the term the business of a glass manufactory, is improper, and ought not to be inserted in the lease. The question for the opinion of the Court is, whether the proposed covenant, binding the defendant to carry on the trade during the term, is to form part of the lease or not.

If the Court should decide the above question in the affirmative, the covenant is to stand. If in the negative, the lease is to be remitted back to the arbitrator for re-consideration (1).

W. P. Wood, for the lessor of the plaintiff, argued that the intention of the parties, to be collected from the whole of their agreement, was, that the lessee should be bound to build upon the demised premises erections suitable for a glass manufactory, and to use them for that purpose during *the term: and that the rule of [*164] equity was, that, if such an intention could be reasonably inferred from the whole instrument taken together, although it was not

(1) The defendant had obtained a rule to show cause why he should not have leave to revoke his submission, and why, if necessary, the order of reference and the appointment of the arbitrator should not be set aside. On the discussion of that rule, it was agreed between the parties that it should be enlarged, and that a special case should be stated for the opinion of the Court, on the question whether the above covenant was a proper one to be inserted in the lease.

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stated in express terms, the Court would give effect to it, by requiring the introduction into the lease, to be executed in pursuance of the agreement, a covenant to that effect. He cited and referred to the following authorities: *Fenner* v. *Hepburn* (1), *Webb* v. *Plummer* (2), *Earl of Shrewsbury* v. *Gould* (3), *Duke of St. Albans* v. *Ellis* (4), *Sampson* v. *Easterby* (5), *Saltoun* v. *Houston* (6).

Crompton, for the defendant, was stopped by the COURT.

POLLOCK, C. B.:

The question is, whether, on the agreement between these parties, we are to infer that it was the intention of both parties that Sir John Guest should enter into this covenant, and be bound thereby. *Mr. Wood's* argument consists of two parts: First, that, although this intention is not expressed in terms, still, if it is to be collected from the whole instrument that such was the intention of the parties, a court of equity will carry it into effect; and the cases he has cited abundantly support that proposition. But the other branch of his argument is also to be established; namely, that it can be collected that such was the intention of these parties; and, in my opinion, no sufficient argument has been advanced to show that such was their intention. I do not see anything to show that Sir John Guest had any intention so to bind himself, or that Lord Bute had any reason so to expect. The parties expected that the trade of a glass manufactory would be carried on upon the premises, because they thought, no doubt, that trade would be profitable; [*165] but they never intended that the lessees *should be bound to carry it on at all events, during this long term, at any loss. Looking at the agreement set out in the case, there is nothing to lead me to suppose that there was any such intention as would be effectuated by this covenant. I think, therefore, that it ought not to stand.

PARKE, B.:

I am of the same opinion. Nothing is to be introduced into the lease as matter of covenant, beyond the precise stipulations contained in the memorandum of agreement, unless we can make out clearly that the parties intended something more than they have expressed thereby. I cannot see that they did. No doubt, both of them expected that the trade would be carried on—that it

(1) 2 Y. & C. C. C. 159.
(2) 21 R. R. 479 (2 B. & Ald. 746).
(3) 21 R. R. 367 (2 B. & Ald. 487).
(4) 14 R. R. 361 (16 East, 352).
(5) 33 R. R. 239 (9 B. & C. 505).
(6) 25 R. R. 665 (1 Bing. 433).

would be a profitable business; and both parties intended it should be; but not that the lessees should be bound to carry it on for the whole term of sixty-one years, under all circumstances. No more, therefore, is to be put into the lease than the actual terms of the agreement. Then nothing turns on the practice of conveyancers, because it is admitted this is an unusual case.

PLATT, B.:

It seems to me that the arbitrator has misconstrued the meaning of the parties. All the cases which have been cited only establish the well-known principle, that the intention of the parties is to be collected from the whole of the instrument. And the question here is, no doubt, what was the meaning of these parties, as they have expressed it in the agreement—looking at the whole document to ascertain it. (His Lordship read the agreement.) I do not see that it differs from the case of any ordinary lease which may be granted of a dwelling-house, with an agreement by the lessee to repair, and not to carry on a particular trade on the premises. Must he necessarily dwell in it, and use it as a dwelling-house during the term? Surely he may shut it up if he pleases: but the security to the landlord is, that the tenant must pay the rent, and therefore that it is *his interest so to use it. The landlord may [*166] indeed limit that use: and so here, the landlord reckons on its being the interest of the lessees to use the premises as a glass manufactory, and limits the use of them to that purpose: nothing more. If the covenant which is now suggested was meant to be part of the terms of the agreement, why was it not expressly stated? Surely so important a stipulation would have been expressed in terms. We ought not, therefore, to extend the agreement beyond its ordinary meaning, merely on a speculation that such was the intention or the expectation of the parties. Lord Bute has not exacted an agreement to that effect from the defendant, and therefore he cannot be so bound.

The case was accordingly referred back to the arbitrator for re-consideration.

1846. *Jan.* 24.

DRAPER *v.* CROFTS AND BARTLETT.

(15 Meeson & Welsby, 166—169; 15 L. J. Ex. 92.)

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Where there is a demise to A. and B. for a term, and B. holds over after the expiration of the term, without A.'s assent, A. is not liable for rent becoming due during such holding over.

ASSUMPSIT for use and occupation of a messuage, cottage, &c. The defendant Crofts pleaded *non assumpsit*, and payment; the defendant Bartlett suffered judgment by default.

At the trial, before Platt, B., at the last Somersetshire Assizes, it appeared that the plaintiff had let the premises to the two defendants by a written agreement, for three years, from Lady Day, 1840, to Lady Day, 1843. The defendant Bartlett alone actually occupied the premises, and paid the rent; and, after the expiration of the three years, he held over down to the year 1845. There was no evidence of any assent of Crofts to this holding over; and the only evidence offered to show his knowledge of it was the following letter, which was written and sent to him by the plaintiff's attorney, on the 2nd of March, 1844:

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"SIR,—I beg to call on you for payment of 43*l.* 15*s.*, remaining due from you and Mr. Theophilus Bartlett for rent of Mr. Draper's premises, up to Christmas last, and I hope to receive it next Thursday.

"I am, &c."

The defendant returned no answer to this letter; and its reception in evidence was objected to on his part, on the ground that it furnished no evidence against him. The learned Judge, however, received it. It was objected also, that without some proof of assent by the defendant to the holding over by his co-tenant, he could not be made liable for the payment of rent which accrued due after the expiration of the original term; and *Christy* v. *Tancred* (1) and *Tancred* v. *Christy* (2) were cited. The learned Judge declined to nonsuit, and left it to the jury to say whether the defendant Crofts had assented to Bartlett's holding over the premises. The jury found that he did, and the plaintiff had a verdict, damages 29*l.* 9*s.*

Greenwood, in last Michaelmas Term, obtained a rule *nisi* for a new trial, on the grounds, first, that the letter had been improperly admitted; and secondly, that the verdict was not warranted by the evidence.

(1) 60 R. R. 779 (9 M. & W. 438). (2) 12 M. & W. 316.

Butt and *Phinn* now showed cause:

There is no ground for saying that a letter of this nature, being shown to have come to the hands of the defendant, is not admissible in evidence against him.

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(PARKE, B.: Supposing it to be so, I can see no evidence sufficient to render the defendant liable. There is nothing to show that he assented to the holding over by his co-tenant, Bartlett; and then, if *Christy* v. *Tancred* be law, it is clear that one tenant cannot bind his co-tenant merely by holding over.)

That case has been *doubted, and has been reviewed in the court of error. [*168]

(PARKE, B.: The Court of Exchequer Chamber awarded a *venire de novo*, on the ground that the facts were not sufficiently stated on the face of the special case, to raise the question for their decision. If they had thought that one joint-tenant or tenant in common could bind his companion by holding over without his consent, they would not have directed a *venire de novo*, in order to have the fact of assent or the contrary found by the jury. The case in error is, therefore, in effect, a decision in support of the law as laid down by this COURT in *Christy* v. *Tancred*.)

The letter, coupled with the other evidence in the case, was some proof of the defendant's assent, which the learned Judge was right in submitting to the jury.

Greenwood, in support of the rule, was stopped by the COURT.

POLLOCK, C. B.:

The rule must be absolute for setting aside this verdict, on the ground of its being entirely unwarranted by the evidence. There is nothing at all from which the jury were warranted in inferring that the defendant Crofts was liable to pay for the use of the premises after Lady Day, 1843.

PARKE, B.:

I am of the same opinion. This was a verdict without any reasonable evidence to support it. With respect to the letter, it seems to me that Crofts, who stood at that time in the situation of a mere stranger, was not bound to return any answer to the demand for rent. Whether it was strictly admissible or not, it is

DRAPER v. CROFTS.

hardly necessary to say. There was a difference between the late Lord ABINGER and the other members of the Court on this very point. The LORD CHIEF BARON thought that a letter such as this was not admissible at all; others, that it was admissible, but not [*169] worth anything when admitted. *My own opinion is, that no attention at all need be paid to a letter asking for money which the party does not owe: it is a different case if he is bound by circumstances, or by his situation, to return an answer. I think, therefore, not that such evidence is absolutely inadmissible, but that it is worth very little when admitted. The rule will therefore be absolute, on the ground that the verdict was not supported by the evidence in the case.

PLATT, B., concurred.

Rule absolute.

THE ATTORNEY-GENERAL *v.* BRIANT (1).

1845. *Nov.* 21. 1846. *Jan.* 26.

(15 Meeson & Welsby, 169—185; S. C. 15 L. J. Ex. 265.)

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In an information by the *Attorney-General* for a breach of the revenue laws, a witness for the Crown cannot be asked, in cross-examination, "Did you give the information?"

For the rule of public policy, which protects a witness from being asked such questions as would disclose the informer, if he be a third person, equally applies to questions which would disclose whether the witness is himself the informer.

THIS was an information filed by the *Attorney-General* against the defendant, a paper manufacturer, to recover penalties under the Excise Acts, for sending out paper without entering the true amounts in the book delivered to the Excise, and for removing paper from his mill without proper wrappers, and without its being duly labelled. Plea, Not guilty.

At the trial, before Pollock, C. B., at the Middlesex sittings after Michaelmas Term, 1844, a witness who was called on the part of the Crown was asked, in cross-examination, this question, "Did you give the information?" The question was objected to by the counsel for the Crown, and, after argument, was disallowed by the LORD CHIEF BARON.

In Hilary Term, 1845, *Montagu Chambers*, for the defendant, obtained a rule *nisi* for a new trial, on the ground that the evidence objected to had been improperly rejected.

(1) Foll. *Marks* v. *Beyfus* (1890) 25 Q. B. D. 494, 498, 59 L. J. Q. B. 479.—A. C.

A.-G. v. BRIANT.

The *Attorney-General*, the *Solicitor-General*, *Jervis*, and *J. Wilde* showed cause in last Michaelmas Term (Nov. 21):

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The question which the Court is called upon to decide in this case is one which involves a principle of considerable importance; namely, whether the rule of policy which has long prevailed, and which operates as a protection to the channels of communication to the agents of the Government, extends also to protect a witness from answering questions, the tendency of which is to elicit that he was himself the source of the information given to the Government, and on which it has acted in instituting penal proceedings. The manner in which the point was put on moving for this rule was this: that the right which the defendant has to test the credit of a witness for the Crown—to ascertain, by inquiry into his motives and actions, whether he is the witness of truth,—is a right which ought to prevail over the right of the Government to prevent the discovery of the channels of their information. But the answer to that argument appears to be, that where a rule of evidence, whose object is to protect the public, comes into conflict with one designed for individual benefit or protection only, the latter must give way before the public good. It is clear that the right of a party to a suit, to inquire into the credit of an adverse witness, is not a principle of so ruling and paramount a nature as that every other rule of evidence must bend to it. The case of a confidential communication by a client to his attorney is an instance where it is made subordinate to another principle, which prevails for the public good. And therefore, *à fortiori*, in cases of treason and other State prosecutions, in which the public good is involved far more extensively, the public principle ought, when they come into competition, to prevail over the private one. It is said, however, that the rule of protection in these cases, which is admitted to exist, applies only to protect the channels of communication to the Government; and so that, although it is conceded that a witness could not be asked whether A. B. gave him the information, A. B. himself may, with the view of discrediting his testimony, be asked *the question, whether he gave the information. But the one question is just as much within the prohibition arising from public policy as the other; and if it were not so, the rule would be utterly useless, because each witness in turn might be subjected to the same inquiry, until the informer was at length discovered. [They cited *Hardy's* case (1) and Phillipps on Evidence, Vol. 1, p. 177 (9th edit.).]

[*171]

(1) 24 St. Tr. 816.

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It appears, from these authorities, that the communication which the law intends to protect is, any communication by any person,

[172] which, if it became generally known, might expose him to vengeance or to ignominy. The object of the rule, and the terms in which it has been promulgated in the authorities referred to, equally apply to protect the witness who himself originally gave the information on which the Government has acted. It is obvious that the answer which it was sought to obtain from the witness in this case would have directly disclosed "the channel by whom the disclosure was made to the officers of justice," and would so have defeated altogether the object of the law. To ask a witness, "Are you the informer?" is, in effect, to ask who is. The invariable course of this Court, in revenue cases, has been to exclude all questions tending to disclose who was the informer. It has become a rule of evidence, established by long practice and tacit consent. The same, in truth, may be said of all which is considered legal evidence on trials before juries. In *Reg.* v. *Ryle* (1) Lord ABINGER, C. B., says, "The notion of legal evidence, on trials before juries, in our law, is the effect of long practice and usage, the decisions of Judges, and the practice of Nisi Prius, which has grown into a system, and forms part, and a very important part, of the law of the land." And PARKE, B., says, "The rules of evidence, as applicable to trials between party and party, and criminal trials, have been the result of practice, established, not by the law of the land, but the Judges, seeing that the species of evidence given in cases between party and party, and between the prosecutor and the accused, was much more lax than in the present day, have prescribed certain rules, which have been adhered to."

[173] (PARKE, B.: In *Watson's* case (2), the question was allowed, "Did you give the information to a magistrate or to a private person?")

That was under peculiar circumstances. The witness was called, and was put forward by the Crown as being in fact the person who had supplied the information: the Crown, therefore, in the first instance, waived the public privilege. * * *

[175] *Chambers, contrà:*

The defendant contends, that, according to the general rules of evidence as established in trials by jury, he was entitled to have this question put, and that no established exception upon those

(1) 9 M. & W. 227. (2) 32 St. Tr. 98.

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rules exists to prevent it. Reliance has been placed upon the supposed course of practice in this Court. But in a very recent revenue case, the question was asked of a witness, (one Burnby, a Custom-house officer), without objection, whether he was the informer.

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(ROLFE, B.: That was in the case of *Reg.* v. *Candy* and *Dean*, which was tried before me. The principle was rather followed than violated by asking that question of Burnby; because it was perfectly clear, and admitted, that he was the informer; and it went to exclude the notion of anybody else being an informer.)

The very fact of his being "put forward" as the informer goes far to show that the supposed rule of public policy does not apply; for surely every accused person has a right to the cross-examination of every person who is put forward to depose against him. [He cited Starkie on Evidence, Vol. 1, p. 160 (2nd edit.), Hale, History of the Common Law (p. 145), *Bushell's* case (1), *Duchess of Kingston's* case (2), *Rex* v. *Gilham* (3), *Rex* v. *Blackman* (4), *Rex* v. *Cole* (5), and *Hardy's* case (6).]

In ordinary criminal cases, nothing is more common than to ask a witness whether he gave information to the police. [181]

(POLLOCK, C. B.: In ordinary prosecutions, the name of the Sovereign is used; but it may be used by any prosecutor; and probably the rule does not apply at all in such cases; but there may be reasons of State policy whenever the Government is directly concerned, and then the rule applies, whatever be the offence.)

And yet it appears that this very supposed public policy is continually set at nought by the Crown itself, when they avowedly "put forward" a witness as the informer, thereby subjecting him to the peril which they suggest as likely to arise, and showing that there is in fact no such overwhelming public policy as should break in upon the ordinary right of the subject. In *Watson's* case, the witness referred to was not put forward as an informer, but as a witness present at the meeting, as an ordinary short-hand writer might have been; and the inquiry, which was stopped by the COURT, was *as to something which had taken place between him and a member of the Government—an inquiry into the channels of communication properly so called. The present case, therefore, [*182]

(1) Vaugh. 143.
(2) 20 St. Tr. 355.
(3) Ry. & M., C. C. R. 198.
(4) 1 Esp. 95.
(5) *Id.* 169.
(6) 24 St. Tr. 751, 809.

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is opposed to no direct authority, and falls within the general right of an accused person, to cross-examine, as to his own motives and means of knowledge, a witness produced against him. To extend the exceptions to this right further than they have been established by express decision, will greatly limit the means of defence of the accused, and will be in contravention of the general practice both in criminal and civil trials. The inquiry now objected to may be, and in this instance was, of the very essence of the case.

The *Attorney-General*, in reply, [cited *Home* v. *Bentinck* (1) and *Rex* v. *Akers* (2)].

Cur. adv. vult.

[183] The judgment of the COURT was now pronounced by

POLLOCK, C. B.:

This was a motion for a new trial, in the case of an information by the *Attorney-General* against the defendant for a breach of the revenue laws, and the ground of the application for a new trial was the rejection of evidence. A witness called on the part of the Crown was asked, in cross-examination, whether he gave the information. The *Attorney-General* objected to the question, and, upon argument before me, I decided that the question ought not to be put. If the question should have been allowed, the rule for a new trial ought to be made absolute: if not, the rule ought to be discharged. The case was argued in last Michaelmas Term. On the part of the Crown, *Hardy's* case and *Watson's* case were cited. *Reg.* v. *Ryle* was also cited as an instance where the ordinary rules of evidence did not apply to a revenue case. It was contended, on the part of the Crown, that the rule was general, and that it was founded upon public policy; and that if a question tended to disclose the source of information on which the executive Government had acted, it could not be put. For the defendant it was contended, that the right of the subject, to discredit a witness by cross-examination, was universal; and the object of the question being to discredit the witness, that it was [*184.] *taken out of the rule. Lord Hale's History of the Common Law was referred to, and several cases were cited, but none directly in point. In *Hardy's* case, John Groves, a witness for the Crown, being asked by whom he was sent to attend certain meetings, the question was objected to, on the ground, that the channels of

(1) 22 R. R. 748 (2 Brod. & B. 162). (2) 6 Esp. 125.

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information could not be inquired into. The *Attorney-General*, afterwards Lord ELDON, stated, that the Court of Exchequer would not permit the question to be asked. The COURT ruled that it was not proper to ask the question, and it was not asked. Subsequently, in the same trial, (page 811), the point arose again; it was on the cross-examination of a witness of the name of George Lynam; this question was put avowedly to try or sift the credit of the witness, namely, who was the person to whom the witness communicated certain facts. Lord Chief Justice EYRE held, that although, in ordinary cases, such a question could be put, yet if it involved the disclosure of the channels of communication with the Government, it could not be put; and he decided that such was the rule, referring to the question asked of the witness Groves, already mentioned. Lord Chief Baron MACDONALD, Mr. Baron HOTHAM, Mr. Justice BULLER, and Mr. Justice GROSE, all gave judgments, and on all hands it was agreed, that the informer, in the case of a public prosecution, should not be disclosed. All the Judges so decided, and the counsel on both sides admitted that such was the law. In *Watson's* case, the same point arose. *Hardy's* case was cited, and Lord ELLENBOROUGH and Mr. Justice ABBOTT, afterwards Lord TENTERDEN, ruled accordingly. It has been, however, contended for the defendant, that, admitting that a witness cannot be asked who was the informer, the informer being a third person, yet he may be asked whether he was himself the informer, and gave the information. On the part of the Crown it was replied, that such a question, addressed to each witness in turn, might be the means of discovering the informer; and that, if the principle and object of the rule was to prevent the informer *from being discovered, the [*185] question cannot any more be put directly to the witness, whether he himself was the informer, than whether a third person was. It was alleged, and, as far as we can learn or have had any experience, it was correctly alleged, that the practice of this Court has been in accordance with this rule. There is no direct authority either way; but the rule clearly established and acted on is this, that, in a public prosecution, a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been a settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public convenience. This is the ground on which the decision took place in *Hardy's* case and in *Watson's* case; and we think the principle of the rule applies to the case where a witness is asked

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if he himself is the informer, and therefore that the question could not be asked. The rule must be discharged.

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ALDERSON, B., added:

When the question was before the Court in *Hardy's* case, Lord ELDON cited the course of the Exchequer as the authority upon which that rule was laid down; and I find that in Plowden (1) it is laid down, "that if a question arises touching the King's revenue, or what thing belongs to the King, which brings revenue to him, and what not, and what is the law touching the same and what not, the records of the Exchequer are the most effectual rule as to the law thereon." Then he gives several instances in which those records have been referred to: "For the usage in any one Court, in a matter whereof it has proper conusance, ought to be affirmed for law in all Courts; and the records of such Court are patterns whereby the whole realm may know the law in such cases." Therefore, it having been the usage in the Exchequer to disallow the question objected to, Lord ELDON transferred such usage to a criminal Court in a similar case.

Rule discharged.

1846. *Jan.* 27.

[194]

ABBOTT *v.* RICHARDS (2).

(15 Meeson & Welsby, 194—198; S. C. 15 L. J. Ex. 330; 3 Dowl. & L. 487.)

A Judge's order, made under the 6th section of the Interpleader Act (3), directed that the goods should be sold by the sheriff, and the money paid into Court to abide the event of an issue to be tried between the claimant and the execution creditor. The issue was tried, and a verdict found for the claimant, who thereupon brought an action of trespass against the sheriff, for breaking and entering his dwelling-house, and seizing his goods and converting them to his own use. The COURT made absolute a rule for striking out so much of the declaration as charged the seizure and conversion of the goods.

And *semble*, (per ALDERSON, B., and ROLFE, B.), the proceedings ought in such a case to be stayed altogether (4).

IN this case, the defendant, the Sheriff of Staffordshire, having taken in execution certain goods under a *fieri facias*, to which the plaintiff set up a claim, the sheriff applied to a Judge at Chambers for relief under the Interpleader Act (3); and an order was made

(1) P. 320 a.

(2) Cited in *Davies* v. *Wise* (1881) 7 Q. B. D. 425, 60 L. J. Q. B. 651 (sub nom. *Cramer* v. *Matthews*).—A. C.

(3) 1 & 2 Will. IV. c. 58, repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 3 and sch. See now R.S.C. Ord. LVII. and s. 157 of the County Courts Act, 1888 (51 & 52 Vict. c. 43).—A. C.

(4) See *Winter* v. *Bartholomew* (1856) 11 Ex. 704, 25 L. J. Ex. 62.—A. C.

that the goods should be sold, and the proceeds paid into Court, to abide the event of an issue between the claimant and the execution creditor. On the trial of the issue, a verdict was found for the claimant, who then commenced this action against the sheriff. The declaration was delivered on the 20th November. It charged the defendant with breaking and entering the plaintiff's dwelling-house, and seizing and taking his goods, and converting them to his own use. On the 28th, the defendant obtained an order for ten days' time to plead; and, on the 8th December, a further order for ten days more. On the 11th of December, a summons was taken out before Platt, B., to stay the proceedings, which was referred by the learned Judge to the Court, the plaintiff having till the fifth day of this Term to make the application.

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In the commencement of this Term, *Gray* accordingly moved [195] for a rule to show cause why the proceedings in the action should not be stayed: the COURT, however, only granted him a rule to show cause why so much of the declaration as charged the defendant with seizing and taking the plaintiff's goods, and converting them to his own use, should not be struck out. Against this rule

Humfrey and *Hance* now showed cause:

First, this application is too late. It has universally been laid down, that the sheriff must come to the Court promptly for relief of any kind; and here he has taken steps in the cause which have put the plaintiff to expense, and occasioned delay.

(POLLOCK, C. B.: This is not a question of irregularity: it is never too late to stay proceedings, where manifest injustice would be done by letting them go on. Besides, where the sheriff obtains an order under the Interpleader Act, the Court may give effect to it any time.

ALDERSON, B.: The only question is, whether the Court ought to allow the plaintiff to go against the sheriff for the acts which were done by him under the interpleader rule.)

The Judge not having, by his order, restrained the plaintiff from bringing an action, the Court will not now stay the proceedings. The Court can exercise their jurisdiction under the Act, only where an adverse claim is made: if, therefore, they hold that the plaintiff ought to be thus limited, the consequence will be, that the party

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will always lie by and bring an action. There may have been special damage arising from the mere act of seizure, or the goods may have sold for much less than their value.

Gray, contrà, was not called upon.

POLLOCK, C. B.:

I think the rule ought to be made absolute on payment of costs. I find no suggestion in the affidavits of any special damage; and the supposed hardship on the party, of having his goods seized, and [*196] sold, perhaps, *for less than their value, and receiving only the proceeds of the sale, is a matter which might and ought to be brought before the Judge at the time of the making of the order. Here, nothing of that nature appears to have been stated to him. There may, perhaps, be some doubt as to the extent of the Judge's authority under the Act: my impression is, that he has a right to do all that is just, proper, and equitable under the circumstances. Here we must presume that he did so. It would therefore be very unjust to make the sheriff responsible for what he did under the order of the Judge. There is nothing in the affidavits to show that any question was intended to be raised before him, except the title to the goods. I think, however, we cannot protect the sheriff as to the trespass charged by breaking and entering the house; but, the goods having been sold under the authority and direction of the Judge, and the plaintiff having already received the proceeds of the sale, which we must suppose to be the value of them, it would be an opprobrium to the law to allow him then to bring an action for supposed special damage, and get damages over again for so disposing of them.

ALDERSON, B.:

I am of the same opinion. The Interpleader Act begins by providing, in the 1st section, for the mode of relief for ordinary persons who desire to interplead. In these cases, the party comes into Court, and states an affidavit that he claims no interest in the subject-matter of the action, and "is ready to bring into Court, or to pay or dispose of, the subject-matter of the action, in such manner as the Court or any Judge thereof may order and direct;" and upon that the Court or the Judge is to make such order therein, as to costs and all other matters, as may appear to be just and reasonable. Then the 6th section points out what is to be done in

the case of sheriffs—namely, the same thing: the Court may, upon application of the sheriff, "exercise, for the adjustment of such claims, *and the relief and protection of the sheriff, all or any of the powers and authorities hereinbefore contained, according to the circumstances of the case." The Court or Judge, therefore, has a jurisdiction over the subject-matter brought into Court, which in this case consisted of the goods seized, and has power to dispose of them in such manner as, according to all the circumstances of the case, shall appear to be just and reasonable. The sheriff holds them at the discretion of the Court or Judge, who is to make such order with respect to them as he shall think just and reasonable. Then, when the Court or the Judge, having a discretion so to do, orders the sheriff to sell the goods, it would be monstrous if he were afterwards to be held responsible in an action for selling them under that order. It would be doing a grievous injustice to the officer of the Court; and that is all that we now intend to prohibit the plaintiff from doing. If any special damage was really sustained by the seizure and sale, that should have been brought under the notice of the learned Judge at the time.

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ROLFE, B.:

I am of the same opinion. My only doubt is, whether the rule goes far enough; for I doubt whether the Legislature intended that there should be any interpleader at all, except where the interpleader disposes of everything: and if the Judge sees that there really is a question which will not be disposed of by determining the title to the goods, I think he should not interfere at all. There is no analogy for allowing the party to split his claim into two parts; first, the title to the goods, and secondly, a claim for damages: therefore I should say, that, in such a case, the Judge has no jurisdiction under the statute; and there is no absurdity in that. The Legislature meant to protect the sheriff as far as they could; and there is no absurdity in saying that there may be cases of adverse claims to which the Act does not apply, and over which the Judge cannot adjudicate. But that, after an interpleader rule *has been disposed of, and an order made, and an issue tried, the party should be allowed to have another action against the sheriff in respect of his seizure of the same goods, would be monstrous. I have therefore no difficulty in concurring to the extent of this rule; the only objection with me is, that it does not go far enough.

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ALDERSON, B.:

I must say I concur with my brother ROLFE, and think the rule does not go far enough.

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Rule absolute.

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WILDERS AND OTHERS *v.* STEVENS (1).

(15 Meeson & Welsby, 208—212; S. C. 15 L. J. Ex. 108.)

Assumpsit by indorsees against indorser of a bill of exchange, drawn by W. & Co. on H., indorsed by W. & Co. to the defendant, and by the defendant to the plaintiff.

Plea, that W. & Co. are the plaintiffs, and no other persons; that the plaintiffs and no other persons are the makers of the bill, and the persons to whose order it was payable, and the persons who indorsed to the defendant, and who are liable to him as such indorsers, in the event of payment of the bill by him.

Replication, that, at the time of the drawing of the bill, H. was indebted to the plaintiffs in the amount of the bill, and thereupon it was agreed between the plaintiffs and H., that, in consideration that H. would procure the defendant to indorse and become surety as indorsee to the plaintiffs of the bill, they would give time to H. for payment of the debt: that the plaintiffs, in pursuance of this agreement, drew and indorsed the bill as in the declaration mentioned, and the defendant, for the accommodation of H., indorsed it to the plaintiffs, with the intent of thereby becoming surety as indorser to the plaintiffs of the bill; that H., in further pursuance of the agreement, delivered the bill so indorsed to the plaintiffs, and the plaintiffs gave time to H., and that no part of the said debt has been paid to them: Held, first, that the facts disclosed in the replication showed a sufficient title in the plaintiffs to sue the defendant on his indorsement to them, notwithstanding their previous indorsement to him. Secondly, that the replication showed a sufficient consideration for the defendant's promise to pay the plaintiffs the amount of the bill. And thirdly, that it was not a departure from the declaration.

ASSUMPSIT by the indorsees against the indorser of a bill of exchange. The declaration stated, that T. and H. Wilders & Co., on &c., made their bill of exchange for 40*l.* 12*s.*, payable to their order, and directed the same to one J. Heigham, &c.; that Wilders & Co. indorsed the same to defendant, and the defendant then indorsed the same to the plaintiffs. The declaration then averred presentment to and non-payment by Heigham, in the usual terms.

Plea, that the said T. and H. Wilders & Co. are the plaintiffs, and no other persons; that the plaintiffs and no other persons are the makers of the said bill and the persons to whose order the same was payable, and the persons who indorsed the same to the defendant, and who are liable to the defendant as such indorsers, in the event of payment of the same by him. Verification.

(1) Approved in *Wilkinson* v. *Unwin* (1881) 7 Q.B.D. 636, 638, 50 L.J.Q.B. 338. See now Bills of Exchange Act, 1882 45 & 46 Vict. c. 61), s. 37.—A.C.

Replication, that, before and at the time of the drawing and making of the said bill by the plaintiffs, and the indorsement thereof by the defendant, as in the declaration mentioned, Heigham was indebted to the plaintiffs in the sum of 40*l.* 12*s.*, and thereupon it was agreed between the plaintiffs and Heigham, that, in consideration that Heigham would procure the defendant to indorse, and become surety as indorser to the plaintiffs of the said bill, the plaintiffs should give time to Heigham for the payment of the said debt of 40*l.* 12*s.*; that the plaintiffs, thereupon afterwards, *in [*209] pursuance and performance of the said agreement, drew and indorsed the said bill as in the declaration mentioned, and that the defendant, for the accommodation of Heigham, indorsed the same to the plaintiffs, with the intent of thereby becoming surety as indorser to the plaintiffs of the said bill; that Heigham, after the said indorsement by the defendant, in further performance of the said agreement, delivered the said bill so indorsed by the defendant to the plaintiffs; that the plaintiffs, in performance of the said agreement, gave time to Heigham for payment of the said debt, and that no part thereof has been paid to the plaintiffs. Verification.

Special demurrer, assigning for causes, that the replication admits the indorsement by the plaintiffs to the defendant, as in the plea mentioned, and that the plaintiffs were liable to the defendant thereon, and their promise thereby to pay him the amount of the bill, if the drawee did not: and that it is inconsistent with such promise and indorsement of the plaintiffs, and is a circuity of action, for the defendant to be liable to them upon his indorsement, though made under the circumstances stated in the replication; and that, as the defendant is not by the replication alleged to have been a party to the agreement between the plaintiffs and Heigham, such agreement could form no consideration for the defendant's indorsement to the plaintiffs. Joinder in demurrer.

Petersdorff, in support of the demurrer:

This replication is no answer to the plea. A party who has indorsed a bill of exchange to another, and has become liable as such indorser, cannot, on having the bill re-indorsed to him by the other, bring an action against him on such indorsement. The reason of this rule is thus stated in Byles on Bills of Exchange, p. 114: "If a bill be re-indorsed to a previous indorser, he has no remedy against the intermediate parties, for they would have their remedy over against him, and the *result of the actions would [*210]

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be to place the parties in precisely the same situation as before any action at all." On this ground it was held, that, where C. made a promissory note to A., who indorsed it to B., by whom it was re-indorsed to A., A. could not recover on the note against B.: *Bishop* v. *Hayward* (1).

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(PARKE, B.: Lord KENYON there says that there might be circumstances, which, if disclosed on the record, might entitle the plaintiff to recover; the question is, whether the replication here does not disclose such circumstances.)

Admitting, however, that the defendant might be liable upon a declaration properly framed, this replication is bad for departure; for it does not support the declaration, but introduces facts inconsistent with it. Further, the facts stated in the replication show no sufficient consideration for the defendant's promise; for no consideration is shown to have existed between the defendant and Heigham, to whose agreement with the plaintiffs the defendant is not alleged to have been a party. The objection arising from the circuity of action, therefore, remains, and prevents the plaintiffs from recovering on the bill against the defendants by reason of his indorsement to them.

Barstow, contrà:

The objection arising from the circuity of action is removed by the facts disclosed in the replication, which rebut the presumption raised by the plea as to the defendant having a counter right of action against the plaintiffs; the defendant may, under the circumstances stated on these pleadings, be treated as a new drawer of the bill: *Penny* v. *Innes* (2): and if he were to sue the plaintiffs upon the bill, the facts stated in the replication would be an answer to the action. In Mr. Justice Story's book on Promissory Notes, pp. 479, 598, the principle is stated, that the acts of parties to negotiable instruments ought to be so interpreted as to carry
[*211] their intentions into effect. *Again, as to the supposed want of consideration, *Ridout* v. *Bristow* (3) is an authority to show that a promissory note is binding, although it purports on the face of it to be given for the debt of another. The facts here alleged bring the case within the same principle. Nor is the objection as to the supposed departure of any weight; for the replication

(1) 4 T. R. 470.
(2) 40 R. R. 629 (1 Cr., M. & R. 439).
(3) 35 R. R. 710 (1 Cr. & J. 231).

supports the declaration, by showing facts which entitle the plaintiffs to sue the defendant upon the bill, notwithstanding their previous indorsement to him. Besides, this objection is not pointed out by the demurrer. (He was then stopped.)

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PARKE, B.:

I think *Mr. Barstow* has given a satisfactory answer to the objections taken in this case on behalf of the defendant. If the replication is a departure from the declaration, that ought to have been pointed out as a cause of special demurrer. With respect to the main objection, although the old authorities are in some degree to the contrary, the modern decisions have settled the law in conformity with the view taken on behalf of the plaintiffs. The declaration shows a title to sue the defendant upon his indorsement; and the replication states circumstances sufficient to negative any right in him to sue the plaintiffs upon their indorsement to him. Then there is a sufficient statement of consideration; for the agreement of the plaintiffs to give time to Heigham is a sufficient consideration for the defendant's promise to pay the note, by way of guarantee for him. The objection, therefore, as to the circuity of action being removed, inasmuch as the defendant could not sue the plaintiffs, the case is brought within those special circumstances, which it was said by the COURT, in *Bishop* v. *Hayward*, may exist, and which entitle the plaintiffs to recover against the defendant. Upon this state of the pleadings, therefore, it seems to me that the plaintiffs are entitled to our judgment.

ALDERSON, B.: [212]

I am of the same opinion. The replication negatives the objection founded on circuity of action, which is the only objection to the plaintiffs' right to recover in this action.

ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiffs.

1846.
Feb. 11.

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TURNER *v.* FORD.

(15 Meeson & Welsby, 212—215; S. C. 15 L. J. Ex. 215.)

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The plaintiff lent a pianoforte to W., in whose hands it was seized under a distress for rent. While the landlord's bailiff remained in possession by W.'s consent, a *fieri facias* against W., at the suit of another creditor, was put into the premises, and the officer seized the pianoforte, and removed it to the premises of the defendant, an auctioneer, for sale: Held, that the plaintiff (after demand and refusal to deliver it) was entitled to recover it from the defendant in trover.

TROVER for a pianoforte. Pleas: Not guilty, and not possessed. on which issues were joined.

At the trial, before Rolfe, B., at the sittings in Middlesex in Hilary Term, the following facts appeared in evidence: The pianoforte in question was the plaintiff's property, and was lent by him to a person of the name of Wyon, in whose possession, in September, 1845, it was seized by his landlord under a distress for rent. The landlord remained in possession of the goods, with Wyon's consent, till the 15th of October; on that day an execution was put into the premises at the suit of one Linton, under which the officer seized the pianoforte, and removed it to the premises of the defendant, an auctioneer, for sale; and the defendant afterwards refused to deliver it to the plaintiff, and sold it under the directions of the sheriff's officer.

Upon these facts, it was contended at the trial, on behalf of the defendant, that the plaintiff had no right of action; for that the chattel being, at the time of the alleged conversion, in the custody of the law, the right of possession was then in the landlord, and not of the plaintiff, and the former only could sue for it in trover. The learned Judge reserved the point, and directed a verdict

[*213] *for the plaintiff, giving leave to the defendant to move to enter a nonsuit.

F. V. Lee having obtained a rule accordingly,

Humfrey and *J. Brown* now showed cause:

The plaintiff is entitled to recover in this action; for his property in the piano was not devested by the distress, at least not so as to prevent his maintaining an action of trover against the defendant, who is a mere stranger. It will be said, that if this action can be maintained, the defendant will be twice vexed, because he would be liable to another action at the suit of the landlord; but that is not so.

(PARKE, B.: The landlord's remedy is by an action against the sheriff's officer for pound-breach.)

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In *Rex* v. *Cotton* (1), the law on this subject is thus stated: "The distrainor neither gains a general nor a special property, nor even the possession in the cattle or things distrained. He cannot maintain trover or trespass; for they are in the custody of the law by the act of the distrainor, and not by the act of the party distrained upon." In Selwyn's Nisi Prius, 1384, (9th edit.), a case is cited (2) *Moneux* v. *Goreham*, in which PROBYN, C. B., is said to have ruled, that a landlord who has distrained goods cannot maintain trover for them. *Wilbraham* v. *Snow* (3) is an authority to the same effect.

(PARKE, B.: You say the plaintiff retains his right of property in the goods, although they are in the custody of the law; and that, as soon as they come out of that custody, he may maintain trover for them, and the defendant has no defence on the ground that, at a prior time, they were in the custody of the law.)

Yes. A sheriff, no doubt, may maintain trover against such as take chattels out of his possession; but the same reason does not apply to the case of a landlord, who is not, like the sheriff, answerable to the owner of the chattels if they escape, or *are wrongfully taken [*214] from him: *Vaspor* v. *Edwards* (4). The only remedy for the landlord is by an action against the sheriff's officer for pound-breach. But, further, here the custody of the law was completely at an end before the conversion by the defendant: *Knowles* v. *Blake* (5), *Rich* v. *Woolley* (6). The following authorities were also referred to in the course of the argument: *Giles* v. *Grover* (7), *Whitley* v. *Roberts* (8), *Williams* v. *Price* (9), *Wilson* v. *Barker* (10), *Wilson* v. *Tummon* (11).

F. V. Lee, contrà:

The real question in this case is, whether a party who distrains goods for rent can, during the time that he is entitled to hold them, maintain trover against a party who converts them. The landlord in this case had at least a lien on this chattel, and a right of possession, together with a power of sale, the five days having

(1) Parker, 121.
(2) From Serjeant Hill's MSS.
(3) 2 Saund. 47 a.
(4) 12 Mod. 658.
(5) 30 R. R. 707 (5 Bing. 499).
(6) 33 R. R. 596 (7 Bing. 651).
(7) 36 R. R. 27 (9 Bing. 128; 2 Moo. & Sc. 197; 1 Cl. & Fin. 72; 6 Bligh, N. S. 277).
(8) 29 R. R. 755 (M'Clel. & Y. 107).
(9) 37 R. R. 529 (3 B. & Ad. 695).
(10) 4 B. & Ad. 614.
(11) 64 R. R. 770 (6 Man. & G. 236; 6 Scott, N. R. 894).

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elapsed within which there could be a replevin. Now, if he could sue in trover, the plaintiff could not; for there could not be two concurrent rights of property in the same chattel in both of them. It must however be admitted, that the case cited from Selw. N. P., and that of *Rex* v. *Cotton*, appear to be at variance with this view of the case, and, if they are held to be law, seem to be decisive of the point.

PARKE, B.:

I am of opinion that the plaintiff is entitled to maintain this action of trover. The conversion in this case took place after the custody of the law was at an end, and at a period when the right of property was certainly in the plaintiff. The present defendant was
[*215] no party to the *pound-breach, and the case, therefore, stands clear of the question, whether an action of trover lies against the defendant for an act for which the distrainor could also have brought an action against him. It is unnecessary, therefore, to consider that question on the present occasion: but I am inclined to think, that, if the act of conversion had amounted to pound-breach, the defendant would have been liable in damages to the landlord, and also to the owner of the property for damages for the conversion. It might be difficult in such a case to ascertain the damages; but they would not exceed, in the whole, the value of the chattels distrained. It is unnecessary, however, to give any opinion upon this point, because here the conversion took place after the landlord's right of action, whatever it was, had ceased, no fresh pursuit having been made.

ALDERSON, B.:

I am of the same opinion. Where goods that have been distrained are in the possession of a third party, under such circumstances that the landlord cannot recover them, the right of possession attaches to the right of property, and the real owner may maintain trover for them.

ROLFE, B., concurred.

PLATT, B.:

In this case it is clear that the impounding was at an end; the landlord might have an action for pound-breach against the sheriff's officer, but his remedy to recover the goods was gone. Then how can the defendant justify his possession of them as against the

plaintiff?—*quo jure?*—that of the landlord, or the sheriff? Certainly not of the landlord, for he was not his bailiff; nor of the sheriff, because the sheriff cannot take one man's goods for another man. The property, and the right of possession, were both in the plaintiff, and he is therefore entitled to recover in this action.

Rule discharged.

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LOAD AND ANOTHER *v.* GREEN AND OTHERS (1).

1846. *Feb.* 21.

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(15 Meeson & Welsby, 216—224; 15 L. J. Ex. 113.)

A. bought goods from B. with the fraudulent intention of never paying for them, and kept them until his bankruptcy: Held, that they did not pass to A.'s assignees under the *fiat*, as having been in his possession, order, and disposition as the reputed owner thereof, with the consent of the true owner; but that A. was the real owner subject to B.'s right to rescind the sale, which was exercisable against A.'s assignees.

TROVER for handkerchiefs, silk, muslin, &c. Pleas: first, Not guilty; secondly, a denial of the plaintiffs' property in the goods. At the trial, before Pollock, C. B., at the London sittings after last Trinity Term, it appeared that the goods in question were bought by the bankrupt, Bannister, on the 1st of July, 1845, from the plaintiffs, and the jury found that he bought them with the fraudulent intention of not paying for them. They were delivered to him on the 4th of July; and on a subsequent day, while they were still on his premises, they were taken possession of by the defendants, who were his assignees under a *fiat* in bankruptcy issued on the 8th of July (2). It was contended for the plaintiffs, that, under these circumstances, the assignees acquired no property in the goods: for the defendants it was insisted, that they were in the order and disposition of the bankrupt, and therefore passed to them as his assignees. A verdict was entered for the plaintiffs, damages 107*l.* 6*s.* 6*d.*, leave being reserved to the defendants to move to enter a nonsuit, or a verdict for them. In last Michaelmas Term, *Humfrey* obtained a rule accordingly; against which

Martin and *Wordsworth* showed cause in Hilary Term (Jan. 14):

The question in this case is, whether, where goods are fraudulently obtained by a party under a pretended contract of sale, and

(1) Approved in *Reynolds* v. *Bowley* (1867) L. R. 2 Q. B. 474, 478, 36 L. J. Q. B. 247, and *Ex parte Whittaker, Re Shackleton* (1875) L. R. 10 Ch. 446, 447, *n.*, 44 L. J. Bk. 53.—A. C.

(2) The precise date of the act of bankruptcy did not appear in evidence at the trial. It was assumed on the argument, that it was subsequent to the sale and delivery of the goods to Bannister; but it was then stated that in fact it took place on the 23rd of June.

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[*217]

remain in his possession down to his bankruptcy, they are to be considered as being in his *"possession, order, or disposition, by the consent and permission of the true owner," within the meaning of the 72nd (1) section of the Bankrupt Act, 6 Geo. IV. c. 16. Before this section can apply, there must be a real owner of the goods, who permits the bankrupt to have the possession of them, knowing himself to be the real owner. Here the plaintiffs were at liberty to affirm or disaffirm the sale to Bannister, at their option, by reason of the fraud; and it was not until they elected to treat the contract as void, that they could, properly speaking, be said to be the real owners of the goods. There was no true owner and apparent owner within the meaning of the statute until after the bankruptcy, when the vendors intervened, and sought to avoid the contract. But, even if this view of the case be incorrect, it is obvious that there could be no consent and permission to the bankrupt being the reputed owner; for consent must mean consent with knowledge of all the circumstances—knowledge that the party consenting is the real owner; and that cannot apply to a case where the transaction is fraudulent altogether on the part of the buyer. Could Bannister have pleaded leave and license to an action of trover by the plaintiffs? Clearly not.

(PLATT, B.: It is a penalty upon the consenting party.)

Yes; upon him who enables the other to obtain a false credit by means of the possession of the goods.

(ALDERSON, B.: How can a man permit, who does not know that he has a right to refuse? He supposes he has parted with the property in the goods: if he has, he has no right to refuse the possession; therefore the supposed consent is under circumstances in which, if they were true, he had no right to refuse.)

The only consent, in truth, was to the bankrupt's holding the goods as real owner.

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The cases of *Miller* v. *De Metz* (2), *Ex parte Carlow* (3), *Earl of Bristol* v. *Wilsmore* (4), and *Ferguson* v. *Carrington* (5), *are authorities for the plaintiffs.

(PARKE, B., referred to *Noble* v. *Adams* (6).)

(1) See now Bankruptcy Act, 1883 (46 & 47 Vict. c. 42), s. 44 (iii.).—A. C.

(2) 1 Moo. & Rob. 479.

(3) 2 Mont. & Ayr. 39.

(4) 25 R. R. 488 (1 B. & C. 514).

(5) 9 B. & C. 59.

(6) 17 R. R. 445 (7 Taunt. 59).

There it is distinctly laid down, that a sale of goods obtained by fraud cannot change the property. The case of *Milward* v. *Forbes* (1), which may be cited on the other side, proceeded on the ground that the property in the goods was changed. The same observation applies to *Haswell* v. *Hunt* (2). In *Sinclair* v. *Stevenson* (3) fraud was expressly negatived by the jury: there are, however, expressions in the judgment of BEST, Ch. J., in that case, which appear to go to the extent that, even if fraud had been proved, the goods would be in the order and disposition of the buyer, and pass to his assignees on his bankruptcy, within the stat. 21 Jac. I.: but those *dicta* cannot be supported consistently with the other authorities.

Humfrey and *Aspland, contrà:*

This case is within the 72nd section. All the terms of that enactment are satisfied by the facts which appear in this case. The bankrupt, at the time of his bankruptcy, clearly had the goods in his possession, order, and disposition, as reputed owner; the plaintiffs were the true owners, the sale being altogether void by reason of the fraud; and there can be no doubt as to the fact of their consent to the possession of the goods by the bankrupt, which is all the statute requires. It says nothing about consent to the means whereby the possession was obtained. Any other construction would do violence to the language of the Act. Everything whereby the trader obtained fictitious credit, is meant to be within the power of disposition of the assignees. The consent is not necessary to the reputed ownership, but only to the possession. No question of property arises: it is enough if there be a consent to the *goods [*219] being in fact, manually, in the possession, order, and disposition of the bankrupt at the time of the bankruptcy. It may be observed, moreover, that mere fraud, not amounting to felony, does not for all purposes vitiate the transaction. In *Parker* v. *Patrick* (4), it was held, that where goods are obtained by fraud, and pawned to a third party, without notice, and the original owner prosecutes the fraudulent person to conviction, and gets possession of the goods, the pawnee may recover them back in trover: and a distinction was taken between a case of fraud and that of felony, in which, by the stat. 21 Hen. VIII. c. 11, the owner of the thing stolen, in case he prosecuted the offender to conviction, was entitled to restitution.

(1) 4 Esp. 171.
(2) Cited 5 T. R. 231.
(3) 2 Bing. 514; 10 Moore, 46.
(4) 5 T. R. 175.

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The ruling in the case of *Sheppard* v. *Shoolbred* (1) seems to go as far as *Parker* v. *Patrick*.

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(PARKE, B.: The case of *Parker* v. *Patrick* has been doubted (2); but I think it may be supported on the ground, that the transaction is not absolutely void, except at the option of the seller: he may elect to treat it as a contract, and he must do the contrary before the buyer has acted as if it were such, and resold the goods to a third party. *Wright* v. *Lawes* (3) is another authority to the same effect.)

In *Milward* v. *Forbes*, Lord ELLENBOROUGH says: "There was a contract, and the defendant let the bankrupt have them on sale, and with a view to obtain payment." That is equally true here. In *Sinclair* v. *Stevenson*, it is true that fraud was negatived by the jury; but the judgment confirms the view now presented to the Court, of the operation of the word "consent" in the statute. BEST, Ch. J., says: "If a person purchase a house and the utensils of a trade knowing that he is not able to pay for them, if possession be delivered to him, does not the property in those utensils pass to him, and will they not become the property of his assignees in case of his bankruptcy? At all events, when the possession of goods has [*220] been acquired under such *circumstances, and the bankrupt has kept that possession for three or four months, and appeared as the visible owner, they will pass to his assignees under the statute of James." It is plain that the LORD CHIEF JUSTICE thought that mere possession, with the consent of the true owner, was sufficient. *Haswell* v. *Hunt* confirms the same construction. BULLER, J., says, that "Lord Ch. J. EYRE held, that the sale was made complete by the act of the plaintiffs, who, by delivery of the goods without demand of the money, vested the property in Lacey (the bankrupt) by their own assent, as a complete sale *ab initio*, without ready money." There the sellers never intended that the bankrupt should have the goods as reputed owner, but as real owner, by virtue of the sale.

Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B.:

This case was argued before my Lord Chief Baron, and my brothers Alderson and Platt, and myself, during the last Term. It

(1) Car. & M. 61.

(2) By DENMAN, Ch. J., in *Peer* v. *Humphrey*, 41 R. R. 474 (2 Ad. & El. 499). See, however, *White* v. *Garden* (1851) 10 C. B. 919, 20 L. J. C. P. 166.—A. C.

(3) 4 Esp. 82.

was an action of trover against the defendants, assignees of a bankrupt, to recover goods obtained by him by a fraudulent purchase from the plaintiffs, without intent to pay for them, and which, therefore, the plaintiffs had a right to recover from the bankrupt himself, by avoiding the contract on the ground of fraud, on the principle of the case of *Noble* v. *Adams* (1), and others. The purchase took place on the 1st of July, the delivery of the goods to the bankrupt on the 4th, and the *fiat* under which the defendants were chosen assignees issued on the 8th. The petitioning creditor's debt was contracted on the 4th of June, and there was an act of bankruptcy on the 23rd of June. The assignees took possession of the goods, and, having refused to deliver them up to the plaintiffs, they brought this action.

If the act of bankruptcy is taken to be on the 23rd of June, [221] no further question could arise; for the defence of the assignees rests on the ground that they were entitled to the goods as having been in the possession of the bankrupt as apparent owner, with the consent of the true owner, under the 72nd (2) section of the 6 Geo. IV. c. 16. But, to come within that section, the goods must have been in the bankrupt's possession at the time he became bankrupt; that is, at the time of the act of bankruptcy; and if they do not come to his possession until afterwards, the statute does not apply: *Lyon* v. *Weldon* (3).

If, however, our decision were to proceed upon this ground, and we were of opinion, that, if the act of bankruptcy was subsequent to the delivery, the assignees would have been entitled, we should perhaps have yielded to the request of the defendants' counsel, and have given a rule for a new trial on payment of costs, as at the trial he had not had his attention sufficiently called to the alleged act of bankruptcy on the 23rd of June.

Our opinion, however, is, that, assuming the act of bankruptcy to have been after the 4th of July, the assignees are not entitled. As the goods were obtained by a fraudulent purchase, the plaintiffs had a right to disaffirm it, to revest the property in them, and recover their value in an action of trover against the bankrupt; and as the assignees take, by virtue of the assignment, such interest only as the bankrupt has, the plaintiffs had a right to recover the value of the goods in the hands of the assignees, in the same form

(1) 17 R. R. 445 (7 Taunt. 59).

(2) See now Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.).—A. C.

(3) 2 Bing. 334 [see now Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 43 and 44 (iii.).—A. C.].

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of action, on a conversion by them, unless they were entitled to those goods under the 72nd section.

The question then is, whether this is a case of apparent ownership at the time of the bankruptcy, with the consent of the true owner, within the meaning of the repealed Act, 21 Jac. I., and the existing [*222] Act, 6 Geo. IV. c. 16, s. 72 (1), which *re-enacts it. We think it was not. None of the cases cited and relied on, on behalf of the defendants, decide that where goods are obtained by fraud, before the act of bankruptcy, and are in the bankrupt's possession at that time, they pass to the assignees, under the clause relating to apparent ownership. In *Milward* v. *Forbes* (2), Lord ELLENBOROUGH'S judgment proceeded on the ground, that the property actually passed to the bankrupt by the sale, under the circumstances of that case. In *Sinclair* v. *Stevenson* (3), the jury negatived fraud; and they also found (incorrectly it would seem) the transaction to be usurious; and, though the Chief Justice, Lord WYNFORD, appears to have expressed an opinion, that, if goods were obtained by fraud, and left in the bankrupt's possession by the true owner for a long time before the act of bankruptcy, the assignees would be entitled, on the ground of apparent ownership; that opinion was extra-judicial, and the Court did not decide the case on that ground. The third case cited was *Haswell* v. *Hunt* (4), which was decided on the ground that the property actually passed to the bankrupt, and not on that of apparent ownership.

Not being bound, therefore, by decision, we must consider whether this case is within the principle of the 21 Jac. I. The meaning of this statute is well explained by Lord REDESDALE, in *Joy* v. *Campbell* (5), in construing the analogous Irish Act. His Lordship says, that "it refers to chattels, where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, who ought not to have them, but whom the owner permits, unconscientiously, as the Act supposes, to have such order and disposition." "The object was to prevent deceit by a trader from the visible possession of property to which [*223] he was not entitled; but in the construction of the *Act, the nature of the possession has always been considered, and the words have been construed to mean—possession of the goods of another, with the consent of the true owner."

(1) See now Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.).—A. C.
(2) 4 Esp. 171.
(3) 2 Bing. 517.
(4) 5 T. R. 231 a.
(5) 9 R. R. 39, 44 (1 Sch. & Lef. 328, 336).

In order, therefore, to bring the case within the statute, there must be a real owner, distinct from an apparent owner, and the real owner must consent to the apparent ownership as such; but in this case the plaintiffs never did consent to the apparent ownership as such; they never contemplated the permitting the bankrupt to obtain a credit by means of the possession and apparent ownership of property which really did not belong to him. They intended to part with the property itself, and to divest themselves altogether of all right to it; and although, in consequence of the bankrupt's fraud upon them, they had a right to annul the contract, and be again the real owners, that right they did not exercise until after the bankruptcy; and consequently at the time of the act of bankruptcy, (upon which the title of assignees depends), the bankrupt was not apparent owner but real owner, and the statute does not apply.

It is to be understood that these observations are not meant to affect that class of cases in which the real owner gives, not the possession only, but an interest to the bankrupt, as where he leases the goods, under such circumstances as that the possession will necessarily, according to the habits of society, carry with it the repute of absolute ownership. These cases proceed upon the principle that the true owner does consent to an apparent ownership in the bankrupt contrary to the truth, because that is the natural result of the consent which he gives.

Whether or not this peculiar case would have fallen within the statute, if the plaintiffs had discovered the fraud long before the act of bankruptcy, and omitted, for an unreasonable time before that period, to avail themselves of the right to rescind the contract, is no question in the present case; for the act of bankruptcy followed the sale and delivery within a short time.

It may be on that ground that the opinion of Lord WYNFORD proceeded in the case above referred to. [224]

Our judgment must therefore be for the plaintiffs, and the rule must be discharged.

Rule discharged.

STURGEON *v.* WINGFIELD.

1846. *Feb.* 11.

(15 Meeson & Welsby, 224—230; S. C. 15 L. J. Ex. 212.)

[224]

In 1742 a farm was demised by the Broderers' Company to F. for 100 years, with a covenant for perpetual renewal. In 1827, the residue of this term had become vested in H., who in that year assigned it by way of mortgage, with a proviso for redemption. On the 22nd May, 1828, H. demised

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the same farm for twenty-one years to the plaintiff. On the 12th January, 1836, the mortgagees and H. surrendered the premises to the Broderers' Company. On the 13th January, 1836, the Company demised them to H. for 100 years; and shortly afterwards the unexpired residue of that term, and all the estate and interest of H. in the premises, were assigned to the defendant.

In an action by the plaintiff against the defendant, on a covenant in the lease from H. to the plaintiff, to keep down the rabbits on the farm, the defendant pleaded, 1st, that H. did not demise to the plaintiff; 2nd, that the reversion on that lease did not vest in the defendant: Held, that both these issues ought to be entered for the plaintiff; for that the lease, being by deed, was a good demise by way of estoppel, and a reversion in H. by estoppel was thereby created, which *primâ facie* was a reversion in fee, and therefore was not surrendered to the Broderers' Company, but passed from H. to the defendant.

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THIS was an action of covenant, charging the defendant as the assignee of the estate of J. H. Hogarth, the lessor of a certain leasehold farm, with breach of covenant, in preserving, and not using his best endeavours to destroy, the rabbits upon the estate in question. The declaration stated, that on the 22nd of May, 1828, by a certain indenture of lease, sealed, &c., made between the Rev. John Henry Hogarth of the one part, and the plaintiff of the other, the said J. H. Hogarth demised to the plaintiff a certain messuage and lands in Essex, for twenty-one years; that J. H. Hogarth did, for himself, his heirs and assigns, covenant, that the rabbits on the said farm were not to be preserved, but that he and they would use their best endeavours to kill and keep down the rabbits on the said lands: that the plaintiff entered, and was possessed thereof for the said term so demised, the reversion thereof belonging to the said John Henry Hogarth, and that the reversion, during the continuance of the said demise and term, to wit, on the 1st of January, 1835, by assignment thereof came to and legally
[*225] vested in the defendant. *Breach, that the defendant did not use his best endeavours to kill, destroy, and keep down the rabbits on the said lands. The defendant pleaded, amongst other pleas, first, that the said J. H. Hogarth did not demise to the plaintiff; secondly, that the reversion mentioned in the declaration never legally vested in the defendant.

The cause came on for trial before Pollock, C. B., at the Middlesex sittings after Trinity Term, 1845, when a verdict was found for the plaintiff for the damages in the declaration, subject to the opinion of this Court upon the following special case, and to a reference as to the amount of damages, if the decision of the Court should be in favour of the plaintiff.

On the 22nd of May, 1828, the indenture of lease in the declaration mentioned, being of a farm at Stifford, in Essex, for twenty-one years from the 24th of June then last past, at a yearly rent of 221*l.* 7*s.* 6*d.*, was duly executed by the lessor, the Rev. John Henry Hogarth, in the declaration mentioned, and by the plaintiff, the lessee. The plaintiff entered into possession of and still holds the farm under the lease, and he paid the rent reserved to the lessor Hogarth, up to Christmas, 1835; and from that period he has continued to pay to the defendant rent under the lease, and the defendant has treated the plaintiff as his tenant of the farm in question. For several years past, the plaintiff has complained that the rabbits on the farm have not been kept down, and that, in consequence, his crops have been very much damaged, and much correspondence has taken place between the plaintiff and defendant as to the amount of damage.

(The case then set forth two letters from the defendant to the plaintiff, in which the former expressed his willingness, on certain terms, to make compensation for the injury done by the rabbits.)

The farm in question was, by an indenture made and dated the 12th of May, 1742, demised by the keepers or wardens and Society of the art or mystery of the Broderers *of the city of London, to [*226] Samuel Foster, for the term of 100 years from Michaelmas, 1741, with a covenant for perpetual renewal. On the 25th of August, 1827, the residue then unexpired of that term became vested in William Bray, who by an indenture made and dated the 25th of August, 1827, assigned the said residue of the said term, [to John Henry Hogarth, in the declaration mentioned. By an indenture made and dated the 28th Aug., 1827, the said John Henry Hogarth assigned the residue of the said term,] (1) the same being then vested in him, to Richard Fleming, Thomas George Vander Gucht, James Elmslie, and William Green, by way of mortgage, to secure 5,000*l.* and interest, with a proviso for redemption on payment within twelve months. After the said residue of the said term had become thus vested in the said Richard Fleming, Thomas George Vander Gucht, James Elmslie, and William Green, the indenture of lease mentioned in the declaration was made. After the making of the indenture of lease mentioned in the declaration, an indenture, dated

(1) The words in brackets are taken from the statement of the case in 15 L. J. Ex. at p. 213. They do not occur in the report in 15 M. & W., and presumably are omitted by inadvertence, as without them Hogarth's position is not satisfactorily explained: see the interlocutory observation of PARKE, B. at p. 637, *post*.—A. C.

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the 12th of January, 1836, was that day made between the said R. Fleming and the said James Elmslie of the first part, the said Thomas George Vander Gucht and (the said W. Green being then dead) the said John Henry Hogarth of the second part, William Wingfield of the third part, and Richard Baker Wingfield of the fourth part, and the said keepers or wardens and Society of the art or mystery of the Broderers of the city of London of the fifth part; by which last-mentioned indenture, the said Richard Fleming, James Elmslie, and John Henry Hogarth, and each of them, purported to assign, surrender, and yield up, demise, release, and quit claim, unto the said keepers or wardens and Society, and their successors and assigns, the said farm, with the appurtenances, together with certain hereditaments and premises therein mentioned, for all the remainder then to come and unexpired, trust, possession, property, benefit of renewal, claim, and demand whatsoever, both at law and in equity, of them the said Richard Fleming, James Elmslie, and John Henry Hogarth, and every of them, of, in, to, or out of the said farm and appurtenances, and any and every part or parcel [*227] thereof, and also the covenant contained in the said indenture *in the declaration mentioned for the renewal or regrant of the lease or demise of the said farm, and all and every other covenant or covenants, if any then existing, in or in respect of any former or prior lease of the said term, or otherwise howsoever, to the intent that the residue then to come of the said term might be merged and extinguished in the reversion of the said farm, and that the said covenant or covenants for renewal might be absolutely and for ever extinguished, determined, and discharged. After the making of this indenture of January 12th, 1836, the said keepers or wardens and Society of the art and mystery of Broderers of the city of London, by an indenture made and dated January 13th, 1836, demised the same farm to the said John Henry Hogarth, for the term of 100 years from Michaelmas, 1835; and by an indenture, made and dated February 4th, 1836, the unexpired residue of the said term became and was, and thence hitherto has been, vested in the defendant.

The leases, indentures, and documents mentioned in this case, and also the pleadings in the action, are to form part of the case, and are to be considered as embodied in it.

The question for the opinion of the Court is, whether the plaintiff is entitled to a verdict on the two first issues, or either of them. If on both, the verdict is to stand, and the amount of damages to be referred; and if only on one of those issues, or on neither, a nonsuit

is to be entered. The Court is to be at liberty to draw the same conclusions and inferences of fact as a jury might have done.

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Cowling, for the plaintiff:

Two questions arise in this case: first, whether Hogarth demised to the plaintiff; secondly, whether the reversion mentioned in the declaration vested in the defendant. With respect to the first point, it is clear that the plaintiff is entitled to the judgment of the Court; for the fact of a demise to him is admitted on the face of this case, and no question is raised as to the nature or extent of Hogarth's interest.

(PARKE, B.: It is a demise *by deed, and therefore clearly operated by way of estoppel.) [*228]

Then, secondly, a reversion in Hogarth is admitted on the pleadings; but if that were not so, a reversion by estoppel would be created, the lease of 1828 being under seal, and executed by Hogarth, the lessor: *Webb* v. *Austin* (1), *Gouldsworth* v. *Knights* (2).

(PARKE, B., referred also to *Whitton* v. *Peacock* (3).)

The only remaining question, then, is whether this reversion vested in the defendant. Now it must be taken, there being no traverse that the reversion belonged to Hogarth, that it continued in him; and then it appears, by the deed of February, 1836, that all Hogarth's interest, whatever it was, passed thereby to the defendant.

(PARKE, B.: The reversion must certainly be taken to continue in the same party until the contrary is shown. That was decided in the House of Lords, in the case of *The Bishop of Meath* v. *The Marquis of Winchester* (4); the cesser of the reversion must be shown by affirmative pleading. Here, therefore, the defendant ought to have shown it. Hogarth (5), no doubt, had no legal reversion, because he had assigned all the residue of the term to the mortgagees; but there is a reversion by estoppel, which, whatever it was, was conveyed to the defendant.)

(1) 7 Man. & G. 701; 8 Scott, N. R. 419.
(2) 63 R. R. 619 (11 M. & W. 337).
(3) 2 Bing. N. C. 411; 2 Scott, 630.
(4) 42 R. R. at p. 74 (3 Bing. N. C. 215; 3 Scott, 592; 4 Cl. & Fin. 555; 10 Bligh, N. S. 478, 479).
(5) See note, *ante*, p. 635.

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Peacock, for the defendant:

Assuming that here there was an estate by estoppel in respect of some reversion, the plaintiff has to show that the particular reversion mentioned in the declaration vested in the defendant; and this has not been done.

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(PARKE, B.: There is but one reversion, namely, the reversion by estoppel, and that has passed to the defendant.)

At the period of the assignment of the lease by Hogarth to the defendant, he had no reversion, because the whole of the original [*229] term of years had previously vested in the *mortgagees. Now the defendant claims under those mortgagees, and therefore he is not bound by the estoppel which bound Hogarth.

(PARKE, B.: Taking it that in point of fact Hogarth, the lessor, had no interest at the date of his lease to the plaintiff, there was an estate by estoppel, which estate is *primâ facie* a reversion in fee. Then, in February, 1836, he makes a conveyance to the defendant, which passes that reversion in fee, because it passes "all his estate, right, title, and interest;" and, before that conveyance, the premises were demised to Hogarth by the Broderers' Company, so that the estoppel was fed.)

Suppose the case of a lessee for twenty-one years granting a lease of the same premises for one hundred years, with covenants on his part; and then, without any knowledge on the part of his lessor that the lessee had granted such a lease, the latter conveyed all his interest to the former by surrender or grant: would it not be competent to the landlord to show that the reversion by estoppel did not come to him? Would he thereby become bound by all the covenants of the lease for one hundred years?

(PARKE, B.: *Rawlins'* case (1), which is cited in *Weale* v. *Lower* (2), is an authority against you. There "Cartwright made a lease to Warlow for six years, by indenture, of a house in which he had nothing, and afterwards he purchaseth of Rawlins a lease of the said house for twenty-one years, upon condition; then Cartwright re-demiseth to Rawlins for ten years. Adjudged, 1st, that the lease to Warlow for six years was good against Cartwright, by conclusion, but nothing in interest; 2nd, that, as soon as Cartwright had purchased his lease for twenty-one years, Warlow's

(1) 4 Co. Rep. 53. (2) Pollexfen, 68.

interest for six years became a lease in interest, the reversion in Cartwright; 3rd, when Cartwright demised to Rawlins for ten years, Rawlins was bound by the estoppel, and took only a future interest, there being no attornment.")

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Webb v. *Russell* (1) is in favour of the defendant. There mortgagor and mortgagee jointly made a lease, in *which the covenants for [*230] rent and repair were only to and with the mortgagor and his assigns; and it was held that the assignee of the mortgagee could not sue upon those covenants, for they did not run with the land, being collateral to the mortgagee's interest therein. A reversion by estoppel must have the same legal incidents as an actual reversion in interest; but here, if there had been an actual reversion, *Webb* v. *Russell* shows that it would have been extinguished by the surrender; and the new reversion gained by the lease to Hogarth from the Broderers' Company, would not have attached to it the rent reserved on the lease to the plaintiff, or the liabilities arising out of it.

(PARKE, B.: Here the reversion by estoppel, being a reversion in fee, never was surrendered: it remained, therefore, (so far as regarded the plaintiff) in Hogarth, until he assigned it to the defendant. The lease to the plaintiff was at first good by way of estoppel only; but when Hogarth took from the Broderers' Company for one hundred years, the lease to the plaintiff became a lease in interest, and the reversion upon it was afterwards assigned to the defendant.)

PARKE, B.:

On the first issue, the verdict clearly must be entered for the plaintiff, that there was such a demise to him as is stated in the declaration. Then, as to the second point, as I have already said, all the reversion of Hogarth, which was a reversion by estoppel, passed from him to the defendant. This estoppel was fed by the demise for one hundred years from the Broderers' Company to Hogarth, the lessor, and thereby the lease from him to the plaintiff became good in point of interest. That lease for 100 years was afterwards assigned to the defendant, and therefore the second issue also ought to be found for the plaintiff.

ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

(1) 1 R. R. 725 (3 T. R. 393).

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HARRISON *v.* SAMUEL RUSCOE (1).

(15 Meeson & Welsby, 231—236; 15 L. J. Ex. 110.)

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A bill of exchange was drawn by H., indorsed by him to B., and by B. to C., in whose hands it was dishonoured. C.'s attorney gave notice of dishonour in due time to A., but stated therein, by mistake, that he was directed by B. (from whom he had no authority) to apply for payment of the bill: Held, that the notice of dishonour was sufficient, notwithstanding this misrepresentation, the only effect of which was to give A. every defence against C. that he would have had if the notice had really been given by B.

ASSUMPSIT on a bill of exchange for 210*l.* 10*s.*, dated 21st December, 1822, drawn by the defendant on, and accepted by, Daniel Ruscoe, payable to the order of the defendant in London four months after date, indorsed by the defendant to W. H. Vaughan, and by him to the plaintiff. Plea, that the defendant had not due notice of the non-payment of the bill. Issue thereon.

At the trial, before the Recorder of Chester, it appeared, that, the bill having become due on the 24th of April, 1845, and being dishonoured, the plaintiff's attorney, a Mr. Roberts of Chester, wrote and sent to the defendant, on the 26th, the following notice of dishonour:

"SIR,—I am requested by Mr. W. H. Vaughan, of this city, to apply to you for the payment of the amount due on you and your brother Daniel Ruscoe's dishonoured bill to him; and as Mr. Vaughan is very pressing for the amount, I trust you will immediately oblige me with the same, together with my charge as under.

"I am, Sir, your obedient servant,

"S. J. ROBERTS."

Mr. Roberts, being called as a witness for the plaintiff, stated that he had no authority from Vaughan to give any notice of dishonour, and that Vaughan's name was inserted in the letter by a clerk of his, in mistake, instead of the plaintiff's. The bill having fallen due in the hands of a banker in London, a notice of dishonour given on the 26th of April would be good either for the plaintiff or for Vaughan.

It was contended for the defendant, first, that, under these
[*232] circumstances, the notice of dishonour, being given in *the name of Vaughan, from whom Mr. Roberts had no authority to give it, was of no avail; and secondly, that it was bad in form, as it

(1) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49.—A. C.

improperly described the bill as being the bill of the defendant and his brother. The learned Recorder thought the notice was good, and directed a verdict for the plaintiff for the amount of the bill and interest, giving the defendant leave to move to enter a nonsuit.

In last Michaelmas Term, *Atkinson* obtained a rule *nisi* accordingly (1); against which

Egerton and *Unthank* showed cause in the present sittings (Feb. 9):

This notice of dishonour was sufficient. *Chapman* v. *Keane* (2) is an authority to show, that it is enough if the defendant has notice of dishonour from any of the parties to the bill.

(ALDERSON, B.: The difficulty here is, from whom is this a notice? The cases would be parallel, if Vaughan had put the bill into the hands of the attorney, and he had given the notice in the name of the plaintiff.)

The cases establish, that a good notice of dishonour may be given by any of the parties to a bill, though he be not the holder. The reason is, that the last indorsee may be considered as an agent, for this purpose, for all the previous parties. The plaintiff, therefore, was for this purpose the agent of Vaughan, and might give a notice that would enure to his benefit; and then, as it is a good notice by Vaughan, it is also a good notice for the plaintiff. Supposing a general notice of dishonour had been given, without any mention of Vaughan's name, that would certainly have been sufficient; and the mistaken mention of his name does no injury to the defendant, and can make no difference in its effect.

Jervis and *Atkinson*, in support of the rule:

The notice *of dishonour, in this case, not having been in fact [*233] authorised by Vaughan, the indorser, cannot enure to his benefit. If the position contended for on the other side be correct, that each of the parties to the bill is, for this purpose, an agent for all, then, as each indorser would have his own time to give notice, it would follow, that, if there were twenty indorsements on the bill, the last indorsee might lie by for twenty days, and then give a valid notice to the drawer. But the answer to this argument is, that there is

(1) The objection as to the form of the bill was given up.

(2) 42 R. R. 363 (3 Ad. & El. 193; 4 Nev. & M. 607).

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no privity between the different parties to a bill of exchange; on the contrary, each of them holds by a title adverse to the others. Here, however, there is not the notice of any party; not of the plaintiff, because it is not given for him; not of Vaughan, because it is not authorised by him.

Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B.:

This case was argued a few days ago before my brothers Alderson and Platt, and myself, at the present sittings, on showing cause against a rule for entering a nonsuit, upon a point reserved by Mr. Welsby, the Recorder of Chester. The case is perfectly novel, there being no decision or authority in point.

The action was upon a bill of exchange drawn by the defendant, payable to his order, by the defendant indorsed to W. H. Vaughan, and by W. H. Vaughan to the plaintiff. The defendant pleaded that there was no notice of dishonour. The bill was, in the body of it, made payable in London; it became due on the 24th of April. On the 26th, an attorney at Chester, who acted for the plaintiff, gave notice of dishonour to the defendant, stating in his letter, that he was requested by Vaughan to desire payment of the defendant's dishonoured bill; but he swore that he was not authorised by
[*234] Vaughan to give that *notice, and that he gave it in a wrong name by mistake. The only question is, whether this notice was sufficient; for we have already intimated our opinion that the notice was in sufficient time, whether it be considered as given by the plaintiff or Vaughan; and that it sufficiently referred to the bill in question, and notified its due presentment and non-payment.

Since the case of *Chapman* v. *Keane* (1), it must be considered as perfectly settled, that a notice of dishonour need not be given by the holder, but that he may avail himself of notice, given in due time by any party to the bill. The decision in that case is referred to and adopted by Chancellor Kent (2), and Mr. Justice Story on Bills of Exchange, sect. 304. The former states the rule to be, that the notice may be given by any one who is a party to the bill: the latter states it more fully, and says, that the notice will be sufficient, although not given by the holder or his agent, if it comes

(1) 42 R. R. 363 (3 Ad. & El. 193). (2) Commentaries, Vol. 3, p. 108.

from some person who holds the bill when it is dishonoured, or is a party to the bill, or who would, on the same being returned to him, and after payment, be entitled to require reimbursement thereof.

The notice, by the terms of the rule as laid down by the Court of Queen's Bench, must be given in due time by the party to the bill, that is, in due time, if he himself were suing; and, consequently, the case of notice by a party who had himself been already discharged by the *laches* of the holder, is excluded. So, the terms of the rule as laid down by Mr. Justice Story seem to exclude the case of a party to the bill, who could not himself sue upon it on paying the amount of the bill; at least they must be so understood, otherwise the mischief would happen which was pointed out by *Mr. Jervis*, that there might be a bill with twenty indorsements, which the holder might retain twenty days after its dishonour, and then recover against the drawer *on a notice then [*235] given to him by the first indorsee, which that indorsee himself could not do. Such a notice would not be in good time if given by the first indorsee, and would therefore be bad, and not support an action by the last. The rule equally excludes the case of notice by an acceptor, who never could sue himself upon the bill after taking it up; and the instances in which a notice by an acceptor has been held good at Nisi Prius (1), are explained by Mr. Justice Bayley (2) on the supposition, that in these the acceptor had a special authority to do so. But in the present case, Vaughan, in whose name the notice was given, was not discharged by the *laches* of the holder at the time it was given, and a notice by him on the 26th would have been in sufficient time to support an action by him, and, consequently, an action by the plaintiff. There is therefore no objection to the notice on that ground; nor would there have been any, if the attorney had omitted to state on whose behalf he applied. It was so held in *Woodthorpe* v. *Lawes* (3), and had been previously laid down in Chancellor Kent's Commentaries, (vol. 3, p. 108), who says, that any agent in possession of the bill may give the notice, and it need not state at whose request it was given, nor who was the owner of the bill.

It remains, therefore, to consider, what is the effect of giving an untrue description of the party on whose behalf it was given. This point has never been decided; for in *Chapman* v. *Keane*, the only

(1) 1 Chit. R. 227; 4 Campb. 87.
(2) Bayley on Bills, ed. 1830, ch. 7, s. 2, p. 254, &c.
(3) 2 M. & W. 109.

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case which bears upon it, the plaintiff's clerk, who gave the notice, must have been authorised, by the nature of his employment, to give it on behalf of the plaintiff, as he was, by the express authority of the holder, to give it for him; and the notice stated no untruth. Here there is an untrue statement, but made unintentionally, and by mere mistake.

[236] There is, no doubt, a difference between the two cases, where a notice is given by an authorised person, without stating on whose behalf it is given, and where untrue information is afforded. In one case, the party is put on inquiry, if he thinks fit to make it; in the other, he is misinformed. What, then, ought to be the result of that misinformation? It is to be recollected, that, whether the party is misled or not as to the person giving the notice, the great object of a notice is answered by the information of the dishonour of the bill, and the person to whom notice is given is thereby enabled to withdraw his effects from, or take his remedy against, the prior parties. And we think it reasonable to hold, that the misrepresentation of the name of the person on whose behalf notice is given ought not wholly to avoid the notice, but only to place the party giving it in the same situation, as to the party to whom it was given, as if the representation had been true; and, therefore, the defendant ought to have every defence against the plaintiff that he would have had if the notice had been really given by the party named: and this is in analogy with the law as to contracts with factors acting for concealed principals, and similar cases, where the contract is not avoided by the mis-statement, but the other party has all the equities against the real as he would have had against the apparent contractor. If, therefore, in the present instance, the notice by Vaughan would have been bad, (as it would have been had he been discharged by *laches*, or had no right of action on the bill against the defendant if he had taken it up), the defendant would have had a defence; if good, as upon the evidence it appears that it would have been, the defendant has not been injured, and has no right to complain of the misrepresentation.

We think, therefore, the ruling of the learned Recorder was right, and the rule ought to be discharged.

Rule discharged.

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(15 Meeson & Welsby, 237—243.)

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In case, the declaration stated, that the plaintiff was lawfully possessed of a mill, and by reason thereof of right ought to have and enjoy the benefit of the water of a watercourse which ran and flowed, by means of a weir therein erected a little above the plaintiff's mill, being kept at a certain height, unto the said mill of the plaintiff, for supplying it with water for the working thereof; and complained, that the defendant wrongfully pulled down the weir, and placed and kept it at a lower height than it ought to have been, &c.

The defendant pleaded, that, before and at the times when &c., he was the occupier of a certain close adjoining to the watercourse, and that he and all others the occupiers for the time being of the said close for twenty years next before the commencement of the suit, enjoyed, as of right and without interruption, the right of from time to time, as occasion required, removing a part of the weir, and placing and keeping it at a lower height than the rest, to such an extent and for such a time as was necessary for diverting enough of the water to irrigate the said close; that, at the times when &c., irrigation was necessary for the close, wherefore the defendant removed the said part of the weir, and placed and kept it at such lower height, to such an extent and for such a time as, and no more or longer than, was necessary for diverting the water for the irrigation of the said close: *quæ sunt eadem*, &c.

Held, that this plea was good; that it was not an argumentative traverse of the right alleged in the declaration, inasmuch as it set up a right which, under the stat. 2 & 3 Will. IV. c. 71, was not complete until the commencement of the suit, and therefore was not inconsistent with the plaintiff's right to have the weir at a greater height at the time of the act complained of.

CASE. The first count of the declaration stated, that, before and at the time of the committing of the grievances &c., the plaintiff was, and from thence hitherto has been, and still is, lawfully possessed of a certain rolling-mill, with the appurtenances, situate &c., and by reason thereof of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or watercourse, which during all that time of right ought to have run and flowed, and until the diversion hereinafter mentioned of right had run and flowed, and still of right ought to run and flow, by means of a certain weir therein erected, a little above the said mill of the plaintiff, being kept at a certain height, unto the said mill of the plaintiff, for the supplying the same with water for the working thereof. Breach, that the defendant, on &c., wrongfully &c. pulled down the said weir, and placed and fixed the same at a much lower height than it then and there ought to have been placed and fixed, and kept and continued the same at such low height as aforesaid, &c.

(1) Cited by LINDLEY, L. J., in *Hollins* v. *Verney* (1884) 13 Q. B. Div. 304, 306, 53 L. J. Q. B. 432.—A. C.

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Plea, that, before and at the said several times when &c., the defendant was the occupier of a certain close called &c., next adjoining to the said watercourse in the declaration mentioned,
[*238] and that the defendant and all other *the occupiers for the time being of the said close, for the period of twenty years next before the commencement of this suit, enjoyed, as of right and without interruption, the right of from time to time, as occasion required, removing a part of the said weir, and placing and fixing the same at a lower height than the rest of the said weir, and of keeping and continuing the said part of the said weir at such low height as aforesaid, to such an extent and for such a time as was necessary and proper for the purpose of diverting and turning away a reasonable quantity of the water of the said watercourse, to irrigate the said close, and of thereby irrigating the said close, for the more beneficial enjoyment thereof, as to the said close belonging and appertaining: and the defendant says, that, before and at the said time when &c., irrigation was necessary for the said close, wherefore the defendant, at the said several times when &c., removed the said part of the said weir, and placed and fixed the same at such lower height, to such an extent and for such a time as, and no more or longer than, was necessary and proper for the purpose of diverting and turning away a reasonable quantity of the water of the said watercourse, to irrigate the said close, and did then thereby irrigate the said close, doing no more than was necessary and proper in that behalf, and doing no unnecessary damage to the plaintiff, as he lawfully might for the cause aforesaid; *quæ sunt eadem*, &c.

Special demurrer, assigning for causes, that the plea is an argumentative denial of so much of that part of the declaration to which it is pleaded, as alleges the plaintiff to be entitled, as therein in that behalf mentioned, to have and enjoy the benefit and advantage of the water of the said stream; that it is also an argumentative denial of so much of that part of the declaration to which it is pleaded, as alleges, in the manner therein mentioned, that the water of the said stream or watercourse of right ought to
[*239] have run and *flowed, and of right had run and flowed, by means of the said weir, unto the said mill: that the plea amounts to the general issue, and is an argumentative traverse of the defendant's having been guilty of the grievances as to which the plea is pleaded. Joinder in demurrer.

The case was argued during the present sittings (Feb. 18), by

Peacock, in support of the demurrer:

This plea is bad. It is an indirect denial, either of the right alleged in the declaration, or of the wrongful act. If the defendant has a right to lower the weir for the purpose alleged in the plea, it amounts to a denial of the plaintiff's right always to have it higher. All that the plaintiff complains of is, that the defendant put the weir lower down than he the plaintiff had a right always to have it. The defendant, in effect, denies the plaintiff's right to that extent; or else he, in effect, denies the breach by wrongfully lowering the weir.

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(PARKE, B.: The case of *Frankum* v. *Earl of Falmouth* (1) shows that Not guilty only puts in issue the actual diversion of the water; this plea, therefore, does not amount to Not guilty; but it seems to be an argumentative denial of the right alleged by the plaintiff always to have the weir kept at a certain height.)

It therefore gives no colour to maintain the action.

The COURT then called upon

Willes, *contrà*:

This plea is good. It is not an argumentative denial of the right alleged in the declaration. If it were, it should conclude with a traverse; but this plea could not, because it does not disclose facts necessarily inconsistent with the declaration. The plea is founded on the stat. 2 & 3 Will. IV. c. 71, the 5th section of which renders it necessary for a defendant, who relies on any proviso, exception, *&c., or on any other cause or matter of fact or of law, [*240] not inconsistent with the simple fact of enjoyment by the plaintiff, to plead it specially. The plea may be true, if any proviso, exception, &c., exist not inconsistent with the general right claimed by the plaintiff.

(PARKE, B.: This declaration is not framed under Lord Tenterden's Act, but at common law, on the plaintiff's possession merely. The 2 & 3 Will. IV. c. 71, s. 5, does not apply to pleas to a declaration in an action on the case at common law, founded on the possession of the plaintiff: it leaves the pleadings upon such a declaration as before. Then your plea amounts to this, that at the time in question the weir ought not to be at the height claimed by the plaintiff, because of the defendant's prior right. That cannot

(1) 2 Ad. & El. 452; 4 Nev. & M. 330.

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be true, if the plaintiff had at that very time a right to have it at that height.)

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The plea does not say anything as to what was the right of the defendant "at the said time when &c.," except by relation to the twenty years; and it would depend entirely on the time at which the action was brought, whether any right existed under the statute.

(PARKE, B.: You say it is consistent with the plaintiff's right at the time of the trespass, that the defendant had then an inchoate right, which has become perfect since, by the completion of the twenty years.)

Yes; in analogy to the decision on the stat. 2 & 3 Vict. c. 29 (1): *Unwin* v. *St. Quintin* (2).

(PARKE, B.: You only undertake to cover twenty years at the commencement of the suit; therefore it must have been less at the time of the trespass.)

The plea therefore gives colour to the plaintiff, by admitting a right at the time of the trespass, and sets up a defence not inconsistent with it, by the perfecting of the defendant's right by the completion of the twenty years at the time of action brought.

Peacock, in reply:

[*241] If the defendant here intended to give *colour, he ought to have done so expressly.

(PARKE, B.: *Mr. Willes* says there is implied colour given.)

The plea does not show, that, at the time of the wrongful act, no complete right had accrued to the defendant, and that it has since accrued; because the enjoyment for twenty years "next before the commencement of the suit" may, in truth, have been an enjoyment for a much longer period. To make the plea good, on the ground on which the defendant now relies, it should have shown that, at the time of the wrongful act, nineteen years only had elapsed, and that the twenty years have since been completed. There is nothing here to show that the defendant had not enjoyed the right for twenty years at the period of the trespass.

(1) Repealed by 12 & 13 Vict. c. 106, s. 1.—A. C.

(2) 11 M. & W. 277.

(PARKE, B.: The defendant only undertakes to show twenty years' enjoyment continually up to the commencement of the suit; therefore it must be less at the time of the trespass.)

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Not necessarily; it may have been more.

(PARKE, B.: The essence of the defence is, that the enjoyment has continued for twenty years up to the commencement of the suit. The Act of Parliament is so worded, that though there have been fifty years' enjoyment up to the time of the act done, that is no defence, unless it continues up to the time of the commencement of the suit. Then this plea seems to admit that the plaintiff had a right at the time of the trespass, and sets up that the defendant had then an inchoate right, which has since been matured by twenty years' enjoyment up to the commencement of the suit, and so that he is in the condition of a party having a title by non-existing grant. If so, it seems to me that the plea does give colour.

ROLFE, B.: He pleads that which is never more than an inchoate right until the action is brought.)

Then if the plea gives colour, it destroys it again: that is not giving a colour to bring the action.

(PARKE, B.: Is it not enough to give a colour of title to complain of the trespass?)

No; the colour necessary is a colourable right to maintain the *action. In *Dr. Leyfield's* case (1) it is said, that "colour as a colour ought to have continuance, although it wants effect;" and that "it ought to be such a colour, that, if it was of effect, would maintain the nature of the action." [*242]

(PARKE, B.: That is, it must have continuance down to the time of the trespass. *Wright* v. *Williams* (2) shows that the periods of time mentioned in the Act of Parliament cannot be construed to mean twenty or forty years before the act complained of.

ROLFE, B.: The act is legal or illegal, according to the result of what happens afterwards; and the defendant pleads that that has happened afterwards which has made it legal.)

Cur. adv. vult.

(1) 10 Co. Rep. 91 b.

(2) 46 R. R. 265 (1 M. & W. 77).

WARD v. ROBINS.

The judgment of the COURT was now delivered by

PARKE, B.:

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We who heard the argument in this case, namely, my brothers ROLFE and PLATT, and myself, have considered it, and are of opinion that the plea is good. (His Lordship stated the pleadings, and continued:) We come to the conclusion that the plea is not bad as an argumentative traverse, which is the ground of objection stated in the special demurrer, on account of the peculiar nature of the right given by Lord Tenterden's Act, from twenty years' enjoyment by the occupier. Such enjoyment, in order to give a right under that statute, must be up to the time of the commencement of the suit, not up to the time of the act complained of; and, consequently, an enjoyment for twenty years or more before that act gives only what may be termed an inchoate title, which may become complete or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement of the suit. This apparent absurdity, arising from a strict construction of the Act, has already [*243] been fully considered by this COURT in the *case of *Wright* v. *Williams* (1), and the literal interpretation adhered to, the COURT intimating its opinion that the mischief of such a construction was rather apparent than real; and the decision in that case was fully approved of and acted upon by the Court of Queen's Bench, in the case of *Richards* v. *Fry* (2). The plea, therefore, which states an inchoate right at the time of the act complained of, but not a complete right under the statute, gives an implied colour of title to the plaintiff at the time of the act complained of; it confesses his right at that time to have the weir of a certain height, but avoids that right by showing that the defendant was then in such a position, as that by matter subsequent he had then a right to pull down a part of the weir. Had the plea, as it might have done if the facts warranted it, stated a complete right in the defendant to reduce the height of the weir at the time of the act complained of, by non-existing grant, or prescription, it would certainly have been an argumentative traverse, as being inconsistent with the plaintiff's right at that time to have the weir of the height claimed, and would have been bad without a special traverse of the plaintiff's right. But, as the plea is founded on Lord Tenterden's Act only, no title under that Act can be absolutely good at the time of the act done, however long the possession might have been. The plea, stating a title

(1) 46 R. R. 265 (1 M. & W. 77). (2) 45 R. R. 816 (3 Nev. & P. 67).

under that act by prior and subsequent enjoyment together, is not inconsistent with the plaintiff's alleged right at the time; and therefore is not an argumentative traverse, but is good by way of confession and avoidance. Our judgment is for the defendant.

Judgment for the defendant.

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HILLS AND ANOTHER *v.* SUGHRUE (1).

1846. *Feb.* 13.

(15 Meeson & Welsby, 253—263.)

[253]

By a charter-party, the owner of the ship agreed that she should proceed direct to Ichaboe, and there load a full and complete cargo of guano, by the ship's boats and tackle, and by the labour of the crew, and being so loaded, should proceed therewith to Cork or Falmouth, &c., and deliver the same, on being paid freight, at 4*l.* 15*s.* per ton, restraint of Princes and rulers, the acts of God and the Queen's enemies, fire, and perils of navigation, always excepted. Twenty-one working days to be allowed to the charterers, if the ship were not sooner discharged, at the port of unloading. The charterers to ship bags and other materials requisite for loading the ship, and to supply the stores for the vessel, at cash prices, for the voyage, and to deduct the amount from the balance of freight; but in the event of the vessel being lost, or any other unforeseen causes preventing the completion of the charter-party, the owner agreed to pay the charterers the amount of their disbursements for such stores.

To a declaration on this charter-party, alleging as a breach of it, that the defendant, the shipowner, did not load a full and complete cargo of guano on board the ship at Ichaboe, he pleaded a plea, which stated, in substance, that he was prevented from doing so by an unforeseen cause, namely, that on the arrival of the ship at Ichaboe, and within a reasonable time afterwards, no guano was to be found there; and that he had paid to the plaintiffs the amount of their disbursements for stores for the vessel:

Held, that this plea was bad in substance, for that the fact of no guano being to be found was not such an "unforeseen cause preventing the completion of the charter-party," as entitled the defendant to pay the amount of the disbursements, and treat the charter-party as at an end, but that he was nevertheless bound by his positive contract to load a full cargo.

ASSUMPSIT. The declaration stated, that, on the 21st September, 1844, by a certain memorandum in writing then made by and between the defendant, therein described *as owner of the ship [*254] called the *Seppings*, &c., and the plaintiffs, the plaintiffs and the defendant then agreed that the said ship should proceed direct to Ichaboe, one of the Guano islands, on the west coast of Africa, and there load a full and complete cargo of guano, free from dirt and

(1) Distinguished by WILLES, J., in *Clifford* v. *Watts* (1870), L. R. 5 C. P. 577, 586, 40 L. J. C. P. 36, 43.—A. C.

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rubbish, and in as dry a state as practicable, by the ship's boats and tackle, and by the labour of the crew, &c.; and being so loaded, should therewith proceed to Cork or Falmouth for orders, which were to be in waiting at both ports, whether to discharge there or at a safe port in the United Kingdom, and deliver the same, on being paid freight, at the rate of 4*l.* 15*s.* sterling per ton; and which freight the plaintiffs thereby bound themselves to pay for every ton of guano so delivered at the port of discharge, restraint of Princes and rulers, the acts of God and the Queen's enemies, fire, and all and every the dangers and accidents of the seas, &c., always excepted; the freight to be paid, one-third on arrival at the port of discharge, and the balance by one approved bill on London at three months' date, or in cash, under discount, at the plaintiffs' option. Twenty-one working days were to be allowed the plaintiffs, if the ship was not sooner discharged at the port of unloading, and ten days on demurrage, over and above the said laying days, at 7*l.* per day. The plaintiffs to ship bags and other materials requisite for loading the ship; the vessel, upon her return, if in London, to be addressed to Messrs. Cramond and Schuyler. The cargo to be taken from alongside the vessel at the expense and risk of the plaintiffs, and the plaintiffs to supply the stores for the said vessel, at cash prices, for the voyage, and deduct the amount from the balance of freight; but, in the event of the vessel being lost, or any other unforeseen cause preventing the completion of this charter-party, the defendant thereby agreed to pay the plaintiffs the amount of the disbursements for the stores supplied by him to the ship. The declaration set forth other stipulations of the charter-party, not material

[*255] to *this report; it then alleged mutual promises, and averred that the plaintiffs shipped on board the vessel the bags and other materials requisite for loading the ship, and supplied the necessary stores; and that, although the defendant was not prevented by restraint of Princes, &c. &c., from fulfilling the agreement on his part, and although, within a reasonable time, the plaintiffs' said orders, directed to the captain at Cork and Falmouth, which were in waiting at both ports at the arrival of the ship at Falmouth, and thereby directed that the ship should proceed to London to discharge her cargo, and although the plaintiffs were always ready and willing to take such cargo from alongside the vessel at their own expense and risk, and to pay freight for the same according to the said indenture, &c., of which proceeding the defendant had notice; and although the said ship did, to wit, on &c., proceed direct to Ichaboe

aforesaid, and arrived there, to wit, on &c., and although a reasonable time for her to load the cargo in the said memorandum mentioned at Ichaboe aforesaid, and to proceed therewith to Cork or Falmouth, and thence to London, elapsed before the commencement of this suit; yet the defendant has disregarded the said memorandum and his promise, in this, to wit, that the said ship did not, at Ichaboe aforesaid, load a full and complete cargo of guano, free from dirt and rubbish, &c. &c., by the ship's boats and tackle, and by the labour of the crew, but, on the contrary thereof, loaded a very small quantity, to wit, twenty tons of guano, and no more, and the same was full of dirt and rubbish, &c. &c.

The defendant pleaded, that, the plaintiffs having supplied the stores for the said vessel at cash prices, amounting to the sum of 183*l.* 15*s.* for the said voyage, the said ship did, after the making of the said memorandum or charter-party, to wit, on &c., proceed direct to Ichaboe aforesaid, and arrived there, to wit, on &c.; and that, upon and after the arrival of the said ship at Ichaboe aforesaid, certain, to wit, the said unforeseen causes preventing the *completion of the said memorandum or charter-party, mentioned [*256] and provided therein, arose, that is to say, the unforeseen causes as hereinafter mentioned, which then and there, and afterwards, wholly prevented the completion of the said memorandum or charter-party: and the defendant in fact says, that upon and after the arrival of the ship at Ichaboe aforesaid, and within a reasonable time and with all reasonable despatch after the arrival of the said ship at Ichaboe aforesaid, the master and crew of the said ship, to wit, Charles Grant, then being the master of the said ship, and one William Hall, being then chief mate of the same, and eight other persons of the crew of the said ship, landed at Ichaboe aforesaid, with the ship's boats and tackle, for the purpose of procuring the said guano in the said memorandum or charter-party mentioned, free from dirt and rubbish, and in as dry a state as practicable, wherewith to load a full and complete cargo in and on board the said ship, in fulfilment of the terms and conditions of the said memorandum or charter-party; yet the said defendant avers, that there was not, at the time the said persons so landed on the said island for the purpose aforesaid, nor within a reasonable time thereafter, any guano as in the said memorandum or charter-party specified, free from dirt and rubbish, to be had, procured, or obtained, wherewith to load a full and complete cargo, or any part thereof, for the said ship, or to be had or procured in or upon the

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said island: whereupon, and by reason of such unforeseen cause as aforesaid preventing the completion of the said memorandum or charter-party, the said ship afterwards, to wit, on the 17th day of September, 1845, necessarily and unavoidably returned from Ichaboe aforesaid, without a full and complete cargo of guano, free from dirt and rubbish, as in the said memorandum specified, or any part thereof: and thereupon afterwards, and after the return of the said ship from Ichaboe aforesaid to England (the plaintiffs and defendant then having notice of the premises aforesaid), the defendant, to

[*257] wit, *on &c., pursuant to the terms and conditions of the said memorandum or charter-party, paid to the plaintiffs the said amount of the said disbursements in the said memorandum or charter-party provided, and in the said first count mentioned, for the stores so supplied by them to the said ship, as in the first count of the declaration mentioned, the same amounting to the said large sum of money, to wit, to the sum of 183*l.* 15*s.*, according to the terms and conditions of the said memorandum or charter-party: Wherefore the defendant saith, that the plaintiffs ought not to have or maintain their aforesaid action thereof against the defendant; and this the defendant is ready to verify, &c.

Special demurrer, assigning for causes (*inter alia*), that the plea improperly assumes that the stipulation in the said memorandum contained, providing for the event of the said vessel being lost, or any other unforeseen causes preventing completion, imports that the defendant was not to be liable for the breach of the said contract to load, proceed with, discharge, and deliver, as therein mentioned, such cargo of guano as aforesaid, in the event of any unforeseen causes preventing the defendant from performing such contract; whereas the said stipulation imports no more than that, in the event thereby provided for, the defendant was to pay to the plaintiffs the amount of their disbursements for stores supplied by them to the ship for the voyage; and that, though the plea does not deny in any way either the contract or the breach of contract above alleged, or the averment in the declaration that the defendant was not prevented from performance by restraint of Princes, &c., yet the defendant attempts to deny his liability for such breach; and further, that the inability of the defendant, by reason of the matters in the plea mentioned, to perform his contract, affords no defence in law to the plaintiff's claim for damages for the non-performance of it, &c., &c.

Joinder in demurrer.

J. Henderson, in support of the demurrer:

This charter-party differs in an important respect from all those upon which such questions have arisen in reported cases. In all of them, the charterer expressly or impliedly stipulated to provide a cargo, and was bound to a particular number of days for loading. Here he does not contract to provide any cargo, but the owner, on the other hand, expressly and unqualifiedly contracts to load a full and complete cargo.

(PARKE, B.: He probably never intended so to contract, but only to load a cargo of guano, if guano were found.)

This is a peculiar case, in which the owner might reasonably so contract, because nothing more was necessary than the mere personal labour of the master and crew: it is distinct in its nature from any other cargo. (He cited *Blight* v. *Page* (1), and *Paramour* v. *Yardley* (2).)

The COURT called on

Hoggins, contrà:

First, this declaration is bad. The contract mentioned in the charter-party is merely a contract by the owner to load a cargo of guano, not to get and load it. His obligation is limited to the loading in the manner pointed out, with ship's tackle and crew: and it was the charterer's duty to provide the cargo for that purpose. The owner's contract is satisfied, if, with his crew, he loads the cargo provided by the charterer.

(PARKE, B.: In that case, the contract would have been to receive and load the cargo received from the charterer, and there would have been lay days for loading; but that is not so here.

ROLFE, B.: Who was to get the cargo?)

The charterers' factor there.

(PARKE, B.: Is a factor to be found in the island of Ichaboe? Very probably the defendant meant only to get the cargo, if it was to be found; but he has not said so. The case is *like that of [*259] *The Marquis of Bute* v. *Thompson* (3); the defendant has entered into a positive contract, and he must perform it.)

(1) 6 [R. R. 795, *n.* (3 Bos. & P. 295, *n.*).

(2) Plowd. 539.

(3) 67 R. R. 688 (13 M. & W. 487).

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It is submitted, that this is no more than the ordinary contract between the charterer and the shipowner.

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(PARKE, B.: No; quite otherwise: the ordinary contract is to receive the cargo from the agents of the charterer, with lay days for loading. There is no doubt as to this part of the case; the defendant has undertaken to load the cargo, and he must load it.)

Secondly, the case mentioned in the plea is specially provided for by the charter-party, when it stipulates, that, in the event of any unforeseen causes preventing the completion of the charter-party, the defendant shall repay the plaintiffs the amount of their disbursements for the ship's stores for the voyage.

(PARKE, B.: That only provides for the repayment of the disbursements: it does not say, that, if unforeseen causes should arise to prevent the getting of the guano, the charter-party shall be at an end.)

It must reasonably be so interpreted; because it cannot mean that the owner is to be at all the expense and responsibility of the voyage, and then to be liable for not supplying a cargo which he could not obtain. The return of disbursements must be applicable to that case. There is nothing to show that the owner is to be an insurer of a full cargo of guano. The "other unforeseen causes" must apply to such a case as this. The words are: "preventing the completion of the charter-party," not "the completion of the voyage:" the parties, therefore, do not contemplate merely the loss of the ship on the voyage, but the occurrence of events which may defeat the performance of the undertaking. It being mere matter of speculation whether any guano was left on the island of Ichaboe, the parties thus provide for the event of there being none.

[*260] (PARKE, B.: You say, if anything occurs *to prevent the completion of the charter-party, the advances are to be repaid, and nothing else: the other side say, that it is only an advance of payment by way of freight, which, if no freight becomes payable, is to be repaid; but in the meantime the party must perform his contract, which is to procure and load a full cargo, or to pay damages if he does not. There is nothing releasing him from the performance of his positive contract.)

The defendant contends, that this is in the nature of a defeasance

on the whole agreement, which is an agreement between these parties as co-adventurers. The one is to receive freight, if the adventure is successful; if it be not, the other is to receive back his stores, and the adventure is at an end. It cannot have been intended, that the one should get a profit by the rise of the market, whereas the other gets nothing, in one event, but a mere remuneration for his labour, and in the other is to be subject to heavy damages. If that were the contract, words would have been introduced guaranteeing the providing of guano at all events. The reasonable construction is, that, there being no cargo to be obtained of which the plaintiff could make a profit, the defendant puts him beyond loss by the return of his advances.

J. Henderson, in reply, was stopped by the COURT.

PARKE, B.:

I think this plea is bad in substance. The question arises entirely on the construction of this charter-party. The first part of it provides, that the ship, of which the defendant is the owner, shall proceed direct to Ichaboe, and there load a full and complete cargo of guano, free from dirt and rubbish, &c., by the ship's boats and tackle, and the labour of the crew, and, being so loaded, shall proceed direct to Cork or Falmouth, &c. Then follows a provision that the plaintiffs shall ship bags and other materials requisite for loading the ship, and shall supply the stores for the *vessel, at cash [*261] prices, for the voyage, and deduct the amount from the balance of freight; and then a clause discharging the charterer from liability in the event of the vessel being lost, or of any other unforeseen causes preventing the completion of the charter-party; but there is no provision for his discharge in the case of inability to find a cargo of guano; and in the clause providing for the lay-days, there is no mention of days for loading the cargo. If the instrument stopped here, there could be no doubt that this is an absolute stipulation to provide a full cargo of guano, and, however he may be prevented from doing so, that the defendant would be bound by that stipulation. He is to receive freight at a high rate, and it looks very much like a contract for supplying guano at that price. But then *Mr. Hoggins* contends, that, inasmuch as it is provided, that in the event of any unforeseen cause preventing the completion of the charter-party, the defendant is to pay the plaintiffs the amount of the disbursements for the stores supplied by them to the

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ship, and as it could not be foreseen that guano would not be found at Ichaboe in sufficient quantity to load, he is, in such an event, discharged from liability on repayment of the amount of such disbursements; but, on fully considering that clause, from which alone any doubt could arise, it seems to me that none really exists. The stipulation of the plaintiffs is in reality nothing more than a stipulation to pay the amount of the necessary disbursements for stores for the voyage, in advance of the freight; then, if the ship be lost, or any other unforeseen cause arise to occasion a loss of the freight, the charterer is to be repaid that advance. If the parties meant to refer to any unforeseen cause which might prevent the loading of a cargo, they would have said so; but they have not; they have only said, that if the plaintiff do not repay himself his advances from the freight, the defendant shall repay it. But if the defendant do not perform his positive contract, by loading a cargo, he is to be answerable in damages, to be [*262] *measured, of course, by the market price of the guano: if it rises, the damages will be substantial; if it falls below the freight, they will be nominal. It is a positive obligation to procure and load a cargo; and the case resembles that of *The Marquis of Bute* v. *Thompson* (1), where there was an absolute covenant, by a lessee, to raise a certain quantity of coals in each year, and it was held to be no answer that no coals were to be got. Our judgment will therefore be for the plaintiffs.

ROLFE, B.:

I am of the same opinion. The exceptions in this charter-party are merely the ordinary ones; restraint of Princes and rulers, the acts of God and the Queen's enemies, fire, and the perils of navigation. Then there is a minor stipulation, that the plaintiffs shall supply the stores for the vessel, at cash prices, and deduct the amount from the balance of freight; and that, in case of the loss of the vessel, or any other unforeseen event preventing the completion of the charter-party, the defendant shall repay those disbursements. The parties contemplate that the freight may possibly never become payable, and therefore there is a stipulation for the repayment of the advances by the defendant; but this clause clearly has no reference to the earlier part of the instrument, wherein the defendant has positively contracted to load a full cargo.

(1) 67 R. R. 688 (13 M. & W. 487).

PLATT, B.:

The contract between these parties is, that a full cargo of guano shall be loaded on board the ship at Ichaboe, by the ship's boats and tackle, and by the labour of the crew. Upon that contract certain exceptions are engrafted, within none of which the present case falls. Then we are to read the subsequent stipulation, and see whether it comes within that; and I am of opinion that it does not. That stipulation is, that the plaintiffs shall supply the stores *necessary for the voyage at cash prices, and deduct the amount [*263] from the balance of freight; and, on the other hand, that in the event of the vessel being lost, or of any other unforeseen event preventing the completion of the charter-party, the defendant shall repay them that amount. It is clear, as my brother PARKE has said, that this payment was merely a payment beforehand of freight to be earned; and all the repayment is of the amount not earned; but it leaves all the other engagements of the charter-party untouched; and the defendant, therefore, is liable, on his express contract, to load a cargo, and is without defence to this action.

Judgment for the plaintiff.

EDWARD SLATER AND MARIA ANN, HIS WIFE, *v.* DANGERFIELD.

1845. *June* 28.
1846. *Feb.* 21.

(15 Meeson & Welsby, 263—276; S. C. 16 L. J. Ex. 139.)

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A testator devised lands to his grandson, G. D., to hold the same unto and to the use of the said G. D., for the term of his natural life; and from his decease, unto and to the use of all and every the lawful issue of the said G. D., their heirs and assigns for ever, equally, as tenants in common and not as joint-tenants, when and as he, she, or they should attain his, her, or their age or ages of twenty-one years. And the testator devised all the residue and remainder of his real and personal estate and effects, whatsoever and wheresoever, not before otherwise disposed of, to his daughter, S. D., absolutely, for her own sole and separate use.

Held, that, in the above devise, issue was to be construed "children," and therefore G. D. took an estate for life only, with remainder to his children as purchasers, and not an estate tail; and therefore that, on his death without issue, S. D. took under the residuary devise, notwithstanding a deed of disentailer executed by G. D. in his lifetime: for a deed of disentailer, executed under the 3 & 4 Will. IV. c. 74, has no effect in barring future contingent estates, unless the party executing it was in fact a tenant in tail.

THIS was an action of detinue for the title-deeds of an estate, of which the declaration alleged that the plaintiffs were lawfully possessed, as of their own property, in right of the plaintiff Maria

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Ann. The defendant pleaded *non detinet;* secondly, that the plaintiffs, in right of the said Maria Ann, were not possessed as of their own property of the deeds, &c. in the declaration mentioned. Issues thereon.

[*264]

By consent of the parties, the following case was stated, under a Judge's order, for the opinion of this Court:

Henry Taylor, of Barking, in the county of Essex, carpenter, being seised in his demesne as of fee of and in the hereditaments, for the deeds and writings relating to which this action is brought (and which are hereinafter described as and called, "the premises in question"), on the 21st day of August, 1823, duly made, signed, and published his last will and testament in writing, bearing date the same day and year aforesaid, and thereby (amongst other things) gave and devised the premises in question in the words following: "Also, I give and devise unto my grandson, George Dangerfield, all those three freehold messuages or tenements which I purchased of James Hawkins Hayllar, with the outhouses, yards, and gardens and appurtenances thereto belonging, situate in the High Street of Barking aforesaid, and now in the occupation of William Bowers, John Wallrond, and William Reed; also all that freehold piece or parcel of marsh land which I purchased of James Sanders, Esq., called Little Paradise Marsh, containing by estimation four acres or thereabouts, with the appurtenances thereunto belonging, situate in Barking aforesaid, and now in the occupation of James Crow, his under-tenants or assigns: To hold the same unto and to the use of my grandson, George Dangerfield, for and during the term of his natural life: And from and immediately after his decease, I do give and devise the same unto and to the use of all and every the lawful issue of my said grandson, George Dangerfield, their heirs and assigns for ever, equally, as tenants in common and not as joint-tenants, when and as he, she, or they shall attain his, her, or their age or ages of twenty-one years." And in the said will was also contained a devise and bequest of the residue and remainder of the real and personal estate of the said testator, in the *words or to the effect following, that is to say: "Also I give and bequeath all my stock and utensils in trade, household furniture, plate, linen, and china, and all other my real and personal estate and effects whatsoever and wheresoever, not hereinbefore by me otherwise disposed of, unto my said daughter, the wife of the said James Dangerfield, to and for her own sole and separate use, benefit, and disposal, independent of, and without being subject or

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liable to, the debts, control, management, or engagements of her present or any future husband she may marry, in manner hereinbefore mentioned."

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The said Henry Taylor, after the making of the said will, died seised of the said premises in question, and without having revoked or in any manner altered the same will, leaving the said George Dangerfield and Sarah Dangerfield respectively him surviving, and also leaving his grandson, Henry Wellington Taylor, his heir-at-law, and which said will was duly proved in the proper Ecclesiastical Court.

The said George Dangerfield entered into possession of the premises in question, and continued possessed thereof until the month of July, 1824, when he departed this life without having had any issue. The said George Dangerfield, on the 16th day of January, 1844, by an indenture of disentailer, duly executed by the said George Dangerfield, Eliza, his wife, and the said Henry Wellington Taylor, conveyed the premises in question to the said Henry Wellington Taylor and his heirs, to the uses, on the trusts, and for the purposes in that indenture mentioned.

The said Sarah Dangerfield, the residuary devisee, departed this life in the month of May, 1837, intestate, leaving Henry Dangerfield, her eldest son and heir-at-law.

The said Henry Dangerfield, on the 13th day of February, 1838, duly made and published his last will and testament in writing, bearing date on the same day and the year last aforesaid, in the words or to the effect following, that is to say, "First, I direct that all my just debts, funeral expenses, *and testamentary charges, be [*266] fully paid and settled. After which I bequeath the whole of my property, of whatever description, unto my wife Maria Ann Dangerfield, for her sole use and benefit, namely, my household furniture, my ready money, my funded property, my interest in the house and shop I occupy, my landed property, also my plate, and any kind of property I may die possessed of, for her sole use and benefit; and I also appoint my said wife Maria Ann Dangerfield my sole executrix."

The said Henry Dangerfield, after the making of his said will, namely, on the 10th day of April, 1839, departed this life without having revoked or in any manner altered the same, leaving the said Maria Ann Dangerfield his widow him surviving; and the said will was, soon after the decease of the said testator, duly proved in the proper Ecclesiastical Court.

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The said Maria Ann Dangerfield, after the decease of her said husband, namely, on the 20th day of January, 1844, intermarried with and became the wife of the plaintiff, Edward Slater, and is one of the plaintiffs. The defendant is, and was before and at the commencement of this action, in the possession of the deeds and writings for which this action is brought, and has refused to deliver them up to the plaintiffs, or to either of them, or to any one on their or either of their behalves, although he has had due notice of the intermarriage of the plaintiffs, and although the said deeds and writings have been, before this action brought, and since the intermarriage of the plaintiffs, duly demanded of him.

Copies of the said wills of the said Henry Taylor and Henry Dangerfield respectively, and also a copy of the said indenture of disentailer, and also a copy of the issues in this cause, are contained in the appendix to this case, and are for all purposes to be considered as constituting a part of this case, and by the Court, counsel, and all parties, to be used and referred to accordingly.

[267] The questions for the opinion of the Court are:

1st. Whether the said George Dangerfield took merely an estate for life in the premises in question, under and by virtue of the will of the said Henry Taylor?

2nd. Whether, in the events which happened, the said Sarah Dangerfield took an estate in fee-simple, expectant on the decease of the said George Dangerfield in the premises in question, under and by virtue of the said will?

If the Court should be of opinion, that, under and by virtue of the said will, the said George Dangerfield took merely an estate for life, and that the said Sarah Dangerfield took an estate in fee-simple in remainder in the premises in question, and that the said estate was not defeated by the deed of disentailer, then the defendant agrees that judgment shall be entered generally for the plaintiffs, by confession of the defendant, in respect of all the deeds, &c., mentioned in the declaration, damages 3,000*l.* (to be reduced to one shilling upon the delivering up of the said deeds, &c.): but if the Court shall be of opinion that the said George Dangerfield took a greater estate, or that the said Sarah Dangerfield did not take an estate in fee-simple in remainder in the premises in question, under or by virtue of the said will of the said Henry Taylor, or that the same was defeated by the said deed of disentailer, then the said plaintiffs agree that a judgment shall be entered against the plaintiffs of *nolle prosequi;* such judgment in either case to be

entered immediately after the decision of this cause, or otherwise as the Court may think fit.

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The case was argued at the sittings after Trinity Term, 1845 (June 28), by

Smirke, for the plaintiffs: who argued that the word "issue," in this will, was used by the testator as being synonymous with "children;" that he appeared in various parts of the will to use the two words indifferently, having, *in three out of eleven devises to grandchildren and their descendants, used the word "children" only, in others the word "issue" only, in others both words; while the concluding proviso, which overrode them all, appeared to show that he had the same disposing intention as to all; that, in the direction to his executors to apply the rents for the maintenance of the issue of his grandchildren, it was clear he could not mean their issue generally, that is, all their descendants. That there was no inflexible rule of law to prevent this construction prevailing, and the word "issue" being interpreted to mean "children," where upon the whole will such appeared to be the intention of the testator. He contended, therefore, that George Dangerfield took for life only, and that on his death without issue, the residuary devise took effect. He cited and commented on the following authorities: *Festing* v. *Allen* (1), *Doe* d. *Hills* v. *Hopkinson* (2), *Merest* v. *James* (3), *Lees* v. *Moseley* (4), and *Greenwood* v. *Rothwell* (5).

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Secondly, he contended, that the words of the residuary devise carried all the real estate which remained undisposed of by the devise to George Dangerfield and his children, &c., to Sarah Dangerfield, and by his death without issue, her estate became an indefeasible estate in fee. And, lastly, that the deed of disentailer executed by George Dangerfield had no operation to defeat that estate, for that, under the stat. 3 & 4 Will. IV. c. 74, s. 3, it had the effect of a recovery at common law only when made by a tenant in tail, which, for this part of the argument, he was assumed not to be.

Bovill, *contrà*, urged, that there was no such expressed *intention in the will, to use the word "issue" as a word of purchase, as the Court could give effect to consistently with the rules of law, which considered it as a word of limitation: that, in some cases, the words "children," and "son," had even been held to be words

[*269]

(1) 12 M. & W. 279.
(2) 64 R. R. 477 (5 Q. B. 223).
(3) 1 Brod. & B. 484.
(4) 41 R. R. 348 (1 Y. & C. 589).
(5) 63 R. R. 423 (5 Man. & G. 628).

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of limitation, as in *Robinson* v. *Robinson* (1), *Broadhurst* v. *Morris* (2), *Mellish* v. *Mellish* (3), and *Doe* d. *Garrod* v. *Garrod* (4); but that, according to all the authorities, "issue" was *primâ facie* to be read as a word of limitation, and as *nomen collectivum*, indicating descendants of every degree, and being equivalent to "heirs of the body": *Doe* v. *Applin* (5), *Denn* v. *Puckey* (6), *Doe* d. *Cock* v. *Cooper* (7), *Mogg* v. *Mogg* (8), *King* v. *Burchall* (9), *Tate* v. *Clark* (10), *Jesson* v. *Wright* (11), *Doe* d. *Atkinson* v. *Featherstone* (12). He urged, that a consideration of the other parts of the will aided this construction: first, there were no children in existence at the time of making the will; secondly, there was no devise over on failure of issue; and, upon the whole context, the words went to show that the testator meant to designate a class through which the descent was to pass; and that this construction avoided all the difficulty which arose from having an indefinite class of parties to take under the devise. That there were many cases showing that the words of division, "as tenants in common," would not prevent an estate tail from being acquired: *Jesson* v. *Wright*, *Doe* d. *Cock* v. *Cooper*, *King* v. *Burchall*, *Denn* v. *Puckey*, *Bennett* v. *Earl of Tankerville* (13).

Secondly, he contended that the residuary devise passed an estate for life only, and not a fee; the words "all other my real and personal [*270] estate," &c., being a designation of the *property, not of the interest: and cited *Doe* d. *Hurrell* v. *Hurrell* (14) and *Doe* d. *Lean* v. *Lean* (15).

Thirdly, that even if George Dangerfield took an estate for life only, the estates in his children were contingent estates, and the estate would in the mean time vest in the heir-at-law; and the deed of disentailer had the same effect as a fine or recovery would formerly have had, in divesting the contingent estates, and creating a tortious fee.

Smirke, in reply, relied on *Lees* v. *Moseley* and *Greenwood* v. *Rothwell* (16).

Cur. adv. vult.

(1) 1 Burr. 38.
(2) 36 R. R. 439 (2 B. & Ad. 1).
(3) 26 R. R. 436 (2 B. & C. 520).
(4) 36 R. R. 488 (2 B. & Ad. 87).
(5) 2 R. R. 337 (4 T. R. 82).
(6) 2 R. R. 601 (5 T. R. 299).
(7) 6 R. R. 264 (1 East, 229).
(8) 15 R. R. 185 (1 Mer. 654).
(9) 1 Eden, C. C. 424; 4 T. R. 296, *n.* (*d*).
(10) 49 R. R. 296 (1 Beav. 100).
(11) 21 R. R. 1 (2 Bligh, P. C. 1).
(12) 35 R. R. 491 (1 B. & Ad. 944).
(13) 19 Ves. 170.
(14) 24 R. R. 265 (5 B. & Ald. 18).
(15) 1 Q. B. 229; 4 P. & D. 662.
(16) The arguments and authorities in this case are so fully stated in the judgment, that it has been thought unnecessary to report the argument in greater detail.

The judgment of the COURT was now delivered by

PARKE, B.: www.libtool.com.cn

This was an action for the title deeds of an estate at Barking, and the only question is, whether the plaintiffs are the parties entitled to the land to which the deeds relate.

The question arises under the will of Henry Taylor, which bears date the 21st August, 1823, and which, so far as it is material to set it out, is as follows: "Also I give and devise unto my grandson, George Dangerfield, all those three freehold messuages or tenements which I purchased of James Hawkins Hayllar, with the outhouses, yards, and gardens, and appurtenances thereto belonging, situate in the High Street of Barking, aforesaid, and now in the occupation of William Bowers, John Wallrond, and William Reed; and also all that freehold piece or parcel of marsh land, which I purchased of James Sanders, Esquire, called Little Paradise Marsh, containing, by estimation, four acres or thereabouts, *with the appurtenances [*271] thereunto belonging, situate in Barking aforesaid, and now in the occupation of his undertenants or assigns: to hold the same unto and to the use of my said grandson George Dangerfield, for and during the term of his natural life; and from and immediately after his decease, I do give and devise the same unto and to the use of all and every the lawful issue of my said grandson George Dangerfield, their heirs and assigns for ever, equally, as tenants in common, and not as joint tenants, when and as he, she, or they shall attain his, her, or their age of twenty-one years." In the said will was also contained a devise and bequest of the residue and remainder of the real and personal estate of the said testator to the effect following (that is to say): "Also I give and bequeath all my stock and utensils in trade, household furniture, plate, linen, and china, and all other my real and personal estate and effects whatsoever and wheresoever, not hereinbefore by me otherwise disposed of, unto my said daughter, Sarah, the wife of the said James Dangerfield, to and for her sole and separate use and benefit and disposal, independent of and without being subject or liable to the debts, control, management, or engagements of her present or any other future husband she may marry, in manner hereinafter mentioned."

Henry Taylor died seised soon after the date of his will, and, on his death, George Dangerfield the devisee entered, and being seised, he, on the 18th of January, 1844, by an indenture of disentailer,

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conveyed the property in question to certain uses, under which the defendant, claiming title to the lands, obtained possession of the deeds in question.

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In July, 1844, George Dangerfield died, never having had any issue. Sarah Dangerfield, the residuary devisee, died in 1837; and all her right to the lands in question under the residuary devise has become vested in the plaintiffs.

This action is brought for the conversion by the defendant of the deeds in question; and it is admitted that a verdict shall be [*272] entered for the plaintiffs, if, under the circumstances, *they are entitled to the lands devised by George Dangerfield.

The point, therefore, to be decided, is, what estate George Dangerfield took. If he took an estate tail, then, by the deed of disentailer, the rights of all persons in remainder, including the plaintiffs, who claim under Sarah Dangerfield, the residuary devisee, have been barred, and the present action cannot be sustained; but if he took for life only, with remainder to his children as purchasers, then, as he never had any issue, on his death, the plaintiffs, as claiming under the residuary devisee, became entitled in possession, and will be entitled to recover in this action.

The question, therefore, is one of those which are of very frequent occurrence, namely, whether the word "issue" is to be treated as a word of limitation or a word of purchase. The general rule in such cases is clear and well established. The word "issue" in a will, *primâ facie*, means the same thing as heirs of the body, and is to be construed as a word of limitation; but this *primâ facie* construction will give way, if there be on the face of the will sufficient to show that the word was intended to have a less extended meaning, and to be applied only to children, or to descendants of a particular class or at a particular time.

Though, however, the rule thus stated is perfectly simple, yet its application is often very difficult. The real question in each particular case is, what are the circumstances which are to be considered sufficient to indicate that the word has been used in a restricted sense. Indeed, the rule itself is one not more applicable to the word "issue," than it is to the words "heirs of the body," or indeed to any other words which can be suggested. In all cases, the *primâ facie* import of words used by a testator is liable to be controlled or modified by the context.

When it was once established that a devise to a man and his issue, means the same thing as a devise to him and the heirs of

his body, it might have appeared reasonable to hold *that all the rules of construction applicable to the latter words were applicable to the former also; considering the great importance of abiding by general rules in the interpretation of wills, with the view of attaining as much certainty and uniformity of decision as the subject admits of. But the Courts have been less reluctant to narrow the *primâ facie* meaning of the word "issue," than of the words "heirs of the body," and have done so in some cases, so nearly resembling the present, and so incapable of being distinguished from it on any satisfactory ground, that we, without deciding what the construction would have been, if the words "heirs of the body" had been used, feel ourselves bound to take the same course, and to hold that the grandson, George Dangerfield, took an estate for life.

The case of *Greenwood* v. *Rothwell* (1) is precisely in point. That was a devise to J. G. for his life, and after his decease to all and every the issue of his body, as tenants in common, and the heirs of such issue. Under this devise the Court of Common Pleas decided that J. G. took an estate for life only. That case is a distinct authority for holding, that, where there is a devise to one for life, with remainder to his issue as tenants in common, with a limitation to the heirs general of the issue, the issue take as purchasers in fee. It would be impossible for us to decide in the case before us that the grandson took an estate tail, without at the same time overruling the case of *Greenwood* v. *Rothwell*. All the circumstances there indicating that the word "issue" was used as a word of purchase, and not of limitation, occur also in the case before us, with the further circumstance, that in the present case the parties to take under the description of issue, are only to take when and as they attain the age of twenty-one years, which brings the case very closely within the principle of *Merest* v. *James* (2), where a gift over, in *case of the issue dying under twenty-one, was of itself [*274] held sufficient to show that the word "issue" was used in its limited, and not its general sense. Whether the decision in that case was quite satisfactory, is not now the question, but it would be a strong thing, where, as in the present case, we find, as well the qualification which in *Greenwood* v. *Rothwell* was sufficient to induce the Court to treat the word "issue" as a word of purchase, as also the circumstances which in *Merest* v. *James* were considered to have the same effect, to hold that both those cases are to be disregarded,

(1) 63 R. R. 423 (5 Man. & G. 628). (2) 1 Brod. & B. 484.

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and that, acting on the same supposed rule of law, the more extended and legitimate meaning of the word "issue" must be adhered to.

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But it is not merely these two cases which we should have to encounter, in deciding that the grandson took an estate tail. Such a decision would be in direct opposition to the case of *Lees* v. *Moseley* (1), in this Court. That was a devise to H. J. for life, with remainder to his lawful issue, and their respective heirs, in such shares as H. J. should appoint; but in case H. J. should not marry and have issue who should attain twenty-one, then to testator's son and his heirs. The COURT, after great deliberation, held "issue" there to be a word of purchase, and that H. J. took for life only. The decision proceeded on the ground, that the issue were intended, in default of appointment, to take as tenants in common, and to take an estate in fee, but only in the event of their attaining twenty-one; and those circumstances were held sufficient to show, that "issue" was used in its restricted and not its *primâ facie* general meaning of descendants extending through all time. This case appears to us as not merely to be decisive of the present, but to go beyond it; for in that case there was what is not found here, namely, a devise over; a circumstance which has, in several cases, been mainly and even exclusively relied on, as the ground for

[*275] *deciding the word "issue" to have been used in its extended sense, and as a word of limitation. This was certainly the main ground on which the cases of *Doe* v. *Applin* (2) and *Doe* v. *Cooper* (3), relied on by the defendant, proceeded. The Court, in those and similar cases, construed the devise over in default of issue, as clearly meaning a devise on a general failure of issue; and proceeding on that construction of the devise over, it was a very natural corollary, that the original devise to the issue must have been also intended to embrace all issues, so as to make the objects of the devise co-extensive with those on failure of whom the devise over was to take effect; and this might fairly justify the Court in disregarding circumstances, which, but for the devise over, would have had the effect of narrowing the *primâ facie* meaning of the word "issue."

All the other cases relied on by the defendant will, on examination, be found either to have turned on the words "heirs of the body," and not the word "issue," or else to have wanted some of the circumstances, which, in *Merest* v. *James*, *Lees* v. *Moseley*, and

(1) 41 R. R. 348 (1 Y. & C. 589).
(2) 2 R. R. 337 (4 T. R. 82).
(3) 6 R. R. 264 (1 East, 229).

Greenwood v. *Rothwell*, were held to make the word "issue" a word of purchase, and not a word of limitation.

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Upon these authorities we feel ourselves bound to hold, that the grandson, George Dangerfield, took for life only, and that, on his death, without having had issue, the residuary devise took effect.

It may be right to advert to one matter contended for in the argument at the Bar, namely, that in this case there was in fact a devise over, inasmuch as the residuary clause would carry all the interest not previously given to the issue; but this is founded altogether in fallacy. The gift over, in the cases where that has been relied on, has always been a gift over expressly in default of issue, and its importance, in helping the Court to come to a decision, has depended *entirely on the circumstance that it has been to take [*276] effect only on a general failure of issue. Whether the language has always been such as fairly to warrant the Court in saying that the devise over was to take effect only on a general failure of issue, and so, reasoning backwards, to infer that in the original devise the word "issue" meant issue extended through all generations, may be matter of doubt; but it is quite clear that the tenor of the reasoning on which, in these cases, the Judges have proceeded, cannot be applied to a general residuary devise of all not previously disposed of. It can make no difference whether the interests in real estate undisposed of are to be carried by the law to the heir, or are disposed of by the testator to the devisee.

It remains only to advert to a point rather suggested than seriously argued, that, even taking George Dangerfield to have been tenant for life only, yet that the deed of disentailer had the same effect as a fine or recovery would formerly have had, in divesting the subsequent contingent estates, and so creating a tortious fee. But the answer given by the plaintiffs' counsel was conclusive. The deed would have had no such operation at common law, and its effect under the statute depends entirely on its having been executed by a tenant in tail; and as we are of opinion that George Dangerfield was not tenant in tail, his deed can have no statutable operation.

We are therefore of opinion, that, for the reasons we have already stated, George Dangerfield took an estate for the term of his life only; and that, on his death, without having had any issue, the plaintiffs, claiming under the residuary devise, became entitled to the lands in question, and consequently that they are entitled to our judgment in this action.

Judgment for the plaintiffs.

1846.
Feb. 21.

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(15 Meeson & Welsby, 285—292.)

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A., being himself yearly tenant of a house to B., underlet the house and furniture at a weekly rent to C. A. being desirous of getting rid of his tenancy at the end of the current year, offered to sell the furniture to C. for 50*l.*; which C. thought too much, but verbally agreed to have it valued, and to pay so much as it should be found worth, on B.'s agreeing to accept him as his tenant instead of A. The furniture was valued at 80*l.*, which C. refused to give, but then offered the 50*l.* Before the expiration of the year, an agent of A. took the key out of the door and gave it to C., telling him that he must settle with A. himself about the furniture. B. refused to accept C. as his tenant, and he continued to occupy the house and use the furniture as before, but continually giving notice to A. to take away the furniture, which he refused to do; and after the lapse of three months, C. sent it to a broker's: Held, that, upon these facts, there was no evidence to go to the jury of an acceptance by C. of the furniture, under a contract of sale, to satisfy the Statute of Frauds.

THIS was an action brought against the defendant as executrix in her own wrong of James Edward Devereux, deceased. The declaration contained, amongst others, a count for the use and occupation of a dwelling-house, and also a count for goods sold and delivered to the deceased in his lifetime, and promises by him. Nothing turned on the other two counts. At the trial, before Tindal, Ch. J., at the last Assizes for Surrey, it appeared that the defendant was the daughter of the deceased, and had intermeddled with his property after his decease. It was proved in evidence, that the house had been let furnished by the plaintiff to the deceased, at 1*l.* 5*s.* per week. About the middle of December, 1845, the plaintiff, who was himself a tenant to a Wm. Kent, was desirous of getting rid of that tenancy from the 25th of the month, the end of the current year of his holding, and offered to sell the furniture of the house to the deceased for 50*l.* This the deceased thought too much, but verbally agreed to have the goods valued, and pay as much as they should be found worth, Mr. Kent agreeing to accept the deceased as tenant from that day. On the 14th, a valuer of the name of Piggott was sent for, with the approbation of both parties, who valued the goods at 80*l.* This the defendant (1) refused to give, but offered to give the amount, 50*l.*, at which the plaintiff had before offered to sell them. On Christmas Eve, one Elland, the brother-in-law of the plaintiff, took the key out of the street door of the house and gave it to the defendant—the deceased being at that time very ill—with a view of giving up the house to the deceased, that a new holding should

[*286] be commenced after that *period under Kent. On that occasion the defendant said, after she received the key, "How about the

(1) *Sic; qu.* the deceased.—A. C.

furniture?" to which Elland replied, "You must settle about that with Wm. Lillywhite" (the plaintiff). Kent refused to receive the deceased as his tenant, and he continued to occupy the house and furniture as before, giving to the plaintiff, however, continually notice to take away the furniture, which he refused to do; and ultimately, about the 17th of March following, it was removed by the deceased to a broker's near, and notice thereof was given to the plaintiff. Soon afterwards, the deceased removed to another house with his daughter. The action was brought to recover the rent up to this period, and also the price of the furniture. The LORD CHIEF JUSTICE directed the jury, first, that there was no evidence of any change in the terms of the tenancy, as the intended holding under Kent had gone off, and without the consent of the plaintiff to letting the house at a lower rent than the 1*l.* 5*s.* per week; and, secondly, that it was for the jury to say, whether, by continuing in possession after the valuation, the deceased did not accept and take possession of the furniture at the valued price. The jury found a verdict on both counts, damages 92*l.*

In last Michaelmas Term, *Montagu Chambers* obtained a rule *nisi* for a new trial, on the ground of misdirection, contending that there was no evidence of any delivery or acceptance of the furniture, within the Statute of Frauds.

Dowling, Serjt., now showed cause:

It was altogether a question for the jury to determine whether there had been a sufficient acceptance of the goods to satisfy the Statute of Frauds. And there was in this case evidence of the acceptance to go to the jury. It was proved that the deceased had bargained for this furniture; that it had been valued for him to take, and that he afterwards continued to use it. Even where goods have remained in the possession of the vendor, that has not been considered of itself sufficient to *prevent the statute from being satisfied, if this was at the instance of the vendee: *Elmore* v. *Stone* (1), *Edan* v. *Dudfield* (2). The deceased never did any act to repudiate the goods, and mere words will not do for that purpose. How otherwise could he have accepted them? [*287]

(PLATT, B.: Wherever the supposed vendee exercises a dominion over the thing supposed to be sold, is it not for the jury to say whether they will refer it to the sale or not?)

(1) 10 R. R. 578 (1 Taunt. 458).

(2) 55 R. R. 258 (1 Q. B. 302; 4 P. & D. 656).

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The COURT then called on

Chambers and *Fortescue*, in support of the rule:

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It is quite impossible that the ruling of the learned Judge can be right on both points. He first tells the jury there is no evidence of any change in the terms of the tenancy, the intended arrangement with Kent having gone off; and he then leaves it to the jury to say, whether, notwithstanding the occupation by the deceased was to be of the same nature and at the same rent as before, the fact of his using the furniture was not evidence of his acceptance of it under the assumed sale. Now, the original tenancy was of a house and furniture; and although the rent issues out of the realty, yet it is considered that the realty is so far improved by the furnishing, as to make the eviction of the furniture occasion a suspension of the rent. How, therefore, can such use of such furniture be any evidence whatever of the possession as owner? Is not, on the contrary, the demand and payment of rent for it clear and conclusive evidence to the contrary? There is no evidence whatever of any intention of the parties that the deceased should thereafter hold from the plaintiff on the terms on which he was to have held of Kent, if the arrangement had not gone off. The ceremony of the delivery of the key was with reference to a holding under Kent,—a giving up possession to the deceased as his agent and tenant,—which Kent refused to recognise; and the [*288] plaintiff consequently *continued Kent's tenant. In like manner the verbal arrangement respecting the furniture had reference to the intended holding under Kent. Now, it is not pretended that there was any note in writing to satisfy the statute, and it is admitted that the deceased, in words, always repudiated the purchase. Then, if there was a delivery and acceptance, when was it? Not, confessedly, at the time the valuation was made known, for at that time the plaintiff had only a reversionary right to sell, and rent was paid and accepted up to Christmas following, as for both house and furniture. Was it then when the ceremony of the delivery of the key took place? Certainly not; because, at that time, the present defendant is proved to have said to Elland, "How about the furniture?" to which he replied, "You must settle with Lillywhite (the plaintiff) about that;" and it could not be afterwards, because, as the jury have found, according to the opinion of the CHIEF JUSTICE, and as the fact was, the occupation was on the same terms as before. There have, indeed, been many

cases in which a constructive or symbolical delivery has been held sufficient; but in every one some act has been done by the party held liable—some change in the state of circumstances has occurred, indicative of an intention to accept. In *Chaplin* v. *Rogers* (1), a stack of hay, standing on the plaintiff's premises, was sold; the defendant had it cut, and took away part: here was an act done by the parties, and it was held sufficient. So, in *Rohde* v. *Thwaites* (2), there was a sale of sugar in bulk, twenty hogsheads, to be filled by vendors: four were filled and delivered, the rest filled up, and notice given to vendees, who said they would send for them. So in *Rugg* v. *Minett* (3), certain turpentine casks were filled up, with others, by the direction of the buyers, and it was held, the goods being bulky, to make a complete transfer of property to the buyers. Many other cases to the same effect might be cited, but in every *one of them there has been some act [*289] done, some change of circumstances or dealing with the property, indicative of a change of ownership. Here is a total absence of any such evidence: the parties were landlord and tenant of house and furniture up to Christmas; they remained so after Christmas; they held the furniture as tenants before, and their possession of it after was consistent with the same holding. Even in the case which has perhaps gone further than any other upon this subject, *Edan* v. *Dudfield*, there was some evidence; for there the defendant sold the goods again, and rendered a debtor and creditor account, the goods being at the time in his possession; and this was held sufficient evidence of acceptance to go to the jury.

But though it is generally true, that whether there is any evidence is a question for the Judge, but the effect of the evidence a question for the jury, there are many cases to show that evidence, to bind a party, must be of a clear and decisive character; and slight circumstances, though raising a suspicion of intention, are not to be left to the jury in cases arising under the Statute of Frauds. Thus, in *Tempest* v. *Fitzgerald* (4), a horse was sold by the plaintiff to the defendant, to be taken away and paid for at a certain time; shortly before the expiration of that time, he called, saw the horse, and rode him, and gave directions about his treatment; and it was left to the jury to say whether, in so doing, he was exercising an act of ownership, or whether it was merely by way of trial, and the jury having found a verdict for the plaintiff, the

(1) 6 R. R. 249 (1 East, 192).
(2) 30 R. R. 363 (6 B. & C. 388).
(3) 10 R. R. 475 (11 East, 210).
(4) 22 R. R. 526 (3 B. & Ald. 680).

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COURT set it aside for misdirection, and granted a new trial. So, likewise, in *Howe* v. *Palmer* (1), an act was done which in an ordinary case it would be difficult to say was not evidence, of however slight a nature; but the COURT held, that the question ought not to be left to a jury, and a rule was made absolute to set aside the verdict and enter a nonsuit, leave having been [*290] *reserved for that purpose.

(POLLOCK, C. B.: What do you say is evidence that should be left to a jury?)

It is difficult to lay down a general rule on the subject; but these cases, and others to the same effect, are sufficient to show that the act of ownership must be unequivocal, and not every slight matter from which an inference may be drawn is to be left to a jury. In the present case, however, there was no evidence whatever, no change of circumstances, either in the parties or the goods; no change of possession, or of the character of possession, and the deceased from the first to the last repudiated the contract of sale.

Cur. adv. vult.

The judgment of the COURT was now delivered by

ALDERSON, B.:

This case was argued last Term before my Lord Chief Baron, my brother Platt, and myself. The motion was, that there should be a new trial, unless the plaintiff would consent to reduce the verdict. There were two demands: one for the use and occupation of a house; and the question as to that was, whether the rate of charge should be as for a furnished or an unfurnished house; in the one case, the amount of damages being, as to this part of the demand, 5*l.*, in the other 17*l.* 10*s.* The second demand was for the price of the furniture, alleged to have been sold by the plaintiff to the deceased. This question turned upon the fact, whether there had been an acceptance of goods by the testator, so as to take the case out of the operation of the Statute of Frauds; there was no contract in writing for the purchase. The LORD CHIEF JUSTICE left this question to the jury, who found in favour of the plaintiff. The goods in question, the subject of dispute, were in the possession of the defendant (2) at the time when the contract was made.

(1) 3 B. & Ald. 321.

(2) *Sic; qu.* deceased.—A. C.

No doubt can be entertained, after the case of *Edan* v. *Dudfield*, which was well decided by the Court of Queen's Bench, that this is a question of fact for the jury; and that, if it appears that the conduct of a defendant, in dealing with goods already in his possession, is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the Statute of Frauds: as, for instance, if he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alters the nature of the property, or the like. But we think such facts must be clearly shown; and, in this case, after careful consideration of all the facts contained in my LORD CHIEF JUSTICE'S notes, we can find no sufficient evidence of this sort. We therefore think the verdict of the jury, as to this part of the case, is altogether wrong; and that there really was no evidence of acceptance, so as take this case out of the operation of the Statute of Frauds. And if so, it is clear that the subsequent possession by the testator was the use and occupation of a furnished and not of an unfurnished house. We therefore think there should be a new trial, unless the plaintiff consents to reduce the damages to 17*l.* 10*s.*

Rule absolute accordingly.

HUTCHINSON *v.* THE MANCHESTER, BURY AND ROSSENDALE RAILWAY COMPANY.

1846. *April* 21.

[314]

(15 Meeson & Welsby, 314—319; S. C. 15 L. J. Ex. 293.)

A Railway Act provided, that in case of refusal by the owners of lands required for the railway, to accept the purchase-money, or compensation awarded by a jury, &c., the money might be deposited in the Bank of England, to the credit of the parties interested in the lands, in the name of the Accountant-General of the Court of Chancery. The Company were prohibited from entering on lands without consent, till payment, or deposit in the Bank, of the purchase-money or compensation. Another clause enacted, that if the Company should wilfully enter upon and take possession of any lands without consent, or without having made such payment or deposit, they should forfeit to the party in possession a penalty of 10*l.*, to be recovered before justices; and if they should, after conviction in such penalty, or after notice from the party in possession, continue in unlawful possession of such lands, they should be liable to forfeit 25*l.* a day, to be recoverable by action: Proviso, that nothing therein contained should subject the Company to the payment of any such penalties as aforesaid, if they should *bonâ fide*, and without collusion, have paid or deposited the compensation agreed or awarded to be paid for such lands, to any person

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whom they might reasonably believe to be entitled to the lands, though he were not legally entitled thereto. The Company, *bonâ fide*, and without collusion, took possession of lands in respect of which compensation had been awarded by a jury under the Act, after they had deposited the amount thereof in the Court of Chancery, to the credit of the plaintiff, the person in possession, but without having performed certain conditions precedent to their right so to deposit it, and retained such possession after notice: Held, that they were protected by the proviso from liability to the penalty of 25*l.* a day: Held, also, that the word "wilfully," in the above clause, applied only to the first branch of it.

THIS was an action of debt, to recover from the Railway Company,
[*315] under the 159th section of their Act of Parliament, *the 8 Vict. c. ix., penalties for unlawfully continuing in possession of land of the plaintiff. The Act empowers the Company to enter upon and take lands for the purposes of the railway, subject as therein mentioned. By sect. 169, in case of difference as to the value of or interest in the lands, the amount of compensation to be paid to owners or persons interested is to be determined by a jury. By sect. 153, in case of refusal to accept the purchase-money or compensation, or of failure to make out a title to the lands, &c., the money may be deposited in the Bank of England, to the credit of the parties interested in the lands, in the name and with the privity of the Accountant-General of the Court of Chancery. Then sect. 158 provides, that the Company "shall not, except by consent of the owner and occupier, enter upon any lands which shall be required to be purchased or permanently used for the purposes of this Act, until they shall either have paid to every party having an interest in such lands, or deposited in the Bank of England, in the manner herein mentioned, the purchase-money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein: Provided always, that, for the purposes merely of surveying and taking levels of such lands, it shall be lawful for the Company to enter upon the same without the previous consent of the owners, making compensation for any damage thereby occasioned to the owners or occupiers of such lands." Sect. 159 enacts, that, "if the Company, or any of their contractors, shall, except as aforesaid, wilfully enter upon and take possession of any lands which shall be required to be purchased or permanently used for the purposes of this Act, without such consent as aforesaid, or without having made such payment or deposit as aforesaid, the Company shall forfeit to the party in possession of such lands the sum of 10*l.*, over and above the amount of any damage done to such lands by reason of such entry and taking possession as

aforesaid; such penalty and damage respectively to be recovered *before two justices, &c.; and if the Company, or their contractors, shall, after conviction in such penalty, or after notice from the party in possession of such lands, continue in unlawful possession of any such lands, the Company shall be liable to forfeit the sum of 25*l.*, for every day they or their contractors shall so remain in possession as aforesaid, such penalty to be recoverable by the party in possession of lands, with full costs of suit, in any of the superior Courts. Provided always, that nothing herein contained shall be held to subject the Company to the payment of any such penalties as aforesaid, if they shall *bonâ fide*, and without collusion, have paid or deposited the compensation agreed or awarded to be paid in respect of the said lands, to any person whom the Company may have reasonably believed to be entitled thereto, although such person may not have been legally entitled thereto" (1).

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At the trial of the cause, before Coleridge, J., at the last Assizes at Liverpool, it appeared that compensation had been awarded, by a jury summoned under the Act, to the plaintiff, who was the lessee for years, under the Earl of Derby, of lands which were required by the Company for the purposes of the railway. The Company, without first calling upon the plaintiff to accept such compensation, or to make out a title to the lands, paid the money, under the advice of counsel, into the Bank of England, to the credit of the plaintiff, and took possession of the lands. The plaintiff brought an ejectment against them, and recovered in that action (2); but the Company subsequently tendered to the plaintiff the amount of the compensation-money, which he refused to accept, and thereupon they again paid it into the Bank to his credit, and retained possession of the lands notwithstanding after notice to deliver them up. The jury found that the defendants had acted *bonâ fide*, and without collusion; and the learned Judge, being of opinion that the *word "wilfully," in sect. 159, applied to the unlawfully continuing in possession after notice, as well as to the former branch of the clause, directed a verdict for the defendants. On the 20th of April,

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Knowles moved for a new trial, on the ground of misdirection:

The learned Judge was wrong in holding that the word "wilfully," in the first branch of the 159th section, applies to the whole clause.

(1) See now Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 89.—A. C.

(2) See 14 M. & W. 787.

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Two matters are separately provided against by that clause: first, the wilfully entering upon and taking possession of lands, without consent, or without having made such payment or deposit as is before mentioned, in which case the Company are liable to forfeit to the party in possession a sum of 10*l.* beyond the damage done, to be recovered before two justices; secondly, the continuing in unlawful possession of such lands, after such conviction, or after notice, which renders them liable to a penalty of 25*l.* a day. Then the proviso at the end of the clause applies only to the particular case of adverse claimants. If the Company act *bonâ fide*, and without collusion, in the case of conflicting claims, and really mistake the true owner, the proviso protects them. It applies only to cases of payment to a wrong party, not to the case of a payment into the Bank to the credit of the party who is the acknowledged owner of the land. But, even if the word "wilfully" is to be held to extend to the second class of penalties mentioned in the section, its legal meaning is no more than "purposely," without reference to *bona fides* or collusion: *Reg.* v. *Price* (1). The defendants, therefore, were liable to the plaintiff in penalties for designedly continuing in unlawful possession of the land after notice, though they may have acted with good faith. A party who trespasses upon land after notice not to do so, is held to be a wilful trespasser within the meaning of the stat. 8 & 9 Will. III. c. 11, s. 4.

POLLOCK, C. B.:

[318] We are all of opinion that the word "wilfully" does not override the whole of the 159th section (2), but applies only to the first part of it. With respect to the meaning of the proviso, we have at present considerable doubt. It is impossible to give it a strictly grammatical construction, for the word "deposited" stands alone, and unconnected with any thing else. We must, therefore, endeavour to ascertain the probable meaning of the Legislature. Now two of its objects are plain: first, to make the payment of the price of the land a condition precedent to the entry of the Company upon it, with the view to protect the public from the grievous injuries they would sustain if the Company were to take land without giving value for it; secondly, to protect the Company in all cases in which they *bonâ fide* pay the price, or make the deposit before they take possession; and accordingly this proviso is inserted for their

(1) 2 Ad. & El. 727.

(2) See now Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 89.—A. C.

benefit; and whatever may be the meaning of the word "deposited," I think it ought to extend to protect the Company in a case like this, of an erroneous deposit, made *bonâ fide* and without collusion. We wish, however, to speak to the learned Judge who tried the cause before we give our judgment.

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Cur. adv. vult.

POLLOCK, C. B., now said:

We have conferred with my brother COLERIDGE upon this case, and there will be no rule. We are all of opinion that the proviso in the 159th section cannot be read precisely as it stands. We must give it some sensible construction; and, so dealing with it, we are of opinion that the section does not apply in this case, the Company having, *bonâ fide* and without collusion, deposited the purchase-money for the benefit of the plaintiff. Sections like this, which may be justly called a penal enactment, ought to be strictly construed; but a proviso, which has the effect of saving parties from the consequences of a penal enactment, should be liberally construed. It appears *to us that this case is not within the [*319] mischief which the Legislature intended to guard against, and that we ought so to read the 159th section as to bring the Company, in this instance, within the protection of the proviso at the end of it.

Rule refused.

GATHERCOLE *v.* MIALL.

1846. *April* 23.

(15 Meeson & Welsby, 319—345; S. C. 15 L. J. Ex. 179; 10 Jur. 337.)

[319]

The conduct and management, by the clergyman of a parish, of a charitable society in the parish, from the benefits of which Dissenters are by his sanction excluded, is not the lawful subject of public comment, so as to excuse, under the plea of Not guilty, the publication of untrue and injurious matter respecting the clergyman in relation to the charity.

Quære, whether sermons preached in a church, but not published, are the lawful subject of such public comment.

In an action for a libel published in a newspaper, evidence that copies of the newspaper containing the libel have been gratuitously circulated in the plaintiff's neighbourhood, though they be not shown to have been sent by the defendant, the publisher, is admissible to show the extent of the circulation of the paper, and the consequent injury to the plaintiff.

It was sought to prove that one of such newspapers had been sent to a public reading-room in the plaintiff's parish, to which there were eighty subscribers. The president of the reading-room stated, that a newspaper, called the *Nonconformist*, (which was the name of that published by the defendant), was gratuitously sent to the room; that, from the glance he had of it, he judged it contained the libel in question; that it remained

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there a fortnight, when it was taken away (as he supposed) and not returned; that he had searched the room for it, and believed it was lost.

Held, first, that this was sufficient evidence to show that the newspaper sent to the reading-room was one of the copies of the defendant's newspaper containing the libel; secondly, that this was sufficient proof of its loss to make secondary evidence of its contents admissible.

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THIS was an action for a libel, published in a newspaper called the *Nonconformist*, on the 7th of January, 1846. It was of great length, and, in the main part of it, had reference to circumstances connected with the establishment and management of a clothing society or club, established in the parish of Chatteris, in the Isle of Ely, (a large parish, containing about 5,000 inhabitants), under the auspices of the plaintiff, the vicar of that parish; from the benefits of which it complained that Dissenters were excluded: and it also commented, with much freedom and severity, on certain topics introduced by the plaintiff into his sermons preached in the church
[*320] of that parish, and *generally upon his conduct in respect of his preaching, and his management of the charities of the parish.

The defendant pleaded Not guilty.

At the trial, before Parke, B., at the last Assizes at Cambridge, the plaintiff, after giving the statutory evidence of the publication of the newspaper, proposed to show that the particular paper containing the libel had been industriously circulated among persons in the plaintiff's neighbourhood, not in the habit of generally taking it in. This evidence was objected to on behalf of the defendant. The learned Judge admitted it; thinking, that, although it was not admissible to aggravate the damages on the ground of malice, unless the act of so circulating the paper was traced to the defendant, it was admissible to show the actual extent of the circulation of the libel, and the consequent injury to the plaintiff's character. Witnesses were then called, who spoke to their having received that particular number of the *Nonconformist* without having ordered it; but none of them were able to produce the copies they had so received, or to show that they were lost; and the learned Judge thereupon rejected the evidence, and in summing up desired the jury to exclude it altogether from their consideration. A person of the name of Brookes was then called, who stated that he was the president of the Chatteris Literary Institution, which consisted of eighty members; that early in January last a number of the *Nonconformist* was brought to the institution, he did not know by whom, and left there gratuitously; that, about a fortnight afterwards, it was taken (as he supposed) out of the subscribers' room

without his authority, and was never returned; that he had searched the room for it, but had not found it, and never knew who had it; and that he believed it was lost or destroyed. The learned Judge, under these circumstances, held that secondary evidence of the contents of the paper was admissible. The witness then stated, that he believed the paper he had spoken of to have been a copy of *that produced in evidence: he remembered that it was headed the *Nonconformist;* and, so far as he could judge from a glance at it at the time, it contained the libellous article in question. The witness was not cross-examined as to his means of knowledge of the identity of the paper, his evidence being objected to as inadmissible altogether; but the learned Judge, for the reason before stated, held it to be admissible. The counsel for the defendant, *Byles*, Serjt., then addressed the jury; and during his address, when contending for the right of an editor of a newspaper, or any other person, to comment upon the sermons and tone of preaching, and the principles on which charities were administered in the parish of Chatteris, as being subjects open to public criticism, PARKE, B., interposed, and intimated his opinion to be, that "every one has a right to comment upon public acts of public servants,—ministers, generals, Judges; but not on the unpublished sermon of a clergyman: and that a sermon, preached by a clergyman to his parishioners, is strictly a private matter, and not the subject of remark." [*321]

No evidence was offered for the defendant; and the learned Judge, in summing up, directed the jury in the following terms: "That a libel is anything written or printed, which from its terms is calculated to injure the character of another, by bringing him into hatred, contempt, or ridicule, and which is published without lawful justification or excuse. That, in an action for libel, the defendant may plead and prove the truth of it, or he may show, under the plea of Not guilty, that it was published on some occasion which excused it. That every one has a right to comment on public acts of public servants, ministers, generals, Judges; that they furnished a lawful occasion for publication; but he thought not on a sermon preached by a clergyman to his parishioners, unless he published it, and therefore offered it as a subject for general criticism, like *any other literary work; that it was however quite unnecessary to offer any opinion on that, because there was no evidence at all of any sermon which was the subject of this comment. That rules which a clergyman or any other man makes for the conduct of a charity which he establishes, are not thereby made a subject for [*322]

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public comment. That no part of the libel was a comment on anything which is public property, and on which the defendant had a right to comment as such." He then left it to the jury to say, first, whether they thought the imputations in the libel were calculated to bring the plaintiff's character into contempt or not; and secondly, if they were, what was a fair amount of damages. The jury found for the plaintiff damages 200*l.*

Sir Thomas Wilde, Serjt., now moved for a new trial, on the ground of the improper reception of evidence, and of misdirection:

First, there was no sufficient evidence of the loss of the paper brought to the Chatteris Literary Institution, to make Brookes' evidence of its contents admissible. This was a room frequented only by the subscribers of the institution, limited in number; and it does not appear how many or how few were in the habit of visiting it about that time. Some inquiry should have been made amongst them, or at least from the proprietor of the rooms. It is not like the case of a public coffee-room, to which any number of strangers may resort.

(ALDERSON, B.: This is not the case of a title-deed, but of an old newspaper. Suppose it had been the back of a letter, must you ask eighty persons whether they have taken it?)

No doubt the nature and quality of the document is to be considered; but so also must the importance of the occasion on which the evidence is offered. If a man were on trial for his life, would a Judge have admitted secondary evidence of a treasonable paper on
[*323] such evidence as this? and yet, of course, the *rule of evidence must be just the same in an action for libel as upon an indictment for high treason. What reason was there for believing that this paper was, in fact, lost or destroyed? The greater probability was, that, if it contained such an article, it was taken away to be preserved.

Secondly, there was no sufficient evidence to go to the jury, that the paper left at the Literary Institution was a copy of the particular number of the *Nonconformist* which contained the libel. All that the witness said was, that it was headed the *Nonconformist*; and, from a glance at it, that he judged it contained the libellous article. That does not show that it was a Nonconformist newspaper purporting to be published by the defendant. The mere fact of the

heading being the same can be no evidence against him as the publisher. GATHERCOLE v. MIALL.

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(POLLOCK, C. B.: You have, besides, the opinion of the witness that it was the same paper. Besides, there was no cross-examination as to its contents; it was almost taken for granted that it was the same paper.)

It was received as evidence of the contents of a paper published by the defendant.

(PARKE, B.: Rather as evidence of the copy of a newspaper of which he is proved by the regular statutory evidence to be the printer and publisher.)

The object being to show a circulation of the paper at a particular place, in order to influence the damages, the evidence given in this case will not bear the test of legal examination.

Thirdly, this particular paper was not at all shown to have been sent to the institution by the defendant, and may have been brought there by some person altogether unconnected with him; it was, therefore, wrongly received as evidence of the extent of the damage done by him. The extended circulation is not his act: the injury consequent upon it is not attributable to him. The party who brought it there is the party responsible for any damage the plaintiff received by that act.

(PARKE, B.: Suppose the plaintiff *published a thousand copies, and one were to find its way, by the hand of a third person, to the reading-room of a debating society, would not that be evidence to show the extent of the mischief done by the publication to the plaintiff's character?) [*324]

Then, if that be so, if a man writes and publishes a libel to A., he is responsible for all the damage that may arise by the exhibition of that libel by A. to B., by B. to C., and so on to the end of the alphabet.

(PARKE, B.: My observation refers only to the case of a newspaper, which is published expressly for general circulation. Surely the proprietor of a newspaper, with a very large circulation, is to be visited with larger damages for a libe published in it, than one of more limited circulation.)

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The next question arises upon the direction of the learned Judge to the jury. And first, with respect to that part of the libel which comments upon the plaintiff's mode of preaching, the observation of the learned Judge, during the address of the defendant's counsel to the jury, was calculated to influence him in the defence he might make by evidence, and in that view had an important bearing on the issue of the cause. It may have been, that by reason of that very observation no evidence was given of any sermon preached by the plaintiff.

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(POLLOCK, C. B.: I think it would lead to endless confusion, if we were to grant a new trial merely because the Judge, in the course of the cause, had made some general observation on a point of law, which might turn out to be wrong, unless it be shown that it had some practical influence on the trial.)

It is sufficient that it governed the conduct and limited the discretion of the counsel in the cause. Now, the doctrine that a sermon, preached in a parish church, cannot be made the subject of public remark, is incorrect, and cannot be maintained.

(PARKE, B.: Can you put it in the same position as if it were published for the use of the world?)

It is submitted that there is no distinction in this respect. The [*325] preached *sermon is published to all who resort to the church.

(PARKE, B.: I did not lay it down conclusively, that a preached sermon, as contra-distinguished from a printed and published sermon, was not the subject of comment, in such a way as to prevent the defendant's counsel from offering a sermon in evidence, if he had wished to do so. I did not express a positive opinion on the point at all.)

Next, as to that part of the libel which related to the conduct of the charity. The learned Judge misdirected the jury, in telling them that this was no legitimate subject of remark. The principles on which charities are conducted are of great importance to the public, and it is very fit they should be the subject of public discussion, when couched in proper language. This is not like the case of a few persons meeting together for the purpose of a private charity; it appeared that Chatteris was a large parish, containing five thousand inhabitants, among whom there was a considerable

proportion of Dissenters. It was a charity presided over by the clergyman of that parish; and the resolutions of the charity convey an imputation upon those who dissent from the Establishment, by representing them as persons unworthy to be the objects of benevolence.

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(POLLOCK, C. B.: You truly say, that the public have a deep interest in the diffusion of charity; so they have in the diffusion of knowledge: but could you say, if a book-club were established, with regulations excluding persons of certain opinions, they could be made the subject of public criticism, which might be neither right as to its facts, nor just in its judgment?)

The true principle is, whether the public have a real interest in the matter. A charity distributed among five thousand persons cannot be considered in the same light as a private book-club. If the mode of dispensing this charity, in so large a parish, was, as undoubtedly it was, a matter in which the public of Chatteris had an interest, that public was sufficiently large to give a just right of criticism on its *objects and management. The soliciting persons to join in a [*326] charity, conducted on such narrow and exclusive principles, is a matter which ought, for the public good, to be prevented, and which any one of the public has an interest to prevent, by an appeal to the general good sense and just feeling of his fellow-citizens. No doubt, if the defendant, or any other person, in doing so, exceeds the just limits of public comment, he may be liable to an action; but this verdict has been given on the principle that the defendant had no right at all publicly to discuss these subjects. The defendant ought therefore to have a new trial, that the matter may be presented to the jury with that limitation.

PARKE, B.:

With respect to the evidence admitted, the case stood thus: When another copy of the newspaper was offered in evidence (it having been suggested in the opening of *Mr. Gunning* for the plaintiff, that many of them had been industriously circulated in the neighbourhood of Chatteris, and given to persons who did not subscribe to the *Nonconformist* newspaper), I said, "Do you propose to affect the defendant with the actual sending of this paper to that particular place?" If the plaintiff could not do that, then, I said, the evidence was inadmissible to aggravate the damages on the ground of malice,

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but that I should receive it as proof of the circulation of the newspaper. Then Mr. Fryar, the first witness, was called, for the purpose of proving the fact of the newspaper having been sent to him by some unknown person: it turned out that he had left the newspaper at home. Then (doubting, however, in my own mind whether I was not rather too strict) I said, "I cannot receive evidence of its contents; you had better abandon that head of evidence." Accordingly, in Mr. Fryar's case it was given up. Then the plaintiff's counsel made a second effort to show that this gratuitous circulation

[*327] had taken place; and they proved that by the circumstance of *its having been sent to the public reading-room at Chatteris; and then, upon proof of the loss of the newspaper, satisfactory to my mind, considering the nature of newspapers, I admitted secondary evidence of its contents. The secondary evidence given was this: There was general evidence that it was a paper called the *Nonconformist*, containing, according to the best of the witness's recollection, the libel, the subject of this action. I thought that was ample evidence to show that one of the copies of the newspaper, of which the defendant was the publisher, and of which, of course, he did not print one copy, but many, had been sent by some person, not the defendant, to that room; then I thought that was admissible evidence to show the extent of damage. If I was wrong in that respect, there ought, of course, to be a rule. But I conceive, that if any person, not the editor of the *Times* newspaper, sends the *Times* paper, published for the purpose of general circulation, to particular individuals, and those individuals read it, (of course, assuming that the article is likely to make an impression prejudicial to the plaintiff), that is a circumstance that may be taken into consideration in aggravation of damages, in an action against the publisher of that paper. It struck me then, and strikes me now, that there was ample evidence of one of the prints of the *Nonconformist* newspaper, one of the impressions published by the defendant, having found its way into the hands of third persons in the reading-room at Chatteris. I did not receive the evidence on the ground that the defendant was thereby proved to have been industriously circulating the newspaper, and so to aggravate the damages against him, as being actuated by private spleen or malice, but that this was to be considered as proof that the papers were in more extensive circulation, by the single fact of its being left in the Chatteris reading-room.

Then, with regard to the rest of the case, certainly I interrupted

[*328] my brother *Byles*, making a remark, as my *brother *Wilde* has

stated, with respect to the right of comment on unpublished sermons; but I never meant to bind myself by that opinion. I had a strong opinion on the subject, I own, and I retain that opinion still; but when the case was closed—my previous remarks being made for the purpose of shortening any long observations that might be made upon that subject—when the case came to its close, I expressed no opinion as to the sermons. I said it was unnecessary to decide the point, because there was no proof of any sermon, that could furnish a lawful occasion for those remarks. And with regard to the parochial subscription set on foot by the clergyman, I thought the clergyman, in so doing, did not thereby make that act the subject of comment, and give a lawful occasion for everybody to remark upon it, in the same way that he would if he were publishing a literary work, and presenting it to the public. Nor was his act a public act, in the same sense as the act of a magistrate in the administration of justice, or of a general in conducting an army, or any public officer in exercising for the benefit of the public an office in the State. The position such a party is in gives occasion to all the public to make remarks on his conduct; and if those remarks are made in a fair spirit, they are justifiable under the general issue. But it seemed to me that there was no occasion, in the fact of a man's making a regulation for his own parish, which could furnish a lawful excuse for the publication of these remarks.

I have stated the view I took of this case at the trial: my learned brothers will now say whether I was right or wrong.

POLLOCK, C. B.:

We are all agreed that there should be no rule in this case. The rule has been moved for on two grounds: first, the reception of evidence which ought not to have been received; and secondly, upon the ground of misdirection. The first ground appears to have been *taken upon this state of things: The defendant was proved [*329] to be the publisher of a newspaper called the *Nonconformist*. One paper was produced, containing the libel complained of; and it was proposed to prove that other copies had been in circulation, not with any view to show malice on the part of the defendant, because for that purpose a publication specially by him, at the place where they were found, probably ought to have been proved, but with a view to show the extent of the mischief that might have been done to the plaintiff, who complained of this wrong. Several witnesses appear to have been examined up to the point of not being able to

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prove the paper, and then they were not allowed to proceed in their evidence; and no stress at all appears to have been laid upon any cases, except where a paper was mislaid or lost, and evidence given of its contents. With respect to the witness Brookes, he appears to have seen a paper, which he took upon himself to say was one of the copies of the *Nonconformist* complained of as having contained the libel. I think this must have been understood by the learned Judge, by the counsel, and by the jury, to be the effect of his evidence. Whatever terms were used, it must be understood that he meant to say that he saw a paper, which, upon some ground more or less clear and positive, he believed to be a copy of this number of the *Nonconformist*. Now this evidence is complained of upon three grounds: First, that there was no evidence that the paper was lost. Now it seems to me, that the evidence of a document being lost, upon which secondary evidence may be given of its contents, may vary much, according to the nature of the paper itself, the custody it is in, and, indeed, all the surrounding circumstances of the particular matter before the Court and jury. A paper of considerable importance, which is not likely to be permitted to perish, may call for a much more minute and accurate search than that which may be considered as waste paper, [*330] which nobody would be likely to take care of, and which might, *I think, be considered as lost, so as not to be produced before a Court and jury, when, after search, in the first instance, at the place where it was likely to be found, it is not discovered there, and we cannot suggest any one place where it is more likely to be than another. Here search was made in the room where the paper ought to be: if the paper be not there, is inquiry to be made of all the persons who frequent that place? Here the club, or reading society, consisted of eighty persons. It might have consisted of 800; nay, it might have been a reading-room accessible to many thousands of persons. What inquiry will do? I think, in cases of this sort, if, some time after its publication, a newspaper, which, except occasionally for the purpose of filing, is not very much considered a few days after its publication, is not found in the place where it ought to be, if it be anywhere, no search is necessary among members of the club, or persons who frequent the club-room: it may be taken to be lost, if it cannot be produced from the spot where it ought to be found. But then, it is said that this paper is not proved to have been issued by the defendant: that is a question entirely for the jury; and I think there is evidence to prove that this was one of

the copies printed at the same time with the libel which is laid before the jury. It is not like the publication of a written libel. The jury must be aware that many copies of a newspaper are issued at the same time; and they are issued for the purpose of publication and distribution. No doubt a suggestion may be made, that the plaintiff, in order to enhance the damages, may have procured some papers to be printed. The jury are to consider whether that is a reasonable suggestion or not. There was some evidence for the jury to consider: and, I think the reasonable conclusion is, that this paper was originally issued by the defendant; that is, that it was probably issued as a newspaper to some newsman, and by the newsman sent down to the place where it was seen; and it appears to me that the defendant *was responsible for that, without at all [*331] entering into some of the questions which arose in the course of the argument, and for every one of which one might not possibly be able to give so satisfactory an answer. But I understood my brother *Wilde* to make a third case: that it was not issued by him in such a way as to entitle the plaintiff to give it in evidence against him to increase the damages. Now, it appears to have been issued as newspapers generally are, for the purpose of being circulated; and I think, in order to show the extent of the mischief that may have been done to the plaintiff by a libel in a newspaper, you have a right to give evidence of any place where any copy of that libel has appeared, for the purpose of showing the extent of the circulation. It seems to me, therefore, in the first place, that due inquiry had been made, and there was reasonable evidence that the paper could not have been found by any search any person could reasonably be called upon to make; that, in the next place, there was evidence to go to the jury that that paper, so lost and so identified, had been issued by the defendant; and, being issued by the defendant, wherever it is traced and found, it is for the jury to consider the effect of that, as tending to show, as such evidence does, that there has been a publication beyond the mere publication the plaintiff complains of, and gives in evidence as the libel which is the subject of the action. Upon the whole, it seems to me that there is no foundation whatever for granting the rule, on the ground that evidence was received which it was not competent for the learned Judge to admit.

The other ground on which the application for a new trial is made, is a misdirection in point of law. It is objected that the learned Judge laid down the same rule with reference to sermons that were preached, and to the rules of the charity that was

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administered in the parish of Chatteris, as applied to private conversations, or to private acts of charity; and it is contended that he ought to have laid it down, that a sermon, preached but not published, was the *subject of criticism in the enlarged style of commentary which that word seems to introduce, according to the decided cases; and that the conduct of the clergyman with reference to the parish charity, and especially the rules of it, justified any *bonâ fide* remarks, whether founded in truth in point of fact, or justice in point of commentary, provided only they were an honest and *bonâ fide* comment; and that this might be shown under the general issue. There can be no doubt, if it might be shown at all, it might be shown under the general issue.

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My brother *Wilde* urged upon the Court the importance of this question; and I own I think it is a question of very grave and deep importance. He pressed upon us, that wherever the public had an interest in such a discussion, the law ought to protect it, and work out the public good, by permitting public opinion, through the medium of the public press, to operate upon such transactions. I am not sure that so extended a rule is at all necessary to the public good. I do not in any degree complain, on the contrary I think it quite right, that all matters that are entirely of a public nature; conduct of ministers, conduct of Judges—the proceedings of all persons who are responsible to the public at large, are deemed to be public property; and that all *bonâ fide* and honest remarks upon such persons, and their conduct, may be made with perfect freedom, and without being questioned too nicely for either truth or justice; but, when the public interest is pressed upon our attention, if it is for the purpose of introducing any new rule, or extending those doctrines to any point beyond that to which they have hitherto been extended, it appears to me to be a sufficient answer to say, if the public is interested in the administration of charity, if it be of importance that the doctrine of "doing good to all men" should be preached, and not only be preached, but that every one should act upon that doctrine, that would be abundantly satisfied by those who comment on these matters only exercising the ordinary *right that they have at the common law, and that is, that they may comment upon anything, only let truth be the basis of their observations, and let the superstructure be justice: if truth be the foundation, and justice be the superstructure, it appears to me that that will work out all the ends of public good that can be required for any such purposes as my brother *Wilde* refers to.

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Now, with reference to the application of this doctrine to the case before us, there are two points to be considered: the one as to the sermons, the other as to the parish charity. My opinion goes entirely along with the intimation of opinion that fell from my brother PARKE at the trial; I think a sermon preached to a congregation may undoubtedly be made the subject of a comment, but you must not put into the mouth of the pastor language that he did not use, or make any comment upon what he did use, or was supposed to use, that does not fairly arise out of the truth. I think you are fettered, with respect to a sermon preached to a congregation, just as you would be fettered with respect to any other matter on which you have a right to comment, but on which you must comment with truth and with justice. It appears, however, from the report of my learned brother PARKE, that he did not exclude any evidence in respect to a sermon; and in the course of the conduct of the cause, and finally, in summing up, he pointedly called the attention of the learned counsel, that with respect to that part of the case, it was unnecessary to give any opinion upon the point, because there was no sermon in evidence to which those comments could possibly apply. Therefore, although entirely agreeing with him in the opinion he intimated in the course of his summing up the case, I think this is quite sufficient reason to refuse the rule upon this ground.

With respect to the rules of the charity, I think that a parochial charity, with the vicar at the head of it, among other persons in the parish, not for parochial purposes, but for some exclusive purpose, with reference either to religious *opinion or to any thing [*334] else, is a private matter, and is not open to what may be called licentious comment, as opposed to a comment that must be based in truth. It really seems to me that licentious comments cannot be applied to a case of this sort, without extending such comments to almost every transaction in society. With respect to the rules that have hitherto been laid down in the case of criticism on works published, it has been held that they invite that criticism; they are held out for an examination, and from the acknowledged usages of society, every man who publishes a book invites criticism. Whether that would apply to a book not published, but printed for circulation among friends, may be doubtful; it is not necessary to follow that up; I think it may be reasonably doubted. In the present case the question is, whether a parochial charity, with the vicar at the head of it, that is, a charity confined to certain persons

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within a parish, may be made the subject of a licentious comment. I own I think that every purpose of public good would be answered by strictly confining it to the privilege that every man has of publishing that which is true, and saying that which the truth will warrant; and that it is not at all necessary, in a case of this sort, to give him any power, either licentiously or with honest prejudices, to invent for himself, or to misrepresent and comment upon, matters that do not exist in point of fact, however honestly.

Some observations have been made in the course of the argument, with reference to there being no evidence actually tendered. I entirely agree, that whenever there is reason to think that the course of any cause has been so altered by the ruling of a Judge in that cause, that justice has not been done, that is a ground for coming to the Court for redress. And it may not be necessary for counsel distinctly to point out in what manner the mischief has been done, if the Court clearly perceives that what has occurred would lead to that mischief. I therefore entertain the application

[*335] *of my brother *Wilde* in the full spirit in which it was made; and I say this the rather, because, during one part of his argument, it might be inferred that I thought he was not exactly *rectus in curiâ*, so as to make the application at all; but, entertaining the application, and entertaining it with the respect that is due to him, and with the reponsibility that belongs to the question,—undoubtedly, I admit, of some importance,—I yet, upon all the points that have been presented to my mind, am so free from doubt, that I think no rule ought to be granted in this case.

ALDERSON, B.:

I am of the same opinion, that there should be no rule in this case. At the same time, I am by no means prepared to say, that if it had depended upon the question as to the sermons, I should not have been in favour of granting a rule, as I by no means entertain a decided opinion upon that point. The two points in question on which this rule has been applied for, are, first, the improper admission of evidence; secondly, misdirection. I shall say very shortly what I think as to the admission of the evidence. It is clear, as it seems to me, that the evidence was properly received. I think the search should be such as should induce the Judge to come to the conclusion, and the Court afterwards, on revising his opinion, to come to the same conclusion, that there is no reason to suppose that the omission to produce the document itself arose

from any desire of keeping it back, and that there has been no reasonable opportunity of producing it which has been neglected. Now, the question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for; and I put the case, in the course of the argument, of the back of a letter. It is quite clear a very slender search would be sufficient to show that a document of that description had been lost. If we were speaking of an envelope, in which a letter had been received, and a person said, "I have searched *for it among my papers, I cannot find it," surely [*336] that would be sufficient. So, with respect to an old newspaper which has been at a public coffee-room; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, "I know it was taken away by A. B.," then I should have said, you ought to go to A. B., and see if A. B. has not got that which it is proved he took away; but if you have no proof that it was taken away by any individual at all, it seems to me to be a very unreasonable thing to require that you should go to all the members of the club, for the purpose of asking one more than another, whether he has taken it away, or kept it. I do not know where it would stop; when you once go to each of the members, then you must ask each of the servants, or wives, or children of the members; and where will you stop? As it seems to me, the proper limit is, where a reasonable person would be satisfied that they had *bonâ fide* endeavoured to produce the document itself; and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper. Then, was the parol evidence of the contents of the paper such as might reasonably be received as against the present defendant? It is clear that there is no evidence whatever to show that this paper, or these papers, have been sent by the defendant individually, from any personal malicious motives. It would be absurd to put it upon that; and if it had been so put, it would have been a misdirection upon that ground. The question is, whether or not there is reasonable evidence that this is a copy of the individual paper which has been produced, and which has been shown to have been published by the defendant. Now we must consider what the nature of the instrument is. It is a copy of a newspaper. We must use our own common sense, and remember that, with respect to newspapers, not *one copy, but a great variety [*337]

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of copies, are published for general circulation among the public at large. If you compare an instrument in one or two parts, and find the one is an exact copy of the other, you would have no difficulty in saying it was printed from the same materials, and from the same type. Suppose I were to have a copy of Meeson & Welsby's Reports here, and Meeson & Welsby's Reports in the Queen's Bench, and Meeson & Welsby's Reports in the Common Pleas, and I were to examine those three books, and to find that there was a misprint in the first page, and a misprint in the fortieth page, and a misprint in the sixty-third page, I should say a jury might very reasonably infer that those three books were printed from the same types. So I say here with respect to a newspaper; if you find it in general corresponds, it is evidence from which the jury may infer that the paper is printed from the same type as the paper which is produced; and if so, it is printed by the defendant; and if so, the defendant is responsible for the extent of injury which may be done by that paper, which by some means has come out of his possession, and which the jury may infer that he, or somebody connected with him, was the person who transmitted to the Chatteris Book Society. It seems to me that it was evidence, and evidence on which the plaintiff might reasonably rely, for the purpose of showing that the injury which the defendant had done him by printing the newspaper, was aggravated by the circumstance that there was a paper here, and a paper there, and a paper in places in which it might do him an injury among those who live around him, all which was owing to the original publication by the defendant of the libel. It seems, therefore, to me, that that evidence was properly received.

Then the question is, whether or not there was a misdirection. Now, if my brother PARKE had told the jury, that, to observe upon the sermon of a clergyman, which he preaches openly in his pulpit,

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was not within the general *rule which enables parties to comment more liberally on the public conduct of individuals than on their private conduct, I, for one, should have desired that the question should be further considered. I do not say that I should not ultimately,—possibly I should,—have come to the same conclusion to which my LORD CHIEF BARON has arrived, and which was intimated by my brother PARKE as the impression which he had at the time of the trial, and which he retains now. I only mean to guard myself against being supposed to have formed a decided opinion upon that point at the present moment. It seems there is

a distinction, although I must say I really can hardly tell what the limits of it are, between the comments on a man's public conduct and upon his private conduct. I can understand that you have a right to comment on the public acts of a minister, upon the public acts of a general, upon the public judgments of a Judge, upon the public skill of an actor,—I can understand that; but, I do not know where the limit can be drawn distinctly between where the comment is to cease, as being applied solely to a man's public conduct, and where it is to begin, as applicable to his private character; because, although it is quite competent for a person to speak of a judgment of a Judge, as being an extremely erroneous and foolish one, (and no doubt comments of that sort have great tendency to make persons careful of what they say), and although it is perfectly competent for persons to say of an actor, that he is a remarkably bad actor, and ought not to be permitted to perform such and such parts, because he performs them so ill, yet you ought not to be allowed to say of an actor that he has disgraced himself in private life; nor to say of a Judge, or of a minister, that he has committed felony, or any thing of that description, which is in no way connected with his public conduct or public judgment; and therefore there must be some limits, although I do not distinctly see exactly where those limits are to be drawn. No doubt, if there are such limits, my *brother *Wilde* is perfectly right in saying, that the only [*339] ground on which the verdict and damages can go, is for the excess, and not for the lawful exercise, of the criticism: and it is for that reason that I doubt, whether you may not properly criticise a gentleman's sermons, by saying "he is a remarkably bad preacher." Possibly you may speak of him, also, as preaching erroneous doctrines, although about that there may be more doubt; seeing that there is a tribunal to which you may refer any erroneous doctrine which he may preach in the pulpit: but with respect to the stupidity or the dulness of his sermon, there is no redress except by public observation; and I am by no means prepared to say you may not criticise them justly and fairly; and if you criticise *bonâ fide*, even although the man sustains an injury from your criticism, it is an injury for which there is no redress at law by damages. But, with respect to the present question, my brother PARKE has not laid it down to the jury that the sermons were not, or might not be, the subject of proper criticism. No sermons were proved; probably none were capable of being proved, of which this could be considered in the light of fair criticism: indeed I must

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say, that I think it would be a libel on criticism, to call this criticism on any man's sermon. Now this gentleman, in his ministerial and public capacity, preaches his sermons, and it is because he does so in his ministerial and public capacity, that I entertain a doubt whether it is not part of his public character. He is, as a clergyman, bound to preach the sermons in his ministerial and public capacity; and it may be, that that is within the limits of the ordinary rule which governs the criticism upon public acts of individuals. But what has his private charity, in the parish of Chatteris, or any where else, to do with that? How does that differ from the private charity of any other individual? It is no part of his peculiar ministerial duty to have a clothing club, though it is a very proper thing for him or any other charitable man *to do. I am at a loss to see how his case differs from that of any other individual who chooses to institute a private charity within particular limits. If so, then the criticism and observations that are to be made upon him, are the criticism and observations which are to be made upon any other private individual, and are to be judged by the same rules, and subject to the same limits; and that is what my brother PARKE laid down; not that you may not comment—God forbid you should not be allowed to comment—on the acts of all mankind, provided you do it justly and truly; but that your comments upon Mr. Gathercole, in the institution of private charities, which Mr. Gathercole chooses to patronise, are to be judged in the same manner as comments on the private conduct of any other individual in his private charities, and that he is for that purpose in the same situation as any other private individual. It is no part of his public duty, no part of his public conduct, that is the subject of comment in that respect. Therefore it is that I think my brother PARKE laid down the right rule. Whether or not this is a libel is not the question before us; there is no doubt about that; the jury have found it to be so, and it seems to me, so far as these charges are concerned, that it is a libel to be governed by the same rules which govern a libel on any other private individual. I do not mean to say what the exact limits are of public and of private libels, but my judgment proceeds upon the ground that this is in the same situation as a libel on any other private individual.

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ROLFE, B.:

I am entirely of the same opinion; and with reference to the first

point, namely, the reception of evidence, I will content myself with silently acquiescing, because my LORD CHIEF BARON and my brother ALDERSON have stated the grounds of my opinion so fully, that it would be mere pedantry to put the same proposition into different language. With regard to the other, which is the main *point, whether there was a misdirection on the part of my brother PARKE, I will add a very few words. In the first place, I entirely concur with my brother *Wilde*, that this ought, in all fairness and candour, to be taken as a direction given by the Judge at the trial, that is, ought to be taken as a direction so far as relates to the private charity. When the short-hand writer's notes are looked at, and coupled with what my brother PARKE states, I cannot, on the other hand, doubt that the observation about the sermon ought not to be taken as a direction. Although at one time he stated that it stood in the same category, yet he corrected himself afterwards; and it is plain to me, that my brother *Byles* acted on this distinction. Therefore the question only is, whether my brother PARKE was right in telling the jury that this private charity, that is, the charity in question,—I will not beg the question by calling it private,—was not a matter which entitled the defendant to assert the privilege given with respect to comments upon public acts. Let us see how the law is on that subject. My brother *Wilde* argued the case as if, in deciding against him, we were to be supposed to lay down some rule, that the policy of having charities in a parish that excluded Dissenters was not the legitimate subject of comment, and that the press were to be restrained if they did make such comment, and that private individuals might be proceeded against by action, or perhaps criminally, if they indulged in such comments; and I should have entirely gone with him, if the law were at all as his argument would seem to imply that it was. I concur with him to the full extent, that a man's conduct, as the clergyman of a parish, in respect to the expediency of so limiting private charities, is the fairest possible subject of observation; and if a man, having made the strongest observations upon the impolicy of such a matter, then added to it, "Mr. Gathercole sanctioned such a charity," he has a right to do that; and if Mr. Gathercole brought his action against him, he *would plead that it was true. Then let us see how the case stands with respect to matters which are called "of a public nature." In every action of libel, as in an indictment for libel, the act done is alleged to have been done maliciously; and in the case of a libel against an individual, it is

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conclusive that it was done maliciously, unless some justification is put upon the record; but in the case of comments upon the public acts of public servants, (and there are other cases to which the same observation would apply), you may at the trial, although you plead nothing but Not guilty, show that what you have done is a justifiable act, by showing what amounts only, in substance, to this: it is not done maliciously. Just in the same way I may show, if I have written of such and such a person, "he is a drunken fellow, and not very honest," that this may be perfectly justifiable as a privileged communication, in answer to a question put to me—"would you advise me to take that man as my servant?" I am perfectly justified in giving that answer, and I need do nothing more, and could do nothing more, I believe, in such a case, than plead Not guilty. If I make reasonable comments upon the conduct of public men in the discharge of their public duties, whether they be generals, or ministers, or Judges, or possibly advocates, (and I should certainly think also, on the same principle, clergymen), I am justified in doing it; and therefore I confess I wish to take this opportunity of saying, that, as at present advised, I should not have gone the length with my learned brother PARKE, in saying that comments on sermons would not come within the category of public acts. I should probably have thought they would do so, but I give no opinion about it, because it does not seem to me that that question arises. The question here is, is it or is not a matter which you can excuse under the general issue, that you have made comments upon the acts of a clergyman in the mode of his administering charity, which comments would, *ex concessis*, have

[*343] been libellous if these be not public *acts. Now it seems to me preposterous to say, that the act of a clergyman, in sanctioning some individuals in his parish, in giving relief to some, and excluding a large class of others who are not to partake of it, can be considered in the light of a public act. The act does not become a public act, because half a dozen or a dozen join in it; it is essentially private; they may manage it as they please. As was thrown out in the course of the argument, you might as well say it was a public act, if you sanction a charity for foreigners in distress. I do not see where the line is to be drawn. It is no part of a clergyman's public functions to preside at a clothing charity: it is something which, although he is a clergyman, and therefore, in a sense, filling a public character, he does merely as one individual there present; and therefore I think that this does not come within

the category of public acts, and consequently that the direction was perfectly right. I may add, that there is really no pretence for saying that any one of the observations made in this libel could possibly have been treated as fair observations on that particular act; at the same time, I do not proceed on that ground,—that would be a very unsafe ground to proceed upon, if the direction had been wrong in point of law. If I had been of opinion that this was a public act, I think my brother *Wilde* would have been entitled to the rule. I think it was clearly not a public act, whatever might have been the case of the sermons, if the question had arisen, in which I, as at present advised, should have concurred with my brother *Wilde*; but in regard to this, I think it was a mere private administration of a charity; and although I may have one opinion, and anybody else may have another, as to the policy of excluding Dissenters, and in such a case it may have been wiser to have made no such distinction, yet that does not make it a matter of a different genus from what it would have been, if it had been a charity to give to any person whatever in the parish that was in distress. I think, therefore, the rule ought not to be granted.

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PARKE, B.: [844]

In explaining to the Court the course I pursued with regard to the admission of evidence, and the reasons that governed me in admitting it, I have already said as much as I think it is necessary to say on that part of the case. I wish to add a word or two with respect to the more important question, whether or not I was right in informing the jury in this case, that there was no justifiable cause or excuse for the publication of a libel upon the plaintiff, in the circumstance of the then existing regulations which he, as a clergyman of the parish, had originated or sanctioned for the purpose of administering charity to the poor. Upon the trial, I, somewhat more at length than is usual with me, explained to the jury what the nature of a libel was: I told them the definition of a libel was, that which is written or printed, and published, calculated to injure the character of another, by bringing him into ridicule, hatred, or contempt; and I said every publication of that description, published without justifiable cause or excuse, was the subject of an action. With respect to the truth, that must be pleaded. Then I left to the jury the question of libel, intimating my opinion pretty strongly that the matter of this paper was libellous, and on that

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there could not be a question. Then I expressed an opinion that there was no occasion for the publication which could render it excusable; and the question really is, whether there was any occasion which would justify the remarks that had been made, or any remarks upon the conduct of the plaintiff; because, if the statements contained in this paper are true, then the rule is that the defendant must plead the truth of them; but nevertheless, if the plaintiff has given lawful occasion by his conduct for the remarks, that is evidence under the general issue. I was of opinion that, although a magistrate, or a minister, gives occasion for remarks by his public conduct, in exercising the functions of a magistrate or a minister, which concern the public; and although

[*345] an individual who gives to the public any literary *work, does the same thing, that, with respect to a clergyman, he gives no such occasion by instituting or carrying into effect any arrangements for a private charity. I thought also, that the clergyman, by preaching a sermon to his own congregation, did not thereby put it on the same footing as a printed and published sermon; but from the first I never gave any decided opinion on that question. If any expression of an unqualified opinion escaped my lips in the course of the interlocutory observations that I made, with the view of shortening my brother *Byles's* speech, I certainly corrected it; and his impression must have been, that on that part of the case I had given no decided opinion. When I summed up, I said the same thing. I had a strong opinion that the mere circumstance of preaching sermons did not make them public property, and did not invite observation on them from the press in general, in the same way that a publication of a literary work does: and with all respect to my brother ROLFE, I must own I still am of the same opinion, viz., that the preaching a sermon in the ordinary mode of a clergyman's duty, in the parish church, does not make it public property, and invite observation upon it, so as to allow the excuse, under the general issue, of any remarks that a person chooses to publish upon that sermon. With regard to the other point, I certainly never felt any doubt, and feel no doubt now, that because a clergyman chooses to institute or to recommend a subscription among the parishioners for a charity of any kind, and makes regulations for that purpose, by so doing he does not put those regulations in the same position as a literary work, and make them public property, and so give occasion to anybody to make criticisms on his conduct in that respect. I am clearly of opinion that he does

not, and consequently, if the publication was libellous on the plaintiff, as to which there is not the least doubt, there certainly was no defence under the general issue. GATHERCOLE v. MIALL.

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Rule refused.

HUGHES *v.* BUCKLAND AND OTHERS (1).

1846. *April* 24.

(15 Meeson & Welsby, 346—356; S. C. 15 L. J. Ex. 233; 3 Dowl. & L. 702.)

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The defendants, servants of P., apprehended the plaintiff while fishing in the night-time near the mouth of the river Ogwen, in Carnarvonshire, in which river P. had a several fishery. In an action of trespass for this arrest, the defendants gave much evidence to show that P.'s fishery included the place where the plaintiff was apprehended. The jury, however, defined the limits of the fishery so as to exclude that place by a few yards; but they also found that P. and the defendants reasonably believed that it included that place: Held, that the defendants were entitled to the protection of the stat. 7 & 8 Geo. IV. c. 29, ss. 35 and 63.

TRESPASS, for assaulting the plaintiff, and imprisoning him, and forcing him to go in custody along a certain public way, &c., and taking from him a certain net, &c. Plea, Not guilty, by statute.

At the trial, before Parke, B., at the last Summer Assizes for Anglesey, it appeared that the action was brought against the defendants, who were gamekeepers of Colonel Pennant, of Penrhyn Castle, in the county of Carnarvon, for taking him into custody, and taking from him a net, with which he was fishing in the night-time, on the Lavan sands, in the Menai Straits, near the mouth of the river Ogwen. The defendants justified as the servants of Colonel Pennant, under the stat. 7 & 8 Geo. IV. c. 29, ss. 35 and 63 (2), on the ground that the plaintiff was illegally fishing *within [*347]

(1) Foll. *Chamberlain* v. *King* (1871) L. R. 6 C. P. 474, 477, 40 L. J. C. P. 273; *Lea* v. *Facey* (1887) 19 Q. B. Div. 352, 354, 56 L. J. Q. B. 536.—A. C.

(2) Sect. 34 enacts, "That if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water which shall be private property, or in which there shall be any private right of fishery, every such offender, on conviction before a justice, shall forfeit a sum not exceeding 5*l.*, besides the value of the fish taken."

Sect. 35. "If any person shall at any time be found fishing against the provisions of this Act, it shall be lawful for the owner of the ground, water, or fishery where such offender shall be found, his servants, or any person authorised by him, to demand from such offender any rods, lines, hooks, nets, &c., which shall then be in his possession; and in case such offender shall not immediately deliver up the same, to seize and take the same from him, for the use of such owner."

Sect. 63. "Any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this Act, (except only the offence of angling in the daytime,) may be immediately apprehended without a warrant, by any peace-officer, or by the owner of

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the limits of a several fishery, of which Colonel Pennant was the owner. The defendants advanced a great mass of documentary and oral evidence to prove the ownership of the fishery; on the part of the plaintiff, it was admitted that it existed in the river Ogwen; but it was denied that it extended into the Menai Straits. The defendants' counsel further contended, that even if the place in question were without the actual limits of the fishery, yet, as Colonel Pennant no doubt believed, and had reasonable grounds, upon the evidence given in this cause, for believing that it was within them, the defendants were entitled to a verdict, on the ground that, the trespass being an act done in pursuance of the stat. 7 & 8 Geo. IV. c. 29, the venue ought, according to the 75th section of that Act, to have been laid, and the cause tried, in the county of Carnarvon, where the fact was committed, and the defendants ought to have had notice of action. The learned Judge left it to the jury to say, first, whether Colonel Pennant was the owner of a private fishery in the place at which the plaintiff was fishing when he was taken into custody; secondly, if not, whether Colonel Pennant reasonably and *bonâ fide* believed that he was the owner of a private fishery in that place; and thirdly, whether the defendants reasonably and *bonâ fide* believed that he was such owner. The jury, after considerable deliberation, drew a line upon
[*348] a plan which had been handed *up to them, extending from the mouth of the river Ogwen into the Menai Straits, and stated that they found that that line, which excluded by a few yards the spot where the plaintiff was fishing, was the boundary of Colonel Pennant's fishery in the Straits; but they found also, that both Colonel Pennant and the defendants *bonâ fide* and reasonably believed that

the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace," &c.

Sect. 75. "For the protection of persons acting in the execution of this Act, be it enacted, that all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act, shall be laid and tried in the county where the fact was committed; and shall be commenced within six calendar months after the fact committed, and not otherwise, and notice of writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action," &c.

[The stat. 7 & 8 Geo. IV. c. 29, was repealed by 24 & 25 Vict. c. 95, s. 1, and sch. The sections above set out were substantially re-enacted by the Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 24, 25, 103, 113. Section 113 of 24 & 25 Vict. c. 96 (corresponding to s. 75 of 7 & 8 Geo. IV. c. 29), was repealed by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2, and sch., and is replaced by s. 1 of that Act.—A. C.]

the fishery extended over that spot. The learned Judge was of opinion that the defendants, under these circumstances, were entitled to the protection of the Act of Parliament, and directed a verdict for the defendants, giving the plaintiff leave to move to enter a verdict for him, with 5*l.* damages.

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In last Michaelmas Term, *Jervis* obtained a rule *nisi* accordingly, contending that the statute protected only persons who were in fact the owners of a fishery in the place where the offender was found, and their servants and persons authorised by them. Against this rule

W. Yardley (with whom were the *Solicitor-General* and *Townsend*) now showed cause :

The defendants were entitled to the protection of the Act, as being "persons acting in the execution of the Act," within the meaning of the 75th section, it being found by the jury that they reasonably and *bonâ fide* believed that Colonel Pennant was the owner of a private fishery in the place where the plaintiff was apprehended ; and it is not necessary, for this purpose, that it should have been shown that he was in fact the owner of a fishery in that place. The jury found him to be the owner of a fishery, the limits of which were within a very short distance of the spot in question ; and the evidence given of his title showed that he had ample grounds for believing that it extended much further. The 35th section of the Act of Parliament authorises "the owner of the ground, water, or fishery, where such offender shall be so found," that is, "shall be found fishing against the provisions *of this Act," "his servants, or any person authorised [*349] by him," to demand from such offender any rods, lines, hooks, nets, &c., which shall then be in his possession ; and if he do not deliver them up, to seize and take them from him for the use of such owner. Sect. 63 enacts, that any person found committing any offence punishable under the Act, except angling in the day-time, may be apprehended without warrant "by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him," &c. Then the 75th section, "for the protection of persons acting in the execution of this Act," directs that all actions and prosecutions to be commenced "against any person, for anything done in pursuance of this Act," shall be laid and tried in the county where the fact was committed, and that a month's notice of action shall be given. Now all the authorities show, that, in the construction of enactments of this

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nature, the protection extends to all persons who *bonâ fide* and reasonably believe that they are acting in conformity with the Act of Parliament, because otherwise they would be nugatory altogether, as persons who strictly comply with the Act of Parliament have a complete justification under the powers given by it, and need no such protection. The analogous cases which have been decided on the stat. 24 Geo. II. c. 44, relating to justices of the peace, are strongly in point for the defendants. Thus, in *Bird* v. *Gunston* (1), a magistrate was held entitled to notice of action for an act done by him when acting as a magistrate, although what he did was not strictly within the scope of his office. In *Prestidge* v. *Woodman* (2), a magistrate who acted out of his jurisdiction was held to be, nevertheless, entitled to notice of action. That case bears a strong analogy to the present. So also, where one magistrate acted alone, in a case where the jurisdiction was required by law to be exercised

[*350] by two: *Weller* v. **Toke* (3). * * *Hopkins* v. *Crowe* (4) was cited for the plaintiff at the trial, but that case is quite distinguishable. There the arrest was made under the Cruelty to Animals Act, 5 & 6 Will. IV. c. 59, which authorises the owner of the animal ill-treated to give the offender in charge to a constable; but the charge was made, not by the owner of the animal, but by his son, who could not possibly have entertained a reasonable belief that he was the owner. Here the Act of Parliament was designed for the protection of those who have acted illegally, but *bonâ fide*; and it is a case in which there was undoubtedly the least possible illegality. He was then stopped by the COURT, who called upon

Jervis and *Welsby*, in support of the rule:

The real principle applicable to this case, and with which all the authorities are consistent, is, that where protection is given to persons for acts done by them in pursuance of an Act of Parliament, the party must, in order to have the benefit of that protection, show that he fills the character mentioned in the Act. Whether the parties claim protection as magistrates, constables, revenue officers, or Commissioners, they must actually fill those characters, in order to be entitled to the immunity; and it is not sufficient that they *bonâ fide* believe themselves to fill those characters. Thus, in

[*351] **Bird* v. *Gunston*, *Weller* v. *Toke*, *Prestidge* v. *Woodman*, and *Wedge* v. *Berkeley* (5), the defendants were actually magistrates,

(1) 4 Doug. 275; 2 Chit. R. 459.
(2) 1 B. & C. 12.
(3) 3 R. R. 355, *n.* (9 East, 364).
(4) 43 R. R. 475 (4 Ad. & El. 774).
(5) 45 R. R. 583 (6 Ad. & El. 663).

although, acting in that capacity, they had acted erroneously or illegally. In *Greenway* v. *Hurd* (1), and *Daniel* v. *Wilson*, the defendants were actually excise officers; in *Ballinger* v. *Ferris* (2), and *Cook* v. *Leonard*, they actually filled the office of constable. In all the other cases, as *Butler* v. *Ford* (3), *Norris* v. *Smith* (4), *Cann* v. *Clipperton* (5), *Jones* v. *Gooday* (6), the parties filled the office, and answered the description mentioned in the protecting clause. So, in *Beechey* v. *Sides* (7), which was a case that arose on the same statute as the present, the defendant, being in fact the owner of the premises trespassed on, was a party entitled to apprehend the plaintiff, and therefore was held to be within the 75th section. On the other hand, where a party had acted as a justice, without being actually such, he was held not to be entitled to notice under the 24 Geo. II. c. 44 (8), although he had acted *bonâ fide* under a supposed authority given by the charter of the borough: *Jones* v. *Williams* (9). * * In *Hopkins* v. *Crowe*, again, the defendant, not filling the character of actual owner of the animal ill-treated, was held therefore not to be entitled to notice.

(PARKE, B.: The defendant there could not reasonably have *believed himself to be the owner.) [*352]

The decision did not proceed upon that ground, but upon the ground that the protecting clause of the Act extended only to an officer, or to the owner of an animal ill-treated, acting upon view or information. * * *

POLLOCK, C. B.: [353]

I think this rule ought to be discharged. It is unnecessary for me to advert to all the cases, a long list of which has been brought before us in the course of the argument. We ought, if we can, ascertain the meaning of the Act of Parliament, and give it such a construction as shall make it consistent with good sense and justice. The object of the clause in question was to give protection to all

(1) 40 R. R. 861 (4 T. R. 553).
(2) 1 M. & W. 628.
(3) 38 R. R. 715 (1 Cr. & M. 662).
(4) 50 R. R. 374 (10 Ad. & El. 188).
(5) 50 R. R. 503 (10 Ad. & El. 582).
(6) 9 M. & W. 736.
(7) 33 R. R. 333 (9 B. & C. 806).
(8) The material provisions of this Act were repealed by s. 17 of 11 & 12 Vict. c. 44, and substantially re-enacted by s. 9. Provisions as to notice of action contained in public general Acts are now repealed in general terms by s. 2 of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).—A. C.
(9) 27 R. R. 474 (3 B. & C. 762).

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parties who honestly pursued the statute. Now every act consists of time, place, and circumstance. With regard to circumstance, it is admitted, that if one magistrate acts where two are required, or imposes twelve months' imprisonment where he ought only to impose six, he is protected, if he has a general jurisdiction over the subject-matter, or has reason to think he has. With respect to time, the case of *Cann* v. *Clipperton* shows that a party may be protected although he arrests another after the time when the statute authorises the arrest. Place is another ingredient; and I am unable to distinguish the present case from that of a magistrate, who is protected although he act out of his jurisdiction. A party is protected if he acts *bonâ fide*, and in the reasonable belief that he is pursuing the Act of Parliament. One who acts in perfect execution of the Act of Parliament has no need to tender amends, and does not stand in need of any protection. The protection is required by him who acts illegally, but under the belief that he is right. I should have drawn the same conclusion, if the 75th section had repeated the terms of the 63rd section. I should then have construed it to mean, that the owner of the right of fishery had a right to apprehend trespassers; and if a person did wrong, either as to time, place, or circumstance, whilst reasonably and *bonâ fide* believing himself to be the owner, and therefore acting in pursuance of the Act, he was *to have the protection of notice of action and of venue. Here the owner reasonably and *bonâ fide* believed himself to be entitled to seize the plaintiff, and to take from him his net; and I can see no difference in this respect between seizing a man's net or rod under the Act of Parliament, without a demand, in which case the party seizing would, if he acted *bonâ fide*, clearly be entitled to protection, or seizing it beyond the limits of his domain. If we look at the spirit of the Act, we shall find it to be a matter of indifference whether the error is committed in respect to time, place, or circumstance. If a party does an act, reasonably and *bonâ fide* believing it to be in pursuance of the Act of Parliament, it is sufficient if he fills the character in one respect. Here the defendants' master was owner of a neighbouring fishery, and the net was seized because the defendants believed him to be the owner of a fishery where the plaintiff was fishing. We need not say how far from the limits of his own land a party would be justified in seizing the nets of another. Here the jury have found that the defendants *bonâ fide* believed that Colonel Pennant had a private right of fishery in the place where

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the plaintiff was fishing. It is enough that we confine our opinion to the case before the Court.

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ROLFE, B.:

I am of the same opinion. The facts of the case are very short. Colonel Pennant is the owner of a fishery in the Menai Straits; and the 35th section of this Act of Parliament authorises the owner of a fishery, or his servants, to seize the rods and nets of parties who illegally fish within it. His servants found a man fishing in what they supposed to be their master's fishery, and they thereupon seized his net. In the ordinary case, an action might be brought against them without notice; but the 75th section of this Act requires that notice shall be given, and that the venue shall be laid in the county where the cause of action arose. I must own that in the course of the argument I have *changed [*355] my opinion on this subject. At first, I thought the defendants entitled to the protection of the Act, as the servants of the owner of a neighbouring fishery, they *bonâ fide* believing the plaintiff to be within the limits of that fishery. The 75th section gives protection to all persons for anything they do in pursuance of the Act of Parliament. The words are quite general, and would seem to protect every one for what he *bonâ fide* believes he does in pursuance of the Act of Parliament. These words, however, "any person," would appear to require some qualification. They are, therefore, to be confined to parties who are supposed to know the law; and therefore, where a party *bonâ fide* and reasonably believes himself to be the owner—that is the qualifying circumstance—the party is then fully protected, and the whole difficulty is removed. This was all that was really meant by PATTESON, J., in the case of *Hopkins* v. *Crowe*. The question here is, did the parties, knowing the law, reasonably believe that the facts brought them within it? It is clear they did; and that circumstance distinguishes the case of *Bush* v. *Green* from the present; because there the defendant could not reasonably have considered himself a gamekeeper. All who *bonâ fide* and reasonably think they fill the character mentioned in the several statutes, and act in pursuance of them, are protected.

PARKE, B.:

I retain the opinion I formed in this case at the trial. The question arises upon the 75th section of this Act of Parliament, which must be construed, like all other Acts, according to its

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grammatical sense, avoiding any construction which would lead to absurdity, and looking at the modifications that the decisions have introduced. The Act is general in its terms, and gives protection to all persons for all acts done in pursuance of it. Those words do not mean acts done in strict pursuance of the Act, because, in such a case, a party would be acting legally, and therefore would not require protection. The words, therefore, must *be qualified by the decisions; and then the meaning will be, that a party, to be entitled to protection, must *bonâ fide* and reasonably believe himself to be authorised by the Act. In the present case, the defendants, in order to be protected, must have *bonâ fide* and reasonably believed Col. Pennant to be the owner of the place where the plaintiff was fishing, and that the trespass was committed within the limits of his property. The jury have found the *bona fides*, and the reasonable belief of the defendants that the trespass was committed within the limits of the property of their master. At the trial, I reserved the point out of deference to the opinion of my brother PATTESON, as expressed in *Hopkins* v. *Crowe*, and not from any doubt that I entertained upon the subject. The authorities may be divided into two classes. In the first class is to be placed the case of justices, who are entitled to certain privileges by the 24 Geo. II. c. 44 (1), and there are other Acts applying to constables; and there, in order to obtain the benefit of the Act, the parties must be actually justices or constables. So, where certain powers are given by local Acts to trustees, the *bona fides* is immaterial, although, by a late decision of the Court of Queen's Bench (2), it is sufficient if they are trustees *de facto*. That disposes of all the cases except *Hopkins* v. *Crowe*. My brother PATTESON is correct in his observation in that case, that the defendant was not entitled to protection; and the reason was, that he could not have supposed that he was the owner of the horse that had been ill-treated. There is nothing in the cases to require a different construction from that which we have given in the present case. The statute extends protection to all who *bonâ fide* and reasonably believe that they fill the character, and are authorised to act; and the defendants are in that predicament.

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Rule discharged.

(1) See *ante*, p. 705, note (8).

(2) *Harrison* v. *Varty*, Trin. T., 1845; not reported.

RAYNER *v.* GROTE AND ANOTHER (1).

1846.

(15 Meeson & Welsby, 359—366; S. C. 16 L. J. Ex. 79.)

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Where the plaintiff made a written contract for the sale of goods, in which he described himself as the agent of A., and the buyer accepted and paid the price of a portion of the goods, and had then notice that the plaintiff was himself the real principal in the transaction, and not the agent of A.: Held, that the plaintiff might sue in his own name for the non-acceptance of and non-payment for the residue of the goods.

ASSUMPSIT. The first count of the declaration stated, that theretofore, to wit, on &c., the defendants bargained for and bought of the plaintiff, and the plaintiff, at the request of the defendants, then sold to the defendants, a large quantity of goods, to wit, fifty tons of soda ash, 48 and 50 per cent., Huson's test, in tierces, free on board at 2¾*d.* per degree, to be delivered in all May, customary allowances, payment cash in fourteen days from delivery, less 2½*d.* off: and in consideration thereof, and that the plaintiff had, at the like request of the defendants, then promised to deliver the said goods to the defendants at the time and in manner aforesaid, the defendants then promised the plaintiff to accept the said goods of and from him the plaintiff, and to pay him for the same in manner aforesaid; and although the plaintiff hath in all things been always ready and willing to perform and fulfil the said contract on his, the plaintiff's, part, and during the whole of the said month of May was ready and willing to have delivered the said goods to the defendants in all respects according to the said contract, and then requested the defendants to accept the same in manner aforesaid; and although the said month of May had long expired before the commencement of this suit, and although they, the defendants, to wit, within the said month of May, did accept and receive of and from the plaintiff, in part performance of their said contract, a certain part of the said goods, to wit, ten tons of the said soda ash, and pay for the same, to wit, in manner aforesaid; of all which premises they the defendants had due notice: yet the defendants, not regarding their said promise, did not nor would, when they were so requested as aforesaid, or at any other time, *accept, take, [*360] or receive of or from him the plaintiff, the residue of the said soda ash, or any part thereof, or pay him for the same in manner aforesaid, or otherwise, but on the contrary thereof, have hitherto wholly neglected and refused so to do: whereby, &c. There were also counts for goods sold and delivered, and on an account stated. Plea (amongst others), *Non assumpsit*, and issue thereon.

(1) *Schmaltz* v. *Avery* (1851) 16 Q. B. 655, 20 L. J. Q. B. 228.

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At the trial, before Cresswell, J., at the Liverpool Summer Assizes, 1846, it appeared that the action was brought to recover the balance due upon the sale by the plaintiff to the defendants of a quantity of soda ash, according to the following bought note:

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"17, EXCHANGE BUILDINGS, LIVERPOOL, 7th March, 1844.

"Messrs. GROTE, TOMKINS, & Co.

"I have this day bought for you the following goods from J. and T. Johnson:

"Fifty tons soda ash, 48 and 50 per cent., Huson's test, in tierces, free on board, at 2¾*d.* per degree.

"To be delivered in all May. Customary allowances. Payment, cash in fourteen days from delivery, less 2*d.* off.

"J. H. RAYNER."

It appeared in evidence, that the plaintiff, although on the face of this note he appeared to contract as the agent of Messrs. J. and T. Johnson, was himself the owner of the goods, and the real principal in the transaction. Thirteen tons out of the fifty were delivered to the defendants early in May, and accepted by them; and there was strong evidence to show that at that time the fact of the plaintiff being the real principal in the sale was disclosed to, and fully known by, the defendants. The invoice sent with these thirteen tons was made out in the name of the plaintiff. The defendants refused acceptance of the rest of the goods. The learned Judge, in summing up, told the jury, that if they were satisfied from the evidence that the defendants had received the first portion of the
[*361] goods with full knowledge of the fact *that the plaintiff was the real seller, and that all parties then treated the contract as one made with the plaintiff as the principal in the transaction, he was entitled (subject to other questions which arose in the cause) to recover in this action. The jury found a verdict for the plaintiff for the amount claimed.

In last Michaelmas Term, *Baines* obtained a rule *nisi* for a new trial, on the ground of misdirection. In Hilary Term (Jan. 29),

Watson and *J. Henderson* showed cause:

The simple question is, whether there was in this case any evidence of a contract with the plaintiff. If the plaintiff was really interested in the goods, and not the mere agent of Messrs. Johnson, he is entitled to use that contract, and to describe it as a contract with himself. The real principal may intervene at any time; and,

on the other hand, the agent may come and say that he is in truth the principal. * * So, an auctioneer may sue a purchaser at the auction for goods sold and delivered, even though the sale was at the house of the owner of the goods, and they were known to be his property: *Williams* v. *Millington* (1).

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(POLLOCK, C. B.: No doubt; but that is the case of an avowed agent.)

Then that case concludes the present, because, if interested, the agent certainly may sue. Applying the principle of the case to this, if an agent, who has no interest save that of his commission, might come in and sue as principal, *à fortiori*, an agent who has a real interest in the subject-matter of the contract may. * * Further, [362] there was evidence of an original contract immediately between the plaintiff and the defendants. The defendants paid the plaintiff a part of the price, and accepted part of the goods, on the footing of the contract being with him.

Baines and *Crompton*, in support of the rule:

The written contract proved in this case excludes the presumption of a contract with the plaintiff; it describes him as the agent of others. Its terms are inconsistent with the notion of any responsibility on his part.

(POLLOCK, C. B.: The contract does not clearly do so; but supposing that it did?)

Then the plaintiff could not recover: he is estopped by his own language and conduct from denying that there was no other contract; and moreover, there is no ground for saying that there was any other contract; the plaintiff has acted solely on the written contract, and has always represented Johnson as being the real principal. There is nothing in the invoice inconsistent with that. It shows that he debited the defendants with the amount, but then it is sent in by him as broker. Besides, all that amount has been paid.

(POLLOCK, C. B.: Supposing the original contract was with Johnson, could not and may not Rayner have been substituted by subsequent agreement? or, suppose Johnson to be a non-existing person, can no one sue?)

(1) 2 R. R. 724 (1 H Bl. 81).

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The question is, whether there is proof of a contract in terms, as stated in the declaration, to accept the thirty-seven remaining casks from the plaintiff.

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(POLLOCK, C. B.: The only question is, whether there is any evidence of a contract for the substitution of the plaintiff for Johnson.)

There was no evidence that the plaintiff was ever substituted, or bound to deliver the thirty-seven casks.

[363] (ALDERSON, B.: Is Rayner precluded from showing himself the principal in the original contract?)

He has avowed himself the agent,—has assigned that character to himself; and he cannot afterwards say that he is not agent. You cannot vary the written contract by parol; the consideration would be different. The question really comes to this, whether you can by parol substitute one person for another named in writing, which, except in cases of principal and agent, cannot be done: you have no right to introduce a new party. [They referred to *Morris* v. *Cleasby* (1) and *Koster* v. *Eason* (2).]

Cur. adv. vult.

[364] The judgment of the COURT was now delivered by

ALDERSON, B.:

In this case, which was heard before my Lord Chief Baron, my brother Rolfe, and myself, the question was, whether the case had been properly left by my brother CRESSWELL to the jury. The facts were these: The plaintiff had made a contract in writing, by which he appeared to be the agent for another party, who was named in the contract, and by which he sold to the defendants a quantity of soda ash; and it was averred in the declaration, and proved at the trial, that although part of those goods had been delivered to the defendants, and accepted and paid for, yet that they had refused to [*365] receive and pay for the *residue. At the time when this contract was made, the plaintiff was himself the real principal in the transaction; and although the contract on the face of it appeared to have been made by him as agent for another party, there was evidence given at the trial, tending strongly to show, that when the first parcel of the goods was delivered to and accepted by the

(1) 16 R. R. 544 (4 M. & S. 566). (2) 14 R. R. 603 (2 M. & S. 112).

defendants, the name of the plaintiff as the principal was then fully known to the defendants: and we think that it was then properly left to the jury to infer from the evidence, that the defendants, with the full knowledge of the facts, had received that portion of the goods, and that all parties then treated the contract as one made with the plaintiff as the principal in the transaction. The defendants' counsel, in the argument, contended against this view of the case, and cited the case of *Bickerton* v. *Burrell* as an authority that the plaintiff could not sue in such a case in his own name. That case is indeed in one respect stronger than the present, inasmuch as that was an action for money had and received, whereas this is a case of an executory contract. If, indeed, the contract had been wholly unperformed, and one which the plaintiff, by merely proving himself to be the real principal, was seeking to enforce, the question might admit of some doubt. In many such cases, such as, for instance, the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then show himself to be the real principal, and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule. But the facts of this case raise a totally different question, as the jury must be taken to have found, under the learned Judge's direction, that this contract has been in part performed, and that part performance accepted by the defendants with full knowledge *that the plaintiff was not the agent, but the real principal. If so, we think the plaintiff may, after that, very properly say that they cannot refuse to complete that contract, by receiving the remainder of the goods, and paying the stipulated price for them. And it may be observed that this case is really distinguishable from *Bickerton* v. *Burrell*, on the very ground on which that case was decided; for here, at all events, before action brought and trial had, the defendants knew that the plaintiff was the principal in the transaction. Perhaps it may be doubted whether that case was well decided on such a distinction, as it may fairly be argued that it would have been quite sufficient to prevent any possible inconvenience or injustice, and more in accordance with former authorities, if the Court had held that a party named as agent, under such circumstances as existed in that case, was entitled, on showing himself to be the real principal, to maintain

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the action, the defendant being, however, allowed to make any defence to which he could show himself to be entitled, either as against the plaintiff or as against the person named as principal by the plaintiff in the contract. It is not, however, necessary for us, in the present case, to question the authority of that decision.

For these reasons, we are of opinion that the case has been properly left to the jury; and we see no reason to be dissatisfied with their verdict. The rule, therefore, must be discharged.

Rule discharged.

1846. *April* 28.

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THORNETT *v.* HAINES (1).

(15 Meeson & Welsby, 367—373; S. C. 15 L. J. Ex. 230.)

Where a sale by auction is advertised or stated by the auctioneer to be "without reserve," the employment by the vendor of a puffer to bid for him, without notice, renders the sale void, and entitles the purchaser to recover back his deposit from the auctioneer.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiff, and on an account stated. Plea, *Non assumpsit.*

At the trial, before Pollock, C. B., at the Middlesex sittings after last Michaelmas Term, it appeared that this action was brought to recover back the sum of 315*l.*, which had been paid by the plaintiff to the defendant, an auctioneer, as a deposit upon the sale by auction to the plaintiff of certain leasehold premises, called the "Bell Wine Vaults," in Shoreditch. The plaintiff sought to avoid the contract, and recover back his deposit, on the ground that the sale was void by reason of the employment of a puffer to enhance the price. One of the conditions of the sale was, that the highest bidder should be the purchaser. The auctioneer, before the biddings commenced, stated that the premises were to be sold "without reserve." It appeared that a person of the name of Robinson attended the sale, and bid against and immediately before the plaintiff. A person named Fry, who had been referred to by Walker, the vendor, as the person to give information respecting the premises, and who had been similarly employed by Walker on former occasions, was also present at the sale, and was directing Robinson, by signs, when to bid and when to stop bidding. The plaintiff's counsel proposed to ask Robinson, who was called as a witness for the plaintiff, what had passed between

(1) Distinguished in *Parfitt* v. *Jepson* (1877) 46 L. J. C. P. 433. See Sales of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58.—A. C.

him and Fry on the morning of the sale. This evidence was objected to on the part of the defendant, on the ground that Fry had not been shown to be the agent of Walker in this matter. The LORD CHIEF BARON received the evidence, and the witness then stated, that, on the morning of the sale, Fry had directed him to attend and bid, *which he accordingly did. The premises were knocked down to the plaintiff at 1,675*l.* [*368]

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Upon these facts, the jury, under the direction of the LORD CHIEF BARON, found a verdict for the plaintiff, damages 315*l.*, leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that the evidence of Fry's directions to Robinson was improperly admitted, or if the employing of a puffer under such circumstances did not avoid the sale.

Early in this Term, *Humfrey* moved accordingly, and obtained a rule *nisi* for a nonsuit, or for a new trial, on the ground that there was no sufficient evidence that Robinson was employed as a puffer by the vendor.

Byles, Serjt., *Robinson*, and *Wordsworth*, now showed cause:

They contended, in the first place, that there was ample evidence to go to the jury of Robinson's being a puffer employed by Fry, and of Fry being an agent of the vendor, Walker, so to employ him.

Secondly, where, upon a sale by auction, the highest bidder is, by the conditions of sale, to be the purchaser, and the auctioneer states, at the time of the sale, that it is to be without reserve, the employment of a puffer by the vendor to enhance the price without notice is a fraud, which avoids the sale. This doctrine of our law is founded upon the rule of ethics laid down in Cicero, De Officiis, lib. 3, s. 15: "Tollendum est igitur ex rebus contrahendis omne mendacium; non licitatorem venditor, nec qui contra se liceatur, emptor apponet." * * In *Bexwell* v. *Christie* (1), Lord MANSFIELD followed the rule of the civil law, and treated a private bidding by or on behalf of the vendor as a fraud. That decision was confirmed in *Howard* v. *Castle* (2), where *the purchaser was the only real bidder, and there being several puffers, Lord KENYON and the rest of the Court held, that unless it was publicly known that the owner intended to bid, it was a fraud upon the purchaser, and therefore no action would lie against him to enforce the sale; and they intimated a clear opinion that this doctrine was not [*369]

(1) Cowp. 395. (2) 3 R. R. 296 (6 T. R. 642).

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affected by the statutes imposing a duty on sales by auction except where the property was bought in by the purchaser or on his behalf. Although in fact there were in that case several puffers, no distinction is made in the judgment between the case of one puffer and of several, but it proceeds upon the ground that any secret bidding on behalf of the seller is a fraud and imposition upon the purchaser. [They also cited *Crowder* v. *Austin* (1) and

[370] *Rex* v. *Marsh* (2).] In *Smith* v. *Clarke* (3), Sir WILLIAM GRANT decided in favour of the vendors, on the ground that they had not employed the bidder generally to enhance the price, but only to prevent a sale at an under value; and said, that, in a similar case to that of *Howard* v. *Castle*, he should come to a similar conclusion.

Humfrey, contrà, contended, first, that there was no sufficient evidence of Fry being the agent of the vendor to bid or employ a bidder at the sale on his part, so as to render his statements and acts, and the acts of Robinson by his direction, evidence to affect the defendant: that Fry was only an agent for the purpose of showing the premises and conducting the sale, but not to do any illegal or fraudulent act.

Secondly, assuming it to be proved that Robinson was employed to bid by the vendor, that does not entitle the plaintiff to avoid the sale. The rule at law and in equity, on this subject, must surely be the same: it is absurd that on one side of Westminster Hall a man may recover back his deposit-money, and on the other side may, in the same case, be compelled to perform his contract. The courts of equity have established it as a rule, that one person may be employed by the vendor as a bidder, in order to protect the property from going below its value, and the same rule ought reasonably to be established in the courts of law. Here there is nothing to show that the property, in consequence of the biddings by Robinson, was sold above its value.

[371] POLLOCK, C. B.:

Upon the question, whether there was evidence to show that Fry was the agent of Walker, the vendor, to bid at this sale, and whether the evidence which was objected to ought to have been admitted, the Court will take some time to consider. Assuming that there was sufficient evidence that Robinson was a puffer employed by

(1) 28 R. R. 646 (3 Bing. 368).
(2) 32 R. R. 813 (3 Y. & J. 331).
(3) 8 R. R. 359 (12 Ves. 477).

Fry, as the agent of the vendor, I am of opinion that the plaintiff is entitled to recover in this action. The authorities cited by my brother *Byles*, of *Howard* v. *Castle*, and *Wheeler* v. *Collier*, establish that, in the case of a sale without reserve, if a puffer be employed without notice of his being there to protect the interests of the seller, the sale is void. It is said that a different doctrine prevails in the courts of equity. I adopt the law as laid down by Lords MANSFIELD, KENYON, and TENTERDEN. I think, however, that the decisions in the courts of law and equity may be reconciled. There is no distinction between a puffer bidding up to the buyer, or a bidding by him at a different stage of the sale; and if there were, it would not apply to this case, as here Robinson was a puffer, and bid immediately before the plaintiff. The only distinction between the cases in equity and law is this, that in the former there may be a reserved bidding without notice. But that does not apply to the present case, where the sale was distinctly stated and understood to be without reserve; and it matters not whether that announcement is made by the particulars of sale, or by the auctioneer by parol. The result is, that the plaintiff is entitled to recover his deposit, if he has satisfactorily made out that Robinson was in fact a puffer on behalf of the vendor.

PARKE, B.:

If there is any proof of Fry being the vendor's agent to bid for him at the sale, then, as he bid himself, and employed another to bid also, there were two persons bidding, after a notification by the auctioneer of the sale being without reserve. The sale, therefore, is void on *the ground of fraud, and the plaintiff is entitled to recover his deposit. As regards the present case, there is no difference in the law, as laid down in the courts of law and the courts of equity. Lords MANSFIELD, KENYON, and TENTERDEN, have expressed their opinion, that, where the seller employs a party to protect the property which is to be sold to the highest bidder, although the Stamp Acts may authorise such a course, still the fact ought to be notified to the public. In equity, the employment by the vendor of one person to bid at a sale, in order to protect the property from being sold at an under value, is not fraud, although not notified, but in law it is otherwise. But all the cases, both at law and in equity, agree in this, that if more persons than one are employed to bid, that amounts to fraud, as only one is necessary to protect the property, and the employment of more can only be to enhance the price, and

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therefore renders the sale void. So also, if it be announced, either publicly or by the particulars of sale, that the sale is to be without reserve, all the cases in equity decide, that if a person is employed to bid, the sale is vitiated, inasmuch as the seller has in effect announced that he will not take that step. This was determined in the case before Sir John Leach, of *Meadows* v. *Tanner;* and the decision of Vice-Chancellor KNIGHT BRUCE, in the case of *Woodward* v. *Miller*, if it be examined, will be found to maintain the same doctrine—that if a sale be advertised generally, without any statement of its being without reserve, it is not fraud to employ a person to bid, but that the employment of such a person renders the sale void, if the sale is to take place without reserve. It is unnecessary, in the present case, to say whether a sale would be valid, if the vendor, without notice, employs a person to buy the property in. Here the sale was without reserve, and two persons were employed to puff. The sale, therefore was invalid, and the plaintiff has a right to recover back his deposit.

[373] PLATT, B.:

Assuming that Robinson was authorised by Walker as a puffer, can the defendant retain the deposit? If we look at the contract, we cannot doubt that the deposit was obtained by fraud, as a puffer was employed to enhance the sale, in violation of the terms of the contract. Therefore, without going through the cases, it seems to me to be clear that the defendant, the auctioneer, cannot retain the deposit. Subject, therefore, to the question of fact, this rule must be discharged.

On a subsequent day, the COURT (PARKE, B., dissenting) expressed their opinion that there was sufficient evidence of Fry's being the agent of the vendor to bid, and the rule was thereupon discharged.

Rule discharged.

1846.

CUMMING *v.* BEDBOROUGH (1).

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(15 Meeson & Welsby, 438—444.)

Where a tenant pays property tax assessed on the premises, and omits to deduct it in his next payment of rent, he cannot afterwards recover the amount as money paid to the use of the landlord.

ASSUMPSIT. The first count of the declaration was framed upon a special agreement, whereby the defendant, as it was alleged, in

(1) Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), s. 15.

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consideration that the plaintiff would surrender to him a term of years in a portion of certain premises which he held as tenant to the defendant, and would assign to him the furniture and effects in that part of the demised premises, of the value of 300*l.*, the defendant agreed to withdraw a distress for rent, and to pay over to the plaintiff the balance of the 300*l.*, after satisfaction of the rent, and of the taxes due in respect of the premises; and the breach was for non-payment to the plaintiff of such balance, amounting to 90*l.* There were also counts for money had and received, for money paid, and on an account stated.

The defendant pleaded *non assumpsit*, and a set-off for use and occupation, &c.

At the trial, before Lord Denman, Ch. J., at the Summer Assizes for Berkshire, 1845, it appeared that the plaintiff was tenant to the defendant of three houses, Nos. 5, 6, and 7, Clarence Crescent, Windsor. In January, 1845, an execution was put into the house No. 6, at the suit of one Millard. The defendant thereupon claimed from the sheriff an arrear of rent which was due to him, amounting to 140*l.* After some discussion, a compromise was come to, whereby it was agreed that Millard should take to the furniture of the house No. 6, valued at about 300*l.*, in satisfaction of his debt, and should pay the defendant 100*l.* in satisfaction of his rent; and that Millard should become the tenant of the house to the defendant, instead of the plaintiff. On the following day, January 15th, the defendant, hearing that another execution was about to be put into the house No. 7, distrained on Nos. 5 and 7, for 185*l.* rent, due at Christmas, *1844; and a written agreement was thereupon entered into between the plaintiff and the defendant, the purport of which was, that the furniture in No. 7 should be taken to by the defendant, at the estimated value of 295*l.*, from which the amount of the rent, and a further sum of 20*l.* (in consideration of the defendant's taking to the house No. 7, without notice), were to be deducted, leaving a balance of 90*l.*, which the defendant was to retain as security for the payment of the rent thereafter to become due for No. 5, and of any rates and taxes then due in respect of any of the three houses. The LORD CHIEF JUSTICE ruled, that the agreement alleged in the first count of the declaration was not proved by this evidence; it was contended, however, that the plaintiff was entitled, on the count for money paid, to a verdict for the sum of 6*l.* 14*s.* 4½*d.*, which was the amount of several payments made by the plaintiff for property tax, in respect

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of the three houses, for the period between October, 1842, and April, 1844, which he had not deducted out of any subsequent payments of rent, and for which no provision had been made in the agreement. The defendant's counsel contended, that the payment of these sums was to be considered, under the circumstances, as voluntary on the part of the plaintiff, and that they could not be recovered back in this action: and *Denby* v. *Moore* (1) was cited. The LORD CHIEF JUSTICE was of that opinion, and directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for him for 6*l.* 14*s.* 4½*d.*

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In last Michaelmas Term, *Whateley* obtained a rule *nisi* accordingly, against which

F. V. Lee and *Bramwell* now showed cause:

There is no foundation for the argument, that the plaintiff was entitled to recover back this sum as money paid to the use of the defendant. The Property Tax Act, 5 & 6 Vict. c. 35, s. 60, [*440] Schedule (A.), No. 4, Rule 9, (which is in the same *terms as the 46 Geo. III. c. 65,) enacts, that "the occupier of any lands, &c., being tenant of the same, and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time being, as a rate of 7*d.* for every 20*s.* thereof would, by a just proportion, amount unto, which deduction shall be made out of the first payment thereafter to be made on account of rent . . . and the tenant paying the said assessment shall be acquitted and discharged of so much money, as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable." The tenant, therefore, is not entitled to make the deduction until the rent becomes due and is paid thereafter. If, then, this settlement between the parties amounted to a payment of rent, the plaintiff should then have deducted the amount of these assessments: *Denby* v. *Moore;* if it did not, then the time for making the deduction has not yet arrived.

(POLLOCK, C. B.: The property tax is assessed upon the land; the landlord, being out of possession, is not personally liable; if the tenant fails to pay the tax, there are no means of getting it from the landlord.

ALDERSON, B.: In *Denby* v. *Moore*, ABBOTT, J., and HOLROYD, J., consider the payment of the tax by the tenant as payment of so

(1) 18 R. R. 444 (1 B. & Ald. 123).

much of the next rent due by him to the landlord; if so, the payment afterwards of the full rent might entitle him to receive back the surplus as money had and received; but here, upon the agreement, it does not appear that the landlord has been overpaid; we do not know whether *he* did not actually pay the property tax.

PLATT, B.: Besides, the payment to the tax collector does not relieve the landlord from any payment; how then is it money paid to his use?

PARKE, B.: There is no implied request by the landlord to the tenant to pay it.)

No; the payment is not in discharge of any obligation of the landlord. Suppose A. let a house to B., and B. sublet it to C., C. to D., and D. to E., at rack rents; E. is forced to pay the property tax; D. is not liable at all *for it, yet he is to allow it in the first instance: [*441] surely it could not be money paid to his use, when eventually it would never come out of his pocket. The landlord cannot refuse to deduct it from the next rent; he would be a wrong-doer thereby, just as much as if he were to receive the whole rent when part had been paid. Indeed, the 103rd section of the Act imposes, for such refusal, a penalty of 50*l.* This case cannot be decided in favour of the plaintiff without overruling *Denby* v. *Moore*; for when the COURT there decided that payment of this tax by the tenant was part payment of the rent, they in effect decided that it was not money paid to the use of the landlord. So, where the tenant had paid the property tax, it was held that he had a right, in an action brought against him for use and occupation, to deduct it at the trial: *Baker* v. *Davis* (1).

(PARKE, B.: *Franklin* v. *Carter* (2) also shows, that, in covenant for rent, the defendant may plead the payment of property tax in bar of so much of the demand.)

But, further, it does not appear, in point of fact, that the landlord has received the amount of these assessments. Suppose the rates and taxes due, at the time of the agreement, amounted to 90*l.* and more, then the defendant would not receive any of the current quarter's rent.

(PARKE, B.: You say, *non constat* that the 90*l.* would pay the

(1) 14 R. R. 814 (3 Camp. 474). (2) 1 C. B. 750.

CUMMING v. BED-BOROUGH.

accruing rent, *plus* the rates and taxes then due, *plus* the property tax paid.)

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Yes; that is left entirely in doubt upon the facts of the case.

Whateley and *Voules*, *contrà*:

If the action of money paid will not lie for the tenant who pays the property tax under such circumstances, how is he to get back the money?

(PARKE, B.: It does not follow, that, if money paid will not lie, there is no other remedy.)

It is a fallacy to suppose that it is a payment of rent; it is payment
[*442] of a tax which is *payable in the first instance by the occupier, and repayable to him by the landlord. The ground of decision in *Denby* v. *Moore* was, that the payment of the whole rent, at the time when it was in the tenant's power to have deducted the amount of the tax, was a voluntary payment by him, and therefore the amount of the tax could not be recovered back by him in an action for money had and received. * * But here the payment was not voluntary on the part of the plaintiff; it was made under a mistake of facts, and at a time when no rent was due from him.

POLLOCK, C. B.:

I am of opinion that this rule ought to be discharged. (His Lordship stated the facts of the case, and continued:) The special agreement alleged in the declaration was not proved by the evidence,
[*443] and the LORD *CHIEF JUSTICE, being of opinion that the amount of the property tax paid by the plaintiff could not be recovered back in this action, directed a verdict for the defendant on all the issues, subject to a motion to enter a verdict for the plaintiff for 6*l.* 14*s.* 4½*d.*, the amount of the property tax, on the count for money paid. I abstain from giving any opinion in this case, whether money paid, or money had and received would lie to recover back the amount of the tax, if not deducted, as it ought to be, out of the next rent; because, in this case, the plaintiff's remedy, if any, was upon the special agreement, and that only; if he has no remedy under it, he has none at all. By that agreement, the rights of the respective parties, arising upon the whole transaction, were regulated; and the plaintiff having agreed that the defendant should retain the 90*l.* as a security for the accruing rent, and for the rates and taxes

then due in respect of the premises, he cannot claim to recover back any part of it until they are satisfied.

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PARKE, B.:

I think this is a very clear case. In the first place, I am of opinion that the tenant, after he has paid the property tax, and omitted to deduct from the next rent, cannot sue the landlord for the amount. He is not in the situation of having paid money to the use of the landlord, but in that of a tenant who has paid rent in advance. The transaction between these parties in January, 1845, was in the nature of a compromise, and thereby all demands were settled up to that time; and the plaintiff did not then claim to be entitled to deduct the property tax. Not having done so, he cannot recover it back, either as money paid, or money had and received.

ALDERSON, B.:

If an action for money paid will not lie in this case, the plaintiff is out of Court. Money had and received would not lie, because it is not shown that the *rent was overpaid at all. It either is a voluntary payment, or it is no payment at all. [*444]

PLATT, B.:

This tax is assessed upon the occupier; he is bound to pay it; and the tenant's remedy is to recompense himself out of the next rent. The money paid by him for the tax is paid in part satisfaction of the rent; and how can money paid in part satisfaction of the rent, be paid to the use of the landlord? Again, how can it be money had and received to the use of the plaintiff? Where a tenant has voluntarily paid the whole rent, and afterwards pays a landlord's tax, even then he cannot have an action for money had and received.

Rule discharged.

DOE D. HAW *v.* EARLES AND ANOTHER (1).

1846. *Jan.* 21. *April* 29.

(15 Meeson & Welsby, 450—458; S. C. 16 L. J. Ex. 242.)

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Devise as follows: "I dispose of all my effects as follows: All my household goods, live stock, furniture, plate, wearing apparel, and other effects at this time in my possession, or that may hereafter become my property, unto my wife J. H. I bequeath to J. P. 200*l.*, to be paid to her at the death of my wife. But if my wife after my decease see fit to marry,

(1) Commented on by LINDLEY, L. J., in *Hall* v. *Hall* [1892] 1 Ch. 361, 365, 61 L. J. Ch. 289; and see note to *Camfield* v. *Gilbert*, 7 R. R. 892, 897. —A. C.

DOE d. HAW v. EARLES.

her second husband shall have no claim whatsoever, that is, to sell or dispose of any part of the property now or hereafter may be in my possession; but the above sum of 200*l.* shall be paid to J. P. at the time of my wife's marriage."

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Held by POLLOCK, C. B., and PLATT, B., PARKE, B., *dissentiente*, that a remainder in fee in real estate did not pass by this devise.

IN pursuance of an order of PLATT, B., made on the 26th May, 1845, by consent, in the above cause, the following case was stated for the opinion of this Court.

John Haw, being seised in fee simple of certain freehold houses, situate in Hoxton, in the county of Middlesex, in remainder expectant upon the decease of Martha Simpson, who survived him, made his will, bearing date the 14th March, 1844, and duly executed, in the following words: "In the name of God, Amen. I, John Haw, of No. 5, Stapel Street, in the parish of St. Mary Magdalen, Bermondsey, in the borough of Southwark, in the county of Surrey being of sound mind, do hereby make, publish, and declare this to be my last will and testament, and do dispose of all my effects as follows: All my household goods, live stock, furniture, plate, wearing apparel, and other effects at this time in my possession, or that hereafter become my property, unto my dearly beloved wife, Jane Haw. I do further bequeath to Jane Parker the sum of 200*l.*, to be paid to her at the death of my wife. But if my beloved wife, after my decease, see good to marry, her second husband shall have no claim whatsoever, that is, to sell or dispose of any part of the property, now or may be hereafter in my possession. But the above sum of 200*l.* shall be paid to Jane Parker at the time of my wife's marriage. And I do declare this to be my last will and testament. And I do appoint my dearly beloved wife, Jane Haw, to be my sole executrix hereto."

The testator had not, at the time of making his will, or at the time of his death, any estates or real property of which he was to come into possession at a future period, except the houses of which he was seised in fee in remainder, as before stated. The lessor of the plaintiff is the widow of the testator, John Haw. The defendants, [*451] one of whom is the *heir-at-law of John Haw, are in possession of the houses in question.

If the Court shall be of opinion that the testator's estate in remainder in the houses in question passed by the will of John Haw, the judgment is to be in favour of the lessor of the plaintiff. If the reverse, the judgment to be in favour of the defendants.

The question for the opinion of the Court is, whether or not the testator's estate in remainder in those houses passed by the will of John Haw to his widow.

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The case was argued in last Hilary Term (Jan. 21) by

Watson, for the plaintiff:

The real estate in remainder passed by this devise to the widow of the testator. There are many cases to show that the word "effects" may be construed to pass real property; and here it is obvious on the whole of the will, that the testator did not intend to die intestate as to any part of his property. He begins by stating his intention to dispose of "all his effects"; and when he afterwards uses the word "property," that is grammatically referable to the last preceding words, "other effects," and is to be taken as being used in the sense which is legally attributable to it. It means, in substance, "whatever property I have, or may hereafter have, I give to my wife." The subsequent proviso, in case of the re-marriage of the wife, confirms this view; for there, referring to the same property which he had previously given to his wife, he says that the second husband shall have no claim "to sell or dispose of any part of the property" that then was, or thereafter should be, in his possession. The intention, therefore, is manifest upon the whole will; and that being so, the word "effects" will, in conformity with the authorities, be held to pass the real estate. He cited *Marquis of Titchfield* v. *Horncastle* (1), *Jackson* v. *Hogan* (2), *Doe* d. *Chilcott* v. *White* (3), *Doe* d. *Wall* v. *Langlands* (4), *Doe* d. *Evans* v. *Evans* (5), *Doe* d. *Tofield* v. *Tofield* (6), *Doe* d. *Morgan* v. *Morgan* (7), *Doe* d. *Hick* v. *Dring* (8), and *Doe* d. *Andrew* v. *Lainchbury* (9). [*452]

Jervis, for the heir-at-law:

The heir is to be disinherited only by clear and unequivocal words. No doubt there are cases which decide that the word "effects" may be strained to carry the real estate, where the intention so appears from all the other parts of the will: but it is equally clear that its *primâ facie* meaning is *personalty*. Here the testator,

(1) 2 Jur. 610.
(2) Cowp. 299; 3 Br. P. C. 389.
(3) 5 R. R. 502 (1 East, 33).
(4) 12 R. R. 553 (14 East, 370).
(5) 48 R. R. 657 (9 Ad. & El. 719; 1 P. & D. 472).
(6) 10 R. R. 496 (11 East, 246).
(7) 30 R. R. 409 (6 B. & C. 512; 9 Dowl. & Ry. 633).
(8) 15 R. R. 308 (2 M. & S. 448).
(9) 11 East, 290.

Doe d. Haw v. Earles.

being at the time of making his will the owner of both personal and real estate, disposes of "all his effects," and then goes on to enumerate the kind of effects he means, namely, his "household goods, live stock, furniture, plate, wearing apparel, and other effects," that is, *ejusdem generis* with those specified. Then he includes in the bequest all effects of the same kind which may hereafter become his property—that is, of which he may hereafter become the owner or proprietor. It is an established rule, that in such a case such words as "other effects," following an enumeration of particular effects, are to be construed to mean effects of the same kind: *Galliers* v. *Moss* (1). It is not a disposition of his effects generally. Nor does the subsequent part of the will conflict with this construction; the words "property now or hereafter in my possession" mean merely "the things which now are or shall hereafter become mine, of the kind before mentioned." He then proceeded to comment upon the authorities cited for the plaintiff, relying strongly on *Doe* d. *Hick* v. *Dring*; and cited also *Doe* d. [*453] *Hurrell* v. **Hurrell* (2), *Doe* d. *Bunny* v. *Rout* (3), *Wilkinson* v. *Maryland* (4), *Marquis of Hertford* v. *Lord Lowther* (5), *Trafford* v. *Berrige* (6), *Hotham* v. *Sutton* (7), *Timewell* v. *Perkins* (8), and *Roe* d. *Helling* v. *Yeud* (9).

Watson, in reply (10):

Doe d. *Hurrell* v. *Hurrell* simply decided that the word "estate" was controlled by its association with "effects on my farm." In *Doe* v. *Rout*, words sufficient to pass real estate were expounded by the testator's other words, used in the last clause of the will. The same is the case here. None of the other cases cited for the defendant have any direct bearing on the present question. In *Galliers* v. *Moss*, the Court did not apply any strict rule of construction, such as "*noscitur a sociis*," as in a deed, but only came to the conclusion, on the whole context of the will, that the testator did not intend to pass mortgaged estates.

Cur. adv. vult.

(1) 9 B. & C. 267; 4 Man. & Ry. 468.
(2) 24 R. R. 265 (5 B. & Ald. 18).
(3) 17 R. R. 448 (7 Taunt. 79).
(4) Cro. Car. 147; 1 Rol. Abr. 834.
(5) 7 Beav. 1.
(6) 1 Eq. Cas. Abr. 201.
(7) 10 R. R. 83 (15 Ves. 319).
(8) 2 Atk. 102.
(9) 12 R. R. 556 (2 Bos. & P. N. R. 214).

(10) *Whateley* appeared for the other defendant, who was a trustee in possession of the premises, and had appeared and pleaded separately by another attorney, and claimed to be also heard; but the COURT ruled that he had no right to be heard, inasmuch as one and the same question only was raised upon the case by both the defendants.

The learned Judges differed in opinion, and now delivered their judgments *seriatim*.

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PLATT, B.:

This action of ejectment was brought by Jane Haw, to recover certain freehold houses at Hoxton, claimed by her as a devisee under the will of John Haw, her deceased husband. The will was in these terms: (His Lordship read it.) At the time of executing this will, and at the time of the death of the testator, he was seised of *the houses in remainder, expectant on the decease of Martha Simpson; and the question in the cause was, whether his interest therein passed by the will to the widow. [*454]

A devise should be more favourably expounded than a deed, to pursue, if possible, the will of the devisor, who, for want of advice or learning, may have omitted the legal or the proper phrases. Thus, a fee may be given without words of inheritance, and an estate tail, without words appropriate to that estate by a will: so, an estate may pass by mere implication, without any express words; as where a man devises lands to his heir-at-law after the death of his wife, she shall have the estate for life by implication, although no estate be given to her in express terms. The instrument is emphatically termed the testator's will, and is entitled to receive a favourable interpretation, and as near to his mind and intention as may be consistently with the forms of law. The maxim of law is, "*voluntas ultima testatoris est perimplenda secundum veram interpretationem suam.*" The mind and intent of the testator must be collected from the terms of the instrument itself, as explained, if apparently ambiguous, by the nature and state of his property; and words not only inapplicable to but opposed to the application of real property, have, when explained by other parts, or by the general context of the will, been deemed sufficient to pass this property. Thus, in *Doe* d. *Tofield* v. *Tofield*, the words "personal estate," so explained, were deemed to be sufficient for the purpose. The question in this case is, what did the testator intend to dispose of by the description "all my effects;" whether the subject of intended disposition was real or personal. This must be collected from the terms of the whole will, coupled with the nature and state of the property of which the testator had this power to dispose. "Benignæ faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire." Had the

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word "effects" stood alone, and without *the means of explanation, the authorities would forbid its being extended so as to include the real estate; but the context of the whole will, in this particular case, induces me to think that the testator used the word "effects" as synonymous with the word "property," and that, in using the words "or which hereafter becomes my property," he contemplated a disposition of the remainder in question, treating it as a contingent interest, and not, as one skilled in the law would have done, as a vested interest, expectant on the determination of a particular estate. This view is confirmed by his words in describing the estate, the sale of which by an after-taken husband of his widow he forbids, as "property which thereafter might be in his possession." It seems, therefore, to me, that what the testator meant to be collected from the different clauses of the will, as explained by the nature and state of the property over which he had a disposing power, was to devise and bequeath the whole of that property, and that the will should be read as if the word "property" had been used instead of the word "effects," and the words "or which may be hereafter in my possession," instead of "hereafter to become my property." The will would in that case have been unambiguous altogether, and would have run plainly in these terms: "I do dispose of all my property as follows: All my household goods, plate, furniture, and other property, at this time in my possession, or which may hereafter be in my possession, unto my dearly beloved wife Jane Haw, &c.; but if my beloved wife, after my decease, think good to marry, her second husband shall have no claim whatever to sell or dispose of any part of the property now or which may be hereafter in my possession." If this is a correct mode of dealing with this will, the judgment of the Court of Queen's Bench in *Doe* v. *Langlands* (1), and in *Doe* d. *Morgan* v. *Morgan* (2), and [*456] the judgment of the VICE-CHANCELLOR OF ENGLAND in **Parkin* v. *Knight* (3), are authorities to show that the remainder in fee would pass by such a devise. I therefore think the judgment should be for the plaintiff.

PARKE, B.:

The only question in this case is, whether a remainder in fee in certain houses, of which a testator died seised, passed by

(1) 12 R. R. 553 (14 East, 370).
(2) 30 R. R. 409 (6 B. & C. 512).
(3) 10 Jur. 23.

his will to his widow. I am of opinion that it did not. The will is as follows: (His Lordship stated it). The words used in a will are *prima facie* to be understood in their ordinary sense, and there is no doubt that the meaning of the word "effects" is, in common parlance, confined to personal things; and it has been judicially decided to bear that meaning, unless the context shows that the testator used it in a more comprehensive sense. This was held by all the Court of King's Bench, in the cases of *Camfield* v. *Gilbert* (1), and of *Doe* v. *Langlands* (2); and although, according to the report of the case of *The Marquis of Titchfield* v. *Horncastle* (3), Lord LANGDALE appears to have thought that the word might originally have been construed to embrace all the effects, real and personal, of a man's industry, he does not intimate any opinion that the decisions ought not to be abided by.

Assuming, then, that the word "effects" will not pass real estate, unless the context shows that the testator intended that it should, the sole question remains, whether the other parts of this will show that intention so clearly as to disinherit the heir-at-law, who is entitled to all which the testator does not, by express words or necessary implication, give to another. I think there are no words which sufficiently indicate such an intention.

He disposes of all his effects "as follows"—so that what follows is only the disposition of what he terms "effects." The words— "all my household goods, live stock, furniture, *plate, wearing [*457] apparel, and other effects, now in my possession, or that may hereafter become my property, unto my wife Jane Haw," carry the case no further; only such "effects" as are or may be his property pass. Then the testator proceeds to add, that if his wife, after his decease, see good to marry, "her second husband shall have no claim to sell or dispose of any part of the property now or hereafter in my possession." These words mean only, that whatever property is left to the wife, shall be held by her to her sole and separate use, independent of any future husband. The words may be applied to personal as well as real estate, and carry the case no further. The "property" means only the property before devised, that is, "effects" merely.

I am therefore of opinion that the remainder did not pass, and that our judgment ought to be for the defendant.

(1) 7 R. R. 892 (3 East, 516).
(2) 12 R. R. 553 (14 East, 370).
(3) 2 Jur. 610.

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POLLOCK, C. B.:

The question in this case turns upon the meaning which is to be put upon the word "effects," as appearing in the present will. The strongest case that was cited on the argument, on the meaning of the word "effects" in a will, is the case of *Doe* d. *Hick* v. *Dring*, which I apprehend remains untouched by any subsequent decision, and is a case binding on us as an authority. In that case it was decided, that a devise of "all and singular my effects of what nature or kind soever," does not pass the real estate, where it cannot be collected from the other parts of the will that such was the testator's intention. Now, on reading this will, I certainly should not conceive that the testator intended to give his wife the estate of which he was seised in fee simple in remainder expectant on the decease of Martha Simpson. He says, "I dispose of all my effects as follows:" I think these words mean his personal estate, and not the real as well as the personal estate: and having thus declared, in the introductory part of the will, that he disposes of all his effects, which I read "personal effects," he says, "All my [*458] household goods, live stock, furniture, plate, wearing apparel, *and other effects at this time in my possession, or that hereafter may become my property, unto my dearly beloved wife, Jane Haw." It seems to me, that, in addition to the will professing in the beginning to deal only with the personal property, there is the additional argument derived from this, that the words "other effects" follow the enumeration of "household goods, live stock, furniture, plate, and wearing apparel;" and therefore, *à fortiori*, are to be considered as meaning personal property only. He goes on to say, that all these things in his possession, "or that may hereafter become my property," that is, things of that description that he may become entitled to, are to go to his dear wife; and then he bequeaths, at her death, a legacy of 200*l*., or, if she shall marry, to be paid immediately on her marriage. It seems to me, therefore, that the word "effects," although undoubtedly it may, if the words to be found in the will, as connected with the state of the property of the testator, warrant that interpretation, be sufficient to pass real property, is in the present instance to be confined to its natural and legal meaning, and that there are no words in the will to extend it beyond that, nor any circumstances to be coupled with the words, to create an opinion that the testator intended to pass any thing beyond his personal property. Even if I were asked to entertain any speculation on that subject, my judgment is clearly

that he did not intend to pass anything more than the personal property.

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There will therefore be judgment accordingly for the defendant.

Judgment for the defendant.

DOE D. LLOYD AND ANOTHER *v.* INGLEBY.

1846.
Jan. 21.
May 8.

(15 Meeson & Welsby, 465—474.)

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A lease for years contained a proviso for re-entry, in case the lessee "should at any time during the term commit any act of bankruptcy, whereupon a commission or *fiat* in bankruptcy should issue against him, and under which he should be duly found and declared a bankrupt." The lessee, being a trader, committed an act of bankruptcy, on which a *fiat* issued against him, and he was by the Commissioners found and declared a bankrupt; but the petitioning creditor's debt on which the *fiat* was founded was proved by A. and B., as partners, whereas it was due to A., B., and C., as partners:

Held, by POLLOCK, C. B., and PLATT, B., PARKE, B., *dissentiente*, that the lessee was not duly found and declared a bankrupt, within the meaning of the proviso.

THIS action of ejectment was tried at the Summer Assizes for Flintshire, 1845, before Parke, B., when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

By indenture of lease, dated the 28th of April, 1834, the lessors of the plaintiff demised to Mr. Thomas Evans, his executors, administrators, and assigns, a messuage or dwelling-house, and other premises, in the town of Mold, in the county of Flint, for the term of forty years from the date thereof, at the yearly rent of 55*l.*, subject to a proviso that if the lessee should assign the lease for all or any part of the term, without the consent in writing of the lessors; or, "in case he, the said Thomas Evans, should at any time or times thereafter during the said term commit any act or acts of bankruptcy, whereupon a commission or *fiat* in bankruptcy should or might be issued against him, and under which he the said Thomas Evans should be duly found and declared a bankrupt," the term should determine and be void, and thenceforth it should be lawful for the lessees to re-enter.

In December, 1838, Evans underlet a portion of the premises to the defendant for twenty-one years, with the consent in writing of the lessors. On the 5th of December, 1839, Evans, being then a trader, carrying on his business at Mold aforesaid, committed an act of bankruptcy, by executing a general assignment for the benefit of his creditors. A *fiat* in bankruptcy issued thereon against

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him on the 24th of January, 1840, and on the 6th of February he was found and declared a bankrupt. All the proceedings under the bankruptcy were regular in form. The petitioning creditors were Messrs. Henderson and Cox, partners, whose debt amounted to 93*l.*, and Messrs. Thomas Rees and Thomas Richard Guppy, partners, whose alleged debt amounted to 99*l.* 18*s.*, for goods sold by them
[*466] to Evans: but it was *proved at the trial, that of this sum of 99*l.* 18*s.*, 28*l.* 10*s.* only was due from Evans to Messrs. Rees and Guppy, for goods supplied by them to him before one William Henry Castles became a partner of Rees and Guppy, and that the remaining 71*l.* 8*s.*, the other part of the said sum of 99*l.* 18*s.*, was due from Evans, for goods supplied to him after Castles had so become, and during the time he continued, a partner of Rees and Guppy. Messrs. Rees and Guppy, before and after Castles joined them, carried on business both at Bristol and Liverpool. Castles resided at Bristol. The goods were supplied to Evans from Liverpool. The style of the firm, both before and after Castles joined, was "Rees, Guppy, and Company," and Castles' name was never used. In January, 1840, a negotiation for the dissolution of the partnership commenced between Rees, Guppy, and Castles, which was finally concluded in February, 1840, when Castles retired from the firm, and upon his retirement it was agreed and arranged between all the said parties, that Rees and Guppy, who continued to carry on the business in co-partnership, should be entitled to all the debts due to the said firm; and Castles, in point of fact, never participated in any of the profits or losses of the said partnership, having on his retirement therefrom received back the money he had brought into it.

The question for the opinion of the Court is, whether, under these circumstances, Evans, the lessee, was "duly found and declared a bankrupt," within the meaning of the proviso for re-entry. If the Court shall be of opinion that he was, the verdict is to stand; if of a contrary opinion, the verdict is to be entered for the defendant.

The case was argued in last Hilary Term (January 21), by

W. Yardley, for the lessors of the plaintiff:

This is a proviso for the benefit of the lessors, and the obvious intention of the parties was, that if, by the commission of an act
[*467] *of bankruptcy, and the issuing of a *fiat* thereon, it should be made to appear that Evans, the lessee, was hopelessly insolvent, the lessors should have it in their power to get rid of him as a

tenant, by determining the lease. The words of the proviso are, that "in case he, the said Thomas Evans should at any time or times commit an act of bankruptcy, whereupon a commission should be issued against him, and under which he should be duly found and declared a bankrupt," the right of re-entry shall attach. All that is necessary, therefore, is, that he should in fact commit an act of bankruptcy; that a *fiat* should in fact issue against him thereon, and that he should, under that *fiat*, be "duly," that is, duly in point of form, be found and declared a bankrupt. Here it appears upon the case that all the proceedings were regular in point of form, and that there was in fact a sufficient petitioning creditors' debt, as well as all the other requisites to support the *fiat*. The terms of the proviso do not require that there should be a *fiat* duly issued, but only that there should be, upon a *fiat* issued in fact, an adjudication duly made, that is, made regularly in due form.

(He then argued, that upon the facts set forth in the case it appeared that Castles was a dormant partner merely, and therefore the proof by Rees and Guppy alone was sufficient to sustain the *fiat*: *Lloyd* v. *Archbowle* (1). But the COURT expressed a clear opinion that no such inference could be drawn from the facts stated.)

Jervis, contrà:

The question is, what was the proper construction of this lease on the day when it was made. Provisoes for re-entry are to be construed strictly; the law abhors a forfeiture; and the lease is not to be avoided unless the construction be clear in favour of the lessor. Now here it is required, that, in order to create a forfeiture, the lessee shall have been "duly found and declared a bankrupt." *Surely, that must mean that he shall be found and [*468] declared a bankrupt upon due and legal proof of all the requisites to support the commission. * * Construing, therefore, the words of the proviso, as the Court will do, most strongly against the lessor, they are not satisfied by an adjudication in fact that the lessee was a bankrupt, such adjudication not having been duly made, that is, not having been made on due proof of all the requisites to give the Commissioners authority to make it.

Yardley, in reply:

It is not correct to say that a proviso for re-entry is to be construed with greater strictness than any other contract. In *Doe* d.

(1) 11 R. R. 595 (2 Taunt. 324).

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Davis v. *Elsam* (1), Lord TENTERDEN lays it down distinctly, that provisoes of this sort are not to be construed with the strictness of conditions of common law; that they are matters of contract between the parties, and should be construed as other contracts, that is, "according to fair and obvious construction, without favour to either side." Applying that principle of construction, this proviso is satisfied in all its terms by the facts found in this case.

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[469] The learned Judges, differing in opinion, now delivered their judgments *seriatim*:

PLATT, B.:

The question in this case arises upon a special case, and involves the construction of a proviso in a lease. The proviso was in the following terms: "That if the said Thomas Evans (the lessee) should assign the lease for all or any part of the said term of forty years, &c., or in case he, the said Thomas Evans, should at any time or times hereafter, during the said term, commit any act or acts of bankruptcy, whereupon a commission or *fiat* in bankruptcy should or might be issued against him, and under which he, the said Thomas Evans, should be duly found and declared a bankrupt, the term should determine and be void." It seems to me that, in order to render this lease void (or voidable, I should rather say), it was necessary that Thomas Evans should be duly found and declared a bankrupt, not only in mere form, but upon a proper foundation, namely, upon a full and good petitioning creditor's debt and trading. If this construction does not obtain, then the word "duly" may be entirely rejected; but that word must have some meaning in the proviso. Now a proviso for a forfeiture must be construed strictly; the old text books so lay it down. It is true that Lord TENTERDEN stated, in the case of *Doe* d. *Davis* v. *Elsam*, that these provisoes are to be construed as mere contracts: so in one view they are, inasmuch as all forfeitures are founded on contracts. Put the case of a proviso for re-entry, rent being in arrear: that, "provided the rent be in arrear for one and twenty days, the lease shall be void." Can any one say, because the demand of rent is not mentioned in the proviso, that it is not necessary in order to work the forfeiture? In the case of *Crusoe* d. *Bleucowe* v. *Bugby* (2), it was distinctly laid

(1) 31 R. R. 729 (Moo. & Mal. 189). But see the words of the same learned Judge, in *Doe* d. *Palk* v. *Marchetti*, 35 R. R. 424 (1 B. & Ad. 721).

(2) 2 W. Bl. 766; 3 Wils. 234.

down by the COURT, that *"the Courts have always held a strict hand over these conditions for defeating leases:" and therefore it seems to me, according to the old doctrine, from which I see nothing to induce me to withdraw, that whenever there is a stipulation for a forfeiture, the case must be clearly and strictly brought within the terms of the condition. The words, "whereupon a commission or *fiat* in bankruptcy should or might be issued against him," may well have been inserted for the purpose of giving a date to the forfeiture. Suppose the petitioning creditor's debt was due on the first of January, 1844, and remained unpaid on the first of January in the following year, and that a valid *fiat* was afterwards sued out, founded upon an act of bankruptcy committed on the first of January, 1845. Although in such case the petitioning creditor's debt was old enough to support the *fiat*, provided an act of bankruptcy had been committed in the month of July, 1844, yet that would not be the act of bankruptcy to which the forfeiture would be referred. The lessor might well exact, and the lessee well concede, that an act of bankruptcy founding a valid *fiat* should operate as a forfeiture, and that the date of such forfeiture should be fixed by the act of bankruptcy upon which a *fiat*, supported by, amongst other things, a good petitioning creditor's debt, might issue. The lessee may say, "I may have committed an act of bankruptcy, but if there was no good petitioning creditor's debt, I was not liable to a *fiat*, and I have not put myself into the condition of forfeiting the lease unless I am duly made a bankrupt." And when we look at the history of these provisoes, and the manner in which the Courts have treated them, one is led to believe that this must be the reason of the matter. The old provisoes providing mainly for forfeiture in the event of an assignment, the courts of law held that that applied to voluntary assignments only, not to involuntary assignments by operation of law. What is the object here? *It is that the lessor should not have a new tenant of any kind or description, either by the voluntary or involuntary assignment of the lessee, forced upon him without his consent. The lessor provides against his having a new tenant forced upon him, by providing for the forfeiture of the lease in case of bankruptcy; but it would be carrying the case too far against the lessee, if we held that the forfeiture attached, if he committed an act of bankruptcy upon which a *fiat* issued, without any petitioning creditor's debt, and where the estate is not validly assigned at all. It seems to me, that we should in that case be carrying the proviso a great deal further than one can suppose was

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the intention of the parties. I think, therefore, that this second branch of the proviso merely relates to the case where a valid *fiat* is sued out; and thereby a perfect meaning and application is given to every word of the proviso, because the intention of the lessee was not to lose this property unless by an involuntary assignment. And I should not be disposed to lean in favour of forfeitures, notwithstanding any recent decision that may have taken place on that subject. The old law was, that whenever a presumption was to be exercised, it was rather to be made against them than in their favour.

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PARKE, B.:

The only question in this case is, whether, according to the true construction of the proviso, it was necessary, in order to determine the term, that there should be a valid *fiat* in bankruptcy against the lessee.

The terms of the proviso are as follows: (His Lordship read it.) This proviso is a matter of contract, and is to be construed as other contracts are (1); and, reading the words in their ordinary sense, and applying the usual rules of construction to them, it seems to me that the lease was avoided by an act of bankruptcy of the lessee, [*472] followed by a *fiat*, *and a finding and declaration of his being a bankrupt by the Commissioners of Bankrupt, made in due form, although there were in fact no sufficient petitioning creditor's debt. The case finds that a debt to a sufficient amount was not proved. If the proviso had been simply "upon the lessee's being duly found and declared a bankrupt," I should have thought that the word "duly" would have meant duly in all respects, and involved in it the fact of a *fiat*, and the validity of the *fiat*, and that it would have been necessary to prove, in order to defeat the lease, not only the issuing of the *fiat*, but all the requisites to support it, the trading, act of bankruptcy, and petitioning creditor's debt, as well as the adjudication; for otherwise he could not have been duly found a bankrupt. But, as this proviso inserts some of the requisites and omits others, the others, upon the principle of "*expressio unius est exclusio alterius*," ought to be construed to be unnecessary; and the word "duly," to be consistent with that context, should be held to mean "in due form," or duly as related to the adjudication only, and to require no more than an adjudication by the Commissioners

(1) Per Lord TENTERDEN, *Doe* d. *Davis* v. *Elsam*, 31 R. R. 729 (Moo. & Mal. 189).

upon the proofs before them. And this construction is far from unreasonable; for why should not the lessor be desirous of getting rid of a tenant, who was insolvent, and had committed an act of bankruptcy, and against whom a *fiat* had actually issued, and who had been declared a bankrupt by the Commissioners, upon proof before them of the petitioning creditor's debt, trading, and act of bankruptcy, though the *fiat* was invalid? Besides, although the petitioning creditor's debt was insufficient, the *fiat* might, as the law stood at the date of the lease (April, 1834), be supported at any future time by the extraordinary power given to the Chancellor by the 6 Geo. IV. c. 16, s. 18, to substitute another petitioning creditor; and thus, besides the inconvenience of having an insolvent tenant, the landlord would be kept for a long time in a state of uncertainty whether *the estate would be divested from his tenant or not, and he [*473] would be incapable of making a profitable use of it. It is extremely likely that a prudent lessor would wish to guard against such a state of things; at all events, the construction, which, according to the ordinary rules, I put upon the words of the proviso, is by no means unreasonable, but entirely consistent with the probable view of the parties.

But, if the word "duly" is to be interpreted as the defendant contends, that is, that the adjudication is to be founded on a sufficient petitioning creditor's debt, as well as trading and act of bankruptcy, it follows, not merely that the lease would not be forfeited in this case, but would not be avoided, even though the CHANCELLOR should render the *fiat* valid, by substituting another petitioning creditor's debt, and so vest the leasehold estate in the assignees, for still the adjudication would not have been duly made. But if the word "duly" is construed "in due manner," or duly with respect to the adjudication only, this inconvenience would not follow. I think, therefore, that our judgment ought to be for the plaintiff.

POLLOCK, C. B.:

The question in this case turns on the legal meaning of a proviso in a lease, by which the lease was to become void in the event of the lessee committing an act of bankruptcy, upon which a *fiat* should issue, and under which he should be "duly found and declared a bankrupt." At the trial, a *fiat* and adjudication were put in, and an act of bankruptcy was proved, but the petitioning creditor's debt was not proved; and the question is, whether the lessee, under these circumstances, was duly found and declared a

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bankrupt, within the meaning of the proviso. It appears to me that he was found and declared a bankrupt, but that he was not duly found and declared a bankrupt. If the proceedings themselves had been in evidence, and the defect had appeared on the face of the proceedings, and, on *reading the adjudication, it had turned out, that, by inadvertence, the proof of the petitioning creditor's debt was imperfect, or was wholly omitted, could it be said the trader was duly found and declared a bankrupt, when the finding and adjudication obviously, and on the face of the proceedings, were founded on a mistake? I cannot distinguish this case in principle from the case I am so putting; for there is nothing in the evidence in this case to show that the actual adjudication in point of fact did not take place by the mere mistake of the Commissioners, in thinking that no proof of a petitioning creditor's debt was necessary at all. To hold that a mere formal declaration is sufficient, appears to me to be giving no effect to the word "duly." I think that is an important word, and that we ought not to pronounce the lease void on insufficient or imperfect materials, or no materials at all. For these reasons, I think the lessee has not been duly declared a bankrupt, and that the defendant is entitled to our judgment.

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Judgment for the defendant.

1846. *May* 22.

LAMERT *v.* HEATH.

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(15 Meeson & Welsby, 486—488; S. C. 15 L. J. Ex. 297; 10 Jur. 481; 4 Rail. Cas. 302.)

The defendant, a share broker, bought for the plaintiff scrip certificates, which were sold in the share market, at a premium, as "Kentish Coast Railway scrip," and were signed by the secretary of the Railway Company. The genuineness of this scrip was afterwards denied by the directors, who alleged that it was issued by the secretary without authority. In an action to recover back from the defendant the price paid to him by the plaintiff for this scrip, and for his commission, on the ground of its not being genuine: Held, that the proper question for the jury was, whether what the defendant intended to buy was that which was sold in the market as Kentish Coast Railway scrip.

DEBT for money had and received by the defendant to the use of the plaintiff, for interest, and on an account stated: Plea, *nunquam indebitatus.*

At the trial, before Pollock, C. B., at the sittings in London after last Michaelmas Term, it appeared that the action was brought by the plaintiff against the defendant, a stockbroker, to recover back the sums of 150*l.* and 282*l.* 10*s.*, which had been paid by the

plaintiff to the defendant for the purchase of 280 scrip certificates of shares in the "Kentish Coast Railway Company." It appeared that the Company was formed in the latter part of the year 1844. Letters of allotment were issued, and deposits paid thereon, partly at the London Joint Stock Bank and partly at the offices of the Company; and scrip certificates, signed by the secretary, were, on such deposits being made, issued from *the offices of the [*487] Company, and were the subject of sale and purchase in the money market until June, 1845, when the scheme was abandoned. The directors then refused to return any of the deposits which had been paid in to the offices of the Company, on the ground that those payments had been received and the scrip issued thereon without their authority, and they denied the genuineness of the scrip so issued. The plaintiff sought to recover in this action, on the ground that the scrip bought for him by the defendant was of this description, and therefore not genuine "Kentish Coast Railway scrip." The LORD CHIEF BARON left it to the jury to say whether the scrip bought by the defendant for the plaintiff was genuine scrip of the Kentish Coast Railway Company or not. The jury found that it was not, and gave a verdict for the plaintiff, damages 432*l.* 10*s.*

In Hilary Term, *Willes* obtained a rule *nisi* for a new trial, on the ground of misdirection; against which,

Jervis, *Montagu Chambers*, and *Hugh Hill* now showed cause:

The order of the plaintiff to the defendant was to buy scrip of the Kentish Coast Railway Company. That order was not fulfilled by the purchase of that which afterwards turned out to be a spurious article, not issued or authorized by the Company. It is not like the case of a chattel which has acquired a conventional name, like the "Patent Smoke-consuming Furnace" (1), and which is sold without a warranty. This is no more a real article than the forged Exchequer bills, which also passed current in the market. The parties who paid money for them would be entitled to recover it back: *Jones* v. *Ryde* (2).

(ALDERSON, B.: But suppose they had only been irregularly issued, without the observance of certain formalities which would bind the Government; would the same rule apply? The question *here is, was it not for the jury to say, whether the plaintiff [*488]

(1) See *Chanter* v. *Hopkins*, 51 R. R. 650 (4 M. & W. 399).

(2) 15 R. R. 561 (5 Taunt. 488).

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bargained for real Kentish Railway scrip, or for that which was in the market as Kentish Railway scrip: if for the latter, he has had what he bargained for.

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ROLFE, B.: The question is not whether it was the real scrip of the Company, but whether it was the scrip which the plaintiff contracted to buy.)

Martin and *Willes*, in support of the rule, were stopped by the COURT.

ALDERSON, B.:

The question is simply this—was what the parties bought in the market "Kentish Coast Railway scrip?" It appears that it was signed by the secretary of the Company; and if this was the only Kentish Coast Railway scrip in the market, as appears to have been the case, and one person chooses to sell, and the other to buy that, then the latter has got all that he contracted to buy. That was the question for the jury, but it was not left to them: the rule must therefore be absolute for a new trial.

POLLOCK, C. B., ROLFE, B., and PLATT, B., concurred.

Rule absolute.

1846.
May 29, 30.
June 12.

[501]

WALSTAB *v.* SPOTTISWOODE (1).

(15 Meeson & Welsby, 501—516; S. C. 15 L. J. Ex. 193.)

A Railway Company was provisionally registered, and a prospectus was issued, which stated the proposed capital to be 2,000,000*l.*, in 80,000 shares of 25*l.* each. The plaintiff applied to the provisional committee for seventy shares, in a letter whereby she undertook to accept the same or any less number that they might allot to her, to pay the deposit of 2*l.* 12*s.* 6*d.* per share thereupon, and to sign the Parliamentary contract and subscribers' agreement when required. To this letter she received an answer, signed by the secretary, stating that the committee of management had allotted to her thirty shares, and requesting her to pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 78*l.* 15*s.*, into one of certain Banks on or before a day mentioned. The plaintiff accordingly paid into one of those Banks, in due time, the deposit of 78*l.* 15*s.*, and received the bankers' receipt for the same. She afterwards presented the receipt to the Company, and made several fruitless applications to the committee for scrip, and at length was informed that the directors had come to the resolution not to issue any scrip, and that the greater part of the deposits had been expended, and the balance would be rateably divided. It appeared that the directors, finding it impossible to go to Parliament in the ensuing Session, had determined not to issue any scrip; and that, of the entire number of 80,000 shares,

(1) Cf. Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4.—A. C.

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70,000 were allotted, but deposits were paid on 4,000 only, producing altogether the sum of 10,500*l.*

In an action by the plaintiff to recover back, from a member of the managing committee, the sum of 78*l.* 15*s.* so paid by her as deposits on the shares allotted to her:

Held, first, that there was sufficient evidence of the final abandonment of the project.

Secondly, that, on its abandonment, under the circumstances above stated, the plaintiff was entitled to recover back, as money had and received to her use, the whole sum so paid by her.

An association of this nature does not amount to a partnership.

ASSUMPSIT. The declaration stated, that heretofore, to wit, on &c., the defendant and certain other persons, whose names are to the plaintiff unknown, agreed together to form a certain joint-stock Company, called "The Direct Birmingham, Oxford, Reading, and Brighton Railway Company," for the purpose of making a certain railway, under the powers of an Act of Parliament to be applied for in that behalf; the capital of which Company was to consist of 2,000,000*l.*, in 80,000 shares, at 25*l.* each, to be allotted by the committee of management of the said Company to such persons as should apply to them, and as they should select for that purpose; and the plaintiff then, to wit, on &c., at the request of the defendant, applied to the committee of *management for, and [*502] there were then allotted to her by the said committee, by a certain letter of allotment, to her directed and delivered, divers, to wit, thirty of the said shares; and thereupon then, in consideration of the premises, and that the plaintiff, at the instance and request of the defendant, would, on or before the 24th day of October, A.D. 1845, pay to one of certain Banking Companies in the said letter of allotment named, whereof one was a certain Banking Company, called "The London Joint-stock Bank," to the account of the said joint-stock Railway Company, a deposit of 2*l.* 12*s.* 6*d.* upon each of the said thirty shares, making in the whole the sum of 78*l.* 15*s.*, and would present the said letter of allotment, with a receipt of one of the said Banks for the said deposit appended thereto, to the defendant or his agents in that behalf, at the office of the said Company, and execute a certain contract relating to the formation of the said Company, called "the Parliamentary contract," and a certain agreement also relating to the formation of the said Company, called "the subscribers' agreement," within a certain reasonable time appointed on that behalf, to wit, on the 27th day of October, A.D. 1845, or within a reasonable time then next following, the said contract and agreement to be

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prepared by the defendant, and ready for execution at such time as aforesaid, the defendant then promised the plaintiff to give her, in exchange for the said letter of allotment and banker's receipt, scrip certificates for the said thirty shares, (that is to say), certain certificates in writing, purporting that the holder or holders thereof were entitled to thirty shares in the capital of the said joint-stock Railway Company, and to be shareholders thereof in respect of such shares; and the plaintiff avers, that she, confiding in the said promise of the defendant, afterwards, and within the time limited in that behalf, namely, on the said 24th day of October, 1845, paid to the said London Joint-stock Bank, on account of the said Railway Company, the said deposit on each of the said shares, amounting in the whole to the said *sum of 78*l.* 15*s.*, and then received from the said Bank a receipt for the same appended to the said letter of allotment; and afterwards, and within the time appointed in that behalf as aforesaid, and at a proper and reasonable time in that behalf, to wit, on &c., the plaintiff presented the said letter of allotment, with the banker's receipt appended thereto, at the office of the said Railway Company, to wit, at Moorgate Street, in the City of London, to the defendant, and then was, and always since has been, ready and willing, and then offered to the defendant, to deliver to him the said letter of allotment and banker's receipt appended thereto, and to execute the said Parliamentary contract and subscribers' agreement, and to receive such scrip certificates as aforesaid in exchange for the said letter of allotment and the banker's receipt, and then requested to exchange the said letter of allotment, with the said banker's receipt appended thereto as aforesaid, for such scrip certificates as aforesaid, and a reasonable time for the defendant so to do had elapsed long before this suit commenced: yet the defendant, not regarding his said promise, did not nor would, at the time when he was so requested by the plaintiff so to do, or at any time before or since, exchange the said letter of allotment, with the said banker's receipt appended thereto, for such scrip certificates as aforesaid, or deliver such scrip certificates as aforesaid to the plaintiff, but then wholly neglected and refused, and still neglects and refuses so to do, and then wholly discharged the plaintiff from executing the said contract or agreement. Breach, &c. There were also counts for money had and received, money paid, money lent, and on an account stated.

[*503]

The defendant pleaded *non assumpsit*, and also several special pleas, which it is not necessary to notice.

At the trial before Pollock, C. B., at the London sittings after last Hilary Term, the following facts appeared in evidence: The defendant was a member of the provisional and managing committee of the "Direct Birmingham, Oxford, *Reading, and Brighton Railway Company," which was provisionally registered in August, 1845. The capital was announced in the public prospectus to be 2,000,000*l.*, in 80,000 shares of 25*l.* each. On the 7th of October, 1845, the plaintiff, Mrs. Walstab, made the following application for an allotment of shares in the undertaking addressed to the provisional committee: [*504]

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"I request that you will allot me seventy shares of 25*l.* each in the Direct Birmingham, Oxford, Reading, and Brighton Railway; and I do hereby undertake to accept the same, or any less number that you may allot to me, and to pay the deposit of 2*l.* 12*s.* 6*d.* per share thereupon, and sign the Parliamentary contract and subscribers' agreement, when required.

(Signed) "ELIZABETH WALSTAB."

To this letter the following answer was returned on the 18th of October:

"W. 283.

"Letter of allotment—(Not transferable).

"Direct Birmingham, Oxford, Reading, and Brighton Railway.

"Capital, 2,000,000*l.*, in 80,000 shares of 25*l.* each.

"Deposit, 2*l.* 12*s.* 6*d.* "No. of Letter, 123.

"No. of Shares, 30.

"46, MOORGATE STREET, LONDON,

"October 18, 1845.

"The committee of management have allotted to you thirty shares in this undertaking; and I am directed to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 78*l.* 15*s.*, into one of the under-mentioned Banks, on or before Friday, the 24th day of October, 1845, or this allotment will be null and void.

"This letter, with the banker's receipt appended thereto, will be exchanged for scrip upon your presenting it at the *offices of the Company, and executing the Parliamentary contract and subscribers' agreement, which will lie at the above offices on and after the 24th of October, and due notice will be given when the deeds will be sent into the country. [*505]

"I am, your obedient servant,

"J. B. RAYNER, Secretary.

"To Mrs. ELIZABETH WALSTAB."

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The letter then contained a list of the bankers to whom the deposits were made payable. On the 24th of October, the plaintiff paid to the Company 78*l.* 15*s.* as a deposit on thirty shares, and received the banker's receipt for the same. The plaintiff's son presented the banker's receipt to the Company, and made several fruitless applications to the committee for scrip; and was finally informed, in the month of November, that the directors had come to the resolution not to issue any scrip. He was also informed, that the greater part of the deposits had been expended, and that the balance would be rateably divided. It appeared that the directors, finding it impossible to go to Parliament during the ensuing Session, had determined, on the 27th of November, not to issue any scrip. Of the entire number of 80,000 shares, 70,000 were allotted, but deposits were paid upon 4,000 only, producing altogether the sum of 10,500*l.*

At the trial, the following objections were taken on the part of the defendant. First, that the letters of the 7th and 18th of October did not prove any contract; or if they did, it was not the contract alleged in the first count, inasmuch as they did not show an agreement to give scrip certificates for shares, but only to allot shares. Secondly, that the contract, if any, being signed, not by the defendant, but by the secretary of the Company, was not personally binding on the defendant. Thirdly, that a contract to give scrip was illegal under the stat. 7 & 8 Vict. c. 110 (1). Fourthly, that the count for money had and received could not be sustained; [*506] that there was no failure of consideration on the *ground of the abandonment of the undertaking: for, first, there was no sufficient evidence that it had in fact been abandoned; and, secondly, the provisional committee had no power to abandon it.

For the plaintiff it was contended, on the authority of the case of *Nockells* v. *Crosby* (2), that the provisional committee were bound, on the failure of the undertaking, to return the plaintiff's deposit; for that the expenses of an abortive scheme must be borne by the projectors of it; and the plaintiff was therefore entitled to recover, either on the special count, or, at all events, on the count for money had and received.

The LORD CHIEF BARON overruled the objections, and under his direction a verdict was found for the plaintiff, damages 78*l.* 15*s.*, leave being reserved to the defendant to move to enter a nonsuit.

(1) Repealed by Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205.—A. C.

(2) 27 R. R. 497 (3 B. & C. 814; 5 Dowl. & Ry. 751).

In Easter Term, *Martin* obtained a rule *nisi* accordingly; against which

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Jervis and *Willes* showed cause in this Term (May 29):

First, the plaintiff is entitled to recover on the special contract alleged in the first count. The Company were bound, on the allotment of shares being made, and on payment of the deposits thereon, to exchange the letter of allotment for scrip. It will be said on the other side, that the letters of the 7th and 18th of October, taken together, show no contract, but that the latter amounted merely to an intimation of an intention, on the part of the directors, thereafter to give scrip in exchange for it. But this argument cannot be supported: nor does it make any difference that the plaintiff's application was for a greater number of shares than was afterwards allotted to her. Suppose a man offered to another to give 50*l.* for a mare, and ten days afterwards the latter wrote him a letter saying, that if he paid the sum of 50*l.* *into a [*507] certain Bank, he should have the mare and her foal; would that be called a mere intimation? would it not be a contract to deliver the mare and her foal on payment of the 50*l.*? This is merely the case of one party contracting to do one thing, if the other party will perform two. There is first a proposal on the part of the plaintiff, which is modified by the qualified acceptance of the Company, and the bargain is completed by the final acceptance of the plaintiff.

Secondly, it is said that the defendant cannot be bound, because this was a Company only provisionally registered, which therefore had no authority to issue scrip: but it is clear from the several provisions of the 7 & 8 Vict. c. 110 (1), that this is otherwise. * * *

The principal question in this case, however, arises upon the second count, for money had and received. Now the principle established by the case of *Nockells* v. *Crosby* is, that the promoters of an abortive Company are bound to return to the subscribers the earnest received from them, and themselves to bear the expenses of the undertaking. That was a case in which a scheme for a tontine was put forth, stating that the money subscribed was to be laid out at interest; and after some subscriptions had been paid to the directors, but before the money was so laid out, the directors determined to abandon the project. The COURT held that each of the subscribers was entitled, in an action for money had and received, to recover the whole of the money advanced by him, without

(1) Repealed by Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205.—A. C.

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deduction of any part towards the payment of the expenses already incurred. * * *

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[508] (ALDERSON, B.: In *Pitchford* v. *Davis* (1), a Company was projected, and a prospectus issued, stating the proposed capital to consist of 10,000 shares of 25*l.* each. The directors entered into contracts at a time when a small portion only of that capital had been raised; and it was held that a subscriber, who had made deposits, was not liable upon such contracts, without proof that he knew of and assented to their proceeding on the smaller capital, or expressly authorised the making of the contracts. Does not the principle of that case apply to the present?)

Unquestionably it does. If the promoters of a scheme of this nature think fit to proceed before the whole of the capital is subscribed for, they do so at their own risk. The party subscribes on the faith that his subscription is to form an integral part of a fund amounting to 80,000 times 2½ guineas; and until that fund is raised, the directors cannot pledge his credit. Until the whole is subscribed, the deposit of each subscriber is a mere earnest: then it becomes a part of the agreed capital. And the stat. 7 & 8 Vict. c. 110, does [*509] not alter the effect *of the contract between the promoters and the subscribers. The former are merely put in the same position, after the concern is provisionally registered, as they were at common law without any provisional registration.

But further, this deposit of 2*l.* 12*s.* 6*d.* is composed of two sums, of 2*l.* 10*s.*, which is the 10 per cent. on each share, required by the Standing Orders of Parliament to be deposited with the Accountant-General, and 2*s.* 6*d.*, which may be considered as paid to be applied to the preliminary expenses. The former sum is appropriated to the express purpose for which it is received, and not having been so applied, the plaintiff is clearly entitled to recover it back. And with respect to the 2*s.* 6*d.*, that cannot be retained for the preliminary expenses until the whole amount of deposits has been paid up. [They cited *Fox* v. *Clifton* (2) and *Bourne* v. *Freeth* (3).]

Lastly, it is said that the secretary had no power to bind the defendant by making this contract. But by the prospectus, applications are to be made to the officer of the Company, and the plaintiff's

(1) 52 R. R. 608 (5 M. & W. 2).
(2) 31 R. R. 536 (6 Bing. 776; 4 Moo. & P. 676).
(3) 33 R. R. 275 (9 B. & C. 632; 4 Man. & Ry. 512).

letter is answered by him as the agent of the provisional committee, to whom her application for shares was addressed.

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Martin, F. V. Lee, and *Peacock, contrà* (May 29 and 30):

First, the special contract alleged in the first count was not proved. The documents which were read in evidence must be taken together, in order to see what the contract was. It consists in the letter of the 7th of October, and the first paragraph of the letter of the 18th. The plaintiff's contract attached on her thirty shares being allotted; there was then a complete obligation upon her to sign the Parliamentary deed, and pay the deposit. She did nothing, and was not called upon to do anything, except what she did and was bound to do upon the allotment being *made to her. There was no consideration for any promise to exchange the letter of allotment for scrip or shares: the allotment was all the plaintiff asked for, and she had all for which she bargained. [*510]

Secondly, the count for money had and received was not established. In the first place, the prospectus contains no engagement on the part of the provisional committee to go to Parliament at all in the then ensuing Session, and there is really no evidence to show that the scheme has been finally abandoned. For aught that appears, it is an open contract to the present hour. But even if this be otherwise, there is no failure of consideration sufficient to sustain the action. Nor can any distinction be drawn between the 2*l.* 10*s.* and the 2*s.* 6*d.*, nor was any such attempted at the trial: the case was rested altogether on the ground of a general failure of consideration, and not on that of a specific appropriation of any part of the deposit. Now it is obvious, that, in such an undertaking, expenses must necessarily be incurred *ab initio*—as for rent of offices, stationery, advertising, &c. &c.: and the subscribers, as well as the promoters, know this to be the case. Why should not such expenses be borne by all the parties, unless there be fraud? There is no difference in their situation, except that one is the first suggester of the scheme to the others. In truth, a party subscribing to such an undertaking becomes a *quasi* partner, and cannot receive back the whole of the money which he deposits for the necessary expenses, in case of the scheme being unsuccessful. * * *

Lastly, there was no sufficient evidence of the dissolution of the Company. The provisional committee still retain their powers under the 7 & 8 Vict. c. 110, s. 23. They were not bound to go to Parliament in the next Session; and although they had failed [511]

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to do so, they might afterwards be compelled by the subscribers to proceed.

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[*512] (ALDERSON, B.: *Is there any authority that the promoters of a scheme of this kind may not abandon it?)

Yes; *The Kidwelly Canal Company* v. *Raby* (1).

(ALDERSON, B.: That was the case of a Company actually formed and incorporated: this is a mere project.)

Nevertheless, they could not dissolve it without the consent of all, or at least of the majority of the subscribers, and the declarations of any other member of the committee that it was abandoned were not at all binding on the defendant.

But further, the secretary had no power to issue scrip at all. The statute does not give any authority to do so. The 24th section subjects the parties to a penalty if it be issued before provisional registration, but it is not therefore lawful after. If not absolutely illegal, it is against the policy of the statute. * * *

Cur. adv. vult.

The judgment of the COURT was now delivered by

POLLOCK, C. B.:

This was an action of assumpsit. The declaration contained a special count, founded on an alleged contract to deliver scrip; there was also a count for money had and received. At the trial before me, on the 27th of February, it appeared that the defendant was a member of the provisional committee of the Direct Birmingham, Oxford, and Brighton Railway Company, registered provisionally under the 7 & 8 Vict. c. 110. The prospectus announced the capital to be 2,000,000*l.*, in 80,000 shares, of 25*l.* each share. The deposit required was stated to be 2*l.* 12*s.* 6*d.* per share. On the 7th of

[*513] October, 1845, the *plaintiff applied to the provisional committee for shares, according to the form directed by the committee (which form it is not necessary now to state). On the 18th of October, the plaintiff received a letter of allotment in the following form. (His Lordship read it, as *ante*, p. 743.)

This letter was signed by the secretary, and set out the names of the several bankers; and the plaintiff, in due time, paid the deposit on the thirty shares into the London Joint-stock Bank, the bankers

(1) 16 R. R. 748 (2 Price, 93).

of the Company, and on the 27th of October applied for scrip. The time for delivering the scrip was extended by the provisional committee to the 6th of November. On the 12th of November the plaintiff applied again; and, after several other fruitless applications at the office of the Company, the plaintiff was told by the secretary, that the directors did not mean to issue scrip; and upon the plaintiff requiring her money to be repaid, the final answer given at the office by one of the provisional committee, not the defendant, was that a statement would be made of the concerns of the Company, and the surplus would be divided. It was admitted, at the trial, that 40,000 shares had been applied for; 7,000 shares had been allotted; but, about the 25th of October, 1845, public confidence in railway schemes having been much shaken, the deposit was paid on 4,000 shares only, a number much too small to justify proceeding with the scheme. The plaintiff, failing to get scrip or her money again, brought the present action. At the trial, it was contended by the defendant's counsel that the defendant was not liable under either count of the declaration; that the special count could not be supported; and that the defendant was not liable on the count for money had and received. A verdict was found for the plaintiff under my direction, with liberty for the defendant to move to enter a nonsuit, if there was not evidence to support the verdict: all the points raised by the defendant's counsel being reserved. Accordingly, *Mr. Martin*, in Easter Term, obtained a rule, which was argued on the 29th and *30th of May last, before [*514] me and my brothers Alderson, Rolfe, and Platt.

For the defendant it was contended, that the contract, as laid in the special count, was not proved, and the defendant was under no contract to deliver scrip. But the argument chiefly turned on the count for money had and received; and it was alleged that the subscribers became a *quasi* partnership, and that their subscriptions went into a common fund, to be applied for the general benefit, and in consequence that the plaintiff could not sue the defendant at law. A further point made was, that the application being made for an allotment of shares, which in fact had been allotted, the plaintiff had really obtained all she asked for, and had no grounds of complaint; and lastly, it was said that there was no evidence of the concern being at an end, as the defendant was not bound by what another member of the committee stated, and unless the concern was abandoned, money had and received would not lie.

For the plaintiff it was argued, that the special count was proved,

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and that there was evidence that the concern was at an end, and the case of *Nockells* v. *Crosby* was cited as an authority. We do not think it necessary to give any opinion on the special count, as to which some doubt may well be entertained, because we are all of opinion that the plaintiff is entitled to recover on the count for money had and received; and as the plaintiff cannot be entitled, in a case like the present, to damages on the first count, for not delivering scrip, as upon a contract broken, and also to have her money returned as on a contract rescinded, we are of opinion that the verdict for the plaintiff on the count for money had and received ought to stand, but that the verdict for the plaintiff on the first count should be set aside, and a verdict entered for the defendant.

With respect to the first point made by the defendant, that the subscribers became *quasi* partners, and that the subscriptions [*515] became a common fund, to be applied for the *general benefit, so that no one could claim back his subscription, we are of opinion that such is not the true result of the publication of the prospectus (by the provisional committee, of which the defendant was one), of the application for shares, and the allotment and the payment of the deposit. We think, in this case, no partnership ever actually commenced. In the case of *Pitchford* v. *Davis* it was decided, that where a prospectus was issued for a speculation to be carried on by means of a certain capital, a subscriber did not become a partner unless the terms of the prospectus were in that respect fulfilled: and that decision has been since frequently acted on in this and other Courts. In the case of *Nockells* v. *Crosby*, cited by the plaintiff's counsel, a similar doctrine was held. It appears to us that the application for shares, and payment of the deposit, amounts to nothing, if the shares subscribed for are so few that the concern cannot proceed, and the scheme must necessarily be abortive.

With respect to the point that the plaintiff applied for shares, and that shares were actually allotted, and therefore no action can be sustained; it is a sufficient answer to say, that the allotment of shares in an abortive scheme, which does not correspond with what the prospectus held out, is really not a compliance with the application. If the scheme has wholly failed, and has ceased even as a speculation, nothing whatever has been allotted to the subscriber. But it was urged that there was no evidence of the concern being at an end. We think that the answer given at the office by one of the provisional committee, that a statement would be made, and the surplus would be divided, was evidence to go to the jury that the

concern was abandoned; and unopposed as this was by any evidence on the part of the defendant, we think that the jury were well warranted in finding that the scheme was at an end. If so, we think, on the authority of *Nockells* v. *Crosby*, that the plaintiff is *entitled, under the count for money had and received, to recover back her deposit. [*516]

A question was raised, though not much argued, whether there was any difference between one portion of the deposit and another. It being, as we think, manifest that the deposit of 2*l.* 12*s.* 6*d.* consisted of 2*s.* 6*d.*, being 10*s.* per cent. on the 25*l.*, in pursuance of the 23rd clause of the Act referred to, and the residue being 10*l.* per cent. required to be deposited by the Standing Orders of Parliament, we think it is clear beyond all doubt, that the amount paid in order to be deposited in pursuance of any Standing Orders, must be returned to the plaintiff. There is no foundation whatever for a claim to retain that, which was paid for a specific purpose, and the concern abandoned before the money could be applied for that specific purpose. But we think that the remainder of the money may be also claimed back, and that the language of LITTLEDALE, J., and HOLROYD, J., in *Nockells* v. *Crosby*, applies to this part of the case. To use the language of HOLROYD, J., in that case, "the concern was never really set agoing; and the expenses incurred in setting a scheme on foot are not to be paid out of the concern, unless they are adopted when it is in actual operation. All the steps taken were only preparatory to carrying the project into effect; and, as it never was carried into effect, the plaintiff was entitled to have back the whole of the money she advanced."

On these grounds we think that the verdict ought to be entered for the defendant on the first count, but that the verdict for the plaintiff on the count for money had and received ought to stand.

Our judgment therefore must be for the plaintiff.

Rule discharged.

REYNELL *v.* LEWIS.
WYLD *v.* HOPKINS.

1846. *Nov.* 21, 23, 24, 25.

(15 Meeson & Welsby, 517—531; S. C. 16 L. J. Ex. 25.)

[517]

The mere fact of a person agreeing to become a member of the provisional committee of an intended Railway Company, amounts to no more than a promise that he will act with other persons, appointed or to be appointed, for the purpose of carrying the scheme into effect. Therefore, in an action against a provisional committee-man for goods supplied on the

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order of the solicitor of the Company, it was held that the law would not imply, from the mere fact of his agreeing to be a member of such committee, an authority from him to the other members of it to make contracts by himself or by the solicitor, nor an authority to the solicitor to make them on behalf of the committee.

If the party not only consents to be a provisional committee-man, but authorises his name to be inserted and published in a prospectus, which merely states the names of the members of the provisional committee, and nothing more, that fact does not alter the liability. If it state the names of an acting or managing committee also, it is a question for the jury to say, whether it means that the latter are to take upon themselves the whole management of the concern, or that the former have constituted the latter their agents to manage it on their behalf, in which case the former would be liable for the contracts of the latter. Or, if the solicitor's name were mentioned in it, the question for the jury would be, whether it meant that he was to be employed by those of the committee who acted, or that he was already appointed by all whose names were mentioned, as their solicitor, to do all solicitor's work on their behalf; and further, what was the business then usually transacted by solicitors, in such undertakings on behalf of the Company. And the same as to the secretary.

Where there is also evidence that the defendant has acted with relation to the proposed scheme, it is a question for the jury, whether, by his consent and acts, he has authorised the solicitor, or secretary, or any member of the committee, to pledge his credit for the necessary and ordinary expenses to be incurred in forming such a Company; and if so, whether the work was done, and the credit given, on the faith of his being liable.

Such an intended association does not constitute a partnership, inasmuch as it constitutes no agreement to share in profit or loss.

THE case of *Reynell* v. *Lewis* was an action of debt for 1,000*l*., due to the plaintiff from the defendant, for and in respect of the plaintiff having, and who had, for the defendant and at his request, before that time caused divers advertisements, statements, and matters to be inserted and published in divers newspapers and other publications, and which were accordingly inserted and published therein; and also for work and labour, care, diligence, and attendance by the plaintiff, at the defendant's request, before then done, performed, and given, in and about inserting, and causing to be inserted, in
[*518] divers newspapers and other publications, *divers advertisements, statements, and paragraphs for the defendant, and for commission and reward due and of right payable from the defendant to the plaintiff, in respect thereof. There were also counts for money paid, and on an account stated.

Pleas: 1, *nunquam indebitatus*, and issue thereon; 2, payment in satisfaction before action brought. This plea became immaterial.

At the trial, before Pollock, C. B., at the sittings in Middlesex after Trinity Term last, it appeared that the plaintiff was an advertising agent, and the defendant one of the provisional committee of

the "Central Kent Railway Company." The action was for charges incurred in advertising in certain newspapers, between 13th September and 29th November, 1845. It was proved that, on the 26th September, 1845, the defendant called at the place of business of Parkes, Smith, & Co., solicitors, and saw Joseph Parkes, a clerk employed in the business of that Company. The defendant said that a mutual friend had solicited him to become a member of the provisional committee, and that he called in consequence, to know who were expected to become members. Certain names being given to him, he said they were unobjectionable, and that he would be a member also. He inquired about the line, and having seen a prospectus and map, went away, leaving a card of his address, and description as a committee-man of some other Company. On the 1st October, the Company was provisionally registered under 7 & 8 Vict. c. 110 (1). A prospectus, issued early in that month, contained the defendant's name, but incorrectly stated; and he called at the Company's office and desired that the error might be amended. He was afterwards seen there several times with the prospectuses in his hand, and talked on the affairs of the line, but never attended any meeting. On the 15th October, a circular letter was sent to him from the Company's office, stating that the provisional committee had resolved on allotting 150 shares to *each committee-man, [*519] and asking how many he would take. On the 16th October he answered by letter, saying he would take the 150. Once he complained that his name had been inserted in some provisional committees of other lines without his authority. On the 6th November, he advertised in the *Times* newspaper that he had consented to join the provisional committee of a railway in only two instances, the Middlesex and Surrey Junction, and the Central Kent. Early in December, the defendant spoke to Joseph Parkes, in terms of anxiety, about what was going on in the market; and said his own opinion was, that the best course was to do nothing. He asked the secretary what expense had been incurred; and being told the amount, said it was creditable to the solicitors that it was so small. No managing committee, or committee of allotment, appeared to have been formed; nor were any shares ever allotted, or deposits made. Parkes, Smith, & Co., the solicitors to the Company, had employed the plaintiff, and his charges were shown to be reasonable.

The LORD CHIEF BARON, on the first issue, directed the jury to

(1) Repealed by Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205.—A. C.

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consider whether the defendant had become a provisional committeeman; and if he had, whether, by taking on him that character, and afterwards acting in the affairs of the Company as he had done, he had authorised the solicitor or secretary, or any member of the committee, to hold him out to the world as personally responsible for the reasonable and necessary expenses incurred in forming such a Company, and on its behalf; and if it was, then whether the work was done, and the credit given, on the faith of his being so personally responsible. The jury found a verdict for the plaintiff, for so much of his claim as accrued subsequently to September.

Wyld v. *Hopkins* was an action of *indebitatus assumpsit* for goods sold and delivered, work and labour and materials, and on an account stated.

[520] Pleas: 1, *non-assumpsit*, and issue thereon; 2, payment before action brought. This plea became immaterial.

At the trial, before Pollock, C. B., at the London sittings after Trinity Term, it appeared that the plaintiff was a map-seller and engraver, and the defendant a member of the provisional committee of the "Peterborough and Nottingham Junction Railway Company." The action was brought to recover for maps, plans, and sections of the proposed line, engraved and printed, &c. by order of one Gridley, on 4th September, 1845. The Company was provisionally registered under 7 & 8 Vict. c. 110 (1); and on the 29th of September, a printed prospectus appeared, stating that the acting engineer of the Company had carefully surveyed the line, and that the provisional committee considered its merits to be such as would induce them to apply with confidence to Parliament in the next Session for an Act to incorporate the Company. In this prospectus the defendant's name, with others, was printed under the heading of "Provisional Committee." Several other names appeared in it, under the heading "Managing Directors:" the defendant's was not one of them. Under the head "Solicitors" were the names of Walker and Gridley, who wrote the following letter to the defendant: "Peterborough and Nottingham Junction Railway Company's Office, 5, Southampton Street, Bloomsbury Square, London, October 8, 1845. SIR,—We have the honour, by desire of the managing directors, to inform you that it has been resolved to give to each member of the provisional committee the option of taking 100 or any less number of shares in this undertaking, provided such option is made known to us in writing on or before Tuesday next, the 19th

(1) Repealed by Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205.—A. C.

instant; and in case of default, the shares will be otherwise applied." On 10th October, the defendant answered the above thus: "GENTLEMEN,—Have the kindness to allot me the full number (100 shares) allowed to the provisional committee." Early in November, Gridley, the solicitor, ordered the maps, &c., *the subject of the action. The managing directors often met. The defendant never attended their meetings, nor acted in any way in the Company's affairs. The Company finally wound up its affairs without going to Parliament. [*521]

The correctness of the plaintiff's account was admitted, and also his employment by Gridley. The jury, under the direction of the LORD CHIEF BARON, found a verdict for the plaintiff for the whole amount claimed.

In *Reynell* v. *Lewis*, the *Attorney-General*, (*Sir John Jervis*) on a former day in this Term (Nov. 4) obtained a rule for a new trial, on the ground of misdirection, and also that the verdict was against the evidence.

In *Wyld* v. *Hopkins*, a like rule was granted (Nov. 7) to *Watson*, on the ground that there was no evidence to go to the jury.

Knowles, *Crompton*, and *Willes*, showed cause in *Reynell* v. *Lewis* (Nov. 20):

On moving for this rule, it was said that the LORD CHIEF BARON should have asked the jury, in terms, with whom was the contract for inserting the advertisements made. His Lordship considered that form of putting the question inconvenient, as leading to ambiguity; for if made with A. in point of fact, it might in point of law be made with him only, or with him and others; and the direction to the jury was correct. Besides, he several times directed the jury to consider what was the order given; and, if given, whether the parties had acted on it; adding that, *primâ facie*, the contract was made with the party giving the order, and the credit given to him, if it was not otherwise shown. The jury thought that the solicitors of the Company could not be taken to have contracted on their own account, but that *respondeat superior:* but no objection was made at the trial, or on *moving for the rule, on this ground. Though others may be liable as well as the defendant, he cannot on that account resist the plaintiff's claim, but may sue the other provisional [committee] men for contribution. Here [*522]

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there was no managing or other than the provisional committee. The facts justify the verdict, if the question is one of fact; and if it be one of law only, the Judge was bound on the evidence to direct the jury that the defendant was liable.

(PARKE, B.: A provisional committee-man is a person agreeing to be on the committee, to carry into effect provisional arrangements.)

Stat. 7 & 8 Vict. c. 110 (1) mentions promoters of Companies, but not provisional committee-men. Though they are not partners with the subscribers till after the Act for incorporation is obtained, they are so far partners with each other for carrying out their scheme to that point, as to be liable for expenses provisionally incurred for that object. * * *

[523] The *Attorney-General* and *Cowling*, in support of the rule, (Nov. 21):

It has never yet been judicially determined what is the nature of the liability of a provisional committee-man of a Railway Company, merely as such. * * In the present case, *primâ facie* the contract was undoubtedly made with Parkes, Smith, & Co.; but if it was made by them as the agents of another, no doubt that principal is liable; and no doubt, also, the authority may be implied from circumstances. But it is contended that it cannot be implied merely from the circumstance of the defendant's being a provisional committee-man. * * The real question is, however, with whom was the contract made? This is not a partnership: it is obvious that one of the committee-men could not of his own authority have ordered these advertisements, and thereby charged the others. Suppose it were carried by a majority of six to five that the plaintiff should be employed; are all the minority liable? It is, in truth, an ordinary case of principal and agent, without the legal incidents of an ordinary partnership. * * *

[524]

Cur. adv. vult.

[525] In *Wyld* v. *Hopkins*, cause was shown against the rule (Nov. 23 and 24), by *Martin* and *Willes*, who contended, first, that if a man consents to be a provisional committee-man, or a director, of a Railway Company, that fact either involves him, in point of law,

(1) Sections 2 to 6 inclusive [repealed by Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205.—A. C.].

in responsibility for necessary expenses, or at all events justifies a Judge in stating it as a *præsumptio juris et facti* in favour of his liability: that a provisional committee-man means a man who allows himself to be one of the managers of the concern provisionally, until the Act of Parliament is obtained, and directors appointed thereby; and so holds himself out to the world as a party liable for the necessary expenses of the concern. * * *

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Watson and *Petersdorff*, in support of the rule, urged similar arguments to those employed for the defendant in *Reynell* v. *Lewis*. * * * [526]

Cur. adv. vult.

The judgment of the COURT was now delivered by

POLLOCK, C. B.:

We have considered the two cases which were argued before us, of *Reynell* v. *Lewis* and of *Wyld* v. *Hopkins*, and give our judgment in those only; but we think it right to state fully the principles on which our judgment proceeds.

The question, in all cases in which the plaintiff seeks to fix the defendant with liability upon a contract express or implied, is whether such contract was made by the defendant, by himself or his agent, with the plaintiff or his agent, and this is a question of fact for the decision of the jury upon the evidence before them.

The plaintiff, on whom the burden of proof lies in all these cases, must, in order to recover against the defendant, show that he (the defendant) contracted expressly or impliedly; *expressly, by making a contract with the plaintiff, impliedly, by giving an order to him under such circumstances as show that it was not to be gratuitously executed: and if the contract was not made by the defendant personally, it must be proved that it was made by an agent of the defendant properly authorised, and that it was made as his contract. In these cases of actions against provisional committee-men of railways, it often happens that the contract is made by a third person; and the point to be decided is, whether that third person was an agent for the defendant for the purpose of making it, and made the contract as such. The agency may be constituted by an express limited authority to make such a contract, or a larger authority to make all falling within the class or description to which it belongs, or a general authority to make any; or it may be proved by showing that such a relation existed [*527]

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between the parties as by law would create the authority; as for instance, that of partners, by which relation, when complete, one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it; or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent. In all these cases, if the agent, in making the contract, acts on that authority, the principal is bound by the contract, and the agent's contract is his contract, but not otherwise. This agency may be created by the immediate act of the party, that is, by really giving the authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency; or it may be created by the representation of the defendant to the plaintiff, that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such; and if the plaintiff really makes the contract on the faith of the defendant's representation, the defendant is bound; he is estopped from disputing *the truth of it with respect to that contract; and the representation of an authority is, *quoad hoc*, precisely the same as a real authority given by the defendant to the supposed agent. This representation may be made directly to the plaintiff, or made publicly so that it may be inferred to have reached him, and may be made by words or conduct. Upon none of these propositions is there, we apprehend, the slightest doubt; and the proper decision of all these questions depends upon the proper application of these principles to the facts of each case, and the jury are to apply the rule with due assistance from the Judge.

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There are few, if any, of these cases, in which it is contended that authority was directly given by the defendant to the party making the contract to make it for the defendant. Rarely has that circumstance been proved by direct testimony. In one case, it was said that it was to be inferred from a conversation, in which the defendant expressed his satisfaction that the expenses were moderate. That was evidence of the fact for the consideration of the jury, entitled to more or less weight according to the other circumstances of the case. But it is contended (and that formed the chief part of *Mr. Martin's* argument, and a part of that of others) that the relation of co-provisional committee-men constituted an association of *quasi* co-partnership, in which one was agent for the other, for the purposes of all preliminary proceedings

necessary to enable them to obtain an Act; or that the fact of their being co-promoters of the scheme, coupled with the fact that no money was supplied for the expenses of it, was evidence to go to a jury that each authorised the other to contract for these purposes, on his behalf, and that of the other promoters. It was insisted, that where there was no other evidence than the mere fact of the defendant having already agreed to be a provisional committee-man, there was a sufficient case, or at least a case for the consideration of the jury, to prove an authority *given by the defendant [*529] to every other committee-man to give the order out of which the contract arose, by himself, or by the solicitor or secretary, or an authority to such solicitor or secretary to give it on behalf of the committee. We think that no such consequence follows as matter at law, from the mere fact of the defendant agreeing to be a provisional committee-man. Such an agreement amounts to no more than a promise that he would act with other persons appointed, or to be appointed, for the purpose of carrying some particular scheme into effect. The term "committee" means an individual or a body to which others have committed or delegated a particular duty, or who have taken on themselves to perform it in the expectation of their act being confirmed by the body they profess to represent or act for; an agreement to become one of the committee-men is an agreement to become one of that body. The schemes may be various—to establish an hospital, or place of emigration, to which persons are to subscribe merely for charitable motives, or partly from these motives, partly from others; or a proprietary school, or literary institution, or assembly-room, in which they are to be beneficially interested as shareholders; or to obtain an Act for a bridge, drainage, railway, or canal; but whatever the object may be, it seems to us to make little or no difference in the position of the person agreeing to act as a committee-man. If the object of some, most, or all, is gain to themselves individually, the legal consequence is the same as if the object of the parties were the most charitable and benevolent, though the result may be practically very different, in exciting an improper prejudice in the minds of a jury when the evidence is laid before them for their consideration. Such an intended association constitutes no agreement to share in profit or loss, which is the characteristic of a partnership. It would be absurd to suppose that such a relation could be meant to be created by any of those who consented to act. Could it be imagined that a person would agree to be a *partner, [*530]

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not only with those who were then named committee-men, but any that should afterwards be named by themselves or by the projectors of the Company; and could those who subsequently agreed to become members, suppose that those previously named could ever have so intended? The truth is, the agreement to become a provisional committee-man means neither more nor less than what the words express: viz., an agreement to act on the provisional committee, in carrying into effect the preliminary arrangements for petitioning Parliament for a bill, and so to promote the scheme. If afterwards the provisional committee-man does act, he is responsible for his acts. But there are other cases in which the question does not assume so simple a form, and where there is evidence that the defendant has not only consented to be a provisional committee-man, but has authorised his name to be inserted in a prospectus, not generally, but a particular prospectus, in which, in some cases, certain persons are described as the acting committee; in others solicitors are named, or engineers, or a secretary. If such prospectus has been so publicly circulated, with the defendant's consent, that the jury would presume that plaintiff knew of it, or if the plaintiff has had it shown to him at or before the time of making the contract, and has in either case acted upon it in making the contract, the question is, what inference ought a reasonable man to draw from the contents of that paper? This must of course depend upon the terms of each particular prospectus. If the prospectus state merely the names of the provisional committee, and nothing more, and no light be derived from the context, that circumstance does not alter the liability of the defendant. If not responsible as being one of that committee in fact, he cannot become so by the representation of the fact. If it states the names of the acting committee also, where that has been appointed, is the meaning that the acting committee is to take the whole management to the exclusion of the provisional committee, their provisional

[*531] character *having ceased; in which case the provisional committee would not be liable: or does it mean that the provisional committee-men have appointed the acting committee, or the majority of it, on their behalf and as their agents; in which case they would be liable for the contracts of the acting committee, or the majority, made as such agents? Again, does it mean, where the solicitor's name is mentioned, that such person shall be regularly employed in that character by those of the committee who acted, or that he was already appointed by all whose names are mentioned, as their

solicitor, to do all solicitor's business on their behalf? And then would arise a further question, what was the business, at the time of the contract, usually transacted by solicitors for Companies intending to obtain an Act of Parliament, and on behalf of the Company?—which is a question of fact, to be proved by evidence. The same remark applies to the appointment of secretary. Applying these observations to the two particular cases before us, we think that in that of *Reynell* v. *Lewis*, there was some evidence to go to the jury of the employment of the plaintiff, and that there was no misdirection; but we think we ought to grant a new trial, on payment of costs, in order that it may be submitted to another jury, and fully considered by them upon the principles laid down above. In the other case, *Wyld* v. *Hopkins*, we entertain so much doubt whether there was any evidence at all to go to the jury, that we think there ought to be a new trial generally, without the condition of the payment of costs.

Rules absolute accordingly.

SMITH *v.* JEFFRYES.

1846. *June* 5.

(15 Meeson & Welsby, 561—562; S. C. 15 L. J. Ex. 325.)

[561]

The defendant, by a written contract, agreed to sell the plaintiff 60 tons of "ware potatoes," at 5*l.* a ton. It appeared in evidence that in the neighbourhood three qualities of potatoes were known, "wares, middlings, and chats," wares being the largest and best: Held, that evidence was not admissible to show that the plaintiff had in fact contracted for the sale to him of a particular kind of ware potatoes, viz. "Regent's wares," while those offered to him by the defendant were of an inferior kind, viz. "kidney wares."

ASSUMPSIT for the non-delivery of potatoes, sold by the defendant to the plaintiff by the following written contract:

"I hereby agree to sell Mr. Smith, of Tanner Hill, Deptford, sixty tons of ware potatoes, at 5*l.* a-ton, and for which he has given me a bill for 250*l.* for three months, and is to give 50*l.* cash on Friday next. Dated the 27th day of October, 1845.

"SAMUEL JEFFRYES."

Plea (amongst others), *non assumpsit.*

At the trial, before Lord Denman, Ch. J., at the last Assizes for the county of Kent, it appeared upon the plaintiff's evidence, that there were three qualities of potatoes known in the neighbourhood where the contract was made,—namely, wares, middlings, and

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chats, of which wares were the largest and best; and the plaintiff proved that he had in fact contracted for the purchase of the best quality, of a particular kind, viz. "Regent's wares," whereas those which the defendant had offered to deliver were wares of a different, and, as the plaintiff alleged, an inferior kind, viz. "kidney wares." This evidence was objected to, but his Lordship received it, and told the jury, in summing up, that if they thought the defendant, when he contracted to deliver ware potatoes, meant, and in fact contracted, to deliver Regent's ware potatoes, the plaintiff was entitled to recover. The jury accordingly found for the plaintiff.

In Easter Term, *Shee*, Serjt., obtained a rule *nisi* for a new trial, on the ground that the evidence had been improperly received, and the jury had been misdirected in respect of it.

Montagu Chambers and *Massy Dawson* now showed cause:

[562] This evidence was admissible. The ambiguity in *this case was a latent one, which arose out of the extrinsic evidence given to explain the meaning of a particular word used in the written contract. As you resort to extrinsic evidence to explain the meaning of the word, you may use the same evidence to explain the ambiguity. When it had been shown by parol evidence that "ware" potatoes meant the best and largest of any kind of potatoes, it became necessary to show, and the same evidence was properly used for that purpose, what kind of ware potatoes the defendant contracted to supply.

(ALDERSON, B.: This is not a latent ambiguity. A latent ambiguity is, where you show that words apply equally to two different things or subject-matters, and then evidence is admissible to show which of them was the thing or subject-matter intended. But when this contract uses a term which signifies the largest and best of any kind of potatoes, it uses a term which means only one thing.)

The term has a general meaning, which requires explanation in the particular case.

(ALDERSON, B.: If I buy sixty tons of potatoes, surely the seller may deliver me kidney potatoes.)

They cited *Doe* d. *Oxendon* v. *Chichester* (1), *Birch* v. *Depeyster* (2), and *Clayton* v. *Gregson* (3).

(1) 16 R. R. 32 (4 Dow, 65).
(2) 1 Stark. Rep. 210.
(3) 44 R. R. 427 (5 Ad. & El. 302).

Shee, Serjt., *contrà*, was not called on.

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Per CURIAM (1):

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We think it is clear in this case that the evidence ought not to have been received. It went to vary and limit the written contract between the parties. There must be a new trial.

Rule absolute.

JACKSON AND WIFE *v.* SMITHSON (2).

1846. *June* 5.

(15 Meeson & Welsby, 563—565; S. C. 15 L. J. Ex. 311; 4 Dowl. & L. 45.)

[563]

Declaration in case stated, that the defendant wrongfully and injuriously kept a ram, well knowing that he was prone and accustomed to attack, butt, and injure mankind: and that the said ram, while the defendant so kept the same, attacked, butted, and threw down, and thereby hurt the plaintiff: Held sufficient, on motion in arrest of judgment, without showing that the defendant negligently kept the ram.

CASE. The declaration stated that the defendant heretofore, to wit, on &c., and from thence until and at the time of the injury and damage being sustained by the plaintiff Catherine Ann, as hereinafter mentioned, wrongfully and injuriously did keep a certain ram, he the defendant during all that time well knowing that the said ram then was, and continued to be, prone and used and accustomed to attack, butt, and injure mankind; and which ram afterwards, and whilst the defendant so kept the same as aforesaid, to wit, on &c., by reason of the premises, did then attack, butt, and gore the said Catherine Ann, and cast and throw her down to and upon the ground, divers, to wit, five times, and thereby the said Catherine Ann then greatly hurt and injured, &c., &c.

The defendant pleaded Not guilty, and other pleas, and at the trial, before Lord Denman, Ch. J., at the last Assizes for the county of Kent, the plaintiff obtained a verdict with 10*l.* damages.

In Easter Term, *Shee*, Serjt., obtained a rule *nisi* for arresting the judgment, on the ground that the declaration was bad, for not averring that the defendant negligently kept the ram.

Montagu Chambers and *J. Brown* now showed cause, and cited the following authorities, as showing that the declaration disclosed enough to sustain the action, in averring that the ram was an animal prone and accustomed to injure mankind, that the

(1) POLLOCK, C. B., ALDERSON, B., ROLFE, B., and PLATT, B.

(2) Followed in *Smith* v. *Cook* (1875) 1 Q. B. D. 79, 83, 45 L. J. Q. B. 122. —A. C.

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defendant kept him knowing him to be such, and that he did injury to the plaintiff,—the *scienter* being the gist of the action; and that this form of declaration had been adopted from the earliest times: Regist. Brev. fol. 110 b, 111; Liber Placitandi, fol. 40, pl. 56; **Cropper* v. *Matthews* (1), *Rex* v. *Huggins* (2), *Jenkins* v. *Turner* (3), *Smith* v. *Pelah* (4); 1 Saund. 37, *n.* (1). As it appeared, however, that the Court of Queen's Bench had a few days before decided that very point, in a case of *May* v. *Burdett* (5), the COURT intimated that they were bound by that decision, and called upon

[*564]

Shee, Serjt., and *Wordsworth*, in support of the rule:

It must distinctly appear on the face of the declaration that the plaintiff has a cause of action. The mere allegation that the defendant "wrongfully and injuriously" kept the ram, is not sufficient; the reasonable meaning of that is, not that the defendant improperly kept the animal, but that it was an improper thing to keep it at all. But a man has a right to keep any animal, however dangerous it may be in its nature, if he use due and proper caution in the keeping of it; and the fact that the defendant did so is not excluded by the declaration in this case. No doubt, if he is negligent in the keeping of it, and damage ensues thereby, he is liable. In *Rex* v. *Huggins*, Lord HOLT says, "If the owner have notice of the mischievous quality of the ox, &c., and he uses all proper diligence to keep him up, and he happens to break loose and kill a man, it would be very hard to make the owner guilty of felony; but if through negligence the beast goes abroad, after having a notice of his condition, it is the opinion of Hale, that it is manslaughter in the owner." In *May* v. *Burdett*, the animal that did the injury was a monkey, a creature altogether *feræ naturæ*, which nobody has a right to keep at all, except under proper control; but a ram is an animal which is kept lawfully, and the owner is not liable for mischief done by it, unless it appear that he has kept it negligently. They cited Com. Dig., Action on the Case, Negligence, (A. 5); and *Jones* v. *Perry* (6), *Hartley* v. *Harriman* (7), **Blackman* v. *Simmons* (8), *Sarch* v. *Blackburn* (9), and *Curtis* v. *Mills* (10), in all which cases the declaration contained an averment of negligence.

[*565]

(1) 2 Sid. 127.
(2) 2 Ld. Ray. 1533.
(3) 1 Ld. Ray. 109.
(4) 2 Stra. 1264.
(5) Since reported, 9 Q. B. 101.
(6) 2 Esp. 482.
(7) 1 B. & Ald. 620.
(8) 33 R. R. 659 (3 Car. & P. 138).
(9) 34 R. R. 805 (4 Car. & P. 297).
(10) 38 R. R. 843 (5 Car. & P. 489).

POLLOCK, C. B.:

The case which has been decided in the Court of Queen's Bench, of *May* v. *Burdett* (1), is a binding authority upon us on this point, and we must leave the parties to go to a court of error, if they think they have any ground for reversing our judgment.

ALDERSON, B.:

I am of the same opinion, and think we are bound by that decision. In truth, there is no distinction between the case of an animal which breaks through the tameness of its nature, and is fierce, and known by the owner to be so, and one which is *feræ naturæ*.

PLATT, B.:

No doubt a man has a right to keep an animal which is *feræ naturæ*, and nobody has a right to interfere with him in doing so, until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible.

Rule discharged.

THE MAYOR, &c. OF POOLE *v.* WHITT.

1846. *June* 6.

[571]

(15 Meeson & Welsby, 571—579; S. C. 16 L. J. Ex. 229.)

Covenant for rent on a lease. Plea, that, before the lease was made, one P. impleaded the plaintiffs, and had judgment of *elegit* against their lands, &c.: that the inquisition found plaintiffs seised of the demised premises then leased to B., subject to two mortgages for years: that the sheriff delivered the demised premises to P., to hold, &c. till his damages and costs should be levied thereout: that, before the rent became due, defendant was evicted by P., who entered, and then ejected, expelled, put out, and amoved defendant therefrom, and kept and continued him so ejected, &c.: that 1,000*l.* was still due to P. which was not levied. Replication traversed the eviction in the words of the plea. At the trial the lease, *elegit*, and inquisition, were put in, and it was proved that P. had called on defendant to pay him rent, or he, P., would turn him out, on which defendant attorned to him, without privity of the plaintiffs, his lessors: Held, that the plaintiffs were entitled to recover, as P.'s *elegit* only entitled him to the reversion expectant on the mortgages by the lessors. Held, also, that the expulsion, as pleaded, was not established by the evidence.

Semble, that if a party, having a paramount right to evict a party in occupation of premises, goes to him claiming to exercise his right, on which the tenant consents to change the title under which he holds, and attorns to the claimant accordingly, that would be equivalent to an expulsion.

COVENANT on an indenture of lease, dated 25th March, 1843, by which the plaintiffs demised to the defendant their markets and

(1) 9 Q. B. 101.

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fairs, weekly, yearly, and from time to time kept and held in and within the borough and county of the town of Poole, together with the market-houses, fish-shambles, shades, shambles, booths, standings, &c., mentioned in the schedule of the indenture, and the customs and tolls, &c., to the markets and fairs belonging &c., for three years, at the yearly rent of 206*l.*, payable quarterly. Breach, that two years' rent was due.

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Plea, that, before the making of the indenture in the declaration, to wit, on 22nd December, 1837, R. H. Parr impleaded the now plaintiffs on a bond, dated 29th November, 1836, conditioned for payment to him out of the borough funds, by instalments of 4,500*l.*, a sum assessed to him by the council of the borough as compensation for the salary and emoluments of his office as town clerk of Poole, to which he had not been appointed under 3 & 4 Will. IV. c. 76; upon which bond he had recovered, 8th December, 1838, and had judgment of *elegit* of the plaintiffs' lands and hereditaments. The plea then set out the inquisition taken in the premises, on 17th December, 1838, stating that the jury found the plaintiffs to be seised of the demised premises, which were then leased to T. Brown for seven years, beginning from 29th September, 1844, at 250*l.* yearly rent, and were also subject to a mortgage, dated
[*572] 5th March, *1822, to J. Seager, for securing 500*l.* and interest, for the term of 1,000 years, and to a further mortgage, dated 6th March, 1822, to Hancock, for 300*l.* and interest, for a term of 500 years, subject to the first mortgage. The jury found the markets, &c., with the customs, tolls, and profits thereto belonging, to be worth 250*l.* per annum. The plea then stated, that the sheriff delivered the said markets, &c., at the reasonable price and extent aforesaid, to Parr, to hold to him and his assigns, as his freehold, according to the form of the statute, &c., until the damages, costs, and charges should be fully levied; and that the markets, &c., so delivered, were the same as were demised by the plaintiffs to the defendant; and that, before any part of the rent or money in the declaration became due, on 5th April, 1843, Parr, by virtue of the delivery aforesaid, entered on the said markets, &c. &c., and became seised thereof as of his freehold, until &c., and then ejected, expelled, put out, and amoved the defendant therefrom, and from the possession and enjoyment of every part thereof, and kept and continued him so ejected, &c. Averment, that Parr had not yet levied the damages, costs, and charges, but a great part thereof, to wit, 1,000*l.*, is yet due to Parr, not levied or satisfied. Verification.

The second, third, and fourth pleas were nearly similar, setting out three other *elegits* for three several instalments of the bond debt to Parr, issued as each became due, the last being dated 5th March, 1841. The replication traversed the eviction in the words of the pleas.

At the trial, before Erle, J., at the last Assizes for Dorsetshire, the documents stated in the plea were produced; and it appeared that Parr had called on the defendant to pay rent to him, adding, that if he did not, he, Parr, would turn him out. The defendant then paid Parr three quarters of a year's rent, and attorned to him without privity of the plaintiffs.

Verdict for the plaintiffs for 412*l.*, with leave to the defendant to move to set aside the verdict for the plaintiffs, *and enter it for the defendant, if the Court should be of opinion against the plaintiffs on both points. [*573]

Cockburn having obtained a rule *nisi* accordingly,

Crowder, *Stock*, and *Maynard*, now showed cause:

First, on these pleadings, Parr had no legal title to evict the defendant. The plaintiffs, after having mortgaged the premises for years, let them to the defendant. They had, therefore, an equity of redemption during the terms created by them; but while the mortgages remained unsatisfied, the mortgagees did not become their trustees, so as to bring the case within stat. 1 & 2 Vict. c. 110, s. 11, authorising hereditaments held in trust for debtors to be taken in execution. * * Parr, even if clothed by his *elegit* with the plaintiffs' equity of redemption, could not evict the defendant unless on such a title as would have enabled him also to support ejectment against him. * * *

(ROLFE, B.: *You say, first, that attornment without actual expulsion will not suffice; and next, that, if it would, the party expelling must have had title to recover in ejectment.) [*574]

Yes. *Hawkes* v. *Orton* (1) was covenant on an indenture. The breach was, that the defendant "expelled and kept out" the plaintiff; thus alleging the actual fact, not using the word "evict," which has a technical meaning.

(POLLOCK, C. B.: The corporation, whether by assent of their

(1) 44 R. R. 445 (5 Ad. & El. 367).

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mortgagees or not, granted the lease after the *elegit* had issued at suit of Parr: Parr then went to the defendant, their tenant, and set up his title by *elegit* as paramount to theirs: but the defendant could not dispute their title being in fee. Sect. 13 of 1 & 2 Vict. c. 110, seems to show that the remedy is in equity (1).)

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Secondly, if Parr had any title to evict the defendant, that title, as laid in the plea, is not proved; expulsion is alleged, but no eviction in fact, or circumstances tantamount to it, appear. Nor would the title alleged enable Parr to enter and eject the defendant.

(ALDERSON, B.: If the title admitted on record is taken by both parties to be real as so admitted, would adding an attornment make the plea good? If it would not, then to add it to the title relied on in evidence would be equally ineffectual. Here only attornment being shown, it must be taken as coupled with the title laid in the plea, that being a title which would not have enabled Parr to bring ejectment.

POLLOCK, C. B.: The questions are, first, can evidence of attornment be substituted for that of actual expulsion? second, if the defendant ought to have attorned to Parr, as a person entitled by law to turn him out, is the attornment equivalent to proof of actual
[*575] expulsion? and third, *is the charge by way of *elegit* created under stat. 1 & 2 Vict. c. 110, s. 11, a charge on the interest existing between the parties to this action?)

Whether or not the lessors assented to payment of rent to Parr by their former tenants, makes no difference; for even a written authority by them to the defendant to pay rent would not change his tenancy: *Wheeler* v. *Branscombe* (2).

Cockburn, *Barstow*, and *Poulden*, in support of the rule:

The plaintiffs having only mortgaged for years, their reversion passed to Parr under the *elegit*, so as to enable him to sue the corporation in ejectment. In *Plunket* v. *Penson* (3), the mortgage in question was in fee; and Lord HARDWICKE says, "If there is a mortgage for a thousand years, and the reversion in fee is left in the mortgagor, it will be legal assets, because the bond creditor might have judgment against the heir of the obligor, with a *cesset*

(1) See Sugd. V. & P., 11th ed. 662, 961.

(2) 64 R. R. 512 (5 Q. B. 373).

(3) 2 Atk. 290.

executio till the reversion comes into possession; but where it is a mortgage of the whole inheritance, I do not see what remedy a bond creditor can have to make it assets at law."

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(ROLFE, B.: Suppose a mortgagor in fee to be in possession, his chattel interest could not be taken by *elegit*. These questions would not have arisen if mere possession by the mortgagor entitled a sheriff to deliver the land as his freehold to a creditor by *elegit*.)

Again, if the defendant could not, as tenant, dispute the title of his lessors the plaintiffs, they, on the other hand, after demising to him in fact, could not deny their title so to demise. In *Pope* v. *Biggs* (1), the lease in question had been granted after the mortgage; and BAYLEY, J., says, "I have no doubt that, in point of law, a tenant who comes into possession under a demise from a mortgagor after a mortgage executed by him, may consider the mortgagor his landlord, so long as the mortgagee allows the mortgagor to continue in possession and receive the rents, and *that payment of the rents [*576] by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee, by giving notice of his mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents (2). It is undoubtedly a well-established rule, that a lessee cannot dispute the title of his lessor at the time of the lease; but he is at full liberty to show that that title has been put an end to."

(POLLOCK, C. B.: What the Court there held was, that payment of rent to a mortgagee after notice of the mortgage, was equivalent to paying the lessor.)

Whether this attornment amounted to eviction or not, it seems, from *Rogers* v. *Pitcher* (3), that a tenant by *elegit* may obtain actual possession without bringing ejectment.

(ALDERSON, B.: Proof of expulsion is necessary for the purpose of your argument.)

Evans v. *Elliott* (4) shows, that a right to receive rent and an attornment are together equivalent to an actual eviction, if the tenant changes the title under which he holds.

(1) 32 R. R. 665 (9 B. & C. 245). See 2 Bing. N. C. 538; 7 Bing. 595.

(2) See *Johnson* v. *Jones*, 48 R. R. 714 (9 Ad. & El. 809); *Davies* v. *Stacey*, 12 Ad. & El. 506; *Wheeler* v. *Bramscombe*, 64 R. R. 512, 516 (5 Q. B. 373, 379).

(3) 25 R. R. 582 (6 Taunt. 207). See 2 Wms. Saund., 5th ed. 69 a, note (e).

(4) 48 R. R. 520 (9 Ad. & El. 342).

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(ALDERSON, B.: There a tenant, being in possession under a lease granted by a mortgagor after the mortgage, attorned to the person who might have turned him out, viz. the mortgagee.)

Further, when the lease was granted to defendant, Parr's position was at least equal, if not superior, to that of a second mortgagee; for he was also in possession by receiving rent from the former tenant West, and could have ejected the lessors in spite of a prior mortgage by them: *Lindsay* v. *Lindsay* (1), *Doe* d. *Watton* v. *Penfold* (2), *Doe* d. *Levy* v. *Horne* (2).

(ALDERSON, B.: Lord DENMAN'S judgment in the last case proceeds on the party's silence as to the fact of a previous mortgage having been made. Here the inquisition recites the prior mortgages,
[*577] and fixes *the defendant with knowledge of them.)

* * * * *

POLLOCK, C. B.:

This is an application to enter a verdict for the defendant, the verdict at the trial having been for the plaintiffs. The action was in covenant for rent on a lease. The plea in effect alleged, that it was true that the defendant was lessee, but that the lessors had become liable to pay money to one Parr, and gave him a bond on which he sued and perfected an *elegit* in 1838, and that the lease to the defendant was granted in 1843. The plea then set out the inquisition on the *elegit*, which found that the lessors, prior to granting the lease to the defendant, had executed two mortgages for years to other persons. The concluding allegation was, that Parr, acting under the *elegit*, had expelled and put out the defendant. The only question was, whether Parr did put him out or not? Now, if a party, having a good right to eject the occupier of demised premises, goes there and demands to exercise that right, and the tenant says, "I will change the title under which I now hold, and will consent to hold under you," that, according to good sense, is capable of being well pleaded as an expulsion. And if, as has been argued, Parr had all the right the lessors had, viz. the equity of redemption, it may be, that if he came forward and received the rents,
[*578] some other *plea of this nature might have been framed to meet the case. However, the present plea is wholly insufficient for the defendant's purpose; for, as the whole estate the corporation had as lessors was a reversion expectant on their mortgages for years, all that Parr could take by the *elegit* against them would be their

(1) Bull. N. P. 110 a. (2) 61 R. R. 397 (3 Q. B. 757).

right to that reversion, without any power to enforce that right, whatever it might be, by ejectment. I doubt if the case of tenant by *elegit* is like that of a second mortgagee. But taking *Mr. Barstow* to be right, it fails to apply to this case, for the recitals of the first mortgage in the second gave full notice to the second mortgagee. If the second mortgagee may in any case recover in ejectment, notwithstanding the first mortgage, that may be because the parties are estopped by their own deeds. But if the first mortgage was set out, and the deeds showed that the second mortgagee took no more than the first had left to him, he would not succeed. Whatever might have been the result on other pleadings, no verdict can be entered for the defendant on these issues.

ALDERSON, B.:

I am of the same opinion, on this short ground: the defendant's plea rests his case on Parr's title as paramount under the *elegit*, but also shows that the mortgagees of the lessors were entitled to that immediate possession of the premises, which the defendant undertakes upon these issues to prove to be the right of Parr. Whether the facts proved amounted to an expulsion, must depend on the title which is pleaded; now what is added to that title in evidence is, that, after it accrued, the present defendant attorned to Parr. But as no title in Parr to eject him is shown, that attornment does not establish any expulsion.

ROLFE, B.:

In this action for rent, the plea sets up a prior title in Parr under an *elegit*, and states the inquisition, and the finding of the jury, that the markets of which *the lessors were possessed were subject to two [*579] terms for years, vested by them in certain mortgagees. Thus the corporation had legal title to the reversion, with power in equity to pay off the incumbrances. The plea also states that the sheriff delivered the demised premises to Parr under the *elegit*, and that by virtue of the delivery aforesaid, Parr entered and expelled the defendant. This bound the defendant to prove that Parr did enter and evict by virtue of that *elegit*. I doubt if that must necessarily mean that he entered and dispossessed the defendant by the forms of an ejectment, for the party might yield without that pressure if he chose. But the defendant was bound to show that Parr, the party claiming, had such a title as conferred a right to eject him. Now it is clear Parr had no such title, having only a reversion expectant on two terms for years.

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PLATT, B.:

Since 29 Car. II. c. 3, s. 10, the writ of *elegit* reaches as well the equitable interests of the debtor, being a cestui que trust, as by 13 Edw. I. c. 18, it did his freehold interests. Then the only change worked by 1 & 2 Vict. c. 110, s. 11, in cases not affected by the proviso at the end, is that the subject-matter of the execution is altered to the whole instead of a moiety of the lands. Then title must be made out in Parr to support this plea. The defendant says, I cannot pay this rent, because I have been evicted by Parr; had he pleaded that a stranger had evicted him, it would have been a bad plea. But this plea seems no more; for Parr's title appears by the inquisition, which describes the previous title, showing that the lessors at the time of letting had only a reversionary interest. To make the title good, as pleaded, the eviction should have been by a party having a right at the time to recover in ejectment. But how could these reversioners have a right of entry at the time of the transaction relied on as an eviction?

Rule discharged.

1846. *June* 8.

[580]

DOE D. EDWARD LLOYD, LORD MOSTYN, AND OTHERS *v.* THOMAS JONES (1).

(15 Meeson & Welsby, 580—586; S. C. 16 L. J. Ex. 58.)

Lessee for lives of a farm inclosed from an adjoining extra-parochial waste, over which there was a right of common in respect of his farm, some small pieces of land near but not actually contiguous to the farm. The lessor was not lord of the waste: Held, that, in the absence of evidence showing a contrary intention, it was to be presumed that the lessee made the inclosures for the benefit of his lessor, to belong to him as part of the farm at the determination of the lease.

Held, also, that such presumption was not rebutted by the fact that the lessee, during the lease, made a conveyance of these inclosures to his son in fee, which, however, was not delivered, nor followed by any possession.

By writing indorsed on the lease, the lessee agreed that all inclosures made by him upon the said waste should be surrendered up to the lessor, his heirs, &c. at the end of the lease, and that the lessee should pay to the lessor, his heirs, &c. the sum of 6*d.* annually, as an acknowledgment for the same: Held, that this was an admission on the part of the lessee that he had made the inclosures for the benefit of the lessor.

EJECTMENT to recover a cottage and several pieces of land in the extra-parochial place of Threapwood, in Flintshire. The pieces of

(1) *Andrews* v. *Hailes* (1853) 2 E. & B. 349; 22 L. J. Q. B. 409; *Earl of Lisburne* v. *Davies* (1866) L. R. 1 C. P. 259, 35 L. J. C. P. 193.

land were numbered 4, 5, 6, 7, 8, 9, and 10, in a map or plan annexed to the case.

At the trial, before Coleridge, J., at the Flintshire Summer Assizes, 1844, a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case:

By indenture of demise, dated the 15th of October, 1756, made between Edward Lloyd, afterwards Sir E. Lloyd, Bart., of the one part, and Richard Jones of the other part, the said E. Lloyd demised to R. Jones, his heirs, executors, &c., Threapwood Farm, in the parish of Worthenbury, in Flintshire, together with certain closes of about 104 acres, for the lives of the said R. Jones, Anne his wife, and Thomas Jones their son, and the life of the survivor, subject to the payment of a yearly rent.

Threapwood Farm in part adjoins the extra-parochial place of Threapwood, which consists entirely of a common, of considerable extent, over which the occupiers of Threapwood Farm, and of other farms in the parish of Worthenbury adjoining thereto, have rights of common. Sir R. Puleston, Bart., is lord of the manor of Worthenbury. After the granting of the above lease, R. Jones, the lessee, from time to time inclosed small portions of the waste of Threapwood (1); and by writing indorsed upon the said *indenture of [*581] lease, signed and sealed by Sir E. Lloyd and the said R. Jones, and duly attested and stamped, dated the 24th of August, 1778, reciting that since the granting of the said lease, an inclosure had been made out of the common of Threapwood, of about two acres of land, over and against the premises demised, it was thereby agreed by the said parties, that the said inclosure should be deemed and taken as part of Threapwood Farm, and that the same should be occupied and enjoyed by the said R. Jones, his executors, administrators, and assigns, during the lives contained in the said indenture, at the yearly rent of 6*d.*, to be paid by the said R. Jones, his executors &c., to Sir E. Lloyd, his heirs, &c. And the said R. Jones did, for himself, his executors, &c., covenant with the said Sir E. Lloyd, that he, his executors, &c., should pay to Sir E. Lloyd, his heirs, &c., the said rent of 6*d.* when demanded, and also to maintain the fences and ditches of the said inclosure; and likewise to deliver up the same well fenced and ditched at the end or sooner determination of the said term, to the said Sir E. Lloyd, his heirs

(1) The plan showed that none of the inclosures actually adjoined the lands of Threapwood Farm; they were separated from them by an intervening road.

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and assigns. The inclosure of two acres, mentioned in this indorsement, has since been divided into, and now forms, the two pieces numbered 4 and 5 on the plan.

By another writing, indorsed on the said lease, signed and sealed by Sir E. Lloyd and R. Jones, and duly attested and stamped, dated the 27th of November, 1793, it was agreed between the said Sir E. Lloyd and R. Jones, their heirs, &c., that a house built by the said R. Jones on Threapwood, and all inclosures then already made upon Threapwood, or which thereafter should be made upon the said common by the said R. Jones, should be surrendered up to the said Sir E. Lloyd, his heirs, &c., at the end of the said demise; and that the said R. Jones, his heirs and assigns, should repair the said house, then in the occupation of Thomas Mullock, and that he, the said R. Jones, his heirs, &c., should pay to the said Sir E. Lloyd, his heirs, &c., the sum of 6*d.* annually, as
[*582] an *acknowledgment for the same. The house mentioned in this latter indorsement is the cottage and outbuildings sought to be recovered in this action, and is marked No. 8. Numbers 7 and 8 were inclosed by R. Jones, the lessee, before 1783. The house was built about 1785, and numbers 6, 9, and 10, were inclosed about the same time.

By indentures of lease and release, of the 1st and 2nd of May, 1792, made between the said R. Jones, the lessee, of the one part, and Richard Jones, his son, of the other part, R. Jones the elder bargained, sold, &c., to R. Jones the younger, all that messuage &c. of the said R. Jones the elder, being in Threapwood aforesaid, in the occupation of T. Mullock. No proof was given what premises, if any, were in the occupation of T. Mullock, nor was any proof given that possession followed these deeds, or that the deeds were delivered to the grantee. R. Jones, the lessee, continued in the occupation of Threapwood Farm until his death in 1804. It was then occupied by his son Richard until 1822, and afterwards by other members of his family until 1837, when the lease was determined by the death of Thomas Jones, the last cestui que vie. Of the other inclosures R. Jones, the lessee, retained possession until his death in 1804, when they were afterwards occupied, together with Threapwood Farm, by R. Jones the younger, until his death in 1822. On his death, T. Jones, the cestui que vie, obtained possession of them, and in 1824 he recovered possession by ejectment of the cottage and an inclosure held by one Edwards, who had been put into possession by R. Jones, the lessee. T. Jones

recovered as heir-at-law of his father and of his brother R. Jones. The lessor of the plaintiff, Lord Mostyn, is heir-at-law of Sir E. Lloyd, and the defendant is heir-at-law of T. Jones, the cestui que vie. No evidence was given of any payment of the rents made payable by the indorsements of the 24th of August, 1788, and the 27th of November, 1793.

The question for the opinion of the Court is, whether the lessor of the plaintiff, Lord Mostyn, is entitled to *recover all or any part [*583] of the premises in question. If the Court should be of opinion that he is so entitled, the verdict for the plaintiff is to stand, and to be entered for such of the premises as he is entitled to recover. If the Court should be of a contrary opinion, the verdict is to be entered for the defendant.

Jervis, for the lessors of the plaintiff:

There are two points in this case, on either of which the plaintiff is clearly entitled to succeed. First, the inclosures made from Threapwood Common by Richard Jones, the lessee of Threapwood Farm under the lease of 1756, are to be presumed, under the circumstances, to have been made for the benefit of his lessor, and to belong to him as part of the farm at the determination of the term. It is found in the case that there was a right of common over this waste in respect of Threapwood Farm. Although it was once doubted, it is now established by many authorities, that if a lessee inclose land contiguous to his farm, he is presumed, in the absence of facts to show a contrary intention, to have inclosed for the benefit of his lessor: *Doe* d. *Challnor* v. *Davies* (1), *Doe* d. *Colclough* v. *Mulliner* (2), *Bryan* d. *Child* v. *Winwood* (3), *Doe* d. *Lewis* v. *Rees* (4). And in this case there was no fact to rebut this presumption. It may be said, that, in *Bryan* v. *Winwood*, the landlord of the farm was also the lord of the waste; but that was not so in *Doe* d. *Lewis* v. *Rees*.

(ALDERSON, B.: There was a case before me at the last Spring Assizes, in which also the encroachment was upon a stranger.)

Secondly, these inclosures were all made before the year 1785, and two of them before the year 1778. Now, by the first indorsement on the lease, made in 1778, the lessee admitted that he made them for the benefit of his landlord; and the others are similarly affected

(1) 5 R. R. 745 (1 Esp. 461).
(2) 5 R. R. 744 (1 Esp. 460).
(3) 9 R. R. 751 (1 Taunt. 208).
(4) 6 Car. & P. 610.

DOE d. LLOYD v. JONES. [*584]

by the second indorsement, *made in 1785. All that can be said on the other side is, that no rent has been paid in respect of these inclosures, and that the defendant has therefore acquired a title to them by lapse of time.

(ALDERSON, B.: They have become part of the farm: non-payment of rent is immaterial.)

Besides, *Doe* d. *Davy* v. *Oxenham* (1) is a distinct authority that a lessor is not barred by omitting to receive rent from his lessee during the continuance of the lease. With respect to the conveyance by Richard Jones to his son, that was not delivered, and could not operate to the prejudice of his lessor.

Townsend, for the defendant:

This is not the case of an annexation to the farm; these pieces of land were held as a separate inclosure. It is, however, still *vexata quæstio* to whose benefit an inclosure made by a tenant shall enure, and the question has never been fully considered in banc. The case of *Doe* d. *Lewis* v. *Rees* is very shortly reported; and there, the encroachment being upon the sea-coast, it would be presumed to belong to the owner of the adjacent soil, not to the lord of the manor: *Lowe* v. *Govett* (2). In *Doe* d. *Colclough* v. *Mulliner*, Lord KENYON ruled, that an encroachment by the tenant on the waste did not belong to his landlord, and is reported to have revolted at the idea that the tenant could make his landlord a trespasser, which he said would unavoidably be the case if the latter could recover in the ejectment.

(ALDERSON, B.: The answer to that is, that the presumption may be rebutted by the repudiation of the landlord, as well as by the acts of the tenant.)

In *Doe* d. *Challnor* v. *Davies*, again, THOMPSON, B., expressed a similar opinion. *Bryan* v. *Winwood* is distinguishable, because there the landlord of the farm was also the owner of the waste. There are also some still more recent cases, which are dis-
[*585] tinguishable from the present. *In *Doe* d. *Lord Dunraven* v. *Williams* (3), as in *Bryan* v. *Winwood*, the lessor of the plaintiff was the lord of the manor. In *Doe* d. *Harrison* v. *Murrell* (4), the encroachment was absolutely annexed to the farm. No difficulty

(1) 56 R. R. 662 (7 M. & W. 131).
(2) 37 R. R. 560 (3 B. & Ad. 863).
(3) 48 R. R. 792 (7 Car. & P. 332).
(4) 8 Car. & P. 134.

exists in applying the principle contended for on the other side, where the lessor is also the owner of the waste encroached upon; then the landlord's land is taken for the landlord's benefit; but there is no reason why the landlord should have the benefit of an encroachment upon a stranger, when he has no interest whatever in the soil.

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But, secondly, there are facts in this case to show that here the lessee inclosed for his own benefit. By the first indorsement on the lease, the land is to be occupied by the lessee and his executors, which distinguishes it from freehold estate, and at a separate rent.

(POLLOCK, C. B.: It is a mere mistake in using the word "executors" instead of "heirs."

ALDERSON, B.: Is not this indorsement really equivalent to saying —"Memorandum, I have inclosed for the benefit of my landlord?" Besides, though the land inclosed was not the landlord's, he had a right over it, and therefore could have stopped the inclosure.

ROLFE, B.: Any admission which the tenant makes that he holds for a term of years under his landlord is very good evidence of title.)

At all events, the inclosure made after the first indorsement did not pass to the landlord, by reason of the conveyance of 1792, which was made for a valuable consideration, before the execution of the second indorsement.

(POLLOCK, C. B.: The indorsement operates not by way of conveyance, but by way of admission. Suppose a tenant holds premises in apparently adverse possession for eighteen years, and in the nineteenth year conveys them to his son, and in the twentieth attorns to his landlord, would the conveyance give any interest to the son?

ALDERSON, B.: Besides, the case finds that no possession followed that deed, and that *there is no proof of its delivery.) [*586]

There may be a sufficient delivery, though the deed remain in the possession of the grantor: *Shelton's* case (1). Further, the second indorsement merely purports to be a surrender, and is to be read as such, and the tenant may show that it was not a voluntary one.

(1) Cro. Eliz. 7.

DOE d. LLOYD v. JONES.

Jervis was not called upon to reply.

POLLOCK, C. B.:

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I think the plaintiff is entitled to our judgment. If there had been no indorsement in the case, but it had been proved that the landlord had asked the tenant what he was doing, and he had answered, "I am making these inclosures for your benefit," would not that have been sufficient?

ALDERSON, B.:

The presumption of law being that the tenant incloses for the benefit of his landlord, it is for the defendant to rebut that presumption. Does he rebut it, by showing a secret conveyance by the tenant to his son, which is not followed by possession? All the public and open acts which appear in this case are such as would induce the landlord to suppose that the presumption was applicable; and the conveyance affords no answer to it.

ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

1846. *June* 5.

[623]

DOE D. STACE AND ANOTHER *v.* WHEELER.

(15 Meeson & Welsby, 623—626; S. C. 16 L. J. Ex. 312.)

Two of three co-executors may recover lands of their testator in ejectment, on a joint demise.

EJECTMENT for premises at Ashford, in the county of Kent. The only demise was in the names of both the lessors of the plaintiff, dated the 14th of March, 1841. At the trial, before Coltman, J., at the last Assizes for the county of Kent, it appeared that the plaintiffs sued as the executors of the will of William Stace, who was the surviving assignee of a mortgage term of 500 years in the premises, created in the year 1757. William Stace died in the year 1841, having by his will appointed the lessors of the plaintiff, William Harvey Stace and Thomas Davis, and his daughter Mary Stace, his executors and executrix; and probate was granted to the lessors of the plaintiff, power for the like grant being reserved to Mary Stace, the executrix.

It was contended for the defendant, that the two lessors of the plaintiff, there being a third executor, could not recover the

[*624] possession of the premises on a joint demise. The *learned Judge reserved the point, and the plaintiff had a verdict.

In Easter Term, *Peacock* obtained a rule *nisi* to enter a nonsuit, pursuant to leave for that purpose reserved at the trial. He cited *Doe* d. *Poole* v. *Errington* (1).

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Fortescue (with whom was *Channell*, Serjt.) now showed cause:

The two lessors of the plaintiff have a right to recover the premises in ejectment. The estate of executors is a peculiar one; it is not analogous to that of joint-tenants, who are for most purposes seised *per my et per tout, i.e. per my* only for their own portions; but each executor has the whole estate: Com. Dig., Administration (B. 12); *Herbert* v. *Pigott* (2). Each, therefore, may part with the whole by his demise; and that being so, the two executors cannot, by their demise, give less than the whole. It is laid down in Bac. Abr., Executors and Administrators, (D) 1, that, "If a man appoints several executors, they are esteemed in law but as one person, representing the testator, and therefore the acts done by any one of them which relate either to the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed the acts of all, for they have a joint and entire authority over the whole." . . . "And for this reason it is holden, that if one executor grants or releases his interest in the testator's estate to the other, nothing passes thereby, because each was possessed of the whole before." The same doctrine is laid down more fully in Godolphin's Orphan's Legacy, p. 134, and in Wentworth on Executors, p. 211. If this were an action by the lessors, instead of the lessee, it might equally (subject to a plea in abatement for nonjoinder of the third) be maintained. In Dyer, 23 a, it is stated that the question arose, "If two executors have a *term, and one grants to a stranger all that belongs to him, how much of the term shall pass? and the COURT thought, that all the whole term passed, inasmuch as each of them has an entire authority and interest in the term as executor; but of other joint-tenants of a term it is otherwise; so there is a diversity." He cited also 2 Roll. Abr. 924, (O), and *Nation* v. *Tozer* (3), and was then stopped by the COURT, who called upon

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Peacock, in support of the rule:

The demise to the nominal plaintiff must be stated according to its legal effect; and on a demise by two of three executors, the

(1) 40 R. R. 415 (1 Ad. & El. 750).
(2) 2 Cr. & M. 384.
(3) 1 Cr., M. & R. 172.

DOE d. STACE v. WHEELER.

estate would not pass from them jointly. Although the whole estate passes from each, John Doe cannot declare on a joint demise. When two executors join in a lease, each passes all that he has, therefore each passes the whole; consequently the two do not pass the whole.

(ALDERSON, B.: We see that John Doe gets the entirety, which is all we want to ascertain.)

But not from the two; each passes the whole, and no joint interest comes from the two.

(ROLFE, B.: Suppose the two actually demised, how would you describe the demise according to its legal effect? and how would your objection be obviated if all three joined?)

Because the whole three have a joint estate: each has the whole, and the whole have the whole. It is like the case of a joint and several bond; the obligee may sue all the obligors jointly, or any one of them separately, but not two out of three jointly.

(ALDERSON, B.: Because they never agreed that he should do so. But here, what is true of all is true of each. It is different from the case of joint-tenants; each has the whole, and there are not many wholes, but one whole.

POLLOCK, C. B.: If the three are one, why are the two more than one? The conclusion from all the cases is, that the estate of executors is different in this respect from that of *joint-tenants or of tenants in common.)

[*626]

No doubt; each has the whole, but two of the three have not the whole.

POLLOCK, C. B.:

There is no authority for your position, and I do not see why we should take it up for the first time.

ALDERSON, B.:

There is certainly no principle for it.

ROLFE, B.:

It is generally said there are only three descriptions of persons who have a joint interest, namely, joint-tenants, tenants in

common, and coparceners; but when we look closely, there are four, that is, co-executors also, who have some of the incidents of all the others.

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PLATT, B., concurred.

Rule discharged.

PILKINGTON AND ANOTHER *v.* SCOTT AND OTHERS (1).

1846. *June* 24.

[657]

(15 Meeson & Welsby, 657—662; S. C. 15 L. J. Ex. 329.)

The plaintiffs agreed in writing with L., that he should serve them for seven years as a crown-glass maker; that he should not during that term work for any other person without their license; that they might deduct from his wages any fine he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame, the plaintiffs should be at liberty to employ any other person in his stead, without paying him any wages; that the plaintiffs should pay him, so long as he should be employed and work as a crown-glass maker, certain wages by the piece, and 8*l.* a year, in lieu of house-rent and firing; and that the plaintiffs should have the option of dismissing him from their service on giving him a month's notice or a month's wages: Held, that this agreement bound the plaintiffs to employ L. during the seven years, subject to the above power of dismissal; that there was, therefore, a good consideration for L.'s contract to serve for the seven years, and the agreement was not in unlawful restraint of trade.

THIS was an action on the case against the defendants, for wrongfully harbouring one Joseph Leigh, a servant of the plaintiffs. Plea, Not guilty (with other pleas not material to be stated).

At the trial, before Patteson, J., at the last Liverpool Assizes, the plaintiffs put in evidence an agreement made between them and Joseph Leigh, dated in the year 1844. The substance of this agreement was, that the said Joseph Leigh should and would, at all times, during the term of seven years, to be computed from the day of the date, serve the plaintiffs, their executors, &c., as a crown-glass maker; that he should not, during the said term, work for any other person at any other glass-house or place of business, without the licence of the plaintiffs; that it should be lawful for the plaintiffs to deduct from his wages any fine that he might incur for breach of their rules; that, during any depression of trade, he should be paid a moiety of his wages; that, if he should be sick or lame, the plaintiffs should be at liberty to employ any other person in his stead without paying him any wages; that the plaintiffs should pay him when and so long as he should continue to be

(1) Cited by CHITTY, L. J. in *Robinson* v. *Heuer* [1898] 2 Ch. 451, 458, 67 L. J. Ch. 644, C. A.—A. C.

PILKINGTON v. SCOTT.

employed, and work as a crown-glass maker, wages by the piece (stating them), and 8*l.* per annum in lieu of house-rent and firing; and that the plaintiffs should have the option of dismissing him from their service on giving him a month's wages or a month's notice.

It was contended for the defendants, that the agreement was invalid, first, as being unilateral, and not mutual; for that under it [*658] the plaintiffs, the masters, were not bound to *employ the workman at all, but only to pay him wages so long as he should in fact be employed; and secondly, because it was in restraint of trade. The learned Judge overruled the objections, and left the case to the jury, who found a verdict for the plaintiffs, damages 4*l.*

In Easter Term, *J. Henderson* obtained a *nisi* for a new trial, on the ground of misdirection on the above points.

Martin and *Crompton* now showed cause:

There is no ground for the objections taken to this agreement. The provision for a month's notice before dismissing the workman implies that the plaintiffs were under an obligation to employ him during the term, subject to that provision. They are bound to keep him in their employ during the seven years, unless they give him a certain notice; if they turn him away without that notice, he has a right of action; and even if they omitted to employ him at all, he would have a right to recover some damages. The agreement, therefore, is mutual. Neither is it unlawful as being in restraint of trade. Why may not a man hire himself for seven years as well as for one year? Since the case of *Hitchcock* v. *Coker* (1), the Court will not inquire into the adequacy of the consideration; it is enough if there is a sufficient consideration to support an assumpsit. Here the right to have a month's notice of dismissal is of itself a sufficient consideration.

J. Henderson, contrà:

This agreement is invalid. It purports to be a contract on the part of Leigh to work for seven years for no other person than the plaintiffs, without any contract on their parts to employ him at all. It may be admitted, that if any consideration, not being a colour- [*659] able one, appears, the Court will not now inquire into the *value or amount of it; that is, they will not make a bargain for the parties. But it is established law, that a contract in restraint of trade, which

(1) 45 R. R. 522 (6 Ad. & El. 440).

is universal in point either of space or of time, is altogether void: *Young* v. *Timmins* (1), *Ward* v. *Byrne* (2), *Mallan* v. *May* (3).

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(ALDERSON, B.: If it be in partial restraint of trade only, it is good, if founded on a consideration. This contract is for seven years only; it is therefore partial only; consequently it is a lawful contract, if there be a good consideration.)

If it withdraws the workman from labouring for the community generally, without any obligation on the masters to employ him, it is invalid. Now throughout this agreement there is no contract or stipulation on the part of the masters to employ the party at all. They only contract to pay him wages "when and so long as he shall continue to be employed." That is no contract to employ him: *Aspden* v. *Austin* (4), *Dunn* v. *Sayles* (5). Then, if so, supposing, immediately after the signing of the contract, the plaintiffs refuse to give him employment, he nevertheless cannot for seven years work for any other person. That is an undue restraint of trade. The agreement to work for no other person is absolute and independent, whereas the agreement to pay wages is dependent and conditional on the employment. Nor can the Court, from the provision as to a month's notice, imply a covenant to employ him during the seven years.

(ALDERSON, B.: Is it not a necessary inference therefrom, and also from the power to employ other persons in his stead during his sickness, that they are bound to take him into their employ? It is because they have engaged to employ him for seven years, that they take a power to discharge him on giving a month's notice. Surely, if I take a power to put an end to an agreement, it is because the agreement has begun. The power to dismiss implies that they have engaged to employ.

PLATT, B.: The proviso must be taken *to be an exception out of the preceding contract.) [*660]

Probably the masters did intend to bind themselves for the seven years, but it is not so expressed.

ALDERSON, B.:

The question in this case simply is, whether the rule ought to be

(1) 1 Cr. & J. 331.
(2) 52 R. R. 827 (5 M. & W. 548).
(3) 63 R. R. 708 (11 M. & W. 653).
(4) 5 Q. B. 671.
(5) *Id.* 685.

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made absolute, on the ground that this is a contract in restraint of trade, and has no adequate consideration to support it. If it be an unreasonable restraint of trade, it is void altogether; but if not, it is lawful, the only question being whether there is a consideration to support it; and the adequacy of the consideration the Court will not inquire into, but will leave the parties to make the bargain for themselves. Before the case of *Hitchcock* v. *Coker*, a notion prevailed that the consideration must be adequate to the restraint; that was, in truth, the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain. Here the restraint is for seven years only, with an engagement on the part of the workman not to go into the service of any other person during that time; and the question is, whether there is a consideration for that engagement. *Mr. Henderson* says there is not, because there is no undertaking on the part of the plaintiffs to employ the workman. But, looking at the agreement altogether, I see sufficient to satisfy me that they are bound to employ him. The workman agrees to serve them during the seven years on certain terms, and they agree to pay him certain wages, and a moiety thereof during any depression of trade, with liberty to them to employ any other person in the event of his being sick or lame. Then they are to have the option of dismissing him from their service, on giving a month's wages or a month's notice. All these provisions being taken together, it appears to me that the agreement points clearly to an undertaking on the part of the masters to employ the workman for the seven years, subject to the notice, and on the part of the workman to serve them for that period on the same terms. That is a reasonable bargain, [*661] having its foundation in a good consideration, namely, the agreement to employ him; and the amount or adequacy of that consideration the Court will not inquire into. The contract, therefore, is not void as being in restraint of trade, and, being binding on the parties, may be made the foundation of an action against the defendants for harbouring and employing the plaintiffs' servant. The rule must, therefore, be discharged.

ROLFE, B.:

This rule was granted on the ground that there was no corresponding undertaking on behalf of the masters to employ the workman: and when the case is looked at, it depends not so much on any principle relating to contracts in restraint of trade, as upon the

principles relating to contracts in general; because, if it was a contract by the workman to work for the plaintiffs for seven years, and by the plaintiffs to employ him for that time, it clearly was not void as being in restraint of trade. The question therefore is, whether, on the face of this contract, there is an undertaking on the part of the plaintiffs to employ the workman: and, looking at the whole together, I think there is. The provision as to notice is conclusive to show that the plaintiffs supposed that, by the other stipulations of the contract, they had agreed to employ him for seven years; else why should they introduce a power enabling them to do that upon notice, which, *ex hypothesi* of the other side, they might do without any notice? This distinguishes the case from that of *Aspden* v. *Austin*, where, as Lord DENMAN says in his judgment, the defendant had not covenanted to carry on his business for three years, but only to pay weekly sums for three years to the plaintiff, on consideration of his performing what, on his part, he had made a condition precedent. But here, subject to the condition of notice, I think the fair meaning of the whole contract is, that the parties did stipulate to do that, which, in the case of *Aspden* v. *Austin*, Lord DENMAN says they *did not. It is, therefore, a contract [*662] by the masters to employ, as well as by the servant to serve, and consequently the ground of this motion fails.

PLATT, B.:

The question is, what is the construction of this contract? The difficulty with me all along has been to see what is the limit of the engagement, if it be not seven years. That it is an engagement for no time at all, is inconsistent with all the provisions of it which have been referred to by my brother ALDERSON. They are all inconsistent with the supposition of the absence of any undertaking on the part of the masters to employ the workman. I think, on the whole, it clearly amounts to an undertaking to employ the party, and to pay him the agreed wages, during the whole seven years, unless in the meantime the contract should be determined by notice. That distinguishes it from the cases in the Queen's Bench which have been cited by *Mr. Henderson*.

Rule discharged.

1846.
July 4.

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SMITH AND OTHERS *v.* PAGE.

(15 Meeson & Welsby, 683—687.)

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In *indebitatus assumpsit* for money due on an account stated, it is not sufficient to plead that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, defendant and plaintiff accounted together of and concerning the said causes of action, and all other claims and demands then being between plaintiff and defendant, amounting to a large sum, to wit, 1,000*l.*, and that on such accounting a small sum, to wit, 150*l.*, was then found to be due and owing from defendant to plaintiff, which defendant then promised plaintiff to pay, and afterwards, before commencement of the suit, paid to plaintiff, who accepted it in full satisfaction of the sum due to him from defendant; for such a plea does not show that, at the time of the second accounting relied on, any cross demand by defendant against plaintiff existed, or that, if it existed, it had not been agreed to be given up by defendant in consideration of plaintiff's giving up some other demand of his on defendant, so as to make payment of the balance a satisfaction of the larger sum.

ASSUMPSIT on two bills of exchange, with counts for interest, money lent, money paid, and on an account stated. Breach, non-payment. Damages, 1,000*l.*

The second plea was, that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the defendant and the plaintiffs accounted together of and concerning the said causes of action, and all other claims and demands then being between the plaintiffs and the defendant, and then amounting to certain large sums of money, to wit, 1,000*l.*; and on that accounting, a certain small sum of money, and no more, to wit, the sum of 150*l.*, was then found to be and then was due and owing from the defendant to the plaintiffs, which sum of money the defendant then, in consideration of the premises, promised the plaintiffs to pay to them on request; and thereupon the defendant afterwards, and before the commencement of this suit, paid to the plaintiffs, who then accepted and received of and from the defendant, a large sum of money, to wit, 150*l.*, in full satisfaction and discharge of such last-mentioned sum so due and owing from the defendant to the plaintiffs as last aforesaid (1). Verification.

Replication to the second plea, that the defendant did not pay to the plaintiffs, nor did the plaintiffs accept or receive from the defendant, the said sum of money in the said plea mentioned, or any part thereof, in such satisfaction *and discharge as the defendant has therein alleged; concluding to the country.

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Special demurrer: for that the replication traverses immaterial

(1) As to this plea, see Com. Dig., tit. "Pleader" (2 G. 11); *Down* v. *Hatcher*, 50 R. R. 359 (10 Ad. & El. 121).

allegations, and thereby offers an immaterial issue, in this, that the statement of the account as in the second plea mentioned having altered the nature of the demand in the declaration mentioned, and the plaintiffs' own remedy being upon such contract of account, and the promise of the defendant thereupon made, and not upon the said several bills and contracts in the declaration mentioned, it is wholly immaterial and beside the merits of the plea and this action, whether the sum of money in the plea mentioned, or any part thereof, was paid, accepted, or received, as is by the said replication denied. Secondly, that the traverse taken in and by the same replication is not taken on the most material allegations or parts of said plea, but on matters which will not properly decide the merits of the same plea, and of this action. Thirdly, that if the accounting and promise in the last count, and the accounting and promise in the plea, are not one and the same accounting and promise, the plaintiffs ought to have newly assigned the statement of account by them in the declaration intended, and should have distinctly alleged in the replication that the several statements of account were other and different, and the replication should have concluded with a verification. Fourthly, that the replication does not answer the whole of the plea, in this, that the same plea contains two available defences to the said action—*i.e.* the accounting and the payment therein respectively alleged; and both of the said defences should have been denied by the replication. Joinder in demurrer.

J. Henderson, in support of the demurrer:

The replication is bad; for the accounting disclosed in the plea is not stated in it to be of and concerning the matters laid in the declaration only; whereas what the replication admits is *an accounting on all other claims and demands between the plaintiffs and the defendant, and a small balance found due from the defendant to the plaintiffs. [*685]

(PARKE, B.: You say the accounting laid in the plea respected claims by the defendant on the plaintiffs as well as by the plaintiffs on the defendant.)

Yes; and that is a good answer to the declaration. * * A new state of things arises on that second accounting; for there is a difference between a mere adjustment of the plaintiffs' demand or single claim, and an adjustment of all claims between the parties.

SMITH v. PAGE.

In Comyns' Digest, Action on the Case on Assumpsit (G.), it is said, "If A. be indebted to B., and afterwards they come to account for all matters between them, this is a discharge of the debt." *Milward* v. *Ingram* (1) is cited, where it was held, that a simple contract to pay a debt might before breach be discharged by the debt being allowed on an account subsequently stated, with a promise to pay the balance then found due. * * *

[686] *Sir John Bayley*, in support of the replication, was stopped by the COURT.

PARKE, B.:

It appears from *Atherley* v. *Evans* (2), that the case of *Milward* v. *Ingram* has frequently been denied to be law. The fault of this plea is, that it does not show that at the time of the second accounting any cross demand existed by the defendant against the plaintiffs, or that, if it so existed, it had not been agreed by the defendant to be given up, in consideration of the plaintiffs giving up some demand of theirs against the defendant, so as to make the payment of a smaller sum, viz. the balance, a satisfaction of a larger by way of payment (3). Nor does it appear that there were any other claims by the plaintiffs on the defendant, beyond those comprised in the account stated which is declared on. In order to make the plea good, as resting on the defendant's new promise merely, it should have alleged, that after the accruing of the causes of action laid in the declaration, and before the commencement of the suit, an account was stated between the plaintiffs and the defendant, of and concerning the said causes of action, and of and concerning other demands of the plaintiffs against the defendant, and a certain other demand of the defendant against the plaintiffs; but a plea merely alleging
[*687] an account to have been stated between *the parties respecting the causes of action declared on, would be bad, unless payment of the balance found due (4) was averred. We are all of opinion that the rest of the plea affords no answer to the action; and as the

(1) 1 Freem. 195; 1 Mod. 205; 2 Mod. 43, *S. C.* See per Lord HOLT, in *May* v. *King*, as reported 12 Mod. 538, 539; also *Price* v. *Dyer*, 17 Ves. 363.

(2) Sayer's Rep. 269. See 1 Ld. Kenyon, 250. Acted on in *Roades* v. *Barnes*, 1 Burr. 9. Held, that an account stated was no plea to a demand for a debt of the same nature, as one simple contract cannot extinguish another.

(3) See *Down* v. *Hatcher*, 50 R. R. 359 (10 Ad. & El. 121).

(4) Or a release. See Com. Dig. tit. "Pleader" (2 G. 11). *Scarborough, Mayor, &c.* v. *Butler*, 3 Lev. 237.

objection to the plea is one of substance, which might be taken on general demurrer, the judgment must be for the plaintiff. SMITH v. PAGE.

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ALDERSON, B., and PLATT, B., concurred.

Judgment for the plaintiff.

THE ATTORNEY-GENERAL *v.* HALLING AND OTHERS.

1846. *June* 10, 11, 25.

(15 Meeson & Welsby, 687—700; S. C. 16 L. J. Ex. 303.)

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The equity (1) jurisdiction of the Court of Exchequer as a court of revenue is not taken away by the stat. 5 Vict. c. 5 (2).

THIS was an information in the nature of a bill, filed by the *Attorney-General* on the equity side of this Court. It stated that, by the Customs Regulation Act, 3 & 4 Will. IV. c. 52 (3), it was enacted, that every importer of any goods should, within fourteen days after the arrival of the ship importing the same, make perfect entry inwards of such goods, or entry by bill of sight, in manner thereinafter provided, and should within such time land the same; and in default of such entry and landing, it should be lawful for the officers of the Customs to convey such goods to the King's warehouse. The information then set forth the other enactments of the same statute, requiring the importers to deliver to the collector or controller a bill of entry of the goods, and to pay down the duties payable on the goods therein mentioned, &c., allowing in certain cases an entry by bill of sight, on which the goods should be provisionally landed, and providing for the subsequently making a full and perfect entry thereof, &c. &c.; and also the provisions *of the Customs Duties Act, 3 & 4 Will. IV. c. 56 (3), imposing certain duties of Customs on the importation of manufactures of wool, not being goats' wool, and other manufactured goods, and of the 3 & 4 Vict. c. 17 (4), by which an additional duty of 5*l.* per cent.

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(1) See Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 34, 32, Order in Council, 26th Feb., 1881, R. S. C. Ord. LXVIII. r. 1. Having regard to s. 24 of the Judicature Act, 1873, this case may appear obsolete, but it is at least doubtful whether a proceeding on the Revenue side of the K. B. D. is a civil cause or matter except to the extent expressly provided for in the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), s. 22. See also *Att.-Gen.* v. *Hallett*, *ante*, p. 581; *Corporation of London* v. *Att.-Gen.* (1848) 1 H. L. C. 440; *Att.-Gen.* v. *Edmunds* (1868) L. R. 6 Eq. 391, 37 L. J. Ch. 706. —A.C.

(2) Repealed by 42 & 43 Vict. c. 59. —A. C.

(3) Repealed by 8 & 9 Vict. c. 84, s. 2.—A. C.

(4) See S. L. R. Act (No. 2), 1874.—A. C.

A.-G. v. HALLING.

was charged upon the produce and amount of all the duties and revenues of Customs and Excise charged and collected under the management of the Commissioners of Customs and Excise, with certain exceptions therein mentioned. The information then stated, that during the months of July and August, 1841, the defendants carried on the business of dealers in French and foreign silk, &c. in Cockspur Street, Westminster, and were, by themselves and their agents, in the habit of importing from France, and elsewhere abroad, consignments of silk, &c., upon all of which true and perfect entries ought to have been duly made upon the importation into this kingdom, for the purpose of enabling the duties of the Customs due thereon to be duly collected; that they employed Messrs. Christopher & Co. as their agents, to make or cause to be made on their behalf, as the importers of such goods, the necessary entries inwards of goods so consigned to or imported by them, and cause the necessary duties to be paid thereon; that, on the 5th July, 1841, a package or case of goods, marked H. P. S. 354 (the said letters being intended to denote the ownership of the defendants, as being the initials of the defendants' firm), arrived in the port of London on board a vessel called the *Harlequin*, &c., which was imported by and consigned to the defendants. It then stated the entry and bill of sight made by the defendants' agents on the importation of these goods, the warrant granted thereon by the collector and controller, and the perfect entry made thereon by the defendants' said agents of such goods, as consisting of goods manufactured, of the value of 31*l.*, and of manufactures of wool, not goats' wool, of the value of 50*l.*; and alleged that the officer of

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Customs, whose duty it was to have checked *such entry, and to have seen that it was a true and perfect entry, being in collusion with the said agents, and with the defendants, permitted it to be passed without any due and proper check, and in collusion with the defendants made an entry of the contents of the package in the blue book, stating that the contents consisted of 187 ells de Laine, 540 ells do. do., worked manufactures of value, and of 67 shawls and 80 shawls, being goods made up at value, and which entry in the said blue book was a false and collusive entry, and was not a true and correct entry of the goods contained in such package, upon which duty ought to have been estimated and paid. The information then proceeded to state, that the duty paid on such entry was only 14*l.* 7*s.* 9*d.*, whereas the package contained a much larger quantity of the same description of goods, and of other

articles, on which an entry ought to have been made and duties paid, and that the amount of the duty payable thereon by the defendants amounted to 140*l.* beyond the amount actually paid; which was and is a debt still due from the defendants to her Majesty, and which duties so unpaid ought to be accounted for and paid to her Majesty, in respect of the duties so payable and withheld by the defendants.

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The information set forth several other transactions of the same nature, and stated that applications had been made to the defendants for payment of the duties remaining unpaid in respect of the goods so imported by them as aforesaid, and to come to a fair account in respect thereof, but that the defendants had refused to do so, and pretended that the goods did not belong to them, and were not imported on their behalf, &c. &c. It then prayed a discovery as to this and all other matters relating to the premises, and that an account might be taken of the said duties, &c., and that a writ or writs of *subpœna* might issue, commanding the defendants to appear and answer, and perform the decree of the Court.

To this information two of the defendants, after protestation *that they did not confess or acknowledge all or any of the matters [*690] and things therein set forth to be true, as set forth and alleged, demurred, and for cause of demurrer said, that the Court of Exchequer, wherein the said information was filed, hath not any jurisdiction in or over all or any of the matters and things in the said information set forth or referred to, and in respect whereof discovery and relief was sought from and against the defendants; and that the information made out no case to entitle the *Attorney-General* to any discovery or relief, &c. The *Attorney-General* joined in demurrer.

The case was argued at great length in Trinity Term, 1845 (June 10 and 11) (1), by *James Parker* and *Bagshawe*, for the defendants, in support of the demurrer, and by *Jervis*, *Wray*, and *J. Wilde*, for the Crown: the question discussed being how far, by the stat. 5 Vict. c. 5, s. 1 (2), the equity jurisdiction of the Court of

(1) Before Pollock, C. B., Alderson, B., Rolfe, B., and Platt, B.

(2) Which enacts, "that on the 15th day of October, 1841, all the power, authority, and jurisdiction of the Court of Exchequer as a court of equity, and all the power, authority, and jurisdiction conferred on or committed to the said Court by or under the special authority of any Act or Acts of Parliament, (other than such power, authority, and jurisdiction as shall then be possessed by or be incident to the Court of Exchequer

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Exchequer in matters of revenue was taken away. On the part of the defendants, *the judgment of the MASTER OF THE ROLLS, in the case of *The Attorney-General* v. *The Corporation of London* (1), was cited and relied upon. The arguments and authorities are so fully stated in the judgment of the COURT, that it appears to be unnecessary to report them in detail.

The judgment was now pronounced by

POLLOCK, C. B.:

This was a proceeding by information, filed the 21st of February, 1845, by the *Attorney-General*, on behalf of the Crown, in a matter of revenue.

The information set forth several provisions of the Customs Acts of the 3 & 4 Will. IV., and the 3 & 4 Vict., by which certain duties became payable on the importation of the goods mentioned in the tables of the said Acts. And in substance it charged, that the defendants were the real importers of various goods liable to duty, which had not been paid; that they ought to set forth the quantities and value of the goods so alleged to have been imported, and the circumstances of the importation of the said goods, and generally of any goods imported liable to duty within certain times specified; and in order to obtain the said duties alleged to remain unpaid, it prayed for a writ or writs of *subpœna*, directed to the defendants, commanding them to appear and answer, and perform the decree of the Court.

To this information two of the defendants, on the 3rd of March, 1845, demurred, assigning for one cause (amongst others) that the Court of Exchequer hath not any jurisdiction in or over all or any of the matters and things in the said information set forth or referred to, and in respect whereof discovery and relief are sought

as a court of law, or as shall then be possessed by the said Court of Exchequer as a court of revenue, and not heretofore exercised or exerciseable by the same Court sitting as a court of equity), shall be by force of this Act transferred and given to her Majesty's High Court of Chancery, to all intents and purposes, in as full and ample a manner as the same might have been exercised by the said Court of Exchequer, if this Act had not been passed; and the same power, authority, and jurisdiction shall, so far as respects the exercise thereof by the said Court of Exchequer, cease and determine: Provided always, that this Act shall not abridge, lessen, or in anywise affect the power, authority, or jurisdiction of or incident to the said Court of Exchequer as a court of law, or the power, authority, or jurisdiction of the same Court as a court of revenue, not exercised or exerciseable by the same Court sitting as a court of equity."

(1) 14 L. J. Ch. 305. [See *Corporation of London* v. *Att.-Gen.* (1848) 1 H. L. C. 440.]

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for against them; and the only point insisted upon and argued before us was, whether the equitable jurisdiction of this Court, in a case like the present, was wholly transferred to the Court of Chancery.

This case was argued before myself and my brothers Alderson, Rolfe, and Platt, and we have now to pronounce the judgment of the Court. [692]

The question turns upon the construction of the recent stat. 5 Vict. c. 5, s. 1 (1).

Prior to that statute, there can be no doubt that the Court had power and jurisdiction to entertain such an information; but it is contended by the defendants, that the effect of the statute referred to is to transfer all equity jurisdiction of every kind (whether in matters of revenue or in other matters) to the Court of Chancery, and that this Court now possesses no authority or jurisdiction but what belongs to or is incident to it as a court of law, or as a court of revenue not proceeding after the forms of a court of equity.

If this be the true construction of the statute, the defendants are entitled to the judgment of the Court; if not, judgment must be given for the Crown.

The case was very elaborately and learnedly argued, and the history of the jurisdiction of this Court was gone into with much research to a very remote period. *Mr. Parker*, for the defendants, contended, that the jurisdiction of the Court might conveniently be considered under four heads: first, the common law jurisdiction; secondly, the revenue jurisdiction; thirdly, the equity jurisdiction; and fourthly, the special jurisdiction conferred by various Acts of Parliament; and that the effect of the statute has been to take away the last two heads, leaving only the common law and the revenue jurisdiction, and the latter deprived of any equity jurisdiction whatever. *Mr. Jervis*, on the other hand, contended for the Crown, that there was in this Court a revenue equity jurisdiction distinct and apart from its jurisdiction as a court of equity, and that the revenue equity jurisdiction remains, although the ordinary equitable jurisdiction has been transferred to the Court of Chancery: and that is the point upon which we have to give our opinion.

There is no doubt that, originally, this Court of Exchequer was a court of revenue alone; and that, as a court of revenue, from [693]

(1) Repealed by the Civil Procedure Act Repeal Act, 1879 (42 & 43 Vict. c. 59).—A. C.

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time immemorial, it has exercised, for the proper collection and enforcement of the revenue, powers of various descriptions. It has been in the constant habit of proceeding both after the forms of the other courts of common law, and in the manner also of a court of equity. The "course of the Exchequer," involving both these modes of procedure, is part of the ancient and general law of the realm.

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Out of this state of things, in very ancient times, an extension of the jurisdiction of the Court (in fact, an usurpation, resisted for some time, but at length acquiesced in) took place. Inasmuch as the officers of the Court and the debtors of the Crown were entitled to use for their own purposes the forms of procedure belonging to the Courts, it became the practice, by a suggestion of that fact, which suggestion was not allowed to be traversed, for others, not being officers of the Court or debtors of the Crown, to avail themselves of the privilege. Accordingly, by means of the writ of *quo minus*, a general common law jurisdiction was introduced; by a similar suggestion bills in equity were filed, so as to make the Court practically a court of equity between subject and subject: for the course of the Exchequer involving both a form of legal and equitable procedure, the usurped jurisdiction naturally divided itself in this way; and after so dividing itself, the branches became gradually entirely separate, and formed two separate sides, the plea side and equity side of the Court,—the revenue, however, still remaining as before, and involving both. Subsequently to this, and in very modern times, the writ of *quo minus* was abolished, and the usurped jurisdiction of this Court in common law was taken away. But, at the same time, the writ of summons was given, and so a real common law jurisdiction was legally conferred on this Court by statute. The usurped equity jurisdiction of the

[694] *Court, however, remained as before, and also its proper equity jurisdiction, in case of those who, being officers of the Court or debtors really of the Crown, chose to avail themselves of it. In consequence of the increase of the business of the Court of Exchequer, it became, however, necessary, in the year 1819, to subject this equity jurisdiction to certain regulations; and accordingly, by the 57 Geo. III. c. 18, the Lord Chief Baron, or in his absence one of the puisne Barons, was enabled to sit alone in causes in equity between subject and subject: and again, by the 1 Geo. IV. c. 35, an Accountant-General and one other equity Master were appointed, for the further regulation of that branch of the Court,

and these newly appointed officers were by that Act made also available in aid of those officers who up to that period had exclusively superintended all matters of revenue. There were two subsequent Acts, 3 & 4 Will. IV. c. 41, and 6 & 7 Will. IV. c. 112, by which the appointment of one of the puisne Barons to sit alone, and assist the Lord Chief Baron in these matters of equity, was further regulated.

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The exact state of this Court, therefore, at the time when the 5 Vict. c. 5, was passed, was, that in the Exchequer there was a court of revenue, held before the Treasurer, the Chancellor of the Exchequer, and the Barons, exercising for the due collection of the revenue, a procedure after the forms of a court of equity, and a court of revenue held before the Barons, exercising the forms of procedure proper to the other courts of common law, both however having certain peculiarities familiarly known by the term "*cursus scaccarii;*" and that, annexed to and as a part of this general revenue Court, there were incidentally courts of equity and of common law for its officers and the real Crown debtors. And that, further, an ancient though originally usurped jurisdiction was exercised by it as an ordinary court of equity between subject and subject; and that by statute (abolishing a similarly usurped jurisdiction at common law between subject and subject), there existed a *court of common law, which, like the other superior courts of [*695] common law, exercised incidentally certain equitable powers of interpleader and the like, some of which had been previously conferred on all those Courts by various statutes, and others had been by common law exercised as parts of their practice from time immemorial.

This statement we have been anxious to premise, because this previous knowledge seems to us to be essential, and to afford the true key to the interpretation of the Act 5 Vict. c. 5; in which interpretation we have the misfortune to differ from Lord LANGDALE's judgment, in the case of the *Attorney-General* v. *The Corporation of London* (1).

Then what did the statute of 5 Vict. c. 5 do under these circumstances? The words are, "that all the power, authority, and jurisdiction of the Court of Exchequer, as a court of equity, and all the power, authority, and jurisdiction conferred on or committed to the said Court by or under the special authority of any Act or

(1) 14 L. J. Ch. 305. [See *Corporation of London* v. *Att.-Gen.* (1848) 1 H. L. C. 440.]

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Acts of Parliament, other than such power, authority, and jurisdiction as shall be then possessed by, or be incident to, the Court of Exchequer as a court of law, or as shall then be possessed by the said Court of Exchequer as a court of revenue, and not heretofore exercised or exerciseable by the same Court as a court of equity," shall be transferred to the Court of Chancery. Now it is plainly our business to construe these words so as, if possible, to give effect to all of them, and to adopt the most literal construction which does not lead to contradiction or absurdity.

First, then, we find, by the words in the commencement, that all jurisdiction as a court of equity, and all jurisdiction conferred on the Exchequer by statute, is taken away. This would, if taken literally, have abolished the writ of summons given to the Exchequer by statute, and would have reduced this Court to its ancient [*696] jurisdiction as a mere *court of revenue. But this is immediately restrained by an exception; and then the question is, what does the exception contain? It is there we are to look to find the reserved jurisdiction of the Exchequer. The first exception is of all powers possessed by or incident to it as a court of law: an exception, in fact, out of the last branch—powers conferred by statute on the Court of Exchequer. Therefore it has all the powers, legal and equitable, which by statute or common law belong to the other superior courts of common law. The second exception is of all powers possessed by it as a court of revenue. Now, this must refer to its peculiar legal and equitable powers; for the previous reservation had already included all the powers, both legal and equitable, belonging to it by statute as a mere court of common law. If the second exception, however, had stopped there, it would have been almost as large as that out of which it was made; for the jurisdiction of the Court of Exchequer, originally exercised after the forms of common law, and all its equity jurisdiction, arose, either rightfully or by usurpation, out of its jurisdiction as a court of revenue. Its existing common law jurisdiction between subject and subject did not, and had therefore previously been saved. Consequently, the words on which the whole question turns were added,—"not heretofore exercised or exerciseable by the same Court as a court of equity." What, therefore, do these words mean? Now, when we find that the Court of Exchequer had used its forms of equitable procedure from time immemorial, not merely for the collection of the revenue, its proper duty, but also as a court of equity for its officers and Crown debtors in their ordinary affairs, and further, by

a suggestion not allowed to be traversed, for all the subjects of the realm, we think the only correct meaning of the whole reservation is, that the Legislature take from the court of revenue this incidental jurisdiction, which is exercised as a mere court of equity, and confine its jurisdiction in future to the mere collection of *the revenue of the Crown, but with all the powers which from time immemorial it has exercised for that particular object. [*697]

And there are many considerations which induce us to come to this conclusion. In the first place, it is not strictly correct to say of this Court, that, in matters of revenue, it sits as "a court of equity." It sits as a court of revenue, having ancient forms of equitable procedure. We give, therefore, full effect even to the proper literal construction of every word of the clause. But, secondly, the officers of the Exchequer, whose presence is necessary to our procedure, are retained. The Chancellor of the Exchequer remains the head of our Court; and yet, if all our equitable jurisdiction be abolished, we know not by what authority he can ever take his seat, as all Chancellors of the Exchequer heretofore have done, on our Bench; for the common-law jurisdiction of the Exchequer is before the Barons alone, even in cases of revenue: it is the revenue jurisdiction in equity which is held before the Treasurer, Chancellor and Barons. Thirdly, if our construction be erroneous, it will follow that some most valuable powers, essential to the just collection of the revenue, and the ease of the subjects of this realm, will be lost to them. As early as the reign of Henry the Second, the objects of the superior Exchequer, as a court of revenue, are stated in the Dialogus Scaccarii of the Red Book, in the custody of the Queen's Remembrancer, thus: "Ut Regis utilitati prospiciant, salvâ tamen æquitate" (1): and accordingly, the books on the subject of our practice lay it down, that, in our Court, the justice done to the public is attempered with a salvo of private rights and equities, and that the foundation of the equitable discretion and moderative power of the Barons, is traceable to sources more remote than any writs from the Royal grace, or any Acts at present extant emanating from the Legislature. Thus, cases repeatedly occur in our ancient records of purely equitable *beneficial proceedings, founded on the ancient law and custom of the Exchequer, upon mere equitable prayer, and permitted expressly in consideration of the equity raised, and often [*698]

(1) I. iv. *init.* p. 66, ed. Hughes, Crump and Johnson, 1902. Cp. pp. 61-2 as to the "inferius scaccarium," *i.e.*, the receipt of the Exchequer.—F. P.

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disclosed on summary proceeding. Thus, again, all kinds of equitable matter raised either on suggestion, petition, or plea, were dealt with, and parties furnished with summary means of asserting their rights against the Crown, and having the matter determined at once by the Court, in a way wholly dissimilar to the practice of any other Court, and presenting a peculiar union of legal and equitable procedure. This summary exercise of the Court's authority, in ease and equitable relief of the subject, wherein their interference would appear by the precedents to be almost without limit, is intimately connected and bound up with the inherent equity of the jurisdiction of the Court of Revenue. Therefore, both by the peculiar comprehensiveness of the power of pleading in revenue, and the equitable interference of the Court by summary motion on all sorts of equities shown, a very important security to the subject, in matters otherwise of very stringent and almost arbitrary proceeding, as well as great facility and saving of time to the Crown, mainly depend on this inherent equity in revenue. And besides all this, the terms of reference to the Queen's Remembrancer, under which he admits all kinds of equities in his adjudications, and is generally armed with commission to examine witnesses on interrogatories and the like, which are generally couched in terms similar to references in Chancery, though in his case made in a summary way, also materially depend on this equitable power of the Revenue Court in the Exchequer. Again, by the 33 Hen. VIII. c. 39, the Judges of this Court, who have the care of its equitable procedure, are empowered to relieve the subjects from recognizances and bonds, upon proper proof, and to relieve persons who can show sufficient cause, in reason and good conscience, in bar of any debt or duty to the Crown. Now Lord Coke puts this, in the 4th Inst. 118, *as one of the duties of this Court as a court of equity. We think it never could have been the intention of the Legislature to leave this Court, as a court of revenue, with a maimed and insufficient authority to decide equitably in matters of revenue between the Crown and subject, and to send the subject into the Court of Chancery for such relief, leaving him, however, to be charged in the Court of Exchequer, and thus subjecting him, therefore, to be harassed by an application to both Courts. Nor would it, we think, be very seemly for the Court of Chancery to interfere, in a matter of revenue, with a court which from time immemorial has held exclusive jurisdiction in such matters, and this, too, in cases in which the Court of Chancery must itself govern its proceedings by precedents to be found only in our

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records. Fourthly, the contrary construction would limit the Crown in the choice of its Court, and would reduce it to the situation of being unable to obtain full justice in one Court alone. This very case shows it. Here is a proceeding to recover duties: hitherto, the Crown, by information, has been enabled to obtain a discovery necessary to its proceedings in the same Court where it is suing for duties. The present contention is, that the Crown should no longer have that convenience, but that it should obtain discovery in Chancery, and redress in the Exchequer.

Upon considering, therefore, all these circumstances, we have arrived at the conclusion, that the construction of the 5 Vict. c. 5, s. 1, which is the literal one, and which avoids all these inconveniences, is also the true one, and that the Court has, notwithstanding that Act, retained all its actual and incidental jurisdiction, equitable as well as legal, which it has as a court of common law, and has retained also all its proper jurisdiction as a court of revenue, for the collection of the revenues of the Crown, whether the jurisdiction be exercised after the forms of common law or equity: but that it has lost all jurisdiction as a court of equity between its officers and Crown debtors, and the *other subjects of the realm, which was [*700] before incident to it as a court of revenue, and was exercised by it as a mere court of equity; and further, that it has lost all its usurped jurisdiction as a court of equity, between subject and subject, a jurisdiction which, though not really incident to it, was, nevertheless, at the time when the Act passed, exercised *de facto* by it as a mere court of equity in the Court of Revenue.

The result is, that we have not arrived at the same conclusion at which Lord LANGDALE arrived in the case of *The Attorney-General* v. *The Corporation of London*. It is due to that learned Judge to say, that, so far as appears from the report of the case and his judgment, these matters were never fully brought before his notice. We have, however, from respect to his authority, considered very deliberately the whole case, which very probably may not rest here, but will be carried to the highest tribunal for final determination.

We cannot but think that, if even it should turn out that our construction is erroneous, this Court will not be left by the Legislature so powerful for the charge, and so impotent for the relief, of the subject, as Lord LANGDALE'S view of the statute would leave us.

We think that this demurrer must be overruled, and that there must be judgment for the Crown.

Judgment for the Crown.

1846.
June 26.
July 4.

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JONES *v.* CARTER (1).

(15 Meeson & Welsby, 718—726.)

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The service by lessor upon lessee of a declaration in ejectment for the demised premises, for a forfeiture, operates as a final election by the lessor to determine the term; and he cannot afterwards (although there has not been any judgment in the ejectment) sue (2) for rent due, or covenants broken, after the service of the declaration.

COVENANT on an indenture, dated the 16th of September, 1844, made between the plaintiff of the one part, and the defendant and Joseph Foster of the other part, whereby the plaintiff gave, granted, and demised to the defendant and Foster full power and authority to work, delve, dig, and open, all the mines, veins, seams, and beds of lead ore, copper ore, sulphate of barytes, mines, minerals, and mineral substances, which were or should be thereafter found, gained, dug, or opened within, under, or upon a certain common or waste land belonging to her Majesty, and then in lease to the plaintiff, situate in the parish of Llysfaen, in the county of Carnarvon; with full powers for the purpose of getting and taking the minerals, erecting machinery, &c. &c.; to hold to the defendant and Foster, their executors, &c., from the 29th of September then instant, for the term of fourteen years, subject to a yearly rental of 50*l.*, payable half-yearly in advance, in the nature of a forehand rent, on the 25th of March and the 29th of September in each year, the first payment to be made on the 29th day of September then instant; and subject also to the payment of a certain royalty on the ores and minerals raised and gotten. And the defendant thereby covenanted with the plaintiff, his executors, &c., well and truly to pay and render, or cause to be paid or rendered, to the plaintiff, his executors, &c., the rent and royalty hereinbefore reserved and made payable, at the days and times and according to the true intent and meaning of the said indenture, without any deduction or abatement whatever; and also to pay and discharge all taxes, &c., charged or assessed upon the demised premises. There were also covenants that the defendant and

(1) Followed or approved in *Toleman* v. *Portbury* (1871) L. R. 6 Q. B. 249, 41 L. J. Q. B. 98; *Clough* v. *L. & N. W. Ry. Co.* (1871) L. R. 7 Ex. 34, 41 L. J. Ex. 17; *Grimwood* v. *Moss* (1872) L. R. 7 C. P. 364, 41 L. J. C. P. 239; *Morrison* v. *General Marine Insurance Co.* (1873) L. R. 8 Ex. 204, 42 L. J. C. P. 115; *Scarf* v. *Jardine* (1882) 7 App. Ca. 360, 51 L. J. Q. B. 612; *James* v. *Young* (1884) 27 Ch. D. 663, 53 L. J. Ch. 793.—A. C.

(2) But the subsequent acceptance of rent by the landlord may be evidence of "an agreement for a new tenancy probably from year to year on the terms of the old lease": see *Evans* v. *Wyatt* (1880) 43 L. T. 177.—A. C.

Foster, their executors, &c., would, during the continuance of the demise, with six men at the least, search for lead and other ores and minerals in proper and likely places, &c., and would fairly and effectually *work and carry on all the mines and works with six able and experienced miners at the least; that they would not cease or discontinue such work, with the aforesaid number of men, for the space of one month in any one year, unless prevented by unavoidable impediments: and other covenants, providing for the dressing and making merchantable of the ores gotten as soon as might be after they were gotten, for the weighing or measuring them within a certain time, for the keeping and regularly casting up fair and legible books of account of all ores and minerals gotten and sold, and producing the same for inspection, &c., upon notice, to the lessor and his agents; for the general repair of the demised premises; for the fencing off and securely inclosing open pits, &c.; for effectually filling up and levelling such pits, &c., as should from time to time become useless; for preventing unnecessary or extraordinary damage to the lands through or under which the mines, &c., should be carried on; and for the non-commission of any wilful or voluntary waste. The declaration then alleged as a breach of the first covenant (for payment of the rent), that after the making of the indenture, and, during the term, to wit, on the 25th of March, 1845, a large sum of money, to wit, 50*l.* of the rent aforesaid, to wit, the rent for a year of the said term, became due and still was in arrear and unpaid to the plaintiff. Breaches were also assigned of all the other covenants in the indenture.

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The defendant pleaded, as to the breach of covenant first assigned, that there was not, on the said 25th day of March, 1845, or at any time since, the said sum of 50*l.* of the said rent, or any part thereof, due and in arrear from the defendant and Foster to the plaintiff, in manner and form, &c.: on which issue was joined. There were also pleas of performance as to the other breaches, and issues joined thereon.

At the trial, before Williams, J., at the last Assizes for the county of Carnarvon, the plaintiff clearly proved *breaches, in the years 1844 and 1845, of several of the covenants set forth in the declaration; as to others also, the proof of performance of which lay on the defendant, no evidence was given on his part. With respect to the rent, payment was proved of all that was due on the 25th of March, 1845: and it appeared that, on the 19th of May, 1845, a

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declaration in ejectment for the recovery of the demised premises (brought under a proviso in the lease, that for any breach of covenant it should determine and be utterly void, and the lessor should be at liberty to re-enter), upon the several demises of the plaintiff and William Lloyd Roberts (a mortgagee), was served on the defendant and Foster, with notice to appear in the following Trinity Term. There was no distinct evidence when the plea and consent-rule were delivered; but it was proved that on the 3rd of December, 1845, the defendants obtained a Judge's order, giving them liberty to withdraw their plea; since which time no further proceedings had been taken in that action. The present action of covenant was commenced in January, 1846. It appeared that the defendants had not done anything upon the demised premises since July, 1845; but it was not shown that any possession of them had been taken by the plaintiff (1). It was thereupon contended for the defendant, that by the service of the declaration in ejectment, and the subsequent proceedings in that action, the plaintiff had elected to consider the term as having then determined, and to treat the defendant and Foster as trespassers; and that he could not, therefore, recover in this action for the rent which would otherwise have become due on the 29th of September, 1845. The learned Judge overruled the objection, and told the jury that the plaintiff was entitled, on the first issue, to recover the sum of 25*l.*, for half a year's rent due on the 29th of September, 1845, and also directed them that he was entitled to a verdict on several of the other breaches (on which nominal damages only were claimed). The jury, however, *found a general verdict for the defendant, saying they were of opinion that there was no rent due, and that there were no breaches of covenant.

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In Easter Term, *Jervis* obtained a rule *nisi* for a new trial, on the ground that the verdict being contrary to the evidence, and to the direction of the learned Judge.

W. Yardley and *Unthank* showed cause on a former day in these sittings (June 26th):

The verdict of the jury, it must be admitted, was contrary to the direction of the learned Judge on several of the issues. But with respect to the first breach, as to the rent, upon which alone the

(1) The entry admitted by the consent-rule was of course fictitious: see Tidd's Practice, 9th ed. 1203.—A. C.

plaintiff claimed substantial damages, the proceedings in the action of ejectment were an answer to that claim. The plaintiff, when he sued the lessees in ejectment as for a forfeiture of their term, elected thereby to put an end to the term, and could not afterwards treat it as a subsisting term, and the rent as a subsisting rent. It is true there was no judgment in the ejectment; the plea having been withdrawn, the defendant has no means of compelling the lessors of the plaintiff to proceed to judgment.

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(PLATT, B.: If they choose to proceed to judgment now, they may have an action of trespass for the mesne profits from the day of the demise.)

Yes, and so they would be recovering this rent twice over. *Birch* v. *Wright* (1) is an authority for the defendant. It was there held, that an action for use and occupation might be maintained by the grantee of an annuity, after a recovery in ejectment against a tenant from year to year of the lands out of which the annuity issued, for all rent in his hands at the time of notice by the grantee, and down to the day of the demise in the ejectment, but not afterwards. ASHHURST, J., there says, "From the 6th of April of 1785 (the day of the *demise) to the time of recovering in the action of ejectment, the plaintiff is precluded from recovering in this form of action; for that would be blowing both hot and cold at the same time, by treating the possession of the defendant as that of a trespasser, and that of a lawful tenant, during the same period." Littleton says (sect. 219), "If a man grant by his deed his rent-charge to another, and the rent is behind, the grantee may choose whether he will sue a writ of annuity for this against the grantor, or distreine for the rent behind, and the distress detain until he be paid. But he cannot do or have both together, &c. For if he recovers by a writ of annuity, the land is discharged of the distress," &c. Lord Coke, commenting on these words, "but he cannot do or have both together," says (Co. Litt. 145 a)—"For there he should recover one thing twice, which should be a double charge to the grantor." In *Bridges* v. *Smyth* (2), it was held that a landlord, having treated an occupier of his land as a trespasser, by serving him with an ejectment, could not afterwards distrain on him for rent, although the ejectment was directed against the claim of a third person, who came in and defended as tenant, and the occupier

[*722]

(1) 1 R. R. 223 (1 T. R. 378).

(2) 30 R. R. 681 (5 Bing. 410).

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was aware of that circumstance, and was never turned out of possession. That case is, therefore, stronger than the present.

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Welsby (*Jervis* with him), *contrà*:

No doubt, although the lease says that it is to determine and be void for any breach of covenant, that is to be construed to mean that it is thereupon voidable at the option of the lessor. But there is no conclusive election to treat the term as determined and void, until judgment recovered in the action of ejectment. The mere service of the declaration has no such effect. Might not the plaintiff, notwithstanding that, have waived the forfeiture by subsequent receipt [*723] of rent? It is said *that he may still proceed to judgment in the ejectment, and have his remedy in trespass for the mesne profits; but, if he did, the recovery of the rent in this action would be pleadable in bar, *pro tanto*, to the action for the mesne profits. The authority cited from Co. Litt. itself shows that there is no conclusive exercise of this option until judgment. Lord Coke there says, "If I grant to another for life an annuity or a robe at the feast of Easter, and both are behind, the grantee ought to bring his writ of annuity in the disjunctive; for if he bring his writ of annuity for the one only, and recover, that judgment shall determine his election for ever; for he shall never have a writ of annuity afterwards, but a *scire facias* upon the said judgment. Which reason Fitzherbert, in his Natura Brevium, not observing, held an opinion to the contrary. But if I contract with you to pay you twenty shillings or a robe at the feast of Easter, after the feast you may bring an action of debt for the one as for the other."

(ALDERSON, B.: Lord Coke, and Fitzherbert in the passage there referred to (1), are distinguishing between the cases when the thing granted "is of things annual, and are to have continuance,"—in which the election remains to the grantor, as well after the day as before,—and "when the things are to be performed *unicâ voce*," as in the case of the contract to pay twenty shillings or a robe at Easter.)

In *Birch* v. *Wright*, the grantee of the annuity had recovered judgment in the ejectment. And BULLER, J., there says, "In the present case the plaintiff has not waived the tort. He has brought his ejectment, and obtained judgment on it, which is insisting on

(1) Fitz. N. B. 152 G.

the tort, and he cannot be permitted to blow both hot and cold at the same time." And again, "The ejectment is the suit in which the defendant is considered as a trespasser; and unless the judgment in ejectment be laid out of the case, the tort is not waived. The defendant stands convicted on *record by judgment, as a trespasser, from the 6th of April, 1785." In *Bridges* v. *Smyth*, also, there had been judgment against the casual ejector, and the Court relied upon the fact that that judgment would be conclusive against the tenant in possession, although the ejectment was in truth directed against the party who came in to defend as landlord. [*724]

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Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B.:

This was an action of covenant on a mining lease, in which breaches were assigned, the first for non-payment of rent, and others for different violations of covenants relative to mining. The principal question related to the rent. By the lease, it was to be paid half-yearly in advance, on the 25th of March and the 29th of September. The rent due on the 25th of March, 1845, was paid on that day. On the 19th of May the plaintiff brought an ejectment for breach of covenant, the lease containing a stipulation that for any breach of covenant it should "determine and be utterly void." Some of the breaches of covenant declared upon were clearly proved to have been committed prior to the bringing of the ejectment. The notice, in the action of ejectment, was to appear in Trinity Term, and no doubt a consent-rule (1) was entered into in or after that Term. The plea to the ejectment was afterwards abandoned; but it does not appear by the learned Judge's note that possession was actually taken by the plaintiff.

Under these circumstances, the question which was brought before us for consideration was, whether the lease was put an end to before the 29th of September, 1845, when the half-year's rent became due. We are all of opinion that it was.

Though the lease is declared to be void for breach of covenant, it is perfectly well settled that the true construction *of the proviso [*725]

(1) The consent-rule was part of the procedure by which the tenant was made defendant instead of the casual ejector. Under it he was bound upon the trial of the issue to confess lease, entry and ouster, and insist upon the title only: see Tidd's Practice, 9th ed. 1203.—A. C.

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is, that it shall be void at the option of the lessor: *Rede* v. *Farr* (1), *Doe* v. *Bancks* (2), and other cases; and consequently, on the one hand, if the lessor exercises the option that it shall continue, the lease is rendered valid; if he elect that it shall end, the lease must be determined. In the cases above referred to, the option was held to have been exercised by the receipt of rent subsequently due, and the lease thereby rendered valid. In like manner, the lease would be rendered invalid by some unequivocal act, indicating the intention of the lessor to avail himself of the option given to him, and notified to the lessee, after which he could no longer consider himself bound to perform the other covenants in the lease; and if once rendered void, it could not again be set up. An entry, or ejectment, in which an entry is admitted, would be necessary in the case of a freehold lease, or of a chattel interest, where the terms of the lease provided that it should be avoided by re-entry. Whether any other act unequivocally indicating the intention of the lessor would be sufficient to determine this lease, which is made void at the option of the lessor, we need not determine, because an ejectment was brought, and proceeded with to the consent-rule, by which the defendant admitted an entry, and the entry would certainly be an exercise of the option; and, once determined, the lease could not be revived.

It was said there was no authority upon the point now under consideration; but there is a case at Nisi Prius materially bearing upon it, in which Lord TENTERDEN expressed a clear opinion that the receipt of rent after an ejectment brought for a forfeiture was no waiver of such forfeiture: *Doe* d. *Morecraft* v. *Meux* (3). A case was desired, but we cannot find that any was argued (4). We

(1) 18 R. R. 329 (6 M. & S. 121).

(2) 23 R. R. 318 (4 B. & Ald. 401).

(3) 1 Car. & P. 346. Sittings at Westminster before Lord Chief Justice Abbott.

1824. *July* 11.

DOE d. MORECRAFT *v.* MEUX

If ejectment is brought on a forfeiture of a lease and after the bringing of such ejectment the landlord accept rent, it is no waiver of the forfeiture.

EJECTMENT to recover premises, the lease of which was forfeited by a breach of covenant in not repairing after notice, which, by the terms of the lease, was to incur a forfeiture. The defence was that the plaintiff had received rent from the defendant since the bringing of the ejectment, which it was contended waived the forfeiture.

ABBOTT, Ch. J.:

I am clearly of opinion that the receipt of rent after an ejectment is brought on a forfeiture is no waiver of such forfeiture.

However, at the request of the defendant's counsel, the jury found for the lessor of the plaintiff subject to a special case.

(4) In November, 1825, a case bearing the same title and stated to

entirely agree in Lord TENTERDEN'S opinion. The precise point that he decided was, that on the trial of an ejectment for a forfeiture *(in which of course the entry was admitted), the receipt of rent after the bringing of that ejectment was too late, and the lease was not rendered valid. (1) We think the same consequence follows from an entry admitted by the consent-rule; but even supposing no consent-rule to have been entered into, we think that the bringing of an ejectment for a forfeiture (2), and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease; and the option must be exercised once for all. Without inquiring whether an ejectment be a real action, the bringing of which and the counting in which would, according to the authority of Lord Coke, be a determination of an election between two remedies, it seems to us that so distinct and unequivocal an act must, independently of any technical reason, be a final determination of the landlord's option; for after such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding under the lease, and bound to perform the covenants contained in it; and it would be unjust to permit the landlord again to change his mind, and hold the tenant responsible for the breach of duty, after that time.

We are all, therefore, of opinion that the lease was determined in May, 1845, and consequently the defendant was not liable to pay the subsequent rent, or damages for any subsequent breach of covenant. There is no reason, therefore, for a new trial as to the issue on the rent being in arrear.

With respect to the remainder, the verdict was clearly wrong, and there must be a new trial, unless the defendant will consent that a verdict be entered for the plaintiff with nominal damages, subject to the same discretion as Mr. Justice Williams would have had at the trial, to certify to deprive the plaintiff of costs.

Rule accordingly.

have been tried at the same sittings before Abbott, Ch. J., came before the Court of King's Bench upon a special case, and is reported 28 R. R. 426 (4 B. & C. 606; 7 Dowl. & Ry. 98; 4 L. J. K. B. 4). It may be that this case is identical with the case reported in 1 Car. & P.; but, if so, the report at Nisi Prius is incorrect and cannot be reconciled with the facts appearing by the special case.—A. C.

(1) See note (1), p. 806.—A. C.

(2) See per WILLES, J. (referring to the case in the text), in *Grimwood* v. *Moss* (1872) L. R. 7 C. P. at p. 364, "I entirely agree that the true principle upon which that case was founded was that the bringing of the action of ejectment is equivalent to the ancient entry."—A. C.

1846.
Feb. 13.
June 26.

[727]

COOKE *v.* TURNER (1).

(15 Meeson & Welsby, 727—737; S. C. 17 L. J. Ex. 106.)

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A condition, in a will of real estate, that if the devisee shall dispute the will, or the testator's competency to make it, or shall refuse, when required by the executors, to confirm it, the disposition in favour of the devisee shall be revoked,—is valid in law.

THIS was a case sent by the VICE-CHANCELLOR OF ENGLAND for the opinion of this Court.

The case stated, in substance, that Sir Gregory Page Turner was duly found a lunatic in the year 1823, under a commission of lunacy. The inquisition and the finding thereon were traversed, but the lunacy was established by the verdict of a jury in 1826, and that the commission was never superseded. In the year 1841, Sir G. O. P. Turner made a will, duly executed so as to pass real estate, whereby he gave certain considerable interests in his real estate to his daughter, Mrs. Fryer, and, subject thereto, gave his property to her children, and in default of issue to his collateral relations; and in the will was contained the following clause: "And my will further is, that if my said daughter, or her husband, or any person or persons in her, his, their, or any or either of their behalf, shall dispute this my will, or my competency to make the same, or if my said daughter and her husband, or either of them, shall refuse to confirm this my will, as far as he or she lawfully can, when required by my executors or either of them so to do, or if they or either of them, or any person or persons in the name or on behalf of them or either of them, shall lodge any *caveat* against proving the same, and if my said daughter and husband, or either of them, shall refuse or neglect to withdraw or cause to be withdrawn such *caveat*, fourteen days after request made by my executors or either of them to that effect; or if any proceedings whatsoever shall at any time be had or taken by any person or persons whomsoever, by any possible result of which any estate or interest could be in any way attainable by my said daughter, or her husband, or any person or persons in her right, of larger extent or value than is intended for her by this my will, and such proceedings
[*728] shall not be formally disavowed, stayed, or resisted by *my said daughter and her husband, to the full extent of their, her, or his ability to do so, then I revoke the use and disposition hereinbefore

(1) Approved in *Soorjomonee Dayee* v. *Suddanund Mohapatter* (1873) L. R. Ind. App. Suppl. 213, and *Evanturel* v. *Evanturel* (1874) L. R. 6 P. C. 1, 29, 43 L. J. P. C. 58.—A. C.

contained, for the raising and payment, during the life of my said daughter, in manner hereinbefore mentioned, of the aforesaid yearly sum of 2,000*l.* and also the use and disposition hereinbefore contained in her favour, in the event hereinbefore mentioned, of the rents and issues and profits of my estate hereinbefore devised, and also the liberty of residing in my said mansion-house, and all other benefits hereby given to or in trust for my said daughter, or derivable by her under this my will, and in lieu thereof I devise to the use of my said trustees, by and out of the net rents, issues, and profits of my said real estate, thenceforth, the yearly sum of 300*l.* only, during the natural life of my said daughter, by equal half-yearly payments, the said yearly sum to be paid into the proper hands of my said daughter, and not into the hands of any other person or persons whomsoever."

Sir G. O. P. Turner died in 1843, without having revoked or altered his will, leaving Mrs. Fryer his only child and heiress-at-law; and she had no issue. Since the death of Sir G. O. P. Turner, Mrs. Fryer and her husband have disputed her father's will, and his competency to dispose of his property, and have refused to do any act to confirm the will.

The question submitted for the opinion of the Court was, whether or not Mrs. Fryer had thereby forfeited the devises in her favour contained in the will.

The case was argued at the sittings after last Hilary Term (Feb. 13), by

Peacock for the plaintiff:

The condition annexed to this devise, that the devisee shall do nothing to contest the will, or the testator's competency to make it, is perfectly valid. There is no authority whatever to show that it is not. In *Cleaver* v. *Spurling* (1), a testator, a freeman of London, *gave by his will 35*l.* to his daughter, provided that if she refused [*729] to give a release, or put the executors to any trouble, the legacy should go over to her sister's children. The daughter claimed her orphanage part, and did not claim the 35*l.* legacy; and this was held to be a forfeiture, and to vest the legacy in the devisee over, the condition being good in law. The condition in the present case does not differ in principle from that. So, in *Simpson* v. *Vickers* (2), where there was a conditional limitation over, if the first devisee

(1) 2 P. Wms. 526. (2) 14 Ves. 341.

COOKE v. TURNER.

should refuse or neglect to comply with the condition, that within six months after the testatrix's death he should release all demands upon her as executrix of A.; a failure of this condition, arising from the act of the first devisee, as heir-at-law, contesting the will, was held to vest the estate in the devisee over. No suggestion was there made of any objection to such a conditional limitation on the ground of public policy. An *Anonymous* case (1), is as follows: "A man devises land to A., his heir-at-law, and devises other land to B. in fee, and saith, 'If A. molest B. by suit or otherwise, he shall lose what is devised to him, and it shall go to B.' The devisor dies: A. enters into the land devised to B., and claims it. The COURT were of opinion, that this entry and claim is a sufficient breach to entitle B. to the land of A." So, a condition that the devisee shall lose the estate if he marry without consent of a particular person, is good and valid: *Williams* v. *Fry* (2), *Fry* v. *Porter* (3), *Hervey* v. *Aston* (4). Unless the intention of the testator be clearly contrary to the policy of the law, it is the duty of the Courts to carry it out. In *Boughton* v. *Boughton* (5), it was expressly held, that a legacy to an heir, upon the express condition that he did not litigate or dispute the will, would put him to an *election between the legacy and the lands devised away, the will not being executed so as to pass real estates. In *Acherley* v. *Vernon* (6), a rent-charge was given to the testator's sister, in lieu and satisfaction of all claim she might have on his real or personal estate, and upon condition that she released all right and claim thereto to his executors and trustees; and the sister having lived several years without executing any release, it was held that she was not entitled to the arrears of the rent-charge. And the COURT said, the release was a condition precedent; but if it were only a condition subsequent, it ought to have been performed in a reasonable time, or at all events during her life. In *Webb* v. *Webb* (7), a father gave his son 40*l*., upon condition that he did not disturb the trustees; and on the trustees' applying for an execution of the trust, the son was decreed either to join them in a sale of the trust estates, or to forfeit his legacy. There is nothing in the present condition more illegal than in those which existed in the cases cited. What is there contrary to public policy that a man should

[*730]

(1) 2 Mod. 7.
(2) 1 Mod. 86.
(3) 1 Cases in Chanc. 138.
(4) Willes, 83; Comyns, 726; 1 Atk. 371.
(5) 2 Ves. Sen. 12.
(6) Willes, 153.
(7) 1 P. Wms. 136.

restrain his child from disputing his competency, by saying that if she does he will not give her his estate?

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(ROLFE, B.: Suppose, instead of imposing a negative duty, the neglect of which should devest the estate, he had imposed an affirmative duty, on condition of the performance of which the estate should vest; as that if she should in six months execute a deed confirming all the uses of the will, she should take: why is that invalid? and this is the same in substance; I see no difference in this respect between conditions precedent and subsequent.)

Martin, for the defendant:

This is a void condition. There is a clear distinction between conditions precedent and subsequent, from the earliest authorities. The question here is, whether a condition subsequent, which has a *direct tendency to induce parties to abstain from contesting the [*731] wills of insane persons,—a condition which, if applied to the case of forgery, has a direct tendency to establish forged wills—is legal and valid. In the words of Sheppard's Touchstone, it is "against the liberty of the law," and therefore void. It is the policy of the law to guard against the establishment of wills made by persons who have been found lunatic according to the regular forms of law. The finding of the jury on the inquisition of lunacy is evidence—not conclusive in law, but so in practice—of the incompetency of the party, in a court of law. Can, then, an estate given to the heir-at-law be devested from him, if he inquire into the incompetency of such a person? The law is the same as to conditional limitations, such as this, as it is with respect to conditions at common law. The condition against marriage is only one instance of illegal conditions, of which there are many. The Statute of Wills itself, 34 & 35 Hen. VIII. c. 5, s. 14 (1), declares that wills made by persons of non-sane memory shall not be good or effectual in the law. It is, therefore, contrary to the policy of that law to impose a prohibition upon the heir-at-law, of having the fact of the testator's sanity ascertained. It cannot be a good condition, which deprives the heir-at-law of the benefit intended for him, if he presumes to institute an inquiry which the law supposes right. No other person has authority to take care that the law is not transgressed in this respect. There is no public officer who can do

(1) Repealed by 7 Will. IV. & 1 Vict. c. 26, s. 2, except as to wills made before 1838.—A. C.

COOKE v. TURNER.

it on the part of the public. The cases cited on the other side do not bear out the argument for the plaintiff. *Cleaver* v. *Spurling* was a mere case of election; and the doctrine of election has nothing to do with this case. There is nothing illegal in the condition imposed in the case of *Simpson* v. *Vickers*, or in the *Anonymous* case in 2 Mod. 7. *Williams* v. *Fry*, *Fry* v. *Porter*, *Hervey* v. *Aston*, and *Acherley* v. *Vernon*, were cases of conditions precedent. *Boughton* v. *Boughton* is put by Lord HARDWICKE

[*732] entirely as a *case of election, it being assumed for that purpose that the devisor was competent to make a will. *Webb* v. *Webb* was also a case of election. The text writers represent a condition of this nature as being in general considered *in terrorem* merely. Mr. Williams says (1)—"A condition that the legatee shall not dispute the will is, in general, considered *in terrorem* merely, and will not operate a forfeiture by reason of the legatee's having disputed the legacy or effect of the will. But where the legacy is given over to another person in case of a breach of such condition, then if the legatee controvert the will, his interest will cease and vest in the other legatee"—for which he cites *Cleaver* v. *Spurling*. [He also cited *Cage* v. *Russel* (2), *Powell* v. *Morgan* (3), *Morris* v. *Burroughs* (4), *Loyd* v. *Spillett* (5), and *Lloyd* v. *Branton* (6).]

[733] *Peacock*, in reply:

All the cases in equity on this subject, relating to personal legacies, turn on the point whether there was a gift over on breach of the condition. If there is, the condition operates, though it may have been intended *in terrorem* only. All the cases cited, where such a condition has not operated, are where there has been no limitation over. Then is it against the policy of the law? If it be, so also would be a condition precluding the heir-at-law from setting up the incompetency of the testator to make a marriage settlement, whereby he provided for his wife and younger children. And in deciding whether such condition is void as being against public policy, the Court will look at the question as applicable to all wills, not with respect only to the reasonableness or unreason-

[*734] ableness of the provisions *of this particular will; nor will they take into consideration the evidence to show this particular testator to have been, in fact, *non compos*.

(1) Williams on Executors, 3rd ed. 1009 [cf. 9th ed. 1139].
(2) 2 Ventr. 352.
(3) 2 Vern. 90.
(4) 1 Atk. 404.
(5) 3 P. Wms. 344.
(6) 17 R. R. 33 (3 Mer. 108).

(PARKE, B.: No; the case cannot turn on the *quantum* of evidence, or *probabilis causa*; we must decide it on the assumption that he was in fact sane.)

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Assuming that, what is there against public policy in his preventing all his acts of indiscretion from being raked up, in order to give his heir-at-law a greater estate? And if this may be done lawfully by way of condition precedent, why not equally by condition subsequent?

Cur. adv. vult.

The judgment of the COURT was now delivered by

ROLFE, B.:

This was a case sent by the VICE-CHANCELLOR OF ENGLAND for the opinion of this Court, on the effect of a proviso contained in the will of the late Sir Gregory Page Turner. (His Lordship stated the facts of the case, and continued:) There is no doubt that, by disputing the will, and refusing to confirm it when required so to do, the devisee, Mrs. Fryer, has brought herself both in letter and spirit within the proviso, by which her interest is made to determine; so that her interest is clearly forfeited, unless the proviso itself is void; and accordingly, the argument on her behalf was, that the proviso is bad, as being contrary to the policy of the law. The ground on which the argument against the proviso was made to rest was, that every heir-at-law ought to be left at liberty to contest the validity of his ancestor's will, and that any restraint artificially introduced might tend to set up the wills of insane persons, and would, in the language of the Touchstone (132), be "against the liberty of the law." We cannot, however, adopt this reasoning. There appears no more reason why a person may not be restrained by a condition from disputing sanity, than from disputing any other doubtful *question of fact or law, on which the [*735] title of a devisee or grantee may depend. In *Stapilton* v. *Stapilton* (1), a father, being entitled to estates for 99 years, if he should so long live, with remainder after his decease to his first and other sons successively in tail, and having two sons, concurred with them in an arrangement for cutting off the entail, and settling the estates in equal moieties on his two sons. While the matter was in progress, and before its final completion, the eldest son died, and

(1) 1 Atk. 2.

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his infant child having filed a bill to compel a completion of the arrangement, the defendant, the second son, by his answer objected, that his eldest brother was in fact a bastard, and so he insisted that the proposed arrangement was not binding; but Lord HARDWICKE held the agreement good, and compelled the second son to concur in all acts necessary for vesting a moiety of the property in the plaintiff. Now a proviso good by way of contract must also be valid by way of condition; and therefore it seems to us to follow, as a necessary corollary from that case, that if A., having succeeded to real property as heir of his father, should devise it partly to a stranger, and partly to B., his next brother, subject, as to the gift of B., to a proviso defeating his estate in case he should dispute his (A.'s) legitimacy, such a proviso would be perfectly good; and yet such a condition would, if we were to adopt the defendant's reasoning in this case, be void, as infringing the liberty of the law. It would prevent or tend to prevent B. from contesting A.'s legitimacy; and it is surely as much against the policy of the law, that an heir should be disinherited by an illegitimate child, as by a party claiming under the will of a *non compos*. The same principle applies to the case of a proviso restraining a devisee from litigating some doubtful question of law. The truth is, that in none of these cases is there any policy of the law on the one side or the other. The conditions

[*736]

said to be void, as trenching on the liberty of the law, are *those which restrain a party from doing some act which it is supposed the State has or may have an interest to have done. The State, from obvious causes, is interested that its subjects should marry; and therefore it will not in general allow parties, by contract or by condition in a will, to make the continuance of an estate depend on the owner not doing that which it is or may be the interest of the State that he should do. So, the State is interested in having its subjects embarked in trade or agriculture, and therefore will not allow a condition defeating an estate, in case its owner should engage in commerce, or should plough his arable land, or the like. The principle on which such conditions are void, is analogous to that on which conditions defeating an estate, unless the owner commits a crime, are void. In the latter case, the condition has a tendency to the violation of a positive duty; in the former, to prevent the performance of what partakes of the character of a duty of imperfect obligation. But in the case of a condition such as that before us, the State has no interest whatever apart from the interest of the parties themselves. There is no duty on the part of an heir,

whether of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the State whether the land is enjoyed by the heir or the devisee; and we conceive, therefore, that the law leaves the parties to make just what contracts and what arrangements they may think expedient, as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another. The question, whether this proviso is a proviso void as being contrary to the policy of the law, may be well tested by considering how the case would have stood, if, instead of a condition subsequent, it had been made, as in substance it might have been made, a condition precedent. Suppose the testator had said, in case my daughter and her husband shall execute all deeds necessary for settling my estates in manner hereinafter mentioned, *then [*737] I give her, &c., surely there would be no doubt of the validity of such a condition, as a condition precedent; and if so, it must be good as a condition subsequent: for where a condition is bad on grounds of public policy, it must obviously be bad whether it be precedent or subsequent. The law will no more allow anything contrary to public policy to be made the means whereby a party shall entitle himself to an estate, than whereby he shall be made to lose that of which he is already in possession.

On these grounds, thinking there is no question of public policy involved, and considering that the law leaves it to the parties interested in property, and to them alone, to decide for themselves what questions of law or of fact they shall insist on or abandon, we have come to the conclusion that this proviso is good, and we shall certify accordingly to the Lord Chancellor.

Certificate accordingly.

GRANT *v.* MADDOX.

1846.

[737]

(15 Meeson & Welsby, 737—746; S. C. 16 L. J. Ex. 227.)

By a written contract, the plaintiff agreed to perform at the defendant's theatre, and the defendant agreed to engage her for three years, and pay her a salary of 5*l.*, 6*l.*, and 7*l.* per week in those years respectively: Held, that parol evidence was admissible to show that, according to the uniform usage of the theatrical profession, the plaintiff was to be paid only during the theatrical season—*i.e.*, during the time when the theatre was open for performance—in each of those years.

ASSUMPSIT. The first count of the declaration stated, that the plaintiff, before and at the time of the making of the promises, &c.,

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followed and exercised, and still follows and exercises, the business and profession of an operative performer, public singer, and actress, and the defendant then was, and still is, the lessee and manager of a certain theatre or play-house, called the Princess's Theatre; and thereupon, to wit, on &c., in consideration that the plaintiff, at *the request of the defendant, would enter into an engagement with the defendant to act and perform at the said theatre for the space of three years then next following, upon the following amongst other terms (stating them); he the defendant then promised the plaintiff that he would pay to the plaintiff 5*l.* for each week of the first of the said three years, 6*l.* for each week of the second of the said three years, and 7*l.* for each week of the third of the said three years. The declaration then averred mutual promises, and that the plaintiff entered upon her said engagement, and performed such parts as she was bound thereby to perform, &c.; and although, at the time of the commencement of this suit, the first year of the said engagement, and part of the second year, to wit, nine months and three weeks thereof, had elapsed, yet the defendant has disregarded his promise in this, to wit, that he has refused and still refuses to pay to the plaintiff her said salary for the space of twelve weeks of the said first year, amounting, to wit, to the sum of 60*l.*, and has also refused to pay to the plaintiff her said salary for the space of nine weeks of the said part of the said second year, amounting, to wit, to the sum of 54*l.*, and the said arrears of salary still remain and are wholly unpaid to the plaintiff. There were also counts for work and labour, and on an account stated.

[*738]

Pleas: first, *non assumpsit*; secondly, as to so much of the first count as relates to the non-payment of the plaintiff's salary for eight weeks of the said nine weeks of the said part of the said second year in the first count mentioned, that at the time of the commencement of this suit the said space of eight weeks had not, nor had any part thereof, elapsed, in manner and form &c.; thirdly, to the first count, except as to 6*l.*, parcel of the sum of 54*l.* therein mentioned, payment before action brought; fourthly, as to the 6*l.*, payment into Court, which the plaintiff accepted and took out of Court in satisfaction of that amount.

[739]

At the trial, before Pollock, C. B., at the sittings in Middlesex after last Hilary Term, the plaintiff, in order to prove the contract stated in the declaration, put in evidence a correspondence between Mr. James Grant, the plaintiff's father, and the defendant, of which the material part was contained in the following letters:

"45, DUKE STREET, SHEFFIELD MOOR, SHEFFIELD,
"19th Jan., 1844.

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"MY DEAR SIR,—I received your letter of the 17th only this morning, and though the delay of your reply was but a day, yet it has created much difficulty in the way of making arrangements, so as to meet anything like your wishes, as to the time you wish Miss Grant to be in London. *Taking both your letters together, the [*740] engagement which you propose would be, as to time, three years, at a salary of five, six, and seven pounds per week in those years respectively, being an advance of 1*l.* per week on each of the two last." (The letter went on to state particulars as to the characters the plaintiff was to perform, the dresses she was to provide, &c. It then proceeded:) "She sees no objection, and has none in so concluding the engagement with you, provided she is not required to open sooner than Saturday, the 3rd of February, and that she receives your answer to that effect without the loss of a post, as the arrangement of her benefit here will depend on that; and even so, she will have to make great sacrifices, you having already lost a day in a matter apparently so urgent has been a great drawback; and if another day should be so lost, it may produce difficulties that may not be so easily obviated as even at present. Miss Grant writes by this post to Mr. Wood, directed to the theatre. Please call on him at once, should you find such necessary to enable you to write your answer to me to-morrow, so that I may receive it on Saturday.

"I remain your very obedient servant,
"JAMES GRANT."

"PRINCESS'S THEATRE, Jan. 20, 1844.

"MY DEAR SIR,—In answer to your letter of yesterday, I accept Miss Grant's services on the terms mentioned, and I expect Miss Grant to be here and ready to perform on Monday, the 5th of February. . . .

"Yours truly,
"J. M. MADDOX."

The plaintiff's counsel contended, that the contract established by these letters was a contract for the plaintiff to perform, if required, and to receive a salary for, every week of the whole of each of the three years. On the part of *the defendant, evidence was tendered [*741] to show that, according to the understanding and custom of the theatrical profession, under an engagement to perform for one or more years, actors were never paid during the time of vacation,

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when the theatre was closed, but only during what was called the theatrical season; according to which view of the case, the special contract alleged in the declaration was not proved. The reception of this evidence was objected to by the plaintiff's counsel, on the ground that it went to explain and vary the unambiguous written contract between the parties. The LORD CHIEF BARON, however, received the evidence, and in summing up, told the jury, that the question for them to decide was, whether the contract was to perform and be paid throughout the three years, or only during the theatrical season in three years, and that in the latter case the defendant was entitled to a verdict. The jury found their verdict for the defendant.

In last Easter Term, *Martin* obtained a rule for a new trial, on the ground that the above evidence had been improperly received.

Montagu Chambers (with whom was *Thomas*) now showed cause:

The evidence objected to was clearly receivable, and being received, proved a contract different from that set forth in the declaration. This was a theatrical contract, made with reference to the known usages of the theatrical profession, and to be construed, therefore, by evidence of those usages. Many authorities have clearly established, that whenever a written contract is made with reference to the custom of a particular district, or the usage of a particular trade or profession, evidence of that usage or custom is receivable, not to vary or contradict the written contract, but to show what the contract is, the usage or custom being a part of it. [He cited *Smith* v. *Wilson* (1) and *Hutton* v. *Warren* (2).]

[743]

Martin and *Peacock*, in support of the rule:

The evidence objected to was not receivable, and there was, therefore, no variance. The true rule is, that if parties enter into a written contract,—especially where it must be in writing, or else is void,—the writing alone speaks; with two exceptions: first (which indeed is hardly an exception), where the language used in the contract has by usage acquired a particular known meaning, *e.g.* a "Welsh rabbit;" secondly, the exception introduced by the case of *Wigglesworth* v. *Dallison* (3), by which the custom of the country as to agricultural matters is imported into agricultural leases, where it is not directly excluded by the terms of them. But this case does

(1) 37 R. R. 536 (3 B. & Ad. 728).
(2) 46 R. R. 368 (1 M. & W. 466).
(3) Doug. 201.

not fall within either of those exceptions. There is no ambiguity in this contract; but if there is, the result is not to let in parol evidence to explain it, but to render it void.

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(ALDERSON, B.: Where the meaning of the words used is clear, but the contract is ambiguous, it is void; but you may explain the meaning of the words used by evidence.)

There is nothing unreasonable in the plaintiff's being paid all the year round. Why might not the parties contract so as to give her a livelihood for the whole year? If they intended to restrain the agreement to what is called the theatrical season, they should have expressly so stipulated, as in *Kemble* v. *Farren* (1), where the agreement was to pay the defendant a certain sum "for every night on which the theatre should be open during the ensuing four seasons." Suppose the defendant chose to open his theatre only for a fortnight in the year, is he discharged by paying the plaintiff for that fortnight only? If the Court give its proper meaning to the word "week" in this contract, why not also to the word *"year?" * * *Smith* [*744]
v. *Wilson* no doubt gives the true rule * * that, "where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible, for the purpose of applying the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties, in framing their contract, had made use of a foreign language, which the Courts are not bound to understand." *Hutton* v. *Warren* and *Reg.* v. *Stoke-upon-Trent* fall within the same class—where a customary incident is annexed to the contract. * * *

ALDERSON, B.: [745]

I am of opinion that the evidence was properly admitted, and the question properly left to the jury, and therefore that this rule ought to be discharged. It is perfectly true that you have no right to qualify or alter the effect of a written contract by parol evidence; but it is perfectly competent to you to qualify or alter by parol evidence the meaning of the words which apparently form the written contract, and to insert the true words which the parties intended to use. That is not to alter the contract, but to show what the contract is. Wherever the words used have, by usage or local custom,

(1) 31 R. R. 366 (6 Bing. 141).

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a peculiar meaning, that meaning may be shown by parol evidence. Here the contract is, that the plaintiff is to be paid, for three years, a salary of 5*l.*, 6*l.*, and 7*l.* per week in those years. That means, according to the evidence and the finding of the jury, that she is to be paid so much per week during every week that the theatre is open in those years.

ROLFE, B.:

I am of the same opinion. There has not been in this case any infringement of the rule that parol evidence cannot be received to alter a written contract; for here the evidence was admitted only for the purpose of explaining the meaning of the words used in the contract. It is clear that this may be done with respect to foreign words or scientific expressions; and I think the same is true of a case where the words of the contract have reference to a particular profession. I wish, however, to guard myself against being supposed to say, that where a certain usage exists, and the parties have put the terms of their agreement into writing, they can say that the agreement is to receive a different construction, because it is contrary to the usage. No such question arises in the present case.

[746] PLATT, B.:

The only question in this case is, what was the contract which the parties entered into. The parol evidence amounted to nothing more nor less than translating the contract.

POLLOCK, C. B., concurred.

The COURT, however on the application of the plaintiff's counsel, allowed the rule to be made absolute to enter a nonsuit, instead of a verdict for the defendant.

Rule accordingly.

1846. *May* 28.

[746]

LAURIE AND ANOTHER *v.* DOUGLAS AND OTHERS (1).

(15 Meeson & Welsby, 746—754.)

A vessel laden with goods arrived in the port of London, and was taken into the Commercial Dock to discharge her cargo. For this purpose she was fastened by tackle, on the one side to a loaded lighter lying outside her, and on the other to a barge lying between her and the wharf. The

(1) Cited in *Notara* v. *Henderson* (1872) L. R. 7 Q. B. 225, 236, 41 L. J. Q. B. 158; distinguished in the *Accomac* (1890) 15 P. D. 208, 211, 59 L. J. Ad. 91.—A. C.

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crew were discharged, except the mate, and lumpers were being employed in unloading her, when the tackle broke whereby she was fastened to the lighter, and in consequence she canted over, water got in through her ports, and the goods still on board were damaged: Held, that this was a loss within the exception in the bill of lading, of "all and every the dangers and accidents of the seas and navigation."

Held, also (in an action by the freighters against the shipowners to recover damages for this loss), that the jury were properly directed, "that the owners were only bound to take the same care of the goods as a person would of his own goods, that is, an ordinary and reasonable care."

CASE. The declaration stated, that heretofore, and before and at the time of the making of the promises by the defendants hereinafter mentioned, and before the commencement of this suit, to wit, on the 20th day of May, 1845, the defendants were owners of a certain ship or vessel called the *Zealous*, then lying and being in the port of Quebec, in Canada, and bound from thence to London; and thereupon the plaintiffs, at the request of the defendants, then caused to be shipped and loaded in and upon the said ship divers goods and merchandizes, to wit, 53 barrels of potash and 6 barrels of pearlash, then in good order and well conditioned, of great value, to wit, of the value of 500*l*., to be taken care of and safely and securely carried and conveyed by the defendants in and on board the said *ship, from Quebec aforesaid to London aforesaid, and at [*747] London aforesaid, in the like good order and well conditioned, to be delivered to the plaintiffs, all and every the dangers and accidents of the seas and navigation of whatsoever kind or nature excepted; and in consideration of the premises, and of certain freight and reward to be therefore paid to the defendants by the plaintiffs, they the plaintiffs then, to wit, on the day and year aforesaid, promised the plaintiffs to take due and proper care of, and safely and securely to carry, convey, and deliver the goods and merchandizes aforesaid, in manner as aforesaid, except as aforesaid. Averment, that the defendants then had and received the said goods and merchandizes, to be taken care of, carried, conveyed, and delivered as aforesaid, and that a reasonable time for the conveying and delivering of the same had elapsed before the commencement of this suit, and that the defendants were not prevented from carrying, conveying, and delivering the said goods and merchandizes as aforesaid, by any danger or accident of the seas or navigation, of whatsoever nature or kind; yet the plaintiffs say, that the defendants disregarded their said promise, and did not nor would take due and proper care of the said goods and merchandizes as aforesaid, or safely and securely carry, convey and deliver the same in manner

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and proper care in the carrying of the goods to London; and the only question on the other issue was, whether the injury, whereby the defendants were prevented from delivering the goods according to the contract, arose from perils of navigation; and that question was left to the jury. It will be urged on the other side, that the learned Judge ought to have told the jury, as matter of law, that the navigation was over at the time of the injury.

(POLLOCK, C. B.: With reference to that part of the cargo in respect to which this action is brought, the voyage was not at an end. A policy of insurance until the discharge of the cargo would still attach.)

The question is, what is the meaning of the exception, "all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind." Here the goods still remained in the vehicle of carriage, and on the water, subject to the perils of navigation; for "navigation" does not mean upon the open sea only, but until delivery of the cargo. It is said the voyage was at an end, because the crew had been discharged.

(POLLOCK, C. B.: It might as well be said the voyage was not begun until the arrival of a ship at Gravesend, where they often take in part of the crew.)

[*751]

The contract stated in the declaration, out of which the exception is made, is a contract for the goods to be safely and securely *carried and conveyed to London, and there in good order and condition to be delivered to the plaintiffs; and the question is, whether the defendants were prevented from delivering the goods in good order and condition, by a danger of navigation within the meaning of the exception. The defendants must have meant to excuse themselves from any accident arising while the ship was still floating on the water, and subject to its perils. Suppose the whole of the cargo is to be delivered on the further side of a dock, and an injury occurs in the course of crossing it, would not that be within the exception? Navigation means all that is necessary to carry the goods to the land, in the ordinary course of the shipowner's duty. (On this part of the case they referred to *Fletcher* v. *Inglis* (1), *Thompson* v. *Whitmore* (2), *Bishop* v. *Pentland* (3), *Carruthers* v.

(1) 20 R. R. 448 (2 B. & Ald. 315).
(2) 12 R. R. 642 (3 Taunt. 227).
(3) 31 R. R. 177 (7 B. & C. 219).

Sydebotham (1), *Kingsford* v. *Marshall* (2), and *Wells* v. *Hopwood* (3).) First, was the navigation ended? That is a question of fact, not of law, and the jury have found that it was. Secondly, was this a peril of navigation? That question is fully discussed in Abbott on Shipping, pp. 339—341 (6th edit.), where the cases are collected, and are clearly extensive enough to include such an injury as this. The plaintiffs say, that if there was negligence on the part of the defendants which also conduced to the loss, it cannot be considered as having happened by a peril of navigation; and with reference to this point they complain of the direction of the learned Judge, as to the amount of care which the defendants were bound to take. But it is submitted that the direction in this respect was perfectly correct, and that they were only bound to take such ordinary and reasonable care as a prudent man would take of his own goods. In order to render the owner liable in such a case, he must be fixed with such a degree of negligence as would, before the *Carriers [*752] Act, 11 Geo. IV. & 1 Will. IV. c. 68, have been necessary to render a carrier liable, notwithstanding a notice limiting his liability; that is, the want of such care as a prudent man would take of his own property: *Bodenham* v. *Bennett* (4), *Lowe* v. *Booth* (5), *Wyld* v. *Pickford* (6), Story on Bailments, c. 1, s. 7.

Jervis and *Greenwood*, in support of the rule:

First, this was not a peril of navigation. It is said on the other side that it was, inasmuch as the goods had not reached their destination. If so, the defendants are in this dilemma—that they did not safely carry and convey the goods, and so the plaintiffs are entitled to the verdict on the first issue. But the important fact to be considered is, that here the vessel had discharged her crew before the injury happened. If the shipowner is still to have the benefit of the exception he must take upon himself all the burthen of keeping the ship in the course of navigation. By discharging the crew, he unfits her to meet that which is an accident of the navigation. This is the case of a common law insurance, limited by a specific exception of the "dangers and accidents of navigation." That means no more than this, that so long as the vessel is in the course of and fitted for navigation, the owner is protected against any peril of that navigation, which is not induced by his

(1) 16 R. R. 392 (4 M. & S. 77).
(2) 34 R. R. 756 (8 Bing. 458).
(3) 37 R. R. 307 (3 B. & Ad. 20).
(4) 18 R. R. 686 (4 Price, 31).
(5) 27 R. R. 717 (13 Price, 329).
(6) 58 R. R. 775 (8 M. & W. 460).

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negligence. Here the vessel was not in the course of or fitted for navigation. *Thompson* v. *Whitmore* is almost expressly this case.

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(POLLOCK, C. B.: There the ship was hove down on a beach, within the tide-way, for repair. It was the same as if she had been put into a dry dock for the same purpose.)

The other cases cited were cases arising on policies of insurance, where the question is a different one.

[*753] Secondly, the direction of the learned Judge, as to the *degree of care which the defendants were bound to use, was not correct. A carrier is an insurer, although no doubt he may by contract engraft an exception upon his common-law liability. He warrants the mode of carrying the goods, as well as their safe delivery. He contracts to have a proper vehicle wherein to carry them—a fit vessel, and a crew exercising proper care: and it is upon that contract that the exception is engrafted. His liability compels him to have a well-found ship in every respect. This term—"the dangers and accidents of navigation"—cannot therefore mean the same as "perils of the sea" in a policy of insurance, but is limited to mere accidents, proper care being used in every respect. This is the case of a bailee for hire; it is only a gratuitous bailee who is in the same situation as if the goods were his own. The responsibility of a bailee for hire is greater. *Forward* v. *Pittard* (1) shows that a carrier is liable at common law for a loss by fire, proceeding from any other cause than lightning. Suppose the crew improperly discharged all the timber at once, and the vessel in consequence inevitably pitched over and was stove in—can it be said the owner would not be liable? The exception is out of the absolute liability to deliver, and the owner must discharge himself of all the responsibility which the law casts upon him, before he reaches this exception. Negligence consists in the omission of any care which is thrown upon the party by the circumstances in which he is placed; and here the "due and proper care" means due and proper care as a carrier. Would not bad stowage, or loss from drunkenness of the crew, prevent the application of this exception? Vinnius (2) lays down the rule thus: "Ad casus autem fortuitos non sunt referendi illi casus, qui cum culpâ conjuncti esse solent; cujusmodi sunt furta. Quamobrem, qui rem furto amissam, vel incendio, verbi causâ,

(1) 1 R. R. 142 (1 T. R. 27).

(2) Ad. Inst., lib. 3, tit. 15, s. 5; cited, 3 Burge's Com. 661.

*servorum negligentiâ orto, consumptam dicit, is diligentiam suam probare debet." The question of negligence, therefore, is involved in the consideration of this exception; and it is not merely the proximate cause of the loss which is to be considered, but the degree of negligence which is to create the liability must be measured by the degree of care which the law casts on the party under the circumstances. They referred to Jones on Bailments, 21; Story on Bailments, 320; 2 Kent's Commentaries, 598, 609; 3 Burge's Commentaries, 690.

Cur. adv. vult.

The COURT (1) now delivered their judgment, holding that the navigation was not at an end at the time of the loss, and that the LORD CHIEF BARON had correctly directed the jury as to the degree of care which the defendants were bound to take of the goods (2).

Rule discharged.

FLETCHER *v.* MARSHALL AND ANOTHER.

1846. *June* 27.

(15 Meeson & Welsby, 755—764; 10 Jur. 528; 5 Rail Cas. 340.)

[755]

A stockbroker employed to purchase shares or scrip of a Railway Company does not thereby undertake to procure them absolutely and at all events, but only to use due and reasonable diligence to endeavour to do so.

A. employed B., a stockbroker at Manchester, and lodged money in his hands to procure for him fifty shares in a certain Railway Company. B., without disclosing the name of his principal, entered into a contract with H., another sharebroker, to purchase them for him. According to the usage of the Stock Exchange at Manchester, there are two "settling days" in each month, on which all transactions between brokers, and between them and their principals, are to be settled, although in some instances settlement is not enforced by brokers on the prescribed days. H. did not perform his contract with B. by the next settling day; and B. having, after that day, refused to return A. his money: Held, that A. was entitled to recover it back from B. in an action for money had and received.

ASSUMPSIT. The first count of the declaration stated, that on the 30th September, 1845, divers persons, whose names are to the plaintiff unknown, had agreed together to form a certain joint-stock Company, to be incorporated by Act of Parliament, to be applied for and sought to be obtained and procured to be passed, for the construction of a certain railway, to wit, from Thelford (3) to the Eastern Counties Railway, at Hatfield, near Chelmsford, and thence

(1) POLLOCK, C. B., ALDERSON, B., ROLFE, B., and PLATT, B.

(2) The reporters were unfortunately absent when this judgment was delivered, and have not been able to obtain a copy of it.

(3) *Sic.* We cannot find any place of this name. *Qu.* Thetford.—F. P.

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to the port of Maldon, to be called "The Essex and Suffolk Railway Company," upon and according to, amongst others, certain terms and regulations following: (that is to say) The capital of the said Company to consist of 1,000,000*l.*, in 40,000 shares of 25*l.* each, which shares were to be allotted to such persons as should apply for the same, and should be appointed by the committee of management of the said Company as shareholders therein; and certain writings, called "scrip certificates," were to be issued by the said committee of management, each of which was to purport that the holder thereof was entitled to so many shares of and in the capital of the said intended Company as should be therein mentioned, and to become shareholders thereof in respect of the same; and before the making of the promise hereinafter mentioned, divers, to wit, all the said shares had been allotted to divers persons, and such scrip certificates as aforesaid were about to be issued. And thereupon, to wit, on the day and year first aforesaid, in consideration that the plaintiff, at the request of the defendants, then employed the defendants to purchase for him the plaintiff divers, to wit, fifty of
[*756] the said shares in the *said intended Company, at a reasonable price in that behalf, and to procure for him such scrip certificates for the said shares as aforesaid, when the same should be issued by the said Company, at and for commission and reward to the defendants in that behalf, the defendants then promised the plaintiff to purchase the said shares for him, the plaintiff, and to procure and deliver to him such scrip certificates for the same as aforesaid, when the same should be issued, as aforesaid, on being paid the purchase-money thereof, and such commission as aforesaid. And the plaintiff says, that he has always performed the said agreement in everything on his part to be performed, and that after the making thereof, and before the issuing of the said scrip certificates, to wit, on the day and year aforesaid, the defendants, in part pursuance of their said promise, bought for the plaintiff the said fifty of the said shares, at and for such price as aforesaid, to wit, 2*l.* 6*s.* 9*d.* per share; and that afterwards, to wit, on the 14th of October in the year aforesaid, scrip certificates for divers, to wit, all of the shares in the said intended Company, were issued by the said persons as aforesaid, and that within a reasonable time in that behalf, to wit, on the day and year last aforesaid, the plaintiff paid to the defendants the said purchase-money, together with their said commission, amounting, to wit, to 12*l.* 17*s.* 6*d.*, and then requested the defendants to procure for and deliver to him such scrip

certificates as aforesaid, in pursuance of their said promise; and the defendants then could and might have so procured and delivered the said scrip certificates, and a reasonable time so to do had elapsed before the commencement of this suit; yet the defendants have not procured and delivered the said scrip certificates to the plaintiff, but have wholly neglected and refused so to do, by reason whereof the plaintiff has wholly lost the benefit of the said purchase, and of the said scrip certificates, and of divers great gains and profits which he would have made by the same; and by reason of a fall in the value of the said *shares, the plaintiff has been greatly damnified by being unable to dispose of the same. [*757]

There were also counts for money lent, money had and received, and money due on an account stated.

Pleas, first, to the whole declaration, *non assumpsit;* secondly, to the first count, that a reasonable time for the defendants to have procured and delivered the scrip certificates to the plaintiff had not elapsed before the commencement of the present suit. Issues thereon.

At the trial, before Coleridge, J., at the last Assizes at Liverpool, it appeared that the plaintiff had, on the 30th of September, 1845, employed the defendants, who are stock and share brokers at Manchester, to purchase for him fifty shares in the Essex and Suffolk Railway Company. The defendants, without disclosing the name of their principal, immediately made a bargain for that number of the shares with a sharebroker of the name of H., and sent the following bought note to the plaintiff:

"5, TOWN HALL BUILDINGS, MANCHESTER,

"To J. FLETCHER, Esq. "Sept. 30, 1845.

"We have this day bought on your account fifty shares in the Essex and Suffolk Railway, at 2*l.* 7*s.* 6*d.* per share.

"We are, Sir,

"Your obedient Servants,

"W. AND E. MARSHALL.

£	*s.*	*d.*	
"118	15	0	paid, and
3	2	6	premium and commission
£121	17	6	net."

According to the practice of the Stock Exchange at Manchester, there were two days in each month on which all accounts between brokers, and between brokers and their customers, were to be

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[*758]

settled; in pursuance of which regulation all sales after the 27th September were understood *to be for the 14th October, the next settling day. The defendants also, in accordance with the practice of other brokers, published lists of the different railway shares in the market on each day, together with the prices of them.

The following account and receipt were put in evidence on the part of the plaintiff:

"J. Fletcher, Esq., in account with W. and E. Marshall.

Dr.	£	s.	d.
"Sept. 30—To 50 Essex and Suffolk - -	121	17	6
Oct. 6—To 20 Chester and Manchester Direct - - - - -	71	5	0
	£193	2	6

Cr.	£	s.	d.
"Sept. 30—By cash - - - - -	30	0	0
Oct. 4—Ditto - - - - - -	20	0	0
Balance - - - -	143	2	6
	£193	2	6

"Dr. to Balance £143 2*s.* 6*d.*

"Settled, October 14, 1825.

"E. MARSHALL."

On the 24th October the plaintiff went to the defendants, and asked if they had not bought for him fifty shares in the Essex and Suffolk Railway; and one of the defendants replying that they had, the plaintiff demanded his scrip or his money, observing that they had treated him very ill, by making use of his money, and not getting him his scrip. To this the defendant replied that they were not using his money, and had not paid it away, and that they had purchased the scrip on the 30th September of Mr. H., but that it had not yet been delivered to them, as things of that nature could

[*759]

not always be procured when *required. On the same day, the plaintiff's attorney, by his instructions, wrote to the defendants demanding payment of the 121*l.* 17*s.* 6*d.*, which not being complied with, the present action was commenced on the 31st October. It appeared that, although scrip had been issued by the Essex and Suffolk Railway Company some time before the 14th of October, none had reached Manchester before that day, and Mr. H. did not receive any until the 11th November, when he delivered it to the defendants.

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On this state of facts, it was objected for the defendants, at the close of the plaintiff's case, that this action was not maintainable; for that the implied contract between the parties was, that the broker undertook to use due diligence to procure and deliver this scrip, not, as alleged in the first count, that he was to procure and deliver it at all events. It was also contended that, under the circumstances, the plaintiff could not recover under any of the common counts. The plaintiff's counsel thereupon applied to the learned Judge to amend the first count by striking out the words "when the same should be so issued as aforesaid, on being paid the purchase-money thereof and such commission as aforesaid," and inserting in their stead the words "within reasonable time in that behalf." The learned Judge granted this application, reserving leave to the defendants' counsel to move to enter a nonsuit, as well on the question of variance, as on the propriety of making the amendment. As to the common counts, his Lordship expressed his opinion, that, the contract being to deliver this scrip within a reasonable time, the plaintiff had a right to rescind it, if not completed within that time, and to recover back his money under the count for money had and received to his use. Witnesses were then called for the defendants, to prove that it was often difficult to get particular kinds of shares or scrip, and that the defendants had taken considerable pains to procure these for the plaintiff. It was shown also, that during the months of September and October, 1845, *there was a vast quantity of business transacted in the [*760] share market at Manchester. Some of the witnesses also stated, that in many cases brokers did not enforce the delivery of shares or scrip on the regular settling days, and frequently allowed transactions to lie over for some time, as suited their convenience. The learned Judge, in summing up, told the jury that they would probably entertain no doubt that the contract laid in the declaration, as amended, was proved; and if so, the question for them to determine was, whether the breach was proved, namely, that a reasonable time for completing the contract had elapsed when this action was brought. In determining this question, the jury should be guided by the rules generally observed in dealings of this nature, and not by what took place in particular transactions; and if they thought fourteen days had been fixed by usage as a reasonable time, the plaintiff was entitled to their verdict. The jury found a general verdict for the plaintiff, with 121*l.* 17*s.* 6*d.* damages.

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In Easter Term, *Watson* moved for and obtained a rule *nisi* to enter a nonsuit or new trial, on the grounds, that the contract proved by the evidence was not properly described in the first count of the declaration, even as amended; and that the learned Judge had misdirected the jury, in stating to them that the contract alleged was proved, and also in laying it down that the plaintiff was entitled to recover on the count for money had and received; for that as the defendants had, by their agreement with H., bound themselves absolutely to him for the purchase of the shares, it was not in the plaintiff's power to revoke that contract.

Martin and *Cowling* showed cause:

First, the plaintiff is clearly entitled to recover on the count for money had and received. The engagement of the defendants was to purchase this scrip for the plaintiff, and deliver it to him on the
[*761] 15th of October, or within a reasonable time. If the *former, then the plaintiff was entitled to have back his money on the 16th; if the latter, then the jury have found that until the 24th was a reasonable time for the completion of the contract. And this finding was fully supported by the evidence. It was shown that, by the general usage of the Manchester Stock Exchange, the reasonable time for the completion of such a contract was fixed to be at the next settling day: and such a general usage cannot be controlled or affected by any practice of individual brokers to the contrary. It was said, however, that the defendants could not be held bound to fulfil their engagement with the plaintiff, in consequence of H.'s not having fulfilled his engagement with them; but that argument cannot be admitted. The plaintiff was *dominus contractûs*, and had a right to prohibit his agent from giving additional time for the performance of it to a third party.

Secondly, there was evidence to sustain the first count. A broker is in the nature of a *del credere* agent, and binds himself, independently of any acts or defaults of others, to procure the article which he undertakes to purchase for his principal.

(ROLFE, B.: Suppose there were no such shares in the market? Or, as there is in general an indefinite supply of such articles, take the case of some other. A man may employ his broker to buy a picture generally, which might easily be done; but suppose he employed him to buy Raphael's Transfiguration?)

In the case of shares, the broker's price lists show what shares are on sale in the market.

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(PARKE, B.: No; they only show the nominal price which the brokers affix on the shares for that day. If a broker is bound to purchase absolutely, at what price is he to purchase?)

At the price of the day on which the order is given.

(PARKE, B.: Suppose I give an order to sell 1,000 shares. You say the obligation of the broker would be to sell them at the price of that day. But it is plain that the instant effect of his going into the market with that number of shares for sale, would be to lower the *market; and still he would be bound to sell at the price of that day. That seems to be a clear *reductio ad absurdum*.) [*762]

In the account furnished by the defendants to the plaintiff, they admit that they have bought these shares; whether that statement be true or not, they are bound by it, and therefore lay under a contract to deliver them.

(PARKE, B.: Then the special count is wrong, for it does not so describe the contract; it describes it as a contract by the brokers to procure this scrip at all events, whether they obtain it themselves or not. But that is not so; the duty of the broker is only to use due and reasonable diligence in endeavouring to procure it. You must be confined to the count for money had and received.)

Atherton, in support of the rule:

The plaintiff is not entitled to recover on the count for money had and received. The question on that count is, whether the defendants did or did not use due diligence to procure these shares within a reasonable time. Now, the question of reasonable time is one which must depend on the circumstances of each case. In this case the learned Judge was wrong in telling the jury that they ought to fix the reasonable time by the settling day; for there was abundant evidence that the brokers at Manchester were not in the habit of considering themselves bound to complete their bargains on the settling days. In truth, it would be impossible in many cases to do so; *e.g.*, where the scrip has to pass through a great number of hands, or where the parties reside at a distance. The

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question of reasonable time, with reference to the special count on which the direction of the learned Judge and the verdict of the jury proceeded, and which the COURT now considers not to be sustainable, is altogether different from the same question viewed with reference to the count for money had and received: being simply whether a reasonable time had elapsed for the absolute delivery of the scrip —not whether the defendants *had a reasonable time in which to endeavour to procure it.

[*763]

PARKE, B.:

I think it is impossible to entertain any doubt as to the plaintiff's right to recover on the count for money had and received. He employed the defendants to make a bargain for shares, to be delivered to him within a reasonable time, and the meaning of that expression is explained, by the usage of the business of brokers at Manchester, to be until the next settling day, although they are in the habit of occasionally extending indulgence to each other beyond that time. The contract was made on the 30th September; and according to this usage the scrip was to be delivered on the 15th of October. On the 24th of that month, the plaintiff inquires of the defendants if they have got the scrip; they reply that they have not; on which he ascertains that they have still got his money, and countermands the application of it, as he unquestionably had a right to do. If the contract which the defendants had made with H. was on the terms that the scrip was to be delivered on the 15th, then a delivery on that day was an essential part of the contract; and on its being broken by H., the defendants were bound to repay the plaintiff his money, and not to pay it over; and if the contract was not made on that condition, they had no right to pay the money over at all. In either view, therefore, the plaintiff was entitled to receive back his money. If any reason could be assigned why the jury should have come to a different conclusion as to what was reasonable time under this count, from that which they came to on the special count, it would be a ground for a new trial; but it is clear that they have proceeded on the ground that the 15th of October was the reasonable time for the delivery of the scrip in both cases. With respect to the first count, I own I think it is not sustained by the evidence, and that the defendant would be entitled to a new trial for misdirection *on that count; but in conformity with the course taken by us in another case yesterday, if the plaintiff will consent that a verdict be entered for the

[*764]

defendants on the general issue to the first count, the present rule may be discharged.

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ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule absolute to enter a verdict for the defendants on the plea of non assumpsit to the first count, and discharged as to the rest.

SHERWOOD *v.* CLARK.

1846. *July* 4.

(15 Meeson & Welsby, 764—768.)

[764]

A writ of *elegit* cannot be sued out for part only of the sum recovered by a judgment, unless it shows on the face of it that the residue of the judgment has been satisfied or otherwise disposed of.

Since the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11, an *elegit* need not describe the lands to be extended by metes and bounds; it is sufficient to describe them in any manner by which they may be identified.

THIS was a rule obtained by *Martin*, calling upon the plaintiff to show cause why the writ of *elegit* (1), and all subsequent proceedings, should not be set aside, and why the plaintiff should not pay to the defendant the costs of and relating to the application, and consequent thereon.

Cause was shown by *Montagu Chambers* and *Bovill* in Trinity Term (May 23), and the COURT took time to consider.

The facts are fully stated in the judgment of the COURT, which was now delivered by

PLATT, B.:

This was a rule calling upon the plaintiff to show cause why the writ of *elegit*, and all subsequent proceedings thereon, should not be set aside, and why the plaintiff should not pay to the defendant the costs of and relating to the application, and consequent thereon.

On the 24th of November, 1836, the plaintiff recovered in an action of covenant 2,000*l.* for his damages and costs against the defendant.

On the 13th of December, 1844, a *scire facias quare executionem non* issued upon that judgment. [765]

Judgment in *scire facias* having been obtained, a writ of *testatum fieri facias* issued into Sussex thereon on the 4th of April, 1845, to which the sheriff returned *nulla bona*.

On the 7th of February, 1846, a writ of *elegit* issued, directed to

(1) See R. S. C. Ord. XLIII. r. 1.—A. C.

SHERWOOD v. CLARK.

the Sheriff of Sussex, whereby, after reciting that the plaintiff, on the 24th of November, 1836, recovered against the defendant 2,000*l.*, which in the Court were awarded to the said plaintiff for his damages which he had sustained, as well by reason of a certain breach of covenant made between the said defendant and the said plaintiff, as for his costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted; and that afterwards the said plaintiff came into Court, and, according to the form of the statutes, chose to be delivered to him the goods and chattels of the defendant, except his oxen and beasts of the plough, and also all such lands and hereditaments as the defendant, or any one in trust for him, was seised or possessed of on the 24th of November, 1836, (but omitting altogether to notice the judgment in *scire facias*), the sheriff was commanded to deliver by reasonable price and extent the defendant's goods and lands, till 12,000*l.* with interest should have been levied.

The inquisition, also, taken under this writ on the 17th of February, 1846, and returned by the sheriff on the 24th of the same month, omitted to describe by metes and bounds the lands extended.

In Easter Term, the defendant obtained a rule *nisi* to set aside the *elegit* and subsequent proceedings. The defendant's counsel objected—first, that the *elegit* should have stated the judgment in *scire facias*; secondly, that, without showing that the residue of the original judgment had been satisfied or otherwise disposed of, an *elegit* could not be sued out for part only of the sum recovered:

[*766] *thirdly, that the inquisition should have stated the metes and bounds of the land extended.

At common law, the demandant in a real action, having allowed a year and a day to elapse after the recovery of his judgment, might have sued out a *scire facias* to revive that judgment (1). The plaintiff in a personal action, if guilty of the same neglect, could not revive by *scire facias*, but was driven to bring his action on the judgment. That was the only remedy the plaintiff in a personal action, who had allowed a year and a day to elapse without suing out execution, retained before the passing of the Statute of Westminster 2, 13 Edw. I. st. 1, c. 45. But that statute, in giving to such a plaintiff an additional remedy, points out the course in which it is to be pursued. It directs, that in such cases the sheriff shall be commanded that he make known to the party of whom the

(1) See now R. S. C. Ord. XLII. rr. 8, 20, 22.—A. C.

SHERWOOD v. CLARK.

complaint is made, that he be before the justices at a certain day, to show if he has anything to say why the matter enrolled should not be executed, and if he do not come on that day, or come and can say nothing why execution ought not to be made, the sheriff shall be commanded to cause the thing enrolled to be executed.

The date of the original judgment, apparent on the face of the writ, shows that the plaintiff could not have been entitled to execution before he had obtained a judgment in *scire facias*. But the writ omits to state that any such judgment has been obtained. It is, however, unnecessary for the Court to express any opinion upon the effect of this omission in order to dispose of this rule. As to the second objection, *Webber* v. *Hutchins* (1), in which a *fieri facias* was set aside on the ground of the mandatory part of it requiring the sheriff to levy for an amount less than the sum recovered by the judgment, without accounting for the residue, is in point.

[767]

With regard to the third objection, the received doctrine resulting from the cases on this subject was, before the 1 Vict. c. 116 came into operation, that the sheriff in general was bound to take and return an inquisition, describing the lands with convenient certainty; and after it was taken, to deliver to the plaintiff a moiety by metes and bounds, the object of such delivery being to define with certainty the portion which the plaintiff was to be entitled to hold thereafter as tenant by *elegit*. Thus, in *Fenny* d. *Masters* v. *Durrant* (2), the Court of King's Bench held a return of the sheriff, stating generally that he had delivered to the plaintiff a moiety of the messuage and lands of which the jury had found the defendant seised, to be void, because it did not show of what particular part of the messuage and lands the moiety delivered consisted. But where the moiety could be sufficiently designated without the addition of metes and bounds, their introduction was unnecessary. This was decided in *Doe* d. *Taylor* v. *The Earl of Abingdon* (3). In that case the sheriff returned an inquisition, finding by name all the different farms and tenements of which the defendant's estate in the county consisted, their value, the number of acres, more or less, the tenants' names, yearly value besides reprises, and the clear yearly amount of the whole, and then repeating the names of a certain number of them, their number of acres more or less, and the yearly amount; further finding that those particular farms and tenements were a true and equal moiety of all the said lands and premises of

(1) 58 R. R. 712 (8 M. & W. 319).
(2) 1 P. & Ald. 40.
(3) 2 Doug. 473.

SHERWOOD v. CLARK.

the defendant; the sheriff then returned as follows: "Which moiety of the said lands and premises I, the said sheriff, on the day of taking the inquisition, have caused to be delivered to the lessor of the plaintiff by the price and extent aforesaid." Yet the inquisition and return were supported, as the description of *the moiety, although without metes and bounds, sufficiently distinguished from the rest of the lands and premises the portions delivered to the lessor of the plaintiff.

[*768]

The object, therefore, of introducing metes and bounds having been to distinguish one moiety from the other when a moiety only of the lands could be taken in execution, the 11th section of the 1 Vict. c. 110, by enabling the execution-creditor to obtain, under an *elegit*, possession of the whole of the execution-debtor's lands, has operated to abolish the necessity of that distinction. Wherefore the introduction of metes and bounds has by that Act been rendered unnecessary, and consequently the third objection fails (1).

On the second objection the rule must be made absolute.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

(IN ERROR FROM THE COURT OF EXCHEQUER.)

1846. *June* 18.

WOODROFFE *v.* DOE D. DANIELL AND OTHERS.

(15 M. & W. 769—794; S. C. 15 L. J. Ex. 356; 10 Jur. 959.)

[THIS case went to the House of Lords, where the judgment of the Exchequer Chamber was affirmed. It is reported in the House of Lords in 2 H. L. C. 811, 18 L. J. Ex. 498, and 13 Jur. 1013, and will appear in a future volume of the Revised Reports.]

(1) See *Doe* d. *Roberts* v. *Parry*, 67 R. R. 643 (13 M. & W. 356).

PRACTICE CASES.

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LLEWELLYN *v.* LLEWELLYN.

1845.

[318]

(3 Dowl. & L. 318—322; S. C. 15 L. J. Q. B. 4; 9 Jur. 991.)

[THIS case is twice cited in Leake on Contracts (4th ed.), as follows: "Where disputed accounts are settled upon the terms that one party shall pay the other a certain sum, there is sufficient consideration to support the settlement" (p. 438). "Payment of a less sum may operate in effectual discharge of an unliquidated or uncertain claim for a greater sum" (p. 630).

These sentences give the whole effect of the case, and give it much better than the head-note, so far as it can be of any modern utility. The only real question was whether a rather loosely drawn declaration contained a sufficient averment of mutual accounts between the parties and contested claims arising out of them, as distinguished from vague allegation of disputes which might have been merely idle. Moreover, the decision is covered by the broader principles of later judgments, see *Miles* v. *New Zealand Alford Estate Co.* (1886) 32 Ch. Div. 266. A reprint is therefore not thought necessary or useful.—F. P.]

REG. *v.* THE JUSTICES OF SURREY (1).

1845.

[343]

(3 Dowl. & L. 343—348; S. C. 15 L. J. M. C. 1; 2 N. S. C. 155; 10 Jur. 72.)

Where an order of removal was executed on the 27th of March, and the next Easter Sessions were held on the 9th of April, consequently less than fourteen days after the removal, and the appellants took no notice of those Sessions, but entered and respited their appeal *ex parte* at the Midsummer Sessions, and gave the regular notice, &c. for the Michaelmas Sessions, at which Sessions the appeal was entered and determined: Held, that the Sessions had jurisdiction over the appeal to hear and determine it, and that the appellants were not bound to have entered and respited at the Easter Sessions, or to have given notice of appeal for the Midsummer Sessions.

The 9 Geo. I. c. 7, s. 8, does not apply to the first Sessions after the removal; but to the first practicable Sessions.

A RULE *nisi* had been obtained in Hilary Term last for a *certiorari*, directed to the justices of Surrey, to remove into this Court an order of Quarter Sessions, quashing an order of removal made under the hands and seals of two justices of the peace for the

(1) *R.* v. *Peterborough Justices* (1857) 7 E. & B. 643, 26 L. J. M. C. 153; *R.* v. *West Riding Justices* (1858) E. B. & E. 713, 27 L. J. M. C. 269; Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), s. 9.

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county of Surrey, whereby Charles Abbott and Esther, his wife, and their child, were ordered to be removed from the parish of St. Mary, Rotherhithe, in the said county of Surrey, to the parish of St. Pancras, in the county of Middlesex; for the purpose of being quashed, on the ground that the Quarter Sessions had not, under the circumstances, any jurisdiction to enter and respite the appeal.

It appeared, that the order of removal was made and served on the 27th of February, 1844, and that the actual removal of the paupers took place on the 27th of March following. That the first Sessions after the removal were the Easter Sessions, which were held on the 9th of April, and at which nothing was done. That at the succeeding Sessions, the Midsummer Sessions, which were held on the 2nd of July, and, by adjournment, on the 8th and 24th, the appeal was entered and respited *ex parte*, and without any notice to the respondents. That on the 28th of September, notice and grounds of appeal were sent to the respondents for the Michaelmas Sessions, which were held on the 15th of October, at which Sessions the appeal came on for hearing. That it was then objected on the part of the respondents, that the Sessions had no jurisdiction, inasmuch as the appeal had been improperly entered and respited; but that the Sessions overruled the objection, and, on hearing, quashed the order. That by the rules of the Surrey Sessions, "six clear days' notice of appeal, and no more, is required to be given by the [*344] appellants to the *respondents previous to trying and prosecuting an appeal against an order of removal."

Howorth, (with whom was *Prendergast*,) showed cause(1):

It is true that by the rules of the Sessions only "six clear days' notice of appeal" is necessary, and, therefore, that the appellants might have given notice for the Easter Sessions, if it had not been for the statute 4 & 5 Will. IV. c. 76, s. 81, which requires that the appellants shall deliver with the notice of appeal, "or fourteen days at least before the first day of the Sessions at which such appeal is intended to be tried," a statement of the grounds of appeal; and enacts, "that it shall not be lawful for the overseers of such appellant parish to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid." The Easter Sessions, therefore, were not a practicable Sessions at which the appeal could have been tried, and the appellants could not, consequently be required to give notice of appeal for those Sessions:

(1) In Trinity Term.

Rex v. *The Justices of Wilts* (1). * * If there were no necessity to give notice of appeal for those Sessions, there could be none to enter and respite the appeal at them. The Midsummer Sessions then became the next Sessions to which the parties were bound to appeal; and the appeal being once properly lodged, the Sessions were fully authorized to adjourn the hearing till the next Sessions: *Rex* v. *The Justices of Wilts* (2). It does not appear on the affidavit whether the appeal was respited on special grounds; but, at any rate, the Sessions exercised their discretion on the matter, with which this Court will not interfere.

Montagu Smith and *Hawkins* in support of the rule:

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The 13 & 14 Car. II. c. 12, s. 2, and the 3 W. & M. c. 11, s. 10, require the parties aggrieved to appeal to the next Quarter Sessions. As the next Quarter Sessions sometimes happened to immediately follow the removal, the notice of appeal that could be given was, in particular cases, inconveniently short; and the 9 Geo. I. c. 7, s. 8, therefore enacted, that no appeal should be proceeded with unless reasonable notice thereof were given to the respondents; but that the Sessions at which such appeal was entered should adjourn the same to the next Sessions, when the appeal should be finally heard and determined. * * The statute of 9 Geo. I. c. 7, therefore, only applies to the next Sessions after the removal, and that upon the express ground that they are not a Sessions at which the parties, in fairness, should be compelled to try. But the present is an attempt to extend the powers given by this Act to the second Sessions after the removal, which the case of *Rex* v. *The Justices of Monmouthshire* (3) shows cannot be done. It is not meant to impeach the power of the Sessions, independent of statute, to adjourn the hearing of an appeal at their discretion; but then the adjournment must take place when the parties have entered the appeal to try it, and not when it is entered as in the present case, *ex parte*, for the purpose of being respited. * * The purpose of the Legislature clearly is, that where a sufficient interval does not occur between the removal and the next Sessions to give a reasonable notice of appeal, that then the appeal shall be heard at the second Sessions; but in no case was it contemplated to give the power of putting off the appeal till the third Sessions.

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Cur. adv. vult.

(1) 8 B. & C. 380; 2 Man. & Ry. 401.
(2) 13 East, 352.
(3) 3 Dowl. 306.

REG. v. JUSTICES OF SURREY.

In the present Term,

WIGHTMAN, J., delivered judgment:

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In this case an order of removal was made in February, and the pauper was actually removed on the 27th of March. The next Sessions were holden in the early part of April, but there was not sufficient time to give the requisite notices and grounds of appeal in order to try, and nothing was done by the appellants at those Sessions. At the July Sessions the appellants entered an appeal *ex parte*, and without any notice to the respondents. On the 28th of September, the appellants gave notice for the October Sessions, and delivered grounds of appeal.

The appeal came on to be heard at those Sessions, and it was objected by the respondents that the appellants were too late, and that the Court had no jurisdiction, and that the appellants ought to have given their notices, &c., in time for the July Sessions, instead of merely entering and respiting the appeal *ex parte*. The objection was overruled by the COURT, who heard the case and determined in favour of the appellants; and the question is, whether they had jurisdiction so to do? By the 13 & 14 Car. II. c. 12, and 3 & 4 W. & M. c. 11, parties thinking themselves aggrieved may appeal to the next Quarter Sessions. The words of the statutes taken strictly would oblige the complaining parties to appeal to the
[*347] very next Sessions, however *near they might be; but as reasonable time must be given to the appellant parish to determine whether they will appeal or not, and due notice, with grounds of appeal, must be given to the respondent parish, it might be impossible to appeal to the very next Sessions consistently with those preliminary conditions; and it has, therefore, been determined, that the next Sessions means the next practicable Sessions, that is, the next Sessions that are consistent in point of time with enabling the appellants to make due inquiries and give the requisite notices. In accordance with this construction of the statute, it is held to be unnecessary to take any step whatever at the Sessions immediately succeeding the order appealed against. This, which was determined in *Rex* v. *The Justices of Essex* (1), and *Rex* v. *Thackwell* (2), and recognised in all the subsequent cases, may be considered settled law.

The appellants, then, in the present case, were not bound to take

(1) 1 B. & Ald. 210.

(2) 4 B. & C. 62; *S. C.* 6 Dowl. & Ry. 61.

any notice of the April Sessions whatever; but it is said, on the part of the respondents, that the appellants were bound to give their notices and serve their grounds of appeal, so as to enable them to try at the July Sessions, and that it was not enough merely to enter and respite the appeal at those Sessions.

When once it was settled that the first practicable Sessions were the next Sessions within the meaning of the statutes, it would seem to follow as a consequence that they must be so for all purposes; and if so, the statute of 9 Geo. I. c. 7, s. 8, directing the justices to adjourn an appeal to the next Quarter Sessions where reasonable notice has not been given, would apply, and the justices be bound to adjourn the case; but whether it did or not, the justices would have jurisdiction where the appeal was entered, and might, of their own authority, adjourn the consideration of it; for which, if it were necessary to cite authorities, the cases of *Rex* v. *The Justices of Wilts* (1), and *Rex* v. *The Justices of Wilts* (2), are in point. If the justices had jurisdiction to adjourn the appeal, the question whether they properly exercised it, in adjourning the appeal *ex parte*, and when no notices had been served, would not be entertained by this Court, which will not review the decision of the Court of Quarter Sessions upon matters within their jurisdiction.

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The adjournment then having been made from the July to the October Sessions by a court of competent jurisdiction, it appears to me that the order of the Court of Quarter Sessions in October cannot be impeached; and I may observe, that the judgment of Mr. Justice WILLIAMS in *Reg.* v. *The Justices of Suffolk* (3), is in accordance with the present decision, as is also that of Mr. Justice PATTESON in *Rex* v. *The Justices of Monmouthshire* (4), as far as the facts of that case render it applicable to this. The rule must, consequently, be discharged.

Rule discharged.

REG. *v.* THE NORWICH AND BRANDON RAILWAY COMPANY.

1845.

[385]

(3 Dowl. & L. 385—392; S. C. 15 L. J. Q. B. 24.)

By the Norwich and Brandon Railway Company Act, 7 Vict. c. 15, (local, personal and public) s. 221, the Company were empowered to build and repair a bridge over a certain river, keeping a certain height above the water, and a certain width of water-way. They had proceeded in the

(1) 13 East, 352.
(2) 8 B. & C. 380.
(3) 8 Dowl. 618.
(4) 3 Dowl. 306.

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construction of the bridge, leaving a less width and height than prescribed; whereupon the proprietors of a mill on the river whose flow of water was injured thereby, wrote requiring them to make it of the width and height prescribed by the Act. To this the solicitors of the Railway Company replied that the Company would make it of the required height, but as to the other matter referred to in the letter, they were instructed to accept service of any process which the parties might think proper to issue. A second, and then a third letter were written requiring compliance, to which the Company returned no answer. It however appeared that the Company had since proceeded to make some of the alterations required: Held, that under these circumstances, there had been a sufficient refusal to warrant the issuing a *mandamus*.

The same section which empowered the Company to build and repair the bridge, enacted that in the event of the bridge not being built, maintained and repaired, it should be lawful for the owner of adjoining lands to do so, and for a justice of the peace to order the Company to pay him the expenses of so doing: Held, that the parties were not compelled to take the course pointed out by this section; but might proceed by *mandamus*.

THIS was a rule calling on the Norwich and Brandon Railway Company to show cause why a writ of *mandamus* should not issue directed to them, commanding them to construct and make a certain bridge, for carrying the railway over the river Yare, at the hamlet of Lakenham, in the county of the city of Norwich, so and in such manner as to leave the same width of water-way under the same as existed at the time of the passing of the Act of Parliament
[*386] of the seventh year of the reign of her present Majesty, *intituled "An Act for making a Railway from Norwich to Brandon, with a branch to Thetford," (7 Vict. c. 15, local, personal, and public,) at the point where the said river is crossed by the said bridge.

The affidavits on which the rule *nisi* was obtained, stated that a certain mill, called the Lakenham Yarn Mill, situated at Lakenham, had belonged to one E. W. Trafford, Esq., who had demised it to the Norwich Union Life Insurance Society, at whose instance the application was made; that the Railway Company had commenced in August, 1844, to build a bridge over the river about a thousand yards from the mill, but without giving the Insurance Society any intimation of their intention; that on the 10th of September, in that year, the directors of the Insurance Society ascertained that the bridge was supported by twenty-eight piles, each about thirteen inches square, driven into the river and standing in eight lines across the water-way; and that the longitudinal beams of the bridge were fixed so as to leave a height of three feet ten inches only above the ordinary surface of the water: whereas the Act of Parliament required five feet, and the same width of water-way as before. That they immediately caused a notice to

be served upon the Railway Company, requiring them to construct the bridge so and in such a manner as to leave the same width of water-way under the said bridge, as at the time of the passing of the said Act existed at the point where the river was crossed by the railway, and so and in such manner as that there should be at all times a clear height of five feet above the ordinary level, or usual water-mark of the river under such bridge, for the passage of boats; that they also gave notice to the Railway Company that the piles and timber placed across the river were an impediment to the free and regular passage of the water to their mills, and diminished the accustomed width of water-way, and did not leave a clear height of five feet above the level of the river. That an answer was received on the 21st of September, from the solicitor to the Railway *Company, who, in acknowledging the receipt of the foregoing notice, stated that it was the intention of the Railway Company to form the bridge in such a manner as to leave the clear height of five feet above the ordinary level or usual water-mark of the river under such bridge; and as to the other matters referred to in the notice, that they were instructed to receive any process which the Insurance Society might think proper to institute in respect thereof. That on the 25th of September, the Insurance Society again wrote to the solicitor of the Railway Company, and stated that they were not satisfied with the bridge being made so as to leave five feet clear height above the ordinary level of the bridge, unless the same width of water-way were left under the bridge as existed at the time of the passing of the Act; and that they insisted on the bridge being made according to the letter and meaning of the Act in every respect. That no notice being taken of this letter, the Insurance Society again wrote to the solicitor of the Railway Company on the 21st of October, stating, that although the Railway Company had altered the bridge, so far as related to the height above the level [of the] water, the width remained the same, and the impediment to the free flow of water and passage of boats, by reason of the piles and timber driven into the water, continued; and requesting to know whether the Railway Company meant to alter the works in these respects, or to try the question as they then stood. That no reply whatever had been received.

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A rule *nisi* for a *mandamus* was obtained in Michaelmas Term, 1844.

The affidavits, in answer (1), stated, that instructions had been

(1) The rule was enlarged, and the affidavits in answer filed in Hilary Term, 1845.

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given by the Railway Company to their engineer, in October, 1844, to widen the river at and under the site of the bridge, by a cutting on the west side thereof, to be laid into and united with the original stream, and to be of the *average depth of six feet, and [*388] of the width of fifty feet on the north side of the bridge, and increasing to sixty-six feet on the south side, and continued on each side of the bridge, so as to join the original banks of the stream without making any angle; that some delay had occurred from a difficulty in obtaining materials and some other causes; that the works for widening the river were begun on the 27th of October, but were stopped early in November, in consequence of the floods in the river which had then begun; that they were prepared to continue the same, and were only waiting till the weather and the state of the water would permit, which they would not at that time; and that the tenant of the mill had been informed of the Railway Company's intention to widen the river, when the instructions were given to their engineers, and before they were commenced.

Gurdon now showed cause:

The Court, it is submitted, will not grant a *mandamus* to a public body to perform an act, unless there has been a direct refusal by them to do it, or there has been such conduct on their part as is equivalent to a direct refusal: *Rex* v. *Brecknock and Abergavenny Canal Company* (1); *Rex* v. *The Wilts. and Berks. Canal Company* (2). In *Reg.* v. *The Bristol and Exeter Railway Company* (3), the COURT refused to grant a *mandamus* where no direct refusal appeared, although the Company there had only a limited time within which to perform the works by the terms of their Act, and that time had expired. Here there has been no direct refusal in terms; and the Court cannot infer one, as the affidavits show that in point of fact the Company did comply with the requisitions stated in the notice of the Insurance Society, until they were prevented from proceeding further by the advanced period of the [*389] year and the state of the *weather. There is, however, a further answer to the present rule. By the 241st section of the Act (4), in

(1) 3 Ad. & El. 217; *S. C.* 4 Nev. & M. 871.

(2) 42 R. R. 445 (3 Ad. & El. 477; *S. C.* 5 Nev. & M. 344).

(3) 4 Q. B. 162; *S. C.* 3 G. & D. 384.

(4) Sect. 241. It was enacted, "that in making the said railway through the estate of the said E. W. Trafford, Esq., in the parish or hamlet of Lakenham, the said Company shall" (make certain ditches, and lay down a

the case of the bridge not being properly built, according to the true intent and meaning of the Act, another remedy is given, by application to a justice of the peace, who is authorized to grant an order to the party to make the bridge, the expenses of which are to be borne by the Railway Company. The Act having pointed out a specific legal remedy, the party is bound to pursue it, and cannot come to this Court for a *mandamus*. Besides, by section 242 (1), the Company may alter the course of any river, *not a navigable [*390] one (which this is not), and if any damage be committed in so doing, compensation must be sought in the manner pointed out by the Act.

certain tunnel), and "construct or cause to be constructed, and for ever keep in repair the bridge for carrying the railway over the said river," (the river Yare) "so as to leave the same width of water-way under the same as at present exists, at the point where the said river will be crossed, and so that there shall be at all times a clear height of five feet above the ordinary level or usual water-mark of the said river under such bridge for the passage of boats; and if at any time after notice in writing shall be given to the said Company by or on the behalf of any owner or occupier of lands adjoining or lying near to the said railway that the said ditches or the said tunnel or bridge or any of them, or any part thereof, are or is not made, cleansed, maintained and repaired, according to the true intent and meaning of this Act, it shall be lawful for any such owner or occupier, from time to time as often as there shall be occasion, to apply for and obtain an order in writing from any one or more justice or justices of the peace for the city of Norwich and county of the same city, and the said justice or justices is and are hereby authorized and required, at his or their discretion, to grant such orders as aforesaid, enabling such person to make, cleanse, and repair such ditches, tunnel, and bridge accordingly; and the reasonable expenses thereof (to be ascertained by the said justice or justices) shall be defrayed by the said Company; and in case of neglect or refusal to satisfy and defray such expenses for the space of fourteen days after demand thereof made upon the said Company, such expenses shall and may be recovered and levied by such owner or owners, occupier or occupiers, in such manner as any other money is by this Act directed to be recovered from the said Company."

(1) Sect. 242 enacts, "that, *subject [*390, *n.*] to the provisions and restrictions contained in this Act, it shall be lawful for the Company, for the purpose of constructing the railway, to execute" (amongst others) "the following works:" "They may alter the course of any rivers not navigable, canals, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, if necessary, for constructing and maintaining tunnels, bridges, passages, or other works over or under the same; and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper:" "provided always, that in the exercise of the powers hereby granted the Company shall do as little damage as can be, and shall make full satisfaction, in manner herein provided, to all parties interested for all damages by them sustained by reason of the exercise of such powers."

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The *Solicitor-General* (with whom was *Cleasby*), in support of the rule:

It is submitted that the conduct of the Railway Company is equivalent to a direct refusal. By their letter of the 21st of September, they say they are willing to comply with the requisitions of the Insurance Society so far as regard the height of water; but that as to the rest, they are ready to accept any process the Insurance Society may think proper to institute against them. This, it is submitted, is equivalent to a direct refusal; especially when coupled with their silence with respect to the two subsequent letters which were sent to them, demanding compliance with the terms of the Act, as regarded the width of water-way. In *Rex* v. *The Wiltshire and Berkshire Canal Company* (1), the demand seems to have been made on the wrong party; and in *Reg.* v. *The Bristol and Exeter Railway Company* (2), the opportunity was not afforded [*391] the Company of exercising the option *which the Act gave them, of altering the work themselves. It is left in uncertainty, on the affidavits of the Company, whether even had they gone on with the works described in October, they would have completed the bridge as required by the Act. They ought to have sworn that by means of the works the water-way would be left in the same state as at the passing of the Act. They refuse to answer the letters of the Insurance Society; and now rely on having complied with their terms. If the works are being properly carried out, that will be an answer on the return. As to the objection that another remedy is given by the 241st section, it is clear that that section does not apply to a case like the present, where the object is to prevent the Company from improperly constructing a bridge, not to enable the party to build one himself.

(PATTESON, J.: The statute does not say that the justices shall have power to order the Company to build the bridge. It would be very hard if a party were confined to the remedy of pulling down the bridge and building up a new one.)

As to section 242, it is impossible to argue that it applies to the bridge expressly mentioned in the preceding section. (They were then stopped.)

PATTESON, J.:

I do not wish to express any opinion as to what the words "so

(1) 42 R. R. 445 (3 Ad. & El. 477; *S. C.* 5 Nev. & M. 344).

(2) 4 Q. B. 162; *S. C.* 3 G. & D. 384.

as to leave the same width of waterway under the same" mean—whether they mean that the Company should throw a single arch over the river, so as to leave the channel untouched, or that they may widen the river and put piers in the middle, so as ultimately to leave the same width. I am, however, of opinion that this rule must be made absolute, and for this reason. Here is a letter written by the solicitors of the Railway Company, in answer to a letter from the Insurance Society, which makes two complaints; with the first of which they say the Railway Company will comply, but as to the other complaint, they say they are instructed to accept service of any *process which the Insurance Company may think [*392] proper to bring against them. If the latter part of that letter is not a refusal by the Company, I confess I am at a loss to know what is to be considered as a refusal. No doubt something is afterwards done by the Railway Company towards removing the obstruction; but then two other letters are sent to them by the Insurance Society, to which they make no reply. If these Companies will take upon themselves to treat parties with so little respect, they must take the consequences upon themselves, and I cannot assist them. The rule will, therefore, be absolute.

Rule absolute.

REG. *v.* THE LONDON AND BLACKWALL RAILWAY COMPANY.

1845.

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(3 Dowl. & L. 399—406; S. C. 15 L. J. Q. B. 42.)

By the London and Blackwall Railway Act, 6 & 7 Will. IV. c. cxxiii., (local and personal, public) sect. 27, the costs, &c. of a jury to assess compensation are, where the jury find a greater sum by their verdict than that offered by the Company, to be borne by the Company, and "such costs, charges, and expenses shall be settled and determined by the sheriff," &c., with a power of distress, in case the same shall not be paid within a limited time. By the 37th sect. the costs of deducing title are to be borne by the Company; and by sect. 38, in case the parties cannot agree as to the amount of such costs of deducing title, &c., they are to be ascertained by one of the Masters of the Court of Exchequer, and that Court may order their payment accordingly: Held, that the Court would not grant a *mandamus* to the Company to pay the costs of an inquiry, and of deducing title to premises injured by the proximity of the railway, where the amount of the costs had not been first ascertained in the mode pointed out by the Act.

SAMUEL WALKER being the owner and occupier of a certain tavern and dwelling-house, a part of which was situated within fifty feet of the London and Blackwall Railway, applied to the Company to purchase the whole premises, making compensation for good will, &c.

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The *Company took no notice of this application. Whereupon thirty days having elapsed, he on the 5th of June, 1841, gave them notice under the 6 & 7 Will. IV. c. cxxiii., (local and personal public,) and the 2 & 3 Vict. c. 95, (local and personal public,) to issue their warrant within twenty-one days for the purpose of causing a jury to be summoned to determine whether he was entitled according to the statutes to have the said tavern and dwelling-house purchased, and compensation made as before demanded, and to assess the sums payable; and he annexed particulars of his claim. This notice being also disregarded, on the 3rd of August, 1841, he issued a precept to the sheriff under the power given by the Acts, requiring him to impannel a jury to inquire whether the property in question had been deteriorated in value by the construction of the railway, and to find whether he was entitled to have the property purchased by the Company and compensation made, according to his claim; and to assess the amount of purchase-money and compensation, and also to inquire, and by their verdict ascertain and determine all such matters and things as they might be lawfully required in the premises. Accordingly the sheriff impannelled a jury and proceeded with the inquiry; but it appearing that only part of the dwelling-house was within fifty feet of the railway; the under-sheriff, who presided, refused to allow the inquiry to proceed, and directed the jury that the claimant was not entitled under the Act to have the premises purchased. A rule *nisi* was obtained in this Court in Michaelmas Term, 1841, for a *mandamus* to compel him to proceed with the inquiry, which in Michaelmas Term, 1842, was after argument, made absolute (1). The sheriff thereupon impannelled a fresh jury on the 27th of March, 1843, and proceeded with the inquiry, when the jury returned a verdict, that the premises were

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deteriorated in value; and *they assessed the value of the lease and good will at the sum of 2,000*l.*; loss by the removal 200*l.*, and the fixtures to be taken at a valuation. The Company paid these sums to Walker, but refused on application by Walker to their solicitor to pay the costs and expenses in preparing the necessary evidence to support his claim on the two several inquiries, or to pay the expenses of deducing title to the premises to the satisfaction of the Company. It was not stated in the affidavit whether the jury had been required to assess the costs of the inquiries, nor did it appear that the mode pointed out by the Act of ascertaining the expenses of deducing title had been followed. The refusal of the Company

(1) See the case reported, 66 R. R. 388 (3 Q. B. 744; *S. C.* 3 G. & D. 549).

to pay them was not however stated to be founded on either of these grounds.

A rule had been obtained, calling on the Company to show cause why a writ of *mandamus* should not issue, directed to them, commanding them to pay to Walker, the costs and expenses of the first and second assessment of compensation before the sheriff; and also the costs, charges and expenses, incurred by him in verifying his title to the premises, in respect of which compensation was awarded by the jury.

Hugh Hill showed cause:

There are several objections to this rule. First, there has been no sufficient demand and refusal of payment of these costs, to found an application for a *mandamus*. In order to make a proper demand, the amount claimed must be a fixed and definite sum. Secondly, the Acts (1) point out a specific mode by which *the amount of costs [*402]

(1) The material sections are as follow: 6 & 7 Will. IV. c. cxxiii. s. 27. "That in every case in which the verdict of a jury, summoned as aforesaid, shall be given for the same or a greater sum than shall have been previously offered by the said Company for the purchase of any lands to be used or taken by them for the purposes of this Act, or as compensation for any damage or loss which may happen or arise in the execution of any of the powers hereby granted, all the costs, charges, and expenses of summoning such jury, and the expenses of witnesses, shall be defrayed by the said Company, and such costs, charges, and *expenses shall be settled and determined by the said sheriff, under-sheriff, bailiff, coroner or other person as aforesaid, or by the registrar of the said court of mayor and aldermen; and in case such costs, charges, and expenses shall not be paid to the party entitled to receive the same within ten days after the same shall have been demanded, then the same shall and may be levied and recovered by distress and sale of any goods and chattels of the said Company, under a warrant to be issued for that purpose by any justice of the peace for the county, city, or liberty wherein such inquistion shall be held, not interested in the matter in question, which warrant such justice is hereby authorized and required to issue, under his hand and seal, on application made to him for that purpose by any party entitled to receive such costs, charges, and expenses," &c.

Sect. 37. "That all the costs, charges, and expenses on the part as well of the seller as the purchaser, of all conveyances and assurances of any lands which shall be purchased or taken by the said Company for the purposes of this Act, and of deducing, evidencing, and verifying such title as the Company may require to the said lands, and of making out and furnishing such abstracts and such attested copies as the said Company may require, and all expenses whatsoever incident to the investigation, deduction, and verification of such title, shall be exclusively borne and paid by the said Company; and the said Company, before entering into possession of the lands so purchased or taken, shall pay the amount of such costs, charges, and expenses, or in case there shall be any dispute about the same, shall obtain such order as hereinafter mentioned, and shall deposit, for the purpose of paying the same, in such [*402, n.]

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is to be ascertained, and that course has not been taken in the present instance. Thirdly, *under the terms of these Acts, it has

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[*403] manner as hereinafter mentioned, the amount of the costs, charges, and expenses claimed by the party or parties from whom the lands shall be purchased or taken: provided always, that the said Company shall not be prevented from entering into possession of the lands so purchased by reason of the non-payment of the said costs, charges, and expenses, or by reason of the order hereinbefore mentioned not having been obtained, or the deposit herein mentioned not having been made, unless the party or parties from whom such lands shall have been purchased shall, within seven days after notice in writing for that purpose shall have been given to them by the said Company, deliver a bill of their said costs, charges, and expenses to the said Company."

Sect. 38. "That if the said Company, and the party or parties aforesaid cannot agree as to the amount of such costs, charges, and expenses, the same shall be ascertained by the said Court of Exchequer; and it shall be lawful [*403, n.] for the said Court on petition, to *be presented by the said Company, to order and direct that such costs, charges, and expenses, shall be referred to one of the Masters of the said Court, to be taxed in the usual manner; and such order shall be served on the party or parties aforesaid, who shall be at liberty to proceed under the same; and after taxation of such costs, charges, and expenses, it shall be lawful for the said Court to order and direct that the amount at which the same shall be so taxed, together with the costs, charges, and expenses attending the taxation thereof, or so much of the same as shall be payable by the said Company to the person or persons from whom such lands shall have been purchased or taken as hereinafter mentioned, shall be paid to the person or persons aforesaid; and the said money so deposited as aforesaid shall be applied under the direction of the [*404, n.] said Court, towards the payment thereof, so far as the same will extend: provided always, that the said Company shall not be at liberty to enter into possession of the lands so purchased or taken until an order shall have been made for the taxation of the said costs, charges, and expenses, and the said Company shall have deposited the sums claimed in respect of the same in the Bank of England, in the name and with the privity of the Accountant-General of the said Court of Exchequer, to be placed to his account there *ex parte* "The Commercial Railway Company," pursuant to the method prescribed by the hereinbefore mentioned Act, passed in the first year of the reign of his late Majesty King George the Fourth, which sums shall be applied under the order of the said Court, in payment of the said costs, charges, and expenses: provided always, that the expense of determining such costs, charges, and expenses as aforesaid, and of obtaining the order or orders referring the same to be taxed, shall be paid and borne by the said Company, unless one-sixth of the said costs, charges, and expenses, shall be disallowed, in which case the said expense shall be paid and borne by the person or persons for whom the said lands were purchased or taken, and the amount thereof may then be paid to the said Company out of the said sum so deposited by them as aforesaid."

2 & 3 Vict. c. 95, s. 18. "That in all cases where the verdict of a jury, summoned as by the said first recited Act directed, shall be given for the same, or for a greater sum than shall have been previously offered by the said Company for the purchase of any lands to be used or taken by them for the purposes of the said recited Acts or this Act, or as compensation for any damage or loss which may happen or arise in the execution of any of the powers thereof, the expenses of instructing, and the reasonable fees to *counsel, not exceeding two in number,

been decided that a party in the situation of Walker is not entitled to costs: *Corrigall* v. *The London and Blackwall Railway Company* (1). And fourthly, even were he entitled to these costs, a specific remedy is given for the costs of the inquiry by distress, and for the costs of title by application to the Court of Exchequer; and therefore the Court will not grant a writ of *mandamus*: *Reg.* v. *The Hull and Selby Railway Company* (2). The terms of the 6 & 7 Will. IV. c. cxxiii. ss. 27 and 37, under which these costs are sought to be enforced, clearly refer to those cases only in which the premises are taken "for the purposes of the Act;" and do not relate to a case like the present where the Company are compelled to purchase under sect. 51, of the first Act, and sects. 22, 23, of the latter Act, in consequence of the premises being deteriorated in value; and where it appears upon the affidavits that the premises were neither "taken, used, nor required for the purposes" of the Acts. The 6 & 7 Will. IV. c. cxxiii. ss. 27 and 38, and the 2 & 3 Vict. c. 95, s. 18, point out the mode in which such costs are to be ascertained; and if the party had any right to make this application, he was at least bound, to first ascertain the costs in the manner pointed out in the Acts and make a formal demand of them. But at any rate it is clear that the Company are not liable for the costs of the first and abortive inquiry, as that would be to make them liable for the mistake of the sheriff.

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Jervis and *Edwin James*, in support of the rule:

The *amount of the costs claimed was not in dispute. Therefore it was not necessary to adopt the remedy pointed out by the 27th and 38th section of the former Act, and the 18th sect. of the latter. The 38th section of the former Act clearly only applies to cases where there is a dispute about the amount of the costs: and not to a case where the only dispute is as to the Company's liability to pay them. It cannot be denied that the case of *Corrigall* v. *The*

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for attending the inquiry before such jury, and the reasonable expenses of one surveyor, which may have been paid by the party with whom the said Company may be in dispute, shall be paid by the said Company and the amount of such fees shall be settled and determined by the sheriff, under-sheriff, bailiff, under-bailiff, coroner, or other person presiding at the taking of such inquiry, in like manner as the costs of summoning such jury, and other expenses payable by the said Company, but upon the same scale of allowance as may for the time being be adopted or allowed by the taxing officers of her Majesty's Courts of Record at Westminster."

(1) 2 Dowl. N. S. 851; *S. C.* 6 Scott, N. R. 241; 5 Man. & G. 219.

(2) 6 Q. B. 70.

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London and Blackwall Railway Company, is against the view here submitted; but the object of the present rule is by putting the answer to the writ of *mandamus* on the record (1), to review the propriety of that decision. The 27th section must be read so as to make the words "previously offered by the Company," apply only to the case of lands purchased by the Company to be used or taken by them for the purpose of the Act; for they have no power to "offer" any sum by way of compensation.

(PATTESON, J.: The section in terms seems not to apply to cases where the Company have made no previous offer.

Hugh Hill referred to the 22nd section of the Act as giving a power to offer compensation.)

With respect to the costs of title, section 37, uses the term, lands purchased or taken "for the purposes of the Act" not for the purposes of the railway; and they would not take in their corporate capacity, except for the purposes of the Act. There was no objection made as to the amount not being ascertained. The only question was as to the Company's liability. The 27th section only applies to cases where the Company does not dispute its liability but the amount claimed. We are obliged to come to the Court to get these costs. The 37th section applies equally to cases where the Company does not take the initiative.

PATTESON, J.:

[*406] Independently of the case in the Common Pleas, there is a difficulty which weighs with me in *this case. The sheriff, in taxing the costs of the inquiry, under the 27th section of the 6 & 7 Will. IV. c. cxxiii., is not bound to hear both sides, but may proceed *ex parte*. Can then a party come here without having first applied to the sheriff to ascertain the amount of the costs in the mode pointed out in the Act of Parliament? It does not appear upon the affidavits indeed that this objection was raised by the Company; but *Mr. Hill* has relied upon it in his argument, and I cannot exclude it from consideration. It seems to me that the proper course is to go to the sheriff and get him to tax the costs of the inquiry, for until that is done I cannot interfere. With respect also to the costs of deducing title, this is not the proper mode of enforcing their payment; for supposing a peremptory *mandamus*

(1) Under the 6 & 7 Vict. c. 67, s. 1.

were to go, directing the Company to pay them, who is to ascertain their amount? Not the Master of this Court, for the Act says they shall be ascertained by one of the Masters of the Court of Exchequer. If, after the amount of these costs has been ascertained the Company refuse to pay them, there is still the remedy pointed out by the Act of proceeding by distress. If these means should fail, it will be then time enough for this Court to grant a *mandamus*. It seems to me, therefore, that the application for a *mandamus* is at present premature, and that the rule must, consequently, be discharged.

Rule discharged.

EX PARTE GEORGE CRITCHLEY (1).

1846.

(3 Dowl. & L. 527—531; S. C. 15 L. J. Q. B. 124.)

[527]

Where a charge of embezzlement was pending before a magistrate, who entertained doubts whether a partnership did not exist between the prosecutor and the accused party: Held, that a warrant of attorney given to secure the payment of the monies charged to be embezzled, the charge being afterwards withdrawn, was invalid; as at the time of giving it, there was a charge of a criminal nature pending, which it was calculated to bring to an end.

A RULE had been obtained in last Michaelmas Term, calling on Thomas Turner to show cause why a warrant of attorney, dated the 10th of October, 1845, and executed by George Critchley the elder, and others, should not be set aside, on the ground that it had been given for an illegal consideration.

The affidavit of George Critchley the elder, on which the rule was obtained, stated the following facts: That in November, 1844, the deponent's son became a partner with Turner in the business of a shoemaker, and that the partnership lasted about eleven months. That on the 17th of September, 1845, Turner, under the pretence that the deponent's son was his servant and not his partner, caused him to be arrested and taken before a magistrate, on a charge of embezzlement. That the prisoner was several times remanded at the instance of Turner, in order to enable him to bring further evidence, and ultimately was admitted to bail to appear on a subsequent day. That prior to the last remand, an interview took place between the deponent, one Adwin, and Turner's attorney, at which *the latter, in answer to questions put to him as to the [*528] nature of the charge against the prisoner, said there were several charges of a very serious nature, amongst which were some for

(1) Cited by FRY, J., *Whitmore* v. *Farley* (1880) 43 L. T. 192, 196.

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receiving and embezzling money, and for altering invoices sent with goods; also one for stealing certain shoes, and various other charges, which would certainly send the accused out of the country; and that if Adwin wished to say anything about the matter he had better come alone, as he (the attorney) objected to any third party being present. That afterwards several other interviews took place between Turner, and his solicitor, and the deponent; and that it was ultimately arranged, that a certain sum of money should be paid down, and that security should be given for any further sum which might be found due from the accused to Turner; and that upon such security being given, the proceedings before the magistrate should be abandoned, and that Turner's attorney should acquaint the magistrate that the charge could not be sustained for want of sufficient evidence. That on the 13th of October, the warrant of attorney in question was accordingly given by the deponent, the accused, his sister and brother-in-law; and that on the 15th of October, to which day the examination of the charge had been adjourned, the attorney for Turner informed the magistrate, that counsel's opinion having been taken, it was found that the charge could not be sustained, and the prisoner was then accordingly discharged. The deponent also stated that he was induced to sign the warrant of attorney by his desire to save his son the disgrace of a trial, and under the belief that on an inspection of accounts he would not be called on to pay the warrant of attorney.

The affidavits in answer did not deny that the warrant of attorney was given to secure the payment of certain sums due to Turner from the accused, and that charges of embezzlement had been preferred; but denied that the warrant of attorney was given to compromise any charge of embezzlement. They stated [*529] that at an interview between *the parties, account books had been produced, and that the accused had then admitted the sum for which the warrant was given to be due from him to Turner. That the defence set up before the magistrate was, that the accused and Turner were partners; and that the evidence that Turner himself had given before the magistrate was, that he had agreed with the accused that the latter should share the profits of the business with him, besides other advantages. That the magistrate himself had expressed great doubt whether, under the circumstances, the charge of embezzlement could be sustained, and that the charge of stealing was withdrawn before the settlement. One of the affidavits also

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stated, that at the time of the settlement the deponent well knew that "no felony was compounded or compromised, as the same had long before been abandoned, and never could be, or was proved, or substantiated, it being altogether doubtful whether any criminal charge whatever could have been legally established."

Pigott (with whom was *Crowder*) now showed cause:

It is not denied that a warrant of attorney given to compound a felony would be void; but here the affidavits show that no felony has been committed; for the charge of embezzlement could not be sustained if the parties were partners, as the evidence showed they were, and the charge of stealing the shoes was withdrawn before the warrant of attorney was given. It is not necessary to constitute a partnership that the parties should share the loss as well as the profit. If no felony had been committed, and the warrant of attorney was only given to secure a debt due from Critchley the younger to Turner, as our affidavits show; it does not signify whether Turner had at one time proposed to treat it as a criminal charge. In *Ward* v. *Lloyd* (1) the ground alleged for setting aside a warrant of attorney was, that it was obtained from the defendant by *a threat of prosecution for felony; but it was held that that was no sufficient ground, unless it distinctly appeared that there was an agreement by the plaintiff, either express or necessarily implied, to abstain from prosecuting upon the security being given. Here we distinctly deny that there was any such agreement; the fact of the books being referred to, shows that the parties considered it as a civil, and not a criminal matter.

[*530]

Petersdorff, in support of the rule:

It is not necessary that there should have been an indictable offence committed, upon which a conviction might be obtained. It is sufficient that at the time there was a charge of a criminal nature pending; that the warrant of attorney was given for part of the monies included in that charge, and that that charge was afterwards withdrawn. The Court will see that if in a case like the present the warrant of attorney were held valid, nothing could be easier then for parties to defeat, in almost every case, the ends of justice. (He was then stopped.)

WILLIAMS, J.:

It appears to me perfectly clear, when we attend to the dates and

(1) 64 R. R. 847 (6 Man. & G. 785; 7 Scott, N. R. 499).

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real nature of this transaction, that the illegality of this security is attempted to be hid under a very thin disguise. *Mr. Pigott* has presented the case as favourably as the facts would permit; but I think there is very little doubt at all. In the case which has been cited (1), the Court does not seem to have thought that there was any ground at all for assuming that any criminal proceedings were about to be taken. In the present case, on the contrary, it is not disputed that a criminal prosecution was pending at the time when the warrant of attorney was given. Now, what induced Critchley to give this warrant of attorney? If there had been anything to show that the criminal prosecution had ceased, and that resort [*531] *was about to be had to civil proceedings for the purpose of recovering the money, there might then be some ground for supposing that the warrant of attorney was given for the purpose of settling such civil claim. That the books were referred to, seems quite consistent with the warrant of attorney being given to compromise the charge of embezzlement, as no doubt the parties would refer to them for the purpose of ascertaining the amount of the debt; for every embezzlement includes a debt as well as a felony. It seems clear, beyond a doubt, that there was a prosecution for a felony at the time pending, and that a doubt had arisen in the magistrate's mind as to whether a partnership existed between the parties or not. That being so, I cannot but see that the warrant of attorney was calculated to bring the proceedings to an end, and, as far as appeared at the time, to prevent the party from being subjected to a criminal prosecution. The rule must, therefore, be made absolute.

Rule absolute.

1846.

CROSBIE *v.* HOLMES.

[566]

(3 Dowl. & L. 566—573; S. C. 15 L. J. Q. B. 125.)

Action on the case. The first count was for selling manure, falsely and fraudulently representing it to be guano; alleging as special damage not only the injury to plaintiff's own lands and crops, but that he had been obliged to pay to several parties named, to whom he had resold it, compensation for the injury caused to their lands and crops. There was a second count similar to the first, upon another sale of another parcel of the manure. Before plea pleaded, a Judge's order was obtained, referring "all matters in difference between the parties in the cause" to an arbitrator; the costs of the action to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. It appeared that at the inquiry before the arbitrator a witness who had

(1) 64 R. R. 847 (6 Man. & G. 785; 7 Scott, N. R. 499).

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purchased or used some of the guano, was tendered on behalf of the plaintiff, to prove the special damage alleged in the declaration, but was objected to on the ground that he was not named in the declaration, and that his evidence was accordingly not received. The arbitrator, by his award, which was not expressed to be *de præmissis*, ordered the defendant to pay to the plaintiff a certain sum of money, and that the costs of the reference and award should be paid by the defendant: Held, that the award was bad, for not showing whether the money was to be paid in respect of the action, or of any other matter in difference between the parties.

DECLARATION on the case. The first count stated that the defendant, upon the sale of certain manure by him to the plaintiff, had falsely and fraudulently warranted and represented the manure to be guano; whereas in truth and in fact the said manure or substance was not guano, but was an useless, hurtful, and deleterious substance, of no use or value to the plaintiff, as the defendant, at the time of such warranty and representation well knew, by means whereof the plaintiff not only used the said manure upon *his own [*567] lands, but sold certain quantities thereof to other parties, and warranted and represented to them that the same was guano, and that the said other parties used the same in manuring their lands. It then alleged as damage that the lands and the crops and herbage of the plaintiff and the said other persons were injured thereby, and that the plaintiff not only lost the benefit and advantage of his own lands and crops, but that he "hath become and now is liable to pay divers large sums of money, amounting, to wit, to 500*l.*, to divers of the said persons to whom he sold the said manure, and warranted the same to be guano as aforesaid, to wit, James Grierson," (here followed several other names) "as and for compensation and amends for the injury they have sustained in their fields and crops as aforesaid," &c. The second count was similar to the above, except that it was for another sale of another quantity of manure.

Before plea pleaded, the parties agreed to a reference; and a Judge's order was accordingly drawn up on the 6th of October, 1845, which ordered "that all matters in difference between the parties in this cause be referred to the award," &c., of H. B., &c., "and that the costs of this action shall abide the event of the award, and that the costs of the reference and award shall be in the discretion of the arbitrator."

The award recited the order of reference, and proceeded thus: "Now, I, the said H. B., having taken upon myself the burthen of the said reference, having examined upon oath all such witnesses

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as were produced before me, and having heard and duly and maturely weighed and considered the several allegations, vouchers and proofs before me, by and on behalf of the said Crosbie and Holmes respectively, do award, order and adjudge, that the said J. N. Holmes, his executors, &c., do and shall pay, or cause to be paid, unto the said J. Crosbie, on, &c., at, &c., the sum of 167*l.* 6*s.* 2*d.* And I do further order, that the costs of the said
[*568] reference and of this my award, and all *other costs connected therewith, shall be borne and paid by the said J. N. Holmes; and all other costs connected therewith shall be borne and paid by the said J. N. Holmes. And that the costs of the said J. Crosbie therein, including the sum of 12*l.* 12*s.*, which he hath paid to me for my charges herein, and for this my award, shall be paid to him by the said J. N. Holmes, at the time and place hereinbefore appointed for the payment of the said sum of 167*l.* 6*s.* 2*d.*"

A rule had been obtained in Michaelmas Term last, calling on the plaintiff to show cause why the award should not be set aside on the following grounds (1): "that the arbitrator has not in or by the award disposed of or decided or awarded upon the action mentioned in the submission and order of reference: that it does not appear whether the sum awarded to be paid was a sum due in or by reason or in respect of the action, or was due in respect of other causes of action or matters in difference between the parties in the cause: and that the sum so awarded may be due in respect of the matters referred to in the affidavit of the defendant, other than matters in the cause, and that the defendant may have been entitled to succeed in the action, although the plaintiff was entitled to the sum awarded to be paid to him; and that the action is left subsisting and entirely undetermined, and that no damages are awarded therein, and that the award is uncertain, and not final, for the reasons aforesaid."

It was stated on the affidavit on which the rule was obtained, that the arbitrator had received evidence in respect of parties not named in the declaration in support of the special damage therein alleged; although such evidence was objected to by the defendant's attorney.

[*569] This was denied by the affidavit on the other side, which *showed

(1) The rule was granted by PATTESON, J., after taking time to consider, and was drawn up on reading the rule making the order of reference a rule of Court, the affidavit on which the application was founded, and a copy of the declaration and award.

that only one witness was called whose name was not stated in the declaration, and that he was called to prove that he had purchased or used some of the guano; but that upon his evidence being objected to, the arbitrator did not receive it.

Heath (with whom was *Jervis*) now showed cause:

It is true that the order of reference comprehends all matters in difference between the parties, but it is not shown by the affidavit that there were in fact any other matters in difference than those relating to the cause. The arbitrator, therefore, in ordering the defendant to pay the sum mentioned in the award, in effect decides the action in favour of the plaintiff. [*Gray* v. *Gwennap* (1).] In the present case, although the award is not stated to be *de præmissis*, the Court will not, in the absence of any allegation to that effect in the affidavit, intend that there were other matters in dispute between the parties than those decided by the award. There are several cases indeed which show that where distinct issues are raised, there must be an express finding on *each issue: [*570] *Kilburn* v. *Kilburn* (2); *In re Leeming* (3); *England* v. *Davison* (4); *Maloney* v. *Stockley* (5). But all those cases are distinguishable from the present, because here the cause was referred before plea, and, therefore, no issue was joined. In *Bearup* v. *Peacock* (6), the declaration contained several counts, and the cause was referred by order of a Judge before plea pleaded; and on motion to set aside the award, it was held that the arbitrator was not bound to find specifically upon each count in the declaration, but might find generally that the plaintiff had good cause of action for a certain sum, and award that the defendant should pay him that sum. The cases of *The Duke of Beaufort* v. *Welch* (7), and *Williams* v. *Moulsdale* (8), show that if there be two constructions of an award, the Court will adopt that which will support it. If, however, the Court should be of opinion that this award cannot stand as a whole, the utmost that can be done is to set aside so much of it as relates to the costs of the action; for the defendant would not by possibility be entitled to more than these costs: *England*

(1) 18 R. R. 442 (1 B. & Ald. 106).
(2) 67 R. R. 780 (13 M. & W. 671; 2 Dowl. & L. 633).
(3) 39 R. R. 516 (5 B. & Ad. 403; *S. C.* nom. *Leeming* v. *Fearnley*, 2 Nev. & M. 232).
(4) 9 Dowl. 1052. See 61 R. R. 636, *n.*
(5) 61 R. R. 636 (2 Dowl. N. S. 122; *S. C.* 4 Man. & G. 647).
(6) 14 M. & W. 149; *S. C.* 2 Dowl. & L. 850.
(7) 10 Ad. & El. 527.
(8) 56 R. R. 665 (7 M. & W. 134).

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v. *Davison; In re Leeming; Maloney* v. *Stockley; Morgan* v. *Smith* (1).

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Crompton, in support of the rule:

It appears uncontradicted that there were other matters in difference between the parties; for it appears that a witness who had purchased some of the guano was called in support of the allegation of special damage in the declaration, and that his evidence was not received, merely because his name was not inserted in the declaration. It therefore lies upon the party [*571] sustaining the award to show that the award *could not have reference to that matter (2). It is submitted, however, that this award is clearly bad. The reference is of "all matters in difference between the parties in this cause, the costs of the action to abide the event of the award;" and the arbitrator never so much as alludes to the action in his award. The event of the award must mean the legal event. There are two counts in the declaration: and the Master cannot tell upon this award, whether it was the intention of the arbitrator that the plaintiff or the defendant should recover the costs of the action; or whether in respect of both the counts, or only of one, and of which. [He cited *Pearson* v. *Archbold* (3) and *Kilburn* v. *Kilburn* (4).]

[572] WILLIAMS, J.:

The objection is that the arbitrator has omitted to decide with respect to the action, which was clearly submitted to him, together with all matters in difference between the parties. The reference is "of all matters in difference between the parties in this cause," and "that the costs of the action shall abide the event of the award," &c. The award is, that the defendant should pay a certain sum of money to the plaintiff, and that the costs of the reference and of the award, and all other costs connected therewith, should be paid by the defendant. It is impossible to collect from this award whether this sum is to be paid in respect of the action, or of any other matters in difference between the parties. Unless, however, he has decided in respect of the action, and, moreover, that the plaintiff is entitled to recover in the cause, how can the costs, which were to abide the event of the award, be taxed

(1) 9 M. & W. 427; *S. C.* 1 Dowl. N. S. 617.

(2) This point was not touched upon in the judgment.

(3) 63 R. R. 659 (11 M. & W. 477; 2 Dowl. N. S. 1018).

(4) 67 R. R. 780 (13 M. & W. 671; *S. C.* 2 Dowl. & L. 633).

for the successful party? In *Gray* v. *Gwennap* (1), a case often cited, the words *de præmissis* seem to have been considered of considerable weight in sustaining an award. Whether they would obviate the present objection it is immaterial to consider, as they do not occur here. I *therefore think that the award leaves it [*573] uncertain in respect of what the finding is, and that the rule must therefore be made absolute.

Rule absolute.

(1) 18 R. R. 442 (1 B. & Ald. 106).

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(1) 9 M. & W. 427; *S. C.* 1 Dowl. N. S. 617.

(2) This point was not touched upon in the judgment.

(3) 63 R. R. 2 Dowl. N. S.

(4) 67 R. R. *S. C.* 2 Dowl.

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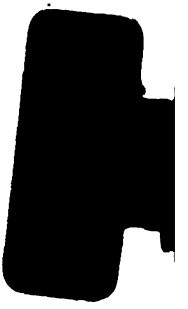

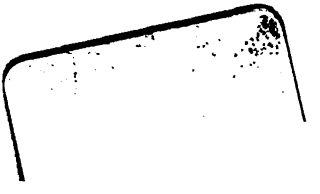

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