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ARRANGED, ANNOTATED, AND EDITED

BY

ROBERT CAMPBELL, M.A.,

OF LINCOLN'S INN, BARRISTER-AT-LAW, ADVOCATE OF THE SCOTCH BAR, AND LATE FELLOW OF TRINITY HALL, CAMBRIDGE.

ASSISTED BY OTHER MEMBERS OF THE BAR.

WITH AMERICAN NOTES

BY

IRVING BROWNE,

FORMERLY EDITOR OF THE AMERICAN REPORTS AND THE ALBANY LAW JOURNAL.

VOL. XV.

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PREFACE TO VOLUME XV.

IT seems necessary to repeat the statement, made in the Preface to Vol. VIII., that the plan of RULING CASES is now so far developed as to afford almost a certainty of the work being completed in twenty-five volumes, as originally estimated.

In this volume, in accordance with the suggestion of some American readers, the Table of Contents has been amplified by adding brief headings of the subjects contained in the cases under each rule. This plan will be followed in future volumes.

R. CAMPBELL.

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RULING CASES.

JUDGE.

No. 1.—EX PARTE JOSÉ LUIS FERNANDEZ.

(1861.)

No. 2. — WATT *v.* LIGERTWOOD.

(H. L. APPEAL FROM SCOTLAND, 1874.)

RULE.

WHEN a Judge, in the legitimate exercise of his jurisdiction, is defiantly disobeyed, he may commit the offender instantly to prison for contempt of Court.

Where a Judge of a superior Court, acting within his jurisdiction, commits for contempt, he is not bound in the warrant (if a warrant is made out) to set forth particularly the ground of commitment.

Ex parte José Luis Fernandez.

30 L. J. C. P. 321–341 (s. c. 10 C. B. (N. S.) 3).

Superior Courts. — Court of Assize. — Witness. — Contempt. — Warrant for Commitment. [321]

The Court of Assize is a superior Court, having authority to issue a general warrant of commitment for contempt.

A witness was fined and committed to prison for six months by a Court of Assize for contempt in not answering a question, and the warrant of commitment (which was headed "*The Queen* v. *C.* Yorkshire, to wit. At the assizes held at, &c., in and for, &c., before the Hon. Sir H. H. and the Hon. Sir H. S. K., two of Her Majesty's Justices assigned to take the said assizes according to the statute, &c.") stated the contempt, but did not set out the question, or state that a jury had been sworn. *Held*, first, that the commitment for a time certain was no excess of jurisdiction; secondly, that it was no ground of objection that the warrant did not state specifically that a jury had been sworn, it appearing

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from the facts stated therein that the proceedings took place upon a trial before a jury; and thirdly, that it was no ground of objection that the question was not set out.

Per WILLES, J. — It was not for the witness, but the Judge to determine whether the question was one which the witness was bound to answer.

Quære, per BYLES, J., whether a warrant was necessary.

José Luis Fernandez was detained as a prisoner in York Castle under the following warrant: "*The Queen* v. *John Barff Charlesworth.* Yorkshire, to wit. At the assizes held, at the castle of York, in and for the said county, on Thursday, the seventh day of March, in the twenty-fourth year of the reign of our Sovereign Lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and in the year of our Lord 1861, before the Hon. Sir Hugh Hill, Knight, and the Hon. Sir Henry Singer Keating, Knight, two of Her Majesty's Justices, assigned to take the said assizes according to the statute, &c.

"On the trial of an information against the defendant for bribery, alleged to have been committed by him on the election of a burgess to serve in Parliament for the borough of Wakefield, José Luis Fernandez, a witness produced, sworn, and examined, on behalf of the Crown, having refused to answer a certain question touching the matter in issue in the said information, put to him by Her Majesty's Solicitor-General of counsel for the Crown in that behalf, and this Court having adjudged that the said José Luis Fernandez was bound by law to answer the said question, and having required him so to do, he wilfully, and in contempt of the Court, refused to answer the said question, and he having wilfully persisted, and still so persisting in such his refusal, the said Court doth therefore adjudge that the said José Luis Fernandez has been and is guilty of a contempt of Court, and the said Court doth order and adjudge that the said José Luis Fernandez be for such his contempt committed, and he is hereby committed to the custody of the sheriff of the said county of York, and to his keeper of Her Majesty's gaol of the castle of York, in and for the said county, to be there detained and kept in safe custody for the term of six calendar months, from the day and year above mentioned. And the said Court doth further order and adjudge that the said José Luis Fernandez, also for such his contempt, shall and do pay to our Lady the Queen the sum of £500, and that he be further

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detained in the custody aforesaid until the said sum of £500 sha
have been paid.

"By the Court, BELL, Associate.
It appeared from the affidavits that the question which the wit
ness had refused to answer was the following: "In the month o
April, 1859, did you receive any money for Mr. Charlesworth ?"
—and that his refusal was on the ground that the answer might
tend to criminate himself. It was then proved, that having been
examined before a Royal Commission appointed to inquire into
corrupt practices at Wakefield, he had received a certificate from
the Commissioners, under 15 & 16 Vict., c. 57, ss. 9 and 10,
protecting him from all legal consequences to which he might be
liable in respect of such corrupt practices; but he objected that he
was still liable to impeachment by the House of Commons. The learned Judge who presided, HILL, J., overruled his objection; but he
consulting KEATING, J., and was accordingly committed under the
still refused to answer,
above warrant.

An application for a *habeas corpus* to discharge the prisoner was
made to the Court of Exchequer, but that Court refused to grant
the writ.

After argument, the Court took time for consideration.
On the 3rd of May the following judgments were given: [328
BOVILL for a writ of *habeas corpus*, on the ground that the impriso
ment of the applicant was illegal; and it appears by the warra
that has been produced, that the prisoner was committed by
Court of Assize held at York, and that he was a witness on
trial; that a question, adjudged by the Court to be a lawful que
tion, was put to him, and that he unlawfully refused to answer
persisted in that refusal, and so was guilty of contempt, and w
committed to prison. Upon the statement in that warrant
appears to me that it was a warrant made by a competent tribu
upon a matter within its jurisdiction, and the warrant is good
the face of it. We are not a Court of review or appeal from
Court of Assize, and if the party is dissatisfied and thinks h
aggrieved, he may apply to the Sovereign, and the Sovereign
give him redress; and it appears from a paper that has
handed to us that he has taken that course. It is not for
say whether we should have done the same as has been done,

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Mr. Bovill to maintain his motion must show that the warrant is void; and the ground that he has taken is, that the warrant alleges that a question was put and an answer refused, and that the warrant does not set out what that question was, and what the ground of refusal, and that it does not set out the evidence upon which the Judge came to the conclusion contained in the warrant. Now, whether that can be required of any Court it is not my purpose to decide; it is certain that if the Court of Assize is a superior Court the objection fails, it being well established that a superior Court may adjudicate that a contempt of its powers has been committed, and may commit for that contempt without stating the facts. The point was most elaborately discussed and examined in *Burdett* v. *Abbott* (14 East, 1; 5 Dow, 165; 12 R. R. 450), and affirmed by the Court of Queen's Bench; elaborately argued again in the same case in the House of Lords; and though the question turned upon a warrant of the Speaker of the House of Commons, the House of Lords put to the Judges the question whether a general warrant adjudicating for contempt, without setting out the evidence made by one of the superior Courts of Westminster, would have been treated as void by another of the Courts of Westminster, and the Judges answered unanimously that it would not, and the House of Lords unanimously affirmed that decision. The question, whether a warrant adjudicating a contempt without setting out the evidence was valid, was again the subject of extreme discussion in *The case of the Sheriff of Middlesex*, 11 Ad. & E. 273, and the rights and powers of a Court of superior jurisdiction to make a warrant of commitment in the form it thinks right for its officers, in the case of *Howard* v. *Gosset*, 10 Q. B. 359, 14 L. J. Q. B. 367, and there is the passage, cited by Mr. Bovill, and relied on, from the judgment of COLERIDGE, J., that the warrant of a superior Court ought to be held void, if it does not comply with certain formalities there in question. That opinion and the judgment founded thereon was the subject of consideration in the appeal to the Exchequer [* 329] Chamber, and that Court held the * warrant good notwithstanding, and established the doctrine that a superior Court may make a warrant of commitment for contempt without setting out the evidence on which it adjudges that the party has been guilty of contempt. Therefore, the question is brought entirely to this point: Is the Court of Assize a superior Court? If it is, the motion fails; if it is not, the motion may prevail. Now, on

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that point Mr. Bovill has brought forward one authority direct, and one authority from Chief Justice VAUGHAN'S report indirect. The direct authority is a passage from Bac. Abr., tit. 'Courts' (D). In treating of superior and inferior Courts it is stated by the compiler of that book that "some Courts are superior and some inferior, and, then, among superior Courts some are superior in a more principal degree: such are the Lords in Parliament, the Chancery Courts, the Court of Queen's Bench, the Court of Common Pleas, and some others; and some are superior in a less principal degree: such are the Courts of Assize, Oyer and Terminer, and other Courts held by custom or charter, such as the Courts of the county Palatine." I do not stop to inquire whether the latter passage means "Courts of Assize and Oyer and Terminer held by custom or charter." We will assume it to be as Mr. Bovill wishes it to be understood. And then there is the opinion of the compiler of that book, that the Court of Assize is a superior Court, but of a less principal degree than the Courts of Queen's Bench and Common Pleas. The proposition to be affirmed is, that it is not a superior Court, and the passage affirms that it is a superior Court, but reliance is placed on its being a superior Court of less principal degree. The words are of no definite significance to my mind, and I think were of none to the writer. He might just as well have said that the Court of Common Pleas was a Court of less principal degree than the Court of Queen's Bench, because at that time a writ of error lay from the Common Pleas to the Queen's Bench, as a Court of superior degree. It might have been said that it was of less principal degree than the Queen's Bench; but if that had been predicated of it, that would not in the slightest degree have interfered with the doctrine that the Common Pleas was a superior Court. So stands the passage, which in its words does not support Mr. Bovill's proposition; but as he has relied on the book, I go no further than it, and I turn to the following chapter in a later part of it, on the Courts of Assize, and it is there stated that Courts of Assize are in effect a substitution for the old Court of Eyre, Justices in Eyre, and Justices of Assize. It does not say that there had been a transfer of the powers and authority of the Justices in Eyre to the Justices of Assize, nor more than the passage in Coke upon Littleton, wherein it is stated that in process of time the Justices in Eyre vanished, and the functions performed by them came, by devolution, to the

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Justices of Assize; but certainly, in speaking of the Justices of Assize, the author had his mind carried back to the Justices in Eyre, and took them as succeeding to many of the powers and authorities exercised by the latter. Now, it is clear that the Justices in Eyre were of equal degree with the Aula Regia. The Aula Regia was where the King was stationary; the Justices in Eyre were sent abroad into the country with all the powers and authorities of the Aula Regia, superseding every tribunal where they came, and having the fullest and highest authority. It is not at all necessary to affirm that all the Justices of Assize are of equal degree, but they are mentioned as taking many of the rights and privileges and authorities which the Justices in Eyre had. The history of the Court of Assize is in the Statute Book, in Magna Charta, and in all the statutes confirming Magna Charta; and provision is made that assizes shall be held four times in every year in each county of the kingdom; and by later statutes the jurisdiction is extended beyond the taking of assizes to the taking of other pleas. And then, I take it, that at that period the Court of Assize was a most principal Court. By the statute of Edw. I., known as the Statute of Westminster the second, jurisdiction to try in the country all the causes which ought otherwise to have been tried in the Courts of Westminster is incidentally made to belong to the Justices of Assize, and from that day to this the Court of Assize has tried all causes in the country under [* 330] the * Nisi Prius clause introduced in the reign of Edward the First just the same as the Courts at Westminster Hall. The statute of the 4 Edw. IV. also provides for the dignity of the Court, enacting that none shall be Justices of Assize except the Justices of either Bench and the Chief Baron and the King's serjeants. Again, the importance of the Court is recognised in the statutes empowering other persons to hold that high office, viz., the Barons of the Exchequer, and afterwards other serjeants besides the King's serjeants. There are in the whole course of our Statute Book and our history the strongest marks that the Court of Assize is of the highest importance. It is called a superior Court in the passage Mr. Bovill relied on, and the history of the Court is confirmatory of its right to that title. In the case of *The King* v. *Joliffe*, 4 T. R. 285 (2 R. R. 383), where the Court considered an affidavit taken at Nisi Prius as taken under the authority of the Court, the Judges of the King's Bench deal with

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the Court of Assize as a Court emanating from and performing the duties of a Court *in banc* in respect of the trial of causes sent to them; and the language of BULLER, J., implies to my mind that, in his opinion, the authority of the Court of Nisi Prius was equal in many respects to that of the Court from which the record came; and to the like effect is *The King* v. *Read*, 16 East, 404, but not so strong. That being the line of authorities on the subject, I turn to see if my knowledge or research can suggest any reason or authority the other way, and I can find no case in which any doubt has been thrown on the point; and I have never known any one acting as a Justice of Assize having any idea that he was an inferior Court or not a Court of a superior degree. That being the state of the authorities to be relied on directly, I come to the indirect authority of the passage in the judgment of VAUGHAN, Ch. J., in *Bushell's Case*, 5 Vaughan, 135, where, dealing with a return to a writ of *habeas corpus* setting forth a commitment for contempt, he uses words to the effect that the tribunal committing for contempt ought to set out the evidence on which the adjudication of contempt is founded, so that the Judges who have to decide whether the committal is right may have the same means of deciding as the tribunal which has committed. Now, these words taken in their widest sense would require every tribunal to set out the evidence on which the adjudication is founded; taken in that wide sense they are not true as a legal proposition. The proposition in that unlimited extent is mentioned by Lord ELLENBOROUGH, in *Burdett* v. *Abbott*, 14 East, 69 (12 R. R. 450), as untenable if taken by itself, and to that extent it is contravened by the case I have referred to, which shows that a superior Court has the power of general commitment without stating the cause. To my mind the wide words used by that eminent Judge in that most celebrated case are to be limited with reference to the particular facts of the case with which he is dealing at the time, as ought the words of every Judge in every case if we are to judge them fairly. That was the case of a most unconstitutional oppression of a jury who had acquitted Penn the Quaker, and the Recorder of London had fined and committed the jury who had so acquitted him, and returned in his warrant that they had acquitted the defendant contrary to the manifest evidence and plain declaration of the law. The LORD CHIEF JUSTICE, commenting on the words, says: "What does the Recorder mean by manifest evidence? How can I tell

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that the evidence which was manifest to the mind of the Recorder was manifest to the mind of the jury who gave the verdict? He ought to have said that it was manifest to the mind of the jury, and that was impossible." He goes on to say further: "What does the Recorder mean by saying, 'contrary to the plain direction of the Court in matters of law'? The Judge cannot lay down the law till the fact is ascertained; and if he choose on hearing the evidence to assume that it was to be taken to be true, and had laid down that the law commands the jury to convict without saying if they found those facts to be true, he would have mistaken his authority." On that he gives his judgment on the facts before him. And it should also be remembered that at that time jurymen were liable to be proceeded against for giving a false verdict, either by commitment for contempt or by attaint. Whether the Chief Justice had that in his mind or not, the words that the evidence ought to be set out where the Judge thinks that [* 331] a jury should be committed for defying * him, were of the very essence of that case; for though they found a verdict contrary to the manifest evidence and to law, though it were fatuous if it was not a false verdict, the jury had committed no offence. To my mind the unlimited extent of that expression remarked upon by Lord ELLENBOROUGH, and contrary to the decisions of that time, appears to me to afford no foundation for holding this warrant to be void for not setting out the evidence on which the Judge acted. VAUGHAN, Ch. J., adverted in his judgment to several committals where the prisoners had been discharged on *habeas corpus*, committals for contempt under the seal of the LORD CHANCELLOR, as if those discharges had been by reason of the generality of the warrant of the CHANCELLOR; and those cases have been adverted to by Mr. Bovill as if the LORD CHANCELLOR was presiding over a Court not co-ordinate with the superior Courts. He referred us to Moore, 833, and there I find *Glanville's Case* and *Throckmorton's Case*, and other cases, showing that at that time the conflict of jurisdiction was going on. The plaintiffs had obtained judgment at law by fraud, and the defendants had gone to the CHANCELLOR for relief from those judgments, and the CHANCELLOR had committed the plaintiffs at law for proceeding with the fraudulent judgments, and Sir EDWARD COKE, the Chief Justice of the Queen's Bench, discharged on *habeas corpus* the plaintiffs who had been so committed by the LORD CHANCELLOR. One

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of the persons who had been so committed and so discharged was again committed and again discharged. These cases occurred before the authority and the rank of the Chancellor's Court were established, and may well have been coupled in the category in which they were by Sir EDWARD COKE as authorities for what he did, and not with any reference to the generality of the warrants. They are not adverted to by COKE as authorising a discharge if the warrant is general, but only as showing the authority there was to release; I therefore think they have no great bearing or weight in the present case. They are classed with cases of discharges from committals for contempt by the Privy Council, the Court of High Commission, and the Star Chamber, and other Courts which the lawyers of Westminster Hall stood up against and resisted. Many of the Courts were such as they may well have been justified in refusing to allow them to have such authority, and in thinking that there had been an excess of authority. Those are the chief cases for maintaining the proposition that the warrant is void. A great deal was said about the case of *The King* v. *Clement*, 2 B. & A. 218, 11 Price, 70. It does not bear on our judgment here, but was cited more by way of remark upon what fell from the Court of Exchequer. I am bound to form an opinion from adjudged cases, and in ordinary cases I should be bound by it; but on a writ of *habeas corpus* each Court is entitled to an original opinion, and that decision has no bearing in my opinion on this case. There ABBOTT, Ch. J., sitting under a commission of oyer and terminer at the Old Bailey, had prohibited the publication of the evidence taken upon some trials for high treason till the trials should be over. It appeared that Mr. Clement published the evidence contrary to that prohibition, and it appears by the warrant of committal that he was called upon to attend and answer the charge of contempt by that publication, and that he did not attend; wherefore, in his absence, a fine of £500 was laid on him. The warrant stated those facts, but neither the form of the warrant nor the points of law discussed in the case have any bearing on the present one, though it appears to have been cited as warranting a proposition which it does not. The great point discussed in that case, both in the Queen's Bench and the Exchequer, was the legal authority to issue the prohibition against the publication of the proceedings of a Court of justice and to fine for a contempt in publishing them after such prohibition; and the case

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has no bearing on this. We were also pressed by Mr. Bovill with some general considerations, urging that the liberty of the subject had been invaded, and that a *habeas corpus* was almost a matter of right. But before any one is entitled to say that the liberty of the subject has been invaded he must satisfy me that the imprisonment is contrary to law. If the imprisonment is by the judgment of a lawful tribunal, the presumption to my mind is, that all things are rightly done. Whether the imprisonment is a [* 332] condign punishment for infringing * the rights of society I do not consider; but it is presumed to be right, and that right has been done. With respect to issuing the writ, in order that the prisoner may on the return to the writ use the argument that the judgment was an error, I think that the writ is misapplied to such occasions unless the Court is reasonably satisfied that the Judge acted without jurisdiction. It is most perniciously applied, if sought for on that ground; witness the almost innumerable applications for *habeas corpus* applied for by persons committed by process of the Courts of law and chancery, bringing into question the legality of their commitments. The argument is answered by saying that if the tribunal has acted within its jurisdiction the writ ought not to go. Something, too, was said about the danger of abuse in our using these powers; but there is not a valuable privilege or power in our constitution which is not capable of being turned to abuse, and almost so in proportion as it is valuable, none such that it never has been abused. Greatly also were we pressed to grant this writ lest our own feelings or desire to support our own authority should personally influence us to decide in favour of our powers. That is quite a mistake. The Justices of Assize are commanded by their commission to do what to justice shall appertain according to the laws and customs of England. They are sent to redress wrong, and those that are interested in wrong are interested in obstructing the course of justice, and are very ingenious in doing so. There are many ways of obstructing the Court. Endeavours are not wanting either to disturb the Judge or to influence the jury, or to keep back or pervert the testimony of witnesses, or by other methods, according to the emergency of the occasion, to obstruct the course of justice. These powers are given to the Judges to keep the course of justice free: powers of great importance to society, for by the exercise of them law and order prevail; those who are interested in wrong

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are shown that the law is irresistible. It is this obstruction which is called in law contempt, and it has nothing to do with the personal feelings of the Judge, and no Judge would allow his personal feelings to have any weight in the matter. According to my experience, the personal feelings of the Judges have never had the slightest influence in the exercise of these powers intrusted to them for the purpose of supporting the dignity of their important office; and so far as my observation goes they have been uniformly exercised for the good of the people. After giving my best attention to all the arguments of the learned counsel, I cannot find the least ground for doubt. I therefore give my opinion that the writ should be refused.

WILLES, J. — I am entirely of the same opinion. Several objections have been taken to the warrant under which the applicant is in custody; some go to the length of saying that under no circumstances could the commitment have lawfully been made; some are directed only to the form of the warrant. I shall first deal with the objection that the commitment for six months is bad, because it is said that the commission of the Justices of Assize is only temporary, and that their authority will be superseded by the issuing of a fresh commission; and so the commitment for a time certain is an excess of jurisdiction. I apprehend, however, that a commitment for a time certain is a correct, if not the only correct course. Such a commitment is, in effect, a sentence upon a summary conviction for an offence against the law: 4 Black. Com. 280; and sentences are not at an end, nor prisoners let out of custody, by reason of the commission under which they have been convicted expiring, on the Justices being superseded. Besides, the Stat. 1 Edw. VI., c. 7, s. 6, makes the Court a continuous one, though the Judges are changed by the issuing of a fresh commission. Moreover, we know officially that no fresh commission has issued, because we are apprised of that fact when it is about to take place, by receiving a warrant under the royal sign manual, commanding us to go the circuits, in the order which we have arranged amongst ourselves. As to the objection that the witness's refusal to answer was no offence, because it was for the witness, not the Judge, to determine whether the question was one which he was bound to answer, that is a startling proposition. Every person in the kingdom, except the * Sover- [* 333] eign, may be called upon, and is bound, to give evidence,

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to the best of his knowledge, upon any question of fact, material and relevant to an issue tried in any of the Queen's Courts, unless he can show some exception in his favour; such, for instance, as that suggested to exist in this case, namely, that to answer might put him in peril of criminal proceedings. Some Judges, out of tenderness for the witness, have held it a sufficient excuse if he swears that in his opinion, where such opinion may be well founded, his answering will expose him to such proceedings; some have thought that too lax and yielding a practice; but there has never been any doubt that it is for the Court to decide whether the circumstances judicially before it are such as to excuse the witness from answering. The law is correctly stated by Mr. Best, in his very able and learned work on Evidence, where the authorities are collected (p. 171, 3rd ed.): "Where the grounds of privilege are before the Court, it is for the Court, and not for the witness or party interrogated, to decide as to their sufficiency." This warrant states that the question was one which the witness was bound by law to answer, and it is, therefore, in that respect sufficient. I need only cite 4 Black. Com. 281, 283, to show that a witness refusing to be examined commits an offence, for which, as being a contempt in the face of the Court, he may be "instantly apprehended and imprisoned, at the discretion of the Judges, without any further proof or examination." As to the objection to the heading of the warrant, that it describes no known Court, it is enough to say that it describes the Court before Justices of Assize, in the same manner as that Court has always been described in writs of Nisi Prius and records. See 3 Black. Com., App. x. This is not only a correct description, but the correct style of the Court. The objection, that it does not appear that there was any jury sworn before which the witness was bound to give evidence, fails, because the warrant states that what took place was at the trial of an information for bribery, which trial can only take place before a jury; and it further states that the witness was sworn and examined, which again can only be upon a trial before a jury. It is not suggested that, in fact, there was not a jury; and the warrant taken as true shows that there must have been one. The remaining objection is, no doubt, one of considerable gravity, not by reason of any doubt as to how, in point of law, it ought to be disposed of, but because of its having been so strenuously urged by a learned counsel of Mr. Bovill's position and

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standing. It is, that all the proceedings, and the evidence given in the case, with the question which the witness declined to answer, ought to have been set forth in the warrant, so as to enable this Court, or any single Judge before whom the question may be moved, to decide, by way of appeal from, and correction of, the Justice of Assize in whose presence and hearing the trial took place, whether, in fact, the refusal to answer the particular question, under the circumstances, did amount to an offence in respect of which the witness was liable, in point of law, to be punished by fine and imprisonment. This objection is founded upon the assertion that the Court held before the Justices of Assize is an inferior Court, not relatively, but absolutely, in the sense of being a Court of an inferior order — such as a Court of *pie poudre*, or the sheriff's tourn, to which credit is not to be given for confining itself to the appointed limits of its jurisdiction, and the proceedings of which must, therefore, be holpen by averments to show that they were beyond all question authorised and regular. That proposition, however, opposed as it is to popular opinion, and the understanding of the profession for centuries, when it comes to be examined, will prove to be, in point of law, unsustainable. It is unnecessary to point out the reasons — for they are part of the history of the country — why the Justices in Eyre were necessarily a superior Court. See 1 Mad. Hist. Exch. 153 *et seq.* It is unquestionable that the Justices Itinerant, who were sent to administer the King's justice in the country, were of the same order as the Justices resident near the person of the King. When their commission was "for the hearing of all causes in general," they had the same powers as the Justices resident, extending to all causes, civil and criminal. Where it was "limited to certain special matters," as it sometimes was *(Dudg. Orig. 52 a), the Justices were still the King's Justices Itinerant, and not an inferior order. The object of the institution of Justices Itinerant, viz., to prevent the delay and expense of trying country causes before the resident Justices, besides the politic reason of substituting a general and consistent administration of justice by the Courts of the King for that of local jurisdictions, subject to prejudice and fear, was at first but partially effected, by reason of the long interval — seven years — which elapsed between their circuits, so that many civil injuries requiring speedy redress were still left practically without remedy. To

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provide against this inconvenience, Magna Charta, c. 12, enacted, that "Justices should be sent by the King, or, in his absence, the Chief Justicier, once a year at least, to take the assizes of novel disseisin and *mort d'ancestor* in the several counties in which they arose." This was the origin of the commission of assize in its present form; and inasmuch as commissions of gaol delivery and oyer and terminer were speedily added (see the form, Dugd. Orig. 53 a), the Justices of Assize were almost from the beginning Justices Itinerant for civil and criminal causes, whose commission was "limited to certain special matters." They were, in common with the other Justices of the superior Courts, "without writ, conservators of the peace in all shires of England, and so continue to this day." Use of the Law, 10. They had the same criminal jurisdiction as Justices in Eyre; and with respect to the assizes of novel disseisin and *mort d'ancestor*, they had a share of the jurisdiction previously exercised only by the branches of the supreme Court, answering to the Queen's and Common Bench. Fitz. N. B., 'Novel Disseisin.' Accordingly, they are treated of by Bracton (lib. 3, c. 2) as being of the same order as the other Justices Itinerant, without any suggestion of inferiority. Under Magna Charta, and up to the reign of Edward the First, we learn, from 2 Inst. 422, that the "Justices of Assize were not, sometime, but apprentices of the law, and a knight associate to them, which oftentimes were favourable;" and the powers of such Judges ceased with the particular circuit for which they were appointed. These were two of the mischiefs which led to the passing of the Statute of Westminster 2 (13 Edw. I.), by which two Justices sworn — *i. e.* two of the Justices in the ordinary service of the King, of whom Lord COKE, in the same page, observes, "What an honourable opinion the law hath of the King's Justices sworn, that they are *omni exceptione majores*" — were to be assigned, before whom, and one or two of the discreetest knights of the shire, whom they were to associate to them, the assizes were to be taken. After this Statute of Westminster the Justices of Assize had the same power as the resident Justices over matters within their peculiar jurisdiction, and they might either give judgment thereon themselves on their circuits, or, in cases of difficulty, might adjourn either to the Court of Common Pleas, before the Justices there, or within the equity of the statute authorising such adjournment, they had the alternative of adjourning before them-

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selves at Westminster. Such adjournments were made to the Exchequer Chamber, and the proceedings of the Justices in such cases are reported in the Year Books and elsewhere, in the same manner as proceedings before the other superior Courts. By the same statute trials at Nisi Prius at the assizes were instituted; and the Justices of Assize, by virtue of their commission as such, have ever since had jurisdiction to try, and, where a trial at bar has not been ordered, have tried, causes arising in the country, of whatever nature or magnitude they may have been. In cases which they thus try, they act, in all points touching the trial and its incidents, as and for the Court from which the record comes. They may receive pleas *puis darrein continuance*, which they return to the Court from which the record comes. The *postea*, or record of the proceedings before them, stands in the place of the record of the proceedings at bar before the superior Court in which the action is instituted. Such *postea* is accepted as conclusive, and entered upon the record of the Court *in banc*, and, in the great majority of instances, the judgment of that Court is pronounced as a matter of course, according to the result of the trial before the Judge of Assize.

It has been said that it is a proof of the * Court being [* 335] inferior, that its proceedings may be reviewed by way of motion for a new trial; and on this account, at Nisi Prius, we familiarly speak of the Court above, and of setting the matter right in a higher Court; but in no other sense than relatively, as in this Court we speak of the House of Lords as a superior Court, and as in the House of Lords even the Chief Justice of the Queen's Bench, when a peer may speak of his own Court as an inferior one. See Lord TENTERDEN'S judgment in *Mellish* v. *Richardson*, 1 Cl. & F. 224. It must be remembered, moreover, that the present practice of new trials, for reasons not upon the record, is of modern introduction — so late as the seventeenth century. The regular mode of correcting errors of the Judge at Nisi Prius is by bill of exceptions founded on the 31st chapter of the Statute of Westminster 2, the construction put upon which furnishes strong proof that the Justices of Assize were from the beginning considered as a superior Court. Although that chapter only mentions the Common Pleas, it has been extended, by construction, to all Courts, superior and inferior, and therefore includes the Justices of Assize; and it is familiar learning, that upon a bill

of exceptions tendered at the assizes, or at Nisi Prius in town, judgment is entered as a matter of course in the Court from which the record comes, according to the opinion expressed at Nisi Prius; and the exceptions can only be discussed in the Court of error from that Court, in like manner as if they were exceptions to the opinion of the Court *in banc* upon a trial at bar. Nothing can more clearly show that the proceedings at the assizes were intended to be of the same force and weight as if they had taken place in the original superior Court itself. By the 14 Edw. III., c. 16, trial by Nisi Prius, the importance and utility of which appear to have been then already fully appreciated, was confirmed and improved, and it was enacted "that Nisi Prius from the Queen's Bench might be tried before Justices of the Common Pleas, and *vice versâ*, or before the Chief Baron of the Exchequer, if he were a man of the law," or before Justices of Assize, one of whom should be appointed from the Justices of either Bench, or the King's serjeants sworn. At this period the office of serjeant was one of great dignity (see Dugd. Orig. 110 *et seq.*), and the Court of Exchequer had not yet taken the high position which it has since acquired as a Court between subject and subject. See 20 Edw. III., c. 2. The Barons of the Exchequer, therefore, were at first qualified to be Justices of Assize only when of the degree of the coif. Indeed, at first, trials at Nisi Prius appear to have been contemplated only in proceedings in the Queen's Bench and Common Pleas, and the trial at Nisi Prius from the Court of Exchequer has a separate history, into which it is unnecessary to enter. See 2 & 3 Vict., c. 22. It was only in the present reign that Queen's counsel, and counsel having patents of precedence, became qualified to be in the commission of assize. 13 & 14 Vict., c. 25. Before the end of the reign of Edward III., a series of enactments, commencing with Magna Charta, including the Ordinance for Justices, 20 Edw. III., cc. 1–6, and ending with 42 Edw. III., c. 11, had conferred upon the Justices of Assize extensive powers of control over the authorities of the counties through which they passed (see Crompton on Courts, 206 *et seq.*), complete original jurisdiction over all criminal cases (the highest in constitutional importance), exclusive jurisdiction over certain real actions, concurrent jurisdiction with the Courts at Westminster to give judgments in others, and the power of trying, at the most important stage, all causes of the Courts at Westminster, wherein questions were to be

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tried in the country, which, under the old law of venue, involved almost every disputed matter of fact taking place elsewhere than in London and Middlesex. The statutes which conferred these large powers and extensive jurisdiction, before the end of the reign of Edward III., are Magna Charta and 12 Westminster 2, c. 30; statutes of the Justices of Assize, 21 Edw. I.; 27 Edw. I., cc. 3, 4; 12 Edw. II., cc. 3, 4; 2 Edw. III., cc. 2, 16; 4 Edw. III., cc. 2, 11, 12; 5 Edw. III., c. 14; 9 Edw. III., st. 1, cc. 4, 5; 14 Edw. III., st. 1, c. 16; 20 Edw. III., cc. 1–6; and the 42 Edw. III., c. 11. In reflecting upon the legislation of this period, it will be perceived that the * Justices of Assize [*336] were throughout employed in transacting business which properly belonged to the superior Courts at Westminster; that they were mentioned with the Judges of such Courts upon equal terms; and that from time to time their jurisdiction and authority became so enlarged, that at length the appointment of any other Justices in Eyre became unnecessary. The statutes 14 Edw. IV., c. 11, and 20 Edw. III., cc. 1–6, the ordinance for the Justices, may serve as instances of the gradual increase of the authority of the Justices of Assize; and the former contains a significant indication that at that period the appointment of Justices in Eyre, other than the Justices of Assize, was falling into disuse. It seems certain that in the reign of Edward III., or, at latest, in that of Richard II., it altogether ceased. Whether this took place because the commission of assize, and those which accompanied it, conferred all the powers which in practice continued to be exercised by Justices in Eyre, and that so the office of Justice of Assize and of those in Eyre became, for all practical purposes, identical, or whether the former is to be looked upon as a new institution, which fulfilled all the purposes of the latter in a more effectual way, and so superseded its use, it seems needless to inquire. Whether by direct descent or not, certainly *de facto*, the Justices of Assize have succeeded, with increased authority in many respects, and improved procedure, to the place of Justices in Eyre. The office of Justice of Assize is described in Co. Litt. 263 as one of "great authority both in criminal causes and common pleas." In Co. Litt. 293, in speaking of the Justices Itinerant, Lord COKE says that "they were much like, in this respect, to the Justices of Assize at this day, although for authority" (referring to their revenue jurisdiction, which was transferred to the Court of

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Exchequer), "and manner of proceeding" (viz. as of the Court out of which the record came, instead of by writ of Nisi Prius), "far different; and as the power of the Justices of Assizes, by many Acts of Parliament and other commissions, increased, so these Justices Itinerant, by little and little, vanished away." So, in like manner, Lord BACON (Use of the Law, 13): "The Judges of Assize, as they be now become into the place of the ancient Justices in Eire, called 'Justiciarii Itinerantes,' which in the prime kings after the Conquest, until Henry the Third's time especially, and after, in less measure, even to Richard the Second's time, did execute the justice of the realm." To the same effect is Dugdale (Orig. 53 a, referring to Selden's note to Hengham Magna, 243): "But these Justices" (in Eyre) "continued not their iters any longer than King Edward the Third's time, for then those which we call Justices of Assize served in their stead." Sir Henry Spelman, in his Glossary, is very precise upon this point. Under tit. 'Iter' he writes thus: "Majoribus nostris idem fuit quod hodie circuitus justiciarorum, designatos sibi comitatus ad justitiam exequendam itinerantium. . . . Erant autem duo justiciarorum itinerantium genera. Alii comitatus itinerabant, alii forestas. Comitatus itinerantes novâ aucti auctoritate sub Edvardo Tertio hoc exuerunt nomen et justitiarii assisarum sunt exinde nuncupati." And under tit. "Assisa pro Curiâ," the same learned writer says: "Hinc forum, quo assisarum prædictarum recognitiones captæ erant assisam dicebant (ut patet ex brevi novæ disseisinæ, Registro, fol. 196 b), cui nec olim aliud quid negotii ingerebant; nec (pro more) certum omne tempus statuebant, sed pro occasione. Dicti autem sunt ejus judices, justitiarii assisarum, quorum in dies ita crevit potestas ut in ipsis tandem coaluit justitiarorum itinerantium munus, et deliberandæ item gaolæ: auctâ que adhuc ipsorum auctoritate statuto anni vigentesimi Edvardi Tertii, capite sexto, assisarum curia maximè jam inde emicuit, cum tamen in eâdem hodie assisarum brevia rarissime prosequuntur. Celebratur autem hæc curia per omnem Angliæ comitatum, bis in anno, hoc est, in vacatione quadragesimali et in æstivali: itinerantibus ergo per provincias justitiariis (quos vocant) assisarum et confluente undique insigni nobilium et plebis frequentiâ." Blackstone, too (3 Com. 57), writes: "These Judges of Assize came into use in the room of the ancient Justices in Eyre;" and after describing the superior Courts at Westminster, he goes on to speak of the

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Courts of Assize and Nisi Prius as amongst the Courts of general jurisdiction * and use, which are derived out of, [* 337] and act as, collateral auxiliaries to the foregoing. Mr. Hallam, also (2 Middle Ages, 334), treats of Justices of Assize as the ancient Justices in Eyre under a more modern name, and dwells upon the importance of the institution. The result is, that historically the Courts of Assize, as being Courts of general jurisdiction in all criminal cases, and having power to try all issues of fact, of whatsoever importance, arising in the several counties on their circuits, do stand in the place of the ancient iters of the Justices Itinerant, and are a superior Court, so to speak, by succession; whilst practically, regard being had to the power which they exercise, they are, as to criminal matters, Courts of the most extensive jurisdiction; and as to civil causes, periodical sittings of the Judges of the Superior Courts, or, in their necessary absence, of others thought worthy to be associated with them, for trying in the country those issues of fact which can be more conveniently disposed of there than in London or Middlesex. For this purpose they are as much branches of the superior Courts, having all the power which could be exercised by those Courts themselves at the trial, as are the Chief or other Justices of those Courts sitting at Nisi Prius in London or Middlesex; and the case of a Judge at Nisi Prius in town furnishes an apt illustration of the power of a Justice of Assize. Long after issues arising in the country were sent by Nisi Prius to be tried at the assizes, and the parties, witnesses, and jurors were thereby spared the labour, and delay, and expenses of appearing at the bar of the Court in town, Middlesex causes continued to be tried at bar before the full Court, and great delay and obstruction were thereby occasioned. In order to remedy this inconvenience the statute of the 18 Eliz., c. 12, enabled the Chief Justice, or two puisne Judges, to sit as Justices of Nisi Prius to try issues in Middlesex; and this was the first of the series of statutes by force of which any Judge of the superior Courts at Westminster may now sit in town as a Justice of Nisi Prius to try issues in either of those Courts. Now, can it be suggested that the Chief Justice, sitting at Nisi Prius, is a Judge of an inferior Court, merely because one puisne Judge or more, constituting the Court *in banc*, might grant and make absolute a rule for a new trial before the Chief Justice? This reduces the argument for the applicant to an absurdity.

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There never has been any doubt — there can be none — that the Chief Justice, or any other Judge, sitting at Nisi Prius, possesses, for the purpose of the trial, all the powers of the Court *in banc* necessary for the effectual trial of causes, including, of course, the power to compel witnesses to give evidence, and to deal with them according to law for improperly refusing to do so. The Court held for that purpose is the superior Court itself, sitting (usually but not necessarily) by one of its own members, with a jurisdiction limited for the time "to certain special matters," but with all the powers of a superior Court as to such matters. This is the true explanation of a technical saying, as old as the writ of Nisi Prius itself (see 40 Edw. III., Mich., 38 a, "that the day at Nisi Prius and the day *in banc* are, in consideration of law, the same"), meaning that the Judge at Nisi Prius is to try the cause, instead of the Court *in banc*, and that what takes place before him, with reference to the trial, is of the same effect as if it had taken place in the Court *in banc*. So far for the inference to be drawn from the origin, the jurisdiction, and the procedure of the Courts of Assize and Nisi Prius, which clearly show that they are superior Courts of record; and, if necessary, this result can be fortified by reference to the estimation in which they have been held. I do not refer to, and for obvious reasons I shall not dwell upon, the reception which the Judges of Assize have always met with from people of every condition in the counties through which they proceed, — a tribute of respect for the administration of the law, which I hope will never be forfeited or withdrawn. It is certain that the Judges on their circuits have for centuries been received with the highest consideration amongst persons who are properly jealous of their own position, and little likely to tolerate undue assumption in others. The traditionary rank of the Justices of Assize, as representing the Crown, no doubt dates from the time when the Judges of circuits were members of
[* 338] the Aula Regis, — that great Court, the Chief Justicier *, of which was Prorex Angliæ in the absence of the King. Spelman's Justitia, 331; see 4 Inst. 74. The circuit of the Judges was substituted for the sovereign eyre of the King *in propriâ personâ*. Gilb. Hist. 20. So, in the iters, the writ to the sheriff ran thus: "Summone omnes archiepiscopos, episcopos, abbates, comites, et barones, milites et libere tenentes et omnes alios de Ballivâ tuo qui coram justitiariis itinerantibus venire solent et

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debent, quod sint apud, &c., coram justitiariis nostris à die, &c., audituri et facturi præceptum nostrum." Dugd. Orig. 32 b. Add to this that the law gives to the Justices of Assize during their circuits the aid and control of the sheriff of each county, as to whom it is laid down, that "as the keeper of the King's peace, both by the common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein during his office." 1 Black. Com. 343. The practice in this respect is in accordance with the law: "The high sheriffs themselves, of every shire, are, in person, to attend upon the Justices or Judges of the Assize and gaol delivery in and through their circuits, and shall give their attendance for the due executing of the commandments and precepts of the said Judges in matters concerning the execution of their offices and ministration of justice." Dalton, Sheriffs, 369. Lord BACON, in his advice to Sir George Villiers upon the duties of Prime Minister, points out the reason for this and like observances as follows (II. 10): "The attendance of the sheriffs of the counties, accompanied with the principal gentlemen, in a comely, not a costly equipage, upon the Judges of Assize, at their coming to the place of their sitting, and at their going out, is not only a civility, but of use also; it raiseth a reverence to the persons and places of the Judges, who, coming from the King himself on so great an errand, should not be neglected." I do not, however, dwell upon these personal respects, but I refer to the series of statutes in which, from Magna Charta downwards, Justices of Assize have been mentioned, and their jurisdiction dealt with, as one of the great legal institutions of the country. It would be needless to refer to all the statutes in which they are mentioned, and in none of which are they dealt with as Courts of inferior jurisdiction. I will instance some, to show how special a subject of consideration they have been with the Legislature. In the Statute of Treason, 25 Edw. III., c. 2, they are enumerated with the other great Courts of the kingdom, the Judges of which, when acting as such, it is high treason to kill: "If a man slay the Chancellor, treasurer, or the King's Justices of the one bench or the other, Justices in Eyre, Justices of Assize, and all other Justices assigned to hear and determine (oyer and terminer), being in their places, doing their offices." Upon which Blackstone, 4 Com. 84, remarks: "These high magistrates, as they represent the King's Majesty during the exe-

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cution of their offices, are therefore, for the time, equally regarded by the laws. But this statute extends only to the actual killing of them, not to wounding, or a bare attempt to kill them." The pnuishment for the latter offence, or for even striking in Court, also shows that the Justices of Assize are a superior Court; for at p. 125, after discussing the offence of striking in the King's palace, Blackstone proceeds: "But striking in the King's superior Courts of justice in Westminster Hall, or at the assizes, is made still more penal than even in the King's palace. . . . A stroke or a blow in such Court of justice, whether blood be drawn or not, or even assaulting a Judge sitting in the Court by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of the offender's lands during life." Practically, in such a case the Judge would now treat such misconduct as a contempt of Court, and punish it upon the spot, as the offence in this case was punished, by fine and imprisonment; but the existence of such a penalty is a proof that the Court is a superior Court. See also 3 Inst. 140. I may here observe that the Justices of Oyer and Terminer, mentioned in the Statute of Treason after Justices of Assize, do not include even such functionaries as Justices at Quarter Sessions, although the words "to hear and determine" be in their commission, but only such Justices of Oyer and Terminer as "have their commis-
[*339] sion *ad audiendum et terminandum* as *the principal designation of their office." 1 Hale's P. C. 231. The Justices intended by this designation generally are "Justices of Assize or other Justices who have a special commission of Oyer and Terminer *per excellentiam.*" Vin. Abr., tit. Justices of Oyer and Terminer, 2. Of such Courts of Oyer and Terminer the Judges only ought to be of the quorum: 2 Edw. III., c. 2; 4 Black. Com. 267; and of these the Queen's Bench is the chief, as it was also the highest eyre: see Vin. Abr., *ubi supra;* 4 Inst. 103. All the Queen's subjects, great and small, are bound to attend and assist the Judges acting under that commission. The next statute is that of the 20 Rich. II., c. 3, which, whether it was intended for the independence or the dignity of the Justices of Assize, equally shows the importance which continued to be attributed to them by the Legislature: "The King doth will and forbid that no lord, nor other of the country, little or great, shall

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sit upon the bench with the Justices to take assizes in their session, in the counties of England, upon great forfeiture to the King, and hath charged his said Justices that they shall not suffer the contrary to be done." The same conclusion as to the estimation in which Justices of Assize were held may be drawn from the form of the commission of Justices of the Peace founded upon the 4 Edw. III., c. 1, which runs, that "in a case of difficulty judgment should not be given unless in the presence of one of our Justices of one or other Bench, or of one of our Justices appointed to hold the assizes in the aforesaid county." See Lambard's Eirenarchia, 38. The last statute which I need mention is the 13 & 14 Car. II., c. 21, being the statute which before this reign (see 22 & 23 Vict., c. 32, s. 18) regulated the attendance with which sheriffs are bound to receive the Justices of Assize. It should seem that after the Restoration the loyalty of the sheriffs had led them into extraordinary expenses in receiving the Judges, which expenses that statute made illegal; but at the same time it provided, as to the attendance of the sheriffs at the assizes, that "no sheriff shall have more than forty men-servants with liveries attending upon him in the time of the said assizes, nor under the number of twenty men-servants, in any county whatsoever, within the kingdom of England, nor under the number of twelve men-servants in any county within the dominion of Wales." This is but a slight matter, and of itself unimportant; yet, with the personal attendance of the high sheriff, already referred to, it suggests a ceremonial quite out of character with the reception of any but a superior Court. It thus appears to me very clearly, whether I consider the history, the procedure, or the jurisdiction of the Court of Assize, or the estimation in which it has ever been held, that I must class it as a superior Court of a high order. Mr. Bovill has not cited a single authority, or even hint, to the contrary; and even supposing that he was right in his construction of the passage from Bac. Abr., tit. Courts, and that Judges of Assize are not to be classed with Justitiarii Itinerantes, but between them and the Courts of the county palatine, these latter are still, by the same authority, superior Courts. Originally belonging, as they did, to the Lords Palatine, to whom the Crown had granted their counties, to hold to them and their heirs, "ita libere ad gladium sicut ipse Rex tenebat Angliam ad coronam," and who possessed *jura regalia* there, including, until the 27 Hen.

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VIII., c. 24, the power of making Justices in Eyre and Justices of Assize, the Courts of such counties palatine, although subject, as was this Court of Common Pleas within living memory, to the control of the King's Bench, by writ of error, were not inferior Courts, so as to require that their jurisdiction and authority should be specially set forth in their proceedings, or in justifying under them. They belonged to that superior class to which credit is given by other Courts for acting within their jurisdiction, and to whose proceedings the presumption *omnia ritè esse acta* applies equally as to those of the Supreme Court of Parliament itself. GILBERT, C. B., lays down that "these were superior Courts within their jurisdiction in as ample a manner as a Court of Westminster." Gilb. Hist. C. P. 190. To the same effect was the opinion of Lord WENSLEYDALE, delivering the judgment of the Court of Exchequer Chamber in the great case of *Howard* v. *Gosset*. The warrant in this case is more precise than [* 340] either of those * which were held valid there, and in the case of *The Sheriff of Middlesex*. In any point of view, therefore, this is a valid warrant, and the appellant is in legal custody. We have been urged to be careful of being misled by our own way of thinking in the decision of this case; because, as it was suggested, our privileges are involved in the question. As that course has been adopted, I take leave to say that I am not conscious of the vulgar desire to elevate myself, or the Court of which I may be a member, by grasping after pre-eminence which does not belong to me, and that I will endeavour to be even valiant in preserving and handing down those powers to do justice and to maintain truth which, for the common good, the law has intrusted to the Judges. I think the case, however important it may be, admits of no doubt, and that the *habeas corpus* asked for ought not to issue.

BYLES, J. — The learning and research of my Lord and my Brother WILLES have left me no more authorities to cite, and very little to say, and, under ordinary circumstances, I should have thought myself justified in not adding a word; but this being a great constitutional question, I think I ought to state generally, very shortly, the grounds on which my judgment proceeds, though I must leave them necessarily incomplete, and must even repeat some things which have been better said before. The power of commitment for contempt is indispensable to the administration

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of justice, and it is the knowledge that it is indisp
renders its exercise almost always unnecessary,
exceedingly rare. As to its abuse, I am not aware
instance of its abuse by a Judge of Assize, during
many centuries, has been brought to the notice of the
tainly the instance under consideration is no abuse
for the power has been exercised to prevent a scand
of public justice. Should, hereafter, a case of abus
no means follows from our judgments that in such a
might not be inquired into, and relief afforded, on af
only substantial objection taken in the present insta
form of the warrant. It is alleged that a Judge of A
commit for contempt in general terms. From the auth
by my Lord, which I will not recapitulate, it is sup
indeed it is so admitted by Mr. Bovill — that the
may commit for contempt with much less reason
appears in this warrant. My Lord has already cite
in which it appears that the power belongs to the H
Parliament; that is to say, to the House of Lords
House of Commons, to the LORD CHANCELLOR, to th
Bench, the Common Pleas, and the Exchequer. The
therefore, is reduced to this: Is the Court of Assize
superior Courts? Now, ever since Magna Charta, the
tion of public justice to the inhabitants of every part of
dom has been, as it ever ought to have been, one of
objects of government, and that great end is sought, n
one hand, by bringing all the suitors to Westminster, juris
other hand, by the establishment of inferior local adminis
but by periodically despatching the Judges to the inhabitants
in the name of the sovereign among the inhabitants th
county in England. This institution is much older E
the Courts of Westminster themselves; the Justices in before
ceeding, as is well known, from the Aula Regia be Justices
divided into the superior Courts of law. The Justices, for
were the predecessors of the present Justices of Assize, one
my Brother WILLES has cited the express authority of Westmin
most eminent lawyers that ever flourished in Westminster ex
The statutes have given to the Justices of Assize more
powers than the Justices in Eyre ever had. That is shown
passage in Blackstone cited yesterday. Now just see what

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jurisdiction is. It extends to all sorts of property of every kind without distinction. The appeal not as to error in fact, but on matter of law, did not exist by the common law, but was given by statute, and then not to the Court from which the Judge or the cause came, but to the Court of Error; for the practice of granting new trials is, as is well known, of modern introduction. In addition to this unlimited civil jurisdiction, the Judges of Assize have unlimited powers as a Court for the trial of criminal [*341] * offences, and they do to this day decide on the lives of the Queen's subjects without appeal. They sit, as was explained in the course of the argument, under four commissions, but I believe it will be found that no single commission is sufficient to confer on them their unlimited powers as a Court of criminal judicature for the trial of all crimes, from high treason down to petty offences. And lest the Judges of the superior Courts should be insufficient in number to execute these responsible duties, there have been associated with them for many ages some of the most eminent practitioners of the law, — the serjeants, who, from their connection with this Court, which formerly had exclusive jurisdiction over real actions, were thought best qualified to assist the Judges in the trial of writs of right and writs of entry, and they were not only associated with the Judges at assizes, but were introduced into the quorum clause and sat as Judges. By this means, before the Courts of equity had engaged the exclusive attention of many eminent practitioners, the commission of assize included all the most eminent lawyers, who thus assisted in administering justice throughout the land; and the Crown has by a late statute thought fit to add that branch of the profession which is now its most distinguished ornament, and of which the learned counsel who moved this rule is himself a member. Now, to call a Court so constituted an inferior Court seems to me to need some authority, and so the learned counsel seemed to think. There is no distinct authority cited, as my Lord has already pointed out, for this proposition, except what was cited from Bacon's Abridgment, as an authority to the effect that the Judges of Assize are an inferior Court. In any way of construing it, it is a distinct authority that the Court of Assize is a superior Court, and I agree with my Brother WILLES that when it is closely canvassed it will appear not only that these Courts are superior Courts, but superior Courts of a high degree — *primæ primariæ.*

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Our attention has been directed to the warrant itself, but our opinion that the Justices of Assize have a power to commit generally for contempt makes it unnecessary to examine the warrant more particularly. I abstain from saying whether it is necessary for the Judge of a superior Court committing for contempt in the face of the Court to give any warrant at all, and that a parol commitment, *sedente Curiâ*, is not all that is required. But if he does, it is necessary that the warrant should show accurately that there was a contempt, and if it be made out so as to show that the alleged contempt was no contempt at all, then it is void, and that is all really that *Bushell's Case* decides. This warrant is not a warrant of a Judge, but of a Court, — the Court of Assize for the county of York, — and it distinctly defines the contempt, alleging that the witness refused to answer a question which he was bound to answer, and which must have been held in the judgment of a Court of competent jurisdiction to have been relevant, material, and harmless. Upon the question that this warrant in its general form is perfectly good, I entertain no doubt; if it were not, it would be necessary to draw every warrant with a very inconvenient degree of certainty. For these reasons, I am of opinion that the writ should be refused. *Writ refused.*

Watt v. Ligertwood and Daniel.

L. R. 2 H. L. Sc. 361–367.

Contempt of Court. — Imprisonment. [361]

A document *in manibus Curiæ* having been carried away by an agent regardless of the Judge's remonstrances: —

Held, that a process-caption (or warrant of imprisonment unless the document is returned on demand) was a proper remedy, and that notice of its issue was unnecessary.

The appellant, an advocate in Aberdeen, presented, on behalf of a client, a petition praying an interdict from the Sheriff against the sale of certain bathing-machines. The petition was opposed. After hearing the appellant and the agents of the other party, on the 19th of March, 1867, the Sheriff refused the interdict; but when he was about to have his judgment written out and signed on the petition, the appellant laid hold of it, saying, "I withdraw the petition." The Sheriff thereupon told the appellant that the petition could not be withdrawn, and ordered the appellant to

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restore it to the clerk; intimating at the same time that disobedience to the order would be treated as "a contempt of Court." The appellant nevertheless walked off, carrying with him the petition; whereupon the Sheriff informed the clerk that he (the clerk) would be held responsible for the recovery of the petition. The clerk, therefore, at once asked and obtained from the Sheriff a process-caption against the appellant, and a sheriff's officer was despatched with it to get back the document or imprison the appellant. When the Court functionary entered the appellant's office and demanded the petition, the appellant threw it into the fire. He was thereupon seized and lodged in prison, where he remained till the following day, when he was released.

The action was brought by the appellant in May, 1867, against the Sheriff, the sheriff-clerk, and the sheriff-clerk-depute, concluding that the process-caption should be rescinded and annulled, and that the defenders should be ordered to pay the appel-
[* 362] lant * £5000 for damages in respect of his imprisonment.

The LORD ORDINARY (Lord MACKENZIE), on the 24th of November, 1870, dismissed the action, and his interlocutor was adhered to by the Second Division of the Court below, who decided, however, on the 28th of October, 1871, that "no expenses were due to either party;" their Lordships differing in their opinions as to the issue of the process-caption without notice.

Mr. Watt appealed to the House against the judgment of the Court of Session dismissing his action. The sheriff-clerk and the sheriff-clerk-depute also presented a cross-appeal, complaining that costs had not been awarded to them.

Mr. John Pearson, Q. C., and Mr. A. Robertson, on behalf of the appellant, contended that the document taken away in this case was not the property of the Court, but the private property of the appellant; secondly, that a process-caption was an inappropriate remedy, which at all events ought not to have been issued without prior notice to the appellant; and thirdly, that the appellant was entitled to damages suitable to his professional status, which had been seriously affected by his imprisonment.

The counsel for the respondents were not called upon to reply.

The LORD CHANCELLOR (Lord CAIRNS): —

My Lords, by one of the practitioners in the Sheriff Court of Aberdeen an act was committed in the year 1867 which I am unable to describe in any other way than as a gross and unjustifi-

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able contempt of Court. A document, which this House has held to be part of the process depending in the Court, and which was clearly *in custodiâ Curiæ*, was carried away by the appellant, in defiance of an express order from the Judge, and after distinct intimation had been given to the appellant that if he removed * the document in question the act would be, and [* 363] would be treated as, a contempt of Court.

On the part of the appellant it is suggested that what the Court ought to have done was to issue a process-caption, with all the accompaniments by which it is ordinarily accompanied, and that he should have given notice to the appellant for a certain number of hours before, requiring him to return the document, and stating that if he did not return it, a process-caption would issue. This process-caption is a proceeding applicable to cases in which a practitioner of the Court borrowing a document belonging to the Court gives a receipt for it, and is under an obligation to return it when called upon. In those cases notice must be given, there being no time originally fixed for the duration of the loan; and that notice must precede any process for the purpose of enforcing the return. But, my Lords, any proceeding of that kind would have been entirely inapplicable to the present case.

Well, then, what could the Judge do? In my opinion, treating this as he stated he would treat it, as a contempt of Court, he might have proceeded at once with the cognisance he had of the whole subject, and vindicated the dignity of the Court by ordering the offender to be committed without more, leaving the contempt to be purged in the usual way. But, my Lords, there were also two other courses, not differing very materially from that which I have mentioned, and each of them milder and gentler, which is described by Lord NEAVES (Scottish Jurist, vol. xliv. p. 241), who says that "it was competent to the Sheriff, within whose cognisance and in whose presence the pursuer's proceedings took place, to have issued a summary order or warrant ordering the pursuer to restore the petition, of which he so took possession, and, failing his immediately restoring the same, for his immediate imprisonment till that order was implemented."

Another course, and a not very dissimilar course, would have been to order the commitment of the appellant until he had restored the document. The practical effect of that third course would have been very much the same as that of the second. It

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would have given Mr. Watt, in substance, the alternative
[* 364] of at once * restoring the document in place of going to prison. But it was the third course which the Judge, through his officers, adopted.

My Lords, without pursuing the case further, I only express my opinion that the Judge was entirely warranted in issuing this warrant or caption, and in my opinion the dignity of the Court would not have been vindicated if some proceeding of this kind had not been taken.

The case having come up to your Lordships' House in a former year (Weekly Notes, 1870, p. 143), when nothing certainly fell from any of your Lordships that could have encouraged the continuance of this litigation, I greatly regret that so much time and so much money have been spent or wasted in these proceedings. Now, all that I can do is to advise your Lordships to dismiss the first appeal (that of the appellant Watt) with costs, and on the cross-appeal to reverse the interlocutor of the Second Division, that is, the interlocutor of the 28th of October, 1871, and in place of that to pronounce a judgment assoilzing the defenders (the above respondents) with expenses, and remit the case in that form back to the Court of Session.

Lord CHELMSFORD: —

In this case it is clear, in my opinion, that no notice or special warning of the caption was necessary.

The case was regularly before the Sheriff-substitute. A petition was presented for an interdict — a *caveat* had been previously lodged which was equivalent to the appearance of the respondent upon that proceeding. The matter being before the Sheriff-substitute, he heard the agents of the parties, documents were produced before him, and he came to the conclusion that no interdict ought to be granted. I think that under those circumstances the respondent was entitled to have a deliverance written upon that petition, and it appears that the Sheriff handed the petition to the clerk for the purpose of having his interlocutor written upon it. At that particular point Mr. Watt said, "I withdraw the petition," and the Sheriff (in his evidence) says, "When he (Mr. Watt) said that, I was proceeding to dictate the inter-
[* 365] locutor." * Mr. Watt then took up the petition from before the clerk. Whereupon the Sheriff said, "You cannot withdraw it in that way, Mr. Watt;" but Mr. Watt persisted in

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keeping it. Then the agent on the other side said that the interlocutor had been given in his favour, and that he wished it recorded, and he objected to the withdrawal. But Mr. Watt said, "There will be no interlocutor; the petition is withdrawn." The Sheriff-substitute (in his evidence) says: —

"Mr. Watt seemed excited, and he certainly was rude. I then said to him very seriously, 'You will quite understand, Mr. Watt, that I desire the interlocutor now to be written upon the petition, and that I shall consider your preventing the clerk from doing it as a contempt of Court.' Mr. Watt retained possession of the petition, I think he put it into his pocket, and he immediately left the room."

Now, can there be the slightest doubt that, under these circumstances, it would have been competent to the Sheriff-substitute to issue a warrant for the committal or imprisonment of Mr. Watt until he delivered back that petition? It hardly seemed to be denied in the course of the argument that the Sheriff-substitute might have proceeded in that way.

But then it is said that the Sheriff-substitute proceeded in an irregular way by issuing what is called a caption-process. Now the caption-process is adapted to a particular state of things, and it is regulated by an act of *sederunt* of the Court. An agent may borrow a process from the clerk, and, when he borrows it, he gives what is called a borrowing receipt. After that he is lawfully in receipt of that process until it is demanded back from him; but when it is demanded back from him, if he does not deliver it, he is then illegally in possession of the process, and this caption-process may be issued against him. Now, it occurred to me in the course of the argument that a person who is a wrongdoer from the beginning, as Mr. Watt was upon the present occasion, who was at all times in illegal possession of the process, was exactly in the position of a person who has the process under this borrowing receipt after it is demanded from him and he refuses to deliver it. Therefore it appeared to me that this caption-process was the proper proceeding against a person who had committed this wrongful act.

It was not only a wrongful but an unprecedented act, for none of * the Judges nor anybody else ever heard of [* 366] anything of this kind before. Therefore the question was whether the caption-process was applicable to a new state of things. The Lord Justice Clerk was of opinion that this caption

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process might properly be issued under the circumstances; but perhaps the opinion of the LORD ORDINARY is so tersely and so well expressed, that I may as well refer to it. He says: —

"The pursuer further maintains that the process-caption was illegally and incompetently granted for recovery of the petition, because he had never borrowed it or granted a borrowing receipt for it. It cannot surely be maintained that although a warrant or caption for the recovery of a process may be issued against an agent who has legally and in ordinary form borrowed it from the sheriff-clerk and granted the usual receipt for its return, and has failed to return it when required, yet that a warrant or caption cannot be issued against an agent for recovery of a process which he has illegally and improperly carried away. Such a proposition is, it is thought, wholly untenable."

Now, I do not think there is any magic in the term "caption-process;" but, most questionably, the process itself was such that the Sheriff-substitute had an undoubted right to issue it, to compel the delivery of that document, and Mr. Watt might have saved himself from imprisonment by delivering back the document. He knew perfectly well what the officer had come for. He had pretty good notice that he had come to demand back that document, and the officer could not have demanded it without having proper authority for doing so, which proper authority was the warrant with which he was intrusted. But Mr. Watt put the document in the fire. I think there can be no excuse whatever for his conduct. I quite agree with my noble and learned friend with regard to the mode in which he purposes to dispose of that part of the case, and I think that Mr. Watt ought to be made to pay the expenses.

Perhaps I ought to say a word, but only a word, with regard to Mr. Ligertwood being joined in these proceedings. It is said that he is answerable for the acts of Mr. Daniel, his depute,[1] and that is founded upon the commission which he received, which says that he is, amongst other things, to do everything concerning the premises which any sheriff-clerk may lawfully do. He [* 367] has power * also to appoint deputies in the said office, for whom he shall be answerable. What is his deputy to do? He is to do what the sheriff-clerk may do, that is to say, what he may lawfully do. This is alleged to be an illegal act on the part of the deputy; yet although he is only the deputy to do what the

[1] Mr. Ligertwood, the sheriff-clerk, had Mr. Daniel for his sheriff-clerk-depute.

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sheriff-clerk may lawfully do, it is argued that the sheriff-clerk is answerable for his unlawful acts. That is all that is necessary to be said. I do not think that Mr. Ligertwood ought to have been joined in this action at all, and I entirely agree in the conclusion at which my noble and learned friend has arrived.

Lord SELBORNE: —

My Lords, I also agree entirely with the motion of my noble and learned friend on the woolsack. It is some satisfaction, in a case depending upon the practice of the Scotch Courts, to know that your Lordships are only affirming the opinion of the LORD JUSTICE CLERK and the LORD ORDINARY; the two opinions which differed from them being, in some respects, I think, not absolutely consistent with each other.[1]

Mr. Watt's appeal dismissed with costs. Respondents assoilzied with expenses, and cause remitted back to the Court of Session to proceed accordingly.

ENGLISH NOTES.

Before proceeding to the cases which more immediately concern powers of a Judge to deal with contumacious persons, it may not seem out of place to direct the reader's attention to the distinction between a committal and an attachment. This was the subject of a learned note supplied to the Judges by the senior registrar (Mr. Lavie) in *Re Evans, Evans* v. *Noton* (C. A. 1892), 1893, 1 Ch. 252, 62 L. J. Ch. 413, 68 L. T. 271, 41 W. R. 230.

In some cases it has been held that the Court will not review the decision. *Rex* v. *Davidson* (1821), 4 B. & Ald. 329, 23 R. R. 295; *Re Crawford* (1849), 13 Q. B. 613, 18 L. J. Q. B. 225, 13 Jur. 955. But the recent decision of the Court of Appeal in *Re Evans, Evans* v. *Noton, supra*, shows that the matter cannot be said to be definitely settled. In the case of English Colonies it appears that the Privy Council will not entertain anything in the nature of an appeal from an order committing a person for contempt. *Rainy* v. *Sierra Leone Justices* (1852), 8 Moo. P. C. 47; *McDermott* v. *British Guiana Justices* (1869), L. R. 2 P. C. 341, 38 L. J. P. C. 1, 5 Moo. P. C. (N. S.) 466, 20 L. T. 47. But cases of committal have been referred to the Privy Council by the Crown, with a view to obtain the advice of that body

[1] Lord SELBORNE, in the course of the argument as to notice, referred to the case of Chief Justice GASCOIGNE, who, without a moment's hesitation, and without any prior notification, sent the Prince of Wales instantly to the Fleet Prison for a contempt of Court committed *in præsentiâ*; the heir of the Crown submitting patiently to the sentence, and making reparation for his error by acknowledging it.

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whether the Royal Prerogative of mitigating or pardoning offences should be exercised : *Rainy* v. *Sierra Leone Justices, supra ; Re Pollard* (1868), L. R. 2 P. C. 106, 5 Moo. P. C. (N. S.) 111. That body was also consulted respecting the exercise by a Colonial Governor of that authority as representative of the Crown. *The Bahama Islands Reference* (P. C. 1892), 1893, A. C. 138, 62 L. J. P. C. 79, 68 L. T. 105.

A person may be punished for contempt for addressing the Court or jury in an improper or disrespectful manner, whether he be suitor in person : *Rex* v. *Davidson* (1821), 4 B. & Ald. 329, 23 R. R. 295 ; or advocate: *Ex parte Pater* (1864), 5 B. & S. 299, 33 L. J. M. C. 142 ; *Rainy* v. *Sierra Leone Justices, supra ; Re Pollard, supra.* Where, however, a suitor is also an advocate, the punishment passed should be inflicted upon him as a suitor, and the jurisdiction which the Court may possess over him as one of its officers should not be invoked. *Re Wallace* (1866), L. R. 1 P. C. 283, 36 L. J. P. C. 9.

Commenting on pending proceedings in a manner that tends to create prejudice is a contempt. *Tichborne* v. *Tichborne* (1870), 39 L. J. Ch. 398, 22 L. T. 55, 18 W. R. 621. So, too, a contempt may be committed in using language at a public meeting having a similar tendency. *Reg.* v. *Castro* (1873), L. R. 9 Q. B. 219, 28 L. T. 222. In some cases the offender has added to his offence by disregarding the express injunctions of the Court to abstain from comment. *Rex* v. *Clement* (1821), 4 B. & Ald. 218, 23 R. R. 260; *Re Clement* (1822), 11 Price 68, 25 R. R. 710. A ward of Court is entitled to have the proceedings affecting him or her kept secret, and the publication of any application heard *in camerâ* is regarded as a serious offence. *Re Martindale* (1894), 3 Ch. 193, 64 L. J. Ch. 9, 71 L. T. 468, 43 W. R. 53. The tendency of modern decisions is to discourage applications of this character, where the contempt is of a technical character. *Plating Co.* v. *Farquharson* (C. A. 1881), 17 Ch. D. 49, 50 L. J. Ch. 406, 44 L. T. 389, 29 W. R. 510; *Re Martindale, supra ; Reg.* v. *Payne* (1896), 1 Q. B. 577, 65 L. J. Q. B. 426, 74 L. T. 351, 44 W. R. 605. The Court may restrain a threatened publication of comments on pending proceedings. *Kitcap* v. *Sharp* (1882), 52 L. J. Ch. 134, 48 L. T. 64, 31 W. R. 227.

Seeking by threats to interfere with the progress or trial of an action is a contempt. *Smith* v. *Lakeman* (1856), 26 L. J. Ch. 305, 2 Jur. (N. S.) 1202 ; *Shaw* v. *Shaw* (1861), 2 Swab. & Tr. 517, 21 L. J. P. 35, 8 Jur. (N. S.) 141, 6 L. T. 477.

In some cases the person committed may be discharged upon purging his contempt, although he does not pay the costs. *Jackson* v. *Mawby* (1875), 1 Ch. D. 86, 45 L. J. Ch. 53, 24 W. R. 92. But the payment

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of costs may be made a condition precedent to the prisoner's right to be discharged. *Re M.* (C. A. 1876), 46 L. J. Ch. 24.

AMERICAN NOTES.

This matter is generally regulated by statute in this country.

The *Fernandez* case is cited in Rapalje on Contempt, pp. 2, 206, to the proposition that "it is conclusively settled by a long line of decisions that at common law all Courts of record have an inherent power to punish contempt *in facie Curiæ*, such power being essential to the very existence of a Court as such, and granted as a necessary incident in establishing a tribunal as a Court." This is warranted by *Ex parte Sam*, 51 Alabama, 34; *State* v. *Morrill*, 16 Arkansas, 384; *Johns* v. *Davis' Ex'r*, 2 Robinson (Virginia), 729; *Middlebrook* v. *State*, 43 Connecticut, 257; 21 Am. Rep. 650; *Ex parte Edwards*, 11 Florida, 174; *Ex parte Smith*, 28 Indiana, 47; *People* v. *Wilson*, 64 Illinois, 195; 16 Am. Rep. 528; *Re Millington*, 24 Kansas, 214; *Johnston* v. *Commonwealth*, 1 Bibb (Kentucky), 598; *Cartwright's Case*, 114 Massachusetts, 230; *Morrison* v. *McDonald*, 21 Maine, 550; *Watson* v. *Williams*, 36 Mississippi, 331; *Tenney's Case*, 23 New Hampshire, 162; *State* v. *Doty*, 3 Vroom (New Jersey), 403; 90 Am. Dec. 671; *People* v. *Sturtevant*, 9 New York, 263; 59 Am. Dec. 536. See *La Fontain* v. *Southern Underwriters*, 83 North Carolina, 132; *Passmore Williamson's Case*, 26 Penn. State, 9; 67 Am. Dec. 374; *Lining* v. *Bentham*, 2 Bay (So. Car.), 1; *State* v. *Galloway*, 5 Coldwell (Tennessee), 326; 98 Am. Dec. 404; *Re Cooper*, 32 Vermont, 253; *State* v. *Harper's Ferry B. Co.*, 16 West Virginia, 864; *United States* v. *Hudson*, 7 Cranch (U. S. Sup. Ct.), 32; *Hughes* v. *People*, 5 Colorado, 436; *Mariner* v. *Dyer*, 2 Maine, 165; *Neel* v. *State*, 9 Arkansas, 259; 50 Am. Dec. 209; *State* v. *Woodfin*, 5 Iredell Law (Nor. Car.), 199; 42 Am. Dec. 161; *Ex parte Adams*, 25 Mississippi, 883; 59 Am. Dec. 234; *Arnold* v. *Com.*, 80 Kentucky, 300; 44 Am. Rep. 480; *Puterbaugh* v. *Smith*, 131 Illinois, 199; 19 Am. St. Rep. 30; *Scott* v. *Fishblate*, 117 North Carolina, 265; *In re Shortridge*, 99 California, 526; 37 Am. St. Rep. 78; *State* v. *Judge*, 45 Louisiana Annual, 1250; 40 Am. St. Rep. 282; *People* v. *Stapleton*, 18 Colorado, 568; 23 Lawyers' Rep. Annotated, 787; *Ex parte Robinson*, 19 Wallace (U. S. Sup. Ct.), 505; 3 Am. & Eng. Enc. of Law, p. 790, citing *Watt* v. *Ligertwood*, and many American cases.

Passmore Williamson's Case, above cited, is one of historic interest. He was a Quaker, who had interested himself in aiding the escape of fugitive slaves, in 1855, by the so-called "underground railroad" to Canada. He was committed for contempt, and on *habeas corpus* was remanded, the Court observing: "The commitment shows that he was tried, found guilty, and sentenced for contempt of Court, and nothing else. He is now confined in execution of that sentence, and for no other cause. This was a distinct and substantive offence against the authority and government of the United States. Does anybody doubt the jurisdiction of the District Court to punish contempt? Certainly not. All Courts have this power, and must necessarily have it; otherwise they could not protect themselves from insult, or enforce

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obedience to their process. Without it they would be utterly powerless. The authority to deal with an offender of this class belongs exclusively to the Court in which the offence is committed; and no other Court, not even the highest, can interfere with its exercise, either by writ of error, *mandamus*, or *habeas corpus*. If the power be abused, there is no remedy but impeachment. The law was so held by this Court in *McLaughlin's Case*, 5 Watts & S. 276; and by the Supreme Court of the United States in *Kearney's Case*, 7 Wheat. 38. It was solemnly settled as a part of the common law in *Brass Crosbey's Case*, 3 Wils. 183, by a Court in which sat two of the foremost jurists that England ever produced. We have not the smallest doubt that it is the law, and we must administer it as we find it. The only attempt ever made to disregard it was by a New York Judge (*Yates' Case*, 4 Johns. 345), who was not supported by his brethren. This attempt was followed by all the evil and confusion which Blackstone and Kent and Story declared to be its necessary consequences. Whoever will trace that singular controversy to its termination will see that the Chancellor and the majority of the Supreme Court, though once outvoted in the Senate, were never answered. The Senate itself yielded to the force of the truths which the Supreme Court had laid down so clearly, and the judgment of the Court of Errors in *Yates' Case*, 6 Johns. 503, was overruled by the same Court the year afterward, in *Yates* v. *Lansing*, 9 id. 395 (6 Am. Dec. 290), which grew out of the very same transaction, and depended on the same principles. Still further reflection at a later period induced the Senate to join the popular branch of the Legislature in passing a statute which effectually prevents one Judge from interfering by a *habeas corpus* with the judgment of another on a question of contempt.

"These principles being settled, it follows irresistibly that the District Court of the United States had power and jurisdiction to decide what acts constitute a contempt against it; to determine whether the petitioner had been guilty of contempt, and to inflict upon him the punishment which, in its opinion, he ought to suffer. If we fully believed the petitioner to be innocent, — if we were sure that the Court which convicted him misunderstood the facts or misapplied the law, — still we could not re-examine the evidence, or rejudge the justice of the case, without grossly disregarding what we know to be the law of the land. The Judge of the District Court decided the question on his own constitutional responsibility. Even if he could be shown to have acted tyrannically or corruptly, he could be called to answer for it only in the Senate of the United States."

The facts constituting the contempt need not be set out in the record. *Ex parte Summers*, 5 Iredell Law (Nor. Car.), 149; *First Cong. Church* v. *Muscatine*, 2 Iowa, 69. In the former, RUFFIN, Ch. J., said: "The question has often arisen in England, and recently it has undergone in that country very elaborate, learned, and anxious discussion both in Parliament and in the Courts; and it is now given up that the facts constituting the alleged contempt need not be stated." The Court add that it would be well to state the facts, "But if the commitment or fine be in a general form for a contempt, all other Courts are bound by it, and the party can only free himself by urging the contempt before the Court that has adjudged it." Citing *Burdett*

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v. *Abbott*, 14 East, 1; *Hobhouse's Case*, 3 B. & Ald. 420; *Stockdale* v. *Hansard*, 9 Ad. & Ell. 1; *Sheriff of Middlesex's Case*, 11 Ad. & Ell. 273.

If the contempt is in the face of the Court, no warrant is necessary; an order is sufficient. *Holcomb* v. *Cornish*, 8 Connecticut, 374; *Matter of Percy*, 2 Daly (N. Y. Com. Pl.), 530 (citing *Ex parte Whitechurch*, 1 Atk. 57).

No. 3. — FLOYD *v.* BARKER.

(STAR CHAMBER, 5 Jac. 1.)

No. 4. — SCOTT *v.* STANSFIELD.

(1868.)

RULE.

A Judge of a Court of record is not answerable in a Court of law for anything done or said by him in his judicial capacity, although corruption as well as malice and want of probable cause are alleged against him.

Floyd v. Barker.

12 Co. Rep. 23-26.

Judge. — Not amenable to Proceedings in a Court of Law.

When a grand inquest indicts one of murder or felony: — after the [23] party is acquitted, no writ of conspiracy lies for him against the indictors.

If a witness conspire out of Court, and afterwards swear in the Court, the party acquitted may have a writ of conspiracy against him.

When a party indicted is convicted of felony, upon not guilty pleaded, he shall never have a writ of conspiracy.

Where a party is convicted or attainted of murder or felony, none of the parties to the proceedings are to be drawn in question in the Star Chamber, or elsewhere, for any conspiracy.

Nor in such cases shall a Judge be charged before any other Judge at the suit of the King.

Records are of so high a nature, that for their sublimity they import verity in themselves, and none shall be received to aver anything against the record itself.

In this very term, between Rice ap Evan ap Floyd, and Richard Barker, one of the Justices of the grand sessions in the county of Anglesey, and other defendants: it was resolved by POPHAM and COKE, Chief Justices, the CHIEF BARON, and EGERTON, Lord Chancellor, and all the Court of Star Chamber, that when a grand

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inquest indicts one of murder or felony, and after the party is acquitted, yet no conspiracy lies for him who is acquitted, against the indictors, for this that they are returned by the sheriff by process of law to make inquiry of offences upon their oath, and it is for the service of the King and the Commonwealth. And as it is said in the 10 Eliz. 265, they are compellable to serve the law and the Court; and their indictment or verdict is matter of record, and called *veredictum*, and shall not be avoided by surmise or supposal, and no attaint lies. And for this reason they shall not be impeached for any conspiracy or practice before the indictment; for the law will not suppose any unindifferent, when he is sworn to serve the King; and with this agrees the books in 22 Ass. 77, Assise, p. 12; 21 Ed. III. 17; 16 Hen. VI. 19; 47 Ed. III. 17; 27 Hen. VIII. 2; F. N. B. 115 a. But it is otherwise of a witness; for if he conspire out of the Court, and after swear in the Court, his oath shall not excuse his conspiracy before; for he is a private person, produced by the party, and not returned by the sheriff, who is an officer sworn, and the jurors are sworn in Court as indifferent persons: and the law presumes that every juror will be indifferent when he is sworn, nor will the law admit proof against this presumption.

2. It was resolved, that when the party indicted is convict of felony by another jury, upon "not guilty pleaded," there he never shall have a writ of conspiracy, but when the party upon his arraignment is *legitimo modo acquietatus;* but in the case at the bar, the grand jury who indicted one William Price for the murder of Hugh ap William, the jury, who, upon not guilty pleaded, convicted him, were charged in the Star Chamber for conspiracy against him, and indicted and convicted, which manner of complaint was never seen before; for if the party shall not have a conspiracy against the indictors, when the prisoner is acquitted upon his indictment, *a multo fortiori* when he is lawfully convict, he shall not charge neither the grand inquest by whom he was indicted, nor the jury who found him guilty; for the law in such case doth not give any attaint, for this that he was indicted by the oath of twelve men at the least, and found guilty by twelve: and in these cases the King is the sole party to the proceedings against the prisoner.

But on the other side, when a jury hath acquitted a felon [* 24] or traitor against manifest proof, there they * may be charged in the Star Chamber for their partiality in finding

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a manifest offender not guilty, *ne maleficia remanerent impunita.* And it will be a cause of infinite vexation and occasion of perjury and smothering of great offences, if such averments and supposals shall be admitted after ordinary and judicial proceeding; and it will be a means *ad deterrendos et detrahendos juratores a servitio Regis.*

3. It was resolved that the said Barker, who was Judge of assise, and gave judgment upon the verdict of death, against the said W. P. and the Sheriff who did execute him according to the said judgment, nor the Justices of Peace who did examine the offender, and the witnesses for proof of the murder before the judgment, were not to be drawn in question in the Star Chamber, for any conspiracy, nor any witness, nor any other person ought to be charged with any conspiracy in the Star Chamber, or elsewhere, when the party indicted is convicted or attaint of murder or felony: and although the offender upon the indictment be acquitted, yet the Judge, be he Judge of assise, or a Justice of Peace, or any other Judge, being Judge by commission and of record, and sworn to do justice, cannot be charged for conspiracy, for that which he did openly in Court as Judge or Justice of Peace: and the law will not admit any proof against this vehement and violent presumption of law, that a Justice sworn to do justice will do injustice; but if he hath conspired before out of Court, this is extrajudicial; but due examination of causes out of Court, and inquiring by testimony, *et similia*, is not any conspiracy, for this he ought to do; but subornation of witnesses, and false and malicious prosecutions, out of Court, to such whom he knows will be indictors, to find any guilty, &c., amounts to an unlawful conspiracy.

And records are of so high a nature, that for their sublimity they import verity in themselves; and none shall be received to aver anything against the record itself; and in this point the law is founded upon great reason; for if the judicial matters of record should be drawn in question, by partial and sinister supposals and averments of offenders, or any on their behalf, there never will be an end of causes: but controversies will be infinite; *et infinitum in jure reprobatur:* and for this it is adjudged in the 47 Ed. III. 15, that a Judge who hath a commission, viz. that is of record, shall not be charged in conspiracy; which is to be understood of what he did in Court, for the reasons and causes aforesaid: and with this agree the books, 21 Ed. IV., 67 and 27 Ass. pl. 12; and the

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reason is for this, that though the party is acquitted, yet the accusing stands with the record: and accordingly was the law taken in this case. But in an hundred Court, or other Court which is not of record, there averment may be taken against their proceedings, for that it is no other than matter *in pais*, and not of record; as it appears in the 47 Ed. III. 15. Also one shall never assign for error, against that which the Court doth as Judges; as to say, that the jury gave verdict for the defendant, and the Court did enter it for the plaintiff, or to say that the party who levied the fine was dead before the fine was levied, or such like. *Vide* 1 Hen. VI. 4; 39 Hen. VI. 52; 7 Hen. VII.; 11 Hen. VII. 4, 28; 1 Mar.; Dyer, 89. But in a writ of false judgment, the plaintiff shall have a direct averment against that which the Judges in the inferior Court have done as Judges, *quia recordum non habent*; and with this accords 21 Hen. VI. 34. And as a Judge shall not be drawn in question in the cases aforesaid at the suit of the parties, no more shall he be charged in the said cases before any other Judge at the suit of the King. And for this in the 27 Ass. pl. 18, one was indicted and arraigned at the suit of the King, that as he was a Justice of Oyer and Terminer, where cer-
[* 25] tain persons were indicted * of trespass before him, he made an entry of record, that they were indicted of felony: and it was adjudged that this indictment was against the law, for this that he was a Justice by commission; and that is of record; and this present act shall be to defeat the record, *hoc est*, to aver against that which he did as Judge of record, which cannot be by the law. *Vide* 27 Ass. pl. 23; 2 Rich. III. 9; 28 Ass. pl. 21; 9 Hen. VI. 60. And it was said, that it was the case of one Nudigate, who as a Justice of Peace had recorded a force upon a view, which he did as Judge upon record; and a bill was exhibited against him in this Court, for this, that he had falsely made a record, where indeed there was not any force: and by the opinion of CATLYN and DYER, Chief Justices, it was resolved, that that thing, that a Judge doth as Judge of record, ought not to be drawn in question in this Court.

Note well, that the said matters done at the Bar were not examinable in the Star Chamber; and for this it was ordered and decreed by all the Court, that the said bill without any answer to it, by the said Richard Barker, shall be taken off the file and cancelled, and utterly defaced: and it was agreed, that insomuch as

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the Judges of the realm have the administration of justice, under the King, to all his subjects, they ought not to be drawn into question for any supposed corruption, which extends to the annihilating of a record, or of any judicial proceedings before them, or tending to the slander of the justice of the King, which will trench to the scandal of the King himself, except it be before the King himself; for they are only to make an account to God and the King, and not to answer to any suggestion in the Star Chamber; for this would tend to the scandal and subversion of all justice. And those who are the most sincere would not be free from continual calumniations, for which reason the orator said well, *invigilandum est semper, multæ insidiæ sunt bonis.*

And the reason and cause why a Judge, for anything done by him as Judge, by the authority which the King hath committed to him, and as sitting in the seat of the King (concerning his justice) shall not be drawn in question before any other Judge, for any surmise of corruption, except before the King himself, is for this; the King himself is *de jure* to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath.

And forasmuch as this concerns the honour and conscience of the King, there is great reason that the King himself shall take account of it, and no other.

And Thorp's judgment, who was drawn in question for corruption before commissioners, was held against the law, and upon that he was pardoned; and it is contained in the same record, *quod non trahitur in exemplum.* *Vide* the conclusion of the oath of a Judge. *Vide* the Chronicle of Stow, 18 Ed. III. 312.

Note: THOMAS WEYLAND, Chief Justice of the Common Bench, Sir RALPH HENGHAM, Justice of the King's Bench, and the other Justices, were accused of bribery and corruption; and their causes were determined in Parliament, where some were banished, and some were fined and imprisoned.

Vide 2 Ed. III., fol. 27. That the Justices of Trayl-baston (so called for their summary proceeding) were in a manner Justices in Eyre; and their authority was founded upon the Stat. of Ragman, which you may see in the old Magna Charta. *Vide* the form of the commission of the * Trayl-baston, Hollingshead, Chron., fol. 312. And note: it appears by the said [* 26]

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precedent and Chronicle, that the King did examine the corruption of his Judges before himself in the Parliament, and not by force of any commission.

Absurdum est affirmare (re judicatâ) credendum esse non judici.

Scott v. Stansfield.

L. R. 3 Ex. 220-225 (s. c. 37 L. J. Ex. 155; 18 L. T. 572; 16 W. R. 911).

Slander. — County Court Judge. — Absolute Privilege.

[220] Plea, to a declaration for slander, that the defendant was a County Court Judge, and the words complained of were spoken by him in his capacity as such Judge, while sitting in his Court, and trying a cause in which the present plaintiff was defendant. Replication, that the said words were spoken falsely and maliciously, and without any reasonable, probable, or justifiable cause, and without any foundation whatever, and not *bonâ fide* in the discharge of the defendant's duty as Judge, and were wholly irrelevant in reference to the matter before him.

Held, that the replication was bad, and the action not maintainable.

Declaration, for that the plaintiff carried on the business of an accountant and scrivener, and the defendant falsely and maliciously, and without reasonable or justifiable cause, and not on any justifiable occasion, spoke and published of the plaintiff, of and concerning him in relation to his said business and the carrying on and conducting thereof, the words following, that is to say: "You," meaning the plaintiff, "are a harpy, preying on the vitals of the poor."

2nd plea: that before and at the time when the alleged grievance was committed, the defendant was the Judge of a certain Court of record, being the County Court of Yorkshire, holden at Huddersfield, and at the time when he did what was complained of, the defendant was sitting in the said Court, and acting in his capacity as such Judge as aforesaid, and was as such Judge hearing and trying a cause in which the now plaintiff was defendant, the hearing and determination of which was within the jurisdiction of the said Court; and during the said trial the now defendant, in his capacity as such Judge, did, as such Judge sitting as aforesaid, speak and publish the said words of which the plaintiff complains which is the supposed grievance above complained of.

Replication to the 2nd plea: that the said words so spoken and published by the defendant as aforesaid were spoken falsely and

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maliciously, and without any reasonable, probable, or justifiable cause, and without any foundation whatever, and not *bonâ fide* in discharge of his duty as Judge as aforesaid, and were wholly uncalled for, immaterial, irrelevant, and impertinent, in reference to, * or in respect of, the matters before him, and were [* 221] wholly unwarranted on the said occasion, of all which premises the defendant had notice before and at the time of the committing of the said grievance, and then well knew.

Demurrer and joinder.

Quain, Q. C. (Kemplay with him), in support of the demurrer. The plea and replication taken together raise the question whether the defendant is liable to an action in respect of the words mentioned in the declaration, such words having been spoken by him in his capacity of Judge, but spoken falsely, maliciously, and irrelevantly. There is no authority for the position that an action will lie against a Judge for anything done by him while acting in the exercise of his jurisdiction. The remedy for any official misconduct on the part of the defendant is by application to the Lord Chancellor for his removal. The principle which governs these cases is laid down in the case of *Floyd* v. *Barker*, 12 Co. Rep. 23 (p. 37, *ante*). That principle has been followed in a long series of decisions. See *R.* v. *Skinner*, Lofft, 55; *Miller* v. *Hope*, 2 Shaw Sc. App. Cases, 125; *Jekyll* v. *Sir John Moore*, 2 B. & P. (N. R.) 341; *Revis* v. *Smith*, 18 C. B. 126; *Henderson* v. *Broomhead*, 4 H. & N. 569; *Fray* v. *Blackburn*, 3 B. & S. 576. It is quite clear from these cases that no action will lie against a Judge for a judicial act, though it be alleged to have been done maliciously and corruptly. The true ground of a Judge's exemption from actions is to be found, with a review of the older authorities, in the judgment of Chief Justice KENT, in the case of *Yates* v. *Lansing*, 5 Joh. 282, 9 Joh. 395. In the case of *Thomas* v. *Churton*, 2 B. & S. 475, it was held that a coroner holding an inquest is not liable to an action for words falsely and maliciously spoken by him in his address to the jury; but COCKBURN, Ch. J., there said (2 B. & S., at p. 479): "I am reluctant to decide, and will not do so until the question comes before me, that if a Judge abuses his judicial office by using slanderous words, maliciously and without reasonable and probable cause, he is not to be liable to an action." The present replication is probably founded upon that *dictum*.

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[* 222] * Manisty, Q. C., *contra*. — The decisions cited are inapplicable to the present case. For it was not alleged in any of those cases that the Judge had said, maliciously and without reasonable cause, what was altogether irrelevant to the matter before him. In Addison on Torts, 2nd ed., p. 547, the law is thus laid down: "A Judge, therefore, is not answerable for slander spoken by him in the exercise of his judicial functions in reference to a matter before him; but if he goes out of his way to make slanderous attacks on the character of private persons in respect of matters not before him, and into which he has no jurisdiction to inquire, he will be responsible, like any other individual, for the consequences." The cases cited in support of that proposition are *Lewis* v. *Levi*, 27 L. J. Q. B. 282, and *MacGregor* v. *Thwaites*, 3 B. & C. 24 (27 R. R. 274); but it must be admitted they do not go far enough to support the plaintiff's contention. It is, however, clear, that the fact of a Judge's having jurisdiction to try a particular case will not justify his going out of his way, and, with reference to a subject wholly irrelevant, making falsely and maliciously slanderous statements affecting private character. It is then just as if he were not acting in his judicial character at all. He cannot abuse his office for the purpose of doing with impunity, under colour of it, that which has no connection with it, and which in a private individual would be actionable. In the case of *Houlden* v. *Smith*, 14 Q. B. 841, it was held that a Judge of a County Court is answerable for an act done by his command, when he has no jurisdiction, and is not misinformed as to the facts on which jurisdiction depends.

KELLY, C. B. — I am of opinion that our judgment must be for the defendant. The question raised upon this record is whether an action is maintainable against the Judge of a County Court, which is a Court of record, for words spoken by him in his judicial character and in the exercise of his functions as Judge in the Court over which he presides, where such words would as against an ordinary individual constitute a cause of action, and where they are alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him.

[* 223] The question * arises, perhaps, for the first time with reference to a County Court Judge, but a series of decisions uniformly to the same effect, extending from the time of Lord COKE to the present time, establish the general proposition that no action

will lie against a Judge for any acts done or words spoken in his judicial capacity in a Court of justice. This doctrine has been applied not only to the superior Courts, but to the Court of a coroner and to a Court martial, which is not a Court of record. It is essential in all Courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a Judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him? Again, if a question arose as to the *bona fides* of the Judge, it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus, if we were to hold that an action is maintainable against a Judge for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his Court submitted to their determination. It is impossible to overestimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action as this can, under any circumstances, be maintainable.

MARTIN, B. — I am also of the same opinion. It seems to me quite clear that words spoken under the circumstances stated in these pleadings are not the subject of an action of slander. The plea states that the defendant, at the time when he spoke the words complained of, was sitting as the Judge of a Court of record, and spoke them while acting in his capacity of Judge, and trying * a cause within his jurisdiction in which the pres- [* 224] ent plaintiff was defendant. If words spoken under such circumstances were the subject of an action of slander, the most mischievous consequences would ensue; no Judge, as my Lord has pointed out, would then be able freely to administer justice, for if it were alleged, as is the case here, that he spoke falsely and mali-

ciously, and not *bonâ fide* in the discharge of his duty, and that what he said was irrelevant to the matter in hand, a jury would have to determine the question whether what he said in the course of a case which he had jurisdiction to try was or was not said under the circumstances so alleged. What Judge could try a case with any degree of independence if he was to be afterwards subject to have his conduct in the administration of justice commented upon to a jury, and the propriety of it determined by them? It appears to me that the opinion expressed by Chief Justice KENT, in the American case cited, puts this matter upon its proper foundation, and states that which is both sound law and good sense in reference to it. I do not think we are really deciding anything new, for to my mind the decisions of the Court of Queen's Bench have gone the full length of our present decision.

BRAMWELL, B. — I am entirely of the same opinion. I will only quote a remark made by the late LORD CHIEF BARON in the case of *Gelen* v. *Hall*, 2 H. & N., at p. 393. He there says: "The question is not whether a magistrate who, without any evidence, wilfully and maliciously convicts a person brought before him, is liable to an action, but whether a man who has really acted as a Judge shall have the question tried before a jury." There might, first of all, be a question as to what the words uttered really were, for the defendant might get into the box and deny having used the words imputed to him, and the jury might find against him: then it would be a question whether they were spoken *bonâ fide*. That question also would have to be determined by a jury if such an action as the present were maintainable. I think there would be manifest inconvenience in such a state of things.

CHANNELL, B. — I am of the same opinion. If the facts [* 225] alleged * by the replication were true, no doubt there would be misconduct on the part of the defendant. It does not follow from the decision which we now pronounce, that a County Court Judge can so misconduct himself with impunity. If a County Court Judge be guilty of misconduct in the exercise of his office, the LORD CHANCELLOR may, if he think it expedient, remove him from such office; but no action will, in my opinion, lie against him for anything done by him in his judicial capacity. For the benefit of the public and the due administration of justice, the law provides that a Judge is to be so far free and unfettered in the exercise of his office as not to be liable to an action for what he does in the

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capacity of Judge, and so placed under restraint in the discharge of his duty. *Judgment for the defendant.*

ENGLISH NOTES.

The rule is confirmed by *Anderson* v. *Gorrie* (C. A. 1894), 1895,1 Q. B. 668, 71 L. T. 382. The immunity enjoyed by a Judge may be compared with the similar exemption possessed by advocates. See *Munster* v. *Lamb*, No. 2 of "Counsel," 7 R. C. 714. Where a Judge of an inferior Court acted without jurisdiction, he was held not to be within the protection of the rule. *Houlden* v. *Smith* (1850), 14 Q. B. 841, 19 L. J. Q. B. 170. A similar distinction between an act within or without the jurisdiction of a Judge is established in respect of the old Ecclesiastical Court in *Beaurain* v. *Scott* (1813), 3 Camp. 388, 14 R. R. 759.

Where a Judge is interested in the subject-matter of a dispute, a Court having appellate jurisdiction will set aside his order. *Dimes* v. *Grand Junction Canal Co.* (H. L. 1852), 3 H. L. Cas. 759, 17 Jur. 73; *Reg.* v. *Recorder of Cambridge* (1857), 8 El. & Bl. 637, 27 L. J. M. C. 160, 4 Jur. (N. S.) 334; *Ex parte Medwin* (1853), 1 El. & Bl. 609, 22 L. J. Q. B. 169. It is no objection that a Judge was, prior to his elevation to the bench, engaged in the cause. *Thellusson* v. *Rendlesham* (1858), 7 H. L. Cas. 429, 28 L. J. Ch. 948. The Court, however, in that case approved of the custom, sanctioned by long usage, of a Judge refusing to adjudicate upon a case in which he has been engaged as counsel.

It was pointed out in the notes to *In re Tufnell* and *Grant* v. *Secretary of State for India*, Nos. 8 and 9 of "Crown," 8 R. C. 233, that the position of Judges is assured in a large measure by statute. In Crown Colonies Judges may be removed for misbehaviour or neglect of duty. *Montague* v. *Governor of Van Diemen's Land* (1849), 6 Moo. P. C. 489. Before being removed, he should be given an opportunity of being heard in his defence. *Willis* v. *Gipps* (1846), 5 Moo. P. C. 379. But an informal notice is sufficient, where it appears that the removed Judge has not been prejudiced. *Montague's* case, *supra*.

AMERICAN NOTES.

Mr. Mechem cites the principal cases (Public Officers, sect. 619), with a great number of other cases, and treats the subject exhaustively.

The leading case on this point in this country is *Yates* v. *Lansing*, 5 Johnson (N. Y.), 282, affirmed 9 ibid. 395; 6 Am. Dec. 290. KENT, Ch. J., in the lower Court examined the question with great learning, citing *Floyd* v. *Barker*, and concluding substantially in accordance with the statement in the Rule. The Court said: "Where Courts of special or limited jurisdiction exceed their

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powers, the whole proceeding is *coram non judice*, and all concerned in such void proceedings are held to be liable in trespass. (*Case of the Marshalsea*, 10 Co. 65; *Terry* v. *Huntington*, Hardres, 480.) But I believe this doctrine has never been carried so far as to justify a suit against the members of the superior Courts of general jurisdiction, for any act done by them in a judicial capacity. There is no such case or decision that I have met with, and I find the doctrine to be decidedly otherwise." "Whenever we subject the established Courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty." See *Cunningham* v. *Bucklin*, 8 Cowen (N. Y.), 178; 18 Am. Dec. 432, citing *Floyd* v. *Barker*. To the same effect are *Phelps* v. *Sill*, 1 Day (Connecticut), 315; *Bradley* v. *Fisher*, 13 Wallace (U. S. Sup. Ct.), 335, a very masterly treatment of the question; *Morgan* v. *Dudley*, 18 B. Monroe (Kentucky), 693; *Kendall* v. *Stokes*, 3 Howard (U. S. Sup. Ct.), 87; *Briggs* v. *Wardwell*, 10 Massachusetts, 356; *Wall* v. *Trumbull*, 16 Michigan, 228; *Hoggat* v. *Bigley*, 6 Humphrey (Tennessee), 236; *Morrison* v. *McDonald*, 21 Maine, 550; *Carter* v. *Dow*, 16 Wisconsin, 298; *Little* v. *Moore*, 1 Southard (New Jersey Law), 74; *Lange* v. *Benedict*, 73 New York, 12; 29 Am. Rep. 80; *Busteed* v. *Parsons*, 54 Alabama, 393; 25 Am. Rep. 688, citing both principal cases (see a very exhaustive review of English and American decisions, in note, p. 694); *Pratt* v. *Gardner*, 2 Cushing (Mass.), 63; 48 Am. Dec. 652; *Harrison* v. *Redden*, 53 Kansas, 265; *Stone* v. *Graves*, 8 Missouri, 148; 40 Am. Dec. 131; *Terry* v. *Wright*, — Colorado, —; and see as to *quasi* judicial officers, *Stewart* v. *Case*, 53 Minnesota, 62; 39 Am. St. Rep. 574. These cases settle that a Judge of a Court of general and superior jurisdiction can be held liable for his judicial conduct only where there is a clear absence of jurisdiction. Merely exceeding his jurisdiction gives no right of action. The distinction between excess and absence of jurisdiction is clearly marked.

It is probable that our Courts apply this principle only where the Judge had jurisdiction of person and subject-matter, and do not excuse him where he was destitute of jurisdiction, although they excuse him for mistake in the course of or excess of jurisdiction. *Bradley* v. *Fisher*, *supra*; *Lange* v. *Benedict*, *supra*. They even excuse for a mistake in holding that the facts of a given case invest him with jurisdiction, if he has jurisdiction of that class of cases: *Busteed* v. *Parsons*, *supra*; and for mere excess of jurisdiction where he has jurisdiction.

The most interesting recent examination of the question is in *Lange* v. *Benedict*, *supra*. Lange was convicted, in the United States District Court, before Judge Benedict, of an offence for which the Court had authority to punish by fine *or* imprisonment. The Court imposed both. The defendant paid his fine, and sued out *habeas corpus*, returnable at the same term, and on the return the Court vacated that sentence and resentenced him to imprisonment alone, and he was thereupon committed for five days. On subsequent proceedings the United States Supreme Court adjudged the second sentence

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void and discharged him. (*Ex parte Lange*, 18 Wallace, 163.) The New York Court of Appeals held that the Judge was not civilly liable in damages for that act in excess of jurisdiction, citing *Floyd* v. *Barker*, and observing: "He was, in fact, sitting in the place of justice; he was at the very time of the act a Court; he was bound by his duty to the public and to the plaintiff to pass as such, upon the question growing out of the facts presented to him, and as a Court to adjudge whether a case had arisen in which it was the demand of the law, that on the vacating of the unlawful and erroneous sentence or judgment of the Court, another sentence or judgment could be pronounced upon the plaintiff. So to adjudge was a judicial act, done as a Judge, as a Court, though the adjudication was erroneous, and the act based upon it was without authority and void. Where jurisdiction over the subject is invested by law in the Judge, or in the Court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other involved in the case; although upon the correctness of his determination in those particulars the validity of his judgment may depend. *Ackerly* v. *Parkinson*, *supra*. For such an act, a person acting as Judge therein is not liable to civil or criminal action. The power to decide protects, though the decision be erroneous. See *Garnett* v. *Ferrand*, 6 B. & C. 611." The "brief" of the plaintiff's counsel in this case (William Henry Amoux, of New York) formed a volume of several hundred pages, and constitutes one of the most learned and important treatises on jurisdiction ever published. The titles of the cases cited alone cover nine pages of the official report.

In *Bradley* v. *Fisher*, *supra*, Mr. Justice FIELD observed: "The plea . . . sets up that the order for the entry of which the suit was brought was a judicial act, done by the defendant as the presiding Justice of a Court of general criminal jurisdiction. If such were the character of the act and the jurisdiction of the Court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequence it may have proved to the defendant. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehensions of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the Judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English Judge (Justice MAYNE, in *Taafe* v. *Donnes*, 3 Moore P. C. 41, note), it would establish the weakness of judicial authority in a degrading responsibility.

"The principle therefore which exempts Judges of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English Courts for many centuries, and has never been denied, that we are aware of, in the Courts of this country. It has, as Chancellor

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KENT observes (*Yates* v. *Lansing*, 5 Johnson, 291), 'a deep root in the common law.'

"Nor can this exemption of the Judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry." (Quoting from *Floyd* v. *Barker*): "The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior Courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those Courts, in which there is great conflict in the evidence and great doubt as to the law which govern their decision. It is this class of cases which impose upon the Judge the severest labor, and often create in his mind a painful sense of his responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the Judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the Judge. When the controversy involves questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfection of human character this is hardly a subject of wonder. If civil actions could be maintained in such cases against the Judges, because the losing party should see fit to allege in his complaint that the acts of the Judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a Judge would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

"If upon such allegations a Judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the Judge before whom he might be summoned by the losing party — and that Judge perhaps one of an inferior jurisdiction — that he had decided as he did with judicial integrity; and the second Judge would be subjected to a similar burden, as he in his turn might also be held amenable to the losing party." (Citing *Pratt* v. *Gardner*, 2 Cushing (Mass.), 63; 48 Am. Dec. 652; *Fray* v. *Blackburn*, 3 Best & Smith, 576.)

"In this country the Judges of the superior Courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with

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which they are clothed as ministers of justice they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to account by impeachment, and suspended or removed from office. In some States they may be thus suspended or removed without impeachment, by a vote of the two Houses of the Legislature." (Two Justices dissented, on the ground that a Judge is civilly liable if he acts maliciously or corruptly.)

Very similar expressions were used by Chief Justice SHAW, in *Pratt* v. *Gardner*, *supra;* and in *Phelps* v. *Sill*, *supra*, the Court said: "If by any mistake in the exercise of his office, a Judge should injure an individual, hard would be his condition if he were to be responsible therefor in damages. The rules and principles which govern in the exercise of judicial power are not in all cases obvious: they are often complex, and appear under different aspects to different persons. No man would accept the office of Judge, if his estate were to answer for every error in judgment, or if his time and property were to be wasted in litigations with every man whom his decisions might offend. It is therefore a settled principle that however erroneous his judgment may be, either by positive acts, neglect, or refusal to do certain acts, or however injurious to suitors, a Judge is never liable in any civil action for damages arising from his mistake."

A Judge is not liable in damages for disbarring an attorney. *Manning* v. *French*, 149 Massachusetts, 391; 4 Lawyers' Rep. Annotated, 339.

A mayor, sitting as Judge in the mayor's Court, and ordering the arrest of a person for contempt, is not civilly answerable, although he acted erroneously and maliciously. *Scott* v. *Fishblate*, 117 North Carolina, 265. "But for the government, of which he is a part, there would be no law, nor would there be any Courts to right public wrongs, none to which the citizen (the plaintiff) could appeal to have his private rights declared and enforced. But for the law, and the Courts to declare and enforce the law, the plaintiff would be without remedy for any grievance, and the law of course might prevail. To have this legal protection, it is necessary to have Courts, — Judges, justices of the peace, including the mayors of towns and cities. And it is the experience and wisdom of our country that these Courts cannot exist, or at least cannot discharge their judicial functions, unless they are made free from pecuniary liability while so acting. This does not protect them from impeachment, nor from indictment for misconduct, fraud, or corruption in office, because these are public wrongs committed against the government, whose servants they are."

But if a Judge of a Court of inferior or limited jurisdiction assumes jurisdiction where he has none, or acts without jurisdiction of person or matter, he is liable to an action of damages. *Yates* v. *Lansing*, *supra;* *Phelps* v. *Sill*, *supra;* *Palmer* v. *Carroll*, 24 New Hampshire, 314; *Craig* v. *Burnett*, 32 Alabama, 728; *Clarke* v. *May*, 2 Gray (Mass.), 410; 61 Am. Dec. 470; *Piper* v. *Pearson*, 2 Gray, 120; 61 Am. Dec. 438; *Waterville* v. *Barton*, 64 Maine, 321; *Hendrick* v. *Whittemore*, 105 Massachusetts, 23; *Morrill* v. *Thurston*, 46 Vermont, 732; *Vaughn* v. *Congdon*, 56 Vermont, 611; 48 Am. Rep. 758; and a long citation of cases in Mr. Mechem's treatise, sect. 630, p. 413. This principle has been so strictly adjudged that an inferior magis-

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trate, acting in good faith under a statute afterwards pronounced unconstitutional, has been held in damages. *Kelly* v. *Bemis*, 4 Gray (Mass.), 83; 64 Am. Dec. 50; *Ely* v. *Thompson*, 3 A. K. Marshall (Kentucky), 70. But this doctrine is criticised in *Henke* v. *McCord*, 55 Iowa, 378, and there seems a disposition in recent times to relax this severity, and to excuse the officer, where he has jurisdiction of the class of cases in question, but errs in holding that he has acquired jurisdiction of the person. As, for example, it has been held that a magistrate is not liable for error in holding that a complaint or affidavit is sufficient to confer jurisdiction: *Bocock* v. *Cochran*, 32 Hun (N. Y. Sup. Ct.), 521; *Clark* v. *Spicer*, 6 Kansas, 440; and color of authority has been held to acquit him of liability: *Grove* v. *Van Duyn*, 44 New Jersey Law, 654; 42 Am. Rep. 648, note; *Henke* v. *McCord*, 55 Iowa, 378; *Savacol* v. *Boughton*, 5 Wendell, 170; 21 Am. Dec. 181. Mr. Mechem very wisely says on this point: "Under the strict rule above referred to, as will be seen from the case cited in the note, it is held that the Justice or other inferior magistrate is liable for a jurisdiction wrongfully assumed, or proceeding without jurisdiction, even though he was called upon to decide whether the preliminary facts, complaint, or affidavit were sufficient to confer jurisdiction, and acted in good faith in deciding that they were. The doctrine has however met with much forcible and reasonable dissent in recent times. There are undoubtedly cases in which the rule stated is properly applicable, as where jurisdiction is assumed or exercised without even the color of authority, or beyond limits which are clearly and unambiguously defined, or in the face of express statutory prohibitions. But where, on the other hand, the officer has jurisdiction of the subject-matter, *i. e.* of that class of cases, but the question of jurisdiction in that particular case depends upon some question for judicial determination, as upon the validity or proper construction of a doubtful statute, or upon technical legal sufficiency of the averments of a preliminary complaint or affidavit, or the existence of jurisdictional facts, — questions upon which he is bound to decide, and questions, too, upon which, as is often the case, the learned Judges of the Courts of last resort are unable to agree, — it certainly seems not only impolitic, but a violation of the well-established principle governing the liability of judicial officers, to hold the inferior officer liable, at any rate where he has acted in good faith and with an honest endeavor to do the right." (Pub. Off., sect. 652.)

A justice of the peace is not personally liable for excluding spectators from the Court room on a trial before him, where he had no authority so to act. *Williamson* v. *Lacy*, 86 Maine, 80; 25 Lawyers' Rep. Annotated, 506.

A Judge of an inferior Court, with jurisdiction of the subject, but failing to acquire jurisdiction of the person, is not civilly liable in damages for his official act, unless wilful or corrupt. *McCall* v. *Cohen*, 16 South Carolina, 445; 42 Am. Rep. 641. But otherwise if he entertains jurisdiction of an offence obviously barred by the Statute of Limitations. *Vaughn* v. *Congdon*, 56 Vermont, 111; 48 Am. Rep. 758. Or issues a search-warrant without the observance of the preliminary requisites. *Grumon* v. *Raymond*, 1 Connecticut, 40; 6 Am. Dec. 200; *Flack* v. *Harrington*, Breese (Illinois), 213; 12 Am.

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Dec. 170. A justice of the peace is not liable for erroneously refusing to grant an appeal. *Jordan* v. *Hanson*, 49 New Hampshire, 199; 6 Am. Rep. 508. Nor for mere error of judgment in proceedings regularly before him. *Reid* v. *Hood*, 2 Nott & McCord (So. Car.), 168; 10 Am. Dec. 582. Nor for erroneously holding a defendant to trial for an offence of which he had jurisdiction, but where the defendant was entitled to and offered bail. *Austin* v. *Vrooman*, 128 New York, 229; 14 Lawyers' Rep. Annotated, 138. And is protected in the exercise of acts in good faith in excess of his jurisdiction. *Adkins* v. *Brewer*, 3 Cowen (N. Y.), 206; 15 Am. Dec. 264; *Thompson* v. *Jackson*, 93 Iowa, 376; 37 Lawyers' Rep. Annotated, 92. Of the last decision the editor of the Lawyers' Rep. Annotated says: "The above case is in line with the trend of judicial thought in its disposition to break down the distinction as to the liability of inferior and superior Judges for acts done in excess of jurisdiction. But there is grave doubt as to the correctness of the decision. Judges, whether of superior or inferior jurisdiction, are not exempt from liability for their acts if they act entirely without jurisdiction." That is true; but "without" is not equivalent to "in excess of." If a Judge has jurisdiction of the person and of the class of cases in question, he does not act "without" jurisdiction, although he acts in excess of jurisdiction. The inception of jurisdiction is sufficient for superior Judges. But the relaxation as to liability for merely excessive acts of inferior Judges is recently noticeable, as the editor points out. It was formerly held pretty generally that acts of an inferior magistrate in excess of his jurisdiction rendered him civilly liable in damages. *Kelly* v. *Rembert*, Harper (So. Car.), 65; 18 Am. Dec. 643.

In *Donovan* v. *Harrison*, a very recent New Hampshire case (not yet officially reported), it was said, sustaining the principle of *Ashby* v. *White*, Ld. Raym. 938; 1 E. R. C. 521: "The principle that no civil action lies against a judicial officer for neglect or breach of official duty (*Anderson* v. *Gorrie* (1895), 1 Q. B. 668; *Fray* v. *Blackburn*, 3 B. & S. 576) does not apply to a supervisor who acts from wilful, corrupt, and malicious motives (*Waldron* v. *Berry*, 51 New Hampshire, 136), as the reason for exempting Judges from civil actions does not apply to officers who decide questions not between individuals but between individuals and the public, and the duties of a supervisor are ministerial as well as judicial. *Lincoln* v. *Hapgood*, 11 Mass. 350; *Spear* v. *Cummings*, 23 Pick. 224." The case last cited decided the novel principle (by SHAW, Ch. J.) that the teacher of a town school is not liable to any action by a parent for refusing to instruct his children. All the American cases sustain the distinction between judicial and ministerial action, and give a private action for misconduct in the latter.

In *Lander* v. *Seaver*, 32 Vermont, 114; 76 Am. Dec. 156, the claim was made that a school teacher acts in a judicial capacity, and therefore is not liable for error of judgment in inflicting corporeal punishment; but this was disapproved by the Court.

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JURY.

No. 1. — CREED *v.* FISHER.

(EXCH. 1854.)

RULE.

THERE is no right of peremptory challenge to jurymen upon a civil action.

Creed v. Fisher.

23 L. J. Ex. 143, 144.

[143] *Special Jury. — Challenge.*

There is no right of peremptory challenge of special jurors summoned at the assizes under the provisions of the 15 & 16 Vict., c. 76, s. 108.

This was an action for an assault and battery, and came on for trial, at the Exeter Summer Assizes, 1853, before TALFOURD, J. A special jury had been obtained under the 15 & 16 Vict., c. 76, s. 108, but upon the jury panel being called, the counsel for the defendant proposed to challenge one of the special jurors peremptorily, but his Lordship refused to allow the challenge. The plaintiff obtained a verdict, with £300 damages.

A rule *nisi* was subsequently obtained for a new trial, on the ground of the refusal of the challenge, and also that the damages were excessive.

Crowder and Collier showed cause. It is a mistake to suppose that there is any right of peremptory challenge of special jurors. The 108th section gives no such right, nor is there any reason why it should be allowed, for if it be feared that a fair trial cannot be had by a panel summoned under the new Act, the old mode of striking a special jury may be resorted to under the proviso at the end of the 108th section.

PARKE, B. — It is quite clear that a special jury is on the same footing as a common jury. There must be a cause for challenging. Although it is a common practice if a juryman is objected to,

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not to call him, yet it is not a matter of right. It is the same in trials for misdemeanours. I recollect trying a case for misdemeanour at York, when every juryman in the panel * was objected to on the one side or the other; but [* 144] the panel being exhausted, I ordered the first name to be called, and required cause to be shown why he should not serve, and we soon had a jury.

POLLOCK, C. B., ALDERSON, B., and PLATT, B., intimated their assent to this view; and

Slade (with whom were Mowbray and Coleridge) did not argue this part of the rule; and on the other point the rule was afterwards discharged. *Rule discharged.*

ENGLISH NOTES.

For the mode of preparing jury lists, returning the names of persons qualified as jurors, making up the jury-book, summoning jurors, preparing the panel, balloting for, calling and swearing juries, in particular cases, the reader must be referred to the various statutes by which these matters are provided for.

As regards the matters which may be tried by a jury, and the way in which a party obtains a jury in the Supreme Court, see R. S. C. (1883), O. 36, rr. 2–8.

Under these rules it is in the discretion of the Court to make or to refuse an order for the trial with a jury of an action which has been commenced in the Chancery Division: *Attorney-General* v. *Vyner* (C. A. 1890), 38 W. R. 194; *Jenkins* v. *Bushby* (1891), 1 Ch. 484, 60 L. J. Ch. 254, 64 L. T. 213, 39 W. R. 321; *Mangan* v. *Metropolitan Electric Supply Co.*, C. A. (1891), 2 Ch. 551, 65 L. T. 202; or in the Queen's Bench Division, if before the Judicature Act it might have been brought in either the Chancery or Common Law Courts: *Baring* v. *North Western of Uruguay Railway Co.* (1893), 2 Q. B. 406, 69 L. T. 740. The Court of Appeal ought not to interfere with the exercise of discretion where there is no reason for expecting a failure of justice. *Mangan* v. *Metropolitan Electric Supply Co.*, *supra*. The *onus* is, however, upon the party desiring the jury to show some good reason for it. *Attorney-General* v. *Vyner*, *supra*; *Jenkins* v. *Bushby*, *supra*.

Plaintiffs' ship was being moved in defendants' docks by their tugs from one berth to another. As she was light, compensation booms were attached to her to keep her upright, but she was pulled over by the tugs and sank. It was held that there was an issue in the action requiring scientific investigation within r. 5, *supra*, and that therefore

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the Judge had jurisdiction to direct it to be tried without a jury. *Swyny* v. *North Eastern Railway Co.* (1896), 74 L. T. 88.

As to the cases in which a special jury may be had, see 6 Geo. IV., c. 50, s. 30, and R. S. C. 1883, r. 7 (b), (c), (d). The Court has no power to order a special jury for the trial of a person charged with felony. *Reg.* v. *Mayne* (1884), 32 W. R. 95.

As to the mode of obtaining a special jury, see the sub-rules last mentioned. Common Law Procedure Act, 1852, ss. 112, 113, and Juries Act, 1870 (33 & 34 Vict., c. 77), s. 18.

Special juries may now be balloted for in the same way as common juries, but it is provided that they may still be struck according to the former practice. See Common Law Procedure Act, 1852, s. 108, and Juries Act, 1870 (33 & 34 Vict., c. 77), ss. 16, 17.

As to striking a special jury, see 6 Geo. IV., c. 50, ss. 30–36; Common Law Procedure Act, 1852, s. 110; see also *Anon.* (1696), 1 Salk. 405; *Rex* v. *Hart* (1776), Cowp. 412; *Rex* v. *Wooler* (1817), 1 B. & Ald. 193, 18 R. R. 460; *White* v. *Eastern Union Railway Co.* (1852), 11 C. B. 875, 21 L. J. C. P. 112.

An application that a jury be struck should be made to a Judge at Chambers. *Chuck* v. *Harris* (1840), 2 Scott N. R. 82; *Phelps* v. *Keily* (1842), 3 Man. & Gr. 883, 4 Scott N. R. 376. Where a party had obtained a rule for a special jury, it was held that a Judge might make an order obliging him to proceed to the striking of it. *Joseph* v. *Perry* (1835), 3 Dowl. P. C. 699. In a *sci. fa.* by the plaintiffs as trustees of a bank, the plaintiffs having obtained a rule for a special jury, the Court made them undertake to strike out of the list any who might be shareholders in the bank. *Esdaile* v. *Lund* (1844), 12 M. & W. 734, 13 L. J. Ex. 191, 8 Jur. 385, 1 D. & L. 990.

The party applying for a special jury is only allowed the costs of a common jury, unless the Judge certify (6 Geo. IV., c. 50, s. 34). This statute applies to criminal cases. *Reg.* v. *Pembridge* (*Inhabitants*) (1842), 3 Q. B. 901, 12 L. J. Q. B. 47. At the trial of an action in January, 1890, the plaintiff obtained a verdict. The Judge had left the building at the time when the verdict was given, and the following morning, on the application of the plaintiff's counsel, he gave judgment in accordance with the findings; but counsel omitted to ask him to certify for a special jury. It was held that an application in April, 1890, for the certificate must be refused. *Webster* v. *Appleton* (1890), 62 L. T. 704.

A jury consists of twelve men. See 6 Geo. IV., c. 50, s. 26. Where by mistake thirteen were sworn, the Judge discharged the jury and had them sworn again. *Muirhead* v. *Evans* (1851), 6 Ex. 447, 20 L. J. Ex. 211. A grand jury ought not to consist of more than twenty-three

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persons. *Rex* v. *Marsh* (1837), 6 Ad. & El. 236, 1 N. & P. 187, 2 H. & W. 366, 1 Jur. 38.

The qualifications required by the various kinds of jurors are provided for by statute.

By the Juries Act, 1870, s. 9, the persons described in the schedule to the Act are exempted from service, and all previous exemptions are abolished. The exemptions in the schedule apply to jurors summoned to serve on coroners' inquests. *Reg.* v. *Dutton*, or *In re Dutton* (1892), 1 Q. B. 486, 61 L. J. Q. B. 190, 66 L. T. 324, 40 W. R. 270.

There are statutory provisions for the fining of persons failing to attend on a jury pursuant to summons, as also for the remitting of such fines.

Where an issue was directed by a court of equity to be tried at bar by a special jury of a county in which the cause did not arise, the Court fined those special jurors who did not attend, it being proved that they were duly summoned. *Layburn* v. *Crisp* (1838), 8 Car. & P. 397. The Court remitted the fine where the party summoned had let his house and was abroad, and this fact had been communicated to the summoning officer: *Ex parte Ford* (1827), 1 Younge & Jervis, 401, 30 R. R. 812; and also where the summons had by mistake been left at a wrong house; the Court, however, requiring the affidavit of the summoning officer to that fact: *Ex parte Brown* (1827), 1 Younge & Jervis, 401, 30 R. R. 812. On the other hand, the Court refused to remit the fine of a person who had a house in London and also in Sussex, but had resided at the latter place for the preceding twelve months. *Ex parte Clarges* (1827), 1 Younge & Jervis, 399, 30 R. R. 811. The Court has refused to hear counsel for a juryman who has been fined for contempt for non-attendance. *Carne* v. *Nicol* (1834), 3 Dowl. P. C. 115.

"The common-law mode of taking the objection to a juror that he is disqualified is by challenge, and the challenge must be allowed unless taken away by some statute." Per PARKE, B., in *Barrett* v. *Long* (1851), 3 H. L. Cas. 395.

"A challenge to jurors is twofold, either to the array or to the polls." Co. Litt. 156 a.

Challenge to the array is where exception is taken to the whole number impanelled. It is a cause of challenge to the array that the sheriff making the return is the actual prosecutor: *Rex* v. *Sheppard* (1773), 1 Leach, 101; that he is solicitor to either party: *Baylis* v. *Lucas* (1774), Cowp. 112; or that he is a subscriber to a society who are prosecuting: *Rex* v. *Dolby* (1843), 1 Car. & K. 238; but not that he omitted to summon one of twenty-four special jurymen returned on the panel: *Rex* v. *Edmonds* (1821), 4 B. & Ald. 471, 23 R. R. 350. It is

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no ground of challenge to the array that the jurors called at an adjourned sitting of a special commission were returned from the previous year's jury-book at a former sitting of the commission: *Mulcahy* v. *Reg.* (1868), L. R. 3 H. L. 306; nor that the Justices have omitted the duties prescribed by the Jury Act in making out the list of names for the jury-book and the sheriff has summoned the jury from a book so improperly made: *Reg.* v. *Burke* (1867), 10 Cox C. C. 519. It may be noted that an objection to the returning sheriff would be a ground for a new trial. *Baylis* v. *Lucas, supra.* There can be no challenge to the array on the ground of unindifferency in the master of the Crown Office. In such a case the only remedy would be to apply to the Court for another officer to nominate the jury. *Reg.* v. *Edmonds, supra.* For further examples of challenge to the array, see Co. Litt. 156 a.

A challenge to the array stating that the sheriff "has not chosen the panel indifferently and impartially as he ought to have done, and that the panel is not an indifferent panel," is bad as being too general. *Reg.* v. *Hughes* (1843), 1 Car. & K. 235.

Challenge to the polls is where exception is taken to the individual jurymen. It is a good ground for this kind of challenge that the person impanelled is an alien: Co. Litt. 156 b; *Rex* v. *Sutton* (1828), 8 Barn. & Cress. 417, 32 R. R. 428; s. c. *nom. Rex* v. *Despard*, 2 Man. & Ry. 406; but *semble* this objection was not thought to apply to a special juror: *Ib.* See now, however, sect. 8 of the Juries Act, 1870. So, it was a good ground if the person impanelled was a woman: 3 Bla. Com. 362; unless on a writ *de ventre inspiciendo;* see *Willoughby's Case* (1597), Cro. Eliz. 566; or that the person is under twenty-one: Co. Litt. 157 a. But if a juror is over sixty, it is a ground only of exemption. *Mulcahy* v. *Reg., supra.*

If the juror be sworn by a wrong Christian name, it is a cause of challenge merely: *Wray* v. *Thorne* (1744), Willes, 488, Barnes, 454; *Anon.* (1783), 12 East, 230 a; *Reg.* v. *Mellor* (1858), Dears. & B. 468, 27 L. J. M. C. 121; but if by a wrong surname, the verdict may be set aside: *Norman* v. *Beaumont* (1744), Willes, 484, Barnes, 453; *Dovey* v. *Hobson* (1816), 6 Taunt. 460, 2 Marsh. 154.

It is a cause of challenge that the juror is of kin to either party: see *Barrett* v. *Long* (1851), 3 H. L. Cas. 395, Co. Litt. 157 a; or his counsel: *Barrett* v. *Long, supra;* but not, in a prosecution for felony, that he is client of the prisoner: *Reg.* v. *Geach* (1840), 9 Car. & P. 499. A juror may be challenged on the ground that he is of the same society or corporation with either party. *Carmarthen (Mayor)* v. *Evans* (1842), 10 M. & W. 274, 2 Dowl. (N. S.) 296. Where, in an action against a committee-man of a projected railway company, it appeared

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that one of the jury was also a member of the committee, and had been sued in respect of the claim in question, the Court granted a new trial on payment of costs. *Bailey* v. *Macauley* (1849), 13 Q. B. 815, 19 L. J. Q. B. 73. But where one of the jury was a shareholder in the defendant's company, a new trial was refused. *Williams* v. *Great Western Railway Co.* (1858), 3 Hurl. & N. 869, 28 L. J. Ex. 2. In an action against an insurance office on a life policy it is no objection to a special juror being sworn that he is a director of another insurance office, unless that office has granted a policy on the life in question, and the amount of that policy is unpaid. *Craig* v. *Fenn* (1841), Car. & M. 43. On trial of an action for a penalty for alleged bribery at the election of a member of Parliament for a borough, it was held no cause for challenge that a juror was tenant of a nobleman whose interest in the borough was supposed to be affected; or that he had been foreman of another jury which had tried another action between other parties for alleged bribery at the same election. *Marsh* v. *Coppock* (1840), 9 Car. & P. 480. On an indictment for riot it is a ground of challenging a juror that he is an inhabitant of the town where the riot occurred, and has taken an active part in the matter which led to it. *Reg.* v. *Swain* (1838), 2 M. & Rob. 112; 2 Lewin C. C. 116. It is a principal cause of challenge that a juror after being returned is entertained by either party. Co. Litt. 157 b. It is no cause of challenge that a juror has visited the prisoner as a friend since his imprisonment. *Reg.* v. *Geach*, *supra*. It is no cause of challenge that in a previous case the juror has shown some dissatisfaction with the law as laid down by the Judge in favour of the party challenging: *Pearse* v. *Rogers* (1860), 2 Fost. & Fin. 137; or, in a case to which the Crown is a party, that on other trials he has not found a verdict for the Crown: *Sawdon's Case* (1838), 2 Lewin C. C. 117. It is a cause of challenge that a juror has said that a prisoner is guilty or will be hanged. *Anon.* (1691), 1 Salk. 153. The fact that one of the jurors who had been returned at the previous sitting of a special commission was not on the jury-book at the adjourned sitting in the following year was held no ground of challenge to him. *Mulcahy* v. *Reg.* (1868), L. R. 3 H. L. 306. It is a ground of challenge to a special juror in a criminal case that he was on the grand jury which found the bill. *Reg.* v. *Sullivan* (1838), 8 Ad. & El. 831, 8 L. J. M. C. 3; and see *Rex* v. *Edmonds* (1821), *supra*; *Cook's Case* (1696), 13 State Trials, at p. 339.

Upon challenges for cause, such as are mentioned in the preceding paragraph, the person making the challenge must be prepared to prove the cause. *Rex* v. *Savage* (1824), 1 Moody's C. C. 51.

Even though a juryman is not challenged, the Court has power to excuse him if he is physically or mentally unfit to perform his duty.

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See *Mansell* v. *Reg.* (1857), 8 El. & Bl. 54, Dears. & B. 375, 27 L. J. M. C. 4.

Besides challenges for cause, there are peremptory challenges, which are made without any reason being assigned. As appears from the principal case, these challenges are not allowed in civil cases, but only in cases to which the Crown is a party. See also *Pearse* v. *Rogers* (1860), 2 Fost. & Fin. 137.

The Crown is entitled as of right to set aside any juror when called; and is not bound to challenge a juror for cause until the whole panel is perused, and it appears that without him a full jury cannot be had. *Rex* v. *Parry* (1837), 7 Car. & P. 836; *Reg.* v. *Geach* (1840), 9 Car. & P. 499; *Mansell* v. *Reg.* (1857), 8 El. & Bl. 54, Dears. & B. 375, 27 L. J. M. C. 4. The time for the Crown to assign cause does not arrive until all the persons whose names appear on the panel have been called, although some of them may be engaged in trying another cause. *Ib.* The Crown is entitled to require the person challenged to "stand by," which expression means that it may require the consideration of the challenge to be postponed till it be seen whether a full jury cannot be made up without him. *Ib.*

The defendant in criminal proceedings is entitled by statute to challenge jurymen peremptorily, in most cases of high treason, to the number of thirty-five, and in the remaining cases of high treason, as well as in all cases of felony, to the number of twenty. After having challenged twenty jurymen in a case of felony, he cannot withdraw one of them so that he may challenge another juryman instead of one that he had previously challenged: *Rex* v. *Parry* (1837), 7 Car. & P. 836, 1 Jur. 674; but he may still examine any other of the jurors who are subsequently called as to their qualifications: *Reg.* v. *Geach* (1840), 9 Car. & P. 499. There is no right of peremptory challenge by the defendant on the trial of a collateral issue. *Rex* v. *Radcliffe* (1746), 1 W. Bl. 3. As to peremptory challenges in cases of misdemeanour, see *Gray* v. *Reg.* (1844), 11 Cl. & Fin. 427, at p. 450, 8 Jur. 879; *Reg.* v. *Blakeman* (1850), 3 C. & K. 97.

If on trial of a case of felony the prisoner peremptorily challenges some of the jurors, and the prosecution also challenges so many that a full jury cannot be had, the proper course is to call over the whole of the panel in the same order as before, only omitting those who have been previously challenged by the prisoner, and as each juror then appears, for the counsel for the prosecution to state their cause of challenge; and if they have not sufficient cause, and the prisoner does not challenge, for such juror to be sworn. *Reg.* v. *Geach, supra.*

No challenge either to the array or to the polls can be taken until a full jury has appeared: *Rex* v. *Edmonds* (1821), 4 B. & Ald. 471, 23

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R. R. 350; *Reg.* v. *Lacey* (1848), 3 Cox C. C. 517, at p. 519; and it must be made before the jury is sworn: *Rex* v. *Sheppard* (1773), 1 Leach, 101; *Brunskill* v. *Giles* (1832), 9 Bing. 13, 2 M. & Sc. 41; *Reg.* v. *Frost* (1839), 9 Car. & P. 137; *Reg.* v. *Key* (1851), 21 L. J. M. C. 35, 2 Den. 347, 3 C. & K. 371, T. & M. 623; *Reg.* v. *Giorgetti* (1865), 4 Fost. & Fin. 546; or, to be more precise, before the book is given into the hands of the jury and before the officer has recited the oath; and it is too late though made before the juror kisses the book: *Ib.* But if the juror takes the book without authority, the party wishing to challenge will not be prejudiced thereby. *Reg.* v. *Frost*, *supra*.

It would seem, however, that when a special jury is struck it is too late to challenge a juror when he is sworn, as the objection might have been made when the jury was struck. *Rex* v. *Sutton* (1828), 8 Barn. & Cress. 417, 32 R. R. 428; s. c. *nom. Rex* v. *Despard*, 2 Man. & Ry. 406. If the party has an opportunity of making his challenge, and neglects it, he cannot afterwards make the objection the ground of obtaining a new trial. *Rex* v. *Sutton*, *supra*.

On a trial for felony, after a previous conviction, the prisoner has no right to challenge the jury afresh, after they have given their verdict on the new charge and before evidence as to the previous conviction: *Reg.* v. *Key*, *supra*.

A challenge to the array or to the polls ought to be propounded in such a way at the trial as that the other party may either demur, or counterplead, or deny the matter of challenge. *Carmarthen* (*Mayor*) v. *Evans* (1842), 10 Mo. W. 274, 2 Dowl. (N. S.) 296; and see *Rex* v. *Edmonds* (1821), *supra*.

A challenge for cause, if not tried by the Court itself is tried by two triers appointed by the Court. Co. Litt. 158 a; *O'Brien* v. *Reg.* (1849), 2 H. L. Cas. 465, at p. 469. Where the challenge is to the array, these triers are generally two of the jury. Co. Litt. 158 a. If the array is quashed for unindifferency in the sheriff, the jury will be summoned by the coroner, or if he also be partial, then by two *elisors* appointed by the Court. *Ib.*; *Rex* v. *Dolby* (1822, 1823), 1 Dowl. & Ry. 145, 2 Barn. & Cress. 104, 3 Dowl. & Ry. 311, 24 R. R. 645, 647. In the case of challenge to the polls, if the challenge is to the first juror called, two triers are appointed, and when they find one juror indifferent, and he is sworn, they and he try the others, and, on finding another indifferent, the triers are dispensed with and the two jurors try the rest. Co. Litt. 158 a. A juror may be examined upon a *voir dire* as to whether he has any interest in the cause: *Anon.* (1691), 1 Salk. 153; but not as to any matter criminal or infamous: *Ib.*

The proper disallowance of a challenge is ground not for a new trial, but for a *venire de novo*. *Rex* v. *Edmonds* (1821), *supra*.

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As to obtaining a *tales de circumstantibus* when sufficient jurors do not appear, or if, after challenges, a sufficient number do not remain, see 6 Geo. IV., c. 50, s. 37. If, in case of a deficiency of jurors, neither party prays a *tales*, the case must go off. *Jenkins* v. *Purcel* (1738), 1 Str. 707. A juror who has been challenged cannot afterwards be sworn as a talesman. *Parker* v. *Thornton* (1725), 2 Ld. Raym. 1410, 1 Str. 640. In a special jury case, the plaintiff may have a *tales* without consent of the defendant. *Gatliff* v. *Bourne* (1838), 2 M. & Rob. 100; *Wood* v. *Thompson* (1841), Car. & M. 171, 5 Jur. 708. Where only ten special jurymen appeared and two talesmen were sworn to fill up the jury, it was held no ground for a new trial that two of the non-attending special jurymen named in the panel had not been summoned to attend, although this was unknown to the defendant until the trial was over. *Rex* v. *Hunt* (1821), 4 B. & Ald. 430, 23 R. R. 333. A *tales* may be prayed in a criminal case. See 2 Hawk. P. C. 414; Black. Com. iv. 354; *Rex* v. *Dolby* (1823), 2 Barn. & Cress. 104, 3 Dowl. & Ry. 311, 24 R. R. 647.

In actions in the Supreme Court, an order for inspection of property by a jury may now be made under R. S. C. 1883, Ord. 50, rr. 3, 5. The order may be made *ex parte* where the consent of the other side has been obtained. *Pickard* v. *Great Northern Railway Co.* (1883), W. N. 194. The Judge may order such things to be done as may be necessary for the inspection, *e. g.* the removal of obstruction. *Bennett* v. *Griffiths* (1861), 30 L. J. Q. B. 98. Where, after a view had been had, the action was before jurymen other than the viewers, the latter being engaged in trying a case in another court, it was held a mistrial. *Kingston Union* v. *Landed Estates Co.* (1873), 28 L. T. 644. Where the venue was in Lancashire, and it was sought to obtain an order directing the sheriff of Lancashire to bring a Lancashire jury to view land in Cheshire, the application was refused. *Stoke* v. *Robinson* (1889), 6 Times L. R. 31. The Court may direct a view in a criminal case. *Reg.* v. *Whalley* (1847), 2 Cox C. C. 231. It is no irregularity to allow the view after the Judge has summed up. *Reg.* v. *Martin* (1872), L. R. 1 C. C. 378, 41 L. J. M. C. 113, 26 L. T. 778, 20 W. R. 1016, 12 Cox C. C. 204. Where it appears necessary for the purposes of a criminal trial that the jury should have a view in another county from that in which the offence was committed, this is sufficient reason for ordering the trial to take place in that county. *Reg.* v. *Sheldon* (1875), 32 L. T. 27.

On a trial for misdemeanour the jury were allowed to separate at night before giving their verdict. *Rex* v. *Kinnear* (1819), 3 B. & Ald. 462. But on trials for felony no separation before verdict was allowed at common law. An alteration in the law has, however, been

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effected by the Juries Detention Act, 1897 (60 & 61 Vict., c. 18), which provides that on a trial for felony the Court may, if it see fit, permit the jury to separate.

If during the trial one of the jury leaves the Court without permission, the jury will be discharged and a fresh jury impanelled: *Reg.* v. *Ward* (1867), 10 Cox C. C. 573; but the discovery that the prisoner has a relation on the jury is no ground for its discharge: *Reg.* v. *Wardle* (1842), Car. & M. 647.

AMERICAN NOTES.

This case is cited and its doctrine approved in Thompson & Merriam on Juries, p. 158, and in Thompson on Trials, sect. 43. The matter is generally regulated by statute in many States which allow a small fixed number of peremptory challenges in civil cases. In Kentucky, where the right to "challenge" was formerly deemed sacred, the civil suitor has a right to challenge one-fourth of the jurors summoned. Judge Thompson, in his work on Trials, suggests that the opinion that once prevailed in England, that the right of peremptory challenge existed only in capital cases, was not very far wrong, for nearly all public offences were capital.

A question sometimes arises whether a proceeding is civil or criminal in its character. Many civil actions in some jurisdictions are waged in the name of the State for the citizen. The test has been stated thus: "When the proceeding is by indictment," — or analogically, by information, — "it is a criminal suit; when by action or other mode, although in the name of the State, it is a civil suit." *State* v. *Pate*, Busbee (Nor. Car.), 244. But a proceeding *in rem* against intoxicating liquors kept for sale contrary to law has been held to be a criminal proceeding, warranting peremptory challenges on the part of the State. *Commonwealth* v. *Certain Intoxicating Liquors*, 107 Massachusetts, 216.

The following have been held civil actions, in which peremptory challenges were allowable: A bastardy proceeding by the State: *State* v. *Pate*, *supra*; a complaint under the statute of forcible entry and detainer: *Quinebaug Bank* v. *Tarbox*, 20 Connecticut, 510; debt to recover a penalty for unlawfully selling intoxicating liquors: *Kleinback* v. *State*, 2 Speer Law (So. Car.), 418.

A plaintiff in a civil action cannot peremptorily challenge a juror drawn to fill the place of one removed for cause. *Huff* v. *Watkins*, 15 South Carolina, 82.

A Judge has no power peremptorily to set aside a juryman in a civil cause. *Welch* v. *Tribune Pub. Co.*, 83 Michigan, 661; 21 Am. St. Rep. 629.

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No. 2. — HIDDLE *v.* NATIONAL FIRE AND MARINE INSURANCE COMPANY OF NEW ZEALAND.

(PRIVY COUNCIL, 1896.)

RULE.

WHERE a civil action is being tried by a jury, although there may be evidence to go to the jury, yet if the proof is such that the jury could not reasonably give a verdict for the plaintiff, the Judge may withdraw the case from the jury and direct a nonsuit; or, according to modern practice, give judgment for the defendant.

Hiddle and another v. National Fire and Marine Insurance Company of New Zealand.[1]

1896. A. C. 372–376 (s. c. 65 L J. P. C. 24; 74 L. T. 204).

[372] *Practice. — Compliance with Condition in Policy. — Nonsuit.*

Where, in an action on a fire policy, the plaintiff's evidence showed that they could have complied with the condition as to giving within fifteen days a detailed account of their loss "as the nature and circumstances of the case will admit" much more fully and completely than they had done: —

Held, that they were rightly nonsuited, since even if the question of compliance were for the jury, a verdict could not have been reasonably given in their favour.

Appeal from a decree of the Supreme Court (Feb. 11, 1895), refusing a rule *nisi* to set aside a nonsuit and for a new trial.

The facts are stated in the judgment of their Lordships.

Bigham, Q. C., and C. C. Scott, for the appellants, contended that the evidence in this case ought to have been left to the jury. The question whether the account delivered was an account within the meaning of the condition, and the further question whether the account was as detailed as the nature and circumstances of the case admitted, were both of them questions for the jury, and the Judge was not authorized to withdraw from the jury the consideration of the evidence on which they depended. [Reference was made to *Roper* v. *Lendon*, 28 L. J. Q. B. 260; *Fitch* v. *Liver-*

[1] Present: Lord WATSON, Lord HOBHOUSE, Lord DAVEY, and Sir RICHARD COUCH.

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pool and London Co., 1 N. S. W. R. 89, 269; *Carnofsky* v. *New Zealand Insurance*, 14 N. S. W. R. 102.]

* Asquith, Q. C., and Upjohn, for the respondents, were [* 373] not heard.

1896, March 20. The judgment of their Lordships was delivered by

Lord DAVEY. — This appeal arises out of an action by the insured against the insurers on a policy of fire insurance. The policy in question is dated November 15, 1893, and thereby the respondents insured the appellants against loss or damage by fire "on stock-in-trade of general store-keepers, as follows, viz., boots and shoes, £100; fancy crockery and stationery, £100; drapery and clothing, £600; ironmongery, £100; and grocery, £100, — £1000," on their premises in Chanter Street, Berrigan, in the colony of New South Wales, in the sum of £1000, subject to the conditions indorsed thereon. The sixth condition, on which the present question arises, was in the following words: —

"6. Statement and settlement of claims: The insured sustaining any loss or damage by fire shall forthwith give notice to the company in Dunedin, or to the recognised agent thereof, at or near the locality in which such loss or damage shall occur, and shall within fifteen days after such fire deliver to the same an account in detail of such loss or damage as the nature and circumstances of the case will admit; and shall verify the same by solemn declaration or affirmation before a magistrate, and shall produce books, vouchers, and such other information and evidence as the directors or agents of the company may reasonably require; and unless such account, verified as aforesaid, shall be delivered within the time aforesaid, and such other information and evidence, if required, shall be produced in manner aforesaid, no part of such loss shall be payable. No profit of any sort is to be included in the claim; and if there appeared to be any fraud, overcharge, or imposition, or any false declaration, or if the fire shall have happened by the procurement, or wilful act, means, or connivance of the assured or claimants, no benefit shall be recoverable under this policy. If the company elect, pursuant to clause 7 hereof, to replace or reinstate any property, the * insured, at his [* 374] own expense, shall produce and give to the company all such plans, specifications, particulars, books, and information (oral and documentary) as the company may require."

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It appears that the appellants in March, 1893, had made an assignment for the benefit of their creditors, and on July 1 in that year they bought back from their trustees their then existing stock at the value of £1557. They afterwards, and before the date of the fire, made further purchases of stock to the amount (it was said), including duty and freight, of £1860 9*s.* 10*d.* In the course of their business they made sales partly for cash (in which case the amount received, but not the particulars of the goods sold, were entered in their cash-book) and partly on credit, the particulars of which last-mentioned sales appeared in their ledger.

The fire took place on January 10, 1894, when the whole stock of the appellants, with a trifling exception, was destroyed. Some of their books, including the cash-book and customers' ledger, were in a safe, and were saved from the fire. The stock-book, however, and the stock-sheets of the end of 1893 were destroyed.

On January 24, 1894, the appellants, in assumed compliance with the sixth condition, forwarded to the respondents a statutory declaration that by the fire they had sustained loss amounting to £2250, as per detailed statement marked B. This statement was in the following terms: —

Statement referred to.

Particulars of Items burnt.	Value at time of fire.	Present value.	Amount claimed.	Remarks.
	£		£	
Drapery and clothing	1600		600	
Boots	200		100	
Fancy goods, crockery, and stationery	150		100	
Ironmongery	150		100	
Grocery	150		100	
	£2250		£1000	

[* 375] * The respondents declined to accept this statment as sufficient compliance with the sixth condition or to recognise any liability in the matter. The present action was accordingly commenced by the appellants on May 8, 1894. The respondents (among other defences) by their eighth plea relied on the sixth condition.

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At the trial before STEPHEN, J., it appeared from the evidence of the appellant Hiddle that the goods in the store at the time of the fire were the goods they bought back *plus* the invoice goods purchased since *minus* the goods sold. There were in addition £40 worth bought from one Paassvanti. The witness stated that the invoices of the goods purchased by them in Melbourne and Sydney were destroyed in the fire — that they had written to the vendors for copies of those invoices, but did not get them until after fifteen days from the fire. The appellants put in evidence (amongst other documents) a detailed inventory and valuation of the stock bought back by them from their trustees in July, 1893, and estimates prepared by their accountant from the materials in their possession after the fire, showing how the amount of the loss was arrived at.

At the close of the plaintiffs' case the learned Judge nonsuited them on the authority of a case of *Carnofsky* v. *New Zealand Insurance*, 14 N. S. W. R. 102, where a condition in precisely similar terms to the sixth condition in the present case was in question. The nonsuit was confirmed by the Supreme Court. The Chief Justice in his judgment referred to two earlier cases in that Court decided on similar conditions in 1862 and 1884, as well as to the more recent *Carnofsky Case*, referred to by STEPHEN, J. This appeal is from the order of the Supreme Court.

It was contended on behalf of the appellants that they were only bound to give such an account as the nature and circumstances of the case would admit of, or (in other words) the best account they could, and that whether they had done so was a question of fact which ought to have been submitted to the jury. Their Lordships, however, accept the rule laid down by WILLES, J., in the case of *Ryder* v. *Wombwell*, L. R. 4 Ex. 38, and they think that the nonsuit was proper, although there may have been * some evidence to go to the jury, if the proof was [*376] such that the jury could not reasonably give a verdict for the plaintiffs. In the present case their Lordships doubt whether the statement forwarded by the appellants was an account at all within the meaning of the sixth condition, and they consider it proved by the evidence of the plaintiffs themselves that at the time of forwarding their statement they had in their possession materials which enabled them to give a much fuller, more detailed, and better account for the purpose of enabling the insurance company to test the reality and extent of the loss.

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Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

ENGLISH NOTES.

It has never been doubted that where there is absolutely no evidence to support the plaintiff's case, it is the duty of the Judge to withdraw the case from the jury and nonsuit the plaintiff. Two recent illustrations of this proposition may be mentioned. In an action for slander in which it was necessary to prove special damage, the plaintiff was nonsuited on his failure to produce any evidence of such damage. *Argent* v. *Donigan* (1892), 8 Times Law Rep. 432. In a libel action in which the occasion was held privileged and the plaintiff was unable to prove malice, the Court of Appeal held that the Judge should have stopped the case, and they allowed an application for judgment by the defendant. *Turner* v. *Bowley* (1896), 12 Times Law Rep. 402. The truth of this proposition is also recognised by implication, if not by express statement, in the principal case and in most of the authorities cited below.

"It was at one time supposed to be requisite in all cases to leave the question to the jury if there was any evidence, even a *scintilla*, upon the mere balance of probabilities in support of the case; but it is now settled that the question for the Judge, subject of course to review, is, as is stated by MAULE, J., in *Jewell* v. *Parr*, 13 C. B. 916, 22 L. J. C. P. 253, not whether there is literally no evidence, but whether there is 'none that ought reasonably to satisfy the jury that the fact sought to be proved is established.' In *Toomey* v. *The London & Brighton Railway Company*, 3 C. B. 150, 27 L. J. C. P. 39, WILLIAMS, J., enunciates the same idea thus: 'It is not enough to say that there was some evidence. . . . A *scintilla* of evidence . . . clearly would not justify the Judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence,' — the fact in that case to be established. And in *Wheelton* v. *Hardisty*, 8 El. & B. 262, 26 L. J. Q. B. 265, in the considered judgment of the majority of the Court, it is said, 'The question is whether the proof was such that the jury could reasonably come to the conclusion' that the issue was proved. 'This (they say) is now settled to be the real question in such cases by the decisions in the Exchequer Chamber, which have in our opinion so properly put an end to what had been treated as the rule, that a case must go to the jury, if there were what had been termed a *scintilla* of evidence;' and in this Lord CAMPBELL, Ch. J., agreed, though differing as to the result. (8 El. & B. 266; 26 L. J. Q. B. 277.)" Per WILLES, J.,

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in *Ryder* v. *Wombwell* (1868), L. R. 4 Ex. 38, 38 L. J. Ex. 8. See also the judgment of Lord CHELMSFORD in *Giblin* v. *McMullen* (1869), 3 R. C. 618, in which he says that "if at the close of the plaintiff's case there was not evidence upon which the jury could reasonably and properly find a verdict for him, the Judge ought to have directed a nonsuit," and approves the law as laid down in *Ryder* v. *Wombwell, supra.*

As regards the meaning of the expression "*scintilla* of evidence," which occurs in most of the above cases, some remarks of MELLISH, L. J., in *Ex parte Morgan, In re Simpson* (1876), 2 Ch. D. 72, at p. 90, 45 L. J. Bk. 43, 24 W. R. 418, seem deserving of notice. He says: "I am not aware . . . that the . . . doctrine of the evidence only amounting to a *scintilla* has ever been applied to a case where a witness has positively sworn to something having taken place within his own knowledge by which, if it did take place, the case was proved. However overwhelming the evidence may be on the other side, the Judge must, in my opinion, in such a case, leave the question to the jury. The test whether the evidence only amounts to a *scintilla* is to assume that there was no evidence to contradict the evidence which is said only to amount to a *scintilla*, and then to inquire whether there would be evidence which would justify the jury in finding a verdict."

The Judge cannot, after the case has been opened, nonsuit the plaintiff without his consent, and without hearing the evidence tendered by him. *Fletcher* v. *London & North Western Railway Co.* (1892), 1 Q. B. 122; *Bottomley* v. *Furnival* (1892), 27 L. J N. C. 103.

In connection with the foregoing cases it may be remarked that by R. S. C. (1875), Ord. 41, r. 6, it was provided that a judgment of nonsuit should have the same effect as a judgment on the merits for the defendant. The expression "nonsuit" thus fell into disuse, and the above rule was repealed and not re-enacted by R. S. C. (1883). It is clear, however, that, where it was formerly competent to nonsuit, the Judge may now direct a verdict for the defendant or dismiss the action.

The principle upon which the Court of Appeal acts in setting aside the verdict of a jury on the ground that it is against the weight of evidence, is laid down in *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152, 55 L. J. Q. B. 401, 54 L. T. 658, 34 W. R. 746. It is there decided that before the Court will set aside the verdict on that ground, there must be such a preponderance of evidence as to make it unreasonable and almost perverse that the jury when instructed and assisted by the Judge should return such a verdict; but the Court is not to substitute its own opinion as to the facts for that of the duly constituted authority appointed to decide them. The Court will order a new trial after verdict with extreme reluctance and in exceptional cases only. *Metropolitan Railway Co.* v. *Wright, supra.*

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AMERICAN NOTES.

"There is a conflict of authority in America as to whether a Judge can, against the consent of the plaintiff, after the jury have been sworn and evidence adduced before them, direct a judgment of nonsuit. In the courts of the United States, North Carolina, Tennessee, Alabama, Arkansas, Missouri, Kansas, Indiana, Vermont, Michigan, and Mississippi, the Judge cannot in any case direct a nonsuit where the plaintiff insists on going to the jury. But in New York, Pennsylvania, Ohio, Wisconsin, Iowa, Connecticut, Maine, New Hampshire, California, Georgia, New Jersey, and South Carolina the power of the Judge in proper cases to order a nonsuit without the consent of the plaintiff is conceded." Thompson on Trials, sect. 2228. Indiana may be added to the first list. *Booe* v. *Davis*, 5 Blackford, 115; 33 Am. Dec. 457. See note, 24 Am. Dec. 620, 621, showing that in the latter list must be included Delaware and Kentucky.

Under the modern code system of procedure the Judge may direct judgment for the defendant if it is apparent in the nature of things that no proof can possibly be supplied to entitle the plaintiff to recover; but unless this is so a judgment only of dismissal of the suit is warranted, and this does not operate as a bar to a new suit. Cases of the latter kind are comparatively infrequent, and a judgment of nonsuit only is the usual result in case of an apparent lack of affirmative evidence. Instances of a fatal and incurable defect of proof arise in slander cases, where the evidence clearly fails to substantiate the charge, and it is evident that the character of the words in question could not be changed on a new trial. This results, like any other case of undisputed testimony, in a question of law for the Court. *Harris* v. *Woody*, 9 Missouri, 113.

The application of the doctrine of the Rule arises most frequently in negligence cases, either where there is a clear defect of proof of absence of contributory negligence on the part of the plaintiff, or that being shown the indisputable existence of negligence on the part of the defendant. *Weston* v. *City of Troy*, 139 New York, 281; *Myers* v. *N. Y., &c. R. Co.*, 82 Hun (N. Y.), 36.

Another instance is where upon the facts shown the law is against either party. *Foot* v. *Sabin*, 19 Johnson (N. Y.), 154; 10 Am. Dec. 208.

A few Courts in this country have adopted the "*scintilla*" doctrine, that "where there is any evidence, however slight, *tending* to support a material issue, the case must go to the jury. *Mercier* v. *Mercier*, 43 Georgia, 323; *Denny* v. *Williams*, 5 Allen (Massachusetts), 1; *Bowen* v. *Lazalere*, 44 Missouri, 383; *Cumberland, &c. Iron Co.* v. *Scally*, 27 Maryland, 589.

But the "*scintilla*" doctrine is now generally denied here. The prevailing doctrine is probably expressed in *Commissioners* v. *Clark*, 94 United States, 278: "The Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. Decided cases may be found where it is held that if there is a

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scintilla of evidence in support of a case, the Judge is bound to leave it to the jury, but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury, there is, or may be, in every case a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Much to the same effect was the conclusion of Chief Justice MARSHALL in *Pawling* v. *United States*, 4 Cranch (U. S. Sup. Ct.), 219. Upon this line of reasoning it is the present practice in many of the States for the Judge to nonsuit or direct a verdict for the defendant, in cases where there is some evidence in support of the plaintiff's claim, but not sufficient to justify a verdict in his favor. *Colt* v. *Sixth Ave. R. Co.*, 49 New York, 671; *Bailey* v. *Kimball*, 26 New Hampshire, 351; *Mason* v. *Lewis*, 1 Greene (Iowa), 494; *Brown* v. *European, &c. R. Co.*, 58 Maine, 384; *Morgan* v. *Durfee*, 69 Missouri, 469; 33 Am. Rep. 508; *Railroad Co.* v. *Houston*, 95 United States, 697.

In Maryland (*Belt* v. *Marriott*, 9 Gill, 331), the Court said that when the evidence furnished by either party "is so light and inconclusive that no rational, well-constructed mind can infer from it the fact which it is offered to establish, it is the duty of the Court, when applied to for that purpose, to instruct the jury that there is no evidence before them to warrant their finding the fact thus attempted to be proved." In *Connor* v. *Giles*, 76 Maine, 132, the Court say that a plaintiff cannot claim a verdict "where the evidence is too slight or trifling to be considered and acted upon by a jury. The evidence must have some legal weight. There is no practical or logical difference between no evidence and evidence which has no legal weight." "The old rule that a case must go to the jury if there is a *scintilla* of evidence has been almost everywhere exploded. There is no object in permitting a jury to find a verdict which a Court would set aside as often as found. The better and improved rule is not to see whether there is any evidence, a *scintilla*, a crumb, dust of the scales, but whether there is any upon which a jury can, in any justifiable view, find for the party producing it, upon whom the burden of proof is imposed." In *Morgan* v. *Durfee*, *supra*, an action of damages for killing plaintiff's father, there was overwhelming evidence that the killing was in self-defence, the Court cited *Hinchcliffe's Case*, 1 Lewin C. C. 161, and observed: "That case is also authority for the exercise of the power by a trial Court, seldom brought into requisition, however, owing to pitiable and painful weakness in the dorsal region, of directing a verdict for either party where the facts are undisputed and the witnesses unimpeached, or where the verdict, if returned for the opposite party, would be set aside as against the law and evidence. This doctrine is well established." In *Baker* v. *Lewis*, 33 Penn. State, 301; 75 Am. Dec. 598, it is said: "When there is any evidence from which there arises a fair and legitimate inference of facts legally sufficient to justify a verdict for plaintiff, it is conceded that the Court should submit it to the jury; but otherwise a judgment of nonsuit may be properly entered." To the same effect: *Tyson* v. *Yawn*, 15 Georgia, 491; 60 Am. Dec. 708; *Brown* v. *Frost*, 2 Bay (So. Car.), 126; 1 Am. Dec. 633; *Hineman* v. *Matthews*, 138 Penn. State, 204; 10 Lawyers' Rep. Annotated, 233; *Baldwin* v. *Shannon*,

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43 New Jersey Law, 596; *Hemmens* v. *Nelson*, 138 New York, 517; 20 Lawyers' Rep. Annotated, 440; *People* v. *People's Ins. Exch.*, 126 Illinois, 466; 2 Lawyers' Rep. Annotated, 340; *Wallace* v. *City, &c. R. Co.*, 26 Oregon, 174; 25 Lawyers' Rep. Annotated, 663. In *Brooks* v. *Somerville*, 106 Massachusetts, 274, the Court said: "It is too well settled to be now brought in question that there may be a state of things in the trial of a cause, in which it may be the duty of the Court either to instruct the jury that there is no evidence upon which the plaintiff is entitled to recover, or on which the other party can maintain his defence. Such a course of proceedings in a proper case is not an invasion of the province of the jury. The rule of law upon which it depends is simple and intelligible in itself, although in the wide diversity of cases in which it is discussed, there is some practical difficulty in its application, and perhaps some apparent conflict in the decisions upon the subject. Thus upon the subject of negligence it has been held as matter of law that an attempt to cross a railroad train by going between two cars in motion, *Gahagan* v. *Boston & Lowell Railroad Co.*, 1 Allen, 187; leaving a train of cars after it had started: *Lucas* v. *Taunton & New Bedford Railroad Co.*, 6 Gray, 64; leaping from a train while in motion: *Gavett* v. *Manchester & Lawrence Railroad Co.*, 16 Gray, 501; crossing a railroad track in front of a railroad train without looking up: *Butterfield* v. *Western Railroad Co.*, 10 Allen, 532; *Wilds* v. *Hudson River Railroad Co.*, 24 N. Y. 430, — if without any reasonable excuse, are facts upon which the jury should be told that they cannot find that the party so conducting was in the exercise of due and reasonable care. But in all these cases there was no dispute about the facts; nothing material was left in doubt; there was no question as to the credibility of witnesses; and nothing was left to be inferred in the way of explanation or excuse. In such cases the Court may properly decide that no case is proved which could in law support a verdict for the plaintiff, and that the testimony furnishes nothing for the consideration of the jury. In *Denny* v. *Williams*, 5 Allen, 1, this Court has said that it is not necessary, in order to apply the rule, that there should be absolutely no evidence, provided the *scintilla* of evidence be so slight that the Court would feel bound to set aside any number of verdicts existing on no other foundation."

In *Wilds* v. *Hudson River Railroad Co.*, 24 New York, 430, the Court said: "Another preliminary point . . . is the claim that the question of negligence belongs peculiarly to the jury; and that cases involving that question should never be taken from them to be decided by the Court. To this position it should be answered that there is no case known to the law (even the question of fraud in certain cases where the statute says it is to be submitted to the jury) in which an appellate Court has not, and does not, on proper occasions, exercise the power of setting aside the verdict of a jury, not merely when it is entirely against evidence, but when it is clearly against the weight of evidence; and no Court can be guilty of the absurdity of holding that in such a case it would not have been competent for the Judge who tried the cause either to nonsuit the plaintiff or to direct a verdict in his favor, as the case might have required. No legal principle compels him to allow a jury to render a merely idle verdict. The full extent of this position has been held by this Court

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(*Johnson* v. *Hudson River R. Co.*, 20 N. Y. 73; 75 Am Dec. 375), in saying that '*to carry a case to the jury* the evidence on the part of the plaintiff must be such as if believed would authorize them to find that the injury was caused *solely* by the negligence of the defendant.' Can this be true without holding that in every case where the verdict would be set aside as against the clear weight of evidence, the Court should take the decision of the case from the jury. Certainly it is not easy to conceive any other definite decision which would be consistent with the decisions. (18 N. Y. 422.)" Citing *Cotton* v. *Wood*, 98 Eng. Com. Law, 566; *Toomey* v. *London, &c. Ry. Co.*, 91 ibid. 148; *Gahagan* v. *Boston & Lowell R. Co.*, 1 Allen (Mass.), 187; *Fox* v. *Glastonbury*, 29 Connecticut, 204. "When the plaintiff's evidence, taken in its full strength, has no tendency, in the opinion of the Judge, to maintain the issue for him, it is a useless consumption of time to hear evidence in defence, and after that direct a nonsuit." *Bragdon* v. *Appleton M. F. Ins. Co.*, 42 Maine, 259.

Another rule, alluded to in several of the cases last cited, has been adopted by some of our Courts, namely, that the Judge should sustain a demurrer to the evidence, instruct peremptorily to find a verdict, or grant a nonsuit, according to the facts and the practice in vogue in his jurisdiction, whenever he can clearly see that it would be his duty to set aside a verdict in favor of the party sustaining the burden of proof, even if there is some slight conflict in the testimony. This is the rule declared in *Herbert* v. *Butler*, 97 United States, 319; *Randall* v. *Baltimore, &c. R. Co.*, 109 ibid. 478; *Simmons* v. *Chicago, &c. R. Co.*, 110 Illinois, 340; *Wilds* v. *Railroad Co.*, 24 New York, 433; *Jackson* v. *Hardin*, 83 Missouri, 175; *Geary* v. *Simmons*, 39 California, 224; *Wright* v. *Malden, &c. R. Co.*, 4 Allen (Mass.), 283; *Morton* v. *Frankfort*, 55 Maine, 46; *Corning* v. *Troy Iron Factory*, 44 New York, 577; *Mateer* v. *Brown*, 1 California, 221; 52 Am. Dec. 303; *Schuerman* v. *Home D. H. Ins. Co.*, 161 Illinois, 437; 52 Am. St. Rep. 377; *Grant* v. *Baker*, 12 Oregon, 329.

"But the Court 'should be extremely cautious on the subject of interfering with the province of the jury,' who by the principles and plan of our jurisprudence have exclusive jurisdiction over the facts of a case. (*Stuart* v. *Simpson*, 1 Wendell, 376.)" *Labar* v. *Koplin*, 4 New York, 547.

In Massachusetts (*Denny* v. *Williams*, 5 Allen, 1) there was early a singular rule, namely, "that if the evidence is such that the Court would set aside any number of verdicts upon it, *toties quoties*, then the cause should be taken from the jury by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that though one or two verdicts rendered upon it would be set aside upon motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions," which appears like the progress of vice, "hated" at first, "but seen too oft," "first endured, then pitied, then embraced." So it seems that a jury's inveteracy and obstinacy in wrong may adversely ripen into right! But in later cases in that State "it has been held that if the whole evidence introduced by the plaintiff has no tendency to show care on his part, but on the contrary shows that he was careless, it is the duty of the Court to direct the jury, as matter of law, to return a verdict for the defendant." *Warren* v. *Fitchburg R. Co.*, 8 Allen, 227; 85 Am. Dec. 700.

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Some Courts have declared the test of authority in the Court to nonsuit or direct a verdict to be such a state of evidence that no two reasonable and intelligent persons could come to a different conclusion upon it. *Williams* v. *Guile*, 117 New York, 343; 6 Lawyers' Rep. Annotated, 366: "In order that a case should be submitted to a determination by the jury, it must present the possibility of different inferences being drawn from the proof. But where, on undisputed facts, the conclusion to be arrived at is as to the legal effect, there is nothing for the jury to pass upon, and a verdict is properly directed on the legal construction given by the trial Judge." "The negligence (contributory) must appear so clearly that no construction of the evidence or inference drawn from the facts would have warranted a contrary conclusion, and that a verdict of the jury the other way would have been set aside as against evidence." *Stackus* v. *New York, &c. R. Co.*, 79 New York, 464. "When the facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was, or was not, at fault, then it is the province of the Court to determine the question of contributory negligence as one of law." Beach on Contributory Negligence, sect. 447, citing a large number of cases. Beach says that to justify a nonsuit the facts should be "beyond a cavil;" Field (Damages, 519), "so clear as to leave no room for doubt;" Shearman and Redfield (Negligence, sect. 56), "clearly settled, and the course which common prudence dictated can be clearly discerned;" Judge COOLEY (*Detroit* v. *Van Steinburg*, 17 Michigan, 120), "very clear," "a perfectly plain case," "does not often occur." Beach also says that this rule is applicable where "the conduct of the plaintiff is such as to shock the mind of an ordinarily prudent man, and to evince a plain disregard of ordinary care and caution, as for example, in cases where it appeared that the plaintiff took desperate chances in crossing a railway track, or jumped from a rapidly moving train, or lay down in a fit of intoxication upon a railway track, or disobeyed plain rules enacted with a view to his protection, or crawled under a train of cars, or rode upon a locomotive as a passenger." As a commentary upon the strictness with which the Courts insist upon this doctrine, consult *Eckert* v. *Long Island R. Co.*, 43 New York, 502; 3 Am. Rep. 721, where it was held proper to submit to the jury the question of the negligence of a man who rushed upon a railway, in front of a rapidly moving and perfectly visible train, for the purpose of rescuing a child on the track, and was struck and killed. The Court say the law "will not impute negligence to an effort to preserve" human life, "unless made under such circumstances as to constitute rashness in the judgment of prudent persons." (Two Judges dissented.) So in *Gibney* v. *State*, 137 New York, 1, where a father plunged into the canal to save his infant son, who had fallen into it through an unguarded bridge, and was drowned in the attempt. So of a locomotive engineer, who was killed by remaining at his post in the face of danger which he might have escaped. *Cottrill* v. *Chicago, &c. R. Co.*, 47 Wisconsin, 634; 32 Am. Rep. 796; *Dickson* v. *Omaha, &c. R. Co.*, 124 Missouri, 140; 25 Lawyers' Rep. Annotated, 320. On the other hand, a nonsuit was approved where the decedent met his death in trying to rescue an adult, it not appearing that the latter had been placed in the perilous position through the defendant's negligence. *Sann* v. *Johns Manuf. Co.*, 16 App. Div. 252 (N. Y. Sup. Ct.).

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JUSTICE OF THE PEACE.

See also "CERTIORARI," 5 R. C. 527 *et seq.*

SECTION I. Commission and Jurisdiction.
SECTION II. Powers and Duties.
SECTION III. Essentials of Procedure.
SECTION IV. Statutory Protection.

SECTION I. — *Commission and Jurisdiction.*

No. 1. — JONES *v.* WILLIAMS.

(K. B. 1825.)

RULE.

IF the King has power (which since the statute 27 Hen. VIII., c. 24, is more than questionable) to delegate to another the power of appointing a justice of the peace, the intention to delegate such a power is not to be inferred without clear words of the charter.

Jones v. Williams.

3 Barn. & Cress. 762–771 (27 R. R. 474).

Justice of the Peace. — Delegation of Office.

By charter, the aldermen, bailiffs, and burgesses had power to elect two [762] of the burgesses to be aldermen of a borough for one whole year, and they were to have power and authority to execute by themselves, or in their absence by their deputies, the office of aldermen of the borough. The charter then contained clauses by which it was provided, that, in the event of the death or removal of any alderman, a new one might be elected, who, during the remainder of the year, should execute the office by himself or his deputy. It was then provided, that, in the absence of any of the aldermen for the time being, the bailiffs and capital burgesses might elect one or more of the burgesses to supply the vacancy or vacancies. These substituted aldermen had no power to appoint deputies. There then followed a clause which directed that the aldermen for the time being, during the time they should remain in their offices, should be justices of the peace within the borough. *Held*, that this charter did not enable the aldermen elected for the year to delegate their office of justice of the peace

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and therefore that a deputy alderman was not a justice of the peace for the borough.

Quære whether, since the statute 27 Hen. VIII., c. 24, s. 2, the Crown can delegate to a subject the power of appointing a justice of the peace.

Trespass and false imprisonment. Plea, not guilty. At the trial before PARK, J., at the Summer Assizes for the county of Salop, 1824, it appeared that the plaintiff had been convicted under the statute 4 Geo. IV., c. 34, s. 3, by the defendant, a deputy alderman of the borough of Denbigh, for absenting herself from her service before the end of the year for which she had contracted to serve, and had been committed to the house of correction at Ruthin, in the county of Denbigh, for one calendar month. It was objected that the defendant was entitled to notice under the statute 24 Geo. II., c. 44, s. 1, and the question was, whether the defendant was a justice of the peace for the borough of Denbigh. By the charter of Denbigh it was granted that the aldermen, bailiffs, and capital burgesses of the borough for the time being, or the major part of them, of which one of the aldermen and one of the bailiffs were to be two, being assembled from time to time, might and should have power and authority yearly, on, &c., to elect two, out of the number of the burgesses of the borough, who should be aldermen of the said borough for one whole year [* 763] then next ensuing; * and they, after they were so elected and nominated aldermen of the borough, were to take the oaths before the steward or his deputy; or if there were no steward at the time of such election and nomination, before their immediate predecessors, and in the presence of ten capital burgesses of the said borough for the time being to execute their office well and faithfully; and they were to have power and authority to execute by themselves, or, in their absence, by their deputies, the offices of aldermen of the said borough for one whole year then next ensuing, and until some other should in due form be elected and sworn to the offices of aldermen; and if it should happen that either of the aldermen of the borough for the time being should die or be displaced from his office, that then and so oft it should be lawful for the surviving alderman and the bailiffs and capital burgesses of the borough for the time being, or the major part of them, to elect or place in another of the number of the burgesses of the said borough for alderman of the said borough; and that he, being so elected and placed in, might have and exercise the said

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office for the remainder of the said year, and until one or more were duly chosen and sworn to the said office (the corporal oaths to be so first taken in form aforesaid), by himself or themselves, or his or their deputies, in his or their absence, and so *toties quoties*, as often as such an accident should happen. There then followed a proviso that the aldermen, bailiffs, and burgesses of the said borough, or the major part of them, from time to time, and at all times thereafter, should and might have power and authority for electing and nominating, and that they should and might elect, the welfare of the said borough requiring it, and when it should be necessary and requisite, * out of the number of [* 764] the capital burgesses of the borough aforesaid, one or two other alderman or aldermen, in the absence of the former alderman or aldermen and bailiffs, or one or more of them; anything to the contrary in any wise notwithstanding, And that he or they, after they were so elected and nominated as aforesaid to be alderman or aldermen of the borough aforesaid, before they were admitted to execute those offices, should take, as aforesaid, their corporal oaths in due form, that they would execute their offices well and faithfully so long as he or they should continue in the said office or offices. By another clause the aldermen of the borough for the time being, during the time they should remain in their offices, were to be keepers and justices of the peace in the said borough, liberties, and precincts of the same, &c. The charter also contained a *non-intromittas* clause, and then nominated the first aldermen, &c.

Upon this evidence it was argued, first, that the Crown could not give to other persons the power of making a justice of the peace; and, secondly, assuming that it had that power, it had not conferred it by the language of this charter, for the charter only enabled the aldermen to execute by themselves or their deputies the office of aldermen of the borough, and the office of justice of the peace, though annexed by the charter to that office, was of itself a distinct office, and the charter did not enable the alderman to appoint another person as deputy justice. The learned Judge, however, was of opinion that as one clause of the charter enabled the aldermen to appoint a deputy to the office of aldermen, and a subsequent clause made the aldermen for the time being justices of the peace for the * borough, the two clauses were [* 765] to be construed together, and as giving to the alderman a

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power of appointing a deputy to do all that he was authorised to do by the charter, and, among other things, to execute the office of justice of the peace, consequently that the deputy was a good justice, and entitled to notice. The plaintiff was therefore nonsuited. Godson in last Michaelmas Term obtained a rule *nisi* to set aside that nonsuit on two grounds: first, that the defendant had no right to exercise the functions of a justice of the peace; and, secondly, if he had, still he was only a deputy to a justice of the peace, and not named in 24 Geo. II., c. 44, s. 1, requiring the notice. On the first point, he urged that the King could not by charter grant to any person a power of making a judicial officer, and, consequently, that a man who was a judicial officer himself could not make a deputy. He cited Comyn's Digest, Officer, D. 2, *The King* v. *The Mayor of Gravesend*, 2 B. & C. 602, and contended that the King being the fountain of justice could alone make justices of the peace, Comyn's Digest, Justices (A. 1), 27 Hen. VIII., c. 24, s. 2 & 6. But, admitting that the King had the power, yet he had not by this charter exercised it, for it could only be done by express words, which were not in this charter; and that it did not follow, without express words, that an alderman should be a justice of the peace. *Reg.* v. *Langley*, 2 Ld. Raym. 1029. And further, that no inconvenience could arise to the borough, as there was a proviso for electing aldermen in the absence of those elected annually under the charter.

W. E. Taunton and Campbell now showed cause. By the charter the alderman had power to appoint a deputy [*766] * to execute all the duties which the principal could execute. The charter nominates two persons to sustain the characters of aldermen and justices of the peace for the borough, and it contains a *non-intromittas* clause. In the absence of the two aldermen, according to the argument on the other side, there would be no person competent to execute the office of justice of the peace within the borough. It is true that a judicial officer, without an express power, cannot appoint a deputy; but here there is such an express power. The charter says that the aldermen shall have power and authority to execute by themselves or their deputies the office of aldermen. Now the deputy is to act as alderman, and to exercise all the powers which the charter confers on the alderman. If the clause by which the aldermen are made justices of the peace of the borough had preceded the clause

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enabling them to appoint a deputy, it could not be doubted that a deputy would have been a good justice of the peace. Then a different intention cannot be inferred from the order in which the clauses stand in the charter. The deputy is to exercise the office of alderman of the borough, and the acting as a justice of the peace is parcel of that office. Now, if a judicial office be granted *tenendum per se vel deputatem*, he may make a deputy; as the Recorder of London: *Molins* v. *Werley*, 1 Lev. 76, Com. Dig., tit. Officer, D. 2; and a deputy not only succeeds to all the functions of his principal, and has power to do any act which the principal may do, but the law will not even sanction a subdivision of the duties of the office. So that if a principal makes a deputy covenant that he will not do anything which the principal may do, the covenant is * void and repugnant. *Parker* v. *Kett*, 1 Salk. [* 767] 96, Com. Dig., tit. Officer, D. 3. Here, therefore, it being a part of the office of alderman to exercise the duties of a justice of the peace within the borough, the deputy had the like power.

Godson, *contra*, was stopped by the Court.

Bayley, J. — The question here turns partly on the power of the Crown to delegate the power to a subject to make a justice of the peace, and partly on the construction of the charter. Supposing the Crown to have the power to delegate such an authority, the language used ought to be extremely clear and express in order to effectuate such an object. The present impression on my mind is, that that power is superseded by the statute 27 Hen. VIII., c. 24, s. 2, by which it is enacted, "that no person shall have any power or authority to make any justices of eyre, justices of assize, justices of peace, or justices of gaol delivery; but that all such officers and ministers shall be made by letters patent under the King's great seal, in the name and by the authority of the King's highness, and his heirs, Kings of this realm, in all shires, counties, counties palatine, and other places of this realm, Wales, and marches of the same, or in any other his dominions, at their pleasure and wills, in such manner and form as justices of eyre, justices of assize, justices of peace, and justices of gaol delivery be commonly made in every shire of this realm; any grants, usages, prescriptions, allowances, Act or Acts of Parliament, or any other thing or things * to the contrary thereof notwith- [* 768] standing." And section 6 contains a proviso, "that all cities, boroughs, and towns corporate which have liberty, power,

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and authority to have justices of peace shall still have and enjoy their liberties and authorities in that behalf after such like manner as they have been accustomed, without any alteration by occasion of this Act." I do not find any clause relating to a corporation to be thereafter created. The words of the Act, however, are very general, and when we consider the power given to justices of the peace, and the talent and integrity required in executing the office, a certain discretion ought to be exercised in selecting persons fit for the office. In Com. Dig., tit. Justice of the Peace, it is laid down, that none but the King can make justices of the peace, for which Dalton, s. 10, is cited, and that the King cannot grant a power to another to make them. It has been said that the Recorder of London and the Justices of great sessions in Wales have power to appoint deputies for certain purposes, but that is by Act of Parliament. The charter of London, which requires that the Recorder shall execute his office by himself or his sufficient deputy, is confirmed by Act of Parliament. So by statute 34 & 35 Hen. VIII., c. 26, the Welch Judges might execute their office by themselves or their sufficient deputies, and that power is now limited by the 13 Geo. III., c. 51, s. 3, to the purpose of calling or adjourning any Court and receiving certain motions, and taking and proclaiming fines, and arraigning recoveries. Oldnall's Welch Practice, p. 4. Assuming that the King had the power to enable a person to delegate the office of justice of the peace [*769] to another, I cannot *say, looking at the language of this charter, that the King intended to exercise that power. The position of the clauses in the charter is of material assistance in guiding our judgment. By one clause, the aldermen, bailiffs, or capital burgesses for the time being are to have power every year to nominate two of the burgesses who shall be aldermen of the borough for one year next ensuing, and after they are so elected aldermen, before they are admitted to execute that office, they are to take the oaths before the steward, or if there be no steward, before the aldermen and ten burgesses, to execute their office well and faithfully, and after this oath so taken, they are to have power and authority to execute by themselves, or, in their absence, by their deputies, the office of aldermen of the borough for one whole year next ensuing. The deputies are to exercise the powers of aldermen. Now the powers of aldermen vary in different boroughs. The powers of a justice of peace do not necessarily belong to the

No. 1. — Jones v. Williams, 3 Barn. & Cress. 769–771.

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office of alderman. There then follow clauses for making new aldermen in the event of the death or removal of any alderman elected for the year, and they are to take the oaths and perform the office by themselves or their deputies. Another clause enables the corporation to elect additional aldermen to act in the absence of the other aldermen; but those additional aldermen have not any power of appointing deputies. There are therefore two descriptions of aldermen: first, those originally elected for the year, and those elected on their death or removal, and they may execute their offices by themselves or by their deputies; secondly, aldermen elected in the absence of the aldermen chosen for the year, and these substituted aldermen have not any * power to ap- [* 770] point deputies. The charter then provides that the aldermen for the time being during the time they shall remain in office, shall be justices of the peace for the borough. It does not say that the deputies of the aldermen shall be justices. The aldermen are to take certain oaths, the deputies are not required to take any oaths. The aldermen are to be chosen out of the burgesses. The charter does not require that the deputy should be a member of the corporation. Considering, therefore, that this charter creates two descriptions of aldermen, and that one of them only has the power of exercising the office of alderman by deputy, and that in the event of the absence of the aldermen, others may be elected in their stead, and that those substituted aldermen have the power of executing the office of justice of the peace within the borough, so that no inconvenience can arise from the deputy not having that power, and that the words of the charter will be fully satisfied by holding that the alderman has a power to appoint a deputy to exercise all his corporate powers only, I am of opinion that the language of this charter is not sufficiently clear to show an intention on the part of the Crown to delegate to the aldermen for the time being a power of appointing deputy justices of the peace. The rule for a new trial must therefore be made absolute.

Holroyd, J. — I think that the deputy had not vested in him the office or power of a justice of the peace. By the charter two persons are constituted justices of the peace, to continue so until others are appointed. The office of justices of the peace is annexed to that of alderman. Then there is a further power that other aldermen * may be appointed to act in the absence [* 771] of those first elected. The charter, after giving this power,

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states that the aldermen for the time being shall and may exercise the office of justices of the peace, but it does not follow that that office is part of the office to which it is annexed. I do not know that a person *qua* alderman has vested in him any known duties, but the duties are generally defined by the charter. The powers of aldermen are to be exercised only on members of the corporation; they are to exercise only corporate powers; but a justice exercises powers which are not corporate, and not confined to members of the corporation. Generally speaking, where there is a power by charter to appoint a deputy, the latter has all the powers of his principal, but then those would be corporate powers. But that is very different from the present case, for here one office is annexed to the other. I think too we are to take into consideration that the Legislature has confined to the King generally the power of making justices, and that we ought not, unless the language of the charter be clear and express, to infer that the King meant to delegate that power to others. The deputy does not become an alderman, but he has all the corporate powers only which were annexed to the officer who is an alderman. That being so, I am of opinion that the defendant was not a justice of peace, and consequently that he was not entitled to notice of action under the statute 24 Geo. II., c. 44. The rule for a new trial must therefore be made absolute. *Rule absolute.*

ENGLISH NOTES.

The Act 27 Hen. VIII., c. 24, recited that the King's prerogative had been lessened by gifts and franchises made by the King's progenitors, and enacted (s. 2) that no persons should thereafter have authority to make justices of the peace, &c.; and that all such officers should be made by letters patent under the King's great seal in the name of the King. It was provided (s. 19) that nothing in the Act contained should prejudice the exercise of any liberty or franchise by any city, borough, or town corporate.

By a charter of Edward IV., the Crown granted to the abbot and convent of S. the right of appointing their own justices, with power of oyer and terminer for all felonies, trespasses, and misdemeanours occurring within the liberty of S. in the county of H., with a *non-intromittant* clause, and that they might have a gaol under their own government without interference by other justice or others, for felons and malefactors within the liberty until such were delivered by due course of law. It was admitted (as decided in *Arnold* v. *Gaussen*, 22

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L. J. Ex. 180), that the power to appoint justices was put an end to by 27 Hen. VIII., c. 24, and that the justices created for the liberty under that statute by the Crown had no exclusive jurisdiction over felonies, trespasses, and misdemeanours. *Arnold* v. *Dimsdale* (1853), 2 El. & Bl. 580, 22 L. J. M. C. 161.

It was also admitted that the statutes 31 Hen. VIII., c. 13, and 32 Hen. VIII., c. 20, which gave to the Crown the liberties, franchises, and jurisdictions of the dissolved abbeys did not, after the dissolution of the abbey of S., revive in the justices appointed by the Crown for the liberty, the exclusive jurisdiction given by the charter of Edward IV. Ib.

Justices at sessions appointed a committee of twelve magistrates to inspect the state of the county bridge and make any new contract for repairing or rebuilding to be executed by the clerk of the peace on behalf of the county. Afterwards they made an order adopting a contract for rebuilding proposed by the committee and directed to be prepared by the clerk; and, after this contract had been executed by the clerk, the justices at a subsequent sessions confirmed all the resolutions of the committee, and ordered the clerk to perform their directions in respect to the contract. It was held that the acts of the committee so confirmed were the acts of the sessions, and that the authority given to and exercised by the committee was not such a delegation of power by the sessions as would invalidate their orders. *Rex* v. *Glamorganshire Justices* (1793), 5 T. R. 279.

Justices are usually appointed by commission. They are in some cases appointed by special charters, as for example the mayors and other officers of certain corporate towns and boroughs, who are by the charter made justices of the peace. "A general commission of the peace gives a temporary authority to those who act under it until revoked by the Crown; and the charter gives a permanent authority from the Crown for the same purpose, and is a permanent instead of a temporary commission of the peace." Per Lord ELLENBOROUGH, Ch. J., in *Weatherhead* v. *Drewry* (1809), 11 East, 168, at p. 175.

It is to be observed that by the Local Government Act, 1888 (51 & 52 Vict., c. 41), s. 2, the chairman of the County Council is by virtue of his office to be a justice of the peace for the county on taking the prescribed oaths.

The Crown may determine the commission at pleasure, by writ under the great seal, or by implication, as by making a new commission in which the former justice's name is omitted. Dalton, the County Justice, c. 3.

Where an elector and an inhabitant of a borough *bonâ fide* signed and sent to the Secretary of State for the Home Department a memorial

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complaining of the conduct of a county magistrate during an election for the borough, praying that the Secretary of State would cause an inquiry to be made into his conduct, and, if the allegation in the memorial were substantial, would recommend to the Queen that the magistrate should be removed from the commission of the peace, it was held that this was a privileged communication, the elector having both an interest and a duty in the subject-matter of the memorial, and that, the memorial being substantially a petition to the Queen for the removal of the magistrate, the Secretary of State had a corresponding duty to cause the inquiry prayed to be made, although it is usually by the advice and agency of the Lord Chancellor that the Crown acts in removing magistrates. *Harrison* v. *Bush* (1855), 5 El. & Bl. 344. 25 L. J. Q. B. 25, 1 Jur. (N. S.) 846.

No. 2. — Ex parte COLVILLE.

(Q. B. D. 1875.)

RULE.

By the statute 1 Mary, sess. 2, c. 8, the sheriff is disqualified during his year of office from acting as justice of the peace for the county of which he is sheriff. This disqualification extends to administrative matters committed to a justice of the peace as well as to his judicial functions.

Ex parte Colville.

1 Q. B. D. 133 (s. c. 45 L. J. M. C. 108; 24 W. R. 456).

[133] *Justice of the Peace. — Disqualification during Shrievalty.*

The statute 1 Mary, sess. 2, c. 8, s. 2, — which provides that no person exercising the office of sheriff of any county shall use or exercise the office of justice of the peace by force of any commission or otherwise, in any county where he shall be sheriff during the time of his exercising the office of sheriff, — has not been affected by any subsequent addition to the duties of justices of the peace, and continues to disqualify a justice from acting as such while he holds office as sheriff.

The applicant, a justice of the peace for the county of Derby, was appointed high sheriff of the county. He applied during his shrievalty to be permitted to attend at the Quarter Sessions and read his report on the county bridges, notwithstanding the statute

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1 Mary, sess. 2, c. 8, s. 2, which provides that no person exercising the office of sheriff of any county shall use or exercise the office of justice of the peace by force of any commission or otherwise in any county where he shall be sheriff, during the time of his exercising the office of sheriff. The justices refused his application.

A. L. Smith moved for a rule for a *mandamus* to the justices, commanding them to admit the applicant to read his report. The statute 1 Mary, sess. 2, c. 8, s. 2, ought not to be held to disqualify the applicant from taking part in the financial duties of the justices, as the greater part of such duties have been created by legislation subsequent to the statute.

[COCKBURN, Ch. J. — The statute 22 Henry VIII., c. 5, gives justices power to tax the inhabitants of counties for the repair of bridges.]

PER CURIAM (COCKBURN, Ch. J., and MELLOR and QUAIN, JJ.). The statute 1 Mary, sess. 2, c. 8, has not been affected by any subsequent addition to the duties of justices of the peace, and still disqualifies a person from acting as justice while he holds office as sheriff. *Rule refused.*

ENGLISH NOTES.

The qualifications of justices are prescribed by statute. By 18 Geo. II., c. 20, s. 1, no person shall be capable of being a justice of the peace for any county, who shall not have either in law or equity, to and for his own use and benefit, in possession, a freehold, copyhold, or long leasehold estate of the yearly value of £100 over and above what will satisfy encumbrances; or shall not be seized of or entitled to in law or equity for his own use and benefit the reversion or remainder of leaseholds for lives of the yearly value of £300; and who shall not take the oath thereby prescribed to the effect that he is so qualified.

It is no objection to a party acting as justice under a landed qualification of £100 a year, that the land was originally purchased (even with the knowledge of the party qualifying) with a trust fund in such circumstances as render him liable to be declared a trustee for the original beneficiary. *Jones* v. *Edwards* (1838), 2 Jur. 519.

Under a devise of real estate in trust for testator's daughter for life, for her separate use, and, if her husband should survive her, in trust for him for life with remainder over, he has not such an estate in remainder as to qualify him under the Act. *Woodward* v. *Watts* (1853), 2 El. & Bl. 452, 22 L. J. M. C. 149, 17 Jur. 790. A sequestration of a living is an encumbrance within this enactment. *Pack* v. *Tarpley* (1839), 9 Ad. & El. 468, 1 P. & D. 479, 2 W. W. & H. 88.

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Where a local Act required commissioners to have a qualification of property of a certain annual value, "above all charges and encumbrances whatsoever," it was held that these latter words did not mean beyond payment of all his debts, but only applied to specific charges on the property in respect of which he claimed to be qualified. *Dumelow* v. *Lees* (1844), 1 Car. & K. 408.

Section 3 of the Act imposes a penalty on any person who shall act as justice without having taken the oath or being qualified under the Act; which penalty is to be recovered by action, &c., in which action, &c., the proof of his qualification shall lie upon the person sued. A justice who acted as such, after his bankruptcy was held to have incurred the penalty under this section. *Wright* v. *Horton* (1816), Holt N. P. 458, 17 R. R. 665. In an action for the penalty notice of action under 24 Geo. II., c. 44, s. 6, is unnecessary. Ib. In such actions it is sufficient if the defendant shows that he has property to the required amount, and it is not incumbent upon him to give evidence that it is not encumbered. *Dumelow* v. *Lees* (1844), 1 Car. & K. 408.

As to the occupation qualification, which is also required by county justices, see 38 & 39 Vict., c. 54.

Justices must take the oath of allegiance and the judicial oath as prescribed by the Promissory Oaths Act, 1868 (31 & 32 Vict., c. 72).

Acts of a justice who is not duly qualified are not absolutely void. Thus, where persons seized goods under a warrant of distress for levying poor rates signed by a justice of one of the Cinque Ports who had not taken the oaths at the general session nor delivered in the certificate required by statute, it was held that they were not trespassers. *Margate Pier Co.* v. *Hannam* (1819), 3 B. Ald. 266, 22 R. R. 378.

And in another case it was held that a *mandamus* would not lie to the justices in sessions to make a new election of a county treasurer on the ground that one of the justices who had voted at the election had not taken the qualification oath prescribed by 18 Geo. II., c. 20, already referred to. *Rex* v. *Hereford Justices* (1819), 1 Chitty, 700, 22 R. R. 830.

As an additional authority for the statement that the sheriff cannot exercise the authority of a justice of the peace in any matter during his year of office, see *Derbyshire* (*Sheriff*), *Ex parte* (1875), 39 Justice of the Peace, 761.

It may be observed that the statute 1 Mary, sess. 2, c. 8, upon which the ruling case is decided, is formally repealed by the Sheriffs Act, 1887, but is in effect restored by section 17 of that Act. The statute does not apply to Scotland, where the sheriff has important judicial and other duties similar to, but more important than, those of a justice of the peace.

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A justice of the peace does not become disqualified from acting as such by reason of his being elected coroner for the same county or division: *Davis* v. *Pembrokeshire Justices* (1881), 7 Q. B. D. 513; or by being appointed and acting as clerk of the peace for the same county: *Forbes* v. *Lloyd* (1876), 10 Ir. R. C. L. 552. The mayor of a borough which had no separate commission of the peace was held to have jurisdiction to act as a justice of the peace for the borough. *Wilson* v. *Strugnell* (1881), 45 L. T. 219, 45 Justice of the Peace, 831.

If county justices act within a city whose justices have an exclusive jurisdiction, their acts would seem to be void. *Talbot* v. *Hubble* (1740), 2 Str. 1154.

Where an information was laid against S. for perjury in a Police Court in a borough which had not a separate Court of Quarter Sessions, and a county justice issued a summons returnable at that Police Court before the county justices, and the mayor and the borough justices were not allowed to take part in the proceedings, though they sat in the same room with the county justices, the Queen's Bench Division made a rule absolute for a *certiorari* to quash the committal of the accused for trial, with costs against the county justices. *Reg.* v. *Durham Justices* (1891), 7 Times Law Rep. 534.

No. 3. — REG. *v.* HANDSLEY: EX PARTE KING.

(Q. B. 1881.)

RULE.

INTEREST, to disqualify a person from judicial action as justice of the peace, must be such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter.

Reg. v. Handsley: Ex parte King.

8 Q. B. D. 383–387 (s. c. 51 L. J. M. C. 137; 30 W. R. 368).

Justices of Peace. — Interest disqualifying. [383]

Where by statute a member of the town council of a borough may act as a justice of the peace in matters arising under the Act, in order to disqualify him from so acting it is not sufficient to show that, as a member of the town council, he has a pecuniary interest in the result of the information or complaint, or that the corporation of which he is a member are the prosecutors, but it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter.

No. 3. — Reg. v. Handsley: Ex parte King, 8 Q. B. D. 383, 384.

An officer of a corporation appointed to collect the borough rate obtained a summons against a ratepayer in arrear. In so doing he acted in the discharge of his duty, but on his own responsibility and without consulting the town council. At the hearing the justices dismissed the summons on the ground that one of the sitting magistrates being a town councillor was thereby disqualified from adjudicating upon the summons. On motion for a *mandamus* to the justices to hear and adjudicate on the summons: —

Held (by FIELD and CAVE, JJ.), that there was no ground for supposing either substantial interest or likelihood of bias, and consequently no disqualification.

Rule calling on Robert Handsley and others, justices of the borough of Burnley, to show cause why a writ of *mandamus* should not issue commanding them to hear and adjudicate on a summons obtained by one King against an inhabitant of the borough for non-payment of the borough rate.

It appeared[1] that King, who was an officer of the corporation, was charged with the duty of collecting the borough rate, and, in the discharge of such duty, applied for summonses against such ratepayers as were in arrear. In so doing he exercised his own discretion and acted on his own responsibility, and did not consult the town council, or any committee or member thereof. In the present case King obtained a summons from a justice who was not a member of the town council; but on the hearing of the summons the justices refused to adjudicate, and dismissed the summons on the ground that one of the sitting magistrates being a town councillor was thereby disqualified from adjudicating upon the * summons. The other justices present were not members of the town council, but were all burgesses of the borough.

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The levying, collection, and enforcement of the borough rate in Burnley are governed by a local Act, the Burnley Borough Improvement Act, 1871 (34 & 35 Vict., c. cliv.). Section 502 of this Act is similar in its effect to s. 258 of the Public Health Act, 1875, and by it it is enacted that, "Except as expressly otherwise provided, any person shall not be disqualified or disabled to act as justice of the peace, coroner, juror, or otherwise, in any matter arising under or in relation to this Act by reason of his being a ratepayer in the borough, or liable to any payments under this Act, or a member of the council or of any committee thereof."

1881, Dec. 7. Channell for the prosecution. — The objection

[1] The statement of facts is taken from the judgment of the Court.

raised that one of the justices is a member of the town council, and therefore virtually prosecutor, would apply to every burgess, and so, probably, to every borough justice. *Reg.* v. *Gibbon*, 6 Q. B. D. 168, would seem to be an authority in favour of the view taken by the justices, but it is inconsistent with *Reg.* v. *Meyer*, 1 Q. B. D. 173. In *White* v. *Redfern*, 5 Q. B. D. 15, reported on another point, the question of interest was involved, and it was necessary to decide it, and unless decided in favour of the view now urged, the second point would not have arisen. The rule to be gathered from the cases is that, in order to disqualify, there must be circumstances likely to produce a bias, and that merely belonging to the prosecuting body is not such a circumstance, and does not disqualify.

Sir H. Giffard, Q. C., showed cause. The justices were right, for, in the words of BLACKBURN, J., in *Reg.* v. *Meyer*, the justice in question was sitting as a Judge on an information arising out of a matter in which he was a litigant party with the defendant.

The section of the local Act which corresponds with s. 258 of the Public Health Act, 1875, prevents the small pecuniary interest of a ratepayer or person contributing to or benefited by any fund from acting as a disqualification; but the objection here is that, as a member of the town council, this gentleman is virtually prosecutor: *Reg.* v. *Milledge*, 4 Q. B. D. 332; *Reg.* v. *Gibbon*; and has such * an interest as might give him a bias in the [*385] matter: *Reg.* v. *Meyer*.

Channell, in reply. *Cur. adv. vult.*

1881, Dec. 20. The judgment of the Court (FIELD and CAVE, JJ.) was read by

CAVE, J., who, after stating the facts as above set out, proceeded: It was contended for the Crown that s. 502 of the local Act authorized the justice in question to act, although he was a member of the town council.

For the defendants it was submitted that the section in question does not empower any town councillor to act in cases in which the corporation are themselves the prosecutors, and that in this case the corporation were, in fact, by their officer, the prosecutors, and the cases of *Reg.* v. *Milledge*, *Reg.* v. *Gibbon*, and *Reg.* v. *Meyer* were cited in support of this contention.

In *Reg.* v. *Milledge* complaint had been made to the Local

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Government Board of a nuisance arising from a piece of water in Weymouth, and the board thereupon required the town council of Weymouth to abate the nuisance. The town council passed a resolution that steps should be taken against the owners of the water for the abatement of the nuisance. Two justices of the borough, who were members of the town council, and who had taken an active part in discussions on the question, were, with four other magistrates, on the bench of justices when the summons against the owner of the water came on for hearing. They refused to retire, although the defendant objected to their sitting, on the ground that they were the prosecutors. The defence was that the nuisance was caused by the town council themselves sending the drainage of the town into the water complained of. The defendant was convicted by a majority of four to two, the justices in question voting in the majority, and it was held that under the circumstances they were disqualified for acting. It is obvious [* 386] that in this case the justices were substantially * interested in the proceeding adjudicated upon so as to be likely to have a real bias in the matter. *Reg.* v. *Meyer* is a similar case, and the decision there is put on that very ground, and it is pointed out that the interest — where not pecuniary — must be substantial, so as to make it likely that the justice has a real bias, and that the mere possibility of bias is not sufficient to disqualify. In *Reg.* v. *Justices of Huntingdon*, 4 Q. B. D. 522, it was held, in accordance with this distinction, that justices who were members of the town council of a borough, and as such had taken an active part in the making of an order under the Dogs Act, 1871, were not thereby disqualified from sitting to hear a complaint of non-observance of the order. In *Reg.* v. *Gibbon*, by a local Act for the improvement of a borough, the corporation was made the authority for the execution of the Act, with power to direct prosecutions for this purpose. An information for an offence under this Act having been preferred by an officer on behalf of the corporation, a summons was issued upon it by a justice who was an alderman and member of the corporation, but such summons came on for hearing before justices none of whom were connected with the corporation, the Court, however, held that such justices could not adjudicate upon the summons, because it had been issued by one who was virtually prosecutor. The case of *Reg.* v. *Meyer* was not cited there, and the Court does not advert to the distinc-

tion established by that case between a substantial interest likely to cause a real bias and the mere possibility of a bias. Still we might have felt ourselves bound by the decision in that case had it not been that in *White* v. *Redfern*, reported, but not on this point (5 Q. B. D. 15), the same question arose, and was decided the other way. Feeling ourselves thus at liberty to exercise our own judgment in the matter, we are of opinion that in cases like the present, where such a section as s. 502 of this local Act exists, it is not enough to show merely that an adjudicating justice is a member of the town council, and, as such, has a pecuniary interest in the result of the complaint or information, or that he is a member of the corporation which is charged with the duty of prosecuting the offence which he sits to adjudicate * upon, [* 387] that in order to disqualify the justice it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter. In our opinion there is in this case no ground whatever for saying that there was any such substantial interest or likelihood of real bias, and consequently the rule must be made absolute.

Rule absolute.

ENGLISH NOTES.

A direct personal pecuniary interest, however small, in the result of the case disqualifies a justice from taking part in the hearing: *Reg.* v. *Rand* (1866), L. R. 1 Q. B. 230, 35 L. J. M. C. 157; *Reg.* v. *Farrant* (1887), 20 Q. B. D. 58, 57 L. J. M. C. 17, 57 L. T. 880, 36 W. R. 184; and any substantial interest, even though not pecuniary, has the same effect: *Reg.* v. *Farrant, supra*; *Reg.* v. *Meyer* (1875), 1 Q. B. D. 173, 34 L. T. 247, 24 W. R. 392. But a mere possibility of bias is no disqualification. *Reg.* v. *Rand, supra.*

The cases are numerous as to what amounts to a disqualifying interest. A justice who is a licensed pilot cannot adjudicate upon a complaint against an unlicensed pilot for a contravention of sect. 361 of the Merchant Shipping Act, 1854 (sect. 598 (1) of Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60). *Reg.* v. *Huggins, Ex parte Clancy* (1895), 1 Q. B. 563, 64 L. J. M. C. 149, 72 L. T. 193, 43 W. R. 329.

Justices who were members of a salmon fishery landowners' association were held disqualified from hearing an information laid by a superintendent watcher of the association. *Reg.* v. *Allan* (1864), 4 B. & S. 915, 33 L. J. M. C. 98, 9 L. T. 761, 12 W. R. 422. A justice who was a member of a board of conservators, and at a meeting of the board voted in favour of a resolution to prosecute defendant for violation of

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the Salmon Fishery Acts, was held disqualified from hearing the case. *Reg.* v. *Henley* (1892), 1 Q. B. 504, 61 L. J. M. C. 135, 66 L. T. 675, 40 W. R. 383. But a justice who was a commoner of Epping Forest was held not disqualified from adjudicating upon a summons against another commoner for removing notice boards and threatening to remove fences belonging to the Corporation of London, the owners of the forest. *Reg.* v. *Alcock* (1878), 37 L. T. 829. A person is improperly convicted of travelling without a railway ticket by justices who are shareholders in the railway company: *Reg.* v. *Hammond* (1863), 9 L. T. 423; but it would seem that the fact that justices are shareholders in shipping companies, the ships of which were insured by associations that were members of a federation of which the prosecutor was agent, is not sufficient to disqualify the justices: *Reg.* v. *Mackenzie* (1892), 2 Q. B. 519, 61 L. J. M. C. 181, 67 L. T. 201, 41 W. R. 144.

A justice who is a member of a municipal corporation is disqualified from adjudicating upon a matter to which the corporation is a party, if he is substantially interested in the matter. See *Reg.* v. *Meyer* (1875), 1 Q. B. D. 173, 34 L. T. 247, 24 W. R. 392, and *Reg.* v. *Milledge* (1879), 4 Q. B. D. 332, 48 L. J. M. C. 139, 40 L. T. 748, 27 W. R. 659, both discussed in the principal case. A justice who had proposed at a vestry meeting that S. should remove an alleged highway nuisance, was held disqualified from hearing a summons against S. by the district surveyor for its non-removal. *Reg.* v. *Gaisford* (1892), 1 Q. B. 381, 61 L. J. M. C. 50, 66 L. T. 24.

The corporation of S. acquired for improvement purposes a licensed house, and appointed a committee for the purpose of negotiating the sale of the premises. A member of this committee was held not disqualified to sit on the licensing committee, when their sanction was asked to an arrangement made by the sale committee for a provisional removal of the license. *Reg.* v. *Stockport Justices* (1896), 60 Justice of the Peace, 552.

Members of a corporation are sometimes empowered by statute to sit as justices, notwithstanding such membership, on matters arising under the statute. For a case in which a justice was held disqualified notwithstanding such a clause, see *Reg.* v. *Lee* (1882), 9 Q. B. D. 394, 30 W. R. 750.

A justice who is a ratepayer in the appellants' parish is disqualified from hearing an appeal against an order of removal. *Reg.* v. *Suffolk Justices* (1852), 18 Q. B. 416, 21 L. J. M. C. 169. Justices in Special Sessions may, however, hear appeals against rates made by a parish, though they are themselves ratepayers in the same parish. *Reg.* v. *Bolingbroke* (1893), 2 Q. B. 347, 62 L. J. M. C. 180, 69 L. T. 717, 42 W. R. 128; *Ex parte Workington Overseers* (1894), 1 Q. B. 416, 70

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L. T. 143, 42 W. R. 177. Where a justice who was a ratepayer in a parish heard a summons against a person for non-removal of soil and compost from a highway, and ordered the soil and compost to be sold and the proceeds to be applied to the repair of the highways, it was held that the order must be quashed. *Reg.* v. *Gaisford, supra.*

A conviction for obstructing a highway in a county is not invalid by reason of one of the convicting justices being a cesspayer, even assuming that the costs of the prosecution are to be paid out of the county funds. *Reg.* v. *Dublin County Justices* (1894), 2 Ir. R. 527.

A justice is not disqualified for hearing a summons by the Royal Society for Prevention of Cruelty to Animals, for cruelty to a horse, by being a subscriber to the society. *Reg.* v. *Mayor, &c. of Deal* (1881), 45 L. T. 439, 30 W. R. 154. Compare *Reg.* v. *Bishop of St. Albans* (1882), 9 Q. B. D. 454, 46 L. T. 692. It seems that magistrates on deciding a case ought not to take an indemnity from either party. *Selwood* v. *Mount* (1839), 9 Car. & P. 75.

A justice is disqualified from sitting at a Special Sessions for appeals against a poor-rate by being himself appellant in one of the cases for hearing. *Reg.* v. *Great Yarmouth Justices* (1882), 8 Q. B. D. 525, 51 L. J. M. C. 39, 30 W. R. 460.

The mere fact that a subpœna has been served upon a magistrate to give evidence in a particular case, does not disqualify him from sitting as a magistrate at the hearing and adjudication of that case. *Reg.* v. *Tooke* (1884), 32 W. R. 753; *Reg.* v. *Farrant* (1887), 20 Q. B. D. 58, 57 L. J. M. C. 17, 57 L. T. 880, 36 W. R. 184.

The jurisdiction of the justices is not affected by the fact that their clerk acts as solicitor for one of the parties on a prosecution; but it is not advisable that the clerk should so act. *Reg.* v. *Brakenridge* (1884), 48 Justice of the Peace, 293.

On an appeal against a refusal to grant an excise license, one of the justices who refused the license ought not to sit. *Reg.* v. *Surrey Justices* (1855), 1 Jur. (N. S.) 1138. A justice taking an active part in defending an appeal against a decision of which he approves, but to which he is no party, is disqualified from taking part in the decision of the appeal. *Reg.* v. *Cumberland Justices* (1888), 58 L. T. 491. A decision of Quarter Sessions dismissing an appeal against a refusal to renew the license of a public house is not vitiated by the fact that prior to the hearing of the appeal one of the justices who refused the renewal wrote to all the justices eligible to sit on the appeal, requesting them to attend on the day fixed for hearing the appeal, and informing them that on that day six appeals relating to the licensed house would be heard, but not asking them to vote in any particular way. *Reg.* v. *London Justices, Ex parte Kerfoot* (1896), 45 W. R. 58.

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An Order of Sessions was held not invalid by reason of the mere presence on the bench of an interested magistrate: *Reg.* v. *London Justices* (1852), 18 Q. B. 421 *n.*; but it was set aside where an interested justice conversed during the hearing with some of the magistrates: *Reg.* v. *Surrey Justices* (1855), 1 Jur. (N. S.) 1138; and where during the hearing he pointed out documents and made observations to the chairman, although he took no part in the decision of the appeal: *Reg.* v. *Suffolk Justices* (1852), 18 Q. B. 416, 21 L. J. M. C. 169, 16 Jur. 612. And see further, as to the amount of interference by an interested justice that will invalidate a conviction, *Ex parte Clarke* (1890), 26 L. R. Ir. 1; *Reg.* v. *Budden* (1896), 60 Justice of the Peace, 166.

It is no answer that there was a majority in favour of the decision without reckoning the vote of the interested party: *Reg.* v. *Hereford Justices* (1845), 6 Q. B. 753, 14 L. J. M. C. 73, 9 Jur. 424; or that the interested party withdrew before the decision: Ib.; or that he did not sign the order or conviction: *Reg.* v. *Meyer* (1875), 1 Q. B. D. 173, 34 L. T. 247, 24 W. R. 392.

A person who is or ought to be aware that a justice is interested, by acquiescing in his adjudicating upon the case, waives the right to take the objection. *Rex* v. *Lord Huntingtower* or *Richmond Justices* (1860), 8 Cox C. C. 314, 8 W. R. 562; *Reg.* v. *Antrim Justices* (1895), 2 Ir. R. 603.

AMERICAN NOTES.

The few American decisions generally arise upon constructions of statutes regulating jurisdiction.

A justice of the peace is not disqualified from hearing a suit for possession of land by the facts that he drew the lease in question, was the only witness to it, and gave notice to quit. *Cook* v. *Berth*, 102 Massachusetts, 372, distinguishing *Richardson* v. *Welcome*, 6 Cushing, 331, and *McGregor* v. *Crane*, 98 Massachusetts, 530, in the latter of which he was acting at the very time as attorney of the plaintiff in the same matter, and in the former had instigated the suit and had agreed to charge nothing for his services unless he should decide in plaintiff's favor.

A justice is not disqualified from trying and sentencing one for a libel against him. *Clyma* v. *Kennedy*, 64 Connecticut, 310; 42 Am. State Rep. 194. The Court observed: "It was doubtless indecorus and unwise for him to try the case, because it exposed him to the appearance of trying to avenge an insult to himself. There is no statute by the terms of which he was forbidden to act in the case, and we are not able to see that he had any such interest in it as made his action void. He was not a party to the cause. He had no pecuniary interest in the subject-matter of the action. It was not his own cause. He was not the moving party. He was not liable for costs, nor was it possible for him to recover anything by any judgment which might be ren-

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dered. The event of the proceeding could not bring him gain, nor subject him to any loss. The fees which he might receive do not constitute an interest in the proceedings. *Commonwealth* v. *Keenan*, 97 Mass. 589. Justice Tuttle had no interest in the cause other than such as he had as a citizen — as one of the public. The interest in a cause which of itself disqualifies a Judge from acting therein is a pecuniary one — similar to the interest which a party to a civil action has in it. All the cases, ancient and recent, are to this effect." Citing *Bonham's Case*, 8 Coke, 226; *Day* v. *Savadge*, Hob. 85; *Fletcher* v. *Peck*, 6 Cranch (U. S. Sup. Ct.), 87; *Taylor* v. *Porter*, 4 Hill (N. Y.), 146; 40 Am. Dec. 274; *Doolittle* v. *Clark*, 47 Connecticut, 316; *Parrott* v. *Housatonic R. Co.*, id. 575; *Dyer* v. *Smith*, 12 id. 384; and distinguishing *Schroder* v. *Ehers*, 31 New Jersey Law, 44, as follows: "A statute of that State provided that certain trespasses to lands might be punished by a fine which went to the owner of the land. The defendant in the case was a justice of the peace, and was the owner of the land on which such a trespass had been committed by the plaintiff. The defendant had arrested the plaintiff, brought him before himself, and sentenced him to pay a fine. The case was a writ of error to reverse that judgment. In the course of the opinion the Court says: 'The entry upon the land in question was in no wise a breach of the peace, but a simple tort of a civil character. Its punishment appertained not to criminal, but to civil jurisdiction.' The judgment was reversed on the ground that the defendant was disqualified by interest from acting in the case."

Relationship, to disqualify, must be so near as to raise evidence of partiality: *Eggleston* v. *Smiley*, 17 Johnson (N. Y.), 133, 191; as brother-in-law: *Foot* v. *Morgan*, 1 Hill (N. Y.), 654; son-in-law: *Rivenburgh* v. *Henness*, 4 Lansing (N. Y. Supr. Ct.), 208; or even where he had once been brother-in-law: *Spear* v. *Robinson*, 29 Maine, 531; and even where he was ignorant of the relationship: *Birdsall* v. *Fuller*, 11 Hun (N. Y. Supr. Ct.), 204 (but *contra*, *Ex parte Victory*, 32 New Brunswick, 249). In *Eggleston* v. *Smiley*, *supra*, the justice was half-uncle of the plaintiff's wife, and the Court held the relationship too remote to "amount to evidence of partiality and fraud;" referring to *Pierce* v. *Sheldon*, 13 Johnson (N. Y.), 191, where the justice was father-in-law of the plaintiff, and the Court said it was perhaps questionable whether he was not disqualified by that fact, and that "the gross indecency of an exercise of judicial power in such a case would induce the Court to scrutinize his proceedings with a jealous eye." The last two cases were before the statute declaring the disqualifying degree of relationship by consanguinity or affinity. In *Rector* v. *Drury*, 4 Chandler (Wisconsin), 24, it was held that the justice was not disqualified, in the absence of statute, by being brother-in-law to the plaintiff.

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No. 4. — REG. *v.* CRIDLAND.

(Q. B. 1857.)

No. 5. — REG. *v.* PEARSON.

(Q. B. 1870.)

No. 6. — WHITE *v.* FOX.

(C. P. D. 1880.)

RULE.

In summary proceedings for trespass or assault where a party *bonâ fide* justifies his act under a claim of title, the jurisdiction of the magistrates is at an end.

But such claim must be a claim of title to land, and the jurisdiction of the magistrates is not ousted by reason that the assault arose over a dispute relating to property in a chattel.

Reg. v. Cridland and others.

27 L. J. M. C. 28–33 (s. c. 7 El. & Bl. 853 ; 3 Jur. (N. S.) 1213).

[28] *Jurisdiction of Justices. — Bonâ fide Claim of Right.*

Appeal from a conviction under the Game Act, 1 & 2 Will. IV., c. 32, s. 30. On the hearing of the information, the defendants *bonâ fide* claimed a right to enter upon the land under an authority from S., who was alleged to be the owner of the land, and asked for an adjournment, as they were not then prepared with evidence, which was refused. *Semble*, that this was such a *bonâ fide* claim of right as put an end to the jurisdiction of the justices.

Rule calling upon two justices to show cause why a conviction of the defendants, under statute 1 & 2 Will. IV., c. 32, s. 30, which had been removed by *certiorari*, should not be quashed on the ground that a question of title was raised.

It appeared from the affidavits that the land upon which the alleged trespass was committed was part of the property in dispute between Captain Swinfen, who claimed as heir-at-law of the testator, and Patience Swinfen, who was in possession under the will. The defendants stated before the justices that they had authority to enter upon the land in search of game from Captain

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Swinfen, who was owner of the land, and not being at that moment prepared to prove that fact, they asked for an adjournment, which was refused.

[There was another ground of appeal which the Court considered conclusive. The judgments are here set forth only so far as relates to the above rule.]

Lord CAMPBELL, Ch. J. — . . . It is not necessary to give [31] an opinion on the other point; but, according to my impression, the justices did not act properly in proceeding, when there was laid before them a *bonâ fide* claim of property. No evidence was offered, but a *bonâ fide* claim was made; and where such a claim is put forward, I think the magistrates have no jurisdiction, and ought not to convict.

COLERIDGE, J. — . . . It is unnecessary to pronounce an absolute opinion upon the other graver matter; but it may be useful now to state, that apart from the particular words of sect. 30 of Stat. 1 & 2 Will. IV., c. 32, where a *bonâ fide* claim, as in this case, is laid before magistrates, their jurisdiction ceases. Sect. 30 of Stat. 1 & 2 Will. IV., c. 32, introduces a very singular provision: "Provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass." The beginning of the enactment relates to charging a person with a trespass. The proviso has reference to the previous words. It enables the magistrates to go into evidence of any matter which would have been a defence to an action at law; but it by no means follows that the magistrates can, against the will of the person charged, try that question. On the contrary, the words giving an option to the person charged with the trespass are pregnant with the conclusion, that the question of title cannot be disposed of against his will. I throw this out for the guidance of magistrates.

ERLE, J. — . . . On the other ground, which has been al- [32] leged, I think, if the case was heard out, it would be found that the justices had no jurisdiction to convict in this case. On the first cursory reading of section 30 of statute 1 & 2 Will. IV., c. 32, it imposes the duty to try; and it has been contended that if the words are taken in their literal and evident sense, that is the proper construction. But I strongly incline to the opinion that the statute authorizes and calls upon the magistrates to try whether the party accused entertained an honest belief that he had a claim

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of right, and if he had an honest claim of right, it would be a defence in a civil action of trespass. And in criminal proceedings there are old authorities, as in *The Queen* v. *Burnaby*, 2 Ld. Raym. 900; the *dicta* of POWELL, J., and HOLT, Ch. J., that in matters of summary proceeding, when a party charged has an honest claim of title, the proper course is to dismiss the information. The question in that case arose in a curious way. A conviction for cutting trees was removed by *certiorari* into this Court, and it was proposed to put in a plea to the conviction, suggesting a title in the defendant; and POWELL, J., who, with two other puisne justices, was of opinion that the plea ought not to be allowed, was also clearly of opinion that the right of the justices to convict was at an end, and said, "If they had not jurisdiction, and I take it they have not where property is in question, then an action lies against the maker and him that executes the conviction." HOLT, Ch. J., who was of opinion that the plea ought to be allowed, said: "For now this conviction is come hither, no prohibition can go. Whereas, upon putting in such a suggestion as this while the conviction remained below, the parties might have a prohibition after conviction to stay the justices from proceeding upon it; for, without doubt, if the defendant had but a colour of title, the justices of peace had no jurisdiction in the cause." It was a datum in the minds of those eminent Judges that *bona fides* in the party charged put an end to the jurisdiction of the justices. In this case, at all events, the justices ought to have dismissed the information, and allowed the title to be tried by the ordinary tribunals.

CROMPTON, J. — . . . Upon the second and more important question, whether, when there is a *bonâ fide* claim of right, the magistrates have jurisdiction to go on and inquire into the title, against the will of the party charged with the trespass, according to the old authorities, and the old principle of law which is supposed to be included in all these enactments giving jurisdiction, the law is, that after a *bonâ fide* and not a colourable claim of right the jurisdiction ceases. In Paley on Convictions, p. 41, 4th ed., by Macnamara, it is said, "Where property or title is in question, the jurisdiction of justices of the peace to hear and determine in a summary manner is ousted, and their hands tied from interfering, though the facts be such as they have otherwise authority to take cognisance of." He mentions it as not arising from legisla-

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tive enactment, but as a rule applicable to the summary mode of trial in general. I cannot think that the Legislature, in carefully providing in section 30 that parties charged under that Act should have as a defence any matter which would be a defence to an action, meant to abrogate the great principle of law, that a *bonâ fide* claim of right shall be sufficient to oust the jurisdiction of the justices. We have inquired on affidavit in County Court cases whether the parties did really set up a claim of title. * Therefore, I am of opinion that the magistrates had no [* 33] jurisdiction to convict in this case, and the conviction must be quashed. *Conviction quashed.*

Reg. v. Pearson.

L. R. 5 Q. B 237–239 (s. c. 39 L. J. M. C. 76; 22 L. T. 126).

Justices. — Jurisdiction. — Summary Conviction on Charge of Assault. — Jurisdiction ousted by Question as to Title to Land. [237]

On the hearing of a complaint for an assault, under 24 & 25 Vict., c. 100, s. 42, if it be shown that a *bond fide* question as to title to land is involved, the jurisdiction of the justices is at once ousted by s. 46, which provides that nothing in the Act shall authorize justices to hear and determine any case of assault in which any question shall arise as to the title to any lands, &c.; and the justices cannot proceed to inquire into and determine by summary conviction any excess of force alleged to have been used in the assertion of title.

Rule, calling upon Robert Turner, and two justices of the county of Derby, to show cause why a conviction by the justices of John Pearson for an assault on Turner should not be quashed.

The conviction had been brought up by *certiorari*, and it appeared * from the affidavits that the defendant having [* 238] appeared before the justices on a summons, under 24 & 25 Vict., c. 100, s. 42,[1] charging him with having assaulted Turner, it was proved that Turner had placed some bricks on an open piece of land of which the defendant claimed to be the owner, and that the defendant was removing the bricks, as being unlawfully on his land, when Turner came up, and the alleged assault was committed.

It was submitted on behalf of the defendant that as a question of title to land arose, the justices had no jurisdiction to determine

[1] 24 & 25 Vict., c. 100, s. 42: "Where any person shall unlawfully assault any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence," &c.

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the case, by reason of the second proviso in s. 46, "that nothing in the Act contained shall authorize any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments. . . ."

It was not denied by Turner that the defendant was raising a *bonâ fide* claim to the land, but it was contended on behalf of Turner that the justices ought to proceed with the hearing of the charge, and that they had authority to determine it, notwithstanding the proviso in s. 46, if the defendant used more force than was necessary.

The justices took this view, and convicted the defendant of an assault in a penalty of £2 10*s.* and costs.

Robinson, Serjt., showed cause on behalf of the justices, and contended that as a claim of title to land would not justify any excess of violence in the assertion of such right, the justices were not, by s. 46, ousted of their jurisdiction to determine the question of whether or not there had been an excess of violence; and he referred to a passage in 1 Oke's Magisterial Synopsis, p. 233, 10th ed., note 36, where *Reg.* v. *Richards*, 20 J. P. 68, is cited, on which passage and case it was understood that the justices had acted. [He also cited *Re Thompson*, 6 H. & N. 193, 30 L. J. M. C. 19.]

G. Bruce, in support of the rule, was not heard.

Lush, J. — The rule must be made absolute. This is a very clear case. It stands uncontradicted that the assault was committed in the assertion of title. The prosecutor had entered on [* 239] * land to which the defendant claimed title, and had put bricks there; and it was in the act of asserting this title by removing the bricks that the alleged assault was committed. This question of title was, it appears, most distinctly brought to the notice of the justices, and their jurisdiction was then at an end by reason of the second proviso in s. 46, and they had no power to go into the question whether the force used by the defendant was excessive. The words of the proviso are very large, and admit of no doubt. By s. 42, where a person has unlawfully assaulted another, the justices have jurisdiction to hear and determine the offence on complaint of the party aggrieved; and the proviso in s. 46, in the widest terms, says that "they shall not hear and determine any case of assault in which any question shall arise as to the title to

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land;" that is, they shall not dispose of such a case in a summary manner. The matter may still be disposed of by indictment, if it be a proper case for such a proceeding. The justices ought, therefore, to have held their hand, and not proceeded to adjudicate by summary conviction.

HANNEN, J., concurred. *Rule absolute.*

White v. Fox and another.

49 L. J. M. C. 60–63.

Justices.—Summary Jurisdiction.—Ouster of Jurisdiction.—Mens Rea.—Assault. [60]

The question as to property which will oust the jurisdiction of justices to determine a charge of assault under 24 & 25 Vict., c. 100, s. 42, must be a question as to real property.

Where two persons who were gamekeepers in the employ of a landlord of a farm to whom the right to game and rabbits was reserved, were charged before the justices by the tenant of such farm, under 24 & 25 Vict., c. 100, s. 42, with assaulting and beating him, and the acts complained of were done in a scuffle to take from the tenant whilst on his farm his bag, in which were rabbits claimed as the landlord's property:—

Held, that the fact that the justices were of opinion that the gamekeepers acted under a *bonâ fide* belief that they had a right to do the acts complained of did not oust the jurisdiction of the justices, no question having arisen as to title to any interest in land within the meaning of section 46 of 24 & 25 Vict., c. 100.

Case stated under 20 & 21 Vict., c. 43, by the justices for the county of Dorset.

On the 8th of November, 1879, a complaint was preferred by the appellant against the respondents, under section 42 of 24 & 25 Vict., c. 100, charging them with assaulting and beating the appellant.

At the hearing of the said complaint it was admitted by the respondents that the appellant rented Notton and Throop farms, in the parish of Maiden Newton, consisting of about five hundred acres, of one Richard Brinsley Sheridan, Esq.

It was proved by the appellant that no lease of the said farm, or any agreement or document under seal, reserving the game and rabbits to the said landlord or any one else, or reserving any right to or for any one to enter or be on any such lands in search or pursuit of game or rabbits, had ever been executed; but he admitted that he had made and signed proposals for a * lease, [*61]

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not under seal, of the said farms, which had also been signed as accepted by one Peter Cox, as agent for the said Richard Brinsley Sheridan, and that under the head of exceptions contained in such proposals were the words, "also all waterfowl, fish, game, and rabbits, and liberty to hunt, hawk, and shoot fish and fowl."

It was also admitted by the appellant in his evidence that he had from time to time applied to the steward of the said Richard Brinsley Sheridan for permission to kill rabbits on his farms, and that on receiving the same had expressed his obligation for the permission when so granted.

It was also proved that the appellant, as such tenant, had been assessed to and paid the poors' rate in respect of the sporting rights on his farm, which he subsequently claimed of and had been allowed by the said Richard Brinsley Sheridan as a disbursement and deduction from his rent.

It was also proved that about noon on Monday, the 13th day of October last, the appellant and his son, and two men in his employ, were on his said farm with nets and ferrets belonging to the said appellant, engaged in ferreting for rabbits, and that whilst in the middle of one of his fields, and having in his possession his said nets and some rabbits which had been caught by him, the two respondents came upon the said land where the appellant then was, took hold of a bag containing such nets and rabbits, and endeavoured to take the same away from the said appellant, and in so doing dragged the said appellant some sixty paces. In the scuffle so arising the hat of the said appellant was knocked or fell off, and the clothes of the said appellant were torn, and thereby the said appellant was assaulted.

It was admitted that the respondents were gamekeepers in the employ of the said Richard Brinsley Sheridan, and were acting under his orders and authority.

The respondents' solicitor, whilst admitting the facts before stated, contended that the said respondents, being such gamekeepers in the employ of and acting under the orders of the said Richard Brinsley Sheridan, their master, who claimed the sole and exclusive right to the game and rabbits on the said farm, were acting in the execution of their duty, as such servants to the said Richard Brinsley Sheridan, so claiming to exercise his reserved rights to the game on the farms referred to, or acting in the *bonâ*

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fide belief of having such rights, and that in consequence the jurisdiction of the justices was ousted.

The appellant's solicitor contended that, it being proved by the appellant and admitted by the respondents' solicitor, that inasmuch as there was no lease, agreement, or document under seal in existence, as was necessary to reserve a right to take and kill game and rabbits to any other person than the occupier of the land, there could not be and there was no question of title in dispute, and no reasonable grounds for a *bonâ fide* belief that the respondents, as such servants of the said Richard Brinsley Sheridan, had a right to take or attempt to take the bags, nets, and rabbits complained of, and that even if there had been a legal reservation of the game, that would not justify the assault complained of, and so oust the jurisdiction of the justices to adjudicate thereon, and, if deemed right, convict the respondents thereof.

The solicitor for the respondents, however, contended that, as in the proposals for lease, although not under seal, the game and rabbits were expressly reserved, they belonged exclusively to the landlord (the said R. B. Sheridan), and that the respondents, as his servants, were justified in taking the bags, nets, and rabbits from the appellant, and did so under a *bonâ fide* belief that they were justified in so doing, and that as the question in dispute was one arising out of land, or some interest therein or accruing therefrom, the jurisdiction of the justices was ousted.

No other evidence having been offered, the justices were of opinion that the respondents acted under a *bonâ fide* belief that they had a right to do the acts complained of, and that the jurisdiction of the justices was ousted, and they accordingly dismissed the summons.

The question for the Court was, whether, under the facts above detailed, the * justices were right in dismissing the [* 62] summons on the ground stated.

Bompas, for the appellant. — Assuming that there was a legal reservation of game to the landlord, that would not justify the respondents, the landlord's servants, in assaulting the appellant, who was a tenant farmer on his own land.

Arthur Charles (Pitt Lewis with him) was then called upon to support the respondents. — The game being the landlord's, the appellant had in his possession what was the property of his landlord, and the respondents only endeavoured to take their master's

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property, and it does not appear from the case that in doing so they used more violence than was necessary. The respondents acted in the *bonâ fide* belief that they were justified in doing what they did, and a *bonâ fide* claim of right under ordinary circumstances suffices to render a conviction by justices for any criminal offence improper. *Watkins* v. *Major*, 44 L. J. M. C. 164, L. R. 10 C. P. 622. In that case the Court thought that the claim of right which was set up in answer to the charge of killing a rabbit contrary to 1 & 2 Will. IV., c. 32, s. 30, was an impossible one in point of law, and that therefore the person so charged might be properly convicted; but otherwise a *bonâ fide* belief in a right to do what was done would, as Lord COLERIDGE, Ch. J., said in delivering judgment in that case, "suffice to render a conviction for any criminal offence improper, for it is well established that justices cannot try the existence of a right *bonâ fide* set up in answer to a criminal charge brought before them. See Paley on Convictions, pp. 47, 137, &c." "But," said Lord COLERIDGE, Ch. J., "it has been decided more than once that a person may be convicted under the statute with which we have now to deal, and other game statutes, although he had no *mens rea*, and believed that he was not a trespasser." In the present case the charge against the respondents is under section 42 of 24 & 25 Vict., c. 100, of unlawfully assaulting the appellant, and to support such charge there must be a *mens rea*; and in *Blades* v. *Higgs*, 10 C. B. (N. S.) 713, 30 L. J. C. P. 347; on appeal, 11 H. L. Cas. 621, 34 L. J. C. P. 286, it was held to be a good defence to an action for an assault, that it was committed in an attempt to take from the plaintiff dead rabbits which he had refused to give up, and which he held without the consent of the defendant's master, to whom they belonged.

[Lord COLERIDGE, Ch. J. — There the killer of the rabbits was a trespasser on the land where he killed them.]

Where sporting rights are reserved, the tenant may become a trespasser on his own land, and at all events the respondents would have good reason to believe he was so in the present case. In *Coleman* v. *Bathurst*, 40 L. J. M. C. 131, L. R. 6 Q. B. 366, the conviction was under 1 & 2 Will. IV., c. 32, s. 12, which makes it an offence for the tenant to take game upon the demised land where the right to the game is reserved to the landlord, and the conviction there was held wrong because the Court were of opinion

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that in that case there was upon the true construction of the agreement of tenancy no reservation of the game. Where the claim of a right is one which cannot exist at law as a claim as one of the public to fish in a non-navigable river, the claim does not oust the justices of their jurisdiction. *Hudson* v. *M'Rae*, 4 B. & S. 585, 33 L. J. M. C. 65. But otherwise, as shown in *Legg* v. *Pardoe*, 9 C. B. (N. S.) 289, 30 L. J. M. C. 108, a *bonâ fide* claim is enough to oust the jurisdiction of the justices.

Bompas in reply.

Lord COLERIDGE, Ch. J. — In my opinion the justices were wrong in dismissing the summons, as I clearly think they had jurisdiction. Two persons assault another, and it is not suggested that they had any right to do what they did. They dragged him several paces along the ground, knocked his hat off, tore his clothes, and took from him, besides the rabbits, which for the present purpose I * will assume were the property of the [* 63] landlord, what was certainly his own property, and they did all this whilst he was on his own land. All this was before the justices, and they say they have no jurisdiction to decide the matter, because in their opinion these two persons (the respondents) *bonâ fide* thought that they had a right to assault the appellant, and to take his property. We were referred during the argument to several cases respecting *mens rea*, which are important when that question arises; but this is a proceeding under 24 & 25 Vict., c. 100, s. 42, which enables the justices to hear and determine the offence of an assault or battery, and section 46 explains under what circumstances the jurisdiction of the justices is ousted. It states that the justices are not to hear and determine any case of assault or battery "in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom." In the present case no question of title to any lands arose, but it has been suggested that a question of title to property arose. I am astonished to find that a mere assertion of a title to property being in question should be said at once to oust the jurisdiction of the justices, but without deciding what statement is sufficient, I am of opinion that the question as to property must be a question as to real property. That is the view which has always been taken of old, and is the view taken by Paley on Convictions, where, when he speaks of the title to property which will oust the jurisdiction (see 5th edit., p. 137), he

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means a title to land, and in the first case, which he gives from 1 Lord Raym. 583, the question was as to the title to land. So also in the case of *Williams* v. *Adams*, 2 B. & S. 312, 31 L. J. M. C. 109, where the complaint before the justices was for leaving rubbish on a highway, and the defendant claimed the soil as his, subject only to a private right of way, the Court of Queen's Bench held that no question of title to land was in dispute, but only a question as to what should be done on the land, and that therefore the jurisdiction of the justices was not ousted.

I am of opinion, therefore, that the justices must exercise their jurisdiction in the present case, and say whether an assault has been committed on the appellant, and if it has, they must adjudge the punishment. The question of *bona fides* may most properly and rightly be considered in awarding the punishment, and I observe that Paley makes that distinction where in his work on Summary Convictions, 5th edit., p. 139, he says: "Where there must be a *mens rea* to constitute an offence, the fact of a man having acted under a claim or notion of right, if established, will form a defence against a criminal proceeding, and must be taken into consideration by the justices, not as a question of title, but as a question of *bona fides*. When, however, the object is to oust the jurisdiction of the justices on the ground that title comes in question, then the claim must be of such a nature as, if substantiated, would afford a defence to an action." That plainly distinguishes between an assertion of a mere right to do what has been done, and a claim of title. No such claim was made here, and the decision of the justices was wrong.

LINDLEY, J. — I am of the same opinion. The charge before the justices was a charge of assault, and it was made under 24 & 25 Vict., c. 100, s. 42, and the 46th section states that the justices are not to have jurisdiction when any question as to the title to any lands shall arise. Now the justices do not find that any such question was involved in this inquiry, but what they find is that the respondents acted under a *bonâ fide* belief that they had a right to do what they did. Clearly there is nothing in that to oust the jurisdiction of the justices, and there is nothing like a finding of the circumstances stated in the 46th section which would deprive the justices of their jurisdiction to hear and determine the charge. *Decision reversed.*

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ENGLISH NOTES.

In order to oust the jurisdiction of the justices in the cases contemplated by the rule, it is essential that the claim of title should be made *bonâ fide*. *Paley* v. *Birch* (1867), 8 B. & S. 356, 16 L. T. 410. The *bona fides* of the claim is for the justices to determine: *Legg* v. *Pardoe* (1861), 9 C. B. (N. S.) 289, 30 L. J. C. P. 108, 7 Jur. (N. S.) 499, 3 L. T. 371, 9 W. R. 234; but they cannot by deciding, contrary to the fact, that the claim is not *bonâ fide*, give themselves jurisdiction: *Reg.* v. *Nunneley* (1858), El., Bl. & El. 852, 27 L. J. M. C. 260, 4 Jur. (N. S.) 1146; *Reg.* v. *Huntsworth* (1864), 33 L. J. M. C. 131, 10 Jur. (N. S.) 945, 10 L. T. 374, 13 W. R. 7; *Lovesey* v. *Stallard* (1874), 30 L. T. 792. A claim of title may be *bonâ fide* though no evidence of title is actually offered. See per Lord CAMPBELL in *Reg.* v. *Cridland*, *supra*. When the *bona fides* of a defendant's claim of title is ignored by a magistrate, he is bound to state clearly his grounds for arriving at such a conclusion. Per FIELD, J., in *Birnie* v. *Marshall* (1876), 35 L. T. (N. S.), at p. 376.

The right claimed must be one which is possible in law. *Hudson* v. *M'Rae* (1863), 4 B. & S 585, 33 L. J. M. C. 65, 9 L. T. 678, 12 W. R. 80; *Reg.* v. *Westmeath Justices* (1866), 15 W. R. 59; *Hargreaves* v. *Diddams* (1875), L. R. 10 Q. B. 582, 44 L. J. M. C. 178, 32 L. T. 600, 23 W. R. 828; *Watkins* v. *Major* (1875), L. R. 10 C. P. 662, 44 L. J. M. C. 164, 33 L. T. 352, 24 W. R. 164; *Mussett* v. *Burch* (1876), 35 L. T. 486. A public right of fishing in a non-navigable river is not such a right: *Hudson* v. *M'Rae*, *supra*; *Hargreaves* v. *Diddams*, *supra*; *Mussett* v. *Burch*, *supra*; nor is a claim to cut sods in a grave-yard for the purpose of covering newly made graves: *Reg.* v. *Westmeath Justices*, *supra*.

It is for the justices to determine whether or not the claim has a reasonable foundation: *Cornwell* v. *Sanders* (1862), 3 B. & S. 206, 32 L. J. M. C. 6, 9 Jur. (N. S.) 540, 7 L. T. 356, 11 W. R. 87; and they should be reasonably satisfied of its reasonable character: *Reg.* v. *Essex Justices* (1872), 26 L. T. 429, 20 W. R. 670; but it seems that their jurisdiction will be ousted if the claim is not on the face of it obviously absurd: *Scott* v. *Baring* (1895), 64 L. J. M. C. 200, 72 L. T. 495. The justices are not entitled to treat the claim as unreasonable, merely on the ground that there has been a decision of the High Court against a similar claim, unless it appears on the face of the claim that it could under no circumstances be lawful. Ib.

A person charged with trespassing in pursuit of game cannot oust the jurisdiction of the justices by asserting a general right in himself and every one else, without showing such a claim of right as would be a defence to an action of trespass. *Leatt* v. *Vine* (1861), 30 L. J. M. C.

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207, 8 L. T. 581. Where a person so charged raises a question of title, he must allege such title to be in himself, or in a person under whom he claims. *Cornwell* v. *Sanders* (1862), 3 B. & S. 206, 32 L. J. M. C. 6, 9 Jur. (N. S.) 540, 7 L. T. 356, 11 W. R. 87.

In a proceeding to recover possession of a house alleged to belong to a parish, under 59 Geo. III., c. 12, s. 24, the jurisdiction of the justices is not ousted by a claim of title, as the question of title is necessarily involved in the matter which the justices have to determine. *Ex parte Vaughan* (1866), L. R. 2 Q. B. 114, 36 L. J. M. C. 17, 15 L. T. 277, 15 W. R. 198.

Among the more recent cases as to the sufficiency of a claim of title, reference may be made to the following: *Leicester Urban Sanitary Authority* v. *Holland* (1889), 57 L. J. M. C. 75; *Cole* v. *Miles* (1889), 57 L. J. M. C. 132, 60 L. T. 145, 36 W. R. 784; *Usher* v. *Luxmore* (1890), 62 L. T. 110, 38 W. R. 254; *Philpot* v. *Bugler* (1890), 54 Justice of the Peace, 646; *Johnston* v. *Melson* (1892), 30 L. R. Ir. 15; *Edwards* v. *Cock* (1894), 58 Justice of the Peace, 298.

AMERICAN NOTES.

As a general rule justices of the peace are by statute in this country forbidden to try suits where title to lands is in issue, and the defendant may divest the justice of jurisdiction by filing a plea that title to land will necessarily come in question. This means "that their adjudication must not be such as to give or purport to give one party an interest in real estate that was not confessedly his before judgment; or purport to deny another a right to lands which he would otherwise have:" Murfree's Justice Practice, sect. 200; Cowen's Treatise, sect. 722.

The right of *possession* of land does not affect jurisdiction. *Conaway* v. *Gore*, 27 Kansas, 122; Cowen's Treatise, sect 520.

And a justice of the peace may try a question of title to land where it comes in question only in a dispute concerning title to personal property. *Hart* v. *Hart*, 48 Michigan, 175 (for the purpose of identifying hoops for which trover was brought).

No. 7. — REG. *v.* DUNN.

(Q. B. 1840.)

RULE.

THE power of justices to require sureties to keep the peace is comprised in the commission of the peace, the form of which is of ancient date, and probably derives its authority from a statute of Edward the Third (1 Ed. III.,

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stat. 2, c. 16). It is an essential condition of the exercise of this power that the party applying makes it appear to the justices that he goes in fear and in danger of personal violence from another. If the inference of personal danger does not necessarily and clearly follow from the facts stated, it is for the party complaining to draw the inference and expressly state on his oath that by reason of the facts stated he goes in fear and danger, &c.

Reg. v. Dunn.

12 Adol. & Ellis, 599–621 (s. c. 4 P. & D. 415; 5 Jur. 721).

Justices. — Articles of Peace. — Essentials. — Clear Inference of Personal Danger.

On *habeas corpus*, bringing up a party committed by justices for not [599] finding sureties of the peace, the Court will not hear affidavits controverting the facts alleged in the articles of the peace. Stat. 56 Geo. III., c. 100, s. 3, does not affect the practice in this respect.

Where a party exhibiting articles of peace alleges, as the ground of fear, expressions in a letter, which he submits to the Court for their construction, the Court will not take the words into consideration, nor act upon the articles, unless the whole letter be set forth.

Where the sessions, upon articles of the peace being exhibited, have ordered sureties to be found, and committed the accused party for want of them, their judgment is not final; but this Court, on *habeas corpus* and *certiorari*, will examine the articles, and if they are, on the face of them, insufficient, supersede the order of sessions as made without jurisdiction, and discharge the prisoner.

Articles of the peace are not sufficient unless they show a threat.

The threat need not be in words, but may be inferred from a course of conduct. That inference, however, must be drawn by the exhibitant himself; and, if he omit to state it in the articles, the Court will not draw the inference.

The exhibitant may allege, as part of his ground for apprehension, misconduct which has been the subject of former articles, although the accused party was committed on those articles for want of sureties, and discharged on *habeas corpus;* and a committment on such new articles will not be contrary to Stat. 31 Car. II., c. 2, s. 6.

The defendant, being in the custody of the keeper of the New Prison, Clerkenwell, obtained a writ of *habeas corpus* (of November 2d, 1840, returnable immediately after the receipt), under which he was now brought before the Court; and the gaoler returned the following warrant as the cause of taking and detention: —

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" Police Court, Hatton Garden.

" Metropolitan Police District, to wit. } To the keeper of the New Prison at Clerkenwell in the county of Middlesex, within the Metropolitan Police District, or his deputy.

" Receive into your custody in the said New Prison the body of Richard Dunn, late of No. 10 King Street, Saint James's, in the county of Middlesex, and within the said district, barrister-at-law, herewith sent you, and who was this day brought before me, Boyce Combe, Esquire, one of Her Majesty's justices of the peace for the said county, and also one of the magistrates of the Police Courts of the metropolis, sitting at the Police Court in Hatton Garden, within the Metropolitan Police District, by, and charged upon the oath of, Joseph Shackell, before me, that the said Richard Dunn is the identical person named in a certain warrant now produced and shown to me, bearing date the 29th day of June last, under the hands of two of Her Majesty's justices of the peace for the said county, signed by them in open session holden at the session house for the said county, on the said 29th day of June, whereby it appears to me that articles of the peace were exhibited against him, &c. [Recites order that R. Dunn [600] should enter into recognizance, &c.]; and the said R. Dunn having neglected and refused to enter into such recognizance with such sureties as aforesaid, him therefore safely keep in your said custody until he shall be discharged by due course of law, unless he, the said R. Dunn, shall in the meantime enter into such recognizance with such sureties as aforesaid. And for so doing this shall be your sufficient warrant. Given under my hand and seal at the Police Court aforesaid, this 11th day of July, 1840. BOYCE COMBE."

A *certiorari* had also issued, dated November 2d, to the justices of Middlesex, in obedience to which they now returned the articles of the peace exhibited by Miss Coutts, with two affidavits on which the order of sessions was grounded, the whole, with the order, being upon one parchment roll. The articles were as follows: —

" Middlesex. — Articles of the peace exhibited by Angela Georgina Burdett Coutts, of Stratton Street, Piccadilly, in the county of Middlesex, spinster, against Richard Dunn, late of the

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parish of St. Marylebone, Esquire, in order to preserve the life and person of this exhibitant from bodily harm.

"First. This exhibitant on her oath saith, that, in the month of August, 1838, this exhibitant received two letters signed Richard Dunn, but which letters, from the strange language contained in them, this exhibitant considered to have been written by some insane person, and consequently threw them aside; and she believes that they were destroyed with other waste papers. And this exhibitant further saith that, in the said month of August, 1838, Richard Dunn, against whom these articles are exhibited, but who until that time was totally unknown either by name or person to this exhibitant (except by the said two letters), came to the * Queen's Hotel at Harrogate in the West [* 601] Riding of the county of York, and there obtained a room nearly opposite to the sleeping-room occupied by this exhibitant, who was at that time residing in the said hotel, and, by some means unknown to this exhibitant, contrived to place or have placed his card in this exhibitant's said room. That this exhibitant, feeling greatly annoyed by this circumstance, on the following morning removed from the said hotel with her establishment, and went to reside at another part of the town, where letters written by the said Richard Dunn, and addressed to this exhibitant, were continually thrown into the garden of the house where this exhibitant was then residing; and she was there otherwise annoyed by the said Richard Dunn coming to the house, endeavouring to gain admittance, and also, when she went out, endeavouring to get into the exhibitant's company and into conversation with her, insomuch that this exhibitant was obliged at length to refrain from leaving the house except in a carriage or attended by a male servant; and which protection this exhibitant had never been obliged to resort to when at Harrogate on former occasions. That, as these annoyances continued to increase, and one of the letters having stated the intention of the said Richard Dunn to come to this exhibitant, this exhibitant became alarmed for her personal safety, and was obliged to have recourse to the magistracy of the neighbourhood; and, in consequence of the complaint of this exhibitant and upon the informations sworn to by her and by other persons, the said Richard Dunn was apprehended, and on or about the 29th day of September, 1838, was ordered and adjudged, by justices of the peace for the said county of York, to enter into

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his own recognizance in the sum of £500, and to find two sureties in the sum of £250 each, or one surety in £500, to keep the peace and to be of good behaviour towards Her Majesty and all her liege people, and especially towards this exhibitant, until the 16th day of October then next, which was the first day of the then next session of the peace for the said Riding; and for want of such sureties the said Richard Dunn was committed to the Castle at York, and there remained until the said then next session, when, as this exhibitant had then left Harrogate and was induced to hope that such annoyance would not be renewed, this exhibitant did not at the then next sessions direct any legal proceedings to be instituted against the said Richard Dunn; and at the said then next sessions the said Richard Dunn was, as exhibitant was informed and believes, discharged from custody.

"Secondly. This exhibitant on her oath saith, that no sooner was he the said Richard Dunn discharged from custody as aforesaid, than he came to London, where this exhibitant then was, and took lodgings at the Gloucester Hotel in Piccadilly, which is situate very near to the town residence of this exhibitant, and commenced a system of annoyance to this exhibitant by writing letters endeavouring to procure interviews with this exhibitant, leaving cards and letters at the door of this exhibitant's house, and by watching and following this exhibitant both when [* 602] in her carriage * and whilst walking in the street; that this exhibitant became, in consequence of these proceedings on the part of the said Richard Dunn, greatly alarmed for her personal safety, and applied to Sir Frederick Adair Roe, Baronet, the then chief magistrate of the police at Bow Street, on the 21st day of December, 1838, who, upon the information of this exhibitant sworn before him, issued his warrant for the apprehension of the said Richard Dunn; and he was accordingly brought before the said Sir Frederick Adair Roe, and was ordered to enter into recognizances and to find sureties, himself in £500, and two sureties in £250 each, to keep the peace towards this exhibitant. And this exhibitant saith that, while the informations were taking and reading before Sir Frederick Adair Roe as aforesaid, the conduct of the said Richard Dunn was so violent that it was with much difficulty he could be restrained, the officer in attendance being obliged for some part of the time to hold him by force lest he should commit some mischief while the said Sir Frederick

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Adair Roe was adjudicating upon the complaint of this exhibitant so made as aforesaid. That, the said Richard Dunn not having procured the required sureties, he was thereupon committed and remained in prison some short time, but was afterwards discharged on *habeas corpus* in consequence of an informality in the warrant of commitment, as this exhibitant is informed and believes.

" Thirdly. This exhibitant on her oath saith that, since the discharge last aforesaid, this exhibitant has been subjected to repeated and constant annoyance by letters being addressed to her by the said Richard Dunn, and by applications repeatedly made by that person at her house and at the house of her father, Sir Francis Burdett, Baronet; that the said Richard Dunn has also been continually observed walking up and down in front of the house of this exhibitant, and watching for opportunities to intrude himself into the company of this exhibitant. . . .

" Fourthly. [Relates certain circumstances of annoyance at Norwood.]

" Fifthly. This exhibitant on oath saith that, after the [603] return of this exhibitant from Norwood as aforesaid, a letter written, as this exhibitant believes, by the said Richard Dunn, dated from No. 10 King Street, Saint James's, on the 18th day of May last, and addressed to this exhibitant, was delivered at this exhibitant's house in Stratton Street, in which said letter is the following passage referring to a proposal in the said letter that this exhibitant should consent to meet the said Richard Dunn (that is to say): If you refuse this request, you will, when it is too late, repent a course the consequences of which will sooner or later fall on yourself and your family.

" Sixthly. [Relates certain acts of Richard Dunn, in consequence of which he was taken into custody, and bound at the Police Court, Marylebone, to keep the peace.]

" Seventhly. That, on the occasion of the said last men- [604] tioned complaint at the Police Court at Marylebone as aforesaid, the said Richard Dunn, as this exhibitant has been informed and believes, publicly stated that this exhibitant had entered into a correspondence with the said Richard Dunn. And this exhibitant on her oath saith, that on no occasion whatever did she either directly or indirectly correspond, negotiate, or have any intercourse or communication with the said Richard Dunn, or by any act, writing, word, look, or gesture, encourage the said

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Richard Dunn to address her, nor did she ever conduct herself so as to lead the said Richard Dunn to believe that she, this exhibitant, either directly or indirectly sanctioned the said Richard Dunn in addressing this exhibitant; but, on the contrary thereof, from the very first moment when the said Richard Dunn began to annoy and terrify this exhibitant in manner aforesaid, this exhibitant hath placed the matter in the hands of her legal advisers, and hath directed them to take all necessary and proper steps to protect her from the annoyances which she has been subjected to by the conduct of the said Richard Dunn.

[605] "Eighthly. This exhibitant on her oath saith, that she is unable to say whether the said Richard Dunn is or not of sound mind; but, from the whole tenor of his conduct and demeanour towards this exhibitant from the month of August, 1838, down to the present time, as well as his determined perseverance in such conduct, and from the premises before detailed in these articles, this exhibitant has deemed it unsafe ever since she returned from Harrogate as aforesaid to leave her house without the attendance of a man-servant, and hath abstained from walking, as she was wont to do, in Kensington Gardens, it being contrary to the regulations there to admit servants in livery therein; and this exhibitant for many weeks has felt it necessary to have the attendance of Mr. Ballard, or of some other of the Bow Street officers, at her house in Stratton Street aforesaid, from the fear that personal violence or molestation would be attempted by the said Richard Dunn against this exhibitant; and this exhibitant (except only when the said Richard Dunn was confined in prison) from fear absented herself when in town from public churches or places of worship, and hath attended divine service in a private chapel in Albemarle Street, where, on some occasions, the said Richard Dunn obtruded himself, and so acted as to create annoyance to this exhibitant, and to cause the interference of the clergyman there, who took measures of precaution for this exhibitant's comfort and safety; and this exhibitant is now in daily fear that some act of violence will be committed against this exhibitant, and that the said Richard Dunn will do this exhibitant some bodily hurt; and therefore this exhibitant, unless she can have protection and security from the annoyance and violence which she fears and apprehends from the said Richard Dunn, will be continually under restraint, terror, and apprehension. This exhib-

No. 7. — Reg. v. Dunn, 12 Adol. & Ellis, 605–608.

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itant therefore humbly prays that the said Richard Dunn may be ordered by this honourable Court forthwith to find sufficient sureties for keeping the peace towards this exhibitant, and be thereby restrained from further molesting, annoying, and terrifying this exhibitant.

"And, lastly, this exhibitant saith, that she doth not make this complaint against the said Richard Dunn through any hatred, malice, or ill will which she hath or beareth towards him, but merely for the preservation of her life and person from bodily harm. (Signed)

"ANGELA G. B. COUTTS."

The first affidavit immediately followed this signature, and began, without any heading or other introduction, as follows: "William Ballard, of No. 3 Chapel Place, Cavendish Square, in the county of Middlesex, retired officer of police, maketh oath and saith," &c. [The affidavit thus stated, in some detail, particulars of violent language and conduct of the above-mentioned Richard Dunn, and concluded by stating that] "this deponent [607] believes that the said Miss Coutts is in constant danger of the said Richard Dunn doing her some personal injury." It was not stated in this affidavit that any of the violent language or conduct particularly described took place in Miss Coutts's presence, or was reported to her. Nothing was subscribed to the affidavit but the signature, "William Ballard."

The second affidavit followed, without any introductory form, beginning: "William Weedon, footman to Miss Angela Georgina Burdett Coutts, of," &c., "maketh oath *and [*608] saith," &c. This deponent gave details as to the conduct of Mr. Dunn at Norwood and the Regent's Park, already stated by Miss Coutts, and added, that "he verily believes, from what he has witnessed of the conduct and manner of the said Mr. Dunn upon several occasions, that the said Miss Coutts is in personal danger, and has reason to be in constant fear of him." Then followed the signature, "William Weedon," opposite which was the following jurat:—

"Sworn by the several deponents above named, in open court, at the general quarter session of the peace, held in and for," &c., "at the session house," &c., "on Monday, the 29th day of June, 1840. RICHARDS."

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The order of the Court of Quarter Sessions, recited in the warrant of commitment, was written on the roll, under the depositions. The order began: "It is ordered that the above-named defendant do enter into his own recognisance," &c., and proceeded in the terms stated by the warrant (*ante*, p. 110); and it was subscribed, "By the Court, H. Elliss, clerk of the peace."

The return and affidavits having been now read,

The defendant, in person, moved[1] that he should be discharged out of custody. He proposed to controvert by affidavit [* 609] the statements in the articles and * affidavits upon which the order of sessions had been founded, contending that Stat. 56 Geo. III., c. 100, ss. 3, 4, authorised such a course. [Lord DENMAN, Ch. J. — We cannot hear such affidavits. The fact returned is, that the Court of Quarter Sessions has required sureties, and the justice has committed for want of them. The justices in sessions have exercised their discretion upon the articles. The only fact we could inquire into on affidavit would be, whether or not the justices had made the order of sessions, or the magistrate had committed. LITTLEDALE, J. — The facts set forth in the return are, that articles of the peace were exhibited, and that, upon those articles, the sessions made an order, and the magistrate afterwards issued a warrant of commitment. These facts may be controverted.[2] Lord DENMAN, Ch. J. — We are of opinion that you cannot go into a statement as to other facts.]

The articles and depositions do not properly appear to have been sworn. The whole should have been headed, "A., B., and C. swear, and each for himself and herself swears." Or if, without such heading, they make separate depositions, each ought to have a distinct jurat. Here one general jurat is given, "sworn by the several deponents above named," &c.; and there is nothing to connect the depositions with each other or with the articles. Taken apart, none appears to be sworn. Perjury could not be assigned on any.

The articles now returned differ from those exhibited. Interlineations have been made. [Lord DENMAN, Ch. J. — We can look only at what is returned.]

[1] Before Lord DENMAN, Ch. J., LITTLEDALE, WILLIAMS, and COLERIDGE, JJ.

[2] Sir J. Campbell, Attorney-General, who opposed the motion, here referred to *Rex* v. *Doherty*, 13 East, 171 (12 R. R. 315), and *Lord Vane's Case*, 2 Stra. 1202; s. c., more fully, 13 East, 171, n. (*a*) (12 R. R. 317). See *Leonard Watson's Case*, 9 A. & E. 731, 787.

No. 7. — Reg. v. Dunn, 12 Adol. & Ellis, 610, 611.

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The articles are, in substance, insufficient. "Surety * of [* 610] the peace is grantable," according to Hawkins (2 Hawk. P. C. 5, Book 1, c. 60, s. 6, 7th ed.), "wherever a person has just cause to fear that another will burn his house, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him such mischief;" and the justice "is bound to grant it, upon the party's giving him satisfaction upon oath that he is actually under such fear; and that he has just cause to be so, by reason of the other's having threatened to beat him, or lain in wait for that purpose." No such reason is suggested here for expecting any injury of the kind. The law requires that some threat should have been used: mere apprehension is not sufficient; the grounds of it should appear. The precedents, in such cases, show acts of violence towards the exhibitant, and reasons for expecting further violence. And the menace should be of something which, if carried into effect, would be a breach of the peace. Here, nothing like a threat is stated, and the acts complained of amount to no more than annoyance, which is not a ground of fear. (Following up this argument, he proceeded to comment on the several statements in the articles.) Any letters relied upon as a ground of the application should be fully set out, as would be done in moving for a criminal information for provoking, by letter, to a breach of the peace.

The party now applying has already been imprisoned upon articles of the peace, not materially differing from those since exhibited; a few circumstances only are now added. From that imprisonment he was discharged by *habeas corpus;* and, therefore, his present detention is contrary to Stat. 31 Car. II., c. 2, s. 6, which forbids, after discharge by *habeas corpus*, recommitting * the party for the same alleged offence, "any colour- [* 611] able pretence or variation in the warrant or warrants of commitment notwithstanding."

The order of sessions is irregular. That Court has not jurisdiction to bind a party to appear at the next general or quarter sessions for the county after the expiration of two years. The order does not state a time from which the two years are to run. And it was made without hearing the defendant.

The Court then said that they doubted if the grounds for apprehending injury were sufficiently set forth in the articles, and desired to hear the counsel supporting the return on this point.

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Sir J. Campbell, Attorney-General, Bodkin, and M. Chambers, in support of the return.[1] The Court of Quarter Sessions appears by the articles to have had jurisdiction, and has decided that Miss Coutts had reason to apprehend personal injury. That decision cannot be reviewed here. If the sessions exceed their jurisdiction, the remedy is to bring up the order by *certiorari*, and quash it; but where there is no excess, this Court cannot interfere. The articles in this case, however, showed a good ground for the order. Justices of the peace, by their commission, are to cause to come before them "all those who to any one or more of our people concerning their bodies or the firing of their houses, have used threats, to find sufficient security for the peace or their good behaviour, towards us and our people."[2] But the threats need not [*612] be *by word of mouth: they may be by conduct; and conduct may have a different effect in different cases, according to the age, sex, or condition of the party, or to other circumstances; as, the party complained of being known or a stranger. This view of the law is consistent with the passage quoted on the other side from Hawk. P. C., b. 1, c. 60, s. 6. If the conduct complained of tends to a breach of the peace, the case for interference arises; the magistrate is not to wait for an actual breach. His duty on this point lies, according to Dalton (Dalt. Just., cap. 3), "in preventing the breach of the peace (wisely foreseeing and repressing the beginnings thereof) by taking surety for the keeping of it, or for the good behaviour of the offenders, as the case shall require." A party exhibits articles *quia timet.* [COLERIDGE, J. — You must contend that the binding by a single justice, as well as by the sessions, is conclusive.] *Willes* v. *Bridger*, 2 B. & Ald. 278 (20 R. R. 434), shows that it is. [COLERIDGE, J. — It was not necessary to decide the point there, because the warrant was held valid.] One magistrate bound over in *Rex* v. *Tregarthen*, 5 B. & Ad. 678; it was contended before this Court (on motion for a *certiorari*) that the words which he had treated as a threat were used metaphorically; but PARKE, J., said, "The magistrate having, in the exercise of his discretion, thought that there was ground for requiring the defendant to enter into recognisances to keep the peace, this Court cannot interfere." And the rule was refused. [COLERIDGE, J. — If this Court could not interfere either on *cer-*

[1] November 5. Before the same Judges.

[2] 5 Burn's Just. 4, tit. Justices of the Peace, II., ed. D'Oy. & Wms.; 3 Chit. Burn's Just. 542, ed. 28.

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tiorari or on *habeas corpus*, there would be no remedy in such a case, however gross the error might be.] The order, if wholly irregular, might be treated as a * nullity. [* 613] [COLERIDGE, J. — In *Rex* v. *Tregarthen*, 5 B. & Ad. 678, the Court went further than was absolutely necessary, because the words, taken in one point of view, did afford ground for requiring sureties. But suppose there had been none. Instances are given in the books in which articles cannot be exhibited, as where the threat is not against a party himself, but against his servant or property. Suppose that appeared upon the articles, the complainant nevertheless swearing that he was in fear of bodily injury; or suppose, in this case, the only ground of fear stated had been the waving a handkerchief.] If the sessions did not exceed their jurisdiction in taking cognisance of the case, there would be no remedy, unless the magistrates were shown to have acted *malâ fide*. The case is like many others in which an inferior Court has power to decide conclusively, as on commitments for contempt. The finding of such a Court on a matter of fact within its jurisdiction cannot be interfered with. [COLERIDGE, J. — The jurisdiction here is limited to the case of certain threats; none have been used; but a threat is to be inferred; can the sessions, by drawing such an inference, from whatever facts, give themselves a jurisdiction not to be interfered with?] If a phrase is ambiguous, they are to judge of it; and they have judged accordingly of the passage from a letter set out in these articles. In *Rex* v. *Holloway*, 2 Dowl. P. C. 525, where sureties of the peace had been required by magistrates out of sessions, application was made to TAUNTON, J., in the Bail Court to remove the proceedings, that the amount of sureties might be reduced; but the learned Judge said: "If the proceedings were before the Court, * there seemed no power to reduce [* 614] the amount of the security required by the magistrates; they were the conservators of the peace, and the amount of the security which the defendant was to find was in their discretion. The Court could not interfere to control that discretion." [COLERIDGE, J., referred to *Rex* v. *Bringloe*, 13 East, 174, n. (*a*) to *Rex* v. *Doherty* (12 R. R. 316 *n.*).] There, upon an ambiguous expression in the articles, this Court held the charge sufficient; but the articles appear to have been exhibited in this Court. No precedent is shown for an application of this kind, after the allow-

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ance of articles of the peace by justices; yet if this Court had had power to review their decision in such cases, precedents would not have been wanting. [COLERIDGE, J. — An analogous proceeding to that of binding to the peace is the taking surety for good behaviour, which it appears that justices are empowered to do by Stat. 34 Edw. III., c. 1, on indictment or suspicion. But their discretion in that case must be exercised according to law, and on good cause of suspicion; and whether the cause be such or not the Judges of this Court are to decide. *Rudyard's Case*, 2 Ventr. 22.[1]] As to the want of a jurat, the Court, looking at the documents returned to the *certiorari*, will now presume *omnia rite acta*. [Lord DENMAN, Ch. J. — You need not consider that question. If there had been no depositions and no jurat, the exhibition of articles would be sufficient. There would be no difficulty in framing an indictment for perjury; and, as to the jurat, the swearing might be proved *aliunde*.]

Then, even supposing that this were not a case already [* 615] adjudicated upon by the sessions, but an original * application, the articles are sufficient in substance. (They then commented upon the facts set forth in the articles, and relied particularly on the words extracted from a letter of defendant, "If you refuse this request, you will, when it is too late, repent a course the consequences of which will sooner or later fall on yourself and your family.") [COLERIDGE, J. — Do the articles refer to the statements in the depositions, so as to show that the facts stated in those were known to the exhibitant, and tended to excite her bodily fear?] That is, in substance, shown; and if it were not, the justices might take into consideration the articles coupled with the depositions. The exhibitant states that she is in bodily fear, and the depositions support that statement by showing reason for the fear.

The Court said that they would consider the case with reference to the sufficiency of the articles; and that, if they found them sufficient, the defendant (who said he had further objections to make) might conclude his argument. *Cur. adv. vult.*

Lord DENMAN, Ch. J., in the same term (November 9th), delivered the judgment of the Court.

Articles of the peace having been exhibited before the Court of

[1] See judgment of TYRREL, J.

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Quarter Sessions for this county by Miss Coutts, against Richard Dunn, and that Court having required him to find sureties to keep the peace and be of good behaviour, which he has failed to do, and was thereupon committed to prison, he has sued out his writ of *habeas corpus* to appear before us; the return to which states this fact in short and general terms. But the * defend- [* 616] ant has also brought before us by *certiorari* the original order of the Court, referring to and incorporating the articles exhibited, and two affidavits sworn in support thereof, which are (as he maintains) insufficient in point of law to give the Court jurisdiction to compel him to find sureties; and, consequently, insufficient to warrant them in sending him to prison for his default.

One of the grounds on which we were urged to remand the prisoner may be at once removed. The articles were discussed at length; and it was argued that, even if they were now submitted to us, with the prayer that we should order sureties to be found by the prisoner, we, in the exercise of our discretion, should undoubtedly feel it our duty to take the step which has been taken by the Court of Quarter Sessions. But against this point there is one decisive observation. Whatever we might think of the defendant's conduct, an essential part of it, for the purpose of the prosecutrix, is a letter written to herself; but that letter is not set forth, or in any way accounted for; only a short extract is made, of very ambiguous meaning. We should have required to see the entire letter, and should not have acted on any selection from it.

Another ground taken was, that the Court of Quarter Sessions is a Court of competent jurisdiction to direct sureties of the peace on articles exhibited, and must therefore have power both to exercise a discretion over the cases in which that security is sought, and to decide upon the proof of the facts on which their discretion is exercised. As to the former objection, it may be enough on this occasion to observe that the Court of King's Bench has, in fact, controlled the decision of the justices, whether in or out of sessions, to a much * greater degree than was supposed [* 617] at the bar. *Rudyard's Case*, 2 Ventr. 22. The latter requires more examination. The power of justices of the peace in this behalf is traced to a statute of Edward III. (see 1 Ed. III., stat. 2, c. 16; 34 Ed. III., c. 1), which was made the foundation of the

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commission of the peace, though some have thought that it did not warrant the Crown in granting so large an authority. We cannot question the validity of the commission, which has been in operation for centuries; but neither can the justices of the peace, on the other hand, give themselves jurisdiction in any case. They cannot go beyond the terms and fair meaning of the commission. The terms were quoted from Burn's Justice in the course of the argument. The fair meaning is, that if one person informs the Court, or a justice of the peace, that he goes in fear and in danger of personal violence from another by reason of threats employed by him, and prays the protection of sureties of the peace, that protection may be granted. Unless such a case appear, no jurisdiction appears; nor can we ever infer facts necessary to give jurisdiction from the mere circumstance of an inferior Court assuming to act as if they possessed it; least of all where, by the exercise of a discretionary power on an *ex parte* statement, which is not allowed to be contradicted, a single magistrate may deprive the subject of his personal freedom.

An opportunity must therefore be given for arguing the validity of the act done by the sessions or magistrate; and unless this may be done by means of the writ of *certiorari*, it could never be done at all, where the gaoler makes a general return to the *habeas corpus*.

[* 618] The prisoner makes this objection to the present * articles. No threat is alleged upon them. We may observe that no precedent has been found, in the reports, of articles of the peace which omit to state in terms that the exhibitant was threatened, or the fact of such language being employed as the Court could not fail to see conveyed one. Where that is left doubtful, as in *Bringloe's Case*, 13 East, 174, n. (*a*) to *Rex* v. *Doherty* (12 R. R. 316 *n.*), the Court will not bind over the party. *Rex* v. *Tregarthen*, 5 B. & Ad. 678, only shows that, where threats are sworn to, this Court will not inquire whether they were used in their natural sense. Among cases not reported, we have examined the articles exhibited by the Marquis of Hertford in 1825.[1] His application

[1] The following report, furnished from the Crown Office, of the case here referred to, is given in a note to the report in 12 Ad. & El.: —

The King v. *The Honourable Augustus Stanhope.* Articles of the peace having been exhibited by the Marquis of Hertford against the Honourable Augustus Stanhope, Mr. Brougham and Mr. Brodrick now informed the Court that the defendant attended to put in bail to them; but that they were prepared, first, to contra-

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was successful, though the word "threat" did not appear in his articles: but he swore that there had been an assault; and the defendant had said that he would repeat it on the occurrence of an event which might have happened at any time.

My Brother COLERIDGE has also found a case in 6 Mod., under the title of *Dennis* v. *Lane*, 6 Mod. 131, which bears much resemblance to the present. (His Lordship here read that case.) The form of the articles does not appear; but the circumstances were very much stronger, and would well warrant her statement that she, the mother herself, had been threatened, — there was a manifest intention to deprive her of her daughter by personal violence, — as well as by the daughter, that she apprehended forcible abduction.

This case may then be said to prove that the threats need not

dict the truth of the articles; secondly, to object to their sufficiency on the face of them.

The Court said they were clearly of opinion that the truth of the articles could not be contradicted, either by affidavit or otherwise; but that defendant might either except to their sufficiency or tender affidavits in reduction of the amount of bail. *Rex* v. *Doherty*, 13 East, 171 (12 R. R. 315), and *Lord Vane's Case*, cited 13 East, 171 *n.* (12 R. R. 317).

The objections taken to the articles were, first, that they were accompanied by an affidavit of Sir Richard Birnie in corroboration of the truth of them, which was against all precedent; secondly, that they did not actually state that defendant was in fear of bodily harm, which is indispensable: Dalt. Just., c. 67, 69; Fitzherbert, Nat. Brev. 79 G, Writ *De Securitate Pacis;* and so is the constant course of precedents; none the other way. Here exhibitant only speaks of his fear that defendant will make him (exhibitant) commit a breach of the peace. He concludes that he applies for security "for preservation of himself from bodily harm, violence, and insult;" not saying that he apprehends it. Besides this, the facts stated are too slight to call for the Court's interference. — The rank of parties will not be looked at.

Sir J. S. Copley, Attorney-General, *contra.* — Affidavits are received in such cases. One was received on exhibiting articles by Lord Sidmouth against Arthur Thistlewood. The facts are fully sufficient to call on the Court to interfere. DENISON, J., said the Court would not look with favour to such applications as this; their duty was to preserve the public peace.

ABBOTT, Ch. J. — It is our imperative duty, both towards the exhibitant and the defendant himself, to require this security. It has been said we must not look to the rank of parties or their station. That is not a just rule. We constantly do look to it, both in applications for criminal informations and in other cases. We have Sir Richard Birnie's affidavit that defendant said, in his presence, he would do everything in his power to annoy Lord Hertford, short of actual violence. It is impossible for a man to keep within the strict line he has laid down for his own conduct. Exhibitant is sworn, when he exhibits the articles, that "he craves security for the preservation of his life and person from danger;" that is the very form of the oath. We should be poor guardians of the public peace if we could not interfere until an actual outrage had taken place, and perhaps fatal consequences ensued.

The Court ordered the defendant to enter into his own recognisance in £500, with two sureties in £250 each, for three years.

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be by word of mouth directed against the exhibitant,
[* 619] * but that looks, gestures, and conduct may express them with equal force; and this is not to be denied: but the invariable rule is that, where reliance is placed on a general fact which may be inferred from particular facts, but does not flow from them by necessary implication, the party shall draw that inference himself, and swear to his belief of its correctness, and not leave the Court to draw the inference instead of him. If this prisoner's conduct did not amount to the threat of personal violence, the justices had no power to bind him over; but, if it did, the exhibitant ought to have so stated in the articles, which are defective by reason of the omission.

In arriving at this conclusion (most reluctantly, we may add, considering how seriously the happiness and comfort of the prosecutrix may be placed in hazard by the prisoner's perseverance in the conduct which has been detailed), we by no means decide that that conduct alone may not have been an actual menace of violence. On the contrary, if it should be repeated, and then brought before us, coupled with former outrages, in a proper form, and so as to fall within the rules that have always hitherto prevailed, we might probably feel but little doubt of the propriety of the conclusion that menaces had been used.

That the former proceedings of the prisoner may be again referred to, as giving a character to those of recent date, no doubt can be entertained, notwithstanding the argument derived by him from Stat. 31 Car. II., c. 2. In the case of *Rex* v. *Mendez*, 1 Stra. 473, the prosecutor was allowed to rely on a fact which
[* 620] had been pardoned by the * act of grace, as an inducement to the Court to believe the defendant a dangerous person. The same reference to former facts was permitted in *Dennis* v. *Lane*, 6 Mod. 131, and this is not inconsistent with Stat. 31 Car. II., c. 2, which merely prohibits a second punishment for the same offence, but never intended to preclude the Court from forming its judgment on the necessity of restraining outrage on consideration of all the circumstances which make it probable.

Perhaps the law of England may be justly reproached with its inadequacy to repress the mischief, and obviate the danger, which the prisoner's proceedings render too probable; and we may naturally feel surprised if none of the numerous police Acts have made specific provisions for that purpose. But the power of the sessions

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and of the justice of the peace to make the order now challenged before us depending wholly on the words of the commission, and those words not being satisfied by the articles exhibited, we are bound to decide that the prisoner must be discharged.

Prisoner discharged.

ENGLISH NOTES.

At an eviction for non-payment of rent, R. addressed a number of persons, including the tenant, thus: "Pay no rent to the landlord. We will make you right about the land; we will build you a house at any expense, and make you comfortable during the winter." A summons was issued against R., calling on her to show cause why she should not be bound over to be of good behaviour, and at the hearing of the summons R. was ordered to find bail to be of good behaviour for six months, and in default to be imprisoned for one month. On her refusal to give bail she was imprisoned. It was held, on motion to show cause against a conditional order for a *certiorari*, that the justice had jurisdiction to make the order. *Reg.* v. *Cork Justices* (1882), 15 Cox C. C. 78. Where an information was laid against a person for assault, and a summons issued against him for that offence, it was held that, notwithstanding that the justices dismissed the information, they were legally justified in ordering him in respect of the charge to enter into his own recognisance to keep the peace for six months. *Ex parte Davis* (1871), 24 L. T. 547.

A justice of the peace has jurisdiction to require sureties for good behaviour in certain cases of libel against private individuals. *Haylocke* v. *Sparke* (1853), 1 El. & Bl. 471, 22 L. J. M. C. 67, 17 Jur. 731. The distinction was here drawn between the jurisdiction founded on the practice of exhibiting articles of peace and the jurisdiction under the statute of 34 Ed. III., c. 1, to take securities for good behaviour where there is ground for a suspicion of an intention to break the peace, which is sufficiently shown by acts tending to a breach of the public peace.

Where E. laid an information before a justice, complaining that M., after having assaulted, had threatened him, and prayed that he might be bound over to keep the peace, and the justices convicted M. of the assault (which was proved at the hearing) and also obliged him to find sureties of the peace, notwithstanding the request of E. that only sureties of the peace should be required from M., it was held that the magistrate had no jurisdiction to convict M. of the assault. *Reg.* v. *Totnes Justices* or *Deny* (1855), 2 L., M. & P. 230, 20 L. J. M. C. 189, 15 Jur. 227. But where a summons for assault also called on the defendant to

show cause why she should not be bound over to keep the peace, and the defendant having appeared, the magistrates convicted her of assault and ordered her to be imprisoned, the conviction was held to be right. *Kennington* v. *Daniel* (1889), 22 L. R. Ir. 667.

When articles of the peace are exhibited against any person, the person against whom they are exhibited may not give evidence before the justices in contradiction of the facts stated in the articles. If it appears on oath to the satisfaction of the justices that the complainant has been threatened, it is their duty to require recognisances to be entered into to keep the peace. *Lort* v. *Hutton* (1876), 45 L. J. M. C. 95, 34 L. T. 730.

In an application under 34 Edward III., c. 1, to bind a party over to be of good behaviour, several distinct instances of misconduct may be alleged and relied on. *Reg.* v. *Queen's County Justices* (1882), 10 L. R. Ir. 294. It has been held in an Irish case that the Judges of the Queen's Bench Division, as conservators of the peace, have original jurisdiction, independently of the above statute, to require sureties for good behaviour from persons whose acts or language are shown to be likely to endanger the public peace. *Ex parte Seymour, In re Davitt* (1882), 15 Cox C. C. 242, 12 L. R. Ir. 46.

It may be remarked that a magistrate being responsible for order in the district over which he has control, and liable for negligently failing to preserve it, is justified in issuing a public notice that public meetings will not be permitted to take place in any place of public resort under his control, where there are reasonable grounds for believing that a breach of the public peace is likely to result from the holding of any public meeting in such place. *Reg.* v. *Graham* (1888), 16 Cox C. C. 420.

AMERICAN NOTES.

The power of justices of the peace in this country to bind over to keep the peace is conferred and regulated by statute in each State. In some States a jury is summoned to inquire into the complaint, but in most the trial is by the justice alone. The question for the justice to investigate, according to the statutes generally, is whether there is "reason to fear" the commission of an offence against person or property. In either case the defendant may be required to give security to keep the peace, and in default thereof he may be imprisoned.

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SECTION II. — *Powers and Duties.*

No. 8. — REG. *v.* ADAMSON.

(Q. B. D. 1875.)

RULE.

WHEN an information and complaint is laid before justices they are bound to hear and consider it; and if they have substantially declined to do so, — *e. g.* by refusing a summons or warrant for some reason extraneous to the information or evidence before them, — the Superior Court will issue a *mandamus*. But the Court has no jurisdiction (otherwise than by express statute) to review a decision of the justices arrived at on a hearing and consideration of the information and evidence before them.

Reg. v. Adamson and others.

1 Q. B. D. 201–207 (s. c. 45 L. J. M. C. 46; 33 L. T. 840; 24 W. R. 250).

Justice of the Peace. — Refusal to issue Summons. — Exercise of Discretion. — Mandamus. [201]

Upon an application to justices for summonses against certain persons to answer a charge of conspiracy to break the peace and do grievous bodily harm at a public meeting, evidence was given that a disturbance had arisen at the meeting in which the defendants took part, and that one or other of them had previously offered money to different persons if they would commits acts of violence at the meeting. The justices, after hearing the evidence, declined to issue the summonses, and a rule *nisi* for a *mandamus* having been obtained, they stated in their affidavit that upon the facts brought before them they did not feel justified in granting the application, but did not say that they thought the witnesses unworthy of credit.

Held, that the rule must be made absolute, for although under 11 & 12 Vict., c. 42, s. 9, the justices are to issue their summons "if they shall think fit," it was here evident that they had not exercised a discretion.

Rule calling upon H. E. P. Adamson, Mayor of North Shields, Northumberland, and others, justices of the borough, to show cause why a *mandamus* should not issue, commanding them to proceed to hear and determine the matter of an application by R. Kiley, for a summons against J. F. Spence, J. Short, G. Kidd,

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— Pye, junior, J. Fenwick, F. Fenwick, G. Wright, and others, for unlawfully and wilfully combining and conspiring to break the peace and do grievous bodily harm to several persons, at the Albion Assembly Rooms, the Albion Hotel, and elsewhere, at North Shields, on the 14th of October, 1875.

It appeared that in November, 1875, application was made at the Police Court at North Shields, to the mayor and other justices, to issue summonses in the form stated in the rule. The charge was founded upon a riot which was stated to have occurred at a meeting which took place in the previous October,

[* 202] * at the Albion Assembly Rooms. This meeting consisted of members and supporters of an association called the Magna Charta Association. The solicitor who made the application read the written statements of a number of witnesses, who were present, and ready to verify their statements on oath. The statement of R. Kiley was that the Assembly Rooms had been hired for a lecture on the 14th of October, by Dr. Kenealy, on the Tichborne case; that Spence joined in making a disturbance at the meeting, and that after the meeting was over he, together with the Fenwicks and G. Kidd, attacked the witness and Dr. Kenealy at the Albion Hotel, and both struck and threw glasses at them. A second witness stated that during the meeting the Fenwicks and Kidd attempted to set the hall on fire with gun cotton. A third witness stated that during the meeting he saw G. Wright throwing Cayenne pepper about the place. A fourth witness stated that on the day of the meeting he was paid money by Short to make a disturbance at the meeting. A fifth witness stated that on the night of the 14th of October, 1875, he saw the defendants making a great disturbance at the meeting, striking people right and left; saw Kidd set fire to a cracker and toss it into the Assembly Room, where there were a lot of people waiting to hear Dr. Kenealy, and that at one time Kidd and his friends blocked up the staircase, and prevented the witness from getting into the room. The deposition of Rogers was that Short came to him with a friend of the name of Ferguson, and said he wanted a few good men to go on the evening of the 14th of October to the Assembly Rooms, to shout, and to smash, and to "clear up everything and anybody who came in their road from among the friends of Dr. Kenealy." About seven o'clock in the evening before the meeting, Short gave the witness and several others whom he had hired some drink, and

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he gave Taylor another shilling for some more drink, after which they went to the Albion Assembly Rooms.

The magistrates, after hearing these statements read, refused, without giving any reason, to issue the summonses.

In answer to the rule they made an affidavit stating that when the application was made they fully considered it, and came to the conclusion that they would not be justified in granting summonses for conspiracy, as the facts brought before them were not, * in their opinion, sufficient to justify them in [* 203] summoning the persons accused to answer for such offence.

Poland (Hawkins, Q. C., with him) showed cause. The justices in refusing to issue the summonses exercised a discretion over which this Court has no control. In granting a distress warrant for a poor-rate the justices act in a ministerial capacity, but where application is made to them for a summons it is their duty to hear the evidence, and if they think there is no evidence upon which a jury would convict, to refuse the application. This is exactly what was done here.

[BLACKBURN, J., referred to 11 & 12 Vict., c. 42, s. 9.[1]]

The words "if they think fit" in s. 9 show that there is no

[1] By 11 & 12 Vict., c. 42, s. 1, "In all cases where a charge or complaint shall be made before any one or more of Her Majesty's justices of the peace of any county, riding, division, &c., or place within England and Wales that any person has committed, or is suspected to have committed, any treason, felony, or indictable misdemeanour, or other indictable offence whatsoever, within the limits of the jurisdiction of such justice or justices of the peace, then and in every such case if the person so charged or complained against shall not then be in custody, it shall be lawful for such justice or justices to issue his or their warrant to apprehend such person, &c. Provided always, that in all such cases it shall be lawful for such justice or justices to whom such charge or complaint shall be preferred, if he or they should so think fit, instead of issuing in the first instance his or their warrant, to issue his or their summons directed to such person, requiring him to appear before the said justice or justices," &c.

By s. 8, "In all cases where a charge or complaint for any indictable offence shall be made before such justice or justices as aforesaid, if it be intended to issue a warrant in the first instance against the party or parties so charged, an information or complaint thereof in writing shall be laid before such justice or justices: Provided always, that in all cases where it is intended to issue a summons instead of a warrant in the first instance, it shall not be necessary that such information and complaint shall be in writing or be sworn to or affirmed in manner aforesaid, but in every such case such information and complaint may be by parol merely, and without any oath or affirmation whatsoever to support or substantiate the same."

By s. 9: "Upon such information and complaint being so laid as aforesaid, the justice or justices receiving the same may if he or they shall think fit issue his or their summons or warrant as hereinbefore is directed to cause the person charged as aforesaid to be and appear before him or them or any other justice or justices of the peace for the same county, &c., to be dealt with according to law."

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absolute right to a summons. In *Ex parte Wason*, L. R.
[*204] 4 Q. B., at p. 575, COCKBURN, *Ch. J., says, "I have no doubt that, supposing the matter brought before the magistrate does not establish facts upon which an indictment could be preferred and sustained, the magistrate has a discretion which if rightly exercised we ought to uphold." It will be argued that it is the duty of justices to commit or bail the person charged, or take the recognisance of the prosecutor under the Vexatious Indictments Act (22 & 23 Vict., c. 17, s. 2), and that if they refuse a summons they deprive the prosecutor of these alternatives. But, first, there is nothing in the section to prevent the prosecutor from applying to be bound over when a summons is refused; secondly, no application was made by the prosecutor that he might be bound over to prefer an indictment; and, thirdly, it cannot be contended that the prosecutor has an absolute right to be bound over where the justices honestly think that upon the evidence there is no ground for a summons.

Sir H. Giffard, S. G. (Philbrick, Q. C., with him), in support of the rule. There can be no doubt that a discretion is vested in the justices as to issuing a summons, but in the present case it cannot be said that they have exercised it. The discretion must be a legal discretion, based upon legal grounds. In *Reg.* v. *Boteler*, 4 B. & S. 959, 33 L. J. M. C. 101, where justices, who, under 2 & 3 Vict., c. 84, were empowered to issue a distress warrant "if they should think fit," refused to do so because they did not think that an extra-parochial place ought to contribute to the common fund of the union, the Court made a rule absolute with costs, directing them to issue the warrant.

[COCKBURN, Ch. J. — That case is distinguishable. There they refused to exercise their discretion because they thought the law unjust.]

In *Ex parte Woolf*, H. T. 1871 (not reported), where a magistrate refused to issue process on the ground that it appeared to him to be an attempt to enforce a civil right through a criminal court, a *mandamus* was granted. Again, the Vexatious Indictments Act (22 & 23 Vict., c. 17), s. 1, has in charges for certain offences (including conspiracy) reserved to the prosecutor the right of asking the magistrate to commit, or to dismiss the charge, and the magistrates ought to have granted the summons in order to bring the matter to a final decision, and to that stage where the prose-

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cutor is * enabled to ask that he may be bound over to [*205] prefer an indictment. The only limit on this obligation is that the information must disclose an indictable offence. Here there was the strongest evidence in support of the charge.

COCKBURN, Ch. J. — This is a case of some perplexity, but on the whole I am of opinion that the rule should be made absolute. Nothing can be clearer than that this Court has, in the absence of express statutory provision, no appellate jurisdiction to review the decision of magistrates who have once heard a case and decided it, in a matter within their jurisdiction. If I could see my way to the conclusion that the magistrates had considered this evidence and given a decision upon it, I should certainly say that the Court could not act upon the matter further, or send the case back to the magistrates; but the Solicitor-General has called our attention to evidence of such a description that I cannot resist the conclusion that the magistrates must have acted upon a consideration of something extraneous and extra-judicial which ought not to have affected their decision, and which, it seems to me, was the same as declining jurisdiction. If they had issued summonses, and heard this evidence upon oath, and had determined that it was not trustworthy, the matter would have been one of which they would have been the sole judges; but I cannot but think that what they did was not merely to consider whether or not the witnesses were worthy of belief. I think it very probable that they thought that they were doing what was right, and that they were influenced by their distaste for the views and doctrines promulgated at the meeting, and thought that the sooner the matter was buried in oblivion the better. But these were considerations which ought not to have influenced them at all, and under the circumstances I think they must be taken to have declined jurisdiction. It would be more satisfactory if the matter were to go before different magistrates; but this, of course, is a question for the prosecution. All we need say is, that the answer of the magistrates is not sufficient to lead us to believe that they have exercised their discretion upon the facts presented to them.

BLACKBURN, J. — I am of the same opinion. I have hesitated, and still hesitate, but I do not dissent from the conclusion at * which the rest of the Court have arrived. It is [*206] quite clear that, by the early law which was practically

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re-enacted in Jervis's Act, the magistrates, upon application for a summons, were bound to hear the evidence brought before them. The evidence need not have been in writing or on oath, but they were bound to hear it, and the question is, when they have heard it, are they, if there is any evidence of an indictable offence, bound to issue summonses to bring the persons charged before them. I think they are not absolutely bound to do so; the words in 11 & 12 Vict., c. 42, s. 9, "if they shall think fit," show that they have a discretion; and the difficulty is, whether we can see that they have not exercised a discretion. Had the charge been one of a conspiracy to murder Dr. Kenealy, or to blow up the Assembly Rooms, the justices might have been quite right in thinking this an incredible story, and that there was no reasonable evidence of an agreement to do any such thing. But here the evidence of a conspiracy to disturb the meeting was strong, and it seems to me that the justices very likely thought, looking at the whole matter, that it was undesirable for the interests of the borough that the prosecution should go on.

Then comes the question, Can we say that the magistrates have gone wrong? I think that when they think the charge frivolous or vexatious they are not bound to grant an application for summonses. But here there is reason for saying that they proceeded on some ground which they ought not to have considered. I have said that I hesitate, but I do not dissent from the opinion that this rule should be made absolute; and I quite agree that it will be better to renew the application before different justices.

FIELD, J. — I am of the same opinion. I am the last person to infringe on the rule that this Court has no jurisdiction to interfere with the decision of justices where they have decided upon a question of fact, but here I have come to the conclusion that they did not consider the question of fact which came before them. What the justices have to consider is, whether there was *primâ facie* evidence of a criminal offence which, in their judgment, calls upon the alleged offender to answer. If they think that there is such *primâ facie* evidence, it is their duty to
[*207] issue summonses. Now, if *the justices had said, "We don't believe the evidence," or given any other reasonable ground for refusing to grant what was asked for, we should not interfere. But I have come to the conclusion that they acted as they did, not because they disbelieved the evidence, but from a

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consideration apart from the facts, which they ought not to have taken into account. *Rule absolute.*

ENGLISH NOTES.

Where justices have a discretion to grant or refuse an application, and have exercised their discretion properly, by hearing and determining the application on the merits, the Court will not grant a *mandamus* to compel them to review their decision: *Reg.* v. *Huggins* (1861), 30 L. J. M. C. 139; *Reg.* v. *Fawcett* (1868), 11 Cox C. C. 305, 19 L. T. 396; *Ex parte Reid* (1885), 49 Justice of the Peace, 600; even though the justices may have decided erroneously: *Reg.* v. *Blanshard* (1849), 18 L. J. M. C. 110; *Ex parte Macmahon* (1883), 48 Justice of the Peace, 70; or though at the hearing they may have rejected certain evidence that was properly admissible: *Reg.* v. *Justices of Yorkshire, Ex parte Gill* (1885), 53 L. T. 728, 34 W. R. 108.

But it will be otherwise if the justices do not properly exercise their discretion, as by refusing to hear the application, or, after hearing it, by refusing to grant it from a mistaken view of their duty amounting to a declining of jurisdiction. *Reg.* v. *Fawcett, supra.* And see the observations of LINDLEY, L. J., in *Reg.* v. *Bishop of London* (1889), 24 Q. B. D. 213, at pp. 240, 241. Where justices, who in 1879 had dismissed a summons for penalties against a gas and water company on the ground that the complaint had not been made within six months after the offence, which they regarded as not a continuing offence, in 1890 refused a similar summons against the company at the instance of the same complainant, on the ground that they had no jurisdiction, the Court granted a rule for a *mandamus* upon the justices to hear and determine whether in the circumstances a summons ought to have issued. *Reg.* v. *Byrde* (1890), 60 L. J. M. C. 17, 63 L. T. 645, 39 W. R. 171, 17 Cox C. C. 187. And where at a special sessions of justices held under a local and personal Act, an application for an order to close a passage was refused on the ground that there was no jurisdiction to make the order, because it did not appear that the passage was "a harbour or receptacle for filth and rubbish," within the Act; the Court, holding this construction erroneous, granted a *mandamus* to hear and determine the matter. *Reg.* v. *Cloete* (1890), 64 L. T. 90.

It will be observed that in the principal case Lord COCKBURN, Ch. J., regards deciding on something extraneous and extra-judicial as equivalent to a declinature of jurisdiction. With this opinion may be compared that of COLERIDGE, Ch. J., in *Reg.* v. *Evans* (1890), 62 L. T. 570, 17 Cox C. C. 81, where it was held that a magistrate cannot judicially consider as ground for adjourning a summons for libel, the

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circumstance that civil proceedings are pending between different parties for a different libel arising out of the same matters.

The justices may, however, in the exercise of their discretion refuse a summons even though there is evidence before them, if they consider that the issue of the summons would be vexatious or improper. See per WILLIAMS, J., in *Reg.* v. *Byrde, supra,* relying upon *Reg.* v. *Ingham* (1849), 14 Q. B. 396, 19 L. J. M. C. 69, where the Court refused to compel justices by *mandamus* to hear evidence on an information for an alleged perjury, in depositions before the Ecclesiastical Court, where it appeared that the suit in which the depositions had been made was still depending, and that the justices had therefore held it improper to proceed on the information.

The Queen's Bench has no authority to control a magistrate by *mandamus* in the conduct of a case or to prescribe to him what evidence he shall receive. *Reg.* v. *Carden, Ex parte Labouchere* (1879), 5 Q. B. D. 1, 49 L. J. M. C. 1.

If the justices from a mistaken view as to their summary jurisdiction refuse to hear and determine, a rule requiring them to do so may be obtained under 11 & 12 Vict., c. 44, s. 5. This mode of proceeding is "a substitute for the old prerogative writ of *mandamus*, being a more speedy and economical remedy." Per CAMPBELL, Ch. J., in *Reg.* v. *Dayman* (1857), 7 El. & Bl. 672, 26 L. J. M. C. 128, 29 L. T. 125, 3 Jur. (N. S.) 744. The two remedies are concurrent. *Reg.* v. *Biron* (1884), 14 Q. B. D. 474, 54 L. J. M. C. 77, 51 L. T. 429. The statutory remedy only applies where a *mandamus* could be had: *Reg.* v. *Dayman, supra; Reg.* v. *Justices of Bristol* (1854), 18 Jur. 426 *n.;* thus it cannot be obtained in the case of a magistrate who has refused a summons on the ground that the information does not disclose an indictable offence: *Ex parte Lewis* (1888), 21 Q. B. D. 191, 57 L. J. M. C. 108, 59 L. T. 338, 37 W. R. 13. Where an application had been made to justices under 11 & 12 Vict., c. 91, s. 9, to issue their warrant to levy the amount due from the assistant overseer, it was held that as the section made the treasurer's certificate *primâ facie,* but not conclusive evidence, the justices in issuing their distress warrant had not a mere ministerial act to perform, and had rightly refused to treat the certificate as conclusive, and a rule was refused. *Reg.* v. *Fordham* (1873), L. R. 8 Q. B. 501, 42 L. J. M. C. 153, 22 W. R. 85. Where justices refused to issue distress warrants against defendants at a board school, without affirmative evidence that the defendants possessed goods *primâ facie* distrainable, it was held that the justices were in their discretion entitled to require such evidence, and in its absence could not be called upon to issue the warrant. *Reg.* v. *German* (1891), 61 L. J. M. C. 43, 66 L. T. 264. But where a statute gives power to justices to issue a distress warrant "if

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they shall think fit," they must not refuse to issue it merely because the statute does an injustice in the particular case. *Reg.* v. *Boteler* (1864), 4 B. & S. 959, 33 L. J. M. C. 101, 12 W. R. 466. On an application to a justice under 35 Geo. III., c. 101, s. 3, to issue a distress warrant for non-payment of charges incurred by the suspension of an order of removal where the charges were under £20, it was held that the justice could not inquire into the propriety of the order, but was bound to enforce it by issuing his warrant. *Reg.* v. *Higginson* (1862), 8 Jur. (N. S.) 1196.

A magistrate, if he refuses to commit or bail the person charged, is bound under 22 & 23 Vict., c. 17, s. 2, to take the recognisance of the prosecutor, if the information discloses any of the offences mentioned in the statute; but he has a discretion to refuse if no indictable offence is disclosed. *Ex parte Wason* (1869), L. R. 4 Q. B. 573, 38 L. J. Q. B. 302, 17 W. R. 881. Where a justice has refused to issue a summons upon complaint, other justices may subsequently refuse to hear an information and take the recognisance of the prosecutor to prosecute in the same matter. The above Act does not apply to such proceedings, unless a summons or a warrant has been granted upon which it can take effect. *Reg.* v. *Bather* or *Battier* (1880), 42 L. T. 532.

AMERICAN NOTES.

This case is cited in Merrill on Mandamus, sect. 212, with *People* v. *Barnes*, 66 California, 594. The writ of *mandamus* has often been issued for this purpose in civil matters, but rarely, it seems, in criminal cases. In the case last cited the decision is put on the peremptory language of the statute commanding the justice to perform the duty in question. See also *Attorney-General* v. *Police Justice*, 40 Michigan, 631.

Mandamus lies to compel any inferior Court to act when it should act, and even to exercise a discretionary power. *Ex parte Mahone*, 30 Alabama, 49; 68 Am. Dec. 111; *McCreary* v. *Rogers*, 35 Arkansas, 298; *Beguhl* v. *Swan*, 39 California, 411; *Ex parte Henderson*, 6 Florida, 279; *State* v. *Whittet*, 61 Wisconsin, 351; *Ex parte Morgan*, 114 United States, 174; *Taylor* v. *Gillette*, 52 Connecticut, 216; *Hull* v. *Supervisors*, 19 Johnson (N. Y.), 259; 10 Am. Dec. 223; *Brown* v. *Buck*, 75 Michigan, 274; 13 Am. St. Rep. 438; *Commonwealth* v. *McLaughlin*, 120 Penn. State, 518; *Dorr* v. *Hill*, 62 New Hampshire, 506; *Ex parte Walters*, 89 Alabama, 237; 18 Am. St. Rep. 103; *Ex parte Alabama State Bar Ass'n*, 92 Alabama, 113; 12 Lawyers' Rep. Annotated, 135; *State* v. *Young*, 31 Florida, 594; 19 Lawyers' Rep. Annotated, 636; *State* v. *Kansas City Ct. of Appeals*, 97 Missouri, 331; 3 Lawyers' Rep. Annotated, 476; *State* v. *Bringier*, 42 Louisiana Annual, 1091; 10 Lawyers' Rep. Annotated, 137.

But *mandamus* lies only to compel action, and not to direct what the action shall be. *Hempstead Co.* v. *Graves*, 44 Arkansas, 317; *People* v. *Judge, &c.*, 41 Michigan, 31; *Board of Police* v. *Grant*, 9 Smedes & Marshall (Mississippi), 77; 47 Am. Dec. 102; *Miltenberger* v. *St. Louis Co. Court*, 50 Missouri, 172;

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Benedict v. *Howell*, 39 New Jersey Law, 221; *People* v. *Common Council*, 78 New York, 33; *Ewing* v. *Cohen*, 63 Texas, 482; *Ex parte Schwab*, 98 United States, 240; *State* v. *Van Ness*, 15 Florida, 317; *Ex parte Banks*, 28 Alabama, 28; *People* v. *McRoberts*, 100 Illinois, 448; *State* v. *Washburn*, 22 Wisconsin, 99; *People* v. *Freer*, 73 New York, 443.

Nor to usurp the office of appeal. *Ex parte Elston*, 25 Alabama, 72; *Ex parte Hutt*, 14 Arkansas, 368; *Flagley* v. *Hubbard*, 22 California, 34; *Marshall* v. *State*, 1 Indiana, 72; *State* v. *Marshall*, 82 Missouri, 484; *State* v. *Curler*, 4 Nevada, 445; *Shelby* v. *Hoffman*, 7 Ohio State, 450; *Ex parte Goolsby*, 2 Grattan (Virginia), 575.

Nor to compel a justice of the peace to entertain a complaint by village authorities under a void by-law. *Chaddock* v. *Day*, 75 Michigan, 527; 4 Lawyers' Rep. Annotated, 809.

Mandamus lies to compel a justice to do any merely ministerial act; as to make correct docket entries in accordance with the facts: *State* v. *Engle*, 127 Indiana, 457; 22 Am. St. Rep. 655; *State* v. *Von Ells*, 69 Wisconsin, 19; *Ashcroft* v. *Clark*, 2 Southard (New Jersey), 577; to furnish a true copy of a judgment rendered by him: *Smith* v. *Moore*, 38 Connecticut, 105; to enter a judgment of dismissal of a cause: *Anderson* v. *Pennie*, 32 California, 265; to administer the oath of insolvency to a debtor in execution and order his discharge: *Harrison* v. *Norfolk Justices*, 2 Leigh (Virginia), 827; to issue a summons in a proper case: *Logansport, &c. R. Co.* v. *Groniger*, 51 Indiana, 383; to enter judgment on a verdict in a criminal case: *Moore* v. *Clegg*, 72 Indiana, 358.

But not to compel him to alter the date in his docket at which an appeal bond was filed and approved by him: *Mooney* v. *Edwards*, 51 New Jersey Law, 479, citing *Rex* v. *Hewes*, 3 Ad. & Ell. 725, and disapproving *Smith* v. *Moore*, *supra*, observing: "The entry of the specific date of the filing of the bond is a determination by the proper tribunal . . . of a question of fact, the entry of which cannot be regarded as a purely ministerial act."

No. 9. — REX *v.* JAMES.

(K. B. 1822.)

RULE.

If a justice of the peace has power to commit for contempt by way of punishment for insulting behaviour, it must be by warrant in writing for a time certain: and a commitment for such contempt "until discharged by due course of law" is bad.

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Rex v. James.

5 Barn. & Ald. 894, 895 (24 R. R. 611).

Justice of the Peace. — Commitment.

A commitment for a contempt, being a commitment for punishment, [894] must be for a time certain, and consequently a commitment for a contempt till the defendant is discharged by due course of law, is bad.

Campbell, on a former day, moved for a writ of *habeas corpus* to the keeper of the gaol for the county of Caermarthen, to bring up the body of the defendant, on the ground that he had been illegally committed, by two justices of the peace, for contempt, under the following warrant of two justices: "Receive into your custody the body of Thomas James, sent by us, and charged by us, upon view for insulting behaviour towards us, by telling us that we were biassed and prejudiced in our conduct towards him as magistrates, in the due execution of our office as magistrates of the county of Caermarthen, and keep him in custody until he shall be discharged by due course of law." He contended, first, that justices of the peace, not sitting in a Court of Sessions, had no power to commit for a contempt; and, secondly, upon the facts disclosed in his affidavit, that the defendant had not been guilty of any contempt for which he could lawfully be committed. In addition to these objections, there was a third, which appeared upon the face of the warrant. For, at all events, as this was a commitment for punishment, it ought to have been for a time certain, and as there was no course of law by which the defendant could be discharged, such a commitment, if valid, amounted to perpetual imprisonment.

*ABBOTT, Ch. J. — Without giving any opinion upon [*895] the power of a justice of peace to commit for a contempt, this warrant appears to us to be bad, for not committing for a time certain. Take the writ.

The defendant being now brought up, under the *habeas corpus*, Campbell moved that he might be discharged.

Taunton appeared for the magistrates, and stated that he had affidavits of the facts of the case, to show the nature of the contempt, and that he meant to contend that the magistrates were justified in committing for a contempt.

ABBOTT, Ch. J. — Supposing a contempt to have been committed,

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and the magistrates to have had power to commit for the contempt, can you contend that a commitment in this form is valid?

Taunton admitted that he could not support the validity of the warrant. *Defendant discharged.*

ENGLISH NOTES.

In *Rex* v. *Revel* (1720), Strange, 420, it was suggested by counsel, apparently without objection from the Bench, that a person who had called a justice a rogue and a liar might have been committed for contempt.

There can be no doubt, however, that where a person is guilty of insulting behaviour towards a justice in Court, the usual and proper cause is to bind him over to be of good behaviour. *Dean's Case* (1599), Cro. Eliz. 689; *R.* v. *Lees* (1701), 12 Mod. 514; *Reg.* v. *Rogers* (1702), 2 Ld. Raym. 777, 7 Mod. 28; *Reg.* v. *Langley* (1703), 2 Ld. Raym. 1029, 6 Mod. 125, 2 Salk. 697, Holt, 654. This remedy, however, is not applicable in the case of a contempt committed out of Court. See *Dean's Case, supra.*

It has been held that a justice of the peace may commit a married woman who is a material witness upon a charge of felony brought before him, who refuses to appear at the sessions to give evidence, or to find sureties for her appearance. *Bennet* v. *Watson* (1814), 3 M. & S. 1, 15 R. R. 373; and see a Police Court case noted in the "Justice of the Peace," vol. 48, p. 457 (1884), where a woman who had obtained a warrant against her husband for assault, on declining to prosecute and refusing to be sworn, was committed to prison.

In *Ex parte Hyndman* (1886), 2 Times Law Rep. 351, it was conceded that a Police Court had no power to commit for contempt in respect of a libellous comment on preliminary proceedings on an indictable case.

For the statement that the warrant of committal must be in writing, further authorities will be found in 2 Hawk. P. C. 122, and *Mayhew* v. *Locke* (1816), 7 Taunt. 63.

The Queen's Bench Division has no power to order an attachment in respect of a libellous comment on Police Court proceedings. *In re Hyndman, supra.*

By 14 & 15 Vict., c. 93, s. 9, justices in Ireland have power to commit or to fine any person wilfully insulting a justice or committing any other contempt of Court. To persist in interrupting and insulting a Court of Petty Sessions in Ireland by shouting at the Bench in a violent and unseemly manner so that none of the justices can speak is a contempt for which the Court may commit even a solicitor practising before them. *In re Rea* (1878), 2 L. R. Ir. 429, 14 Cox C. C. 139. Where

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at Petty Sessions in Ireland a contempt committed in Court is brought to the notice of the justices, and while the offender is still in Court, the justices may order that he be attached then and there to answer for such contempt; *Mitchell* v. *Smith* (1894), 2 Ir. R. 351; and the mere fact that the order so made is carried out after the offender, in order to evade arrest, has left the Court, is not sufficient to render his arrest illegal; *Ib.*

AMERICAN NOTES.

The power of a justice of the peace to punish for contempt is not conferred in most of the American States, and where it exists, he is held to a strict compliance with the requirements of the statute. *Rutherford* v. *Holmes*, 66 New York, 368. The power exists also in Illinois, North Carolina, South Carolina, and Indiana.

A commitment by a town council for contempt, not naming a definite term of imprisonment, is void. *Matter of Hammel*, 9 Rhode Island, 248.

But "until the further order of this Court," is valid: *Yates' Case*, 4 Johnson (N. Y.), 373, by KENT, Ch. J.; *Williamson's Case*, 26 Penn. State, 24; 67 Am. Dec. 374. (*Contra: Ex parte Alexander* [Kentucky], 2 Am. Law Reg. 44.) And so "till he obey:" *Tome's Appeal*, 50 Penn. State, 285. Or till he answer: *People* v. *Phelps*, 4 Thompson & Cook (N. Y. Supr. Ct.), 467 (only till he should be *willing* to answer: *People* v. *Davidson*, 35 Hun [N. Y. Supr. Ct.], 471.) These cases seem to make a difference between imprisonment as a punishment for misconduct and to enforce the performance of a duty. Rapalje on Contempt (sect. 129) says: "While the authorities are not uniform upon the question, yet the better opinion seems to be that the order of commitment should name a definite term of imprisonment in all cases where the imprisonment is inflicted as a punishment for the contempt, and not as a means to compel the party to do some act required of him by the Court. Thus it has been directly held that an order of committal for contempt until the further order of the Court, as a punishment, and not as an aid to the enforcement of a previous order, is void for uncertainty. *People* v. *Pirfenbrink*, 96 Illinois, 68; S. P. *Whittem* v. *State*, 36 Indiana, 196; *Matter of Hammel*, 9 Rhode Island, 248; *Yates* v. *People*, 6 Johnson (N. Y.), 337. *Contra: Yates* v. *Lansing*, 9 Johnson (N. Y.), 395; *Ex parte Yates*, 4 ibid. 317; *Re Allen*, 13 Blatchford (U. S. Circ. Ct.), 271. See also *Richmond* v. *Dayton*, 10 Johnson (N. Y.), 393."

The holding in *People* v. *Pirfenbrink*, *supra*, was that an order for commitment until the further order of the Court, for contempt in refusing to obey a previous order of the Court that the party surrender books, &c., was void. The Court said it was a punishment for disobedience, and not to compel the surrender, and cited the principal case, observing of the commitment in that case, "If that was void for uncertainty, this must be."

The principal case was also cited in *Ex parte Maulsby*, 13 Maryland, 625; where the commitment was "until he purge the contempt by appearing before the Grand Jury," &c., but the Grand Jury had risen, and it had become impossible for him to appear before it. The Court said: "In deter-

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mining the legal effect of the commitment it is proper to notice a distinction between punishment and process;" and speaking of the principal case: "In that case it was held that the committal was for punishment. There is no doubt of the power of the Court to commit until the party answer or testify, or produce papers before a Grand Jury. In such a case the commitment is a compulsory process to compel the party to obey the mandate of the Court. But if by an event subsequently happening, as by the adjournment of the Court, and the discharge of the Grand Jury, it becomes impossible for him to obey the Court's process, it must result from necessity that the term of the imprisonment imposed is ended, and that the party is entitled to be discharged; otherwise the imprisonment would be perpetual."

But a witness, for refusal to answer, may be committed until the further order of the Court, although the Court has power to commit only for thirty days. *People* v. *Fancher*, 2 Hun (N. Y. Sup. Ct.), 226.

A party may be committed until a fine is paid, although the statute grants no such specific power. *Fischer* v. *Hayes*, 6 Federal Reporter, 63; *Ex parte Crittenden*, 62 California, 534. And unless the fine is paid immediately, for two hundred and fifty days. *Ex parte Sweeney*, 18 Nevada, 74.

In speaking of the power of the Court to imprison for an indefinite term as process to enforce an order, the Court said, in *Williamson's Case*, *supra*: "The law will not bargain with anybody to let its Courts be defied for a specified term of imprisonment. There are many persons who would gladly purchase the honors of martyrdom in a popular cause at almost any given price, while others are deterred by a mere show of punishment. Each is detained until he finds himself willing to conform. This is merciful to the submissive, and not too severe upon the refractory. The petitioner therefore carries the key of his prison in his own pocket. He can come out when he will, by making terms with the Court that sent him there. But if he chooses to struggle for a triumph — if nothing will content him but a clean victory or a clean defeat — he cannot expect us to aid him."

No. 10. — In re PATER.

(Q. B. 1864.)

RULE.

A Court of Quarter Sessions (being a Court of record) has power to fine a person who is guilty of a contempt; and the superior Court will not interfere if there has been ground, in the conduct of the person, which might be reasonably treated as a contempt.

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In re Pater.

33 L. J. M. C. 142–151 (s. c. 5 Best & Sm. 299; 10 Jur. (N. S.) 972; 10 L. T. 376; 12 W. R. 823).

Quarter Sessions. — Counsel. — Contempt of Court. — Fine. [142]

A Court of Quarter Sessions has power to fine a person who is guilty of a contempt of Court, even if that person be a barrister engaged in his professional duty.

The Court of Queen's Bench will not interfere in such a case if there be reasonable ground upon which the conduct of the person might be treated as a contempt.

Rule calling upon the keepers of the peace and justices in and for the county of Middlesex, to show cause why a writ of *certiorari* should not issue to remove into this Court all orders made by them at the General Sessions holden for the said county at the Clerkenwell Sessions House, on the 22nd of March, 1864, concerning Thomas Kennedy Pater.

The following affidavit had been made by the said Thomas Kennedy Pater in support of the rule: 1. That I was engaged as counsel to defend one Robert Griffiths on an indictment for larceny, on the 22nd day of March last, at the adjourned General Sessions holden in and for the county of Middlesex at Clerkenwell, in the Second Court, before JOSEPH PAYNE, Esq., acting as Deputy Assistant Judge of the said Court. 2. That in the course of the trial I urged to the Court an objection against the course adopted by the prosecuting counsel, when I was interrupted by the foreman of the jury, who said, "We know what all that is for; we know the object of such interruptions;" and on another occasion during the trial, in the discharge of my duty I objected to the prosecuting counsel examining his own witness as if in cross-examination, and contended that as the witness had not shown himself to be hostile, it was not open to the learned counsel to cross-examine his own witness as if he were hostile, and added that to do so was very objectionable, as very little pressure only was sometimes necessary to induce a person to state that which was not the truth; and I further say, that immediately after I had made this objection I was again interfered * with by the said fore- [*143] man, who said, that "counsel had no right to insinuate that the witness was not speaking the truth;" to which I replied,

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that it would be as well for him not to get "into collision with me." 3. That these interferences were entirely unchecked by the Court, and were in tone and character such as to lead me to believe that the foreman had prejudged the case, and in consequence of that belief, I, in my address to the jury, made the following observation: "I thank God that there is more than one juryman to determine whether the prisoner stole the property with which he is charged, for if there were only one, and that one the foreman, from what has transpired to-day, there is no doubt what the result would be." 4. That the said Deputy Assistant Judge immediately said that that was a very improper observation to make, and insisted upon its withdrawal, and upon my declining to do so, he said he should take down the observation and consult the Assistant Judge, W. H. BODKIN, Esq., who was then sitting as Judge in the other Court, as to what should be done, and went to the other Court for that purpose, and on his return said he had consulted the Assistant Judge in reference to this matter, but it was his opinion that at that stage it would not be fair to interfere, as it might prejudice the case against the prisoner at the bar, but when it was concluded they should then consider what course should be taken as regarded myself. The said W. H. BODKIN, Esq., sat and acted as Assistant Judge of the said Sessions in the First Court during the said Sessions, and during the day when the said fine was imposed. 5. That I then resumed my address to the jury, and at the conclusion of the trial, and after the prisoner was convicted and sentenced, the said Assistant Judge came into the Court presided over by the said J. PAYNE, Esq., and recommended him to treat the observation set out in paragraph No. 3 of this affidavit as a contempt of Court, and to inflict upon me a fine of £20, and I was a short time afterwards fined £20 by the said J. PAYNE, Esq. 6. That before the fine was inflicted I wished to address the Court, but the said J. PAYNE, Esq., declined to hear me, and the fine was imposed without an opportunity having been given to me to show cause why the fine should not be inflicted. 7. That in order to ascertain whether the words set forth in the said parargaph No. 3 were the words considered to be the contempt of Court, I made an application to the Court the following morning (namely, the 23rd day of March last), and I was then informed by the said J. PAYNE, Esq., in open Court, that they were the words, and upon my applying for a copy of the

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words, the said Deputy Assistant Judge, J. PAYNE, Esq., said, "What you have read is sufficiently correct." That in making the observations set forth in paragraphs 2 and 3, I say I acted *bonâ fide* and according to the best of my judgment in discharge of the duty which I owed to my client, and I had no thought of offering any contempt to the Court.

The following affidavit was sworn by the Deputy Assistant Judge: I, JOSEPH PAYNE, of West Hill, Highgate, in the county of Middlesex, Esq., Deputy Assistant Judge of the Court of General and Quarter Sessions of the Peace for the county of Middlesex, make oath and say as follows: 1. I have read the affidavit sworn in this Honourable Court, on the 28th day of April last, by Thomas Kennedy Pater, Esq., Barrister-at-law. 2. In the course of the trial referred to in the said affidavit, the said Thomas Kennedy Pater irregularly told the witness for the prosecution who was under examination that he was not speaking the truth; the foreman of the jury thereupon said that he thought the counsel had no right to tell the witness that he was swearing falsely. Whereupon, the said Thomas Kennedy Pater immediately, in a loud, offensive, and insulting tone and manner, said to the said foreman, "You had better not get into collision with me, sir," to which the said foreman made no reply, and the case for the prosecution proceeded to its close. 3. When the said Thomas Kennedy Pater rose to address the jury on the part of the prisoner he was in a state of great excitement, and he began his address in the following words: "I thank God there is more than one juryman to determine whether the prisoner stole these articles, for if there was only one, and that one the foreman, from what has transpired to-day, there *is no doubt what the result would [*144] be." The said Thomas Kennedy Pater also told the said foreman that he ought to be removed from the box and another put in his place. The above words were uttered by the said Thomas Kennedy Pater in a loud, threatening, insulting tone and manner, and accompanied with violent gestures, and the conduct of the said Thomas Kennedy Pater on the said occasion appeared to me to be calculated to provoke retaliation on the part of the said foreman of the jury, and probably to lead to a breach of the peace. 4. I thereupon stated to the said Thomas Kennedy Pater that I thought this was hardly the way to treat a gentleman who was discharging upon oath an important and compulsory duty in a

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Court of justice, and requested him, the said Thomas Kennedy Pater, to withdraw the expressions he had used, as they might be taken to insinuate that the said foreman of the jury would find the prisoner guilty on account of the previous collision with his counsel; to which the said Thomas Kennedy Pater answered that he would repeat the words again; which he did in the same loud, offensive, and insulting manner as before, and also added that if I wished them to be taken down he would repeat them again, and would repeat them to the end of time. 5. I thereupon wrote down the words before mentioned and went into the adjoining Court to consult the Assistant Judge, and by his advice I allowed the case to proceed to the end without further notice in the mean time of the conduct and language of the said Thomas Kennedy Pater. 6. After the case was over I requested the attendance of the Assistant Judge in my Court; and the said Thomas Kennedy Pater was thereupon requested by the said Assistant Judge to withdraw the expressions he had so used as aforesaid, the said Assistant Judge saying to him, "Mr. Pater, now the case is over, surely you must see the impropriety of such remarks as you made." But the said Thomas Kennedy Pater, in the presence of the said Assistant Judge, of myself and several other magistrates, again refused to withdraw or in any way qualify the expressions which he had used, or to make any apology for the same or for the manner in which he had conducted himself. Whereupon the said Thomas Kennedy Pater was adjudged to have committed a contempt of the said Court, and for such contempt was fined the sum of £20. 7. On the said fine being imposed the said Thomas Kennedy Pater said, addressing me, "This shall not rest here. I shall bring the subject under the notice of Sir George Grey, and very probably your removal from the Bench will be the result." 8. I say that the conduct, manner, and gestures of the said Thomas Kennedy Pater during the proceedings hereinbefore set forth were violent, offensive, and contemptuous, and were in my judgment calculated to disturb and obstruct the due and proper administration of justice. 9. I say that on a trial before me at a former Session of the Peace for the county of Middlesex, held a few weeks before, as I had finished my summing up, the foreman of the jury pronounced a verdict of guilty, without at that moment consulting his brother jurors, whereupon the said Thomas Kennedy Pater said to the said foreman, in a rude manner, "You have not done

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your duty." To this the said foreman replied that they had before agreed upon their verdict, but did not think it right to interrupt the summing up of the Judge, upon which the said Thomas Kennedy Pater said to the foreman, "You are a wicked old man, and are quite old enough to know your duty better." The whole of the jury having expressed themselves strongly in reprobation of the conduct of the said Thomas Kennedy Pater, I forebore on that occasion to inflict any fine upon him, hoping that such reprobation would be a sufficient caution to the said Thomas Kennedy Pater for his future conduct. 10. I deny that before the said fine was inflicted, I declined to hear the said Thomas Kennedy Pater, and that the said fine was imposed without an opportunity being given to the said Thomas Kennedy Pater to show cause why it should not be inflicted.

Bovill and Welsby showed cause against the rule. The respective affidavits show the state of the case upon which the Court have now to say whether the rule ought to be discharged or to be made absolute. Every opportunity was given to Mr. Pater to withdraw the expressions which *he had used. [*145] It is true that he swears, in his affidavit, that he had no intention of offering any contempt to the Court, but the manner, tone, and expression must be observed, and it was for the Court to say whether it was a contempt or not. Every Court must maintain its dignity, and it is absolutely necessary that the power of punishing those who treat it without proper respect should be vested in it. In *The King* v. *Davison*, 4 B. & Ald. 329 (23 R. R. 295), which was an indictment for a blasphemous libel, the defendant conducted his own defence, and in the course of his speech, which he read from a written paper, he was guilty of conduct which BEST, J., who tried the case, said was improper, and that he must confine himself to matter relevant to the defence, and that if he departed from that course, he (the learned Judge) should be obliged to use the means he had to restrain him; to which the defendant replied, "My Lord, if you have your dungeon ready, I will give you the key." For that expression the Judge fined him £20, and two other sums of £40 each, for subsequent expressions used by him. Having been convicted, he moved for a new trial. In refusing the rule, ABBOTT, Ch. J., said: "If I thought that the decision I am about to pronounce could have the effect of restraining any person who may hereafter stand

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on his trial from making a bold as well as a legitimate course of defence, I would pause before I pronounced that decision. The question, indeed, is a momentous one. It is absolutely a question whether the law of the land shall or shall not continue to be properly administered, for it is utterly impossible that the law can be so administered if those who are charged with the duty of administering it have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the Judges not for their personal protection, but for that of the public. And a Judge will depart from his bounden duty if he forbears to use it when occasions arise which call for its exercise."

And in another part he says: "The question here is, if a Judge, sitting at Nisi Prius, has power to impose a fine on a defendant for contempt. That he has power to do so I can entertain no doubt; no lawyer can doubt the power of every Court to fine for contempt." And BAYLEY, J., said: "The question is shortly this, whether for the future, decency and decorum shall or shall not be preserved in Courts of justice; or whether, under colour of defending himself against any particular charge, a defendant is at liberty to introduce new, mischievous, and irrelevant matter upon his trial." And further on he says: "When a case is conducted by counsel, they know perfectly well what the rules of law are, and they have that regard for their own character which generally prevents them from doing anything which may break in upon the rules of decency and decorum. They have also sufficient knowledge (arising from their experience and education) to form a judgment whether the matter be relevant or not." And HOLROYD, J., said: "The law arms him with an authority to fine and imprison a person for so doing, and makes it incumbent on the Judge so to act. In the case of an insult to himself, it is not on his own account that he commits, for that is a consideration which should never enter into his mind. But though he may despise the insult, it is a duty which he owes to the station to which he belongs, not to suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the dignity of his station and uphold the law, so that in his presence, at least, it shall not be infringed." There is also a very recent case of *Ex parte Fernandez*, 10 C. B. (N. S.) 3, 30 L. J. C. P. 321. ERLE, Ch. J., said, at the commencement of the argument: "It is the undoubted right of a superior Court to commit for con-

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tempt; and there is no necessity to specify the particular matter which constitutes the contempt. *The Case of the Sheriff of Middlesex*, 11 Ad. & E. 273, 9 L. J. (N. S.) Q. B. 82. We could not sit in review upon the grounds on which the Judge of assize acted."

[COCKBURN, Ch. J., referred to *Carus Wilson's Case*, 7 Q. B. 984, 14 L. J. Q. B. 201.]

Denman, M'Mahon, and Kenealey, in support of the rule. — There has been a *stretch of authority in this [*146] case, which gives this Court a right to interfere. It is not only of importance to the Bar, but also to the Judges, and to every person whose interests may be represented by counsel, that the Judge of an inferior Court should not be allowed to inflict punishment in such a case as this. It is submitted that Mr. Pater was justified in every word which he uttered. The Court ought to have interfered when the juryman made observations which he had no right to make. If other parties interfere improperly, a counsel may be led, in the honest discharge of his duty, to use expressions which may appear severe or harsh, but which are to be excused, or, at any rate, are not deserving of punishment. A counsel may be put in such a position that he is obliged, if he endeavours to discharge his duty honestly and fearlessly, to make use of expressions which the Judge may think too strong; but it has been the boast of the profession that its members have been bold enough to maintain their position in spite of the threatenings of the Bench. A signal instance occurred in the career of Lord ERSKINE, when at the Bar. In the case of *The Dean of St. Asaph* he was counsel for the prisoner; and Lord CAMPBELL, in the "Lives of the Chancellors," vol. 6, p. 432, describes the scene which occurred in Court. The learned Judge who tried the case had told the jury that the only question they had to decide was, whether the defendant was or was not proved to have published the pamphlet. The jury returned a verdict, "Guilty of publishing only."

"BULLER, J.: If you find him guilty of publishing, you must not say the word 'only.'

"Erskine: By that they mean to find there was no sedition.

"Juror: We only find him guilty of publishing. We do not find anything else.

"Erskine: I beg your Lordship's pardon; with great submis-

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sion, I am sure I mean nothing that is irregular. I understand they say, 'We only find him guilty of publishing.'

"Juror: Certainly, that is all we do find.

"BULLER, J.: If you only attend to what is said, there is no question or doubt.

"Erskine: Gentlemen, I desire to know whether you mean the word 'only' to stand in your verdict.

"Jurymen: Certainly.

"BULLER, J.: Gentlemen, if you add the word 'only,' it will be negativing the innuendoes.

"Erskine: I desire your Lordship, sitting here as Judge, to record the verdict as given by the jury.

"BULLER, J.: You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment.

"Juror: Certainly.

"Erskine: Is the word 'only' to stand part of the verdict?

"Juror: Certainly.

"Erskine: Then I insist it shall be recorded.

"BULLER, J.: Then the verdict must be understood; let me understand the jury.

"Erskine: The jury do understand their verdict.

"BULLER, J.: Sir, I will not be interrupted.

"Erskine: I stand here as an advocate for a brother citizen, and I desire that the word 'only' may be recorded.

"BULLER, J.: Sit down, sir! remember your duty, or I shall be obliged to proceed in another manner.

"Erskine: Your Lordship may proceed in what manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct."

Lord CAMPBELL adds: "The learned Judge took no notice of this reply, and, quailing under the rebuke of his pupil, did not repeat the menace of commitment. This noble stand for the independence of the Bar would of itself have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall. We are to admire the decency and propriety of his demeanour during the struggle, no less than the spirit and the felicitous precision with which he meted out the requisite and justifiable portion of defiance." It is submitted that Mr. Pater has done nothing here which the conscientious desire to do

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his duty might not have impelled him to do; and as for his not withdrawing the expressions at the request of the Court, he was unable to do that, because he believed honestly that he
* had not acted improperly. No case of this kind can be [*147]
found in the books where the Court has inflicted a fine upon a barrister; and the only case which the other side can bring forward is *The Queen* v. *Davidson*, where the defendant himself was guilty of the contempt of Court, and was fined by the Judge.

[COCKBURN, Ch. J. — At the same time I cannot but think that the Court must have authority to protect jurymen, who are not in a position to protect themselves.]

But it never can be right to inflict a fine unless that which is supposed to render the party liable to be fined was wilfully done, and was calculated to obstruct the Court in the discharge of its duty. A number of strong epithets are used by Mr. PAYNE in his affidavit, which remind one of the language used in *Bushell's Case*, Vaughan's Rep. 135, which was a *habeas corpus* to bring up Edward Bushell, who had been committed to Newgate for not paying a fine of forty marks imposed upon him, for that he, as a juryman, had acquitted certain prisoners " in contemptum Domini regis nunc, legumque suarum, et ad magnum impedimentum et obstructionem justitiæ, necnon ad malum exemplum omnium aliorum juratorum in consimili casu delinquentium."

[COCKBURN, Ch. J. — In the case of *The Dean of St. Asaph* it seems to me that the counsel was right and the Judge wrong.]

So here, the juryman was wrong, and the Court ought to have stopped him. Both the LORD CHIEF JUSTICE and SHEE, J., have retired from cases in which one of the jury had improperly interfered.

[COCKBURN, Ch. J. — I do not recollect that I had insulted the juryman, or that he was addressed by me in reprobation after he had interfered. If I had done so, I should have been condemned by the Court.]

There is nothing in the expressions used which can be considered a contempt of Court.

[COCKBURN, Ch. J. — I may as well say that we do not consider ourselves a Court of appeal, to say whether Mr. PAYNE was right or wrong in the construction which he put upon the manner and tone and expressions used. He was the proper judge of whether or not a contempt had been committed.]

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Bushell's Case shows that this Court has a right to hear the case by way of appeal. It was there held that the juryman was improperly fined.

[MELLOR, J. — If the words amount to contempt, ought we to interfere?]

It is submitted that the Court will consider whether it amounts to a contempt or not. See *The Sheriff of Middlesex's Case*, and *Burdett* v. *Abbott*, 14 East, 1 (12 R. R. 450). When a counsel is defending a prisoner, he is performing a duty thrown upon him by statute, and he cannot be fined for using expressions in the *bonâ fide* discharge of his duty, and by which he does not intend to insult the Court. Mr. PAYNE has introduced a great deal of irrelevant matter into his affidavit, and it does not appear that he was very fit to pass judgment upon the case, for if the words themselves were sufficient to justify the imposition of the fine, it would not have been thought necessary to introduce the previous occurrences into his affidavit. It is to be noticed that throughout the argument against the rule, no attempt has been made to define contempt of Court. In the argument of *The King* v. *Clement*, 4 B. & Ald. 218, 221 (23 R. R. 260), the "Practical Register in Chancery," p. 99, is referred to, and there it is stated that "contempt is a disobedience of the Court, or an opposing or despising the authority, justice, or dignity thereof; it commonly consists in a party doing otherwise than he is enjoined to do or not doing what he is commanded or required by the process, order, or decree of the Court."

[COCKBURN, Ch. J. — That is contempt of the Court of Chancery.]

Yes, but it must be the same as contempt of the other Courts, and it is cited by the Attorney-General as applicable to the common-law Courts as well.

[BLACKBURN, J. — There is also a much more narrow contempt, namely, by interfering with or interrupting the proceedings of the Court.]

But here there was no personal allusion to Mr. PAYNE, or interference with the dignity of the Court; observations addressed
[*148] to the juryman who had improperly interfered * ought not to be considered as being a contempt of Court. Again, counsel stand in a different position in court from the other persons there. They are privileged when they use language which if used by other persons would be open to reprehension. There are

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many decisions on the subject, and among them *Hodgson* v. *Scarlett*, 1 B. & Ald. 232 (19 R. R. 301); and in 3 Blackstone's Com. 29, the learned author writes: "And in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men (a few of whom may sometimes insinuate themselves even into the most honourable professions), it hath been holden that a counsel is not answerable for any matter by him spoken, relative to the cause in hand and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions if it be impertinent to the cause in hand, he is then liable to an action from the party injured."

COCKBURN, Ch. J. — I am of opinion that this rule must be discharged. I think there can be no doubt whatever that the Court of Quarter Sessions being a Court of record, has attached to its jurisdiction, and inherent in it, a power to punish for contempt. I agree that the Court of Quarter Sessions is, although a Court of record, a Court of inferior jurisdiction, and that this Court has authority, in cases of any usurpation of jurisdiction by such a Court, to intervene to restrain any usurpation of that kind; and I agree that if the Court of Quarter Sessions having power to commit or fine for contempts, treats that as a contempt which there was no reasonable ground for so treating, this Court may interfere to protect the party against whom the power to commit or fine for contempt has been improperly exercised. That being so, the question arises whether, here, that jurisdiction has been exercised without anything to ground or warrant such an exercise of their jurisdiction.

Now, as regards that question, it appears to me plain that we must not take upon ourselves the power or the functions of a Court of Appeal, in matters of this kind, from the decision of the Court of Quarter Sessions. All we have to do is to say whether the Court had jurisdiction in the matter complained of. I find that doctrine laid down by Lord DENMAN in the well-known case of *Carus Wilson*, in which a *habeas corpus* was sent to Jersey in consequence of the applicant, Mr. Carus Wilson, having been committed for a contempt of that Court. The Court being a colonial Court, and Mr. Carus Wilson being in custody under the

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sentence of the Court, the writ of *habeas corpus* was one which this Court had authority to issue, and the question came to be whether he had or had not committed a contempt. Lord DENMAN said: "I profess to decide this upon what I find returned as the practice of the Royal Court. We gave full credit to that Court for knowing and administering their own law. We find the party sent to prison in consequence of a supposed contravention of the law by which those who show want of respect to the bailiff are to be sent to prison, until they have asked pardon and have paid the fine imposed. Had anything positively absurd and unjust appeared, we might have acted, as repeatedly has been done in cases where we have seen that the colonial Courts have pronounced judgment against a party who has had no opportunity of making his defence. But here it appears that a contempt was supposed to have been committed. That is a case in which it becomes the unfortunate duty of a Court to act as both party and Judge, and to decide whether it has been treated with contempt. We cannot decide upon the face of this return that they have come to a wrong conclusion. A Court may be insulted by the most innocent words uttered in a peculiar manner and tone. The words here might or might not have been contemptuous according to the manner in which they were spoken, and that is what we must look to. If the words were contemptuously spoken, that was an ample question for the decision of the Royal Court, with which no other Court can meddle. Every Court in such a case as that forms its own judgment. We must always feel most unwilling to [*149] interfere in this way; *indeed, the practice has almost been discontinued for a century, and there is no Judge who would not be extremely grieved at finding himself compelled to exert the power. As to the question whether it sufficiently appears for what pardon is to be asked, I agree that it is shown to be for want of respect. The Court had adjudged the fact of want of respect, and had a right to order reparation; having called for it, the law left them no choice as to the mode in which they were to enforce their demand."

Now, it is plain that Lord DENMAN there took the same view which has occurred to me throughout this discussion. We are to see that there is evidence upon which the Court could reasonably come to the conclusion that a contempt has been committed; but we are not to try the effect of the evidence one way or the other.

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I protest against being called upon to exercise any appellate jurisdiction in the matter, if there was anything which could fairly be construed to be a contempt. We ought to protect a party from being improperly punished for contempt; but we are not to decide, as a jury, upon the evidence whether the Judge was right or wrong in coming to a conclusion upon the conflict of facts.

Now, what are the facts of the case? It appears that Mr. Pater was fined for words uttered by him. I quite agree with the learned counsel who have argued for Mr. Pater, that the words, in themselves, are words which any counsel might have uttered in the honest discharge of his duty, and that if they had been uttered in the honest discharge of his duty, though they might have been harsh and unpleasant, and offensive to the juryman to whom they were applied, and who was affected by them, that would be within the right and privilege of counsel and ought not to be construed into a contempt. But on the other hand, if although they were used in the course of his address to the jury, they were not used for the purpose of inducing the jury to come to a conclusion favourable to the interests of his client, but for the purpose of wantonly and unnecessarily and unjustifiably insulting the juryman, then I say that they are an abuse of the privilege of counsel and that the Court might properly punish in such a way as contempt can be punished. We have before us Mr. Pater's denial on oath that he did use these words as a contempt of Court, and I think that we all of us should give the most unbounded credit to what Mr. Pater states; but unfortunately Mr. Pater at the time allowed his temper to get the better of his judgment, and what I am quite sure would have been on reflection his better feelings, and when he found that the Judge put an unfavourable construction on his language, instead of doing that which no gentleman ought ever to be ashamed of doing, if he has used language ambiguous and capable of being interpreted as contemptuous and insulting, of at once explaining his meaning, — instead of doing that, Mr. Pater chose to persist in the words, and, I think, persist in them with the construction which Mr. PAYNE had put on them; if he does that, he must take the consequence of his want of discretion and good taste. It is just what has happened here. Unfortunately there had been a good deal of altercation of an unpleasant character between Mr. Pater and the foreman of the jury, and I regret that the foreman of the jury was allowed to

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make the observations which he did without the interposition of the Court. It would have been much more conducive to the upholding of the dignity of the Court if the learned Judge had told the juryman that if he had any observations to make, the proper way was to make them to himself, and not to get into altercation with the counsel conducting the case. I regret that that course was not pursued. But still we find that before the words were used there had been considerable altercation, and that, amongst other things, the learned counsel had twice so far forgotten himself as to address to the juryman, first, this observation, "You had better not get into collision with me," which must be construed into a sort of threat that he would be roughly and unpleasantly handled if he did; and then he goes on to say that he ought to be removed from the jury-box and another man put in his place. These were observations of an unpleasant and offensive character, and might be well taken as giving a meaning and sense to words which were afterwards unfortunately used which otherwise [*150] they would not be capable of, *and I think that I ought in justice to Mr. PAYNE to say that if he believed they had not that meaning he would not have taken the course he did. After that unseemly conflict Mr. Pater got up to address the jury on the part of the prisoner, and then come the words upon which the Court proceeds to fine him for contempt. Certainly these words are capable of a twofold construction. They might have been intended to operate as an appeal from the foregone conclusions of the one juryman to the rest of the jurymen sitting in the box, or they might be taken in the sense in which Mr. PAYNE considered them to be used. Thereupon Mr. PAYNE does not proceed at once to inflict the fine, as for contempt of Court on the part of Mr. Pater, or for the insult to the juryman, but he says to Mr. Pater, "You really should not use that language to a gentleman discharging an important duty, because it implies that you mean to say that in spite of the evidence he will convict your client simply because he has had a conflict and a dispute with you." If Mr. Pater's temper had not got the better of him, I must hope that he would have said directly, "That is not the sense in which I meant the words," and he would have said to the jury, "This gentleman seems to have taken a strong view of the case, and I appeal to the rest of the jury not to be led away or influenced by him," — that would have deprived the words of their offensive

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character; but instead of that, after Mr. Pater had learned the sense and construction which had been put upon the words, we find that he not only did not retract the words, but that he said that he would go on until the end of time. Now, I cannot help thinking that when language is used which is capable of a twofold construction, especially when he is told, "Your language may mean an insult, do you mean it in that sense?" and he gives no explanation, but perseveres in the words, and says, "I will persevere in the words as much as I please," that must be taken to mean, and the fair and reasonable inference any one would draw from that is, that he persevered in that which had been stated. Then, Mr. Pater having had time to cool and get rid of the heat of the moment, the Assistant Judge, Mr. BODKIN, comes in, and he (Mr. Pater) is again asked to withdraw the language or qualify it, and not a single word is said by way of intimation that he had no intention of insulting the jury, and which would have stopped the punishment, but he perseveres in that language after the particular construction had been put on it as being offensive. I quite agree that a man who is called upon to apologise where no apology is really required is justified in saying "I refuse, because I have nothing to apologise for;" but, here, inasmuch as the language is capable of a twofold construction, and as Mr. Pater persevered in that without saying that he did not mean it in an offensive sense, I cannot help thinking that he used it for an offensive purpose. Then it comes to this, are we under these circumstances to say that the presiding Judge, Mr. PAYNE, with the assistance of Mr. BODKIN, with whom he had communicated, came to a conclusion which was so unreasonable and so utterly wrong on all these facts as that we are to say that the Court of Quarter Sessions has no jurisdiction under the circumstances to fine Mr. Pater for contempt? I cannot come to that conclusion. I regret very much that there has been this unfortunate result. No man, I hope, can have a higher sense of the importance of the rights and privileges of counsel in discharge of their arduous and important duties, and I agree with the observation of Mr. Kenealey that I should regret if they had not that privilege, not only for their own sake, but for the sake of the whole community; but on the other hand, I think we are bound to protect jurymen, who cannot protect themselves, and who have no means of fining for contempt, or taking any other course for resisting indignity and insult if offered

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to them. I feel it is our duty to protect and uphold those in the administration of justice in regard to the important duties which they have to discharge; but we must look to both sides of the case, and if we see that there were fair and reasonable grounds for saying that insult was intended to be offered, and was offered, to the juryman, while we ought to uphold the privileges of counsel we ought not to say that that does not amount to such a [* 151] contempt as the Court * is empowered to inflict punishment for. I regret very much that I am bound to come to this conclusion, but I cannot help thinking that under the circumstances we should not be justified in interfering with this decision.

BLACKBURN, J. — I am of the same opinion entirely. I think it is very important to bear in mind the distinction which my Lord has pointed out, between our being a Court of appeal and a Court of supervision over inferior tribunals. This Court has the power of keeping all inferior tribunals within their jurisdiction, and, therefore, whenever it appears to us that they have acted beyond their jurisdiction, we interfere to set them right. But if there has been before the inferior Court reasonable evidence on which that Court could draw the conclusion that facts existed which gave them jurisdiction, and they have drawn that conclusion upon reasonable grounds (and that this Court would look into), we cannot weigh whether there was other evidence that might tend to make them come to an opposite conclusion. And if we do not draw the same inference, all we can say is that the Court had reasonable grounds for drawing the inference, and that would support the judgment. I quite agree, looking at contempt in the sense in which Lord DENMAN uses it, and which is rather a happy one, that you are to judge of contempt by gesture and tone. I also agree with what was intimated by the counsel for Mr. Pater on the present occasion, that we are to see whether the Court of Quarter Sessions had the power which it has exercised. Now that Court is a Court of record. I take it that it is a Court which has, as incident to it, like every other Court of record, necessary power of preventing that which, in the face of the Court, leads to the obstruction of the administration of justice in that Court, and that they must have power to treat that obstruction, in the face of the Court, as a contempt. If it be not warranted by law, and if it be an unwarrantable interference with the proceedings, although it may be by counsel, still if it be an unwarrantable obstruction, that

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would be so. Nor can I bring myself to doubt that if counsel, under the colour of addressing the Court, takes the opportunity of obstructing the course of justice by insulting a juryman, or the Court, I cannot doubt that that would be such an obstruction as would be a contempt of the Court, and would justify the imposition of a fine and committal for contempt, if necessary. Then comes the question whether in this case that was so. Now, considering how very wide and extensive the privilege of counsel is, and how much it is for the interests of the public that latitude should be given to them, there are tolerably strong grounds for saying that the language which was so used, and which would certainly be within the privilege of counsel if done for the purpose of defending his client, was not so, but was really done for the purpose of insulting the juryman in revenge for a previous quarrel. That is matter that requires to be made out; but when I look at the evidence it is not for me to say whether I draw that conclusion. I wish not to be understood as expressing my own opinion; but as Mr. PAYNE, under the circumstances, drew the conclusion that it was done in that manner, we are to see that he did not act without reasonable grounds for it. I do not repeat those grounds; my Lord has stated them in giving his judgment, and has stated them clearly and well. All I say is that I quite concur, and I hold that Mr. PAYNE, sitting as the Judge of the Court of Quarter Sessions, had reasonable grounds on which he might draw the conclusion that Mr. Pater being counsel for a prisoner was not acting as such, but was obstructing the due course of the business of the Court by insulting the juryman in revenge for a previous squabble. We do not inquire who was in the right or who was in the wrong.

MELLOR, J. — I am entirely of the same opinion, and I agree in the judgment which my Lord and my Brother BLACKBURN have given, and I desire to add nothing to what they have said.

SHEE, J. — I only say that I entirely concur in the judgment.

Rule discharged.

ENGLISH NOTES.

A Court of gaol delivery has the power to make an order to prohibit the publication of the proceedings pending a trial likely to continue for several successive days, and to punish disobedience to such order by fine. *Rex* v. *Clement* (1821), 4 B. & Ald. 218, 23 R. R. 260.

The Judge of a County Court which is also an inferior Court of rec-

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ord, has a statutory power to fine for contempt of Court under 51 & 52 Vict., c. 43, s. 162, which substantially re-enacts section 113 of 9 & 10 Vict., c. 95, repealed.

To observe to a County Court Judge in the course of, and in reference to his judgment that "that is a most unjust remark," was held to be an insult to the Court, and if not withdrawn to amount to such a "wilful insult" as was contemplated by the latter of these sections. *Reg.* v. *Jordan* (1888), 36 W. R. 589. This case also bears out the statement in the rule that the superior Court will not interfere with a committal by an inferior Court of record, except where there is no reasonable evidence of a contempt having been committed.

AMERICAN NOTES.

In the absence of statutory provision, no review may be had of a judgment or order in contempt proceedings in a Court of record. Rapalje (Contempt, sect. 141) says: "Every superior Court of record being, at common law, the sole judge of contempts against its authority and dignity, it naturally results that the judgment of every such Court, in cases of contempt, is at common law final and conclusive, and not reviewable by any other tribunal (which in other cases would lawfully exercise appellate jurisdiction), either on writ of error or appeal, unless specially authorized by statute." This is warranted by *Ex parte Kearney*, 7 Wheaton (U. S. Sup. Ct.), 38; *Ex parte Bradley*, 7 Wallace (United States Sup. Ct.), 376; *Hogan* v. *Alston*, 9 Alabama, 627; *Cossart* v. *State*, 14 Arkansas, 524; *Tyler* v. *Hammersley*, 44 Connecticut, 393; 26 Am. Rep. 471 (citing the principal case); *Lockwood* v. *State*, 1 Indiana, 161; *Shattuck* v. *State*, 51 Mississippi, 50; 24 Am. Rep. 624; *Phillips* v. *Welch*, 11 Nevada, 187; *Ex parte Summers*, 5 Iredell Law (Nor. Car.), 149; *Ex parte Maulsby*, 13 Maryland, 625; *State* v. *Galloway*, 5 Coldwell (Tennessee), 326; *Re Cooper*, 32 Vermont, 253; *State* v. *McKinnon*, 8 Oregon, 487; *Johnston* v. *Commonwealth*, 1 Bibb (Kentucky), 598; *Larrabee* v. *Selby*, 52 California, 506; *Clark* v. *People*, Breese (Illinois), 340; *First Cong. Church* v. *Muscatine*, 2 Iowa, 69; *State* v. *Towle*, 42 New Hampshire, 540; *Floyd* v. *State*, 7 Texas, 215; *State* v. *Giles*, 10 Wisconsin, 101; *Williamson's Case*, 26 Penn. State, 9; 67 Am. Dec. 374; *Robb* v. *McDonald*, 29 Iowa, 330; 4 Am. Rep. 211; *Ex parte Sternes*, 77 California, 156; 11 Am. St. Rep. 251; note 22 Am. St. Rep. 417.

But if the facts plainly show that there was no jurisdiction, or that the facts do not constitute contempt, discharge may be granted on *habeas corpus*, or relief afforded on appeal or writ of error. *Ex parte Adams*, 25 Mississippi, 883; 59 Am. Dec. 234; *State* v. *Galloway*, 5 Coldwell (Tennesee), 326; 98 Am. Dec. 404; notes, 87 Am. Dec. 51; 67 ibid. 395; 26 ibid. 49; 52 ibid. 303; 79 ibid. 536; 22 Am. St. Rep. 422; *In re Shortridge*, 99 California, 426; 37 Am. St. Rep. 78; *In re Pryor*, 18 Kansas, 72; 26 Am. Rep. 747; *Storey* v. *People*, 79 Illinois, 45; 22 Am. Rep. 158.

In *Williamson's Case*, *supra*, the Court said: "It is most especially necessary that convictions for contempt in one Court should be final, conclusive,

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and free from examination by other Courts on *habeas corpus*. If the law were not so, our judicial system would break to pieces in a month. Courts totally unconnected with each other would be coming in constant collision. The inferior Courts would revise all the decisions of the Judges placed over and above them. A party, unwilling to be tried in this Court, need only defy our authority, and if we commit him, to take out his *habeas corpus* before an inferior Judge of his own choosing, and if that Judge is of opinion that we ought not to try him, there is an end of the case. This doctrine is so plainly against the reason of the thing that it would be wonderful indeed if any authority for it could be found in the books. There is none except the overruled decision of Mr. JUSTICE SPENCER of New York, already referred to, and some efforts of the same kind to control the other Courts, made by Sir EDWARD COKE, in the King's Bench, which are now admitted to have been illegal, as well as rude and intemperate. On the other hand we have all the English Judges and all our own, declaring their want of power to interfere with or control one another in this way." STORY, J., in *Ex parte Kearney*, *supra*, pronounces this doctrine "reasonable, just, and convenient," and in *Tyler* v. *Hammersley*, *supra*, the Court said: "Sentences for contempt would amount to nothing if the offenders could supersede them by writs of error, and the authority of Courts would be contemptible indeed if it could be thus eluded and prostrated." In *Johnston* v. *Commonwealth*, *supra*, the Court said: "It seems necessary to the very existence of a Court in the healthy exercise of its powers, that it should have exclusive jurisdiction to judge of contempts to its authority."

In some States judgments for contempt are reviewable on error like other judgments in criminal cases. *Gandy* v. *State*, 13 Nebraska, 445; *Cooper* v. *People*, 13 Colorado, 337; *Beck* v. *State*, 72 Indiana, 252; *Ruhl* v. *Ruhl*, 24 West Virginia, 279; *Myers* v. *State*, 46 Ohio State, 473; 15 Am. St. Rep. 638; *In re Danton*, 105 North Carolina, 59; *In re Cheeseman*, 49 New Jersey Law, 115; 60 Am. Rep. 596; *Baltimore, &c. R. Co.* v. *Wheeling*, 13 Grattan, (Virginia), 40; *Clair* v. *State*, 40 Nebraska, 534; 28 Lawyers' Rep. Annotated, 367; *State* v. *Knight*, 3 South Dakota, 509; 44 Am. St. Rep. 809; *Winkelman* v. *People*, 50 Illinois, 449; *Butler* v. *People*, 2 Colorado, 295; *Storey* v. *People*, 79 Illinois, 45; 22 Am. Rep. 158.

In some States a clear abuse of discretion may be availed of on appeal. *Howard* v. *Durand*, 36 Georgia, 346; 91 Am. Dec. 767; *Haines* v. *Haines*, 35 Michigan, 138.

In *State* v. *Knight*, *supra*, the Court said: "At common law judgments of superior Courts of record in matters of contempt were final, and not revisable in any other Court upon appeal or writ of error. By statute in some States the remedy by appeal and writ of error has been given. There is no good reason, however, in any case that we have examined, why cases of contempt are not subject to review in some manner by an appellate Court." "If wrong be done a citizen by error of facts or judgment in the exercise of this power, there must be some channel of redress provided by law to rectify the wrong. In the absence of statutory enactment there must be some tribunal to review and correct this error, and some road leading to that tribunal which aggrieved parties may take to reach it."

The statement in the Rule concerning the non-interference of the superior Court is sustained by all the American cases.

But if the moving party tenders an issue of law upon the return, upon which the question of contempt is tried and decided, a writ of error lies upon that adjudication. *Tyler* v. *Hammersley, supra*; *Re Cooper, supra.*

No. 11. — PAINTER *v.* LIVERPOOL OIL GAS LIGHT CO.

(K. B. 1836.)

RULE.

WHERE a magistrate has power under a statute to grant a warrant in the nature of an execution, he must first summon and hear the parties, unless the statute expressly or by necessary implication dispenses with such summons and hearing.

Painter v. Liverpool Oil Gas Light Co.

3 Adol. & Ellis, 433–449 (s. c. 6 N. & M. 736; 2 H. & W. 233).

Justice of the Peace. — Statutory Execution. — Implied Requirement of Summons.

[433] By statute establishing a gas light company, it was enacted that if any person should refuse or neglect, for ten days after demand, to pay any rent due from him to the company for the supply of gas, such rent should be recovered by the company or their clerk by warrant of any justice of peace for the town, &c., and it should be lawful for the company, or their clerk, or any person acting under their authority with such warrant, to levy the sum so due by distress and sale of the goods of the party so neglecting or refusing to pay, or the same might be recovered by action, &c.

Held, that a warrant so issued by a justice, without previously summoning and hearing the party to be distrained upon, was illegal, though a summons and hearing were not in terms required by the Act.

Where a magistrate grants a warrant in the nature of execution, he is bound first to summon and hear the parties, unless the statute under which he acts clearly renders the discharge of that function ministerial only, or in some other manner dispenses with the summons and hearing.

In trover for distraining plaintiff's goods, the company justified under the above warrant, and stated that it was issued on the complaint of their collector, and that he, by virtue of it and under their authority, seized the plaintiff's goods for the purpose of levying a sum owing by him to them, and duly demanded according to the Act.

No. 11. — Painter v. Liverpool Oil Gas Light Co., 3 Adol. & Ellis, 433, 434.

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Held, that the warrant, although it would have protected the clerk or an officer, was no justification to the company, they not having acted in obedience to it, but having put it in force as parties.

Trover for coaches, horses, and harness. Plea, that the plaintiff, after the passing of an Act, 4 Geo. IV., c. xxxix. (local and personal, public), for lighting the town of Liverpool with oil gas, and before the time when, &c., to wit, on, &c., was indebted to the defendants in a large sum, to wit, &c., for gas supplied by contract, and that afterwards, and while the plaintiff was so indebted, to wit, &c., William Henry Parkinson, the collector for the defendants, left, at the place of business of the plaintiff, a demand in writing of the said sum so due and owing from him to the defendants: "and afterwards, and more than ten days after the leaving of the said demand at the said place of business of the said plaintiff as aforesaid, he, the said W. H. P., then being such collector, *and so acting under the authority of the [*434] said defendants as aforesaid, to wit, on, &c., preferred a complaint against the plaintiff for the premises aforesaid, before James Aspinall, then being one of His Majesty's justices of the peace in and for the county of Lancaster; and, thereupon, afterwards, the said J. A., so being such justice for the said county as aforesaid, and before the said several times, when, &c., to wit, on, &c., according to the form of the statute in such case, &c., duly made and caused a certain warrant under his hand and seal, directed to the sub-bailiffs, head constables and assistant constables in and for the borough of Liverpool, and also to the said W. H. P. and John Hampson and their assistants; and thereby then authorised and commanded them, every or any of them, that upon the goods and chattels of the said plaintiff, they should levy the said sum of £12 18*s.*, for that he, being a person who had contracted with the said defendants, to take the benefit of the gas from the said defendants, did refuse and neglect, after demand[1] left in writing at the place of business of the said plaintiff, to wit, on, &c., to pay the sum of £12 18*s.*, being the rent due to the said defendants from the said plaintiff for gas consumed by the plaintiff, contrary to the form of the statute, &c., whereof he, the said plaintiff, was duly convicted, and for the levying thereof,

[1] LITTLEDALE, J., observed that the warrant, as set out, did not show a default "after the space of ten days after demand made," according to the Act. See sect. 72, *post*, p. 163, *n.*

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they were to seize, take, and carry away the said goods and chattels; and if, in five days after such seizure, the said sum of £12 18*s.*, together with the reasonable charges," &c., "should not be paid, then, and in such case, after the expiration of [*435] *the said five days, they were to make sale thereof, or of so much thereof as should be sufficient to levy the said sum," &c. Then followed directions as to the disposal of the overplus, and the return to be made to the warrant if the distress should not be sufficient. The plea then stated that Parkinson, so being clerk and acting under the authority of the defendants, did seize, take, and carry away, under and by virtue of the said warrant, certain goods and chattels of the plaintiff, being the goods and chattels in the declaration mentioned, for the purpose of levying the said sum, &c.; and did afterwards, and more than five days after such seizure, to wit, on, &c., sell, &c., for the purpose of satisfying and discharging the said sum, &c. Replication, that the plaintiff was not, at any time before the said James Aspinall made the said warrant in the said plea mentioned, summoned or warned to answer the said complaint of the said W. H. Parkinson against the plaintiff, for the said supposed debt, before the said J. A. or any other of His Majesty's justices of the peace, nor did he before then have any notice of such complaint, nor did he appear before the said J. A. or any other of His Majesty's justices of the peace, or any officer or person whatever authorised or empowered to hear the said complaint, to answer the said complaint, and the said warrant was made and issued against him as aforesaid, without his having had any means or opportunity to hear or answer the said complaint; wherefore the defendants, of their own wrong, &c. Rejoinder, that the gas was supplied after the passing of the act, and that Parkinson, as such collector, &c., left a demand in writing at the place of business of the said [*436] plaintiff, thereby requiring him to *pay the said sum, &c., so due and owing from the said plaintiff to the said defendants, as in the said last plea mentioned; conclusion to the country. Demurrer, because the rejoinder neither confesses nor avoids, nor traverses nor denies the matter of the replication, and because it tenders an immaterial issue. Joinder.

Wightman in support of the demurrer. — The point taken by the plaintiff is that, before a warrant was granted, he ought to have been summoned, or to have appeared without summons, before

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the magistrate, to answer the complaint. The defendants contend that no summons was necessary, either by the statute or otherwise, and that the demand by their collector was sufficient ground for a warrant. Unless the local Act expressly takes away the proceeding by summons, the case falls within the principle of *Rex* v. *Benn*, 6 T. R. 198. But the Act gives no authority for dispensing with a summons. By the clause for recovery of rents,[1] s. 72, * it is enacted, that they shall and may be [*437] recovered by warrant of a justice, but it does not say that the justice shall proceed without summons and hearing. And other modes of recovering the debt are given in that section, viz., by action, bill, plaint, or information. Now, in any of those proceedings, the defendant must of course have been heard; and the Legislature cannot have meant that he should have that advantage or not, according to the course adopted by the company. In an action he might allege payment, or some matter in excuse; why should he be debarred from doing so before a justice? But, unless summoned, he has no opportunity. [LITTLEDALE, J. — He cannot

[1] 4 Geo. IV., c. xxxix. (local and personal, public), s. 72, enacts "that in case any party or parties who shall contract with the said company," (established by s. 1) "or agree to take, use, or enjoy the benefit of the said gas, shall refuse or neglect after the space of ten days after demand made or left in writing at the place or places of abode or business of such party or parties, to pay the rents or sum or sums of money then due for such gas to the said company, according to the terms and stipulations of the said company, it shall be lawful for the said company" to separate his gas pipes from their mains; "and that the rent or rents, sum or sums of money then due from any such party or parties to the said company for such gas, as also any other rent or rents, sum or sums of money due and owing to the said company for gas supplied by them to any person or persons, shall and may be recovered by the said company or their clerk or superintendent, or any person or persons acting under their authority, by warrant under the hand and seal of any justice of the peace for the said town of Liverpool or county of Lancaster (as the case may require); and it shall be lawful for the said company, or their clerk or superintendent, or any person or persons acting under their authority, with such warrant, to levy the said sum or sums so due and owing as aforesaid by distress and sale of the goods and chattels of the party or parties so neglecting or refusing to pay the same, rendering the overplus, if any, to such party or parties, after deducting the necessary charges of such distress and sale, or the same may be recovered in the Borough Court of Liverpool, or in any of His Majesty's Courts of record in England, by action of debt, or on the case, bill, plaint, or information," &c.

By s. 74, any person "thinking himself aggrieved by any rule, bye-law, or order of the said company, or any thing done in pursuance thereof, or by the order or determination of any justice or justices of the peace in pursuance of this Act," may appeal to the sessions. No further power is given, to justices or others, of relieving parties aggrieved by any thing done under the Act.

There are many clauses in the Act directing summary proceedings for the recovery of penalties, compensations, &c. They are noticed in the judgment of PATTESON, J., but need not be more particularly stated.

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know what justice the opposite party may apply to.] Although the Act does not expressly say how the warrant is to be obtained, it must mean that this shall be done in a regular manner, and according to the rules which guide this Court. The present Act must be construed, as to the clause in question, like 43 [*438] Eliz., c. 2, *s. 4, which empowers justices to issue a distress warrant for poor-rates, and under which a summons has always been held necessary. [LITTLEDALE, J. — The warrant there is to be granted against "every one that shall refuse to contribute," which may imply a refusal before justices; here the words are more general, "in case any party shall refuse or neglect." Lord DENMAN, Ch. J. — I think you cannot bring the case within the authority of those under the statute of Elizabeth; you must rely on the general principle.] The Legislature cannot have intended that, in any case, execution should issue without the party being summoned. It is an invariable maxim that no man shall be punished without being heard. No precise form of words is requisite in a statute to enforce this rule; but the strongest language would be necessary to sanction a departure from it. *Rex* v. *The Justices of Stafford*, 5 Nev. & M. 94 (s. c. *nom. Rex* v. *Hughes and Rogers*, 3 Ad. & El. 425), was a similar case to this, and is an authority for the plaintiff. [Lord DENMAN, Ch. J. — We did not mean there to lay down a general rule: we thought it reasonable and just that the magistrates should have refused to grant a warrant without previous summons; but it would not follow from that decision that the issuing of a summons would be necessary to the defence in an action like this. In the present case the more general question is pressed upon us.]

Cowling, *contra*. — First, even admitting that a summons was necessary, the proceedings were so far valid as to justify persons acting under this warrant. If the case fell within the jurisdiction of the magistrates, which the facts here show that it [*439] did, the proceedings and warrant, *though erroneous, are not void. In *The Case of the Marshalsea*, 10 Co. Rep. 76 a, it is said, "a difference was taken when a Court has jurisdiction of the cause, and proceeds *inverso ordine* or erroneously, there the party who sues, or the officer or minister of the Court who executes the precept or process of the Court, no action lies against them. But when the Court has not jurisdiction of the cause, there the whole proceeding is *coram non judice* and actions

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will lie against them without any regard of the precept or process." In *Dr. Webb* v. *Batchelour*, 1 Ventr. 273, Freem. 396, 407, 457, and 488, where the special verdict is set out, which was an action of trespass for taking cows, it was found, by a special verdict, that the plaintiff was called upon to perform statute duty under Stat. 22 Car. II., c. 12, but omitted to do it, whereupon a justice of the peace made a warrant to the defendant to distrain upon him under the authority of the Act. The warrant was made without summoning the plaintiff, though the statute, s. 9, empowers the justices to grant warrants only against parties in default, "not having a reasonable excuse to be allowed by the said justices;" which makes the case stronger than the present. Yet the Court there held, that the defendant, who made the levy, was protected by the warrant, saying, "The officer that executes the warrant (though unduly made for the cause alleged) is not answerable, for he is not to judge, but to execute the matter, it being within the jurisdiction of the justice of the peace." The defendants there were surveyors of highways, who had procured the warrant. It is suggested here, that the *party, if summoned, might have proved that he had already paid, or was excused from paying; but, in the case just cited, Freem. 490, [*440] HALE, Ch. J., said, "You might have gone to the justice, though after the distress, before it was sold, if you had any excuse." And here the warrant directed that the goods should be kept five days between the seizure and sale. [LITTLEDALE, J. — How could the justice have relieved the plaintiff, if he had applied to him in that interval?] The plaintiff might have called upon the justice to order a restoration of the goods. At all events the present remedy is not a proper one. There is no hardship on the plaintiff, who must be taken to owe the money; and, even if there were, he might have obtained redress if the proceeding was improper, by an action on the case against the company, for procuring a warrant to issue without a previous summons. A conviction may be set aside for such a cause, as in *The Queen* v. *Dyer*, 6 Mod. 41; or the Court may refuse to enforce the granting of a warrant by *mandamus;* but the party acting under the warrant is not a trespasser. POWELL, J., said, in the case last cited, "that if an action were brought against an officer upon execution of this conviction, it would not lie, for an erroneous conviction would justify him." As to the effect of the want of summons, suppos-

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ing it to be a material error in the proceedings, *Ackerley* v. *Parkinson*, 3 M. & S. 411 (16 R. R. 317), is a case in some degree analogous, where a party was excommunicated for disobeying a citation which proved to be void; but it was held that, although the proceeding was irregular, there was no want of origi-
[*441] nal jurisdiction, and therefore that the vicar-general * and surrogate, who had excommunicated the plaintiff, were not liable to an action on the case.

But further, the magistrates were not bound to summon before issuing their warrant. The decisions on this point, which refer to the granting of a mandamus, are inapplicable, and the statute 43 Eliz., c. 2, has already been distinguished from the Act now in question. Magistrates, in respect to clauses like the present, do not act in a strictly judicial capacity, but in a ministerial one, nearly resembling a judicial. In modern Acts it is usual to say that the magistrates shall convict, or to give a form of a conviction, when it is so intended. But the intention of the present and similar clauses is to give the same remedy as a landlord has for the recovery of his rent; by which name, indeed, the gas company's dues are spoken of in the very clause in question. Then, to avoid breaches of the peace, the statute, instead of giving an immediate power of seizure, requires the intervention of a magistrate's warrant, to give an ostensible sanction to the proceedings. It is argued here, that the warrant might be issued though the party had paid; but so also it may be said that a landlord might seize for rent, though none was due. If he did, the party distrained upon would have his remedy by action; and here, the same remedy may be taken if a warrant is obtained improperly. [PATTESON, J. — The justice, in this warrant, has given five days for payment, acting as if under Stat. 27 Geo. II., c. 20. The local Act does not call upon him to give any time; he therefore exercises a discretion in this respect, as against the parties obtaining the warrant. Then can it be said that he merely acts ministerially? Throughout the warrant he affects to act
[*442] *judicially.] It must be admitted that the warrant contains superfluous matter; but, if the magistrate proceeded judicially, the omission to summon is only an error, and does not affect the party acting under the warrant: if ministerially, that party is not liable, because the justice then was not bound to summon. It may be better, in a case like this, that a summons

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should issue; but the proceedings are not void for want of it. If a *capias* issue out of an inferior Court without a previous summons, an arrest under it is not void so as to give the party an action for false imprisonment; note (1) to *Pitt* v. *Knight*, 1 Wms. Saund. 90.

Wightman, in reply. — The warrant, here, showed upon the face of it an excess of jurisdiction, and trespass would have lain for enforcing it; *Groome* v. *Forrester*, 5 M. & S. 314 (17 R. R. 333).

The defendants here do not stand in the situation of officers executing process, but of parties procuring it to be sued out. That distinction was taken in *Parsons* v. *Lloyd*, 2 W. Bla. 845, where DE GREY, Ch. J., said, "If the defendant" (the plaintiff in the suit then before the Court) "is injured, he is entitled to a remedy somewhere; but not against the sheriff or his officer, who are bound to obey the writ." — "The officer not being liable, the plaintiff must be. He has procured the writ to be sued out, and is answerable for all its consequences."[1] An officer justifies under the warrant; *a plaintiff under the judgment. [*443] It is said that the present Act was intended to give the same remedy to the company which a landlord has for his rent; but the remedy is a more summary one, for the distress may be sold immediately; and, according to several authorities, such a distress would be irreplevisable. *Wilson* v. *Weller*, 1 Brod. & Bing. 57.

Lord DENMAN, Ch. J. — The first question is, whether the warrant in this case was a good warrant, justifying any person who acted under it? It is said to be so, under the seventy-second section of the statute 4 Geo. IV., c. xxxix. In order to decide this point, we are called upon to consider, on general principles, whether justices authorised by statute to proceed by warrant, in execution, may do so without a previous summons to the party to be affected. No case, as yet, has furnished an express authority on this subject, for, although Lord KENYON intimated an opinion upon it in *Rex* v. *Benn*, 6 T. R. 198, it was not necessary, for the decision which the Court there came to, that this point should be determined. But, in the present case, I am of opinion that the

[1] PATTESON, J., enquired if the warrant in *Webb* v. *Batchelour* was void upon the face of it? Cowling answered that it did not appear that any summons was mentioned in the warrant (see Freem. 489); but that, if it had, the justices could not have given themselves jurisdiction by reciting a false fact. *Welch* v. *Nash*, 8 East, 403 (9 R. R. 478), per LAWRENCE, J.

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warrant ought to have been issued upon summons of the party. The warrant states that the plaintiff, having contracted with the defendants for a supply of gas from them, refused, after demand made in writing, to pay the rent due to them for gas consumed by him, whereof he was duly convicted. The very terms of this warrant, referring to a conviction, make it evident that the party ought to have been summoned to show either that he had not refused to pay, or that he had an excuse for not paying. [* 444] Therefore we are called upon by general principles to * say that this warrant is illegal, because the party against whom it issued had no opportunity given him of showing that he ought not to be convicted. But then the question is, whether the warrant, though improperly issued, will protect these parties. A warrant is a justification to officers, because they are not to canvass the legality of the process they have to execute. Acts of Parliament have been passed for their protection, founded on that principle; and it is a just one; for it would be absurd that an officer charged with the execution of a warrant should have to pause and consider whether it was regularly issued or not. But here the parties relying on the warrant are not officers; it is not even the clerk of the company who justifies, but the company themselves who allege that their clerk, acting under their authority, and by their command, took the goods, by virtue of the warrant. The case, therefore, is like those where the question has been, not whether an officer was justified, but the parties who set him in motion. The decision in *Webb* v. *Batchelour*, 1 Ventr. 273, Freem. 396, 407, 457, 488, limits itself to the principle, that an officer is not liable for executing an irregular warrant; a doctrine also laid down by POWELL, B., in *Gwinne* v. *Poole*, 2 Lutw. 935, 1560. Those cases would have resembled the present, if the defendants there had been parties intervening between the magistrate and the officer, and justifying themselves for employing the officer to act under the warrant. The plaintiff is entitled to judgment.

LITTLEDALE, J. — I am of the same opinion. I think it [* 445] was necessary, to render this warrant available, that * a summons should have issued first. The case is like *Rex* v. *Benn*, 6 T. R. 198. The fourth section of Stat. 43 Eliz., c. 2, empowers justices by their warrant to levy the poor-rate upon every one that shall refuse to contribute; by which a refusal be-

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fore justices appears to be more plainly pointed out than in the early part of 4 Geo. IV., c. xxxix., s. 72, where it is said that if any party shall refuse or neglect after the space of ten days after demand, in writing, to pay the company's rents, they may be recovered by warrant of a justice, though it may be observed that, in the part of the section which immediately follows the mention of proceedings before the justice, the words "so neglecting or refusing to pay" occur again. And the operation of both statutes, in this respect, ought to be the same. In the case of malicious injuries punishable by summary conviction, under Stat. 7 & 8 Geo. IV., c. 30, a justice is empowered (by s. 30), on a charge being made before him, to issue his warrant for apprehending the party charged, without previous summons; but that is in the nature of a criminal proceeding, and the warrant issues only for the purpose of bringing the party before the justice. The warrant, here, is in the nature of an execution; and, both upon the principle stated in *Rex* v. *Benn*, 6 T. R. 198, and in common justice, such process ought not to issue without a hearing of the party. Without a summons, the party has no opportunity of going to the justice. When the demand is made, he can apply only to the gas company themselves; for, at that time at least, no summons from a justice has issued. As to the legality of the warrant, therefore, I think that it ought not to have *been granted [*446] without a summons. Then, as to the protection claimed by these defendants; it is true, that, according to *Webb* v. *Batchelour*, 1 Ventr. 273, Freem. 396, 407, 457, 488, an officer, in a case like this, would be protected, because it does not belong to him to say, "there is an error in the proceedings, therefore I will not execute the warrant." But this is an action against the company themselves; they are the persons who put Parkinson the collector in motion, and cause him to demand the rent and seize the goods. It is not he that justifies, but they who allege that he acted under their authority; they adopt the warrant, and they identify themselves with him throughout the transaction. It was their duty, then, to see that the warrant was a proper one; and, as it is not so, for want of a summons, the judgment must be against them.

PATTESON, J. — As to the first point: the statute of Elizabeth and that now in question are not analogous to each other in all respects, as perhaps no two Acts are: but it is sufficient to say that on this Act there is not the slightest doubt in the world that

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the party ought to have been summoned before a warrant was granted against him. There are many clauses in this Act providing for the recovery of penalties and damages by summary proceeding before justices, and authorising them to issue warrants for levying the sums to be recovered; scarcely any two of them agree in their terms, and in none of them is a summons mentioned, except in s. 70, which relates to compensation for damage done to lamps. It cannot be supposed that the Legislature [* 447] * meant the justices to proceed upon summons in that case only; and, if in others, why not in this? Taking all the provisions together, the intention evidently is that the justices should issue their warrant for the recovery of these rents, after the proper steps have been taken, and not otherwise. The question raised by the defendants comes to this, whether the proceeding of the justices was judicial or ministerial; if it be judicial, the justices cannot have issued their warrant without having determined some point; and that should have been upon hearing the parties. Mr. Cowling says that the party distrained upon may apply to the justices after the distress; but that is not a satisfactory answer, for the goods may be sold immediately: the Act says nothing of any time to be given, although the justice in this case allowed five days. In *Webb* v. *Batchelour*, 1 Ventr. 273, Freem. 396, 407, 457, 488, it was assumed throughout, that the warrant was bad for want of a previous summons. It is true that the particular case arose under a statute which contained the words "not having a reasonable excuse to be allowed by the said justices;" but the whole case shows that, even at that time, a summons was held to be necessary before a warrant issued in execution, which, as my Brother LITTLEDALE has pointed out, differs much, in this respect, from a warrant in the nature of mesne process.

The remaining question is, whether the present defendants can justify under the warrant, it not having been directed to them but to their clerk. The reason for which such a warrant, though irregular, would be a protection to an officer, is, that he would not be entitled to set up his private opinion against that of the [* 448] justice * as to the goodness of the warrant. He is bound to obey it, and is, therefore, protected in doing so. But the company were not so bound. If they did not act upon the warrant they were in no way answerable; and they cannot justify under it if they have officiously used it. The case is not like

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that of persons called in to assist those who have a warrant to execute. This is an action of trover against parties who have received the fruits of the levy, and who plead that the goods were taken by their officer, and under their direction. They have officiously interfered in the execution of the warrant, and they have the proceeds. In *Webb* v. *Batchelour*, 1 Ventr. 273, Freem. 489, the parties held to be justified were those to whom the warrant was directed.

WILLIAMS, J. — There is no doubt that this was a judicial Act. By s. 72, of the Gas Company's Act, no proceeding can be taken, whether summarily, or by the ordinary process of law, for recovery of the rents in question, until the expiration of ten days after demand. A warrant, then, for the purpose of this levy, could not be claimed as matter of right, and without inquiry to satisfy the justice that it was grantable, any more than a warrant to arrest for felony. The Act, therefore, being clearly judicial, the party against whom the application was made should have had an opportunity of showing cause. *Rex* v. *Benn*, 6 T. R. 198, was decided under a different statute; and the judgment of Lord KENYON, which had been referred to, went somewhat beyond the immediate question in the case; but I never heard the proposition doubted, that a party is not to suffer in * person or in purse without an opportunity of being heard. [* 449]

As to the other point, the case of an officer executing process or a warrant bears no analogy to this. It would be wild work if the officer were entitled to scan the warrant delivered to him, for the purpose of ascertaining whether it was regular or not under the circumstances of the case. But here, the persons justifying are parties who allege that money was due to them, and that the warrant was executed under their authority, for the purpose of satisfying their demand. The argument, therefore, on this point, which depended wholly on the supposed analogy between the present case and that of an officer, fails.

Lord DENMAN, Ch. J., referred to *Harper* v. *Carr*, 7 T. R. 275 (4 R. R. 440), where Lord KENYON said, "It is an essential rule in the administration of justice that no man shall be punished without being heard in his defence; the party must be summoned before a warrant of distress is granted, as we decided in *Rex* v. *Benn*; and on that summons many circumstances may appear to show that a warrant of distress ought not to be granted."

Judgment for the plaintiff.

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ENGLISH NOTES.

The principle underlying the cases comprised in this rule is concisely stated by Lord KENYON in *Rex* v. *Benn* (1795), 6 T. R. 198, where he says: "It is an invariable maxim of our law that no man shall be punished before he has had an opportunity of being heard."

In *Rex* v. *Justices of Staffordshire* (1835), 5 N. & M. 94, s. c. *nom. Rex* v. *Hughes & Rogers*, 3 Ad. & El. 425, referred to in the principal case, a local act authorised certain paving rates, and enacted that in case any person should neglect to pay his rate for seven days after demand it should be lawful for any justice upon proof on oath of such demand and non-payment, by warrant to authorise the collector to levy the rate by distress and sale of the goods of the person rated; and in case there should be no distress, to commit the party to gaol. It was held not to be obligatory on the justice to issue a warrant without a previous summons.

Where two magistrates made an order on the guardians of a union under 4 & 5 Will. IV., c. 56, s. 27, directing them to give relief to an infirm pauper, without requiring that she should reside in any workhouse, and the guardians returned, amongst other things, that neither they nor the overseers of the parish in which the pauper was stated to be residing, and entitled to relief therefrom, had been summoned to attend, nor were present at the hearing of the complaint, or the making of the order, it was held that this was a good objection to the order. *Reg.* v. *Totnes Guardians* (1845), 7 Q. B. 690, 14 L. J. M. C. 148, 2 New Sess. Cas. 82.

In certain cases, however, the Legislature has for particular reasons empowered a magistrate to act, although no summons has been issued; thus, meat taken before a justice under sections 116, 117, of the Public Health Act, 1875, may be condemned as unsound without any summons, or notice to the person to whom it belongs. *White* v. *Redfern* (1879), 5 Q. B. D. 15, 49 L. J. M. C. 19, 41 L. T. 524.

Where a statute gives a magistrate power of commitment without a previous conviction, it should appear on the face of it that the charge was heard, and the evidence taken in presence of the prisoner. *Reg.* v. *Tordoft* or *Tordoff* (1844), 5 Q. B. 933, 31 L. J. M. C. 145; *In re Gray* (1844), 2 D. & L. 539, 14 L. J. M. C. 26.

AMERICAN NOTES.

This procedure is regulated by statute in most of the States, and differs considerably. In some States the issuance is delayed to allow an opportunity to appeal or furnish security and stay the issuance.

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No. 12. — EVANS *v.* M'LOUGHLAN.

(H. L. 1861.)

RULE.

WHERE, under a revenue statute, an officer has power to detain an offender and to convey him before a magistrate; the officer, making reasonable efforts to find a magistrate who will hear the case, is justified in detaining the offender in prison in the mean time. Where, after some magistrates have declined to hear the case, the offender is brought before a magistrate who does hear it, this magistrate has jurisdiction in the matter.

Evans v. M'Loughlan.

1 Paterson (Sc. App.) 989-997 (s. c. 1 Macqueen, 89).

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Justice of Peace. — Jurisdiction. — Court of Session. — Illegal Imprisonment. — Excise. — 7 & 8 Geo. IV., c. 53. — 19 & 20 Vict., c. 56, § 17. — Suspension and Liberation. — Review.

M. was apprehended by excise officers for an offence against the Excise [989] Acts, on 22nd and detained without warrant till 24th, when he was taken before a justice, and charged with the offence.

Held (reversing judgment), That as the delay was caused by the difficulty in finding a justice, there was nothing illegal in the detention.

Held further, That as any review was taken away by the statute for mere irregularities in procedure, the suspension of the conviction was incompetent.

The suspender (or complainer in the proceedings below, who is the appellant before the House of Lords), was a miner residing near Airdrie. He was apprehended near an illicit still for the manufacture of spirits on 22nd March, 1858, by the respondent (in the proceedings below, appellant before the House) and Alfred Eyeres, both officers of excise. According to the suspender's statement, he had, after quitting his work on the afternoon of the above day, "come accidentally near to a place where there was a still for the distillation of spirits. He had never seen a still before in his life, and he did not know, and had nothing whatever to do with, the parties to whom the still referred to belonged. When in-

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dulging his curiosity" "he was suddenly laid hold of by the respondent (M'Loughlan) and Alfred Eyeres, another officer of excise, and certain police constables who had been concealed in the neighbourhood, on the allegation of being concerned in the illicit operations of the said still. The complainer told the respondent and his assistants who he was, from whence he had come, and that he had nothing whatever to do either with the parties to whom the still belonged, or with the operations they might have been carrying on; and referred the respondent to his neighbours for evidence of what he then stated. The respondent, disregarding these statements, forthwith handcuffed the complainer, and carried him off" to Airdrie, where he was lodged in prison on a writing, made out by the respondent, bearing that the suspender was "detained at the request of Robert Evans, excise officer, Clarkstone, and Alfred Eyeres, excise officer, Airdrie."

The suspender was detained in prison the rest of the 22nd, the whole of the 23rd, and until the forenoon of Wednesday, the 24th March, 1858, without any warrant having been obtained; and he was not brought before a magistrate till the forenoon of
[* 990] the 24th, when he was brought up * before Mr. Torrance, a justice of peace in Airdrie. He was then orally charged by the respondent with a breach of the 33rd section of 7 & 8 Geo. IV., c. 53. No written complaint or charge had been previously, or at any time, served upon him, nor was any charge presented to the justice, and no clerk was present.

The respondent in the record stated, in explanation of the delay which had occurred in taking the suspender before a magistrate that, on lodging him in prison, the respondent had immediately proceeded to endeavour to find a justice of the peace to hear the cause.

"He first applied to Kidd, Esq., justice of the peace in Airdrie, on said 22nd March, 1858, and requested him to hear the case. Mr. Kidd declined to do so, and referred the respondent to Mr. Watt, the justice of the peace clerk at Airdrie. The respondent applied to Mr. Watt to procure a justice to hear the case, but that gentleman stated that it could not be done on the evening of the 22nd, and requested the respondent to attend next morning, when a justice would be procured. In these circumstances the complainer was detained, along with the other persons apprehended, during the night of the 22nd, in the county police office.

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The respondent attended next morning at Mr. Watt's office, and again requested that the case should be taken up. He was informed, that it would be so taken up during the course of the day, when a Court, which was then being held by the sheriff substitute, was over. The respondent waited till said Court was over, and again applied for a hearing, but he was informed by the Procurator Fiscal, Mr. Steel, that none of the magistrates present would hear the case, because the respondent had not exhibited informations and served summonses upon the prisoners; which things were not necessary. The respondent then proceeded to his superior officer, the supervisor at Hamilton, and informed him of the circumstances. The supervisor came in with the respondent from Hamilton to Airdrie, on the morning of the 24th March, and having seen Mr. Thomas Torrance, justice of the peace, the supervisor induced him to hear the case on the 24th of March."

It appeared that proceedings before the justice were conducted by the respondent, who gave evidence in support of the accusation, and he was the only witness examined in the case. The complainer admitted, that he was in the vicinity of the still at the time, but he denied any participation in the operations there carried on. After hearing the suspender, and the evidence of the respondent, the justice considered the charge proved, and, upon the motion of the respondent, the penalty not having been paid, signed the warrant of commitment.

The suspender was immediately thereafter removed to the House of Correction and detained till 23rd April following, when he was liberated in consequence of a note of suspension passed. And after a record was made up, the Court of Session sustained the reasons of suspension, and suspended the proceedings.

Evans appealed to the House of Lords, maintaining, in his case, that the judgment of the Court of Session should be reversed, because — 1. The Court of Session had no jurisdiction in the matter. 6 Anne, c. 26, ss. 1, 6, 7; 33 Henry VIII., c. 39; 19 & 20 Vict., c. 56, s. 1; 7 & 8 Geo. IV., c. 53, ss. 33, 58; *Brough* v. *Stewart*, 13 Dunlop, 408; *Young* v. *Townsend*, 2 Irvine, 525. 2. Because assuming jurisdiction, the judgment of the Court of Session was erroneous.

M'Loughlan in his printed case supported the judgment on the following grounds: 1. The appellant had no authority to detain the respondent in the Airdrie prison; and when brought before

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the justice, he was not brought before him under any legal arrest, nor by summary procedure on arrest, nor under the circumstances set forth in the 33rd section of the Act; and, therefore, the justice had no power or jurisdiction under that section, or otherwise, to try, convict, and imprison him. 2. The respondent was brought within the power of the justice by means of an illegal detention and imprisonment. 3. According to the law of Scotland, the provisions of the statute founded on, and the orders of the Commissioners of Inland Revenue, no imprisonment for an offence under the statute could be legal, unless the party imprisoned had been brought before the justice in the way provided in the Act, and unless, prior to such imprisonment, there had been a written information or complaint, a written record of the evidence and whole proceedings at the trial, and a written conviction. In the present case, the respondent was not brought before the justice in the way provided by the Act, and there was no written information, record, or conviction. 4. The warrant of commitment was informally framed; it was illegally written by a revenue officer, concurrent in the arrest of the respondent, and was illegally addressed to the informer and prosecutor. It was, moreover, illegal and unwarranted by the 33rd section to commit the respondent to the custody of the prosecutor and informer. 5. Because the whole procedure against the respondent was informal, illegal, oppressive, and unjust. 6. Because the whole proceedings were in neglect and violation of the common and statute law, and the Court of Session had power to determine that they were so to quash the conviction and discharge the respondent. *Hay* v. *Linton*, 2 Irvine, 333; *Craig* v. *M'Colm*, Hume's Dec. 253; *Guthrie* v. *Cowan*, 10th Dec. 1807, F. C.; *Anderson*, 28th Feb. 1811, F. C.; *Mackenzie* v. *Maberly*, 31 Sc. Jur. 5; *M'Kenzie*, 2 Swinton, J. C. 152; *Christie*, 1 Irvine, 293; *Rodger*, Arkley, 393; *M'Donald and Gray*, 6 Dunlop, 1161; *Smith and Tasker* v. *Robertson*, 5 S. 848; *Coyle* v. *M'Kenna*, 32 Sc. Jur. 10.

Lord Advocate (Moncreiff), Welsby, and F. Russell, for [* 991] the appellant. — The Court of Session * in this case was wrong in holding that this was a Court of Session case, and not an Exchequer case. This was properly an Exchequer case, and to be dealt with exclusively in the Court of Exchequer.

[Lord Chancellor. — Assuming the conviction here to be bad, and consequently the imprisonment under it illegal, do you deny

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that the Court of Session could take cognisance of the matter and liberate the prisoner?]

Yes; where an inferior Court of revenue miscarries, the only Court which has jurisdiction is the Court of Exchequer. This Court can liberate in that case by *habeas corpus*. The Court of Exchequer was founded in its recent form by the Act of Union, article 19, and had a revenue jurisdiction like the English Court of Exchequer, and the 6 Anne, c. 26, regulated its proceedings. The Court of Exchequer could stay proceedings in an action commenced in the Court of Session which touched the revenue, even though that action was one for damages.

[LORD CHANCELLOR. — The English Court of Exchequer also removes actions from the other Courts in like manner.]

So in the cases of *Duke of Queensberry*, M. App. Jurisdiction, No. 19; *Brough* v. *Stewart*, 13 Dunlop, 408; *Young* v. *Townsend*, 2 Irvine, 525.

[Lord CHELMSFORD. — I see that Lord COWAN reserves his opinion as to the power of the Court of Session to interfere, had the proceedings in the Court below been grossly irregular.]

[LORD CHANCELLOR. — Suppose there was a sentence of transportation against a man for illegal distillation, and he was imprisoned under that sentence, would not the Court of Justiciary have jurisdiction to release him?]

Perhaps it might. But at all events the Court of Exchequer was a Court of paramount authority, and could give redress in every form, in actions and proceedings touching revenue. The Court of Session had no higher power than the Court of Exchequer, in the way of revenue, at any time.

[Lord CHELMSFORD. — Supposing the proceedings before the committing magistrate are void *ab initio*, do you say, that that being a question arising out of revenue matters, no other Court than the Court of Exchequer could interfere in that case?]

Yes.

[LORD CHANCELLOR. — Although there was no jurisdiction on the part of the magistrate — though they were assuming a jurisdiction in matters of revenue which they did not possess by law?]

Yes; the Court of Session is merely the Court for deciding whether proceedings ostensibly taken under revenue statutes are regular. The Scotch Court of Exchequer was precisely on the same footing as the English Court of Exchequer.

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[LORD CHANCELLOR. — *Prima facie*, I think the question of the legality of the conviction would come to be considered rather in the Court of Queen's Bench than in the Court of Exchequer here.]

The Scotch Court of Exchequer was merged in the Court of Session by 19 & 20 Vict., c. 56, and the Judges of the Court of Session became the Judges of that Court, and the procedure was amended. Sections 17 and 21 regulate the right of suspension. The present is what is called an Exchequer cause, and even though the justices had no jurisdiction, the Court of Session was not the proper tribunal to apply to; but here, the irregularities which took place do not appear *ex facie*, and, therefore, there is no ground for saying there was no jurisdiction. If it is an Exchequer cause, then all powers of review are excluded by the 79th section. This section might not apply if the proceeding was, on the face of them, not under the Act of Parliament. In such questions it is not enough to say, that there was an irregularity of procedure in order to enable the Court to interfere.

[LORD CHANCELLOR. — It was viewed differently in the Court of Queen's Bench; the test was, whether the magistrate was acting within his jurisdiction, or beyond his jurisdiction; and I must acknowledge, that the Court strained a little to take cognisance for the purpose of doing justice. Now, there is no temptation of that sort, because the magistrates have a right to state a case for the opinion of the superior Courts, under the statute 20 & 21 Vict., c. 43.]

The proceedings in this case could only have been challenged by the old writ of *habeas corpus* in the Court of Exchequer, and if the warrant of commitment had been valid *ex facie*, that Court would not have interfered. Here the warrant is regular *ex facie*. It is said the illegality was not in the warrant, but in the detention for a day in the police cell. It is admitted, that the statute gives a power to detain the prisoner for a certain time, and it is difficult to gather from the judgments of the Court below at what point of time that custody ceased to be legal.

[Mr. Chambers, for the respondent, said he would contend, that the legal custody ceased the moment the prisoner was put into the gaol or into the police office, for then the officer was no longer within the statute.]

[Lord CHELMSFORD. — That could not always be so, for a jus-

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tice is not always to be found; there must be a reasonable time allowed.]

[LORD CHANCELLOR. — Whether it be a gaol, or a cage as it is called, or a room at an inn, it cannot make any difference.]

*If it were held, that the excise officer could not com- [*992] mit the prisoner to the custody of the police till a justice was found, it would be impossible to carry out the statute in such districts as the Highlands, where the justice might be fifty miles off. The statute says the excise officer may detain; that means, he may take all reasonable means for that purpose. If the prisoner is detained an unreasonable time, he would have an action for wrongous imprisonment. In *Van Boven's Case*, 9 Q. B. 669, though a week had elapsed, it was held, that that did not prevent the jurisdiction of the magistrate attaching. Here it could make no difference, that the prisoner was put in a police cell, for if he had been put in the hands of two strong men, the character of the detention would have been quite the same. The prisoner was still under the authority of the excise officer, who could order the gaoler to liberate him. It would have been the same if the officer had remained in gaol with the prisoner, or had left him in the cell, and carried the key in his pocket. The prisoner was detained, as the detainer expressed it, at the request of the officer.

[Lord CHELMSFORD. — I think we must look to the thing itself, and not to the name applied to it. It may be called incarceration, or it may be called a detention. The question is whether it is a detainer or no.]

[LORD CHANCELLOR. — Stress seems to have been laid upon the circumstance, that M'Loughlan denied his delinquency, and that he was only proved to have been engaged in the distillation by one witness. Supposing that he had been caught *in delicto*, and that it was manifest that he should be convicted, would that make any difference?]

None. The magistrate below had clearly jurisdiction. The statute says, when an excise officer finds a man aiding, &c., that is the offence. When that offence was proved, it was the duty of the justice to convict. The statute gave authority to the excise officer to detain him, and to all persons acting in his aid and assistance. Whether the prisoner was detained an unreasonable time, could have nothing to do with the jurisdiction of the jus-

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tice, who has to deal with the offence alone. The prisoner must either have been put within stone walls, or chained to the officer during the intermediate time.

[Lord CHELMSFORD. — What the other side will say is, that, by reason of the detention, this was not a case of summary proceeding under the 33rd section, but should have been taken under the 61st section.]

The immediate arrest mentioned in the 61st section means immediate upon the detection in the act. Under the 33rd section the officer, on taking the man *in flagrante delicto*, has authority to arrest him.

[LORD CHANCELLOR. — Could he say to the prisoner, "It is not convenient for me to go before a magistrate, will you go home, and this day week I will do so?"]

Montague Chambers, Q. C., and Neish, for the respondent. — The justice had no jurisdiction in this case, or at least had exceeded it, and therefore the Court of Session had a right to liberate the prisoner. Wherever a subject of the realm is falsely imprisoned, it is a civil right which he has, to appeal to the Court of Session for liberation. *Craig* v. *M'Colm*, Hume, 253; *Wilkie* v. *Bouse*, Hume, 252. It is one thing to review the case on the merits, and another to release a person imprisoned by a justice who has no jurisdiction. It is familiar knowledge in Westminster Hall, that a person may apply for a writ of *habeas corpus* at all the three common-law Courts, and also the Court of Chancery in succession. There are no words in the Exchequer Acts in Scotland to take away the jurisdiction of the Court of Session; and, according to the rule in Ersk. 1, 2, 7, such jurisdiction remains. As to the recent Act, 19 & 20 Vict., c. 56, the first 17 sections apply to the procedure of the Court of Exchequer proper, and do not touch the case of the respondent here. The 17th section gives a cumulative remedy by appeal, but does not exclude the ordinary right of applying to the Court of Session. Section 21 recognises the right of applying to the Court of Session. Assuming, therefore, the Court of Session could interfere, there was good ground, inasmuch as there was no jurisdiction in the justice. No subordinate person is entitled to imprison another whom he is to take before a magistrate. When the excise officer here handed the prisoner over to the policeman, the prisoner ceased to be detained by the excise officer. This broke the continuity of the first arrest

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and detention. The excise officer had no right to give a warrant of detention to the policeman.

[Lord CRANWORTH. — Is it anything more than if he had said, verbally, "I want to go to the magistrate; you take charge of the prisoner?"]

The powers given to the excise officer are very limited. The ordinary proceeding was to get the authority of the Excise Commissioners, under the 61st section, and issue an information, and it was only in the case of an immediate arrest, that the power to detain was given; but in that case he had no power to authorise a third person to imprison the party arrested. If he could be detained a day, why not two, and why not a month?

[Lord CHELMSFORD. — When, according to your view, does the power of summary jurisdiction of the magistrate cease?]

It never began; at all events it ceased the moment the prisoner was handed over to another custody — that of the police.

[Lord CHELMSFORD. — Could not the officer have left the prisoner in a room, under the charge * of somebody, while [*993] he went in quest of a magistrate, and then returned and carried him before the magistrate?]

No; he could not leave the prisoner in a room, but must carry him about with him, for these are strict powers given to the officer. He could have no more power than an ordinary constable.

[Lord CHELMSFORD. — Surely if a man is apprehended in this country, so late, that he cannot be taken before a magistrate, he may be detained till the next morning; that is reasonable, and it has been decided.]

Yes; but, though the prisoner may be detained, he cannot be taken to an ordinary prison.

[Lord CHELMSFORD. — Call it a lock-up house; it is, in fact, a gaol.]

The prisoner might have been rearrested under 4 & 5 Will. IV., c. 51, s. 25, but could not be detained in a prison.

[LORD CHANCELLOR. — The whole question turns on this, whether the officer was not all the while *bona fide* pursuing the object of the Act in bringing the party before the magistrate, and whether there was any unreasonable delay.]

The duty of the magistrate was to ask, if there had been any delay in bringing the prisoner up, and, if there was, to decline to proceed. In *Hay* v. *Linton*, 2 Irvine, 333, the Court of Justiciary

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held, that, under the Reformatory Schools Act, 17 & 18 Vict., c. 74, a child could not be detained in a police cell while inquiry was made under the Act, even though the magistrate caused the detention. There are other objections to the conviction. There ought to have been an information in writing. 7 & 8 Geo. IV., c. 53, ss. 65, 82, contemplate that. It is conformable to practice in other cases, and is understood, unless specially dispensed with. *Law* v. *Steel*, Arkley, 109; *Mackenzie* v. *Maberley*, 32 Sc. Jur. 5.

[LORD CHANCELLOR. — Then you must admit there must be a detention for two seconds at least till the information in writing is got ready.]

Perhaps the magistrate might detain but not the officer. Then there ought to be a written record. The justice ought to have taken notes, and drawn up the evidence in proper form. Paley on Convictions, 84 (ed. 1838); *Christie* v. *Adamson*, 1 Irvine, 293.

The warrant of commitment, if taken as a conviction, was bad, because it does not appear, that the conviction was taken in view of the justice, and that the evidence was on oath. *Re Grey*, 2 Dowl. & L. 539; *R.* v. *Tordoft*, 5 Q. B. 933. Lastly, the officer with his own hand filled up the blank warrant of commitment.

[Lord CHELMSFORD. — But he did not sign it.]

[LORD CHANCELLOR. — All was vitiated by the officer filling up a blank *coram non judice*. If he had handed a piece of blotting paper to prevent the signature being blotted, or supplied a little sand to serve the same purpose, would that have been fatal?]

The principle is to keep the stream of justice pure.

[Lord CHELMSFORD. — You think it does not flow purely through the exciseman's still!]

The Lord Advocate in reply was not called upon.

Lord Chancellor CAMPBELL. — My Lords, notwithstanding the able argument which we have heard at your Lordship's Bar from the counsel for the respondent, I must say, that I entertain a clear opinion, that the decree appealed against ought to be reversed, but not at all on the ground that the Court of Session has no jurisdiction over such matters. The Court of Session has jurisdiction over such matters, and no Act of Parliament has been passed to deprive that high tribunal of the jurisdiction which it once enjoyed. Although the Court of Exchequer may have co-ordinate jurisdiction in such a matter, it does not at all follow, that when the

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action was brought into the Court of Session it would have been *coram non judice.*

If this proceeding could have been impeached on the ground, that the justice had not jurisdiction over the offence with which the respondent was charged, I am of opinion, that in that case the Court of Session would have had jurisdiction, and would have been fully entitled to hear the objections that were raised; but upon looking at the Act of Parliament, it appears to me quite clear, that, in the circumstances of the case, the 79th section takes away jurisdiction from the Court of Session, and it lies upon the respondents to show, that the suspension by which the proceedings were commenced before the Court of Session was regularly sued out.

By the 79th section of the 7 & 8 Geo. IV., c. 53, it is enacted, "That no writ of *certiorari*" (that would apply to England) "or other writ or process shall be issued at the suit of any defendant out of any of His Majesty's Courts of record in England, Scotland, or Ireland, nor shall any bill of suspension, advocation, or reduction, or any other proceeding be issued out of the Court of Session or Court of Justiciary in Scotland, to supersede, sist, stay, remove, or in any wise affect any information or judicial proceeding before the Commissioners of Excise or Commissioners of Appeal in this Act after mentioned, or before any justice or justices of the peace in the United Kingdom in pursuance of this Act." Therefore, if the justice before whom Mr. M'Loughlan was brought was acting in pursuance of the Act, he had jurisdiction in the matter, and therefore the suspension was incompetent, and the Court of Session had no jurisdiction.

*It seems to me, that the counsel for the respondent [*994] have utterly failed in showing that the justice had not jurisdiction; for it is enacted, by the 33rd section of the same Act which created the offence, that "it shall be lawful for any officer of excise, and all persons acting in his aid and assistance" (and in this case I know not whether the officer of police might not be considered as acting in aid and assistance of the officer of excise, if it were necessary to consider that), "to arrest and detain every person so discovered, and to convey him or her before one or more justice or justices of the peace for the county, shire, division, city, town, or place wherein such person shall be so discovered as aforesaid." Here there is power given to the excise officer, and

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to all who are acting in his aid, to arrest, detain, and convey the offender before a justice. Then come the words which give jurisdiction to the justice: "And it shall be lawful to and for such justice or justices of the peace, on confession of the party, or by proof, on the oath of one or more credible witness or witnesses made, of such offence, to convict every such person so discovered as aforesaid."

Now, it is not at all disputed, that the magistrate who acted in this case would have had jurisdiction, if he had been the magistrate to whom the respondent was taken in the first instance, on the 22nd March, in order to make the complaint before him. If the respondent had been immediately conveyed before that magistrate, and that magistrate had proceeded to hear and decide, no question could have been made about the jurisdiction; but it so happens that, the arrest being on the 22nd March (I believe there is some doubt about the date), it was, according to the statement in the case, not till the 24th March that the hearing took place, and it is said, that during that interval the respondent could not be considered as having been detained under the authority of the Act.

Now, it is allowed by the counsel for the respondent in his ably argued case, that all that is reasonable may be done by way of detention for the purpose of having the matter adjudicated; and it is not disputed, I presume, that if Mr. M'Loughlan had been taken to the house of a justice, and the justice had been at dinner, he might lawfully have been detained in the hall, or introduced into the drawing-room, or into a picture gallery to amuse himself until the repast was over, and the matter heard. Indeed, it is admitted, that the excise officer might have taken him to his (the officer's) house, and detained him there; but the objection is, that instead of being in the officer's house, he was taken to a prison, and a police officer was asked to take care of him. Well, I say again, referring to these sections of the Act of Parliament, that the police officer in doing that must be considered as acting in aid of the excise officer, at all events he was acting for the excise officer, and the excise officer must be considered as the party who is detaining him. *Qui facit per alium facit per se.* He, for the excise officer, did detain him; and it is allowed, that there was no detention whatsoever beyond what was essentially necessary for the matter being adjudicated. There was no malice, no violence, no harsh treatment, and no time at all was wasted. The excise officer

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does his best to find a justice to hear the case. He goes first to one man, and then to another, and then he consults the officer who represents the government at Airdrie, and he advises him, I think, to go to Hamilton. He goes to Hamilton. He does his best to find a justice down to the 24th when Mr. Torrance is found, and the proceedings are consummated.

Such being the facts of the case, it seems to me quite clear, that it must be considered, that there was a continuity of detention, and that it was always either by the excise officer, or by some person acting in aid of the excise officer; and there is no doubt, that, if a justice could have been found sooner, the detention would have been abridged.

It was said by the counsel for the respondent, that this was not in the heart of the Highlands; that Airdrie is a very populous place, and that there are a great number of magistrates there. But if it be admitted, that in the heart of the Highlands, where magistrates are rare, the respondent might have been detained till a magistrate could be found, then if in any other part of the country there are twenty magistrates applied to, and each of them improperly refuses to hear the case, it is clear, that the man must be detained till a magistrate could be found to administer the law. Under these circumstances, it appears to me that Mr. Torrance had jurisdiction, just as much as if he had been present at the time when the unlawful distillation was discovered, and had sat at the outset of the proceedings to hear and adjudicate.

Van Boven's Case, 9 Q. B. 669, is, I think, in point, because it shows, that even although the detention be for an unreasonable time, that does not affect the case. I do not think, that the detention in the present case was for an unreasonable time; and if a jury had had to try that question, I think any jury would have said, that there was no detention for an unreasonable time. One noble and learned Lord has intimated his opinion, in commenting on *Van Boven's Case*, that that would not have interfered with the jurisdiction of the justice when the hearing actually took place. In that case the Act of Parliament gave power to detain for a reasonable time, and the jury expressly found, that he had been held in custody for an unreasonable time, but still the determination was that that did not interfere with the jurisdiction of the magistrate

That being so, all the other questions disappear. The Court of

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Session having no jurisdiction to suspend the proceedings before the justice, because the justice had jurisdiction in the [* 995] matter, *and the suspension being incompetent, the other questions that have been discussed at the Bar do not arise.

I am almost ashamed to refer to some of the objections that have been made, such as, that there was only one witness examined, for the Act of Parliament says, that the proof of one witness shall be sufficient, and again, that the officer filled up a blank warrant. Although these objections received a certain countenance from the LORD ORDINARY, I must say, that they seem to me to be wholly frivolous, and I am sorry that they should have received countenance in that quarter.

The only further objection that I think it right to take notice of is, that there was no written information, and that consequently there was not any jurisdiction in the justice. If this had been a proceeding under a different clause of the Act of Parliament, not where there has been an arrest, but an immediate procedure for obtaining an adjudication, and the infliction of a penalty, I think there might have been good reason for such an objection; but it is quite clear, that the Legislature meant, and this *festinum remedium* of arresting parties taken *in flagrante delicto*, and having an immediate conviction, contemplated that it should be done without the formality of a written information, and without the formality of a regular conviction. Those steps may be necessary and proper when there is a regular proceeding, which is supposed to take place before a magistrate, but this is a special proceeding to be adopted for the purpose of putting down an offence which it is very difficult to meet, namely, the offence of unlawful distillation, and it seems to me, that if parties were allowed to raise such objections as these, the very object of the Act would be defeated. All that it appears to me judicially necessary for us to decide is, whether this suspension was competent or not, and I say, that it was incompetent. I have therefore to advise your Lordships, that the interlocutors of the Court of Session should be reversed.

Lord CRANWORTH. — My Lords, I entirely concur with my noble and learned friend. The 33rd section of the statute in question makes it the duty of any officer of excise, upon finding a person *in flagrante delicto* engaged in illicit distillation, to arrest and detain him, and bring him before one or more justice or justices of the

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peace, in order that he may there be dealt with, and the duty then imposed upon the justice is to hear and determine the case, and to fine the party £30 if he is convicted either upon his own confession or by the evidence of one witness, and in default of his payment, then to commit him for a certain time to prison.

Now what happened here was this: The officer of excise, Evans, did find M'Loughlan engaged in illicit distillation, did arrest him, did detain him, and did bring him before a justice of the peace, and the first point that was argued was, that it was the duty of the justice of the peace to inquire, whether he had been brought up *quam primum* before him. Now, in my opinion, the justice of the peace not only had no obligation to make such an inquiry, but he would have been doing that which he would not have been justified in doing, had he stopped to make such an inquiry. He might just as well have inquired whether the arrest had been unnecessarily harsh, as to have inquired whether the detention had been unnecessarily long. The justice of the peace had no duty to perform except to proceed upon the case as the case of a person taken *flagrante delicto*, having been arrested, and detained by the officer and brought before him. That, therefore, I think, disposes altogether of the question about unreasonable detention.

But I must say, that, looking at it as a question of fact, if I had to decide it only as a juryman, I should say, that there was no unnecessary detention at all. The man was taken, and, for aught that appears, would have been immediately brought before the justice that same evening, if a justice could have been found; but for some reason not explained the officer of excise goes first to one justice of the peace, and then to another, and none of the justices chooses to entertain the case, till at last, forty-eight hours after the man had been taken, the excise officer does find a gentleman of the name of Torrance, who hears the case and convicts. It appears to me, therefore, that this question of unreasonable detention, which seems to have been the only ground on which the Court of Session proceeded, entirely falls to the ground. It was not a question that could come into contest before the justice, even if the facts had warranted it, and in truth, the facts would not warrant it if it had come before the justice.

That may be considered as a question of substance; all the other questions are questions really and entirely of form. I had at one

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time a doubt whether the conviction was drawn up in the proper form, but I think, that what was pointed out by my noble and learned friend is unanswerable on that subject, namely, that the substance being right, the authority of the Court of Session to inquire into the form is taken away by the 79th section of the statute. That the Court had jurisdiction to inquire into such a matter, if it had appeared on the face of the proceedings, that the justice was acting without jurisdiction, I can entertain no doubt. I do not think, that the statute meant to give exclusive jurisdiction to any justice of the peace, or to any tribunal, to imprison one of Her Majesty's subjects, without its being distinctly shown on what ground he was imprisoned, and that he was lawfully imprisoned, but all the rest being entirely matter of form, the right of suspension is taken entirely away.

Upon the whole, therefore, I think that the Court of Session have certainly come to an erroneous conclusion, and that the interlocutor must be reversed.

Lord CHELMSFORD. — My Lords, I agree with my noble [*996] and learned friend upon the *woolsack, that the general jurisdiction of the Court of Session is not taken away by any of the provisions of the Acts to which reference has been made. If, therefore, the magistrate had been acting without any jurisdiction, I apprehend, that it would have been competent to the Court of Session to have entertained these proceedings; but, supposing the magistrate has jurisdiction, then, according to the opinion of my noble and learned friend upon the woolsack, in which I entirely agree, the 79th section of the 7 & 8 Geo. IV., c. 53, took away from the Court of Session the power of granting a note of suspension. Therefore, in this case, the real substantial question is, whether the magistrate had or had not jurisdiction under the circumstances over the particular case.

I confess, that upon the question of the magistrate's jurisdiction, I am unable to agree either with the conclusion at which the Court of Session arrived, or with the reasons which they have given for that conclusion. They thought, that the proceeding under the 33rd section of the 7 & 8 Geo. IV., c. 53, was incompetent, in consequence of what they regarded to be an illegal detention of the respondent because he was not brought before the justice in the manner prescribed and authorised by the statute — that it ceased to be a proceeding on immediate arrest under the

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Act from the nature of the detention, the respondent not being conveyed before the justice by the excise officer, but being brought up as a prisoner in the hands of a gaoler.

It is to be observed, that, upon this single point, upon which the Court of Session decided, the LORD ORDINARY seemed rather to be of opinion, that the detention or imprisonment, or whatever it is to be called, was not sufficient in itself to make the conviction bad, and I think it is perfectly clear, that it could not have that effect. Let us look to the object, and to the words of the 33rd section of the Act upon which the question turns. The object of that section of the Act was to provide for the immediate apprehension of offenders who were likely to escape from justice; and, accordingly, it empowers the officer, where any person is discovered assisting in the illegal manufacture, that is, the illicit distillation of spirits, "to arrest and detain every person so discovered, and to convey him or her before one or more justice or justices," &c., so that the officer is empowered to arrest and detain. Arrest and detention are here in a certain sense synonymous terms, but inasmuch as the officer is to convey the offender before a magistrate, there must necessarily be some detention following the arrest in order to enable him to perform his duty in that respect. Now, detention is of various kinds. It may be by the officer keeping hold of the person that he has so arrested, and detaining him in that manner. It may be by locking him up in a room under the charge of some persons who are intrusted to watch over him, while the officer goes for the purpose of finding some justice of the peace; and it is admitted, on the part of the respondent, that such detention would be lawful in every case where the room, or the parties who were watching that room, were under the control of the officer. But it is said, that in this particular case the man having been lodged in a gaol, from that moment the detention ended in the sense of the Act of Parliament, and that a new species of custody, in the nature of an imprisonment, changed the character of the detention, and made the party no longer under the control of the officer. It appears to me however, that you cannot, by using the term "incarceration" or "imprisonment," alter the nature of the thing. It may still be detention, although the detention is in a gaol, or lock-up house, and not in a private house, in which it is admitted, that the detention would be lawful under the Act of Parliament, because

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after all, the persons who have the control over, and the custody of the offender, are aiding and assisting the officer in the detention of the offender. It is not a change of custody as long as they are holding him upon the authority of the officer, and for the purpose of detaining him under the Act of Parliament.

Now, when the party under these circumstances is brought before the magistrate, I quite concur with my noble and learned friend (Lord CRANWORTH) that the magistrate has nothing to do with the mode in which the party has been dealt with after he has been arrested. When he is discovered, and is immediately arrested by the officer, then the jurisdiction of the magistrate would attach, and it would be no part of the duty of the magistrate to inquire, when he found that there had been a delay, as in this instance of two days, why it was that the party arrested *flagrante delicto* was not immediately brought before him. The whole of his duty is to ascertain whether the offence has been committed, whether the party was discovered assisting in the illegal distillation. And if he were so discovered, and immediately arrested, that is quite sufficient to give the magistrate jurisdiction; and the magistrate has no duty to inquire further, or to ascertain whether, since his arrest, he has been actually in the immediate keeping of the officer, or whether he has been in some other custody, but still under the charge of the officer, and under his control.

The case was likened by the LORD JUSTICE CLERK to the case of *Hay* v. *Linton*, and yet it is impossible to conceive any one thing more distinguishable from another than the case of *Hay* v. *Linton* from the present case. What was the case of *Hay* v. *Linton?* It was a proceeding under an Act of Parliament, which authorised constables to bring before a magistrate any child under fourteen years of age found wandering in the streets, without any home, proper guardianship, or visible means of subsistence; and the magistrate was authorised, if no person appeared after
[* 997] * intimation being given to provide for the child, and find security to that effect, to order such young person forthwith to be transmitted to and received at any reformatory school. Now, when a destitute child is brought before a magistrate under the provisions of that Act, it is quite clear, that when intimation has been made, the child is to be taken care of in the meantime, until it can be ascertained whether any person will appear and

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give the requisite security. But in that case, instead of taking care of the child in that manner, the magistrate granted a warrant to detain the child in the cells of the police office. Therefore when the child was brought up after the period of intimation had expired, it was insisted, or rather it was afterwards insisted, when the child had been sent to the reformatory, that the jurisdiction of the magistrate had ceased, because the character and condition of the child had altogether changed. And so the LORD JUSTICE CLERK puts it very clearly when the order was afterwards pronounced; the child was no longer before the magistrate in the position contemplated by the statute, that is, brought before him immediately upon being found in the streets in a state of destitution, but, on the contrary, was brought up as a prisoner from the cells of the police office. Now, what possible analogy can there be between that case and the present? The character of the immediate arrest changed in this case by reason of the subsequent detention? Is there anything in the evidence to prove, that the party was discovered in the act of illicit distillation? It is clear, that the analogy between the two cases altogether fails, and that there was nothing whatever in the circumstances of this detention, even supposing it had been an illegal detention, which would take away from the magistrate that jurisdiction which attached to him under the Act, by reason of the discovery which was made of the party, and the immediate arrest upon that discovery.

I wish that it may be understood, that I do not intend to express any opinion which might countenance the delay which took place upon the present occasion in carrying the offender before a magistrate. My noble and learned friend (Lord CRANWORTH) thinks that there was no unnecessary delay, and he may be right in that respect. But I am bound to say, that, even if there was an improper delay, the officer was placed in a situation of great difficulty and embarrassment in consequence of the refusal of one or more of the magistrates to hear the case. However, I am so perfectly clear with regard to the question as to the jurisdiction of the magistrate not being taken away, that I could not have entertained any doubt whatever upon the subject, if it had not been for the very high respect which I entertain for the judgment of the learned Judges of the Court of Session who have decided this question.

With regard to the other objections which have been raised, in

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my opinion they are really very frivolous. I entirely concur with the opinions which have been expressed by my noble and learned friends, — and I think, that upon the present occasion the interlocutors ought to be reversed.

LORD CHANCELLOR. — Lord Advocate, what adjudication do you pray?

Lord Advocate. — I think the judgment should run: reverse the second, third, and fourth interlocutors complained of, and remit to the Court of Session to refuse the note of suspension.

LORD CHANCELLOR. — Be it so.

Interlocutors reversed, and cause remitted with a declaration.

ENGLISH NOTES.

Magistrates have no authority to detain a person known to them till some other person makes a charge against him. Before detaining a known person, they should have a charge actually made. *Rex* v. *Birnie* (1832), 5 Car. & P. 206, 1 M. & Rob. 160.

Two constables, on a Monday morning, were taking the plaintiff before a magistrate on a charge of misconduct when they met the magistrate, who desired them to take the plaintiff back to the lock-up, and bring him up for examination on the Tuesday. They did so, when the magistrate imposed a fine upon him. It was held that the magistrate was liable to an action of trespass for having sent him back to the lock-up; and that he should either have gone into the case on the Monday, or have desired that the plaintiff should be taken before another magistrate. *Edwards* v. *Ferris* (1836), 7 Car. & P. 542.

A magistrate ought not to commit a party charged with felony for re-examination for an unreasonable time, and if he does so he will be liable to an action. *Davis* v. *Capper* (1829), 10 B. & C. 28, 5 M. & Ry. 53, 4 Car. & P. 134; *Cave* v. *Mountain* (1840), 1 Man. & Gr. 257, 1 Scott N. R. 132. The reasonableness of the period of commitment is for the jury. Ib.

Where a person was convicted under 13 Geo. III., c. 80, s. 4, and a warrant issued to levy the penalty on his goods, it was held that the magistrate might order him verbally to be kept in custody until a return was made on the warrant. *Still* v. *Walls* (1806), 6 Esp. 36, 7 East, 533.

AMERICAN NOTES.

Unavoidable delay of a peace officer in taking bail is not false imprisonment. *Cargill* v. *State*, 8 Tex. App. 481. A reasonable time is allowed for procuring a warrant. *Ocean S. S. Co.* v. *Williams*, 69 Georgia, 251. But delay for an unreasonable time in taking the arrested person before a magistrate

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constitutes false imprisonment. *Johnson* v. *Americus*, 46 Georgia, 80; *Schmeider* v. *McLane*, 4 Abbott's Court of Appeals Decisions (N. Y.), 154; *Brock* v. *Stimson*, 108 Massachusetts, 520; 11 Am. Rep. 390; *Phillips* v. *Fadden*, 125 Mass. 198; *State* v. *Parker*, 75 North Carolina, 249; 22 Am. Rep. 669; *Green* v. *Kennedy*, 46 Barbour (N. Y. Sup. Ct.), 16, affirmed, 48 New York, 653; *Burk* v. *Howley*, 179 Penn. St. 579; 57 Am. St. Rep. 607.

In *State* v. *Parker*, *supra*, a constable, without warrant, arrested a drunken man and locked him up until he was sober, and then discharged him without taking him before a magistrate. This was held a criminal assault and battery. The same was held in *Brock* v. *Stinson*, *supra*. In both cases the offence consisted in not taking the complainant before a magistrate after he was "sobered off." The officer erred through excess of mercy. Arrest is only warranted as a preliminary step toward taking the offender before a magistrate.

It is unlawful to prolong the imprisonment, after discharge, beyond the doors of the lock-up, for the purpose of sending the plaintiff out of town. *Bath* v. *Metcalf*, 145 Mass. 274; 1 Am. St. Rep. 455.

But where the constable lets the intoxicated person go, at his request, and because on account of a "severe flood" (of water) there is no magistrate accessible, the arrested person is without remedy. *Caffrey* v. *Drugan*, 144 Massachusetts, 294.

If parties arrest a person, and instead of taking him before a magistrate, hold him under the alternative of paying a prescribed penalty or going to jail, this is false imprisonment; but if he pays the penalty demanded, he has no action against the wrongdoers. *Twilley* v. *Perkins*, 77 Maryland, 252; 19 Lawyers' Rep. Annotated, 632.

"From the earliest dawn of the common law a constable could arrest without warrant when he had reasonable grounds to suspect that a felony had been committed; and he was authorized to detain the suspected party such a reasonable length of time as would enable him to carry the accused before a magistrate. And this is still the law of the land." "It cannot be questioned that when a person is arrested, either with or without a warrant, it becomes the duty of the officer or the individual making the arrest to convey the prisoner, in a reasonable time and without unnecessary delay, before a magistrate, to be dealt with as the exigency of the case may require. The power to make the arrest does not include the power to unduly detain in custody; but on the contrary, is coupled with a correlative duty to take the accused before a magistrate 'as soon as he reasonably can.'" "If the officer fails to do this, and unreasonably detains the accused in custody, he will be guilty of a false imprisonment, no matter how lawful the original arrest may have been:" *Kirk & Son* v. *Garrett*, 84 Maryland, 383.

On an arrest without warrant for felony, on Sunday, the officer, on the next day, requested the public prosecutor to prepare a complaint and issue a warrant, which was done on Tuesday. This was held a not unreasonable delay. *Diers* v. *Mallon*, 46 Nebraska, 121.

If a sheriff with warrant endeavors to bring the accused immediately before the Court, but it has adjourned, he may detain him in jail until the next sitting. *Kent* v. *Miles*, 68 Vermont, 48.

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No. 13. — REG. *v.* CAMBRIDGE GUARDIANS.

(1861.)

RULE.

THE Court of Quarter Sessions have jurisdiction to adjourn the hearing of an appeal to the following Sessions, unless the Act which gives the appeal expressly requires that it should be determined at the next Sessions.

Reg. v. Cambridge Guardians.

30 L. J. M. C. 137–141 (s. c. 1 Best & Sm. 61; 7 Jur. (N. S.) 1073; 4 L. T. 212; 9 W. R. 599).

[137] *Appeal. — Quarter Sessions. — Adjournment. — Pauper Lunatic.*

At the hearing of an appeal against an order made by justices adjudicating the settlement of a pauper lunatic and ordering payment for his maintenance, the Court have power to adjourn the hearing to the next Sessions, and this after the hearing and trial of the appeal has been partly proceeded with.

But the power of so adjourning ought to be cautiously and carefully exercised.

On an appeal against an order of two justices of the borough of Birmingham, dated the 14th of May, A. D. 1860 (made under the "Lunatic Asylum Act," 16 & 17 Vict., c. 97), adjudging the parish of St. Edward, Cambridge, to be the place of the last legal settlement of William Ind Hailstone, a pauper lunatic, confined in the lunatic asylum of the said borough of Birmingham, and ordering the payment by the said guardians of the poor of the Cambridge Union of the sums incurred and to be incurred for the maintenance of the said pauper, and which appeal came on to be heard at Warwick, at the Midsummer Quarter Sessions of the peace for the county of Warwick, held on the 4th of July, A. D. 1860, the Court adjourned the further hearing of the said appeal to the then next Quarter Sessions of the Peace, subject to the opinion of this Court on the following

CASE.

The settlement relied upon by the respondents at the trial of the said appeal was a settlement by apprenticeship; and in support of this settlement, and in order to enable them to give secondary evidence of the indenture of apprenticeship of the said pauper, the

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respondents called evidence to prove a proper search for the said indenture and the loss of the same. The Sessions on hearing this evidence, and on the objection of the appellants, held that a sufficient search for the missing indenture had not been made by the respondents, and refused to admit secondary evidence of the same.

The respondents then applied to the Sessions, to adjourn the further hearing of the said appeal to the then next Quarter Sessions, in order to enable them to make further search for the said missing indenture.

On the part of the appellants, it was objected that the statute 16 & 17 Vict., c. 97, limited the jurisdiction of the Sessions over the said appeal to the particular Sessions at which the same was then being tried, and that the Sessions had no power to adjourn the further hearing of the said appeal, as contended for by the respondents, * and that no subsequent Sessions had [*138] power over the said appeal; and that the said order of the 14th of May, A. D. 1860, ought to be quashed, there being no evidence before the Sessions to support the same. The Sessions held that they had jurisdiction to adjourn the further hearing of the appeal to the then next Quarter Sessions, and they made an order adjourning the same accordingly, on payment of the costs of the day by the respondents to the appellants, subject to the opinion of this Court on this point.

And at the then next Quarter Sessions of the Peace, held at Warwick, on the 16th of October, A. D. 1860, the Court, on the application of the respondents, and for the purposes of, and without prejudice to, this case, further adjourned the hearing of the said appeal to the then next Quarter Sessions of the Peace in and for the said county.

If this Court should be of opinion that the decision of the Court of Quarter Sessions was incorrect on this point, and that they had no jurisdiction to adjourn the further hearing of the said appeal, then the said order of Sessions adjourning the said appeal, and the said order of the 14th of May, 1860, to be quashed.

Macaulay and Chandos Leigh, for the respondent. — The Sessions had power to adjourn the hearing of this appeal. It is necessary that they should have such power, so as to do justice in any particular case where an adjournment is required; and this Court will suppose that they have exercised a sound discretion in order-

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ing the adjournment. Indeed, there are no materials before the Court by which it could come to the conclusion that the Sessions have acted unwisely.

[CROMPTON, J. — It would have been their duty to adjourn upon good reason being shown at the beginning of the hearing. But is that so when the hearing is regularly entered upon? It is a bad practice to adjourn the hearing under the circumstances which appear in this case. BLACKBURN, J. — It seems to me that they acted indiscreetly in adjourning for the purpose of giving time to make a further search. CROMPTON, J. — In *The Queen* v. *Kendal*, 1 E. & E. 492, 28 L. J. (N. S.) M. C. 110, we held that there was a power to adjourn the hearing; but there, as the counsel was only just beginning to state the case, it was very nearly the same as if the appeal had not begun.]

In *Rex* v. *The Justices of Wilts*, 13 East, 353, Lord ELLENBOROUGH, Ch. J., said: "I hold, without any doubt, that the Court who are to try the appeal have an incidental authority to adjourn it, when once properly lodged, if it be necessary for the advancement or convenience of justice, and that the Sessions are to judge of the proper occasion for doing so."

[CROMPTON, J. — We have always held that at Nisi Prius we may adjourn a cause where we can get the same body to try it.]

The Court of Quarter Sessions is a continuing Court, sitting under the same commission four times a year. But it will be said that there is a limitation to the jurisdiction of Sessions apparent upon the appeal clause in 16 & 17 Vict., c. 97, s. 108, because, after giving an appeal to the next General Quarter Sessions of the Peace, it says, "And such Sessions, upon hearing the said appeal, shall have full power finally to determine the matter." But the real meaning is, that the Sessions, with their usual powers and authorities, shall have full power, &c. It was held in *The Queen* v. *Belton*, 11 Q. B. 379, 17 L. J. M. C. 70, that under the Licensing Act, 9 Geo. IV., c. 61, there was no power to adjourn an appeal to the next Sessions; but there the words were peculiar, and the distinction is adverted to by COLERIDGE, J., who said: "I would not break in upon the general power of Quarter Sessions to adjourn cases depending, which is a very useful one. But here a specific limit is given by the language of the Act. The words 'Session' and 'Sessions' are often used indiscriminately, but here, in section 27, an appeal is given to the General or Quarter Sessions; and then

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it is said that 'the Court at such session' shall hear and determine, and shall make such order, with or without costs, as to 'the said Court' shall seem meet. The whole power of the Court arises upon this clause, and is tied up by it." And Lord DENMAN, Ch. J., said: "I agree in the opinion expressed by Lord ELLENBOROUGH * in *The Queen* v. *The Justices of Wilts*, as to the [*139] power inherent in the Sessions under ordinary circumstances, though it is true that in that case, as my Brother PATTESON intimated in *The Queen* v. *Kimbolton*, 6 Ad. & E. 603, 6 L. J. (N. S.) M. C. 90, it was not necessary to lay down so general a proposition. But giving the fullest effect to the general rule of law, I think the Sessions had no power to act upon it under this statute." And in *Bowman* v. *Blyth*, 7 E. & B. 26, in error, p. 47, 26 L. J. M. C. 57, it was held that there was no power to adjourn the consideration of the table of fees to be taken by the clerks of justices from one Sessions to another; but that was upon the special words which precluded the construction that the power could be exercised by any but the next subsequent Sessions. But it appears from *The Queen* v. *Kimbolton*, above referred to, that the justices had the power to adjourn, if they thought proper to do so. COLERIDGE, J., said: "The only question is, whether this appeal was well lodged. If it was, the Court of Quarter Sessions had power to adjourn. Suppose that a witness were ill, or that any other circumstance occurred which made it impossible to go on. Every Court of justice has an incidental power of adjourning, unless where they are bound by the positive words of a statute." So in *Ex parte Becke*, 3 B. & Ad. 704, it was held to be matter of discretion.

[CROMPTON, J. — I do not doubt that it is matter for them to exercise their discretion upon, supposing they have jurisdiction, but that is the point upon which I am not clear.]

Keen v. *The Queen*, 10 Q. B. 928, 16 L. J. M. C. 180, shows that a judgment may be respited from one Sessions to another without adjourning the Sessions.

Huddleston and Isaac Spooner, for the appellants. — There is no doubt that an appeal may be adjourned before the hearing, but it cannot be done after the hearing has commenced. Before the hearing the Sessions may either respite or adjourn, and after the case is heard they may respite their judgment; but in this case, even if the power existed, it ought not to have been exercised, for the adjournment was asked for to enable the respondents to supply

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a want of evidence occasioned by their own negligence. Another reason why it seems improper to exercise such a power is, that the Court to which the appeal is adjourned might consist of a number of persons not one of whom had been at the original Sessions. There is no case in which it has been held that such a power exists. The Court of Quarter Sessions cannot have a greater power of adjournment than this Court has at Nisi Prius, and yet until the Common Law Procedure Act, 1854, s. 19, there was no power to adjourn during the hearing of the cause.

[BLACKBURN, J. — If the appeal was commenced, and during the examination of an important witness he fell ill, and there was reasonable evidence to show that he would be well enough to give evidence at the next Sessions, though not before, could not the Court adjourn the appeal?]

The proper course would be to adjourn the case and the Sessions; in a criminal case, the jury would be discharged, and continuances entered on the record. The words of section 108 of the 16 & 17 Vict., c. 97, are different from those of section 128, where power is given to the Sessions to adjourn an appeal against orders other than orders for adjudication of settlement of pauper lunatics, or for their maintenance. In the latter section power is expressly given to adjourn, but in section 108 "such Sessions" are fully to determine the matter. "Such" means the same as regards time and place, that is the General Quarter Sessions for the locality. In Bac. Abr., vol. 2, p. 477, under the title "Court of Sessions of Justices of the Peace," it is said, "When the justices are once legally convened, they cannot adjourn any matter depending before them without expressly adjourning the Sessions also; which adjournment must show when the original Sessions commenced." And the author refers to *The Queen* v. *Reading*, Cas. temp. Hardw. 80.

[BLACKBURN, J. — It is very strange that that case should be cited as an authority for the sentence you have read from
[* 140] Bac. * Abr., for, as I read it, it seems to be a decision that the Sessions may adjourn in the middle of the case for the purpose of taking the opinion of the Judges.]

No doubt the Sessions may be continued for the purpose of taking the opinion of the Judges; but the effect of the decision is, that the Sessions must give final judgment, just as in a case when the Sessions give judgment and grant a case for the opinion of

this Court. In *The Queen* v. *The Justices of Warwickshire*, 28 L. J. M. C. 249, it was held that the Sessions had a discretion to decide whether an appeal should be respited or not, but there had been no part hearing in that case.

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CROMPTON, J. — I am of opinion, upon the whole, that the Sessions had power to adjourn the hearing of this appeal. It is a power to be exercised with great care, and ought not to be resorted to unless in cases where the interests of justice require it; as, for instance, in cases where a justice or an important witness has fallen ill in the course of the hearing. The question which we have to decide is, whether the justices had jurisdiction to adjourn the appeal if they thought it right to do so. I am afraid that in *The Queen* v. *Kendal* I rather hastily assumed that if the case had been entered upon, it could not have been adjourned; the point did not actually come before the Court, but I said what I thought, that in such a case there would be no jurisdiction to adjourn. I should have spoken more correctly, if I had said that in general the appeal ought not to be adjourned. But the appellants have failed to make out that there is any difference between such a case and the ordinary one of an appeal being adjourned. In *The Queen* v. *The Justices of Warwickshire* we decided that the appeal might be respited to the next Sessions; and that being so, the whole argument on the part of the appellants fails, for the only ground upon which they rest their contention is removed when it is shown that the first Sessions has not an exclusive jurisdiction to decide the appeal. I think our decision in *The Queen* v. *The Justices of Warwickshire* was quite correct, because the general words of the statute do not show that the justices at the first Sessions are the only justices who can hear and determine. In *The Queen* v. *Belton* the words were peculiar, and left the case free from doubt. The general power of the Sessions to adjourn an appeal or to adjourn the determination is not disputed, but it is contended that there is no power to adjourn to another Sessions after the hearing is commenced; but if part of an appeal can be adjourned, I do not see why the hearing as well as the determination should not be so as well. I think that if the circumstances make it proper to adjourn the appeal, the whole should be adjourned, and should be heard again from the beginning. The authorities show that an appeal may be adjourned to the next Sessions, by way of entering continuances, and the counsel for the appellants admit

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that it may be done for the purpose of consulting the Judges of Assize; if so, why may it not be done in other cases as well? No doubt there may be great inconvenience in adjourning when the appeal has been partly heard, but that is only a question of degree, and cannot show that there is no jurisdiction. *The King* v. *Hedingham Sible*, Burr. Settlement Cases, 112, was a case where a question was referred by the Sessions to the Judges of Assize, and an order founded upon the decision of the Judges was held bad because there had been no continuance or adjournment when the question was put to the Judges. The reporter does not say it would have been improper to enter continuances and adjourn the appeal, and the expression used, "that the Sessions could not take the matter up again," would seem to show that there was something to be done; and I think that probably they would not decide finally before consulting the Judges, and therefore, though it is not said that the case had not been fully heard and determined, it seems probable that such was the case. In *The Queen* v. *Reading* it seems to me that the Sessions did adjourn in the middle of the hearing to the next Sessions. I have come to the conclusion that the justices have a general power to adjourn, but I think that the power ought to be exercised with great care and caution, and probably the true reason for the scarcity * of decisions upon the subject is the unwillingness which has been felt in practice to use the power which they have.

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HILL, J. — I am of the same opinion.

BLACKBURN, J. — I am of the same opinion. I only wish to add, that the words of section 108 are sufficient to give jurisdiction to another Sessions to deal with the appeal. The general rule as to adjournment is laid down by Lord ELLENBOROUGH, Ch. J., in *The Queen* v. *The Justices of Wilts.* He was not speaking of a case where there had been a partial hearing; and the question now before us is, whether it is impossible to justify such an adjournment in any case at all where it may be for the advancement of justice that it should be done. We are only asked whether there is jurisdiction to do it. When a case has been begun and is only partially heard, there is no doubt that it may be exceedingly inconvenient to adjourn; and the Sessions ought to pause long, and require good ground to be laid for the adjournment, but I am unable to see that in no case is there the power to adjourn. In this case it may have been very proper, and it may have been

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improper; I cannot tell about that. The discretion is given to them, and they must decide whether adequate reason is shown or not. *The Queen* v. *Reading* seems to have been a case where the matter was referred to the Judges after a partial hearing, and the case seems to have been taken up by a subsequent Sessions. Lord HARDWICKE said: "Where an appeal is lodged in the Sessions, it is necessary that they make a direct and final judgment (Salk. 480), and they cannot refer it to the Judges of Assize for their judgment; and the case of *The King* v. *Willey* this term; and, therefore, had the matter rested upon the first order, it would undoubtedly have been bad; but then it cannot be doubted that they may continue over the determination on the appeal by a proper adjournment, either to take the advice of the Judges, or for any other reason." Therefore, I understand him to say that, for sufficient reasons, the Sessions may adjourn the hearing, and the only question before us is, whether there is such jurisdiction.

Judgment for the respondents.

ENGLISH NOTES.

As to the general power of justices at Quarter Sessions to adjourn the consideration of a matter properly before them to a subsequent Sessions, see also *Reg.* v. *Justices of Westmoreland* (1868), L. R. 3 Q. B. 457, 37 L. J. M. C. 115, 9 B. & Sm. 288, 11 Cox C. C. 172. Most of the cases on the point anterior to the principal case are there collected. It may be noted that in one of these cases, namely, *Rex* v. *Justices of Wilts* (1811), 13 East, 352, it was decided that although a statute giving an appeal to the Sessions within four months after the cause of complaint shall arise, directs the justices at the said Sessions to determine the matter of such appeal; yet it seems they have an incidental power of adjourning it to another Sessions upon lawful cause, such as the absence of a material witness, of the sufficiency of which they are to judge.

In *Rawnsley* v. *Hutchinson* (1871), L. R. 6 Q. B. 305, 40 L. J. M. C. 97, 23 L. T. 843, 19 W. R. 436, it was held that where, at a General Quarter Sessions held in October, an appeal was dismissed with costs, but the amount of such costs was not ascertained by the clerk of the peace until the Sessions held in November, an order of Sessions for payment of such ascertained amount of costs was good. But in *Midland Railway Co.* v. *Edmonton Guardians* (1894), 1895, 1 Q. B. 357, 64 L. J. Q. B. 113, 72 L. T. 206, 43 W. R. 309; (affirmed H. L.) 1895, A. C. 485, 64 L. J. Q. B. 710, 72 L. T. 811, the opinion was expressed

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by Lord HALSBURY and A. L. SMITH, L. J., that where costs are allowed by an order of Quarter Sessions and consent to a taxation out of Sessions is not given, no subsequent Court of Quarter Sessions has jurisdiction to order a taxation.

It has been held in an Irish case that justices at Petty Sessions have, in addition to the power of adjournment given to them by statute, an inherent power of adjourning a case at any time to any further Sessions: *Reg.* v. *Justices of Cork* (1885), 18 L. R. Ir. 99; but that where a case is fully heard and only adjourned for the purpose of determining and pronouncing the order, the same justices who heard the case must also concur in the order pronounced: *Ib.*

SECTION III.—*Essentials of Procedure.*

No. 14.—REG. *v.* HYDE.

(Q. B. 1852.)

RULE.

THE forms of conviction given in the schedule to the Summary Jurisdiction Act, 1848 (11 & 12 Vict., c. 43),—now superseded by the forms of the Summary Jurisdiction Rules, 1886, made under the powers of the Summary Jurisdiction Act, 1879 (42 & 43 Vict., c. 49, s. 29),—apply to all cases; and convictions drawn up in such of the forms as are applicable to the particular case are sufficient.

Reg. v. Hyde.

21 L. J M. C. 94–96 (s. c. 7 El. & Bl. 859 *n.*; 16 Jur. 337).

[94] *Conviction.—Validity.—Statutory Forms.*

The forms of convictions given in the schedule to the 11 & 12 Vict., c. 43, apply to all cases; and convictions drawn up in such of the forms as are applicable to the case are sufficient.

A conviction under the Game Acts, 1 & 2 Will. IV., c. 32, and 5 & 6 Will. IV., c. 20, s. 21, adjudged a pecuniary penalty, to be paid and applied according to law, following the words of Form I. 2, in the schedule to 11 & 12 Vict., c. 43. The Game Acts provided that one moiety of the penalty should be paid to the informer, and the other moiety to go to the overseers of the poor, and to be paid to one of the overseers or to some other parish officer appointed by the justice.

Held, that the conviction was sufficient.

No. 14. — Reg. v. Hyde, 21 L. J. M. C. 94, 95.

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The following conviction, and an order of Sessions confirming the same, having been removed into this Court by *certiorari*, in order to enforce it under 12 & 13 Vict., c. 45, s. 18, a rule *nisi* to quash the conviction was afterwards obtained.

"Kent, to wit. — Be it remembered, that on the 27th day of December, A. D. 1850, at Sevenoaks, in the said county of Kent, John Hyde the younger is convicted before the undersigned, two of Her Majesty's justices of the peace for the said county, for that he, the said John Hyde, did between the 1st day of February last past, and the 1st day of October last past, to wit, on the 28th day of September last past, at the parish of Kemsing, in the county aforesaid, kill one pheasant, contrary to the statute in such case made and provided, and we adjudge the said John Hyde for his said offence to forfeit and pay the sum of 5*s.*, to be paid and applied according to law, and also to pay to George Turner, who prosecutes in this case, the sum of £1 2*s.* for his costs in this behalf; and if the said several sums be not paid forthwith, we adjudge the said John Hyde to be imprisoned in the house of correction at Maidstone, in the said county, for the space of one calendar month, unless the said several sums shall be sooner paid. Given under our hands and seals the day and year first above mentioned, at Sevenoaks, in the county of Kent aforesaid.

"W. LAMBARDE (L. S.).
"C. R. C. PETLEY (L. S.)."

Archbold now showed cause. This is a conviction under 1 & 2 Will. IV., c. 32, by section 35 of which the *certiorari* is taken away.

[Hawkins. — This objection was raised when the writ was moved for. If it issued improvidently, there should have been a motion to quash it. Upon the present rule no point can be argued except as * to the validity of the conviction. Moreover, here [*95] the order of Sessions is brought up to be enforced, and any objection can therefore be taken. *The Queen* v. *Hellier*, 29 L. J. M. C. 3. Thirdly, the conviction is wholly without jurisdiction, and so the *certiorari* is not taken away.]

The objection raised here is not to the jurisdiction, but to the form of the conviction in not distributing the penalty. But the conviction is perfectly good in this respect. By the 5 & 6 Will. IV., c. 20, s. 21, one moiety of the penalty is to go to the overseers to

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be applied to the county rate, and the other moiety to the informer. The justices, therefore, had no discretion in the matter, and so no distribution of the penalty was required. *In re Boothroyd*, 15 M. & W. 1, 15 L. J. M. C. 57.

[COLERIDGE, J. — It does not state who the informer is.]

It states who prosecutes, and that is the same thing. But this conviction follows the form in the Schedule I. 2, to 11 & 12 Vict., c. 43, which is made sufficient by sect. 32 of that Act. It cannot be necessary to specify in the conviction the person to whom the penalty is to be paid, because it may be ordered to be paid forthwith, and the conviction itself need not be drawn up until afterwards. When the *certiorari* was granted it was suggested that sect. 17 of the 11 & 12 Vict., c. 43, did not apply where there is no distribution of the penalty; but that is not so; that section assumes that some one of the three forms referred to will meet every case.

[PATTESON, J. — It would have been sufficient if the defendant had paid the justices.]

It may be paid to the justices' clerk or to any of the overseers. In *Griffith* v. *Harries*, 2 M. & W. 335; 6 L. J. (N. S.) M. C. 29, and *Chaddock* v. *Wilbraham*, 5 C. B. 645, 17 L. J. M. C. 79, there was a clear excess of jurisdiction and not a mere want of particularity, which is the most that can be suggested here. *Ex parte Hopwood*, 19 L. J. M. C. 197, shows that this Court will not review the manner in which justices have exercised their jurisdiction.

Bramwell and Hawkins in support of the rule. — Every conviction must show that an offence has been committed, and a penalty imposed according to law: Paley on Convictions, p. 190; and the mode of paying the penalty must be adjudged as part of the conviction: *The King* v. *Dimpsey*, 2 T. R. 96. In this case a moiety of the penalty is to be paid to one of the overseers, or to some other parish officer appointed by the justice; until the justice has exercised his discretion as to the person to receive it, the law cannot apply the penalty.

[PATTESON, J. — Unless the justices appoint any other person, the penalty is to be paid to one of the overseers. The form in 1 & 2 Will. IV., c. 32, s. 39, is silent about any other officer.]

At all events, the justices must select one of the overseers. Then, as to the other moiety, there is nothing to show the defendant who is the informer to whom it is to be paid. *Chad-*

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dock v. *Wilbraham* shows that the person must be accurately designated.

[Lord CAMPBELL, Ch. J. — There the penalty was ordered to be paid to a wrong person, and in default the defendant was to be imprisoned, which was a clear excess of jurisdiction.]

So here, there is no proper adjudication of the persons to whom the penalty is to be paid, and therefore the imprisonment is illegal.

[Lord CAMPBELL, Ch. J. — This conviction follows the form given in 11 & 12 Vict., c. 43. If that is not sufficient such a form becomes a mere snare.]

The Legislature could not have intended that the form should apply to all cases, even where the law does not make a semblance of direction with respect to the payment of the penalty. It must be looked upon as a model merely, and not as obligatory upon the justices.

Lord CAMPBELL, Ch. J. — It is difficult to see how a *certiorari* lies in this case, but upon that point I give no opinion.

*In the case of *Chaddock* v. *Wilbraham* there was a clear [*96] excess of jurisdiction, because the justices directed an imprisonment which they had no power to order, and therefore the *certiorari* clearly lay. Here there is not the same excess of jurisdiction, and this case therefore is not governed by that authority. However, the conviction being now before us, it seems to me it ought to be supported, for although it may not be sufficient under 1 & 2 Will. IV., I think it is quite sufficient under 11 & 12 Vict., c. 43, inasmuch as it follows exactly the requisites and the form which that Act prescribes. It is a conviction in a penalty, and in default of payment imprisonment, and it is couched *in ipsissimis verbis* of the form given in the schedule; it states also those matters which are required by, but which are not set out in, the form. The Legislature thought this was enough to be shown, and substantially no hardship or practical inconvenience is likely to arise from considering the form to apply to this case, because the party convicted can easily learn how he is to pay the penalty and relieve himself from imprisonment. If it be necessary for the justices to select to which of the overseers payment is to be made, or to point out any other parish officer for that purpose, that may be done by word of mouth. As, therefore, the form given by the Act has been pursued, I think the conviction must be held good.

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PATTESON, J. — I have had some doubt whether a *certiorari* would lie in this case. The case that has been referred to was one in which the justices had ordered payment to a person who had no right to receive it, which was clearly an excess of jurisdiction. Here it is said that the imprisonment was an excess of jurisdiction; but how far that could be considered anything more than a matter of form, in respect of which the *certiorari* in this case is taken away, it is not necessary now to determine, because I think the form given by the 11 & 12 Vict., c. 43, does apply here, and that a conviction drawn up according to that form is sufficient. It applies to all cases in which a penalty and imprisonment are imposed, and the justices having so drawn up the conviction in this case, I think, even supposing the *certiorari* to lie, that it is good and must be upheld. I wish to guard myself from saying whether the 37th section of the first Act, 1 & 2 Will. IV., c. 32, does or does not apply, so as to require the justices to name one of the overseers to whom the penalty should be paid.

COLERIDGE, J. — Assuming that the *certiorari* would lie, of which I have some doubt if the case had stood upon the two Acts of Will. IV., I should have felt a difficulty; but, I think, under the 11 & 12 Vict., c. 43, the conviction may be upheld. The 17th section of that Act was intended to embrace all cases, both of convictions and orders, under a threefold division. First, where the punishment under the conviction was to be by distress, and in default imprisonment; secondly, where a penalty was imposed, and in default of payment imprisonment; thirdly, where the punishment was by imprisonment only. And in the case of orders just the same division is followed. That being the classification, the language of the section is, that in all cases of convictions (no exception whatever being made) it shall be lawful for the justices to draw up their conviction in such one of the forms (I. 1–3) in the schedule as shall be applicable to the case, or to the like effect. That is to say, the justices are to turn to the three forms given, and to select the one applicable to the particular case. It may turn out that something may not have been exactly provided for in the form, but the Legislature has thought it better to prescribe a form that may in all cases be used, than to leave the conviction open to every attack which might be pointed out by ingenuity, knowing well, as we do in this case, that no substantial hardship would follow to the party convicted; it being remembered also that we are dealing with a

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conviction which may not be drawn up at all, unless required for the purpose of an appeal. I think, therefore, that as the conviction follows the form given by the statute, it is perfectly valid.

Rule discharged.

ENGLISH NOTES.

Before the Summary Jurisdiction Act, 1848, a general form for summary convictions, where no form was provided by the particular statute, was given by 3 Geo. IV., c. 23.

In summary convictions matters of form must be strictly observed as in indictments. *Rex* v. *Pain* (1826), No. 15, p. 208, *post*. If part of a conviction is bad the whole is bad. *Rex* v. *Patchett* (1804), 5 East, 339. Where justices had convicted a person in one penalty for two alleged offences, and the conviction was bad as to one of them, it was held to be bad altogether. *Bettesworth* v. *Allingham* (1885), 16 Q. B. D. 44, 34 W. R. 296.

The conviction may state the time when the offence was committed as being between two dates. *Onley* v. *Gee* (1861), 30 L. J. M. C. 222, 42 L. T. 338. The place must be sufficiently stated to show that the justices had jurisdiction. *Rex v. Hazell* (1810), 13 East, 139; *Rex* v. *Chandler* (1811), 14 East, 267; *In re Peerless* (1841), 1 Q. B. 143, 10 L. J. M. C. 67.

A conviction is bad where the charge does not in terms show a legal offence, although the meaning of the charge was understood by the party charged, and was in a form used time out of mind in the Court before which the party was charged. *Ex parte Daisy Hopkins* (1892), 61 L. J. Q. B. 240, 66 L. T. 53, 17 Cox C. C. 444.

In stating an offence in a conviction it is sufficient to follow the words of the Act by which the offence is created: *In re Perham* (1859), 5 Hurl. & N. 30, 29 L. J. M. C. 33, 5 Jur. (N. S.) 1221; but the conviction must bring the offence within the words of the Act: *Rex* v. *Marsh* (1824), 2 B. & C. 717, 4 Dowl. & Ry. 260.

In *Fletcher* v. *Calthrop* (1845), 6 Q. B. 880, 19 L. J. M. C. 49, 1 New Sess. Cas. 529, it was held that where an act was made punishable by statute on summary conviction, which act might be lawful if performed under certain circumstances, these circumstances ought to be negatived in the conviction. And it would seem that this is still necessary, as the Summary Jurisdiction Acts, 1848 and 1879, though they make it unnecessary to negative an exception in an information or complaint, are silent as to convictions.

All the facts material to constitute the offence should be alleged: *Rex* v. *Jukes* (1800), 8 T. R. 536, 5 R. R. 445; *Rex* v. *Walsh* (1834),

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3 N. & M. 632; *Chaney* v. *Pain* (1841), 1 Q. B. 712; and there ought to be no room for doubt as to the offence with which the defendant is charged: *Rex* v. *Pereira* (1834), 2 Ad. & El. 375. Where an Act gives summary proceedings for various offences, the conviction, though formally drawn, will not support a commitment if it leaves it uncertain under which section of the Act the conviction actually took place. *Charter* v. *Graeme* (1849), 13 Q. B. 227, 18 L. J. M. C. 73. A defendant may be convicted of several offences in the same conviction. *Rex* v. *Swallow* (1799), 8 T. R. 284.

A conviction which does not contain an adjudication cannot be supported. *Rex* v. *Harris* (1797), 7 T. R. 238.

Surplusage does not vitiate a conviction. *Rex* v. *Jefferies* (1792), 4 T. R. 767; *Rex* v. *Picton* (1802), 2 East, 195; *Charter* v. *Graeme* (1849), 13 Q. B. 227, 18 L. J. M. C. 73.

The conviction need only be signed by two justices, where the offence is within the jurisdiction of two justices. *Ex parte Roynton* (1850), 14 Justice of the Peace, 129.

Quashing a conviction on a penal statute for mere matter of form at Sessions, was held not to be an acquittal of the defendant, so as to conclude the case against any further inquiry in the Court of King's Bench. *Rex* v. *Ridgway* (1822), 5 B. & Ald. 527, 1 Dowl. & Ry. 132.

An instrument in which a magistrate states that a party has been brought before him and is to be punished in pursuance of an Act of Parliament, is a conviction and not an order. *Ex parte Gray* (1844), 1 New Sess. Cas. 354, 8 Jur. 1049.

No. 15. — Ex parte PAIN.

(K. B. 1826.)

RULE.

WHERE a statute describes an offence by an alternative, a summary conviction, stating the offence in the alternative, but not stating which of the alternatives has been committed, is bad.

Ex parte Pain.

5 Barn. & Cress. 251–254 (29 R. R. 231; s. c. *nom.* *Rex* v. *Pain*, 7 Dowl. & Ry. 678).

Justice of the Peace. — Statutory Offence. — Alternative. — Conviction.

[251] By the 6 Geo. IV., c. 108, s. 3, it was enacted that vessels of a certain description found "in any part of the British or Irish Channels, or

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elsewhere on the high seas, within one hundred leagues of the coasts of the United Kingdom," having "in any manner attached thereto" casks of certain dimensions, "of the sort or description used, or intended to be used, or fit or adapted for the smuggling of spirits (unless such casks are really necessary for the use of such vessel, or are a part of her cargo, and included in the regular official documents of such vessel)," the casks, vessel, &c., shall be forfeited. By s. 49, certain persons found to have been on board such vessels liable to forfeiture are subjected to certain punishments. A conviction stated that A. B. was convicted of having been found on board a vessel liable to forfeiture; "for that it was found in the British Channel, having in a certain manner attached thereto divers, to wit, twenty casks (of the dimensions mentioned in s. 3), and of the sort or description used, or intended to be used, for the smuggling of spirits, the said casks not being really necessary, for the use of the vessel, and included in the regular official documents of the vessel." *Held*, first, that the vessel being found in the British Channel, it was not necessary to allege that she was within one hundred leagues of the coast. Secondly, that the statement that the casks were "in a certain manner" attached to the vessel was sufficient. Thirdly, that it was not necessary to negative that the casks were part of the cargo, the conviction stating that they were not included in the official documents of the vessel. Fourthly, that the allegation that the casks were "of the sort or description used, or intended to be used, for the smuggling of spirits," being in the alternative, was bad.

Platt moved for a writ of *habeas corpus* to bring up the body of Pain, in order to have him discharged. The prisoner had been convicted under the 6 Geo. IV., c. 108, s. 3. The conviction stated that an information was exhibited against Pain, which charged that he was on, &c., discovered to have been on board a certain boat on the high seas, then liable to forfeiture under the provisions of a certain Act of Parliament relating to the revenue of customs.[1] "For that the boat *not being square-rigged, [*252] and belonging in the whole to his said Majesty's subjects,

[1] By the 6 Geo. IV, c. 108, s. 3, it is enacted, "That if any vessel or boat, not being square-rigged, belonging in the whole or in part to His Majesty's subjects, or whereof one-half of the persons on board, or discovered to have been on board, the said vessel or boat, shall be subjects of His Majesty, shall be found in any part of the British or Irish Channels, or elsewhere on the high seas, within one hundred leagues of any part of the coasts of the United Kingdom, or shall be discovered to have been within the said limits or distances, having on board, or in any manner attached or affixed thereto, or conveying or having conveyed in any manner any brandy, &c., or any cordage, &c., or any casks or other vessels whatsoever capable of containing liquids of less size or content than forty gallons, of the sort or description used or intended to be used, or fit or adapted for the smuggling of spirits, &c. (unless such cordage or other articles as aforesaid are really necessary for the use of the said vessel, or are a part of the cargo of the said vessel, and included in the regular official documents of the said vessel), then, and in such case, the said spirits, &c., together with the casks, &c., and also the vessel, &c., shall be forfeited."

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on, &c., was discovered to have been in a certain part of the British Channel, having in a certain manner attached to the said boat divers, to wit, twenty casks, capable of containing liquids, of less size and content than forty gallons each, and of the sort and description used or intended to be used for the smuggling of spirits, the said casks not being really necessary for the use of the said boat, and included in the official document of such boat, contrary to the form of the statute. The said H. Pain being discovered to have been on board the said boat at the time of her becoming and being so subject and liable to forfeiture," &c. The warrant of commitment followed the conviction. Four objections were taken to the conviction: first, that the offence was described in the alternative; viz., that the boat on board which the prisoner had been was discovered to have been in a certain part of the British Channel, having in a certain manner attached to her twenty casks, used or intended to be used for smuggling. Secondly, that the mode in which the casks were attached to the boat should have been alleged with more certainty. Thirdly, that the conviction did not state that the boat had been within one hundred leagues of the coast of the United Kingdom. Fourthly, that the exception in the [* 253] statute was not sufficiently negatived, the * conviction merely stating that the casks were not necessary for the use of the boat, and were not included in the official documents of the boat. [ABBOTT, Ch. J. — The first is the only objection in which there is any weight. The statute speaks of casks in any manner attached to the boat; the manner of attaching them forms no part of the offence. As to the third, if the boat be found anywhere in the British or Irish Channels, no question as to the distance from the coast can arise. The fourth objection fails, because the exception does not apply, unless the casks are both part of the cargo and included in the official documents of the boat. Here it is alleged that they were not so included; they could not, therefore, be within the exception.]

The Attorney-General and Shepherd opposed the motion, and contended that the first objection was also invalid; for that whether the casks were of a description used in smuggling, or intended to be so used, they were equally within the words of the statute, and that consequently the description in the alternative was sufficient; and they relied upon the case of *Rex* v. *Middlehurst*, 1 Burr. 399, where an order of sessions confirming an order of two

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justices made in pursuance of the 11 Geo. II., c. 19, s. 3, against T. Middlehurst, for "wilfully and knowingly aiding and assisting in fraudulently removing and conveying away five cows, &c., or in concealing the same," was held good. So also in Hale's P. C. 535 it is said that an indictment for robbing in or near the king's highway is good.

*PER CURIAM. — In *Rex* v. *Middlehurst* the Court appear [* 254] to have proceeded upon a distinction between an order and an indictment; and it has always been held that matters of form must be as strictly observed in summary convictions as in indictments In the passage cited from Hale's P. C. it is said that the indictment is good in the form there mentioned, because that which is in the alternative is not the substance of the offence. The enactment in question mentions three descriptions of casks which it is unlawful to have attached to any boat under certain circumstances. First, those of the sort or description used for the smuggling of spirits; secondly, those intended to be so used; and, thirdly, those fit or adapted for that purpose. This conviction does not allege that the casks attached to the boat on board which the prisoner was found answered any one of those descriptions, but that they answered one or other of those descriptions. That allegation in the alternative is defective in form, and the prisoner is entitled to avail himself of the mistake. The writ must, therefore, be granted.

Writ granted.

ENGLISH NOTES.

Where an information charged that the defendant "did kill, take, and destroy, or attempt to kill, take, and destroy, the fish in a river or stream," and it was adjudged that he was "guilty of the offence aforesaid," and he was convicted "of the premises," the Court admitted the validity of the objection that the offence was stated in the alternative and quashed the conviction. *Rex* v. *Sadler* (1787), 2 Chitty, 519. And where a defendant was charged with selling "beer or ale" without an excise license, it was held that it ought to have been stated which of the two alternative offences had been committed, and that the conviction was therefore bad. *Rex* v. *North* (1825), 6 Dowl. & Ry. 143, 28 R. R. 538. Where a bye-law provided that "no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public," and an information and conviction stated that the defendant permitted smoke to escape contrary to the bye-law, without stating in terms any reasonable ground of complaint to the passengers or the public or either of them, it was held that

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such statement was insufficient and that the conviction must be quashed. *Cotterill* v. *Lempriere* (1890), 24 Q. B. D. 634, 59 L. J. M. C. 133, 62 L. T. 695, 17 Cox C. C. 97.

The conviction will be bad notwithstanding that the penalty is the same for either offence. *Ib.; Rex* v. *Sadler, supra.*

AMERICAN NOTES.

It is familiar law that an allegation in an indictment or information should never be laid in the disjunctive, and it results that a conviction following such allegation would be bad. As "forged or caused to be forged;" "meadow or pasture;" "mesne process or execution." So on an indictment for burglary, of premises "in which goods, wares, merchandise, or other valuable thing was kept for use, sale, or deposit." *Danner* v. *State*, 54 Alabama, 127; 25 Am. Rep. 662. So of selling intoxicating liquors, without license, "to be drunk in, upon, or about the building or premises where sold." *State* v. *Charlton*, 11 West Virginia, 332; 27 Am. Rep. 603. So of carrying arms "on or about the person." *Parker* v. *State* (Texas), 20 S. W. Rep. 707. So of fraudulently concealing property, "with intent thereby to prevent the attachment or seizure of the same upon mesne process or execution." *State* v. *Naramore*, 58 New Hampshire, 273. So in arson, of "did burn or cause to be burned." *People* v. *Hood*, 6 California, 236.

But where "or" is used in the sense of "to wit," that word may be adopted. As "counterfeit bills or promissory notes." *Brown* v. *Commonwealth*, 8 Massachusetts, 59. And "a mare of a bay or brown color." *State* v. *Gilbert*, 13 Vermont, 647. And "art or mystery." *Read* v. *People*, 86 New York, 381.

No. 16. — REX *v.* JUSTICES OF ESSEX.

(K. B. 1826.)

RULE.

WHERE an appeal is made by a person under a statute which gives the right of appeal to persons aggrieved, the notice of appeal must state that the appellant is aggrieved.

Rex v. Justices of Essex.

5 Barn. & Cress. 431–433 (29 R. R. 283).

Justice of the Peace. — Appeal. — "Person aggrieved."

[431] In a notice of appeal against an order of two justices for stopping or diverting a public footway, it is necessary to state that the party intending to appeal is injured or aggrieved by the order.

No. 16. — Rex v. Justices of Essex, 5 Barn. & Cress. 431–433.

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At the Epiphany Sessions for the county of Essex, 1826, George Frost appealed against an order made by two justices, for diverting and turning a certain part of a public footway in the parish of Mountnessey, in the said county. It was stated in the notice of appeal that George Frost, of the parish of Mountnessey, a rated inhabitant of the said parish, intended to appeal against the order, &c., but it was not stated that he was injured or aggrieved by the order, and it was objected that the * 55 Geo. III., [*432] c. 68, s. 3, gave the right of appeal only to the person or persons injured or aggrieved by the order or proceeding; and that it was therefore necessary for the party intending to appeal to show by his notice that he was a person injured or aggrieved; for otherwise he did not come within the description of persons entitled to appeal. The Court of Quarter Sessions were of opinion that the notice was insufficient in this respect, and they refused to hear the appeal. A rule *nisi* had been obtained by Jessopp for a *mandamus* commanding the justices to cause continuances to be entered, and to hear and determine the merits of the appeal at the next Quarter Sessions.

Knox and Brodrick showed cause, and contended, as before, that the party could not show himself to be entitled to appeal unless he described himself as a party grieved.

Jessopp and Dowling, *contra*. — The statute in question does not require that the grounds of the appeal should be stated; the party was not therefore bound to show how he was aggrieved by the order. That was to be made out by evidence at the hearing of the appeal; and if he could not show himself aggrieved, it would be a sufficient reason for dismissing the appeal. *Primâ facie* every person is aggrieved by the stopping up or diverting of a public footway, and as the appellant is not compelled to state how he is aggrieved, it would be useless to describe himself as a party aggrieved. That would not give the respondents any information as to the nature of the case which they had to meet at the sessions.

* Abbott, Ch. J. — The matter in question, viz., the stop- [*433] ping up or diverting of a public highway, affects in a certain degree all His Majesty's subjects; and therefore as the statute has not given a right of appeal to all persons, but merely to the party aggrieved, we must suppose that the Legislature intended to confer that privilege upon those persons alone who have sustained some

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special and peculiar injury, and not to extend the power of appealing to any captious person whomsoever. Upon the whole, then, I am of opinion that, in order to satisfy this statute (without giving any rule for the construction of others), it should have been stated in the notice that the appellant was aggrieved. This rule must therefore be discharged. *Rule discharged.*

ENGLISH NOTES.

Where, by a local Act, trustees of roads were authorised to make an order for stopping up part of certain old highways, and a right of appeal was given to any person aggrieved by the making of any such order, it was held that in a notice of appeal against an order of the trustees for stopping up a highway, it was necessary to state that the party intending to appeal was aggrieved by the order. *Rex* v. *Justices of Yorkshire* (1828), 7 B. & C. 678, 1 Man. & Ry. 547.

By an improvement Act an appeal to Quarter Sessions was given to any person who should think himself aggrieved by any order made by virtue of the Act. At a meeting of the owners of property to consider an application to Parliament for an Act for the purpose of a better supply of water for the town, the chairman stated that the expenses of such application could not be charged on the rates under the Improvement Act; but a resolution was passed in which A. concurred, empowering the commissioners, out of the town's funds, to prosecute such application. An order was afterwards made by the commissioners on the treasurer for the payment of certain sums of money for expenses incurred in such application. It was held that A. was not a party aggrieved within the Act, and therefore could not appeal against the order. *Harrup* or *Harrop* v. *Bayley* (1856), 6 El. & Bl. 218, 25 L. J. M. C. 107, 2 Jur. (N. S.) 882. Where, in the metropolis, a tenant of D. left a package on the pavement of a court (in the city) 141 feet long and 25 feet wide, with two foot pavements, and was charged under 30 & 31 Vict., c. 134, s. 6, with leaving a package longer than necessary, and D., the freeholder, contended that the court was private property for the sole use of the tenant and was not a street, on the tenant being convicted, it was held that D. was not "a person aggrieved," and was not entitled to have a special case stated under 42 & 43 Vict., c. 49, s. 33. *Draper's Co.* v. *Hadden* (1893), 57 Justice of the Peace, 200.

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SECTION IV. — *Statutory Protection.*

No. 17. — HAZELDINE *v.* GROVE.

(Q. B. 1842.)

No. 18. — KIRBY *v.* SIMPSON.

(EX. 1854.)

RULE.

A JUSTICE of the peace is entitled to the statutory protection, although he has exceeded his jurisdiction, if with some colour of reason he has believed himself to be acting in pursuance of his lawful authority, and although he is charged with having acted maliciously.

Hazeldine v. Grove.

3 Queen's Bench, 997-1008 (s. c. 12 L. J. M. C. 54).

Justice of the Peace. — Statutory Protection. — Limitation. — Notice of Action.

A charge being brought before defendant, a justice appointed under [997] Stat. 2 & 3 Vict., c. 71, plaintiff was examined for the defence on that charge; and, his evidence being unsatisfactory to defendant, he was removed into an adjoining room, while defendant considered the charge, as to which defendant decided that he had no jurisdiction; but he then held plaintiff to bail, suspecting him of perjury, to a future day (some witnesses in contradiction having gone away), and on that day (the witnesses appearing) committed plaintiff for perjury. The bill for perjury was thrown out. Plaintiff sued defendant for false imprisonment in less than six months but in more than three, and laid the venue out of Middlesex, in the county where the imprisonments took place. On these facts the plaintiff was nonsuited.

Held, that the nonsuit was right, defendant not appearing to have acted otherwise than *bonâ fide*, and being therefore entitled to the protection of 2 & 3 Vict., c. 71, as to limitation of time, and venue; and that plaintiff, not having demanded that the question of *bona fides* should be put to the jury, could not demand a new trial on the ground that the Judge had nonsuited him on the objection.

Trespass for assault and false imprisonment.

Plea, not guilty (by statute). Issue thereon.

The cause was tried before ALDERSON, B., at the Kent Spring Assizes, 1842, when the following facts appeared, as stated by the

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LORD CHIEF JUSTICE on delivering the judgment of this Court *in banc.*

"The defendant is a police magistrate at Greenwich, appointed under Stat. 2 & 3 Vict., c. 71. A person, the master of the plaintiff, had been brought before him on a charge under the Pawnbrokers' Act. Two witnesses were examined in support of it; and the master proposed to call the plaintiff in his defence. [* 998] The defendant, * who appeared to entertain suspicions of the truth of the testimony about to be offered, cautioned the plaintiff, with some earnestness of manner, before he gave his evidence, of the consequences if he should prevaricate or forswear himself. The evidence, however, was given; and, it appearing to be wholly unsatisfactory to the defendant, the plaintiff was removed to another room, while he considered the principal case; in which, on examination of the statute, he found he had no jurisdiction, and dismissed the complaint. The plaintiff was then called in; but, the two witnesses having in the mean time departed, the plaintiff was told he would be committed unless he found bail to appear on the 4th of August. The bail were immediately found, and he was discharged. On the 4th of August, the witnesses appeared, and the plaintiff; the charge of perjury was gone into, and the plaintiff committed to take his trial at the Central Criminal Court. At the sessions, the bill was preferred, and thrown out by the grand jury. The action was brought more than three but less than six months after either imprisonment; and the venue was laid in Kent, where the trespasses were committed. The defendant's counsel insisted that he was entitled to the protection of sect. 53 [1] of Stat. 2 & 3 Vict., c. 71, and that the venue therefore should have been in Middlesex, and the action brought within three months. The Judge was of this opinion, and nonsuited the plaintiff." The case at Nisi Prius was discussed principally on the effect of the statutes, neither party requiring that any question as to *bona fides* should be put to the jury.

In last Easter Term, Sir W. W. Follett, Solicitor-General, [666 *] * obtained a rule *nisi* for a new trial. In last Michaelmas Term [2]

Thesiger and Bodkin showed cause. It is contended on behalf

[1] Repealed by the Public Authorities Protection Act, 1893 (56 & 57 Vict., c. 61), which gives a uniform period of six months' limitation.

[2] November 23rd, 1842. Before Lord DENMAN, Ch. J., WILLIAMS and COLERIDGE, JJ.

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of the plaintiff, first, that the magistrate had no power to proceed at all, inasmuch as he could not commit for perjury; and that, having no jurisdiction over the subject-matter of the charge, he was not protected by any of the limiting clauses which apply to the case of magistrates acting in the execution of their office. But the argument is founded on a misapprehension of the authorities. The justices in Quarter Sessions have, indeed, no power to entertain indictments for perjury; but they have authority to take the preliminary proceedings. Hawkins's Pleas of the Crown was cited for the plaintiff. It is there said, vol. iii. p. 77, ed. 7, Book 2, ch. 8, s. 64: "It hath been of late settled, that justices of peace have no jurisdiction over forgery or perjury at the common law; the principal reason of which resolution, as I apprehend, was, that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence; and the word 'trespass,' in its most proper and natural sense, is taken for such kind of injuries; it shall be understood in that sense only in the said statute and commission, or at the most to extend to such other offences only as have a direct and immediate tendency to cause such breaches of the peace; as libels, and such like, which on this account have been adjudged indictable before justices of peace. And for this reason principally, as I apprehend, the Court of * King's Bench in the case [*1000] of one Pitt, since the above-mentioned resolution concerning perjury and forgery, refused to quash an indictment found at a session of the peace for a libel, but ordered the defendant to demur to it, if he thought fit." *Reg.* v. *Bainton*, 2 Str. 1088, and *Reg.* v. *Yarrington*, 1 Salk. 406, are referred to in the margin: those cases, as well as the whole passage in Hawkins, show that the author is speaking only of the trial, not of the preliminary proceedings. In 3 Hawk. P. C., p. 75, Book 2, ch. 8, sect. 58, it is said that the justices of the peace have no jurisdiction to hear and determine certain felonies; but it is added that they can take examinations for any kind of felony. Sect. 3 of Stat. 7 Geo. IV., c. 64, gives express power to every justice of the peace to take examinations, bind over, &c., on charges of misdemeanour; and perjury is classed among misdemeanours in sect. 23 of the same statute. And at any rate the power to bind over to prosecute or give evidence in cases of perjury is there recognised; but who can bind over except a magistrate?

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It will, however, be contended that the defendant either acted in the supposed execution of his general power as a magistrate, and can therefore be protected only by Stat. 24 Geo. II., c. 44, s. 8, or as a metropolitan justice of the peace, in which case he would be protected by Stat. 10 Geo. IV., c. 44, s. 41; and that, in both these statutes, the limitation is six months. Also that, in the former case by Stat. 21 Ja. I., c. 12, s. 5, and in the latter by Stat. 10 Geo. IV., c. 44, s. 41, the venue is to be laid in the county where the fact was committed, that is, in Kent. But the defendant [* 1001] is appointed under Stat. * 2 & 3 Vict., c. 71, the object of which Act was not the same as that of Stat. 10 Geo. IV., c. 44. Stat. 2 & 3 Vict., c. 71, erects a jurisdiction for the metropolitan Police Courts, and makes the justices appointed to them justices of the counties of Kent, &c.; and by sect. 14 one of such justices may act singly in cases where the law ordinarily requires two county justices, except that they cannot act where the law requires the act to be done at a special or petty session of all the justices of the division, nor at Quarter Sessions. This jurisdiction is very different from that under Stat. 10 Geo. IV., c. 44. The defendant, therefore, acts under Stat. 2 & 3 Vict., c. 71, the fifty-third section of which limits the action to three months and requires the venue to be in Middlesex. If, however, there were an inconsistency, and any of the earlier statutes applied, as well as Stat. 2 & 3 Vict., c. 71, then the later statute must prevail. *Rex* v. *The Justices of Middlesex*, 2 B. & Ad. 818. And this answers any argument which may be suggested from sect. 55 of Stat. 2 & 3 Vict., c. 71, whereby it is enacted that Stat. 10 Geo. IV., c. 44, shall be construed as one Act with Stat. 2 & 3 Vict., c. 71.

Stat. 2 & 3 Vict., c. 71, s. 23, makes it perjury to give false evidence wilfully before any of the Courts appointed; and sect. 36 gives a general power to remand a party charged, or to let him go at large on his personal recognisance. Here, however, it is contended that there was no charge. But the question is not whether the act of the defendant was perfectly legal; for then the protecting clauses would not be wanted. They were passed to protect magistrates who may render themselves liable to actions in the *bonâ fide* exercise of what they suppose to be their duty. [* 1002] The * question is as to the *bona fides*, not as to the strict jurisdiction, unless the subject-matter of inquiry be itself without the jurisdiction: *Weller* v. *Toke*, 9 East, 364; *Prestidge* v.

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Woodman, 1 B. & C. 12; and the same principle applies to parties not magistrates, acting in the supposed execution of a statute which has a protecting clause: *Beechey* v. *Sides*, 9 B. & C. 806 (33 R. R. 333); *Ballinger* v. *Ferris*, 1 M. & W. 628, Tyr. & Gr. 920; *Cann* v. *Clipperton*, 10 A. & E. 582. See *Reed* v. *Cowmeadow*, 6 A. & E. 661; *Lidster* v. *Borrow*, 9 A. & E. 654; *Norris* v. *Smith*, 10 A. & E. 188, — in the last of which cases it was indeed said that the belief must be reasonable; but the facts here leave no doubt on that point.

Sir W. W. Follett, Solicitor-General, Platt, and G. T. White, *contra*. — The question as to *bona fides* was never left to the jury: the Judge nonsuited the plaintiff. [Thesiger. — It was for the plaintiff to require that the question of *bona fides* should go to the jury, if he denied it. *Wedge* v. *Berkeley*, 6 A. & E. 663.] The defendant could not be said to be acting as a magistrate at all: no charge was made, no witness was heard, and the supposed perjury was committed in giving evidence on a charge which the magistrate knew he could not entertain. Sect. 36 of Stat. 2 & 3 Vict., c. 71, referred to on the other side, applies only to cases where parties are charged, and takes for granted that there will be depositions. There could be no reasonable ground here for the magistrate's belief that he was acting in the execution of his office; and therefore he is not within the protecting clauses, although he may have acted *bonâ fide*. *Cann* v. *Clipperton*; *Cook* v. *Leonard*, 6 B. & C. 351 (30 R. R. 348). The * defendant could have [* 1003] made no valid return to a *habeas corpus*, so far as regards the first confinement. [COLERIDGE, J. — Cannot a magistrate commit a man whom he sees picking a pocket?] If he can, that must be because the fact is unquestionable; but a magistrate cannot, on the mere view or hearing, say that a man is wilfully swearing what is false; and, on the first detainer, the magistrate could not possibly have made up his mind that perjury had been committed. [Thesiger. — In *Wedge* v. *Berkeley*, 6 A. & E. 663, the magistrate acted on the view, drawing his inference from what he saw.] That was a case of supposed felony.

But, further, supposing this act to have been done in *bonâ fide* execution of the defendant's duty, it was under his general duty as a magistrate, not under any peculiar powers conferred by Stat. 2 & 3 Vict., c. 71. Although that statute makes the defendant a justice of peace, it does not impose the limitations of sect. 53 in the

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case of all acts of a justice of peace so created, but only in the case of the peculiar acts which this statute authorizes; as, for instance, acts done under sects. 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33. Therefore either the limitation is that of Stat. 24 Geo. II., c. 44, s. 8, and the venue that prescribed by Stat. 21 Ja. I., c. 12, s. 5, or, at any rate, the limitation and venue are determined by sect. 41 of Stat. 10 Geo. IV., c. 44, which statute (sect. 1) makes the police magistrates justices of Kent, &c., and is to be construed as one statute with Stat. 2 & 3 Vict., c. 71, by sect. 55 of the latter. The statutory clauses are, in fact, not inconsistent, but applicable to different cases.

[* 1004] * As to the general right to commit in cases of perjury, no argument arises upon sect. 23 of Stat. 2 & 3 Vict., c. 71. That section makes a particular act perjury; but this offence, as appears by the passage cited from Hawkins, stands on a different footing from other misdemeanours; therefore sect. 3 of Stat. 7 Geo. IV., c. 64, does not apply; and Stat. 2 & 3 Vict., c. 71, s. 23, gives no additional power to magistrates in cases of perjury.

Cur. adv. vult.

Lord DENMAN, Ch. J., now delivered the judgment of the Court.

This was an action against a magistrate for trespass and false imprisonment, in which a nonsuit passed on the grounds that the venue was wrong, and the action brought too late. Two questions were made on the argument: the first, whether the defendant was entitled to any statutory protection; the second, whether, if so, the plaintiff had adopted the right limitation of time and selection of venue. It will be found more convenient to consider the latter point first.

(His Lordship then stated the facts, as *ante*, pp. 215, 216, and then proceeded as follows:)

It is now insisted on, for the plaintiff, that the defendant, if entitled to any protection, was only so to that afforded by Stat. 21 Ja. I., c. 12, s. 5, as to the venue, and Stat. 24 Geo. II., c. 44, s. 8, as to time; that the action therefore was well brought, in Kent, and within six months.

The question then is, was the action brought for anything done in pursuance of Stat. 2 & 3 Vict., c. 71, or in the execution of the powers or authorities given by it? By the third section [* 1005] of the Act the Queen is empowered * to appoint persons,

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with certain qualifications there specified, to be "magistrates of the said Courts," and any person so appointed "may act as a justice of the peace in and for" the counties and liberties named, "although he may not have the qualification by estate required of other justices of the peace." Before they act, they must take the oaths required to be taken by justices of the peace, except the oath of qualification. By subsequent sections of the Act, certain disabilities were imposed on them, which prevent them from exercising their functions in some cases in which ordinary justices may act; and also powers more extended, and a jurisdiction, in many cases, are conferred on them, which ordinary justices have not.

The plaintiff's counsel contended, therefore, that a police magistrate was entitled to two kinds of protection, in respect of his two-fold character: that he was a justice of the peace with the ordinary powers, except as to those specially taken from him; and that, when acting "by virtue or reason" of his office as such (to use the words of the statute of James), or "in the execution of his office" as such (to use the words of the statute of George II.), he was entitled to the protection of these statutes: but that he was moreover a magistrate of the Police Court; and that when, as such, he was exercising any branch of the special jurisdiction conferred on him by Stat. 2 & 3 Vict., c. 71, he was then acting in pursuance of that Act or in the execution of the powers or authorities under it, and so entitled to the protection of the fifty-third section. But the defendant in the present case derived no special power from the statutes, according to his own case: he conceived the crime of perjury to have been committed * before him, [* 1006] and had proceeded, as any ordinary justice might, to the examination and committal of the person accused for trial.

The distinction sought to be established appears to us to be highly inconvenient, not so much to the magistrates, as the parties seeking redress against them for alleged injuries. It must be often very difficult to ascertain which of the statutes a plaintiff must comply with in his notice, venue, &c., if it is to depend on so nice a point, which can only be determined on full acquaintance with the statute; and the words of the clause do not make it necessary. The Queen, acting under the power given her by the statute, appoints an individual under specified circumstances a magistrate of a Police Court. Both the officer and the Court are the creation of the statute law. When so appointed, the statute invests him

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with the ordinary authority of a justice of the peace, with certain restrictions. It appears to us, therefore, that when he is exercising the most ordinary jurisdiction of a justice of the peace he is acting in execution of a power and authority conferred on him by the Act, as much as a commissioned justice doing the same thing would be acting in execution of a power and authority conferred by the commission.

If so, it becomes necessary to consider the first question stated; namely, whether the defendant was entitled to any statutory protection. It was admitted in the argument that the fifty-third section of this Act must be construed on the principle which has always been applied to the construction of the analogous clauses in the statutes of James I. and George II. before referred to, and other similar provisions in various statutes. That principle [* 1007] seems to be this: that where the magistrate, with * some colour of reason and *bonâ fide*, believes that he is acting in pursuance of his lawful authority, he is entitled to protection, although he may proceed illegally, or exceed his jurisdiction. Whether he acts with such colour of reason, and *bonâ fide*, are questions for the jury under all the circumstances, if there be any evidence of them and the plaintiff desires the opinion of the jury to be taken on them, although it is very common to submit them to the judge first, as in the present case, on an application for a nonsuit. And if the plaintiff, on such application being made, does not desire the matter to be submitted to the jury, he must abide by the decision of the Judge, if the Court shall think it warranted by the evidence.

In the present case we think it abundantly warranted. In the first place there was no evidence of malice of any sort offered. By the twenty-third section of the Act it is provided that wilful and corrupt false evidence before a Police Court shall subject the party to the penalties of perjury. It cannot be doubted that a magistrate may receive informations and take depositions on a charge of perjury, and hold to bail, or commit on such charge of perjury. It is true that no direct charge or information had been laid before the defendant when he first caused the plaintiff to be removed into another room, and he may have exceeded his authority in so doing; but there is ample ground for believing that he thought he might himself institute the proceeding when the offence had been committed in his presence, and all his subsequent conduct flowed

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from this. He was not bound to proceed with the case, if regularly before him, out of its order: he might well direct the party to be detained till the business before him was disposed of. At the * end of half an hour he is about to proceed with it, but [* 1008] the witnesses are gone; and he then, not improperly, still on the supposition that the charge was regularly before him, calls on the plaintiff to find bail for his appearance at a future day.

There was a fault in the commencement, which made the whole proceedings illegal; but these statutory protections suppose an illegality, so that there is no defence on the merits. For the reasons, however, which we have given, we think there was no illegality of such a palpable nature, no such want of reasonable colour or *bona fides*, as to disentitle the defendant to notice and the other protection of the statute; and that this rule, therefore, for setting aside the nonsuit must be discharged. *Rule discharged.*

Kirby v. Simpson.

33 L. J. M. C. 165–169 (s. c. 10 Ex. 358; 18 Jur. 983).

Action against Magistrates. — Notice of Action. — Bona Fides. [165]

A magistrate acting in the execution of his office is, by the 11 & 12 Vict., c. 44, entitled to notice of action, although he acts maliciously and without reasonable and probable cause.

In actions against magistrates for acts done in the execution of their office, the Judge is to decide whether notice of action is necessary, and the jury are not to determine the question of *bona fides*.

Trespass. The first count stated that the defendant gave the plaintiff into custody, and caused him to be imprisoned in the house of correction. The second count alleged that the defendant, being the owner of a duck, which the plaintiff had unwittingly killed, and being desirous to punish the plaintiff for so killing the said duck, maliciously caused and instigated one John Blenkin to make a complaint on oath to him, the defendant, as one of Her Majesty's justices of the peace for the East Riding of the county of York, that the plaintiff had, as his hired servant, in his, the said John Blenkin's, said service, been guilty of divers misdemeanours, miscarriages, and ill behaviour towards him, the said John Blenkin; and the said defendant maliciously convicted him, the plaintiff, of the said offence, and wilfully, wrongfully, and without sufficient

cause issued his warrant of commitment, whereby he commanded the constable of Bridlington, in the said East Riding, to convey the said plaintiff to the said house of correction at Beverley, and also commanded the keeper of the said house of correction to receive the said plaintiff into his custody in the said house of correction, there to remain and be corrected and be held to hard labour for the space of twenty-one days from the date of the said commitment; and the defendant, for the furtherance of his said malicious desire, wrote a letter to the gaoler of the said house of correction at Beverley, ordering him to flog the said plaintiff severely.

Plea, not guilty by statutes (the 11 & 12 Vict., c. 44, and 20 Geo. II., c. 19, s. 2).

At the trial, before CRESSWELL, J., at the last Yorkshire Spring Assizes, the defendant gave evidence of the following facts: The plaintiff, a boy of thirteen years of age, and in the service of one Blenkin, passing the premises of the defendant in * the month of June, 1853, killed one of the defendant's ducks. The plaintiff was shortly afterwards brought before the defendant, a magistrate of Yorkshire, and on being charged with killing the duck, stated that he thought it was a wild duck. The defendant then told the plaintiff he might go, but that he should be sent to Beverley the following week. A few days after the defendant sent for the plaintiff and Blenkin, and on their coming to his house said, "So this is the boy that killed the duck;" to which Blenkin answered, "Yes, and I have told him to be sure not to do so." Upon this the defendant said he should send the boy to Beverley Gaol, and proceeded to make out a commitment. This commitment, which was also a conviction, stated that information had been made, on the oath of John Blenkin, before the defendant, one of Her Majesty's justices, &c., that John Kirby, one of his hired servants, had in his service been guilty of divers misdemeanours, miscarriages, and ill behaviour towards him, and particularly by neglect and disobedience of orders on the 2nd of June, as well as on other similar occasions. The commitment then stated that he was convicted thereof, and commanded the gaoler to receive him in the house of correction, there to remain and be corrected and held to hard labour for twenty-one days. The plaintiff having been lodged in the house of correction accordingly, the gaoler wrote to the defendant, stating that an old form of commitment had been used, but he supposed the defendant did not mean the

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boy to be flogged. To this the defendant answered, that he wished the plaintiff to be flogged, the plaintiff's father having given a bad account of him. The plaintiff was flogged accordingly. The plaintiff's case having closed, it was contended, on behalf of the defendant, that he was entitled to notice of action, pursuant to the 11 & 12 Vict., c. 44, s. 9. For the plaintiff, it was urged that the evidence showed that the defendant had acted maliciously, and had used his power as justice of the peace colourably and for the purpose of oppression; and that the question of the defendant being entitled to notice of action depended upon his *bona fides*, which point was for the jury. The learned Judge ruled that the defendant was entitled to notice of action, and that there was no question for the jury, and accordingly he directed a nonsuit.

A rule *nisi* having been obtained by

E. V. Price, on the ground that no notice of trial was necessary,

P. Thompson showed cause. The defendant, being a magistrate, was entitled to notice of action for any act done by him in the execution of his duty, whether done maliciously or not. The 8th section enacts, "that no action shall be brought against any justice of the peace for anything done by him in the execution of his office" after six months; and the 9th section enacts, that "no such action shall be brought against any justice of the peace until one month's notice of action has been given." Every magistrate, therefore, who acts in the execution of his office is entitled to notice of action, whether he acts maliciously or not. He is entitled to such notice in order that he may be able to tender amends; and it is reasonable that he should be allowed to tender amends, even although he may have acted maliciously. The very fact of a magistrate being allowed to tender amends implies that he has acted wrongfully, and he is not the less entitled to notice of action because he has not only acted wrongfully but maliciously also. No case can be found in the books as to the question of *bona fides*, with reference to magistrates being entitled to notice of action.

[PARKE, B. — The Acts of Parliament relating to notice of action to be given to magistrates differ from those in which notice of action is to be given to private individuals.]

The sole question in this case is, whether the defendant was a magistrate acting "in the execution of his office;" and as it was clear that he was so, he was entitled to notice of action, whether he acted maliciously or not. *Wedge* v. *Berkeley*, 6 Ad. & E. 663,

6 L. J. (N. S.) M. C. 86, may be relied on by the other side. That, it is true, was the case of an action against a magistrate, and the Court said that *bona fides* was a question for the jury; [* 167] but there * the character in which the defendant acted was equivocal. He cited and mentioned *Staight* v. *Gee*, 2 Stark. 445; *Cook* v. *Leonard*, 6 B. & C. 351, 5 L. J. M. C. 99 (30 R. R. 348); *Beechey* v. *Sides*, 9 B. & C. 806, 8 L. J. K. B. 71 (33 R. R. 333); *Cann* v. *Clipperton*, 10 Ad. & E. 582, 8 L. J. (N. S.) Q. B. 268; *Kine* v. *Evershed*, 10 Q. B. 143, 16 L. J. Q. B. 271; *Briggs* v. *Evelyn*, 2 H. Bl. 114 (3 R. R. 354); *Horn* v. *Thornborough*, 3 Ex. 846, 18 L. J. Ex. 349; *Weller* v. *Toke*, 9 East, 364; *Morgan* v. *Palmer*, 2 B. & C. 729, 2 L. J. K. B. 145 (26 R. R. 537); *James* v. *Saunders*, 10 Bing. 428, 3 L. J. (N. S.) M. C. 105; and *Wright* v. *Wales*, 5 Bing. 336, 7 L. J. M. C. 60 (30 R. R. 622). Secondly, the question of *bona fides* is not for the jury, but for the Judge. The observations in *Wedge* v. *Berkeley* were not well founded, and were not necessary to the decision of that case. *Arnold* v. *Hamel*, 9 Ex. 404, 23 L. J. M. C. 137, is in point, and shows that the question of *bona fides* is for the Judge, and not for the jury. There the 8 & 9 Vict., c. 87, the Smuggling Prevention Act, enacted, section 117, that "no writ shall be sued out against, nor a copy of any process served upon, any person acting under the direction of the Commissioners of Customs, for anything done in the execution of or by reason of his office, until one calendar month next after notice in writing." Section 118, "Provided always, that no plaintiff in any case when an action shall be grounded on any such act done by the defendant shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice to be given as aforesaid." It was held that under these enactments it was the province of the Judge to decide whether notice of action was necessary, and for that purpose he should have evidence on both sides, so as to enable him to determine whether the defendant was an officer of the customs, acting by reason of his office and under a reasonable belief that his duty as such officer required him to act as he did. The words of that Act and of the present are the same in effect. The 12th section makes it incumbent on the plaintiff to prove that the action was brought within the time limited by the Act, &c. *Wagstaffe* v. *Sharpe*, 3 M. & W. 521, 7 L. J. (N. S.) Ex. 167, applies to this part of the case. He also referred to *Shearwood* v. *Hay*, 5 Ad. & E. 383, 5 L. J.

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(N. S.) K. B. 246, and *Brittain* v. *Kinnaird*, 1 Brod. & Bing. 432 (21 R. R. 680).

E. V. Price, *contra*, in support of the rule. — First, the 11 & 12 Vict., c. 44, has no application to this case. It appears on the face of the declaration that the action is brought against the defendant, not for convicting the plaintiff improperly, but for taking advantage of his position as a magistrate to injure him. The defendant maliciously instigated the master to bring a charge against the plaintiff. The defendant, therefore, was not acting in his character of magistrate, but stood, in fact, in the situation of an ordinary individual. *Barton* v. *Bricknell*, 20 L. J. M. C. 1, is in point. Secondly, supposing the 11 & 12 Vict., c. 44, applies, then under the 9th section it was the duty of the Judge to put to the jury the question whether the defendant had acted *bona fide*. *Wedge* v. *Berkeley* is decisive as to that point.

[PARKE, B. — The second count shows that the defendant was acting as a magistrate; it alleges that he acted improperly as such, but does not state that he acted maliciously and without reasonable and probable cause. A magistrate may act maliciously, and yet may have reasonable and probable cause for his acts. So he may be in the execution of his duty although he may act maliciously; and I think, therefore, he was entitled to notice of action. If he were acting within his jurisdiction, in what way can he be said not to be acting as a magistrate? The plaintiff's case is that he abused his power as a magistrate.]

The tendency of the decisions is to show * that the [* 168] question of *bona fides* is for the jury, and that upon that question depends the point whether the defendant is entitled to notice of action.

PARKE, B. — I think this rule must be discharged, as the plaintiff was properly nonsuited. In support of the first count the plaintiff put in evidence the commitment, which, according to the authority of the cases, amounted to a conviction. Now, upon that first count the plaintiff was clearly out of court, as he himself showed a commitment which, being good upon the face of it, afforded a protection to the magistrate. The second count also admits that the defendant was acting as a magistrate, as it states that the defendant instigated Blenkin to make a complaint to him, the defendant, as one of Her Majesty's justices of the peace for Yorkshire, and that the defendant issued his warrant of commit-

ment against the plaintiff. That shows that the defendant was acting as a magistrate. On that state of facts the defendant was entitled to notice of action. Then comes the question, whether the matter is for the Court or the jury, and I must say that before to-day I have always thought that if a question of *bona fides* arose, it was a matter to be determined by the jury. In *Hazeldine* v. *Grove*, 3 Q. B. 997, 12 L. J. M. C. 10 (p. 215, *ante*), the Queen's Bench said, that the plaintiff not having demanded that the question of *bona fides* should be put to the jury, could not demand a new trial on the ground that the Judge had nonsuited him on the objection. But in cases relating to magistrates I doubt much whether it be law that the question of *bona fides* is a matter to be determined by the jury. In the case of *Arnold* v. *Hamel* this Court was of opinion that the points there raised were for the Judge and not for the jury, since no effect could be given to the Act of Parliament unless the facts there raised were decided by the Judge. I, for one, certainly did not think at the time that the 24 Geo. II., c. 44, bore a resemblance to the Customs Act, by which that case was governed. But if the present case had stood on the statute of 24 Geo. II., c. 44, I should have been of opinion that the same law was applicable as in *Arnold* v. *Hamel*. The wording, however, is different. But, nevertheless, I think the Judge in this case was bound to decide whether notice of action was requisite or not. I must say I cannot distinguish between the 12th section of this Act of Parliament, 11 & 12 Vict., c. 44, and the Act of Parliament by which *Arnold* v. *Hamel* was decided. I hold the opinion that I entertained on the moving of the rule *nisi*, that the protection granted by the 1st section of the 11 & 12 Vict., c. 44, applies to all that is done by a magistrate in the execution of his duty. That section in effect admits that a magistrate may act maliciously, and yet may be in the execution of his duty within the Act of Parliament and be entitled to notice of action. The result of the 9th and 1st sections is, that even in cases where the magistrate in the execution of his office has acted maliciously he is entitled to notice of action. The question, therefore, was one for the determination of the Judge, and the learned Judge in this case was right in taking upon himself the determination of this case. With respect to the facts of the case, I am of opinion that there was no want of reasonable and probable cause. The question of reasonable and probable cause was a matter for the consideration of the Judge. Here the

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action was brought against the defendant solely in his character of magistrate, and notice of action was required to enable him to tender amends to the plaintiff, which he was at liberty to do under the Act of Parliament. I may add, that these observations will not necessarily apply to all the cases arising under various Acts of Parliament, but only to cases relating to magistrates.

PLATT, B. — I am of the same opinion. This question depends on the 11 & 12 Vict., c. 44, illustrated and explained by the cases decided on other Acts of Parliament, and by the 24 Geo. II., c. 44. I must say I do not quite understand the arrangement and nature of the 11 & 12 Vict., c. 44, for the 1st section, which applies to cases of a magistrate acting within his jurisdiction, does not state that no action shall be brought until the * conviction [* 169] or order has been quashed, whereas the 2nd section enacts that when a magistrate has acted without jurisdiction, or has exceeded his jurisdiction, no action shall be brought until after the conviction has been quashed. It is difficult, I say, to understand the meaning of this diversity in the clauses, but we must find our way to the true construction of the clauses as well as we are able. Now the 9th section says "that no such action shall be commenced against any justice" until after notice of action. That refers to the 8th section, which refers to anything done by the justice "in the execution of his office." Now the 8th section includes the 1st, for the words "in the execution of his duty" and "in the execution of his office" are identical in their meaning. This case falls within the 1st section, and it ought to have been stated in the declaration that the act was done "maliciously and without reasonable and probable cause." The declaration may, however, in that respect be amended. Therefore, supposing the declaration to contain this allegation, still the 9th section as to notice of action applies. Where, therefore, a magistrate acts in the execution of his office maliciously, and without reasonable and probable cause, still he is entitled to notice of action. Reading, therefore, the 1st, 8th, and 9th sections together, I am of opinion that the Judge was right in taking upon himself to decide that notice of action was necessary; and therefore this rule must be discharged.

MARTIN, B. — I am of the same opinion. The question against the defendant is, What is the cause of action? I think it falls within the 1st section of the statute, — assuming, as I do, that the declaration is amended. The real complaint is, that the defendant

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induced the master of the plaintiff to come before him, and without examining the plaintiff upon oath, convicted him of a breach of duty. If, indeed, the plaintiff had been fairly charged before him, and the master of the plaintiff had shown that there was good cause of action against him, and the defendant had confined himself to do an act which was within his jurisdiction, and he had authority, he could not be liable, as we cannot look at the motives of the defendant. The real cause of action is, that the defendant convicted the plaintiff maliciously and without reasonable and probable cause. The case, therefore, falls within the 8th and 9th sections of the 11 & 12 Vict., c. 44; and therefore the Judge who tried the cause was right in deciding that the defendant was entitled to notice of action. *Rule discharged.*

ENGLISH NOTES.

The Protection of Justices Act, 1848 (11 & 12 Vict., c. 44), section 1, provides that for an act done by a justice of the peace within his jurisdiction the action shall be on the case, and it shall be alleged to have been done maliciously and without reasonable and probable cause, and if at the trial the plaintiff fail to prove such allegation he shall be nonsuited. Under this section trespass *vi et armis* will not lie against a justice for committing a person to prison in default of sureties to keep the peace. *Haylock* v. *Sparke* (1853), 4 El. & Bl. 471. A warrant of commitment was drawn up in which blanks were left for the amount of costs to be inserted, and so signed by the justices. The blanks were afterwards filled up by the clerk, and the plaintiff was arrested on a warrant. It was held that the signing in blank by the justices was a mere irregularity, and not an excess of jurisdiction, and that the plaintiff, having brought an action for false imprisonment against the justices, was rightly nonsuited under the above section. *Bott* v. *Ackroyd* (1859), 28 L. J. M. C. 207, 5 Jur. (N. S.) 1053, 7 W. R. 420.

The duty of a magistrate in admitting to bail is judicial, and therefore an action cannot be maintained against him for refusing to admit to bail a person entitled to be admitted to bail, without proof of malice. *Linford* v. *Fitzroy* (1849), 13 Q. B. 240, 18 L. J. M. C. 108, 13 Jur. 303. But it may be doubted whether an action is maintainable against a justice acting judicially in a matter in which he has jurisdiction, even for a malicious act. See *Gelan* v. *Hall* (1857), 2 Hurl. & N. 379, 27 L. J. M. C. 78.

Where an order of affiliation was made on a plaintiff, he gave notice of appeal, and entered into a recognisance for payment of costs. The

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Quarter Sessions confirmed the order subject to a case. On non-payment of the sum ordered, a justice issued his warrant to take the plaintiff before two justices. In an action for trespass against the justice it was held that neither the giving of notice of appeal and entering into the recognisance, nor the confirmation of the order subject to a case, suspended the jurisdiction of the justice to issue his warrant, under 7 & 8 Vict., c. 101, s. 3; and that the granting of the warrant being for a judicial inquiry as to whether or not the plaintiff should pay the money, was within the justice's jurisdiction, notwithstanding the pendency of the appeal; and therefore the action was barred, there being no allegation that the act was done maliciously and without reasonable and probable cause. *Kendall* v. *Wilkinson* (1855), 4 El. & Bl. 680, 24 L. J. M. C. 89, 1 Jur. (N. S.) 538. By a local Act, owners and occupiers of abbey lands were liable to be rated for a certain purpose, and if any owner or occupier of land in respect of which a rate was imposed refused to pay, a justice, on proof of demand, might summon, and on due proof issue a distress warrant. An appeal was given to a person claiming exemption on the ground that his lands were not abbey lands. The plaintiff having been rated in respect of lands which the jury found were not abbey lands, and having refused to pay on summons, a magistrate issued a distress warrant, under which the plaintiff's goods were seized. It was held that the magistrate was not protected by the above section nor by a similar clause in the local Act. *Pedley* v. *Davis* (1861), 10 C. B. (N. S.), 492, 30 L. J. C. P. 374, 8 Jur. (N. S.) 263, 5 L. T. 253. In *Gelan* v. *Hall* (1857), 2 Hurl. & N. 379, 27 L. J. M. C. 78, it was questioned whether an action is maintainable against a justice for wilfully and maliciously, and without reasonable and probable cause, convicting a person in a penalty in a matter in which he has jurisdiction, when the penalty is paid but the conviction has been subsequently quashed.

In an Irish case it was held that where the means of knowledge, as distinguished from knowledge actual or imputed, is relied on to sustain an action against a justice, acting judicially for an act done within his jurisdiction, the action will lie only when he has acted maliciously, and without reasonable and probable cause. *Johnston* v. *Meldon* (1891), 30 L. R. Ir. 15.

By section 2 of the Act it is provided that for an act done by a justice without or exceeding jurisdiction, an action may lie without such allegation; but not for an act done under a conviction, or order, until it has been quashed; and not for an act done under a warrant to compel appearance if a summons were previously served, and not obeyed.

This section and the previous section must be read together, and, therefore, where in the course of a matter transacted before a justice

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there has been an excess of jurisdiction, this section does not apply unless the action in which it is sought to be applied is brought for an act done in respect of that part of the matter, or some part of it, which was beyond the jurisdiction. *Barton* v. *Bricknell* (1850), 13 Q. B. 393, 20 L. J. M. C. 1, 15 Jur. 668.

An action for trespass was held maintainable against justices who issued a distress warrant for costs not adjudged by a conviction. *Leary* v. *Pattrick* (1850), 15 Q. B. 266, 19 L. J. M. C. 211, 14 Jur. 932.

Section 5 of the Act, which enables a party to obtain a rule calling upon a justice to do an act relating to the duties of his office, as to which see *Reg.* v. *Adamson*, No. 8, p. 127, *ante*, and notes thereto, provides that no action shall be brought against a justice for obeying such rule.

Section 8, which provided that an action should not be brought against a justice for anything done in the execution of his office, unless within six months after the act complained of was committed, is now superseded by section 1 (*a*) of the Public Authorities Protection Act, 1893 (56 & 57 Vict., c. 61), and is formally repealed by S. L. R. Act, 1894 (57 & 58 Vict., c. 56).

Section 9 of the Act of 1848, which provided that notice of action must be given, is entirely repealed by the S. L. R. Act, 1894.

In *Hardy* v. *Justices of North Riding* (1887), 50 Justice of the Peace, 663, it was held that the building of a police station was an act done by justices in the execution of their office; and that the justices, if sued for negligence in building or maintaining thereof, and for damage arising therefrom, were entitled to the protection afforded by 11 & 12 Vict., c. 44.

AMERICAN NOTES.

A justice of the peace, although he acted illegally in causing the arrest on his own view of one travelling on Sunday, yet having general jurisdiction of the subject, and intending and assuming to act as a magistrate, he was within the protection of a statute entitling him to thirty days' notice of any action to be brought against a justice of the peace for anything done by him "in the execution of his office." *Jones* v. *Hughes*, 5 Sergeant & Rawle (Penn.), 298; 9 Am. Dec. 364: "The English statutes for the protection of officers of justice, being remedial, have always been liberally construed in favor of the object which induced their enactment." "It may be laid down as a general rule, that whenever the officer has acted *honestly*, although *mistakingly*, when he supposed he was in the execution of his duty, although he had no authority to act, he is entitled to the protection of the Act of the Assembly." "But the having of jurisdiction is not the criterion; for if one magistrate were to act in a case in which jurisdiction is expressly committed to two, he would still be entitled to notice. *Weller* v. *Toke*, 9 East, 364. Where indeed the act done is entirely foreign to the magistrate's jurisdiction, nothing can give

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it official color; but where he has a general jurisdiction over the subject-matter, and intended to act as a magistrate, he will be entitled to all the benefit which the Act of Assembly gives to him in any case. For the purpose of bailing or committing, a justice has general jurisdiction over everything constituting an offence against the laws; and if in an honest exercise of it he judges erroneously of the legal character and consequences of an act done, and treats as an offender a person who has committed no crime, does he not present exactly that sort of case for which the Legislature intended to provide? For if the justice should act within the limit of his jurisdiction, he would not be answerable for mere mistake of judgment upon the merits, and not being a wrongdoer, his conduct would call for no protection from this or any other Act of Assembly." To the same purport, *Mitchell* v. *Cowgill*, 4 Binney (Penn.), 20, an action against a justice for performing a marriage ceremony for the plaintiff's infant daughter.

LAND.

No. 1. — SPENCER'S CASE.

(K. B. 1584.)

No. 2. — MILNES *v.* BRANCH.

(K. B. 1816.)

RULE.

THE statute 32 Hen. VIII., c. 34, which entitles assignees to sue the covenantor, applies only to covenants which run with the land. Therefore the assignee of a rent-charge is not within the statute, (*a*) because he has not the reversion, and (*b*) because a covenant cannot run with a rent.

Spencer's Case.

5 Co. Rep. 16 a–18 a (1 Smith Lead. Cas. 52).

Covenant. — Running with Land. — Collateral.

A lessee by indenture covenanted for himself, his executors and admin- [16 a]
istrators, that he, his executors or assigns, would build a brick wall upon part of the land demised, &c.: *Held*, if the lessee assigns his term, such covenant does not bind his assignee;[1] and resolved: 1. Where a covenant extends

[1] But see note at p. 244, *post*.

No. 1. — Spencer's Case, 5 Co. Rep. 16 a.

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to a thing *in esse*, parcel of the demised, such covenant shall go with the land, and shall bind the assignee, although he be not bound by express words. 2. If the lessee covenants for himself and his assigns, that they will make a new wall upon some part of the land demised, the assignee is bound by such covenant. But the assignee though named is not bound by a covenant to do something which is merely collateral, and which in no manner touches or concerns the thing demised and assigned over. 3. If a man leases personal goods, and the lessee covenants for him and his assigns at the end of the time to deliver the same in as good plight, &c., such covenant is but a personal contract, and does not bind the assignees. 4. If a feoffment be made by the word *dedi*, the assignee of the feoffee shall not vouch. But if a lease for years be made by the word *concessi* or *demisi*, the assignee of the lessee, upon eviction, may have a writ of covenant. 5. Tenant by the curtesy, or any other who comes in the *post.*, shall not vouch; but in the case of a ward granted by deed to a woman, who takes husband and dies, the husband shall vouch by force of the word "grant," so the husband of a *fême* lessee for years, after her death, shall have an action of covenant as well on the covenant in law on the words "demise or grant," as upon the express covenants contained in the lease. So tenant by statute merchant or statue staple or *elegit* of a term, and the vendu of a lease by force of any execution, shall have an action of covenant in such case as a thing annexed to the land. 6. A covenant to repair runs with the land. 7. The assignee of the assignee, and the executors of the assignee of the assignee, shall have an action of covenant.

The assignee of the assignee shall vouch, and so also the heirs of the assignee, upon a warrant to one, his heirs and assigns.

The word "grant" in the case of a chattel real in itself imports a warranty.

But the words *concessi* or *demisi* in the case of freehold or inheritance doth not import any warranty.

Spencer and his wife brought an action of covenant against Clark, assignee to J., assignee to S., and the case was such: Spencer and his wife by deed indented demised a house and certain land (in the right of the wife) to S. for term of twenty-one years, by which indenture S. covenanted for him, his executors and administrators, with the plaintiffs, that he, his executors, administrators, or assigns, would build a brick wall upon part of the land demised, &c. S. assigned over his term to J., and J. to the defendant; and for not making of the brick wall the plaintiff brought the action of covenant against the defendant as assignee: and after many arguments at the Bar, the case was excellently argued and debated by the Justices at the Bench; and in this case these points were unanimously resolved by Sir CHRISTOPHER WRAY, Chief Justice, Sir THOMAS GAWDY, and the whole Court. And many differences taken and agreed concerning express covenants and covenants in law, and which of them run with the land, and which of them are collateral

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and do not go with the land, and where the assignee shall be bound without naming him, and where not; and where he shall not be bound although he be expressly named, and where not.

1. When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee although he be not bound by express words: but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant: but in the case at bar the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or *administrators, [*16 b] and not the assignee, for the law will not annex the covenant to a thing which hath no being.

2. It was resolved that in this case, if the lessee had covenanted for him and his assigns, that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. So on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a *Warrantia Chartæ*. F. N. B. 135, and 9 Ed. II., *Garr' de Charters*, 30; 36 Ed. III., Garr. 1; 4 Hen. VIII.; Dyer, 1. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore

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in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger.

3. It was resolved, if a man leases sheep or other stock of cattle or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them, and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract, and wants such privity as is between the lessor and lessee and his as-
[*17a] signs * of the land in respect of the reversion. But in the case of a lease of personal goods there is not any privity, nor any reversion, but merely a thing in action in the personalty, which cannot bind any but the covenantor, his executors or administrators, who represent him. The same law, if a man demises a house and land for years, with a stock or sum of money rendering rent, and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant: for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only; and therefore as to the stock or sum the covenant is personal, and shall bind the covenantor, his executors and administrators, and not his assignee: and it is not certain that the stock or sum will come to the assignee's hands, for it may be wasted or otherwise consumed or destroyed by the lessee, and therefore the law cannot determine at the time of the lease made that such covenant shall bind the assignee.

4. It was resolved, that if a man makes a feoffment by this word *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch; but if a man makes a lease for years by this word *concessi* or *demisi*, which implies a covenant, if the assignee of the lessee be evicted, he shall have a writ of covenant; for the lessee and his assignee hath the yearly profits of the land which shall grow by his labour and industry for an annual rent, and therefore it is reasonable when he hath applied his labour, and employed his cost upon the land, and be evicted (whereby he loses all), that he shall take such benefit of the demise and grant as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee hath bound him to.

5. Tenant by the curtesy, or any other who comes in in the

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post., shall not vouch (which is in lieu of an action). But if a ward be granted by deed to a woman who takes husband, and the woman dies, the husband shall vouch by force of this word "grant," although he comes to it by act in law. So if a man demises or grants land to a woman for years, and the lessor covenants with the lessee to repair the houses during the term, the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law on these words (demise or grant) as on the express covenant. The same law is of tenant by statute merchant or statute staple or *elegit* of a term, and he to whom a lease for years is sold by force of any execution shall have an action of covenant in such case as a thing annexed to the land, although they come to the term by act in law; as if a man grants to lessee * for years that he shall have so many estovers as will serve [* 17 b] to repair his house, or as he shall burn in his house, or the like, during the term, it is as appurtenant to the land, and shall go with it as a thing appurtenant into whose hands soever it shall come.

6. If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant, and goeth with the land in whose hands soever the term shall come, as well those who come to it by act in law, as by the act of the party, for all is one having regard to the lessor. And if the law should not be such, great prejudice might accrue to him; and reason requires that they who shall take benefit of such covenant when the lessor makes it with the lessee, should on the other side be bound by the like covenants when the lessee makes it with the lessor.

7. It was resolved that the assignee of the assignee should have an action of covenant. So of the executors of the assignee of the assignee; so of the assignees of the executors or administrators of every assignee, — for all are comprised within this word (assignees), for the same right which was in the testator or intestate shall go to his executors or administrators; as if a man makes a warranty to one, his heirs and assigns, the assignee of the assignee shall vouch, and so shall the heirs of the assignee: the same law of the assignee of the heirs of the feoffee, and of every assignee. So every one of them shall have a writ of *Warrantia Chartæ*. *Vide* 14 Ed. III., Garr. 33; 38 Ed. III. 21; 36 Ed. III., Garr. 1; 13 Ed. I., Garr. 93; 19 Ed. II., Garr. 85, &c. For the same right which was in the ancestor shall descend to the heir in such case without express words of the heirs of the assignees.

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Observe, reader, your old books, for they are the fountains out of which these resolutions issue, but perhaps by these differences the fountains themselves will be made more clear and profitable to those who will make use of them. For example, in 42 Ed. III. 3 the case is: grandfather, father, and two sons; the grandfather was seised of the manor of D. whereof a chapel was parcel; a prior, with the assent of his convent, by deed covenanted for him and his successors, with the grandfather and his heirs, that he and his convent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor and his servants, &c. The grandfather did enfeoff one of the manor in fee, who gave it the younger son and his wife in tail; and it was adjudged that the tenants in tail, as terre-tenants (for the elder brother was heir), should have an action of covenant against the prior, for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor, as it is there said. And [* 18 a] Finchden related that he had seen it * adjudged, that two coparceners made partition of land, and one did covenant with the other to acquit him of suit, which was due, and that coparcener to whom the covenant was made did alien, and the suit was arrear; and the feoffee brought a writ of covenant against the coparcener to acquit him of the suit; and the writ was maintainable, notwithstanding he was a stranger to the covenant, because the acquittal fell upon the land: but if such covenant were made to say divine service in the chapel of another, there the assignee shall not have an action of covenant, for the covenant in such case cannot be annexed to the chapel, because the chapel doth not belong to the covenantee, as it is adjudged in 2 Hen. IV. 6 b. But there it is agreed that if the covenant had been with the lord of the manor of D. and his heirs, lords of the manor of D. and inhabitants therein, the covenant shall be annexed to the manor, and there the terre-tenant shall have the action of covenant without privity of blood. *Vide* 29 Ed. III. 48 and 30 Ed. III. 14, *Simpkin Simeon's Case*, where the case was, that the Lady Bardolph by deed granted a ward to a woman who married Simpk. S., against whom the Queen brought a writ of right of ward, and they vouched the Lady Bardolph; and afterwards the wife died, by which the chattel real survived to the husband (and resolved that the writ should not abate); the vouchee appeared, and said, What have you to bind me to warranty? The husband showed how that the lady granted

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to his wife before marriage the said ward; the vouchee demanded judgment for two causes.

1. Because no word of warranty was in the deed; as to that it was adjudged that this word (grant) in this case of grant of a ward (being a chattel real) did import in itself a warranty.

2. Because the husband was not assignee to the wife, nor privy. As to that it was adjudged that he should vouch, for this warranty implied in this word (grant) is in case of a chattel real so annexed to the land, that the husband who comes to it by act in law, and not as assignee, should take benefit of it. But it was resolved by WRAY, Chief Justice, and the whole Court, that this word (*concessi* or *demisi*) in case of freehold or inheritance doth not import any warranty. 11 Hen. VI. 41, *acc'.; vide* 6 Hen. IV.; 12 Hen. IV. 5; 1 Hen. V. 2; 25 Hen. VIII., Covenant, Br. 32; 28 Hen. VIII.; Dyer, 28; 48 Ed. III. 22; F. N. B. 145, c. 146 and 181; 9 Eliz.; Dyer, 257; 26 Hen. VIII. 3; 5 Hen. VII. 18; 32 Hen. VI. 32; 22 Hen. VI. 51; 18 Hen. III., Covenant, 30; Old N. B., Covenant; 46 Hen. III. 4; 38 Ed. III. 24. See the statute of 32 Hen. VIII., c. 24, 34, which Act was resolved to extend to covenants which touch or concern the thing demised and not to collateral covenants.

Milnes and others v. Branch.

5 Maule & Selwyn, 411–417 (17 R. R. 373).

Covenant. — Rent. — Personal.

Where J. B., being seised in fee, conveyed to defendant and T. J., [411] their heirs and assigns, to the use that J. B., his heirs and assigns, might have and take to his use a rent certain to be issuing out of the premises, and subject to the said rent, to the use of defendant, his heirs and assigns, and defendant covenanted with J. B., his heirs and assigns, to pay to him, his heirs and assigns, the said rent, and to build, within one year, one or more messuages on the premises, for better securing the said rent, and J. B. within one year demised the said rent to plaintiffs for one thousand years: *Held*, that covenant would not lie for the plaintiffs for non-payment of the rent, or for not building the messuages, for the covenant was personal to J. B.

Covenant. The plaintiffs declare that, by indenture of the 20th of June, 1805, between one Joshua Barnsley, of the first part, one J. Robinson, a trustee for J. Barnsley, of the second, the defendant of the third, and one J. Jackson, a trustee for the defendant, of the fourth (reciting indentures of lease and

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[* 412] release, * whereby a plot of land was conveyed to one P. Hope and the said J. Barnsley, their heirs and assigns, as to one undivided moiety, to the use of such person and persons, and for such estate, &c., as P. Hope should, by deed in writing, duly executed, &c., limit or appoint, and, in default of such appointment, after the decease of P. Hope, to the use of the right heirs of P. Hope for ever; and as to the other undivided moiety, to the like use with respect to J. Barnsley; subject to the yearly rent of £42, payable to the relessors; and reciting also other indentures of lease and release, whereby the said P. Hope limited and appointed to J. Barnsley and J. Robinson, and the heirs and assigns of J. Barnsley, his undivided moiety in the plot of land, and also in four messuages, then lately built thereon, in trust, as to the estate of J. Robinson, for J. Barnsley, his heirs and assigns for ever, subject to the rent covenants, &c., reserved and contained in the former release; and further reciting, that the defendant had contracted with J. Barnsley for the purchase of the plot of land and messuages, subject to the yearly chief rent of £86 3*s.* 3*d.*), the said J. Barnsley, by virtue of the said power, limited and appointed one undivided moiety in the plot of land and messuages, to remain to the defendant and J. Jackson, their heirs and assigns for ever; and for the further assuring the same, and to convey and assure the other undivided moiety, and in consideration of the yearly rent and covenants, &c., on the part of the defendant, his heirs, executors, administrators, and assigns, to be paid and performed, and also of 5*s.* paid by the defendant to J. Robinson, J. Barnsley, and J. Robinson (according to their several estates), the said J. [* 413] Barnsley did grant, bargain, sell, alien, enfeoff, and * confirm to the defendant and J. Jackson, and the heirs and assigns of the defendant, all that plot of land, &c., and six messuages built thereon, &c., and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, &c., of them the said J. Barnsley and J. Robinson, *habendum* to the defendant and J. Jackson, their heirs and assigns, to the use, intent, and purpose that J. Barnsley and J. Robinson, their heirs and assigns, might have, receive, and take, to the use and behoof of J. Barnsley and J. Robinson, and the heirs and assigns of J. Barnsley (nevertheless, as to the estate of J. Robinson, in trust only for J. Barnsley, his heirs and assigns for ever), the clear yearly rent of £86 3*s.* 3*d.*, to be issuing out of the

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premises, by equal half-yearly payments on the 24th of June and 25th of December, with power of distress and entry for recovery thereof, to J. Barnsley and J. Robinson, and subject to the above rent, and powers for recovery thereof, to the use of the defendant and J. Jackson, and the heirs and assigns of the defendant, for ever (nevertheless as to the estate of J. Jackson, in trust only for the defendant, and his heirs and assigns); and the defendant did for himself, his heirs, executors, and administrators, covenant with J. Barnsley and J. Robinson, and the heirs and assigns of J. Barnsley, that he, his heirs or assigns, would pay to J. Barnsley and J. Robinson, and the heirs and assigns of J. Barnsley for ever, the said yearly rent; and also that he, his heirs and assigns, would, within one year next ensuing the date of the indenture, erect, build, and finish, in a good and substantial manner, and for ever support and maintain, upon the plot of land, one or more messuages or other buildings, of good brick or stone, or both, set in * good [* 414] lime mortar, and covered with slates, which at the time of finishing, and at all times thereafter, should, together with the messuages conveyed, be of the clear yearly value of double the yearly rent thereby reserved, at the least, over and above all reprises, and, in case of fire, tempest, destruction, or decay, should rebuild the same, so that at all times, for ever, the buildings then erected and to be erected should continue of the clear yearly value of double the yearly rent thereby reserved at the least, for the better security of the yearly rent thereby reserved; and J. Barnsley and J. Robinson constituted their attorney, to deliver seisin to the defendant and J. Jackson, according to the indenture, which was accordingly done. And J. Barnsley and J. Robinson being so seised of the rent aforesaid, within one year next ensuing the date of the said indenture, namely, on the 24th of June, 1805, by indenture of that date, demised to the plaintiffs, their executors, administrators, and assigns, the said rent of £86 3*s.* 3*d.*, and all their interest in the same for one thousand years. And the plaintiffs assign for breach a year's rent in arrear on the 24th of June, 1814, and also, that the defendant or his assigns did not, within one year next ensuing the date of the first-mentioned indenture, nor at any other time, erect, build, or finish, in a good and substantial manner, or otherwise howsoever, upon the plot of land or any part thereof, one or more messuages, &c., which at the time of finishing was or were, or at any times thereafter hath or have been with the other

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messuages conveyed of the clear yearly value of double the yearly rent at the least, &c.

The defendant prayed oyer of the indenture, and demurred to the declaration. Joinder.

[* 415] * Richardson, in support of the demurrer, argued that the plaintiffs were not entitled, either at common law, or by virtue of the Stat. 32 Hen. VIII., to maintain, as assignees of the rent, this action against the defendant. The statute speaks only of such as are grantees of the reversion, giving them the like advantages against the lessees as the lessors and grantors had. But this defendant, who takes by a conveyance of the fee simple, is not a lessee, neither are the plaintiffs grantees of the reversion, like tenant for life in remainder. *Isherwood* v. *Oldknow*, 3 M. & S. 382 (16 R. R. 305). And although an assignee of part of the estate may maintain covenant, yet these plaintiffs have nothing in the land, but only the rent, and the covenant as to the rent is personal, to Barnsley, who alone shall have covenant. And so it was adjudged that if A. grant a rent-charge to B. for the life of C., *habendum* to B., his heirs and assigns, to the use of C., and A. covenant to pay it, *ad usum* C., if the rent be behind, B. may have an action of covenant against A.; for though the rent-charge is executed by the statute, and the power of distraining, as incident thereto, transferred to C., yet the covenant being collateral, is not transferred nor discharged, but remains with B. (1 Mod. 223; 2 Mod. 138.)

Littledale, *contra*, compared this to the grant of a rent-charge by the owner of the fee, who covenants with the grantee to pay the rent, in which case he said, if the rent be assigned, covenant will lie for the assignee; and for this he quoted the opinion of Lord Holt, in *Brewster* v. *Kidgill*, Ld. Raym. 317, Salk. 198, 5 Mod. 369, wherein he takes the distinction between the assignee of

[* 416] the land and the assignee of * the rent. "If," says he, "tenant in fee grant a rent-charge out of lands, and covenant to pay it without deduction for himself and his heirs, you may maintain covenant against the grantor and his heirs, but not against his assignee; for it is a mere personal covenant, and cannot run with the land." And again (12 Mod. 170), "There is another matter, that is, whether the terre-tenant, in this case, be obliged by the covenant; this is a covenant by the grantor of the rent, who was seised in fee of the manor. Now who this terre-tenant is does not appear, whether he be heir or assignee; for if he be assignee, I do

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not think him chargeable in law, for this covenant doth not run with the land. I make no doubt but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted." And if the heir or executor, as representative of the grantee by operation of law, might have this action, by parity of reason, the plaintiffs, who are his representatives by special assignment, may also have it. Therefore, where a man made a feoffment in fee by indenture, reserving rent, &c., and covenanted that if the feoffee, his heirs or assigns, should be distrained to do more services than were reserved in the deed, then it should be lawful for the feoffee, his heirs and assigns, to distrain in his manor of D., &c. The feoffee made feoffment over, and it was adjudged that the second feoffee might distrain, for the covenant ran with the land. *Anon.*, Moore, 179. And as rent may be assigned, as well as the land, upon which the assignee shall have the like remedies of assise, *mort d'ancestor*, and novel disseisin, by the same analogy this covenant may be said to run with the rent.

* Lord ELLENBOROUGH, Ch. J. — I am inclined to think that [* 417] the language of Lord HOLT, as to the right of the assignee of the rent to have covenant, was extra-judicial; and putting aside that *dictum*, I do not find any authority to warrant the position that this covenant runs with the rent. I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shown that this is land; it might as well be applied to any covenant respecting a matter merely personal. The Stat. Hen. VIII. recites that, at common law, such only as are parties or privies to any covenant can take advantage of it; here is neither privity of contract nor privity of estate; the rent is reserved out of the original estate.

BAYLEY, J. — I am entirely of the same opinion. The argument for the plaintiffs loses sight of the conveyance by which this rent is created. It is incorrect to state it as a rent-charge granted by the owner of the fee; it being a conveyance in fee by Barnsley and Robinson to the defendant to certain uses, one of which is, that they shall receive the rent; so that the rent arises out of the estate of the feoffors. It is therefore not a grant by the owner of the fee, and the covenant is a covenant in gross.

ABBOTT, J., concurred.

HOLROYD, J., having been of counsel in the case, declined giving any judgment. *Judgment for the defendant.*

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ENGLISH NOTES.

The *Anonymous* case (1585), Moore, 159, pl. 300, has been identified as a report of the final determination in *Spencer's Case*. See *Minshull* v. *Oakes* (1858), 2 Hurl. & N. 793, 808, 27 L. J. Ex. 194, 198. The difference between the report in Moore and that in 5 Co. Rep. was explained in assuming that Coke gives the argument and Moore the actual decision. A translation of the report in Moore, which is short, is reproduced: "In the same term, Gawdy moved on the statute of 32 Hen. VIII., that enables grantees of reversions to enter into conditions, and to bring actions of covenants; and also enables the tenants of the particular estates to maintain actions of covenants against the said grantees: If lessee for life covenant for him his executors and administrators to build a wall during his term, and then he assigns over his estate: if the grantee of such (*scilicet* the) reversion or the grantor shall have covenant against the assignees: and they all agreed that he should; for Meade said that the statute is that the grantees shall have the like remedies by entry or actions against the assignees, &c., as they ought to have against the lessees themselves. And notwithstanding that the covenant lacks words (assigns), yet each, by the acceptance of the possession, has made himself subject to all covenants concerning the land but not to collateral covenants; and covenants of reparations, and building of walls or houses, are covenants inherent to the land, with which the assignee without special words shall be charged. Also Gawdy remembered a case that was but lately adjudged in the Common Bench where the lessor for years covenanted in his lease that at the end of the term he would make a new lease to the lessee or his assignees and then granted over his reversion, and at the end of the term the lessee maintained covenant against the grantee; to which also all the Justices and serjeants agreed."

The rule is presented in another aspect by Lord KENYON, Ch. J., in *Webb* v. *Russell* (1789), 3 T. R. 393, 402, 1 R. R. 725, 730. "It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be privity of estate between the covenanting parties." To establish this privity of estate, the reversioner must execute the deed containing the covenant that the assignee may maintain his action. *Pitman* v. *Woodbury* (1848), 3 Ex. 4. This point is concluded by the judgment of the Court of Exchequer, delivered by Lord WENSLEYDALE in that case. He says: "The cases establish that the covenantee in an ordinary indenture, who is a party to it, may sue the covenantor who executed it, although he himself never did; for he is a party, although he did not execute, and parties to an indenture may sue, though strangers cannot; and it makes no difference that the

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covenants of the defendant are therein stated to be in consideration of those of the covenantee. Of this there is no doubt, nor that a covenant binds without consideration. But with respect to leases by indenture, the older cases show that the covenants, which depend on the interest of the lease, and are made because the covenantor has that interest, — such as those to repair and pay rent during the term, are not obligatory if the lessor does not execute, — not because the lessor is not a party, but because that interest has not been created to which such covenants are annexed, and during which only they operate, as such covenants undoubtedly do not, if the term ends by surrender, or are suspended by eviction by the lessor, so they do not begin to operate unless the term commences; the foundation of the covenant failing, the covenant fails also. Unless there be a term, a covenant to repair during it is void. But with respect to collateral covenants, not depending on the interest in the land, it is otherwise, and they are obligatory. This rule of law is to be found in the older authorities, which are collected in Com. Dig. 'Covenant' (F). The case of *Soprain* v. *Skurro* (Yelv. 18) is one. In that case the Court says, the covenants to repair depend upon the lease; if no lease, there is no covenant; and if the lease was made, and then surrendered, all the covenants would be void. . . . And in *Knipe* v. *Palmer* (2 Wils. 132) it was held that the lease was void at law, because made by the committee of a lunatic; and that all the covenants which run with the land, the lease being void, fell to the ground." The rule thus stated by Lord WENSLEYDALE was applied in *Webb* v. *Russell*, *supra*, and *Russell* v. *Stokes* (Ex. Ch. 1791), 1 H. Bl. 562, 1 R. R. 732. In that case a mortgagor and mortgagee joined in making a lease of the mortgaged property. The covenants for the rent and repairs were, however, only entered into with the mortgagor and his assigns. In the first action the assignee of the mortgagee was held not entitled to maintain an action, as the covenants were collateral to his interest. In the second action it was held that the mortgagor could maintain an action against the lessee upon the covenants as covenants in gross. It is, however, to be observed respecting *Webb* v. *Russell* and *Russell* v. *Stokes* that as between the mortgagor and the lessee and those claiming under them respectively, the lease operated by estoppel, and that this estate by estoppel is a sufficient estate to support an action of covenant based upon privity of estate. *Cuthbertson* v. *Irving* (1859), 4 Hurl. & N. 742, 28 L. J. Ch. 306.

In considering whether assigns are bound although not named, it is well to bear in mind the observations of COTTON, L. J., in *Clegg* v. *Hands* (C. A. 1890), 44 Ch. D. 517, 59 L. J. Ch. 477. "Cases, so far as they give us a rule of construction, are very useful; but it is very seldom, to my mind, the case upon the construction of one particular

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document tells us much about the construction of another document, unless it lays down some principle to guide us." It is unnecessary to cite many authorities, but it is clear that it is entirely a question of construction whether covenants which run with the land are to bind assigns generally, or are merely to govern the rights of the contracting parties personally, or a more or less limited category of assigns. Thus covenants in leases of public houses to deal with the lessors have been held to run with the land and bind all assigns, in *Clegg* v. *Hands*, *supra*, and *White* v. *Southend Hotel Co.* (C. A.), 1897, 1 Ch. 767, 66 L. J. Q. B. 387; but in *Doe d. Calvert* v. *Reid* (1830), 10 B. & C. 849, the assign of the covenantee was held to have lost his remedy by reason that he did not carry on the business at a particular brewery.

The word "assign," as is pointed out by FRY, J., in *Taite* v. *Gosling* (1879), 11 Ch. D. 277, 48 L. J. Ch. 397, is a word of diverse meaning. He says: "The verb 'assign' as applied to leasehold property has the technical meaning of assigning the whole interest, while the word 'assign' as used in the expression 'heirs and assigns' has not been confined to a person taking by an assignment exhausting the whole interest." As covenants restricting the lessee's right of alienation run with the land (*Roe d. Hunter* v. *Galliers* (1787), 2 T. R. 133, 1 R. R. 445), it may be observed that a covenant against alienation is not broken by a transaction whereby a third person takes possession under an equitable assignment. *Cox* v. *Bishop* (1857), 8 De G., M. & G. 815, 26 L. J. Ch. 389, 3 Jur. (N. S.) 499. But it would seem that the party coming in under the lessee as in *Cox* v. *Bishop* might be liable for the rent to the original lessor. *Wright* v. *Pitt* (1870), L. R. 12 Eq. 408, 40 L. J. Ch. 558, 25 L. T. 13. The statute 32 Hen. VIII., c. 34, extends to permit the action to be maintained where the lessee has assigned over a part of the lands and retained the other part. *Palmer* v. *Edwards* (1783), 1 Dougl. 186 *n*. The privity of estate is not destroyed where the lessee grants part of the lands leased to one and part to another. *White* v. *Southend Hotel Co.* (C. A.), 1897, 1 Q. B. 767, 66 L. J. Q. B. 387. But the privity is destroyed where the term is broken up in interest, as where a lessee grants a sub-term not exhausting his interest. *Holford* v. *Hatch* (1779), 1 Dougl. 174; *Earl of Derby* v. *Taylor* (1801), 1 East, 502, 6 R. R. 337; *Copeland* v. *Stevens* (1818), 1 B. & Ald. 593; *Williams* v. *Bosanquet* (1819), 1 Brod. & Bing. 238, 21 R. R. 585. But where the lessor grants away less than his estate in reversion the privity of estate is not destroyed. Thus an action founded on privity of estate may be maintained by a devisee for life claiming under the will of a testator seised in fee: *Attoe* v. *Hemmings* (1616), 2 Bulstr. 281; or by one claiming under a demise of years of the reversion: *Leonard's Case*, cited 2 Bulstr. 282; *Wright* v. *Burroughes* (1846),

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3 C. B. 685, 4 Dowl. & L. 438, 16 L. J. C. P. 6. And where a valid lease is granted by a tenant for life under a power contained in a settlement by will, the remainder-man is an assignee of the reversion within the 32 Hen. VIII., c. 34; *Isherwood* v. *Oldknow* (1813), 3 M. & S. 382, 16 R. R. 305. The person to whom copyholds are surrendered by a lessor is also assignee. *Whitton* v. *Peacock* (1834), 3 My. & K. 325. Where the lands are severed by the lessor and part granted away, this does not destroy the privity of estate. *Twyman* v. *Pickard* (1818), 2 B. & Ald. 105, 20 R. R. 368. The destruction of part of the interest in reversion by merger does not take away the right of action at law of those whose interest has not merged. *Badeley* v. *Vigurs* (1854), 4 El. & Bl. 71, 23 L. J. Q. B. 377.

The assignee of a rent may maintain an action for it against the lessee without attornment. *Allen* v. *Bryan* (1826), 5 B. & C. 512, 29 R. R. 307; *Williams* v. *Hayward* (1859), 1 El. & Bl. 1040, 28 L. J. Q. B. 374. But here the action rests not on privity of estate, but privity of contract. *Marle* v. *Flake*, 3 Salk. 118.

Fixtures (see title "Fixtures," 12 R. C. 193 *et seq.*), being regarded as part of the land itself, may be the subject of a covenant which will be binding on assigns. *Williams* v. *Earle* (1868), L. R. 3 Q. B. 739, 37 L. J. Q. B. 231. Amongst the lessee's covenants which run with the land are covenants to repair (this subject was dealt with under the head "Dilapidations," 9 R. C. 468, 469). So also are covenants requiring the personal residence of the lessee: *Tatem* v. *Chaplin* (1793), 1 H. Bl. 133, 3 R. R. 360; and covenants against assignments: *Roe* v. *Galliers* (1787), 2 T. R. 133, 1 R. R. 445. The common covenants in leases of "tied" public houses, restricting the right of the lessee to purchase his supplies in the open market, generally run with the land. *White* v. *Southend Hotel Co.* (C. A. 1897), 1 Ch. 767, 66 L. J. Q. B. 387, and the cases there cited. But a covenant by the lessor that he will not allow another house of a like character to be built on adjacent land belonging to him does not so run. *Thomas* v. *Hayward* (1869), L. R. 4 Ex. 311, 38 L. J. Ex. 175, 20 L. T. 814. Covenants framed with a view to prevent the lessee employing apprentices or servants from outside a particular locality, and who might thereby gain a poor-law settlement, are collateral to the land. *Mayor of Congleton* v. *Pattison* (1808), 10 East, 130; *Walsh* v. *Fussell* (1829), 6 Bing. 163, 3 Moore & Payne, 455. A covenant binding an agricultural tenant to grind his corn at the lessor's mill runs with the land. *Vyvyan* v. *Arthur* (1823), 1 B. & C. 410, 25 R. R. 437. In general, covenants by the lessee regarding the manner in which the demised property shall be enjoyed or dealt with run with the land. Thus a covenant to use a house as a private dwelling-house only, runs

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with the land. *Wilkinson* v. *Rogers* (1864), 10 Jur. (N. S.) 5, 9 L. T. 434, 12 W. R. 119. So where the lessee of a mine covenanted to erect a smelting-house on adjacent waste which was not demised, the benefit of the covenant was held to pass to the assignee of the reversion as tending to the support of the mine. *Easterly* v. *Sampson* (Ex. Ch. 1830), 6 Bing. 644, 1 Crompton & Jervis, 105. But a covenant by a lessee to indemnify his undertenant against a breach of covenant to build on his (the lessee's) part will not run with the land so as to charge the assignee of the lessee with damages upon the eviction of the undertenant. *Doughty* v. *Bateman* (Ex. Ch. 1848), 11 Q. B. 444, 17 L. J. Q. B. 111, 12 Jur. 182. In *Vernon* v. *Smith* (1821), 5 B. & Ald. 1, 24 R. R. 257, a covenant to insure a house against fire, where the house was situate within the "weekly bills of mortality," was held to run with the land, because by section 83 of the 14 Geo. III., c. 78, the insurance money was liable to be laid out in rebuilding. In *Ex parte Gorelly, Re Barker* (1864), 4 De G., F. & S. 477, 34 L. J. Bk. 1, 10 Jur. (N. S.) 1085, Lord Westbury, L. C., held that the operation of the statute extended to the whole of Great Britain, but only applied to houses and buildings, and not to trade fixtures. There have been strong expressions of opinion, however, in the House of Lords, by Lords Selborne and Watson, that the Act does not apply to Scotland. *Westminster Fire Office* v. *Glasgow Provident Investment Society* (H. L. 1888), 13 App. Cas. 699, 707, 716, 59 L. T. 641. A covenant by a lessor to supply water to the demised premises at a rate therein mentioned runs with the land. *Jourdain* v. *Wilson* (1821), 4 B. & Ald. 266, 23 R. R. 268. A covenant to renew runs with the land, as appears from the report of *Spencer's Case* from Moore, set out at the commencement of this note. And a covenant for renewal is not obnoxious to the rule against perpetuities. *Hare* v. *Burges* (1857), 4 K. & J. 45, 27 L. J. Ch. 86, 3 Jur. (N. S.) 1294. The leaning of the Court is to impose upon those claiming a perpetual renewal the burden of strict proof, and strongly against inferring such a right from equivocal expressions, — which may fairly be capable of being otherwise interpreted. Per Lord Selborne, L. C., in *Swinburne* v. *Milburn* (H. L. 1884), 9 App. Cas. 844, 54 L. J. Q. B. 6.

In Cooke v. *Chilcott* (1876), 3 Ch. D. 694, 34 L. T. 207, a purchaser of a piece of land with a well and spring upon it covenanted with the vendor, who intended to dispose of land adjoining as building sites, to erect a pump and reservoir, and to supply water to the houses when built on the vendor's land. Malins, V. C., held that the covenant ran with the land, and further that an injunction should be granted restraining the defendant from allowing the work to remain unperformed. This case has not been actually overruled, but the reasoning upon which the Vice-Chancellor proceeded has been dissented from.

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In the first place, the better opinion seems to be that although the benefit ran with the land retained by the vendor (see *Jourdain* v. *Wilson*, 4 B. & Ald. 266, 23 R. R. 268), yet there is no authority for holding that the burden ran with the land purchased. In the next place, it threw on the purchaser the obligation of putting his hand in his pocket, — an obligation which is not enforced in equity as regards affirmative stipulations. See *Austerberry* v. *Corporation of Oldham*, No. 4, p. 258, *post*. It is difficult also to support *Cooke* v. *Chilcott* upon the reasoning of *Morland* v. *Cook* (1868), L. R. 6 Eq. 252, 37 L. J. Ch. 825, 18 L. T. 496. There, upon a partition of lands, a deed of mutual covenants was executed, whereby the cost of maintaining certain works to keep out the sea from the lands, which were situated below the sea level, was thrown upon the respective owners according to their holding. This was held to bind a purchaser, who, it was held, had notice of the covenant by reason of the character of the property. Now a partition was certainly in the nature of a cross-grant, and there was a covenant extending to a thing *in esse*, the works being in existence, parcel of the property conveyed. Besides, there was a statutory obligation by the statute of Sewers (23 Hen. VIII., c. 5), and this might well have been held to make the covenant run with the land, as is now the case with covenants to insure, by reason of the provisions of 14 Geo. III., c. 78, s. 83, which make the insurance money liable to be laid out in reinstating houses and buildings. *Vernon* v. *Smith* (1821), 5 B. & Ald. 1, 24 R. R. 257; *Rex* v. *Commissioners, &c. for Essex* (1823), 1 B. & C. 477, 2 Dowl. & Ry. 700, 25 R. R. 467. Besides, it was an action for contribution in equity, to enforce a common-law right which seems to have existed from very early times. See *Rex* v. *Commissioners, &c. for Essex, supra*.

Milnes v. *Branch*, the second principal case, has been followed. *Haywood* v. *Brunswick Permanent Building Society* (1881), 8 Q. B. D. 403, 51 L. J. Q. B. 73, 45 L. T. 699.

The statute 32 Hen. VIII., c. 34, only applied where the lease was under seal. *Standen* v. *Christmas* (1847), 10 Q. B. 135, 16 L. J. Q. B. 265, 11 Jur. 694. Where the demise was by a document not under seal, the original lessor was the proper person to sue notwithstanding assignment. *Bickford* v. *Parson* (1848), 5 C. B. 921, 17 L. J. C. P. 193, 12 Jur. 377. The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), s. 10, has extended the provisions of the 32 Hen. VIII. to leases by parol.

As to the cases in which the performance of a covenant is excused by force of an Act of Parliament, see *Baily* v. *DeCrespigny* (1869), L. R. 4 Q. B. 180, 38 L. J. Q. B. 98, 19 L. T. 681; *Mills* v. *East London Union* (1872), L. R. 8 C. P. 79, 42 L. J. C. P. 46, 27 L. T. 557, No. 70 of "Landlord and Tenant," and notes, *post*.

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AMERICAN NOTES.

The matter in question is much influenced by statutory enactments in this country.

The general American doctrine is that "any deed that transfers the title passes to the grantee the benefit of a covenant that runs with the land:" 1 Jones on Real Property, sect. 933, citing as to quitclaim deeds *Jenks* v. *Quinn*, 137 New York, 223; *Wilson* v. *Widenham*, 51 Maine, 566; *Chandler* v. *Brown*, 59 New Hampshire, 370; *Hunt* v. *Middlesworth*, 44 Michigan, 448; *Thomas* v. *Bland*, 91 Kentucky, 1; *Wead* v. *Larkin*, 54 Illinois, 489; 5 Am. Rep. 149; as to deeds without covenant at a judicial sale: *White* v. *Whitney*, 8 Metcalf (Mass.), 81; *Moore* v. *Merrill*, 17 New Hampshire, 75; 43 Am Dec. 593; *Thomas* v. *Bland*, *supra*; *Richard* v. *Bent*, 59 Illinois, 38; 14 Am. Rep. 1; *Redwine* v. *Brown*, 10 Georgia, 311; *Town* v. *Needham*, 3 Paige (N. Y. Chan.), 545; 24 Am. Dec. 246; *Saunders* v. *Flaniken*, 77 Texas, 662; as to purchasers on mortgage foreclosure sale: *White* v. *Whitney*, *supra*; *Mygatt* v. *Coe*, 142 New York, 78; 24 Lawyers' Rep. Annotated, 850; *Town* v. *Needham*, *supra*; *Rose* v. *Schaffner*, 50 Iowa, 483; *Wilder* v. *Davenport*, 58 Vermont, 642; *M'Murphy* v. *Minot*, 4 New Hampshire, 251. So as to a purchaser on a sheriff's sale. *McCrady* v. *Brisbane*, 1 Nott & McCord (So. Car.), 104; 9 Am. Dec. 676, the Court observing: "The authorities in the English books are not calculated to make the question plain. They do not express the doctrine clearly, and so generally fail to discriminate, with confidence and exactness, between the common law and the effect of the statute of Henry VIII., c. 34, that it is difficult to apply them to a question that with us has almost grown obsolete. None of them however, I think, go so far as to say that in no case could an action be sustained at common law by an assignee of a covenant running with the land. The terms of the statute are limited; they are only intended to benefit the assignee of the reversion, and appear to apply only to leasehold estates." See also *Backus* v. *McCoy*, 3 Ohio, 219; 17 Am. Dec. 585.

A personal covenant, although to the grantee, "his heirs and assigns," does not run with the land. *Mygatt* v. *Coe*, *supra*; *Norcross* v. *James*, 140 Massachusetts, 188; in the New York case the Court observing: "Whatever confusion may exist in these cases with reference to the use of these words, it is clear that they cannot dispense with some privity of estate in order to carry the covenant with the land; and it has never been held that a covenant, which in its nature otherwise is personal, is made to run with the land by the mere employment of these words."

A covenant does not run with the land unless there is mutuality or succession of interest. Privity of contract will answer as between the immediate parties, but privity of estate is essential to carry the benefit of the covenant to subsequent owners of the land in question. Therefore a covenant of a stranger to a title does not run with the land. *Mygatt* v. *Coe*, 147 New York, 456; *Hurd* v. *Curtis*, 19 Pickering (Mass.), 459; in the former the Court observing: "The distinction between personal covenants in deeds and those which run with the land was made at a time when by the common law *choses*

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in action were not assignable, and this circumstance doubtless was an element in the process of reasoning through which the rule was established. Since *choses in action* are now assignable, it may well be doubted whether the reason of the rule still exists in all its force. When a person who is a stranger to the title consents to become a party to the conveyance for the benefit of the land, and in order to enhance the value of the estate conveyed, it is not difficult to suggest arguments based upon reason and justice, for holding him to his stipulation in favor of a remote as well as an immediate grantee. But the law for this case at least seems to be settled otherwise, and doubtless according to the weight of authority" (two Judges dissenting), affirming the same case in 124 New York, 212; 142 ibid. 8. This doctrine however is disapproved in *Dickinson* v. *Hoomes*, 8 Grattan (Virginia), 353, a learned examination of the authorities, citing *Spencer's Case* and the English editor's notes upon it in 43 Law Library, 99. See also Hare's note upon it, 1 Smith's Leading Cases (8th ed.), 192. In the dissenting opinion above mentioned it is said: "In many of our cities searching and guaranteeing companies have been organized for this very purpose. Such companies are strangers to the title, and have no privity of estate, but for a consideration they undertake to defend the title, and we know of no reason, either in law or morals, why they may not intentionally make their guaranty run with the land." The same Judge lays stress upon the probability that the husband intended to make a covenant beneficial to the land. The existence of privity of estate is deemed necessary by Kent (4 Com. 472, 474) and by Washburn (2 Real Property, 262, 263), and so in *Hurd* v. *Curtis*, 19 Pickering (Mass.), 459, citing *Spencer's Case*.

Covenants of warranty and quiet enjoyment are pretty uniformly deemed to run with the land, provided possession passes. *Booth* v. *Starr*, 1 Connecticut, 244; 6 Am. Dec. 233; *Barry* v. *Guild*, 126 Illinois, 439; *Crooker* v. *Jewel*, 29 Maine, 527; *White* v. *Whitney*, 3 Metcalf (Mass.), 81; *Real* v. *Hollister*, 17 Nebraska, 661; *Moore* v. *Merrill*, 17 New Hampshire, 81; 43 Am. Dec. 593; *Carter* v. *Denman's Ex'rs*, 3 Zabriskie (New Jersey Law), 260; *Lawrence* v. *Senter*, 4 Sneed (Tennessee), 62; *Flaniken* v. *Neal*, 67 Texas, 212; *Marbury* v. *Thornton*, 82 Virginia, 702. In *Tillotson* v. *Pritchard*, 60 Vermont, 94; 6 Am. St. Rep. 95, the Court said: "The covenant attached to a grant does not pass by the deed from the covenantee to his assignee, but only by the land conveyed. It passes not by the form of the conveyance, but merely as an incident to the land; so when the grantee takes no estate under the grant, no assignee of the land by him can transfer it to the assignee. As it is not capable of a direct transfer, so as to enable the assignee to maintain an action for its breach in his own name, it cannot pass by the operation of the assignment, for it cannot run with the land which the grantee does not have to convey. It is stated that in England, where nothing but bare possession of the land passes by the conveyance, the covenant does not pass, either by the direct or indirect operation of the assignment. But the tendency of American cases is to hold that possession is a sufficient estate to cause the covenant to attach to the land, and upon an assignment or transfer of the land by the covenantee, to pass to the assignee. Possession is an estate that in time may ripen into a perfect title." The same

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was held in *Mygatt* v. *Coe*, 142 New York, 78; 24 Lawyers' Rep. Annotated, 850, the Court observing: "It is certainly the law of this State that one in possession of land merely has an estate in the land which he may transfer to a grantee, and which is sufficient to carry with it his covenant of warranty down the line of succession." But such possession must be founded upon a valid right on interest in the nature of property, and does not grow out of a husband's residence upon his wife's land with her, and his management of it, and so does not make his covenant for quiet enjoyment in her deed a covenant running with the land. *Mygatt* v. *Coe*, 147 New York, 456.

A vendee can claim the benefit of no covenants contained in the deed to his vendor, except such as attach to and run with the land, namely, for quiet enjoyment and warranty. *Barry* v. *Guild*, 126 Illinois, 439; 2 Lawyers' Rep. Annotated, 334.

A widow, evicted of lands assigned to her for dower, has no action on a covenant of warranty in the deed to her husband. *St. Clair* v. *Williams*, 7 Ohio, Part. 2, 110; 30 Am. Dec. 194. This was put on the ground that "she does not hold the whole estate." But the benefit of a covenant running with the land has been held to be separable and to inure to the purchaser of any part. *Lamb* v. *Danforth*, 59 Maine, 322; *Kane* v. *Sanger*, 14 Johnson (N. Y.), 89; *Dickinson* v. *Hoomes*, 8 Grattan (Virginia), 406; *Brown* v. *Metz*, 33 Illinois, 539; *Whitzman* v. *Hirsh*, 87 Tennessee, 513.

The resolutions in *Spencer's Case* were stated in *Hickey* v. *Lake Shore, &c. Ry. Co.*, 51 Ohio State, 40; 46 Am. St. Rep. 545; 23 Lawyers' Rep. Annotated, 396, and their substance thus expressed: "In other words, the covenants which are connected with the estate run with the land and vest in point of benefit and liability in the assignee;" and this doctrine was approved and applied in the case of a deed accepted upon a condition respecting fencing, as of an implied covenant.

The soundness of the rule in *Spencer's Case*, requiring privity of estate between the covenantor and the covenantee in order to attach the covenant to the land, is questioned in *Gilmer* v. *Mobile & M. R. Co.*, 79 Alabama, 569; 58 Am. Rep. 623, with a reference to *Van Rensselaer* v. *Read*, 26 New York, 558, where it is said, "It has often been held that the covenants, both in their benefits and their burdens, run with the land, where no tenure, in its strict sense, exists between the parties."

In a recent case, *Bald Eagle Valley R. Co.* v. *Railroad Co.*, 171 Penn. State, 284; 50 Am. St. Rep. 807; 29 Lawyers' Rep. Annotated, 423, it was held that a covenant may be enforced in equity whether it runs with the land or not, where it appears that it was the intention of the parties that it should bind their successors in interest as well as themselves. Of *Spencer's Case* the Court said: "This case, decided three hundred years ago, as with many of the cases of that time, bases its conclusions in the main on the results arrived at by the ratiocination of the Judges. They assumed certain premises, and if from them a certain conclusion was reached, then the judgment was for plaintiff or defendant; as for instance in the first resolution" (stating it and the conclusions that "here the assignee is bound although the covenantor hath not so said," and "here the covenant does not bind the assignee although the

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covenanter hath so said"), and continuing: "Resort was had to the instrument to ascertain the subject of the contract, and when that was settled on, a contract was made by the Judges for the parties without much regard to what the parties said; they looked not for the expressed intention, with a view to giving it effect in the judgment, but adopted a conclusion, based often on an arbitrary or artificial rule of construction, and this conclusion moulded the judgment; the intention was subordinated to the rule. As shown by the large number of cases, both in England and this country, cited by the able editors of the notes to *Spencer's Case*, 1 Smith's Leading Cases, 9th Am. ed., 174, there has been more or less of a struggle by the Courts in the three centuries which have elapsed since that decision was announced, to escape from its application, and very often if the rule defeated the manifest intent of the parties, some distinction was found or assumed which warranted a disregard of it; and in some cases, where the rule if invoked would plainly shut the door against equity, the door was closed against the rule. Like the arbitrary ancient rules in *Shelley's Case*, in *Twyne's Case*, and others, it has been given such flexibility by so many later decisions, that without overruling well-decided cases, it is impossible to rigidly apply it at this day, even in common-law actions." The Court then declined to consider whether *Spencer's Case* would rule the case at bar if it were a common-law action, because the case was in equity, and cited *Tulk* v. *Moxhay*, 2 Phil. 774, as overruling *Keppell* v. *Bailey*, 2 Mylne & K. 517, and establishing the doctrine "that a covenant made by a purchaser of land, that he and his assignee would use, or abstain from using, the land in a particular way, may be enforced in equity against all purchasers, without reference to the question whether the covenant ran with the land."

This is also the doctrine of *Lewis* v. *Gollner*, 129 New York, 227; 26 Am. St. Rep. 516, where there was a parol agreement by the defendant not to erect flats or tenement-houses in the neighborhood; and in *Hodge* v. *Sloan*, 107 New York, 250; 1 Am. St. Rep. 816, it was held "that a purchaser by deed without restriction, but from one who was restricted by a personal covenant not running with the land or binding his assigns, yet with notice of the facts, is bound by the restriction in a Court of equity." "In *Parker* v. *Nightingale*, 6 Allen (Mass.), 344; 83 Am. Dec. 632, it is declared not to be in the least material that the restrictive stipulations should be binding at law, or that any privity of estate should subsist between parties in order to render them obligatory and to warrant equitable relief in case of their infraction." So in *Sutton* v. *Head*, 86 Kentucky, 156; *Kettle River R. Co.* v. *Eastern R. Co.*, 41 Minnesota, 461; 6 Lawyers' Rep. Annotated, 111 (treating *Keppell* v. *Bailey* as not overruled).

The doctrine of the binding character of negative easements, or "an equity in the land sold for the benefit of the land retained," on successors in the title who had notice of the facts, express or implied, is declared in *Ladd* v. *Boston*, 151 Massachusetts, 585; 21 Am. St. Rep. 481. A long list of authorities, English and American, to the same effect, is given in a note, 21 Am. St. Rep. 486–508, citing *Whitney* v. *Union Ry. Co.*, 11 Gray (Mass.), 359, as the leading American case.

No. 3. — Tulk v. Moxhay, 2 Phill. 774. — Rule.

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A covenant by a grantor to a purchaser of one of several lots in a tract, that he will make certain building restrictions in the deeds of the other lots to their purchasers, inures to the benefit of subsequent purchasers of said lots. *Hutchinson* v. *Ulrich*, 145 Illinois, 336; 21 Lawyers' Rep. Annotated, 391.

The distinction however seems well established that the covenant or agreement must affect the land itself and not be merely collateral, in order to bind the assignee. *Blain* v. *Taylor*, 19 Abbott Practice (N. Y.), 230; *Kettle River Co.* v. *Eastern R. Co*, *supra*; *West Va. Trans. Co.* v. *Ohio River P. S. Co.*, 22 West Virginia, 600. For example, the agreement in the last case, that the oil produced from the land should be transported exclusively by one company, was held not to be a real covenant binding assigns.

Milnes v. *Branch* is cited in Rawle on Covenants, p. 294.

No. 3. — TULK *v.* MOXHAY.

(CH. 1848.)

No. 4. — AUSTERBERRY *v.* CORPORATION OF OLDHAM.

(C. A. 1885.)

RULE.

A PURCHASER with notice of restrictive stipulations is bound in equity to observe them, although they do not run with the land at law.

But the doctrine is limited to restrictive stipulations, and will not be extended so as to bind (in equity) a purchaser with notice of a covenant to expend money on repairs or otherwise, which does not run with the land at law.

Tulk v. Moxhay.

2 Phill. 774–779.

Restrictive Covenant. — Breach with Notice. — Injunction.

[774] A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law.

In the year 1808 the plaintiff, being then the owner in fee of the vacant piece of ground in Leicester Square, as well as of several of the houses forming the Square, sold the piece of ground

No. 3. — Talk v. Moxhay, 2 Phill. 774–776.

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by the description of "Leicester * Square Garden or Pleas- [* 775] ure Ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stone work round the same," to one Elms in fee; and the deed of conveyance contained a covenant by Elms, for himself, his heirs and assigns, with the plaintiff, his heirs, executors, and administrators, "that Elms, his heirs and assigns, should and would from time to time, and at all times thereafter, at his and their own costs and charges, keep and maintain the said piece of ground and Square Garden, and the iron railing round the same in its then form, and in sufficient and proper repair as a Square Garden and Pleasure Ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said Square Garden and Pleasure Ground."

The piece of land so conveyed passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with his vendor; but he admitted that he had purchased with notice of the covenant in the deed of 1808.

The defendant having manifested an intention to alter the character of the Square Garden, and asserted a right, if he thought fit, to build upon it, the plaintiff, who still remained owner of several houses in the Square, filed this bill for an injunction; and an injunction was granted by the MASTER OF THE ROLLS to restrain the defendant from converting or using the piece of ground and Square Garden, and the iron railing round the same, to or for any other purpose than as a * Square Garden and Pleasure [* 776] Ground in an open state, and uncovered with buildings.

On a motion, now made, to discharge that order,

Mr. R. Palmer, for the defendant, contended that the covenant did not run with the land, so as to be binding at law upon a purchaser from the covenantor, and he relied on the *dictum* of Lord BROUGHAM, C., in *Keppell* v. *Bailey*, 2 M. & K. 547, to the effect that notice of such a covenant did not give a Court of equity jurisdiction to enforce it by injunction against such purchaser, inasmuch as "the knowledge by an assignee of an estate, that his assignor had assumed to bind others than the law authorised him to affect by his contract, — had attempted to create a burden upon property

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which was inconsistent with the nature of that property, and unknown to the principles of the law, — could not bind such assignee by affecting his conscience." In applying that doctrine to the present case, he drew a distinction between a formal covenant as this was, and a contract existing in mere agreement, and requiring some further act to carry it into effect; contending that executory contracts of the latter description were alone such as were binding in equity upon purchasers with notice; for that where the contract between the parties was executed in the form of a covenant, their mutual rights and liabilities were determined by the legal operation of that instrument, and that if a Court of equity were to give a more extended operation to such covenant, it would be giving the party that for which he had never contracted.

He admitted, indeed, that the decisions of the VICE-
[* 777] CHANCELLOR of England in *Whatman* v. *Gibson*, 9 Sim. 196, and *Schreiber* v. *Creed*, 10 Sim. 35, were not reconcilable with that doctrine; but he referred to the present LORD CHANCELLOR'S order, on appeal, in *Mann* v. *Stephens*, 15 Sim. 379, as apparently sanctioning it by the liberty there given to the plaintiff to bring an action, from which it was to be inferred that his Lordship thought that the right of the plaintiff to relief in equity depended upon, and was commensurate with, his right of action upon the covenant at law.

The LORD CHANCELLOR (without calling upon the other side).

That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. Here there is no question about the contract: the owner of certain houses in the Square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a Square Garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this Court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a

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manner inconsistent * with the contract entered into by his [*778] vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

That the question does not depend upon whether the covenant runs with the land, is evident from this, that if there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. There are not only cases before the VICE-CHANCELLOR of England, in which he considered that doctrine as not in dispute; but looking at the ground on which Lord ELDON disposed of the case of the *Duke of Bedford* v. *The Trustees of the British Museum*, 2 My. & K. 552 (6 R. C. 702), it is impossible to suppose that he entertained any doubt of it. In the case of *Mann* v. *Stephens*, before me, I never intended to make the injunction depend upon the result of the action; nor does the order imply it. The motion was, to discharge an order for the commitment of the defendant for an alleged breach of the injunction, and also to dissolve the injunction. I upheld the injunction but discharged the order of commitment, on the ground that it was not clearly proved that any breach had been committed; but there being a doubt whether part of the premises on which the defendant was proceeding to build was locally situated within what was called the *Dell*, on which * alone he had under [*779] the covenant a right to build at all, and the plaintiff insisting that it was not, I thought the pendency of the suit ought not to prejudice the plaintiff in his right to bring an action if he thought he had such right, and, therefore, I gave him liberty to do so.

With respect to the observations of Lord BROUGHAM in *Keppell* v. *Bailey*, he never could have meant to lay down that this Court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it.

I think the cases cited before the VICE-CHANCELLOR and this

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decision of the MASTER OF THE ROLLS perfectly right, and, therefore, that this motion must be refused with costs.

Austerberry v. Corporation of Oldham.

55 L. J. Ch. 633–646 (s. c. 29 Ch. D. 750; 53 L. T. 543; 33 W. R. 807).

[633] *Covenant to maintain and repair Road. — Covenant running with Land. — Notice.*

A road declared by deed to be enjoyable not only by the parties to the deed, but also by the public at large, for all manner of purposes, and in all respects as a common turnpike road, on payment of such tolls as might from time to time be demanded, is not a highway dedicated to the public, nor is it a highway repairable by the inhabitants at large under section 150 of the Public Health Act, 1875.

Semble, a road cannot be dedicated to the public by an individual without the authority of an Act of Parliament, if he reserves the right to receive tolls for the use of the road.

A piece of land was conveyed to trustees for valuable consideration for the purposes of making a road, and the trustees covenanted with the vendor, his heirs and assigns, that they, their heirs and assigns, would make the road, and at all times keep it in good repair, and allow the public to use it on payment of tolls. *Held*, that this covenant did not run with the land (either with regard to the burden or benefit), and could not be enforced by the purchaser from the vendor against a purchaser from the trustees, both parties taking with notice of the covenant to repair.

This was an appeal from a decision of the VICE-CHANCELLOR of the County Palatine of Lancaster.

In the year 1837 the owners of property adjacent to a highway between Higginshaw and Lower Moor, in the borough of Oldham, were desirous of making a more direct road between these places. It was accordingly proposed that the owners of the lands (under one of whom the plaintiff in this action claimed) through which the new road was to be made should sell the necessary pieces of land for agreed sums, and the construction and maintenance of the road should be undertaken by an association of proprietors who were to be represented by trustees.

By an indenture of settlement dated the 3rd of March, 1837, and made between Joshua Milne, John Milne, and Samuel Lees, of the first part, James Milne and John Travis, of the second part, the said James Milne, and various persons named in the second schedule thereto, and other persons who should execute the deed and whose names should be comprised in the third schedule thereto,

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of the third part, after reciting that the making and completing of the road would be of great public advantage; that the parties to the deed were willing at their own expense to carry out the undertaking, and to form a joint-stock company, and to raise the capital necessary for the formation of the road and making and maintaining the same; that it had been agreed that Joshua Milne, John Milne, and Samuel Lees should be trustees, and that the necessary land should be purchased in their names, and that the road should not only be appropriated and enjoyed by the parties thereto for their individual purposes, but (subject as thereinafter mentioned) should be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road, and that the trustees should stand possessed of the land purchased upon such uses and trust, as to and for such intents and purposes only as were thereinafter mentioned: It was witnessed and agreed that the trustees should stand possessed of the lands over which the road was to be made upon the trusts thereinafter declared: And it was further witnessed and agreed (*inter alia*) that a toll-house should be erected, and that no person or persons (except such persons and for the purposes only as were mentioned in the several conveyances of the * land so purchased by the company) should [* 634] be allowed to travel upon, use, or enjoy any part of the road, or pass through the toll-gates, side-bars, or chains to be erected or set up, without having previously paid such toll as might from time to time be demanded of him, her, or them, pursuant to the table of tolls for the time being authorised by the company to be demanded and taken; that the parties to the deed should pay the tolls, except that the persons who conveyed the lands might reserve to themselves the right of using the road for agricultural purposes.

The schedule referred to in the above deed was signed by the parties to the deed and the owners of the slips of land which were to be conveyed for the road, and attached to it were a specification and plan showing the position of the proposed road and the names of the various owners of the land through which the road was to pass, including the name of John Elliott, through whom the plaintiff in this action claimed, who owned land on both sides of the road.

By an indenture dated the 8th of April, 1837, and made between John Elliott of the one part, and Joshua Milne, John Milne, and Samuel Lees, the trustees, of the other part, John Elliott, for the

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consideration therein mentioned, conveyed to the trustees the plot of land therein described, being part of certain lands belonging to him, called Higher Moor Field, and which said plot of land was therein expressed to be intended to form part of the intended line of road from Higginshaw to Lower Moor, together with full liberty to enter upon the adjoining lands of John Elliott for making and completing the road, and to erect on the said plot of land toll-gates and toll-houses, and to demand and take the tolls mentioned in any table of tolls put up at any such toll-gates, before any horse, beast, cattle, cart, waggon, or carriage (except as thereinafter mentioned) should be permitted to pass through such toll-gate. The deed contained the usual general words and the usual restrictions as to mines and minerals, "and also except such rights and privileges of passing toll free over the said line of road for certain purposes as hereinafter is mentioned and expressed," to hold the said plot of land, liberties, powers, and privileges to the use of the trustees for the ends, intent, and purposes therein in that behalf mentioned. Then followed covenants by the trustees with John Elliott that they would within three years make the piece of land granted by Elliott into a road to form part of the road from Higginshaw to Lower Moor, and make the remainder of the said road in accordance with the above-mentioned specification and plan, "and also that the said line shall, from and immediately after the expiration of the said term of three years (subject nevertheless to such toll for horses, cattle, beasts, carts, and carriages passing thereon as may, by the said Joshua Milne, John Milne, and Samuel Lees, their heirs and assigns, from time to time be fixed and determined upon), be used by the public, and shall and will for ever hereafter be kept open and used as and for a road for the use of the public (subject as aforesaid); and also that they, the said Joshua Milne, John Milne, and Samuel Lees, their heirs and assigns, shall and will from time to time, and at all times hereafter, keep and maintain the said road and every part thereof in good repair, order, and condition, except such part thereof as hereinafter is mentioned." "Provided always, and it is hereby further agreed and declared, that it shall not be lawful to demand or take, and no toll shall be demanded or taken, from the said John Elliott, his heirs or assigns, lessees, tenants, or occupiers, for any horse, cattle, beast, or carriage passing laden with, or unladen for, or returning after having been laden with any stone, gravel, soil, or other materials only for repairing

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the said fences or drains hereinafter covenanted to be kept in repair, opened, cleared, and maintained by the said John Elliott, his heirs or assigns, or his or their tenants or occupiers of the said lands adjoining the said plot of land and premises hereby granted as aforesaid, nor for any horses, cattle, beasts, or carriages passing laden or unladen through, across, or over the said line of road, or any part thereof, or for any purpose connected with the occupation of the said tenement and lands at Higher Moor aforesaid for farming or agricultural purposes only, or relating to the cultivation thereof, or of any * part thereof." Shortly afterwards [*635] the road was made, and was called Shaw Road, and a toll-gate was erected and tolls were taken from carriages and horses and cattle, but not for foot-passengers. The land in the vicinity of the road, which had originally been agricultural land, became built upon, and prior to 1865 numerous buildings were constructed on both sides of the road on the faith, as the plaintiff alleged, of the covenants and stipulations contained in the above-mentioned deeds.

By the Oldham Borough Improvement Act, 1865, s. 27, power was given to the corporation for the compulsory purchase of Shaw Road; but the corporation did not exercise this power within the time limited by the Act.

By a deed dated the 21st of April, 1868, John Elliott conveyed the Higher Moor Field to the plaintiff. The plaintiff built several houses on this field, and paid the usual tolls when using the road.

In 1880 the Oldham Improvement Act was passed, which, after referring to the 27th section of the Act of 1865, and reciting that the corporation had not exercised their powers within the period limited by that Act, and that a transfer of Shaw Road without compulsion had been agreed on for the sum of £6000, enacted (section 62) "that nothing contained in the Act of 1865 or in this Act shall exclude, limit, or affect the right of the corporation to exercise the powers conferred upon them by section 50 of the Public Health Act, 1875, as regards the road or street within the borough called Shaw Road;" (section 63), that with respect to Shaw Road the following provisions should take effect — namely, first, on the corporation paying to the said Joshua Milne and Cheetham William Taylor the consideration money aforesaid, and producing a copy of the Act duly stamped, "all the rights, interests, property, and things comprised in section 27 of the Act of 1865, as subsisting at the time of the vesting thereof under this section, and the

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soil of Shaw Road, shall, by virtue of this section, vest absolutely in the corporation and their successors for all the estate and interests therein of Joshua Milne, Cheetham William Taylor, and Charles Edward Lees, and each of them, their and each of their heirs, executors, and administrators, and of all persons and bodies claiming through or under them." Secondly, that the receipt of the trustees should be a good discharge. Thirdly, that the persons to whom payment is so made should hold the money received by them, subject to payment and discharge of all debts and liabilities (if any) properly payable thereout or chargeable thereon, in trust for such persons as were at the time of payment beneficially interested in Shaw Road, and according to the proportions or respective amounts of the interests of those persons. Fourthly, that on the vesting taking effect all rights of levying tolls in respect of traffic on Shaw Road, and the interests of all persons in any tolls so levied, should be absolutely extinguished.

The agreement mentioned in this Act was carried out, and the road and soil thereof became vested in the corporation, who thereupon removed the toll-gates and ceased to levy tolls.

In 1881 the corporation served Austerberry and other owners and occupiers of lands fronting or adjoining Shaw Road with notices requiring them to sewer, level, flag, channel, pave, and complete Shaw Road as in the notices specified. The plaintiff and other owners failed to comply with these notices, and the corporation then executed the works required, and the costs of the works were by the order of the Justices apportioned between the owners and occupiers.

The plaintiff then brought this action on behalf of himself and all other owners and occupiers of the lands fronting and adjoining Shaw Road against the corporation and trustees, claiming a declaration that the corporation were not entitled to recover from the adjoining owners any sums or charges for the bedding, paving, or execution of repairs on Shaw Road or other works necessary for keeping the road in good repair, and that the corporation might be restrained from taking any proceedings to recover such sums, or a declaration that the trustees were liable to indemnify the plaintiff out of the purchase-money, and to have the trusts relating to the purchase-money executed.

The VICE-CHANCELLOR of the County Palatine dismissed the action as against all the defendants.

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* The plaintiff appealed. [* 636]

The arguments appear sufficiently from the judgments.

Henn-Collins, Q. C., and Maberly, for the appellants, cited and referred to *Taylor* v. *The Corporation of Oldham*, 46 L. J. Ch. 105, 4 Ch. D. 395; *The Northam Bridge and Roads Company* v. *The London and Southampton Railway Company*, 6 M. & W. 428, 9 L. J. Ex. 165; *The Queen* v. *The Inhabitants of Lordsmere*, 19 L. J. M. C. 215, L. R. 15 Q. B. 689; *The Queen* v. *The Inhabitants of Netherthong*, 2 B. & Ad. 179; the Public Health Act, 1875, ss. 4, 144, 148, and 150; Viner's Abr., tit. "Toll Traverse;" *Nutter* v. *The Accrington Local Board of Health*, 48 L. J. Q. B. 487, 4 Q. B. D. 375; *Cooke* v. *Chilcott*, 3 Ch. D. 694; *Aspden* v. *Seddon*, 46 L. J. Ex. 353, 1 Ex. D. 496; *Spencer's Case*, 5 Co. Rep. 16 a (p. 233, *ante*); *Holmes* v. *Buckley*, 1 Eq. Cas. Abr. 27; *Morland* v. *Cook*, 37 L. J. Ch. 825, L. R. 6 Eq. 252; *Western* v. *Macdermott*, 35 L. J. Ch. 190, 36 L. J. Ch. 76, L. R. 1 Eq. 499, L. R. 2 Ch. 72; *Milnes* v. *Branch*, 5 M. & S. 411 (p. 239, *ante*); *Nicoll* v. *Fleming*, 51 L. J. Ch. 166, 19 Ch. D. 258; *Tulk* v. *Moxhay*, 2 Ph. 774, 18 L. J. Ch. 83 (p. 254, *ante*); *Haywood* v. *The Brunswick Permanent Benefit Building Society*, 51 L. J. Q. B. 73, 8 Q. B. D. 403; *Rickards* v. *Bennett*, 1 B. & C. 223 (25 R. R. 372); and Gunning on Tolls, pp. 36 and 37.

Cookson, Q. C., and Pankhurst, for the respondent, cited and referred to *The Queen* v. *Livesey*, 22 L. T. (N. S.) 470; *Spencer's Case*; *Western* v. *Macdermott*; *Cooke* v. *Chilcott*; *Haywood* v. *The Brunswick Permanent Benefit Building Society*; *The London and South-Western Railway Company* v. *Gomm*, 51 L. J. Ch. 530, 20 Ch. D. 562; *Tulk* v. *Moxhay*; *Morland* v. *Cook*; *Holmes* v. *Buckley*; and *Keppell* v. *Bailey*, 2 Myl. & K. 517.

Collins, Q. C., in reply, referred to Gale on Easements, 5th ed., 545, and *Rider* v. *Smith*, 3 T. R. 766.

COTTON, L. J. — This is an appeal by the plaintiff against the decision of the VICE-CHANCELLOR of the County Palatine, who did not grant the relief which he sought. The nature of the case is this: The plaintiff is the owner of land lying on two sides of what is now a street in Oldham; he had got a notice from the corporation, under the 150th section of the Public Health Act, 1875, to do certain work, which, if the road or street is within that section, they are entitled to require to be done, in the nature of paving and sewering the street. He did not do it; then they executed the work, and sought to recover from him in the way pointed out by

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the Act his proportion of the expense which they had incurred in paving and sewering the road or street, part of which divided his property. He contended before the VICE-CHANCELLOR unsuccessfully, and has contended on appeal, that for various reasons the corporation had got no power to put in force against him section 150 of the Public Health Act, 1875, and the consequential powers given by that Act in respect of work done under that section. That was, of course, saying, "You have no right at all as against me to claim any part of this money;" but there was also a subsidiary point. He contended that if he was wrong on the first point, yet they were only entitled to claim from him the expense of part of the work which they had done, on the ground that under the deed which I shall have to refer to, the corporation were bound to bear the remainder of the expense under a covenant entered into by their predecessors in title.

Now, the point first argued was as to the general power under section 150 of the Public Health Act, 1875. [His Lordship read it, and, after commenting on the circumstances under which the road was made and used, stated, that, in his opinion, there was no such dedication to the public as to make this a public highway, and that consequently it did not come within the exception of section 150 of "a highway repairable by the inhabitants at large."

He continued:]

[* 638] * Then comes this other point. Assuming that this corporation had the power to act under section 150, it was said that when the land forming the portion of the road about which this question arises was originally purchased from a Mr. Elliott, he being one of those over whose land the new road went, there was a covenant by the trustees who bought on behalf of the joint-stock company to preserve and maintain it as a road. The covenant was by those trustees with John Elliott, his heirs and assigns, that they should, within the space of three years, at their own cost, make and form and fence off in a good and workmanlike manner the road; and then it goes on to prescribe the mode of making the road, and "that the said line shall, from and immediately after the expiration of the said term of three years (subject, nevertheless, to such toll for horses, cattle, beasts, carts, and carriages passing thereon as may by the said Joshua Milne, John Milne, and Samuel Lees (who are the trustees), their heirs and assigns, from time to time be fixed and determined upon), be used by the public, and shall and

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will for ever hereafter be kept open and used as and for a road for the use of the public (subject as aforesaid), and also that they, * the said Joshua Milne, John Milne, and Samuel [* 639] Lees, their heirs and assigns, shall and will, from time to time, and at all times hereafter, keep and maintain the said road and every part thereof in good repair, order, and condition." Now it is said that that covenant having been entered into by the trustees, the corporation, as purchasers from them, are now subject to that covenant. The corporation bought this road under an Act of Parliament which was passed in the year 1880. I do not think it necessary in the view I take of this case to go in detail into that Act of Parliament, but section 63 gives the power of purchase. There had been a previous Act of Parliament which had given them the right to enter into a contract with the trustees for the purchase of this road; they had not done that; and then section 63, with respect to this road, which is called Shaw Road, gave them this power, — that on their paying to the trustees out of the borough funds, or the moneys borrowed, the consideration money which they were to pay, and on a copy of this Act being produced to the Commissioners of Inland Revenue (duly stamped), "then, and in that case, but not sooner or otherwise, all the rights, interests, property, and things comprised in section 27 of the Act of 1865" (that was the previous Act), "as subsisting at the time of the vesting thereof under this section, and the soil of Shaw Road, shall, by virtue of this section, vest absolutely in the corporation and their successors, for all the estate and interest therein" of the trustees. It seems by the immediately preceding section that this Act contemplated that probably the corporation might have power to exercise the rights given by section 150; but in the view which I take of this case I shall not enter minutely into that question, or as to the general effect of this Act of Parliament with regard to the question in dispute. But it is said on behalf of the appellant, Here is this covenant with the trustees; the corporation are their successors under that Act of Parliament, taking all the estate and interest of the trustees in Shaw Road, and that being so, they must be bound by the covenant; it is a covenant the burden and benefit of which run at law, or at least in equity, they having taken with notice, — which undoubtedly they did, — and if not enforceable at law, it is a covenant which could be enforced in equity; and the consequence must be that they cannot claim under the Public

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Health Act, 1875, the expense of repairing this road, or, at any rate, they cannot claim from the plaintiff the full amount, but only such proportion as would meet the amount that would have been required to put the road in the state of repair required by the covenant with Mr. Elliott, through whom the plaintiff claims.

Now as to enforcing this covenant in equity — I will deal with that point first. In my opinion, if this is not a covenant running at law, there can be no relief in respect of it in equity: it is not a restrictive covenant; it is not a covenant restraining the corporation or the trustees from using the land in any particular way, at least so far as this case is concerned. If either the trustees or the corporation were intending to divert this land from the purpose for which it was conveyed, — that is, from being used as a road or street, — that would be a very different question; then one would have to consider this, — how far, having regard to that Act of 1880, the equitable right would travel, because undoubtedly where there is a restrictive covenant, the burden and benefit of which do not run at law, Courts of equity do restrain any one who takes the property with notice of that covenant from using it in a way inconsistent with the covenant. But here the covenant which is attempted to be insisted upon on this appeal is a covenant to lay out money in doing certain work upon this land, and that being so, in my opinion — and the Court of Appeal has already expressed a similar opinion in a case which was before it — that is not a covenant which a Court of equity will enforce. It will not enforce a covenant not running at law when it is sought to enforce that covenant in such a way as to require the successors in title of the covenantor to spend money, and in that way to undertake a burden upon themselves. The covenantor must not use the property for a purpose inconsistent with the use for which it was originally granted. But, in my opinion, a Court of equity does not, and ought not to enforce a covenant binding only in
[* 640] equity in such * a way as to require the successors of the covenantor himself, they having entered into no covenant, to expend sums of money in accordance with what the orginal covenantor bound himself to do. The case principally relied upon by the appellant was one before Vice-Chancellor MALINS. That was the case of *Cooke* v. *Chilcott*. Now undoubtedly the VICE-CHANCELLOR did decide that case on the equitable doctrine, and said that he would enforce the covenant; but that is an authority which,

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in my opinion, was not right on that point. In the subsequent case of *Haywood* v. *The Brunswick Permanent Benefit Building Society* (both Lord Justice LINDLEY and myself were members of the Court which decided that case) we expressed our opinion against *Cooke* v. *Chilcott* being a correct development of the doctrine established by *Tulk* v. *Moxhay*, or for which *Tulk* v. *Moxhay* was an authority. Then there was another case before the late Lord ROMILLY of *Morland* v. *Cook* which was relied upon; but that was really a case not turning upon that doctrine, because it was this: There was a deed of partition of land, all of which was below the sea level, and was protected by a river or sea wall, and a covenant was entered into by the different parties to pay their proportion of the expense of repairing the sea wall, whoever should do it; and that covenant was enforced for and against the successors of those who were parties to the deed. But in that case it appeared that there was, according to the view of the MASTER OF THE ROLLS, a common-law liability, independently of that covenant, to repair the sea wall, so that it would be very different from the case of creating a new liability; the covenant there was framed in such a way as to create a grant by the different persons who took, on partition, portions of the property of a rent-charge out of their lands, in order to provide for the expense. The covenant was in this form: They covenanted for themselves, &c., "severally and respectively, in manner following — that is to say, that the charges, damages, and expenses of or attending the keeping and maintaining the walls and gutts of or belonging to the said lands, fresh marsh lands, hereditaments and premises hereby granted and released, or intended so to be, in good order and repair, shall be borne and paid by them (naming them), their respective heirs and assigns, out of the said lands and hereditaments hereby divided in proportion, and by an acre-scot to be from time to time for that purpose made thereon and payable thereout in the same proportions in ready money." So, although in terms it was a covenant, it was a covenant by these parties that their proportion of the expense should be paid out of their land by an acre-scot, and be payable thereout in the same proportions in ready money. That is, therefore, really a grant by each of the parties of a rent-charge of so much money as would be equivalent to his proportion of the total expense of repairing that wall.

Those, I think, were the principal cases which were relied upon.

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As to the case of *Holmes* v. *Buckley*, although that was a case which came from equity, yet I apprehend it was not decided on the ground taken in *Tulk* v. *Moxhay*, therefore I do not think it necessary on this part of the case to refer to that decision. Therefore, in my opinion, if the plaintiff here cannot say he is entitled at law to sue on the covenant, he cannot have any relief on the equitable doctrine of *Tulk* v. *Moxhay*. Then, is there a covenant enforceable at law here? Two things must be considered on this point, — the burden of the covenant, and the benefit of the covenant; and unless the plaintiff can show, he being an assign of the original covenantee, that he is entitled to the benefit of the covenant, and unless he can show also that the corporation, being assigns of the original covenantor, are subject to the burden of the covenant, he cannot establish in this Court any covenant which can be enforced at law. If the plaintiff fails in either of these points he fails on this part of the case. As I think my learned brethren will consider more particularly the question whether this burden runs with the land, I do not propose to enter into this part of the case. If I had to do so, I ought to give my opinion upon the debated point whether the burden of a covenant can properly run with the land; and for that purpose [*641] *I should like to consider the authorities which are supposed to lay down the proposition that it can, before I gave any opinion on the subject; but I in no way say that the burden of a covenant can be so annexed to the land as to run properly with the land. But does the benefit of the covenant run with the land in the present case? Now, in order that the benefit may run with the land, the covenant must be one which relates to or touches and concerns the land of the covenantee. Here, undoubtedly, what was to be done was not to be done on the land of the covenantee at all, but simply to be done on the land of the purchasers from him — these trustees; and when we look at the particular form of covenant entered into with him, it is clear that it was not pointedly with reference to his land that this covenant was entered into: it was a covenant that this strip of land should be kept as a road for the use of the public. Of course that was insufficient to dedicate it as a public highway so as to make it repairable by the parish, for it was only a matter of covenant as between him and the purchasers from him. Looking at the terms of the covenant, it is rather a covenant for the benefit of such

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of the public as might be willing to use this road, not a covenant having a direct reference to the land or the enjoyment or benefit of the land of the covenantee, the predecessor in title of the plaintiff here. There was undoubtedly a reservation to the covenantee, which was for the benefit of his land and the occupiers of it, in relation to his right to cross this road, in respect of and for agricultural purposes, without paying tolls; but it is conceded that this right or easement, or whatever it was, is gone, and here we are dealing with a covenant in which the public is constantly referred to, not the owners and assigns of the land. The words are, "shall and will for ever hereafter" (that is, the road) "be kept open and used as and for a road for the use of the public." That shows this, that although the covenantee thought it would benefit himself and the other owners of the adjoining land to have a road which they as members of the public might use, this covenant is not a covenant which was made and entered into in such a way that it relates to or touches and concerns the land of the covenantee. In my opinion, therefore, the plaintiff fails to make out that the benefit of this covenant can be said so to run with the land as to enable him, as the assign of the covenantee, to maintain this action. This being so, I think I need hardly go through many of the cases; but some of them, perhaps, one ought to mention. *Holmes* v. *Buckley* is one. It is doubtful whether that case was decided on the ground that the covenant ran with the land, because there the land of the plaintiff was nothing but the easement of a watercourse; and it is suggested that that decision really must not be looked upon as an authority that the benefit of the covenant would run with such an easement; but I should think myself that the watercourse must have been used to convey water to adjoining land of the plaintiff, and probably it was in respect of that land that the covenant was said to run with the land. However, I will not enter further into that case, because one of my learned brethren will do so more fully; but even if that is an authority as to the burden or a benefit of the covenant running with or against the land, one can see it has no application to the point on which I decide this case, because there the watercourse must undoubtedly have been for the benefit of the adjoining land of the grantee. Then as to the other case of *Morland* v. *Cook*, I have explained what the case really is, and although Lord ROMILLY did decide that that covenant would run

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with the land, I do not think, having regard to the explanation which I have given, one need consider that an authority which ought to trouble one either as regards the benefit or burden of the covenant; but, as regards benefit, a covenant for the keeping up of a sea wall which would prevent the land in question owned by the plaintiff from being flooded, from being drowned, was undoubtedly a covenant with reference to the benefit to be enjoyed by the land by the keeping of the sea out. Then *Western* v. *Macdermott* was another decision of Lord ROMILLY, and [*642] he did express his opinion that there *the covenant ran with the land; but there the covenant was one which was much more pointedly and directly for the benefit of the plaintiff or the predecessor in title of the plaintiff, because it was a covenant not to build on adjoining land, the evidence being that it was not for the benefit of mere members of the public other than the owner of the adjoining land, but to prevent the adjoining land being made less commodious by the erection of buildings on the land of the covenantor. Then there is the case of *Cooke* v. *Chilcott*, which was before Vice-Chancellor MALINS, where he likewise expressed an opinion that the covenant ran with the land. He did not base his opinion on the cases I have mentioned, but it was a case where there was very little, if any, difficulty as regards the benefit of the covenant touching and relating to land of the plaintiff, because it was to erect a pump and pump water from the land of the defendant's predecessor in title to the land of the plaintiff's predecessor in title, and there was reference to the benefit of the land, which showed that that was the object of the covenant. As to whether it was right to express any opinion as to the burden running with the land I say nothing, but there is no authority which can in any way interfere, when fairly regarded, with the opinion which I express, that the covenant in the present case was neither in terms nor in its obvious sense such as to be a covenant relating to, or touching and concerning, the land of the plaintiff's predecessor in title. So, in my opinion, this point that there is a covenant on which the plaintiff can sue the corporation at law is one which cannot be maintained, and so far as this case depends on that, in my opinion the appeal fails. If one had been of opinion that either at equity or at law the plaintiff could have relied on this covenant as against the corporation, it would have been necessary to consider what would have been

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the effect of the 268th section of the Public Health Act, 1875, which points out what is to be done if a person charged considers that he has been charged too much; but as I decide this case on the other point, that neither in equity nor law can the plaintiff successfully rely on this covenant, I think it is not necessary to enter into the question as to how far that section would prevent him from arguing the contention before us that what he has been called upon to pay should be reduced by striking off such proportion of this expense as is attributable to repairs which ought to be done by the trustees under the deed of covenant.

LINDLEY, L. J. — The controversy in this case has arisen in this way: There is a road called Shaw Road, in Oldham, and the defendants, who are the Corporation of Oldham, have recently paved, flagged, sewered, and repaired it. The plaintiff had some land adjoining the road, and the corporation have sought to charge him with what would be, under ordinary circumstances, his share of so making the road, paving, and draining it. He says that the corporation have no right to charge him with any of that expense; and he says, if they have, they have no right to charge him with the whole of it. Now, the first point, whether they have a right to charge him with any of it, depends upon the question whether this Shaw Road is or is not "a highway repairable by the inhabitants at large" within the meaning of section 150 of the Public Health Act. Mr. Austerberry maintains that it is a highway repairable by the inhabitants at large. The VICE-CHANCELLOR has expressed a doubt whether that expression in section 150 — "highway repairable by the inhabitants at large" — is synonymous with all highways; whether it does not mean highways repairable by the inhabitants at large primarily, and whether the turnpike roads, and so on, which are primarily repairable by the public, though they may be repairable at common law by the inhabitants at large, are within that expression. I think there is some doubt about that, but it is unnecessary to decide that question, for the reasons that have been mentioned at length by Lord Justice COTTON, and to which I will very shortly refer. I think it is very doubtful, but it is unnecessary to decide, whether it is possible to dedicate to the public a highway subject to a toll. *I do not say it is not, but I am very [*643] far from saying that it is. But whatever doubt there may be upon that point, which, if we had to decide, I should like to

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investigate further, it appears to me impossible to hold that a highway is dedicated to the public subject to a toll which may fluctuate from day to day. This highway was constituted under a trust deed giving the trustees a power to levy tolls if they liked, and to change them whenever they liked; and it appears to me quite impossible not to see that that is not a dedication to the public, — it is liberty to such of the public as choose to pay the toll to use the road, that is all. I cannot come to the conclusion that the road was ever dedicated to the public. That appears to me to be the short answer (I need not go further into it) to that first point; and, in my opinion, this road is within section 150 of the Public Health Act, and upon the first point the corporation is right. But then arises another and a totally different point. The plaintiff says: "You, the corporation, have bought or acquired this road under an Act of Parliament which places you in the position of, and in no better position than, those from whom you got it; you acquired it from certain trustees, and those trustees covenanted with my predecessors in title to keep this road open for the public, and to repair it; you are bound by that covenant to repair, and I am in a position to enforce against you that covenant." First it seems to have been thought that that covenant was so worded as to cover everything which the corporation has done — I mean by "everything" the metalling, and paving, and sewering; but when the covenant is looked at it is seen that it is not extensive enough to cover that; and therefore, whatever may be the merits of the case, the corporation must be right as to a great portion of the charges made against the plaintiff. But then there is the covenant which extends (to use a short word) to repairing, and the plaintiff says that, at all events, to the extent to which you, the corporation, have incurred expense in repairing the road, to that extent you are bound to exonerate me by virtue of that covenant. That gives rise to one or two questions of law. The first question which I will consider is whether that covenant runs with the land, as it is called, — whether the benefit of it runs with the land held by the plaintiff, and whether the burden of it runs with the land held by the defendants, because, if the covenant does run at law, then the plaintiff, so far as I can see, would be right as to this portion of his claim.

Now, as regards the benefit running with the plaintiff's land, the covenant is, so far as the road goes, a covenant to repair the

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road; what I mean by that is, there is nothing in the deed which points particularly to that portion of the road which abuts upon or fronts the plaintiff's land — it is a covenant to repair the whole of the road, no distinction being made between the portion of that road which joins or abuts upon his land and the rest of the road; in other words, it is a covenant simply to make and maintain this road as a public highway; there is no covenant to do anything whatever on the plaintiff's land, and there is nothing pointing to the plaintiff's land in particular. Now it appears to me to be going a long way to say that the benefit of that covenant runs with the plaintiff's land. I do not overlook the fact that the plaintiff as a frontager has certain rights of getting on to the road; and if this covenant had been so worded as to show that there had been an intention to grant him some particular benefit in respect of that particular part of his land, possibly we might have said that the benefit of the covenant did run with this land; but when you look at the covenant it is a mere covenant with him, as with all adjoining owners, to make this road, a small portion of which only abuts on his land, and there is nothing specially relating to his land at all. I cannot see myself how any benefit of this covenant runs with his land. But it strikes me, I confess, that there is a still more formidable objection as regards the burden. Does the burden of this covenant run with the land so as to bind the defendants? The defendants have acquired the road under the trustees, and they are bound by such covenant as runs with the land. Now we come to face the difficulty; does a * covenant to repair all this road run with the land — [* 644] that is, does the burden of it descend upon those to whom the road may be assigned in future? We are not dealing here with a case of landlord and tenant. The authorities which refer to that class of cases have little if any bearing upon the case which we have to consider, and I am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed, amount to either a grant or an easement, or a rent-charge, or some estate or interest in the land. A mere covenant to repair, or to do something of that kind, does not seem to me, I confess, to run with the land in such a way as to bind those who may acquire it. It is remarkable that the authorities upon this point, when they are examined, are very few, and it is also remarkable

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that in no case that I know of, except one, which I shall refer to presently, is there anything like authority to say that a burden of this kind will run with the land. That point has often been discussed, and I rather think the conclusion at which the editors of the last edition of "Smith's Leading Cases" have come to is right, that no case has been decided which does establish that such a burden can run with the land in the sense in which I am now using that expression. The case of *Holmes* v. *Buckley* looks a little like it at first; but the observation to be made on that case I think is this: In the first place it is quite plain that there the plaintiff had a cause of action; he was entitled to an injunction of some sort to restrain the defendants from interrupting his watercourse. The right of the plaintiff to enforce specifically the covenant to repair, or rather to cleanse the watercourse, is obscure, and we have not got the decree which was pronounced, and I confess that having only that short note of it which is to be found in "Equity Cases Abridged" I fail to understand the exact grounds of that decision, if it was a decision specifically enforcing that covenant to cleanse. I doubt whether it was a decision to that effect, but the case is too loosely reported to be a guide on the point. Now, *Morland* v. *Cook* — another case in which it was said that the covenant ran with the land — is intelligible on this ground, that there was there that which amounted to the creation of a rent-charge for the repair of the sea wall which was in question. That is intelligible enough, and if the covenant in the present case amounted to anything of the kind, of course the observations I am now making would not be applicable. The case before Vice-Chancellor MALINS of *Cooke* v. *Chilcott* has been so shaken that I cannot rely upon it as an authority at all. I think the VICE-CHANCELLOR did intimate an opinion that the covenant there would run with the land. I confess I doubt the correctness of that opinion. He decided the case upon another point, and upon that other point only has it been followed. There is no other authority that I am aware of that such a covenant as this runs with the land unless it is *Western* v. *Macdermott*, where the Court of Appeal did not sanction the notion that the covenant in that case ran with the land, although the covenant was a purely restrictive covenant. I am not aware of any other case which either shows or appears to show that a burden such as this can be annexed to land by a mere covenant such as we have got here;

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and in the absence of authority it appears to me that we shall be perfectly warranted in saying that the burden of this covenant does not run with the land. After all, it is a mere personal covenant. If the parties had intended to charge this land for ever, into whosesoever hands it came, with the burden of repairing the road, there are ways and means known to conveyancers by which it could be done with comparative ease; all that would have been necessary would have been to create a rent-charge and charge it on the tolls, and the thing would have been done. They have not done anything of the sort, and therefore it seems to me to show that they did not intend to have a covenant which should run with the land. That disposes of the part of the case which is perhaps the most difficult. Now the other point was this: that even if it did not run with the land at law, still, upon the authority of *Tulk* v. *Moxhay*, the defendants having bought the land with * notice of this covenant, take the land subject [* 645] to it. Mr. Collins very properly did not press that upon us, because under the two recent decisions in the Court of Appeal, in *Haywood* v. *The Brunswick Permanent Building Society* and *The London and South-Western Railway Company* v. *Gomm*, that argument is untenable. *Tulk* v. *Moxhay* cannot be extended to covenants of this description. It appears to me, therefore, I confess, that upon all points the plaintiff has failed, and that the appeal ought to be dismissed.

Fry, L. J. — I have very little to do in this case except to express my assent and concurrence with the conclusion of my learned brothers. Upon the question of dedication, I think it plain that there has been no dedication to the public of the road in question. I doubt whether there can be a dedication of a road to the public with a levy of a toll, unless under a grant from the Crown; but that point is one which it is not needful now to decide. In the present case what is relied upon as a dedication is the language used in the deed of settlement; but I regard that as a mere convention between the parties, who associated themselves together for a private enterprise, and covenanted that they would open the road to the public, subject to a toll to be varied from time to time, with an eye, no doubt, to the dividends which they were to declare amongst the shareholders. I consider that they no more dedicated the road to the public than a company formed for the purpose of carrying on a theatre or a pleasure-

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garden dedicates the theatre or the pleasure-garden to the public because they agree among themselves that they will admit the public, subject to the payment of a toll.

Upon the second point I have not much to add. It appears to me that the questions are three. In the first place, did the benefit of this covenant run with the land — the land of Mr. Elliott? Upon that point my opinion is perhaps not quite as confident as that of my learned brothers. I am rather more inclined to think that the road connecting the land with the public highway was so far an incident to the use and occupation of the remainder of Mr. Elliott's land that it might be conceivable that it came within the principles of covenants relating to things incident to the land; but, at the same time, I do not desire to express any difference of opinion upon that. But upon the point whether the burden of the covenant ran with the land of the covenantors, I am clearly of opinion that it did not so run; and I share the doubt which has been expressed by my learned brothers, whether in any case, except that of landlord and tenant, the burden of covenants of this description does ever run with the land. There is one case which appears to me very closely parallel to the present case. I think that the most favourable way of stating the case of the present appellant is to hold that there was the grant of an easement by the covenantors to Mr. Elliott of a right of way over that land of the covenantors, with a covenant by the covenantors that they would maintain the land, subject to the right of way, in repair as a road. Now, putting the case in that manner, it is extremely like the circumstances which occurred in the case of *Brewster* v. *Kidgill*, which is best reported in vol. 12 Modern Reports, p. 166. That was a case which came before Lord HOLT and the King's Bench, and was evidently very elaborately argued. There, one Brewster, who was seised in fee of a manor, in consideration of £800, granted a rent-charge in fee of £40 per annum, and on the back of the deed was indorsed a memorandum declaring it to be the true intent and meaning of that deed "that the grantee and his heirs shall for ever hereafter be paid the said rent-charge without any deduction or abatement of taxes, charge, or payment out of, for, or concerning the said rent, or the said manor or lands charged herewith." The question then arose whether the memorandum was really part of the grant of the rent-charge, or a covenant collateral to the grant. Lord HOLT conceived it to be a

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collateral covenant; the other Judges of the King's Bench thought that it was part of the grant. They all agreed in the view that if it was a part of the grant it ran with the land; but that if it was a covenant to pay it did not run with the * land. [* 646] Now what Lord HOLT said upon that point is this: "I make no doubt but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted; but that covenant should run with the rent against the assignee of that land, I see no reason. If this rent was granted so to be paid, it would be another matter; but here is only a covenant, and no words amounting to a grant, and therefore there can be no relief in this case against the terre-tenant, but," his Lordship added, "in equity," — I will consider that point hereafter, — "and, therefore, for this point I do not see how the plaintiff can have his judgment." The learned Judges differed on the question of construction, but they do not appear to have differed on the point of law which Lord HOLT discussed.

There remains, therefore, only the question whether there is any relief in equity in a case of this description where there is none at law. The point is not pressed upon us by the appellant. I do not think it is arguable after the recent decisions. A covenant of this description requiring the outlay of money upon the land is not a covenant which, if it does not run at law, runs at equity by reason of any doctrine such as that of *Tulk* v. *Moxhay*. I agree, therefore, that this appeal must be dismissed with costs.

ENGLISH NOTES.

This and the next rule might perhaps have been conveniently dealt with together. But building schemes seem to present topics of interest peculiar to themselves.

"Restrictive" seems a better word than "negative" in connection with the present rule, since a covenant affirmative in form may involve a negative. *Kehoe* v. *Marquis of Lansdowne* (H. L.), 1893, App. Cas. 451, 62 L. J. P. C. 97; *Catt* v. *Tourle* (Ch. App. 1869), L. R. 4 Ch. 654, 38 L. J. Ch. 665, 17 W. R. 939. Any words in a deed, which show an agreement to do a thing, make a covenant. Com. Dig., tit. "Covenant," A, 2. The passage was cited and followed in *Easterby* v. *Sampson* (Ex. Ch. 1830), 6 Bing. 644, 1 Cr. & J. 105, affirming s. c. 9 B. & C. 505, 33 R. R. 239. In that case both Courts spelt out a covenant to build from an express covenant to keep in repair and a recital that there was an agreement to build. A covenant may in

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terms limit the liability to the personal acts of each successive owner or occupier. *Gaskin* v. *Balls* (C. A. 1879), 13 Ch. D. 325, 28 W. R. 552. These covenants are not obnoxious to the rule against perpetuities. *Mackenzie* v. *Childers* (1889), 43 Ch. D. 265, 59 L. J. Ch. 188, 62 L. T. 98.

Notice, not knowledge merely, is sufficient to bind a purchaser. *Feilden* v. *Slater* (1869), L. R. 7 Eq. 523, 38 L. J. Ch. 379, 20 L. T. 112. An intending tenant is bound by the contract of his landlord, and is fixed with notice of all those matters which would have appeared upon an investigation of his landlord's title. *Cosser* v. *Collinge* (1832), 3 My. & K. 283; *Feilden* v. *Slater*, *supra*. So a purchaser who accepts less than the statutory length of title will be fixed with notice of all those matters which an abstract extending over forty years would have disclosed. *Re Cox and Neve's Contract* (1891), 2 Ch. 109, 64 L. T. 733, 39 W. R. 412; and cf. *Patman* v. *Harland* (1881), 17 Ch. D. 353, 50 L. J. Ch. 642, 44 L. T. 728. The limitations placed upon the development of the law respecting constructive notice by the Conveyancing Act, 1882 (45 & 46 Vict., c. 39), s. 3, should, however, be borne in mind. A plea of purchase for value without notice must negative the notice not merely before, but at the respective times of the execution of the conveyance and of the payment of the consideration. *Jackson* v. *Rowe* (1828), 4 Russ. 514, 9 L. J. (O. S.) Ch. 32, 28 R. R. 168.

A restrictive covenant would not, without more, render a person bound by the stipulations to take proceedings against his tenant for a breach. *Hall* v. *Ewin* (C. A. 1887), 37 Ch. D. 74, 57 L. J. Ch. 95, 57 L. T. 831.

The more recent cases upon restrictive covenants are here referred to as illustrating the points which arise for discussion. Restrictions upon business, or the class of business, have given rise to some important decisions where trades overlap. A person may be entitled to sell things which are common to his and the forbidden trade. *Jones* v. *Bone* (1870), L. R. 9 Eq. 674, 39 L. J. Ch. 674; *Stuart* v. *Diplock* (C. A. 1889), 43 Ch. D. 343, 59 L. J. Ch. 142, 62 L. T. 333. But the terms of the restrictive covenant may be such as to prevent a sale of articles common to both. *Drew* v. *Guy* (C. A.), 1894, 3 Ch. 25, 63 L. J. Ch. 547, 71 L. T. 220, and the cases there cited. Covenants respecting the sale of intoxicating drinks have given rise to several questions. A covenant against the user of a house "as an inn, public house, tap room, or for the sale of spirituous liquors, or ale or beer," was held not to extend to the sale of wines. *Feilden* v. *Slater* (1869), L. R. 7 Eq. 523, 38 L. J. Ch. 379, 20 L. T. 112. A restrictive covenant may be broken although the trade in dispute is merely ancillary to the general business, and carried on for the convenience of customers. *Buckle* v. *Fredericks*

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(1890), 44 Ch. D. 244, 62 L. T. 884, 38 W. R. 742; *Fitz* v. *Iles* (C. A.), 1893, 1 Ch. 77, 62 L. J. Ch. 258, 68 L. T. 108. The granting of "grocers' licenses" for the sale in bottles of intoxicating liquors gave rise to many questions. *Feilden* v. *Slater, supra*, was one. In *Jones* v. *Bone* (1870), L. R. 9 Eq. 674, 39 L. J. Ch. 405, 23 L. T. 304, JAMES, V. C., refused to enforce a covenant by injunction, holding that the sale under the grocer's license could not have been contemplated at the time when the deed was executed. A "beershop" is a shop where beer is sold, but a "beerhouse" is a house licensed for the sale of beer; a sale under a grocer's license would be a breach of a covenant not to use a building as a beershop, but not where the word used is "beerhouse." *London, &c. Building Co.* v. *Field* (C. A. 1881), 16 Ch. D. 645, 50 L. J. Ch. 549, 44 L. T. 444; *Holt & Co.* v. *Collyer* (1881), 16 Ch. D. 718, 50 L. J. Ch. 311, 44 L. T. 214. A covenant by a tenant to purchase articles of trade from his landlord, and expressly or impliedly from no other person, is not an unreasonable restraint of trade. *Catt* v. *Tourle* (Ch. App. 1869), L. R. 4 Ch. 654, 38 L. J. Ch. 665, 17 W. R. 939; and see *Mallan* v. *May, &c.*, No. 38, 39, and 40 of "Contract," 6 R. C. 392. But the landlord must supply articles of good marketable quality, or the tenant may obtain his supplies elsewhere. *Luker* v. *Dennis* (1877), 7 Ch. D. 227, 47 L. J. Ch. 174, 37 L. T. 827. And where the landlord has covenanted to supply goods of a specified quality and price, the obligation of the lessee's covenant is conditional on the performance by the lessor of his covenant: s. c. A negative stipulation for the exclusive sale of articles of commerce will be enforced by injunction. *Donnell* v. *Bennett* (1883), 22 Ch. D. 835, 52 L. J. Ch. 414, 48 L. T. 68, 31 W. R. 316, cited in notes to *Gervais* v. *Edwards, &c.*, Nos. 63 and 64 of "Contract," 6 R. C. 664.

The more recent cases upon restrictive building clauses have dealt with the following subjects: —

Open spaces. *Tulk* v. *Moxhay*, the first principal case. *McLean* v. *McKay* (P. C. 1873), L. R. 5 P. C. 327, 29 L. T. 352, 21 W. R. 798.

Building on open spaces in advance of the building line. *Gaskin* v. *Balls* (C. A. 1879), 13 Ch. D. 325, 28 W. R. 552; *Chitty* v. *Bray* (1883), 48 L. T. 860.

Bay or bow windows in advance of the building line. *Manners* v. *Johnson* (1875), 1 Ch. D. 673, 45 L. J. Ch. 404, 24 W. R. 481.

Bay or bow windows over a garden. *Western* v. *Macdermott* (Ch. App. 1866), L. R. 2 Ch. 72, 36 L. J. Ch. 76.

Boundary walls. *Bowes* v. *Law* (1870), L. R. 9 Eq. 636, 39 L. J. Ch. 483.

An invasion of privacy. *Manners* v. *Johnson, supra.*

Using a building as a private dwelling-house, or covenanting not to carry on a business. *Patman* v. *Harland* (1881), 17 Ch. D. 353, 50

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L. J. Ch. 642, 44 L. T. 728; *Rolls* v. *Miller* (C. A. 1884), 27 Ch. D. 71, 53 L. J. Ch. 682, 50 L. T. 597; *Bramwell* v. *Lacey* (1879), 10 Ch. D. 691, 48 L. J. Ch. 339.

"Nuisance" in a covenant means actionable nuisance: *Harrison* v. *Good* (1871), L. R. 11 Eq. 338, 40 L. J. Ch. 294, 24 L. T. 263; but this was dissented from in *Tod-Heatley* v. *Benham*, cited below.

An act "which shall or may be or grow to the *annoyance*, nuisance, grievance, or damage of the lessor, or the inhabitants of the neighbouring or adjoining houses, may be something less than a nuisance." *Tod-Heatley* v. *Benham* (C. A. 1888), 40 Ch. D. 80, 58 L. J. Ch. 83, 60 L. T. 241.

The mere fact that there are windows in an adjacent house overlooking the purchased property does not fix the purchaser with constructive notice of any agreement giving a right to the access of light to them. *Allen* v. *Seckham* (C. A. 1879), 11 Ch. D. 790, 48 L. J. Ch. 611, 41 L. T. 260. Of the cases relating to an implied grant of light where a house is granted and vacant land retained, or contemporaneous grants of a house to one and vacant land to another, it is sufficient to refer to the latest: *Broomfield* v. *Williams* (C. A.), 1897, 1 Ch. 602, 66 L. J. Ch. 305. From this case it appears that under the circumstances there is an implied grant of light, but that implication is rebutted by showing knowledge on the part of the grantee of the house, that the vacant land is to be used, and by the extent of his knowledge his rights are to be limited. There is no greater right (apparently in the absence of express provision) conferred by a grant of light than is acquired by enjoyment under the Prescription Act. *Leech* v. *Schweder* (Ch. App. 1874), L. R. 9 Ch. 463, 43 L. J. Ch. 487, 30 L. T. 586. The subject of ancient lights was discussed 3 R. C. 1–75.

It may be stated as a general rule that the breach of a negative stipulation will be restrained by injunction. See the observations of Lord Cairns, L. C., in *Doherty* v. *Allman* (H. L. 1878), 3 App. Cas. 708, 39 L. T. 129, 26 W. R. 513, set out 9 R. C., at p. 466; *Manners* v. *Johnson* (1875), 1 Ch. D. 673, 45 L. J. Ch. 404, 24 W. R. 481. Damage need not be shown. *Feilden* v. *Slater* (1869), L. R. 7 Eq. 523, 38 L. J. Ch. 379, 20 L. T. 112; *Manners* v. *Johnson*, *supra*; *Collins* v. *Castle* (1887), 36 Ch. D. 243, 57 L. J. Ch. 76, 57 L. T. 764. But if, by change of circumstances, as evidencing waiver of or acquiescence in the breach, it becomes inequitable to enforce a covenant by injunction, the injunction will not be granted. *Duke of Bedford* v. *British Museum Trustees* (1822), 2 Mylne & K. 552, 6 R. C. 702; *Knight* v. *Simmonds* (C. A.), 1896, 2 Ch. 294, 65 L. J. Ch. 583, 74 L. T. 563. But where the only evidence of waiver or acquiescence is non-objection to trivial breaches, the right to an injunction will not be lost. *Knight* v. *Sim-*

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monds, supra. In cases of very trivial breaches the provisions of Lord Cairns's Act (21 & 22 Vict., c. 27) would be put in force and nominal damages awarded. *Sayers* v. *Collyer* (C. A. 1884), 28 Ch. D. 103, 54 L. J. Ch. 1, 57 L. T. 723. The Chancery Division has, however, all the former powers of a common-law Court to award damages: s. c., per BAGGALLAY, L. J.

Regarding the form of order: "Where there is an action to restrain a breach of covenant. There may be cases where it is a great question whether a particular thing is or is not a breach of the covenant, and the Court adjudicates on the question in issue between the parties. Then in my opinion the injunction ought not to be in general terms to restrain the defendant from committing any breach of covenant, because the defendant has threatened to break the covenant, but should contain an adjudication on the particular thing which is said to be a breach of the covenant, and so to restrain him by injunction from doing that particular thing, in that way to limit the generality of the injunction." *Parker* v. *First Avenue Hotel Co.* (C. A. 1883), 24 Ch. D. 282, 286, per COTTON, L. J. The order is absolute in terms, and it is for the party enjoined to find out how to obey the order. *Lane* v. *Newdigate* (1804), 10 Ves. 192, 7 R. R. 381. Cf. *Elliott* v. *North Eastern Railway Co.* (H. L. 1863), 10 H. L. Cas. 333, 32 L. J. Ch. 402, 8 L. T. 337. Where, however, it appeared by an affidavit filed in the action that the defendant was entitled to sell certain specified articles, the injunction was qualified by inserting words to the effect that the injunction was not to prevent the defendant from selling such things as were set out in the affidavit. *Drew* v. *Guy* (C. A.), 1894, 3 Ch. 25, 63 L. J. Ch. 547, 71 L. T. 220. So by consent a mandatory order contained provisions to the effect that in case of any dispute whether the defendant had pulled down to a sufficient extent, the question should be referred to a named person. *Smith* v. *Smith* (1875), L. R. 20 Eq. 500, 44 L. J. Ch. 630, 32 L. T. 787.

The operation of an injunction is frequently suspended: see 1 Seton Decrees, *passim;* and in one case was suspended for five years: see *Attorney-General* v. *Birmingham, &c. Drainage Board* (C. A. 1881), 17 Ch. D. 685, 50 L. J. Ch. 786, 44 L. T. 906.

Where there has been a great conflict of "expert" evidence the Court has called for the testimony of an independent expert witness. See *Leach* v. *Schweder* (Ch. App. 1874), L. R. 9 Ch. 463, 43 L. J. Ch. 487, 30 L. T. 586; *Manners* v. *Johnson* (1875), 1 Ch. D. 673, 45 L. J. Ch. 404, 24 W. R. 481.

There is jurisdiction to grant a mandatory injunction on an interlocutory application. *Morris* v. *Grant* (1875), 24 W. R. 55; and see *Newson* v. *Pender*, No. 5 of "Ancient Lights," 3 R. C. 57, and notes thereto, and Addendum, 30.

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A person who knowingly aids and assists in the doing of acts which have been expressly prohibited by injunction (although he is not a party to the litigation, nor named in the order granting the injunction) may be committed for contempt of Court. *Seaward* v. *Paterson* (C. A.), 1897, 1 Ch. 545, 66 L. J. Ch. 267. But in *Attorney-General* v. *Birmingham, &c. Drainage Board, supra,* the application against the defendants as successors of the Birmingham Corporation was dismissed, because the Public Health Act did not render the defendants liable under the decree against the predecessors, and there was no allegation of an act by the defendants.

The validity of restrictive stipulations is recognised in the law of Scotland. *Lord Zetland* v. *Hislop* (H. L. 1882), 7 App. Cas. 427.

AMERICAN NOTES.

This doctrine has been considerably anticipated in connection with *Spencer's Case, ante,* p. 250, and in the cases there cited will be found a sufficient key to the American rulings.

Mr. Jones (1 Real Property, sect. 778, 779, 780) cites *Tulk* v. *Moxhay,* and quotes from it as the leading case, in connection with cases cited in the last note, and *Webb* v. *Robbins,* 77 Alabama, 176; *Trustees* v. *Lynch,* 70 New York, 440; 26 Am. Rep. 615; *Middletown* v. *Newport Hospital,* 16 Rhode Island, 319; *Coughlin* v. *Barker,* 46 Missouri Appeals, 54, to the doctrine that restrictive covenants create easements, but observing that "the Courts of England, as well as those of some of the States, repudiate the idea that the Courts interfere on the ground of protecting an easement." Citing *De Gray* v. *Monmouth B. C. Co.,* 50 New Jersey Equity, 329, in which both principal cases and *Spencer's Case* are cited, with the remark that "this rule of equity being an encroachment on the general doctrine of the common law that the burden of a covenant does not run with the land, its application is not to be extended beyond the class of cases in which it has been heretofore enforced." This decision recognizes the validity of building restrictions, but points out five instances in which they are applicable as to purchasers not parties to the original covenant, fortifying them with American and English citations. This is a very instructive case.

Mr. Jones adopts the doctrine of the *Austerberry* case, citing *Hodge* v. *Sloan,* 107 New York, 244; 1 Am. St. Rep. 816, which relies on *Tulk* v. *Moxhay* in a case where the purchaser of a lot from a sand-dealer covenanted not to sell sand off the lot and thus interfere with the grantor's business. (Two Judges dissented, on the ground that the covenant was personal and did not run with the land.) In *Brewer* v. *Marshall,* 19 New Jersey Equity, 537 (Court of Errors and Appeals), it was held, citing *Tulk* v. *Moxhay,* that a covenant by a vendor that he would not sell any marl from his adjoining premises should not be enforced against an alienee of the land thus charged. This is placed on the ground that the contrary rule would enable "the owner of land to impress upon it any of his notions . . . in the hands of every subsequent holder," "as multiform and as innumerable as human caprice."

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"No case has as yet been so extreme as this." "The decisions in this branch should be followed but not transcended." This decision is distinguished in *Hodge* v. *Sloan*, but it seems difficult to distinguish it. The decision was pronounced by eight Judges against four. *Tulk* v. *Moxhay* was cited by the New Jersey Court of Chancery (*Kirkpatrick* v. *Peshine*, 24 N. J. Eq. 213), where it was held that a covenant by a vendor that in case of further sales he would bind the grantees to build on a line twelve feet from the street was enforceable against a subsequent grantee with notice. This was followed in *Coudert* v. *Sayre*, 46 New Jersey Equity, 391 (citing *Tulk* v. *Moxhay*), a case of covenant by grantee that the premises should not be used for a slaughter-house, &c. The Court quoted from *Whitney* v. *Union Ry. Co.*, 11 Gray, 363: "Every owner of real property has a right so to deal with it as to restrain its use by his grantee within such limits as to prevent its appropriation to purposes which will impair the value or diminish the enjoyment of the land which he retains. The only restriction on this right is that it shall be exercised reasonably, with due regard to public policy, and without creating any unlawful restraint of trade."

In *Blain* v. *Taylor*, 19 Abbott Practice (N. Y.), 230, the Court, citing *Mayor, &c.* v. *Pattison*, 10 East, 130, observed: "If the thing to be done is merely collateral, and in no respect concerns the land, an assignee is not bound. For instance, if a lessor covenants in the lease to build a house upon other land than his, or to grind at the lessor's mill, according to the custom, all the corn, grain, or malt which the lessee may have occasion to use or spend, these covenants are not binding on the grantee or assignee." See *Kettle River R. Co.* v. *Eastern R. Co.*, 41 Minnesota, 461; 6 Lawyers' Rep. Annotated, 111, where the covenant was that the owner of the land should have all the product of a stone quarry on the land transported over one line of railroad, and this was held a mere traffic agreement. To be binding on assigns, the Court said: "It must inhere in or be attached to the land, or relate to its mode of occupation or enjoyment." The doctrine of restriction was recognized, and *Tulk* v. *Moxhay* was cited, and also *Keppell* v. *Bailey*. Precisely the same was held in *West Va. Trans. Co.* v. *Ohio R. P. L. Co.*, 22 West Virginia, 600; 46 Am. Rep. 527, distinguishing *Tulk* v. *Moxhay*, and approving *Brewer* v. *Marshall*, *supra*, and *Keppell* v. *Bailey*. In the West Virginia case the Court said: "In my judgment it would be unwise to enlarge the sphere of action of Courts of equity in this direction; and it may be found even necessary to restrict their action, at least in some of the cases which are not binding authorities upon us." "For example, the owner might covenant with a stranger, that he or his assigns would never cultivate wheat on the land, or never build upon it a dwelling-house, or would always have all the blacksmithing for said land done at a particular blacksmith shop, or the grain raised on the land sold in a particular market or to a particular person. If such covenants are now made and broken, as it is a mere personal covenant, the only remedy is a suit against the covenantor. But if Courts of equity get to enforcing the specific performance of such contracts by the purchasers of land, because they had notice of them when they purchased, it seems to me that a great public mischief will be

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thereby done." So in *Hurd* v. *Curtis*, 19 Pickering (Mass.), 459, a covenant by several mill-owners, drawing from the same stream by means of the same dam, that they would erect and use wheels of a certain construction and power, was held not binding on the assigns.

Tulk v. *Moxhay* is cited in 3 Pomeroy's Equity Jurisprudence, pp. 959, 1993. This excellent author says (note, p. 1997): "I doubt whether American Courts would feel themselves bound to follow these latest English decisions" (*Haywood* v. *Brunswick, &c. Soc.*, 8 Q. B. Div. 403; *London, &c. Ry.* v. *Gomm*, 20 Ch. Div. 562), "which put a limitation upon the rule hitherto unknown. It is proper to remark that the first of these two cases, in which the limitation was for the first time laid down, was an action at law for damages, decided by a Court composed of Judges trained in legal rather than in equitable doctrines. Finally, the limitation is in my opinion wholly arbitrary, for on principle there seems to be no distinction between the equitable operation and effect of affirmative and of restrictive covenants."

It has been held however that a covenant not to be performed on the land, but which concerns it, will be enforced against an assignee of the covenantor with notice. As a covenant "to pay for work on a canal which does not touch the land of the covenantor, but is to his benefit, and the way in which it was intended to obtain that benefit more fully and directly was by connecting the land with the canal by a ditch, which must of course touch the land; and its not being *in esse* at the time makes no difference when assigns are mentioned." "The language of Lord Coke in *Spencer's Case*, 1 Smith's L. C. 23, does not require a physical touch." *Norfleet* v. *Cromwell*, 70 North Carolina, 674; 16 Am. Rep. 787, citing *Tulk* v. *Moxhay*; *Barrow* v. *Richard*, 8 Paige (N. Y. Ch.), 351; 35 Am. Dec. 713; *St. Andrew's Church Appeal*, 67 Penn. State, 512. This is the doctrine of *Gilmer* v. *Mobile & M. R. Co.*, 79 Alabama, 569; 58 Am. Rep. 623, where the covenant was, in consideration of a grant of a right of way, to erect a flag station at a point convenient to the grantor's house, but not on the land conveyed, to allow the grantor to cultivate the sides of the way, and not to permit the sale of ardent spirits in the station so to be built. The Court cited *Spencer's Case*, and enumerated, as merely personal covenants, "a covenant not to hire persons of a certain description to work in a mill; or a covenant with a stranger not to permit a grist-mill to be erected on the owner's premises; a covenant with the vendor of lands not to permit marl to be sold from adjoining lands; by a lessee of a house to pay so much for every tun of wine sold in the house, or to buy all beer used by him from his lessors or from his successors in trade."

Tulk v. *Moxhay* is also cited in *Watrous* v. *Allen*, 57 Michigan, 362; 58 Am. Rep. 363, where the covenant was that no intoxicating liquors should be sold on the granted premises; and in *Shields* v. *Titus*, 46 Ohio State, 528, where the covenant was to establish a common private way between the lands of different owners for the common benefit; and in *Newbold* v. *Peabody Heights Co.*, 70 Maryland, 501, as stating the law with "admirable clearness."

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No. 5. — RE BIRMINGHAM AND DISTRICT LAND COMPANY AND ALLDAY.

(CH. D. 1892.)

RULE.

IT is a question of fact to be deduced from all the circumstances of each case whether a "building scheme" is merely matter of agreement between vendor and a purchaser, or is meant by the vendor, and understood by the purchasers, to be the regulations by which the rights of the owners of the several lots are to be adjusted.

Re Birmingham and District Land Company and Allday.

1893, 1 Ch. 342–352 (s. c. 62 L. J. Ch. 90; 67 L. T. 850; 41 W. R. 189).

Building Land. — Sale in Lots by Auction. — Restrictive Covenants. — [342] *Liability of Vendors.*

Where a vendor puts up building land for sale in lots subject to restrictive covenants, it is a question of fact to be deduced from all the circumstances of the case whether the restrictions are merely matters of agreement between him and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers; and the retainer by the vendor of some part of the property is only an element, though an important one, to be taken into consideration with other circumstances in ascertaining the intention; for though the vendor may not part with his whole estate, there may be circumstances which show that the intention was that each purchaser should be entitled to enforce the restriction against the vendor himself as well as against purchasers.

A land company put up freehold building sites for sale by auction in lots, subject to particulars and conditions of sale which, in the view of the Court, constituted an invitation to the public to come in and purchase on the footing that the whole of the property offered for sale was to be bound by one general law affecting the character of the buildings to be erected thereon. At the auction some of the lots were sold and some were not, and after the sale the vendors claimed the right to sell the unsold lots free from the restrictive covenants in case they desired to do so.

Held, that a purchaser who had bought one of the lots sold at the auction, but had not completed his purchase, was entitled to the benefit of a contract by the vendors, implied in the conditions of sale, that the vendors would, as to the lots unsold at the auction, observe stipulations similar to those which the purchasers of those lots, had they been sold, would have been bound to covenant to observe; and *held*, also, that the purchaser was entitled to have such obligations of the vendors expressed in the conveyance to him of his lot.

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Summons under the Vendor and Purchaser Act, 1874.

On the 5th of November, 1891, the Birmingham and District Land Company put up for sale by auction in twenty-two lots a piece of freehold land at Moseley, in the county of Worcester, [* 343] * about two miles from Birmingham, according to particulars and a plan, and subject to certain conditions of sale. The particulars and plan were headed, "Particulars and plan of valuable building sites, in suitable lots for the erection of small villas, situate in Cadbury Road; and a few plots in Stoney Lane and Anderton Park Road." They then described the property offered for sale as "A small freehold estate, divided into twenty-two convenient lots of sound building sites, having frontages of 13 yards and upwards, and mean depths of 40 yards, the lots varying in quantities from 289 square yards to 2182 square yards. The building restriction being £250 per house." The particulars next specified the locality, frontage, and contents in square yards of each of the various lots, and then stated, "These eligible plots of land, which are quite ripe for building operations, are pleasantly situated in a most desirable neighbourhood, and for the greater part fronting a newly made road (which is properly curbed, channelled, and sewered in accordance with the requirements of the sanitary authority), and the whole are admirably adapted for the erection of a class of houses to be let at moderate rentals, for which there is considerable demand in this salubrious locality."

The plan showed that the piece of land out of part of the area of which the lots had been made was in the shape of a triangle, the base of which was formed by Cadbury Road and the lots fronting thereon, and the sides by Anderton Park Road and Stoney Lane, and it appeared that between the apex and the base of the triangle there ran across the property from Anderton Park Road to Stoney Lane a piece of land belonging or having formerly belonged to the vendors, upon which thirteen villas fronting either in Anderton Park Road or Stoney Lane had been erected, which piece of land separated some of the lots offered for sale from the others.

All the lots fronted on one or other of the three roads, and the plan showed that the villas had been erected according to a building line which was marked as continuing across such of the lots offered for sale as fronted in the same direction with the villas. The plan also showed that other houses had been built on adjoining lands, apparently of the vendors, and these villas and

No. 5. — Re Birmingham and District Land Co. and Allday, 1893, 1 Ch. 342–345.

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* houses were marked with names such as might be given [*344] to dwelling-houses of the same character as the houses for the erection of which the lots to be sold were stated to be suitable.

Of the conditions of sale, the only material one was the 11th, which was as follows: —

"Each purchaser in the assurance to him of the property purchased by him shall covenant with the vendors, their successors and assigns, and also by way of separate covenant with the other conveying parties (if any), their heirs and assigns, as follows: That no buildings other than dwelling-houses with necessary out-buildings shall be erected or built upon the land purchased by him. And that every such dwelling-house and out-building shall, in the erection and completion thereof, cost not less than the sum of £250, and that no house shall be used for any other purpose than as a private dwelling-house. That no building shall be erected upon any of the lots fronting to Anderton Park Road and Stoney Lane respectively within the building line as shown upon the plan annexed to the particulars, so that the line of the buildings now standing upon the other land of the vendors fronting Anderton Park Road and Stoney Lane respectively shall be observed, and that no building shall be erected upon any of the lots fronting to Cadbury Road within the building line as shown upon the said plan being at a distance of three yards back from Cadbury Road."

At the auction some of the lots put up for sale were sold, William Allday being the purchaser of one of them, viz., lot 15. The remainder, twelve in number, were unsold. Allday accepted the vendor's title, and required the vendors to convey to him the lot he had purchased together with the benefit of the contract of the vendors, implied in the conditions of sale, that the vendors would, as to the then unsold lots, observe and abide by stipulations similar to those which the purchaser was by the conditions of sale to enter into with the vendors. The vendors declined to admit such a grant in the conveyance, and maintained their right to sell the lots unsold at the sale without any building restriction in case they thought it desirable to do so. The purchaser then took out this summons for a declaration that he was entitled * to the benefit of a contract by the vendors implied [*345] in the conditions of sale, that they would as to the lots unsold at the auction observe and abide by stipulations similar to those which the purchasers of the unsold lots had they been

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sold at the auction would have been bound to covenant that they would observe and abide by; and also that he was entitled to have the obligations of the vendors in respect of the unsold lots expressed in and made binding by his conveyance.

T. C. Wright, for the purchaser, in support of the summons:—

On the face of the particulars, plan, and conditions, this was a building estate, subject to one general law, imposing upon every purchaser certain restrictions. Certain lots forming part of this building estate were put up for sale; some of them were and others were not sold. Under these circumstances there is an implied contract between the vendors and each of the purchasers of the lots sold, that the vendors will not use or treat the lots unsold in a manner inconsistent with the restrictions of the building scheme. *Renals* v. *Cowlishaw*, 9 Ch. D. 125; *Spicer* v. *Martin*, 34 Ch. D. 1; 14 App. Cas. 12; *Mackenzie* v. *Childers*, 43 Ch. D. 265. The vendors might, if they had chosen to do so, have expressly reserved to themselves the right of selling the unsold lots under different arrangements, and either subject to or free from the restrictive stipulations applicable to the then sale. *Sidney* v. *Clarkson*, 35 Beav. 118. But they did not do so; and the purchaser is entitled to have from them a recognition of his rights on the face of his conveyance.

Hastings, Q. C., and Henry Fellows, for the vendors:—

Where a vendor purposes to sell in lots a building estate as a whole, and puts it up under restrictive conditions, then no doubt the inference arises that such covenants are for the common benefit of the purchasers. But where a portion only of a building estate is put up, and the vendor retains in his own hands adjoining property, no implied covenant arises against him as regards any property not sold or retained by him. In such a case [*346] the presumption is that the conditions were inserted * and the contract entered for his own benefit only, and the purchasers cannot claim the benefit of them as against him. *Nottingham Patent Brick and Tile Company* v. *Butler*, 15 Q. B. D. 261; 16 Q. B. D. 778.

T. C. Wright, in reply.

1892, Nov. 2. STIRLING, J.:—

This is a summons under the Vendor and Purchaser Act, 1874, raising a question as to the form of the conveyance on a purchase, but in reality, as has been very fairly admitted by the counsel for

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the vendors, a question as to the rights of the purchaser under his contract. Before completion of the purchase the vendors set up a claim to be able to sell the unsold lots free from the restrictive conditions under which the purchaser bought. This right is disputed by the purchaser, who insists that the conveyance shall contain words sufficient to negative the claims of the vendors. The question whether the contention of the vendors or that of the purchaser ought to prevail is the substantial question which I have to decide upon this summons. On behalf of the purchaser, reliance was placed on the statement of the law made by Lord MACNAGHTEN in advising the House of Lords in the case of *Spicer* v. *Martin*, 14 App. Cas. 12. He said (14 App. Cas. 24): "If the site of the houses now known as Cromwell Gardens had been put up for sale by auction in building lots, according to a plan corresponding with that on Mr. Martin's lease, and if the conditions of sale had prescribed that houses should be built such as those which have actually been erected, and that every purchaser should bind himself by a covenant, in the terms of the restrictive covenant now in question, no one, I think, could have doubted that each purchaser would, as against the vendor, and as against every co-purchaser, have had a right to the benefit of the covenant, although there might have been no direct stipulation to that effect, and no express provision for mutual covenants by the purchasers *inter se.*" And further on he says: "It seems to me that when Mr. Spicer put his houses in Cromwell Gardens on the market he invited the public to come in and take a portion of an estate which was *bound by one general law — a law perfectly well [*347] understood, and one calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses. The benefit of that increase, whatever it was, Mr. Spicer got. Can he or his representative be permitted to destroy the value of the thing he sold by authorising the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole?"

It was not disputed by the counsel for the vendors that if the doctrine thus laid down applies, the purchaser is in the right; but it is said that such doctrine is inapplicable, because it is apparent on the face of the particulars and conditions of sale that the vendors retained in their own hands adjacent lands of considerable extent, and that these restrictive stipulations must be taken to

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have been introduced for the protection of the property held by them. In support of that, they rely on the judgment of Lord ESHER, M.R., in *Nottingham Patent Brick and Tile Company* v. *Butler*, 16 Q. B. D. 778. I will refer first to the judgment in that case given in the Court below by Mr. Justice WILLS, which was approved of by Lord Justice LINDLEY, as being a correct statement of the law. He says (15 Q. B. D. 268): "The principle which appears to me to be deducible from the cases is that where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit." Then he says (15 Q. B. D. 269): "It appears to me that, where land is put up [*348] to auction in lots, and *two or more persons purchase according to conditions of sale containing restrictions of the character of those under consideration in the present case, it is very difficult to resist the inference that they were intended for the common benefit of such purchasers, especially where the vendor purposes (as in the present case) to sell the whole of his property. Where he retains none, how can the covenants be for his benefit; and for what purpose can they be proposed except that each purchaser, expecting the benefit of them as against his neighbours, may be willing on that account to pay a higher price for his land than if he bought at the risk of whatever use his neighbours might choose to put his property to? Where, therefore, the vendor desires to sell at the auction the whole of his property, the inference is strong that such covenants are for the common benefit of the purchasers; and it seems to me that the strength of this evidence is not diminished by the fact that at the sale a considerable number of the lots may fail to find purchasers." When the case was heard on appeal, Lord ESHER, M.R., in the course of his

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judgment, said this (16 Q. B. D. 784): "I think that Mr. Justice WILLS' view of the law on this subject is perfectly correct. In my view he is right in saying that, when an estate is put up for sale in lots, subject to a condition that restrictive covenants are to be entered into by each of the purchasers with the vendor, and the vendor is intending at that sale to sell the whole of the property, the question whether it is intended that each of the purchasers shall be liable in respect of those restrictive covenants to each of the other purchasers, is a question of fact, to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every other question of intention. And, if it is found that it was the intention that the purchasers should be bound by the covenants *inter se*, a Court of equity will, in favour of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so under such circumstances without introducing the vendor into the matter." Then he says (16 Q. B. D. 785): "There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property, with no then existing intention * of selling [* 349] the rest, and subsequently there is a sale of another part; then, as regards the later sale, you cannot look at the conditions of the former sale, you must look only at the conditions relating to the later sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others." The judgments of the LORDS JUSTICES do not go any further; but Lord Justice LINDLEY expressly approves the statement of the law as given by Mr. Justice WILLS.

That case is cited as an authority for the contention that the restrictive covenants are only enforceable by a purchaser when the vendor sells the whole of the property. I cannot come to that conclusion. I take the same view as Mr. Justice WILLS, that it

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is a question of fact, to be deduced from all the circumstances of the case, whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. The MASTER OF THE ROLLS seems to have been of that opinion also, though in the judgment referred to he was speaking of a case where the vendees disposed of the whole estate. He says that if the vendor does not reserve any part, "that is almost if not quite conclusive (unless there is something contradictory);" but that language appears to concede that the conclusion may be rebutted by something else. Though the retainer by the vendor of some part of the property is a highly important element, it is after all only an element to be taken into consideration along with other circumstances in ascertaining the intention. It appears [*350] *to me that although the vendor may not part with his whole estate, there may be circumstances which show that the intention was that each purchaser should be entitled to enforce building restrictions against the vendor and every other purchaser. That being so, let us turn to the particulars and conditions in this case. [His Lordship then read the description in the particulars of the property offered for sale, and continued:—]

Stopping there, what would a purchaser infer from looking at the particulars and plan? Admitting that it appears (as it certainly does appear), from the plan and conditions, that the vendors were owners of other property in the immediate neighbourhood, it is still to be borne in mind that the owners of building estates in the neighbourhood of large towns do not throw the whole of their estates on the market at once; and, further, that they do not devote the whole estate to the erection of the same class of houses, but very often appropriate one portion to one class and another portion to another class, and that these various plots do not, in the language of the particulars, become "ripe for building operations" at the same time, and that considerations of this kind apply with not less force when the vendor is a land company, presumably dealing with land for purposes of sale, and not for the purpose of retention as a permanent investment. It would seem to me, then, that a purchaser would naturally infer that this property described as "a small freehold estate" had been selected by the vendors from the larger property belonging to them to be devoted to the erection of houses of a particular class. But turn-

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ing to the restrictive conditions, we find condition 11 to be this. [His Lordship read the condition, and continued:—]

These restrictive conditions provide in substance (1) for the erection of private dwelling-houses only; (2) for a minimum value as regarded each house erected; and (3) for adherence to a building line, stated to be already existing as regards buildings on other land of the vendors. Now, the plan annexed to the particulars shows each lot on the adjoining land of the vendors' as having a house erected on it, and, in most cases, as bearing a name adapted to a villa residence of the class usually found in the neighbourhood of large towns; but there is [* 351] no indication of their value. It may, however, fairly be assumed, as against the vendors, that those houses were of a value equal to or exceeding the minimum. As regards the land thus retained by the vendors, the intending purchaser would see that the building conditions had already been complied with; and the inference which I have already suggested as that likely to occur to his mind upon reading the particulars would be strengthened. It seems to me, therefore, that these particulars and conditions constituted (in the language of Lord MACNAGHTEN in *Spicer* v. *Martin*, 14 App. Cas. 12) an invitation to the public to come in and purchase on the footing that the whole of the property offered for sale was to be bound by one general law affecting the character of the buildings to be erected thereon; and that the vendors ought not to be allowed to destroy the value of that which was sold by authorising the use of a part of the property for a purpose inconsistent with the law by which they purported to bind the whole. It is said, and, indeed, the secretary of the company has sworn, that the company never intended to give the purchaser the benefit claimed by him. Upon that, it is to be remarked that, whereas a purchaser cannot dive into the recesses of a vendor's mind, a vendor offering property always has it in his power to make his intentions clear; and it is his duty so to do. It has long been the practice for vendors, whose intentions are such as stated in the present case, to reserve, by express conditions, power to make future sales discharged from restrictive conditions. An example is to be found in the case, cited in argument, of *Sidney* v. *Clarkson*, 35 Beav. 118, relating to a sale in the year 1865. I do not, of course, mean that the vendor cannot indicate his intention in other ways; but this consideration appears to me to relieve such cases of any element of hardship to which weight might otherwise

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attach. I may add, that the remarks of Lord LANGDALE in *Peacock* v. *Penson*, 11 Beav. 355, 359, and the case of *Collins* v. *Castle*, 36 Ch. D. 243, appear to support the view which I have taken. I make a declaration that the applicant Allday is entitled to the benefit of a contract by the vendors, [*352] *implied in the conditions of sale; that the vendors, as to lots unsold at the auction at which Allday bought, are bound to observe and abide by stipulations similar to those which the purchasers of those lots, had they been sold at the auction, would have been bound to covenant that they would observe and abide by, and that Allday is entitled to have such obligations of the vendors expressed in the conveyance to him of his lot.

ENGLISH NOTES.

It is not uninteresting to note, as a point of comparative jurisprudence, that the Scotch law closely resembles the English law, in drawing a distinction between conditions affecting the user of land, which are only enforceable between the parties to a contract, and those in which a contracting party is to be deemed to have bargained for third parties. *Hislop* v. *Leckie* (H. L. 1881), 6 App. Cas. 560.

An analogous question is involved in the cases of which *Cockshott* v. *Bennett*, No. 5 of "Fraud," 12 R. C. 317, and *Re McHenry, Levita's Claim* (C. A.), 1894, 3 Ch. 365, 64 L. J. 13, 71 L. T. 502, afford an example. There the question arises whether a debtor is the agent of the creditors to bring about a settlement on a common basis, or whether the debtor is to be regarded as entering into a series of bargains with his creditors and obtaining for himself the best terms he can from each. There is a distinction, however, between the composition cases and the building scheme cases, in that in the latter the benefit may be claimed by persons who are not ascertained at the time when the stipulations are originally entered into. There is no doubt the *dictum* of Lord ESHER, M. R., in *Nottingham Patent Brick and Tile Co.* v. *Butler*, referred to in the principal case, that the lots must be disposed of contemporaneously, but this view is opposed not only to the decision in the principal case, but also to *Martin* v. *Spicer* (H. L. 1888), 14 Ap. Cas. 12, 58 L. J. Ch. 309, 60 L. T. 546. In *Sayers* v. *Collyer* (C. A. 1884), 28 Ch. D. 103, 54 L. J. Ch. 1, 51 L. T. 723, more than twelve months intervened between the respective conveyances under which the plaintiff and defendant claimed. The following cases are given as illustrating the considerations by which the Court is moved in determining the question whether a building scheme does or does not exist: *Western* v. *Macdermott* (Ch. App. 1866), L. R. 2 Ch. 72, 36 L. J. Ch. 76; *Keates* v. *Lyon* (Ch. App. 1869), L. R. 4 Ch. 218, 38 L. J. Ch. 357, 20 L. T. 255;

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Master v. *Hansard* (1876), 4 Ch. D. 718, 46 L. J. Ch. 505, 36 L. T. 535; *Sheppard* v. *Gilmore* (1887), 57 L. J. Ch. 6, 57 L. T. 614.

The last note (p. 277 *et seq.*) may be referred to for restrictions that have been discussed and also respecting the relief granted in recent cases. The following observations seem, however, necessary to supplement the matters there dealt with. One of the most important matters when property is cut up for sale in lots as a building estate is the nature and character of the roads. These, in practice, are generally made up by the owner at his own expense prior to the sale. The reader may be reminded that local authorities have made bye-laws under the authority of Acts of Parliament dealing with the subject of roads. These bye-laws regulate the width of the roads, and universally, or almost always, forbid the construction of *cul de sacs*. Before roads are taken over and made repairable by the inhabitants at large, certain provisions have to be observed regarding paving and kerbing footpaths and channelling the roadway. These requirements vary in different localities, and it is not deemed necessary to deal with the matter in detail; but these local regulations should not be overlooked. As regards contracts respecting roads it is a question whether the words used amount to an actual undertaking that the roads shall be made or a mere expression of intention. *Harding* v. *Wilson* (1823), 2 B. & C. 96, 3 Dowl. & Ry. 287, 26 R. R. 287; *Peacocke* v. *Penson* (1848), 11 Beav. 355, 18 L. J. Ch. 57, 12 L. T. 329; *Mason* v. *Cole* (1849), 4 Ex. 375, 18 L. J. Ch. 478; *Randall* v. *Hall* (1851), 4 De G. & Sm. 343; *Re Chifferiel, Chifferiel* v. *Watson* (1888), 40 Ch. D. 45, 58 L. J. Ch. 263, 60 L. T. 99.

A purchaser is not entitled to assume, because he is shown a plan of a building estate, and his agreement is on a printed form with written alterations, that there is a building scheme, and that the purhasers of the other lots are bound by restrictive covenants. *Tucker* v. *Vowles* (1893), 1 Ch. 195, 62 L. J. Ch. 172, 67 L. T. 763.

Although there is a building scheme, the restrictive stipulations may be personal to the covenanting party. *Re Fawcett & Holmes' Contract* (C. A. 1889), 42 Ch. D. 150, 58 L. J. Ch. 763, 61 L. T. 105.

The principle of "building scheme" cases has recently been applied to the case of a flat. *Hudson* v. *Cripps* (1896), 1 Ch. 265, 65 L. J. Ch. 328, 73 L. T. 741. There the tenant of a flat was held entitled to restrain by injunction the conversion of another part of the building into a club, on the ground that his tenancy had been created on the footing that the building was to be used for residential purposes.

The right to an injunction is not totally lost because in some instances the covenants have been broken without complaint. *Richards* v. *Revitt* (1877), 7 Ch. D. 224, 47 L. J. Ch. 472, 37 L. T. 634; *Hudson* v. *Cripps, supra; Knight* v. *Simmonds* (C. A.), 1896, 2 Ch. 294, 65 L. J.

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Ch. 583, 74 L. T. 563, 44 W. R. 580. In *Weston* v. *Macdermott* (Ch. App. 1866), L. R. 2 Ch. 72, 36 L. J. Ch. 76, the applicant had himself been guilty of slight breaches of the building scheme, but was held not debarred from enforcing other portions of the same scheme.

Objections for want of parties have been pointedly raised and discussed in the following cases: *Weston* v. *Macdermott, supra; Fairclough* v. *Marshall* (C. A. 1878), 4 Ex. D. 37, 48 L. J. Ex. 146, 39 L. T. 389. The person sued should in general be the person breaking the covenant. *Hall* v. *Ewin* (C. A. 1887), 37 Ch. D. 74, 57 L. J. Ch. 95, 57 L. T. 831. In *Mackenzie* v. *Childers* (1889), 43 Ch. D. 265, 59 L. J. Ch. 188, 62 L. T. 92, where trustees were about to assign lands discharged from restrictive covenants, an injunction was granted restraining them from authorising any purchaser to build contrary to a building scheme. The Court ought not to dismiss actions for want of parties, where the necessary parties can be added either as plaintiffs or defendants. *Hunter* v. *Young* (C. A. 1879), 4 Ex. D. 256, 48 L. J. Ex. 689, 41 L. T. 142; *Van Gelder, Apsimon, & Co.* v. *Sowerby Bridge, &c. Society* (C. A. 1890), 44 Ch. D. 374, 59 L. J. Ch. 583, 63 L. T. 132.

AMERICAN NOTES.

This case is cited in 1 Jones on Real Property, sects. 774, 778, and is there largely quoted from.

"The right of an owner of a lot to enforce a covenant to which he is not a party or an assign, restrictive of the use of other lands, is dependent on the covenant having been made for the benefit of this lot. Obviously, while a subsequent purchaser might, by the operation of this rule, acquire a right of action against a prior purchaser, the prior purchaser would acquire no rights from a covenant entered into by a subsequent purchaser, unless there exists some conditions which will entitle him to the benefit of such covenant. The right of grantees from the common grantor to enforce *inter sese* covenants entered into by each with said grantor, is confined to cases where there has been proof of a general plan or scheme for the improvement of the property, and its consequent benefit, and the covenant has been entered into as a part of a general plan to be exacted from all purchasers, and to be for the benefit of each purchaser; and the party has bought with reference to the general plan or scheme, and the covenant has entered into the consideration of his purchase." *Mulligan* v. *Jordan*, 50 New Jersey Equity, 363.

This is the well-settled doctrine of the Massachusetts Courts. *Jewell* v. *Lee*, 14 Allen, 145; 92 Am. Dec. 744; *Dana* v. *Wentworth*, 111 Mass. 291 (citing *Keates* v. *Lyon*, L. R. 4 Ch. 218, and remarking: "The judgment of the Chancellor of New Jersey in *Winfield* v. *Henning*, 6 C. E. Green, 188, is inconsistent with the decisions in this Commonwealth and in England"); *Beals* v. *Case*, 138 Mass. 138; so in *Coughlin* v. *Barker*, 46 Missouri Appeals, 54; *Graham* v. *Hite*, 93 Kentucky, 475 (disapproving *Winfield* v. *Henning*, *supra*).

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LANDLORD AND TENANT.

See also Nos. 8 and 9 of "DEED," 8 R. C. 642 *et seq.*; Nos. 2 to 8 of "DILAPIDATIONS," 9 R. C. 436–488; "DISTRESS," 9 R. C. 601 *et seq.*; "LAND" (covenant running with), pp. 233 *et seq.*, *ante*.

SECTION I. Obligations incidental to the Relation of Landlord and Tenant.
SECTION II. Tenancies for a Term certain under Leases and other Instruments in Writing.
(a) Constitution of Tenancy.
(b) Term of Lease, and Obligations during its Currency.
(c) Assignment and Surrender.
(d) Rights and Duties on Expiry of Term.
(e) Forfeiture for Breach of Condition.
SECTION III. Yearly and other Tenancies not necessarily constituted by Writing.
SECTION IV. Covenants in Leases.

SECTION I. — *Obligations incidental to the Relation of Landlord and Tenant.*

No. 1. — COOKE *v.* LOXLEY.

(K. B. 1792.)

No. 2. — DELANEY *v.* FOX.

(C. P. 1857.)

RULE.

A TENANT cannot call in question the title of the landlord who let him into possession. But he may show (*a*) that he has been evicted by title paramount and replaced in possession by the evictor; or (*b*) that the title of his landlord has expired.

Cooke v. Loxley.

5 Term Reports, 4, 5 (2 R. R. 521).

Landlord and Tenant. — Estoppel.

In an action for use and occupation by an incumbent against a tenant of [4] the glebe lands who has paid him rent, the defendant cannot give evidence of a simoniacal presentation of the plaintiff, in order to avoid his title.

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This was an action for use and occupation, tried upon the last Northern Circuit before Lord KENYON. The former incumbent had let some of the glebe lands to the defendant, who had continued tenant to the present incumbent, the plaintiff, and had paid him half a year's rent for the same. This action being brought for some arrears of rent, the defendant offered to give evidence of the plaintiff's having been simoniacally presented, of which the defendant was stated to be ignorant when he paid the former rent; but Lord KENYON refused to receive it, being of opinion that the case fell within the common rule, that a tenant should not be permitted to impeach his landlord's title in an action for use and occupation. There was a verdict accordingly for the plaintiff.

Cockell, Serjt., now moved, and Erskine and Chambre supported the motion, for a rule to show cause why the verdict should not be set aside, and a new trial had. They grounded their arguments upon the manifest policy of the 31 Eliz., c. 6, for preventing simony; whereby every admission, institution, and induction, upon a simoniacal presentation is declared utterly void, frustrate, and of none effect in law. The object of the statute, therefore, clearly was to avoid the preferment *ab initio*, and consequently all acts done by the incumbent. Now that cannot be said to be done, if he can enjoy the fruits of the living by receiving rent. And if this objection of tenancy were held to be an estoppel, the whole intent of the statute would be frustrated by the ignorance of a tenant contracting with the incumbent without notice of his simoniacal presentation. However, therefore, the policy of the law may estop the tenant to question the title of a landlord in this form of action in general, yet the superior policy of this statute, affecting the interest of the community at large, will remove the estoppel in this particular instance. And this argument holds in other cases depending upon public policy. Generally speaking, a man ought not to be suffered to object to the illegality of a contract into which he has solemnly entered; yet that is allowed in cases of usury, illegal insurances, smuggling contracts, and the like; because the public interest is taken to be concerned in the exposure and avoidance of such contracts. In all such cases the rule [* 5] of private * convenience and good faith, which should bind men to the observance of all engagements freely and knowingly entered into by them, must yield to the more powerful necessity of public policy; and that policy is at least as evident in cases

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of simony as in any of the other instances alluded to. And it was held in a case in Hobart (Hob. 168), that a party, who is sued for tithes, may show that the parson was simoniacally presented.

Lord KENYON, Ch. J. — Conforming to the uniform decisions in all the cases upon this subject, I ruled at the trial, and continue to entertain the same opinion, that in an action for use and occupation it ought not to be permitted to a tenant, who occupies land by the license of another, to call upon that other to show the title under which he let the land. This is not a mere technical rule, but is founded in public convenience and policy. And the only question here is, whether that rule shall still prevail: if it do, it applies equally strong to the present case as to all others. Here the defendant, who occupied the land, did so by the permission of the plaintiff, and then refused to pay his rent under an idea that he might contest the plaintiff's right: but the plaintiff could not be supposed to come to trial prepared to meet such a defence and to make out his title; such an action as the present does not involve the question of title. This differs from the cases of usury and smuggling alluded to at the bar, for there the contracts themselves are founded in fraud.

BULLER, J., declined giving any opinion, being connected with one of the parties.

GROSE, J. — It has been said that the rule of not giving in evidence *nil habuit in tenementis* in an action for use and occupation is a technical rule; but, in my opinion, no rule is better founded in justice and policy than this. The general rule is admitted that in such an action as this the tenant cannot dispute the landlord's title; and no exception to it has been shown applicable to this case. *Rule refused.*

Delaney v. Fox.

26 L. J. C. P. 248–250 (s. c. 2 C. B. (N. S.) 768).

Landlord and Tenant. — Estoppel. — Trespass. — Constructive Eviction. [248]

The rule by which a tenant is estopped from denying the title of the landlord who let him into possession is applicable in an action of trespass as well as in ejectment.

Payment by a tenant of rent to a person other than the person who let him into possession under a threat of expulsion does not amount to a constructive eviction so as to affect the estoppel.

No. 2. — Delaney v. Fox, 26 L. J. C. P. 248, 249.

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This was an action of trespass. The first count of the declaration was, in the usual form, for turning the plaintiff out of her dwelling-house. The second count was founded on the Small Tenements Act.

Plea to the first count, *liberum tenementum.*

At the trial before MARTIN, B., at the Yorkshire Spring Assizes, 1857, the defendant gave *primâ facie* evidence of his title; and the plaintiff then showed that at the time she was let into possession by the defendant he had no title himself, and that the real owner, Mrs. Knowles, distrained on the tenant of a cellar [*249] in the * house in question, and threatened to distrain on the plaintiff who, under the influence of that threat, paid her the rent. It was objected, on behalf of the defendant, that the plaintiff was estopped from denying his, the defendant's title; but a verdict was given for the plaintiff, with 40*s.* damages, on the first count, leave being reserved to the defendant to move to have the verdict entered for him.

A rule *nisi* was afterwards obtained to enter a verdict for the defendant, on the ground that the plaintiff was estopped from showing that the defendant had no title, and for the defendant to amend his pleadings, the plaintiff being at liberty, if it should be necessary, on the argument of the rule, to move that the verdict should be entered for her on the second count of the declaration.

Cleasby (June 11) showed cause. There is no estoppel in this case, the action being in trespass; although there might have been if it had been in ejectment. The estoppel terminates with the tenancy. In Co. Lit. 47 b it is said the estoppel does not continue after the term ended. But the tenant may always show that the landlord had a particular estate which is terminated. Here the plaintiff shows the determination of the defendant's estate by the constructive eviction caused by the claim of rent by, and the payment to, the real owner. The case is just as if the plaintiff had been expelled and let into possession again by the true owner, which constitutes a constructive eviction. *The Mayor, &c. of Poole* v. *Whitt*, 18 M. & W. 571, 16 L. J. Ex. 229. At all events, there is no estoppel in this case. In *Watson* v. *Lane*, 25 L. J. Ex. 102, POLLOCK, C. B., says that the doctrine which prevents a party from denying his landlord's title is peculiar to the action of ejectment.

Manisty and Brett, in support of the rule, were directed by the Court to confine themselves to the question of constructive evic-

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tion. There was no eviction actual or constructive of the tenement held by the plaintiff. *The Mayor, &c. of Poole* v. *Whitt* proceeded upon grounds which do not exist in this case.

[WILLIAMS, J. — From the notes to *Moss* v. *Gallimore*, 1 Smith's L. C. 315, it would appear that in the case of a mortgage, where the mortgagee claims and the tenant pays rent, the latter becomes tenant to the former. How do you distinguish that case from the present?]

The cases there alluded to are founded upon the consideration that the mortgagor has ceased to become entitled to the rent by his own act, and has created a relation between himself and the mortgagee, which entitles the latter to claim the rent.

COCKBURN, Ch. J. — I think this rule must be made absolute. I am of opinion that in this case the plaintiff was estopped from denying the title of the defendant, under whom she had got possession of the premises as her landlord, upon the common-law principle that a person who gets possession of land from another is, by taking possession from him, estopped from denying his right to give possession. It has been attempted to make a distinction between an action of ejectment and one of trespass, and what was said by POLLOCK, C. B., in *Watson* v. *Lane* is relied upon. Now if ejectment had been brought against the tenant, he would have been estopped from denying his landlord's title; and so it is in trespass also. But, on the other hand, it is true that the tenant may show that the landlord's title has expired, and he may do that, among other ways, by showing an eviction, either actual or in point of law; and *The Mayor, &c. of Poole* v. *Whitt* is instanced as a case of constructive eviction. It is not necessary to decide that question here, because there was not even a constructive eviction. Here there was only a payment of rent on a threat. The case cited was one neither of ejectment nor trespass, but was founded upon a covenant to deliver up fixtures at the end of a term, and what was said by the CHIEF BARON in *Watson* v. *Lane* had reference to the form of that action. Here there can be no difference in principle between trespass and ejectment. There was nothing which could amount to a constructive eviction, even if we were of opinion — of which I am not as at present advised — * that [* 250] there could be for this purpose such a thing as a constructive eviction.

CRESSWELL, J. — I am of the same opinion. In the first place,

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evidence was given on the plea of *liberum tenementum*, that the defendant had let to the plaintiff, and that of itself was a sufficient *primâ facie* case of seisin in fee. Unless it is shown to have been determined or altered in some way, it must be presumed to continue. With regard to the question of eviction, I entirely concur that the consent to pay the rent to Mrs. Knowles did not establish an eviction, and I also doubt whether in such case a constructive eviction could be set up. *Watson* v. *Lane* contains no decision on the point in question.

WILLIAMS, J. — I am of the same opinion. It has been fully established by a long series of cases that a tenant shall not be permitted, as against a landlord who let him into possession, to dispute that landlord's title so long as the possession continues; but he may show that it has expired. The case of *Doe* v. *Barton*, 11 Ad. & El. 307, was decided as an instance of that doctrine; but it may be doubted whether it really was so. As regards the eviction, the rule is, that if a party having title paramount enters and then restores possession to the tenant, the question may be raised, because the possession is not the same. It is unnecessary in the present case to give any opinion as to the question of constructive possession.

WILLES, J. — I am of the same opinion. The defendant gave *primâ facie* proof of his plea, and that has not been displaced, if there be an estoppel, which there was. Now it is said the estoppel ceased with the re-entry; but at all events it continued as long as the tenant remained in possession. It is said to make a difference if the tenant has been evicted by title paramount, and that this has been the case here, and so a constructive eviction has taken place; but that has not been proved here, and if it had been, I do not know that it would have been sufficient. *Rule absolute.*

ENGLISH NOTES.

The case of *Doe d. Higginbotham* v. *Barton* (1840), 11 Ad. & El. 307, referred to in the latter principal case, was an ejectment by a lessor who was owner of the equity of redemption; and the defence was offered that the mortgagee had given notice to the tenants to pay him the rents, which they had done accordingly. The Judge at the trial held that the tenant was estopped from this defence, and rejected the evidence. The Court held that the tenant, by showing that his lessor was only mortgagor in possession, did not impugn the right of his

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lessor to confer upon him by the demise a legal title to the possession, but might show that his lessor had since been treated by the mortgagee as a trespasser so as to determine his right; and that the mortgagee's notice to the tenant to pay him the rent might, if received in evidence, have tended to show that the mortgagee had treated the lessor (mortgagor) as a trespasser. A rule for a new trial was accordingly made absolute.

The rule has been laid down as well-settled law in *Corbett* v. *Plowden* (C. A. 1884), 25 Ch. D. 678, 54 L. J. Ch. 109, 50 L. T. 740, 32 W. R. 667, that where a mortgagee intervenes by virtue of his paramount title and claims rent, which he has a right to do without setting up any lease, the rent, if paid, will be the previously existing rent, but under a new tenancy from year to year of the mortgagee.

It is the fact of being let into possession, and not the agreement to become tenant, which creates the estoppel. And so where a tenant (A.) under a demise by B. of premises (X.) to which C. claims title, has signed an acknowledgment as follows: "I do hereby attorn and become tenant to C., of X.;" A. is not estopped from showing that C. has no title, and that the instrument — which, if anything, is a mere promise to become tenant to C. — is inoperative for want of consideration. *Cornish* v. *Searell* (1828), 8 Barn. & Cress. 471, 32 R. R. 445.

The principle of estoppel as applied to a lessee is that having accepted a lease, he cannot plead against his lessor *nil habuit in tenementis*. But although the term for which the lessor has purported to demise has not expired, the lessee may show that his lessor's interest has been determined. *Langford* v. *Selmes* (1857), 3 K. & J. 220.

The assignee of a lessor, on a lease by deed, where the lessor has no estate in the land, but has put the lessee into possession, has the reversion by estoppel as against the lessee, and may, as assignee of the reversion, sue the lessee upon his covenants in the lease. *Cuthbertson* v. *Irving* (1859, 1860), 4 Hurl. & N. 742, 28 L. J. Ex. 306; affirmed Exch. Ch. 6 Hurl. & N. 135, 29 L. J. Ex. 485, 3 L. T. 335, 8 W. R. 704.

The following points are laid down in the judgment of the Court of Exchequer in this case (4 Hurl. & N. 757): "First, if any estate or interest passes from the lessor, or the real title is shown upon the face of the lease, there is no estoppel at all. Secondly, if the lessor have no title, and the lessee be evicted by him who has title paramount, the lessee can plead this and establish a defence to any action brought against him: *Doe d. Higginbotham* v. *Barton* (1840), 11 Ad. & El. 307; but, thirdly, so long as the lessee continues in possession under the lease, the law will not permit him to set up any defence founded upon the fact that the lessor *nil habuit in tenementis;* and that upon the execution of the lease there is created in contemplation of law a rever-

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sion in fee simple by estoppel in the lessor which passes by descent to the heir, and by purchase to an assignee or devisee."

The case of *Doe d. Higginbotham* v. *Barton* above cited was that M. (a mortgagor in possession) had demised to a tenant who entered, and subsequently the mortgagee gave notice to the tenant to pay his rent to him, which the tenant did accordingly. In an ejectment by the mortgagor the tenant was not estopped. For he did not impugn M.'s right to confer upon him by the demise a legal right to the possession, but might show that M. had since been treated as a trespasser by the mortgagee, so as to determine M.'s right.

Where a mortgagor in possession makes a lease which is good by way of estoppel, the concurrence of the mortgagee in an assignment by way of sale of the lease gives a good legal title to the assignee on the principle of accretion of title treated of in 1 R. C., p. 480 *et seq.* *Webb* v. *Austin* (1844), 7 Man. & Gr. 701, 8 Scott N. R. 419, 13 L. J. C. P. 203. The same effect, of course, ensues if the estate has been reconveyed to the mortgagor.

AMERICAN NOTES.

See *ante*, vol. 11, p. 76. Mr. Washburn has a chapter on "Lessee estopped to deny Lessor's Title" (1 Real Property, [* 357]), citing both principal cases. This doctrine "is said to be traceable to feudal tenures, where the tenant was bound to the landlord by ties not much less sacred than those of allegiance itself." *Blight's Lessee* v. *Rochester*, 7 Wheaton (U. S. Sup. Ct.), 548. *Delaney* v. *Fox* is cited in Taylor on Landlord and Tenant, sect. 89.

In modern days, although the doctrine is recognized that the tenant may not deny or controvert the title of the landlord under which he came into possession, yet this is read in the strict limitation of the phraseology, and is confined to that title as it then existed, and by operation of the contract and as matter of good faith alone. But if not inconsistently with the contract and good faith the tenant ceases to hold under the lease, the estoppel ceases. Says Washburn: "All that the law requires is that during the time which the tenant actually holds possession by permission of the landlord, the landlord's title shall not be disputed. In technical phrase, the tenant shall not be allowed to plead, to his landlord's action, *nil habuit in tenementis.*" And Chief Justice MARSHALL (*Blight's Lessee* v. *Rochester, supra*): "He cannot be allowed to controvert the title of the lessor, without disparaging his own, and he cannot set up the title of another without violating that contract by which he obtains and holds possession; and breaking that faith which he has pledged, and the obligation which is still continuing and in full operation."

Washburn points out the instances in which the tenant may defend the landlord's action for rent or possession as follows: (1) He may show that he himself is the owner of the estate or has acquired an independent right to hold possession, and that the term has expired; (2) that he has been evicted by paramount title and has attorned to the evictor; (3) that he was in pos-

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session when the lease was made or did not derive from the lessor; (4) that the landlord's title has determined or been extinguished.

So long as a tenant retains possession under the lease he is estopped from denying his landlord's title. *Tondro* v. *Cushman*, 5 Wisconsin, 279; *Sims* v. *Glazener*, 14 Alabama, 695; *Cranz* v. *Kroger*, 22 Illinois, 74; *Hughes* v. *Watt*, 28 Arkansas, 853; *Tewksbury* v. *Magraff*, 33 California, 237; *McIntyre* v. *Patton*, 9 Humphreys (Tennessee), 447; *Conley* v. *Chiles*, 5 J. J. Marshall (Kentucky), 302; *Winston* v. *President*, 28 Mississippi, 118; 61 Am. Dec. 540; *Grant* v. *White*, 42 Missouri, 285; *Brahn* v. *Jersey City Forge Co.*, 38 New Jersey Law, 74; *Stacy* v. *Bostwick*, 48 Vermont, 192; *Walden* v. *Bodley*, 14 Peters (U. S. Sup. Ct.), 156; *Jackson* v. *Harper*, 5 Wendell (N. Y.), 246; *Moore* v. *Beasley*, 3 Ohio, 294; *Bowdish* v. *Dubuque*, 38 Iowa, 341; *Fuller* v. *Sweet*, 30 Michigan, 237; *Evans* v. *Bidwell*, 76 Penn. State, 497; *Abbott* v. *Cromartie*, 72 North Carolina, 292; *Hatch* v. *Pendergast*, 15 Maryland, 251; *Ryder* v. *Mansell*, 66 Maine, 167; *Hatch* v. *Bullock*, 57 New Hampshire, 15; *Thrall* v. *Omaha Hotel Co.*, 5 Nebraska, 295; *Whaley* v. *Whaley*, 1 Spears Law (So. Car.), 225; 40 Am. Dec. 594; *Emerick* v. *Tavener*, 9 Grattan (Virginia), 220; 58 Am. Dec. 217; *Springs* v. *Schenck*, 99 North Carolina, 551; 6 Am. St. Rep. 552; *Williams* v. *Wait*, 2 South Dakota, 210; 39 Am. St. Rep. 768 and notes, 776; Wood on Landlord and Tenant, p. 490, citing *Delaney* v. *Fox*.

But after the relation ceases his rights are not impaired: *Heath* v. *Williams*, 25 Maine, 209; 43 Am. Dec. 265; *Camp* v. *Camp*, 5 Connecticut, 291; 13 Am. Dec. 60; *Bank of Utica* v. *Mersereau*, 3 Barbour Chancery (N. Y.), 528; 49 Am. Dec. 189; *Smith* v. *Mundy*, 18 Alabama, 182; 52 Am. Dec. 221; and so he may then buy and assert an adverse title: *Gable* v. *Wetherholt*, 116 Illinois, 313; 56 Am. Rep. 774.

The tenant may purchase the land on an execution sale against the landlord. *Camley* v. *Stanfield*, 10 Texas, 546; 60 Am. Dec. 219; *Murrell* v. *Roberts*, 11 Iredell Law (Nor. Car.), 424; 53 Am. Dec. 419; *Casey* v. *Gregory*, 13 B. Monroe (Kentucky), 505; 56 Am. Dec. 581; *Nellis* v. *Lathrop*, 22 Wendell (N. Y.), 121; 34 Am. Dec. 285; *Ten Eyck* v. *Craig*, 62 New York, 423.

Or from a purchaser under a judgment. *McAusland* v. *Pundt*, 1 Nebraska, 211; 93 Am. Dec. 358.

But not as against an absent landlord. *Lausman* v. *Drahos*, 10 Nebraska, 172; 35 Am. Rep. 468; *Davis* v. *Davis*, 83 North Carolina, 71.

So the tenant may purchase the leased land at tax sale, if he is not bound to pay the taxes. *Weischselbaum* v. *Curlett*, 20 Kansas, 709; 27 Am. Rep. 204; *Ferguson* v. *Etter*, 21 Arkansas, 160; 76 Am. Dec. 361; *Bettison* v. *Budd*, 17 Arkansas, 546. But not so if he was bound to pay them. *Williams* v. *Towl*, 65 Michigan, 204; *Baily* v. *Campbell*, 82 Alabama, 342; *Blake* v. *Howe*, 1 Aikens (Vermont). 306; 15 Am. Dec. 681; *Burgett* v. *Taliaferro*, 118 Illinois, 503; *Carithers* v. *Weaver*, 7 Kansas, 110. Some Courts hold that the tenant may not in any event acquire title by purchase at a tax sale. *Curtis* v. *Smith*, 42 Iowa, 665. The tenant may become assignee of a mortgage on the premises. *Niles* v. *Ransford*, 1 Michigan, 338; 51 Am. Dec. 95. Or pur-

chase a judgment against the landlord and offset the amount against the rent. *Thrall* v. *Omaha Hotel Co.*, 5 Nebraska, 295; 25 Am. Rep. 488.

The tenant may show that the landlord's title has expired in fact or by operation of law: *Niles* v. *Ransford*, 1 Michigan, 338; 51 Am. Dec. 95; as by his own conveyance or by judgment sale against him: *McAusland* v. *Pundt*, *supra;* or by the tenant's making title under a mortgage to himself: *Shields* v. *Lozear*, 34 New Jersey Law, 496; 3 Am. Rep. 256; *Jackson* v. *Rowland*, 6 Wendell (N. Y.), 666; *Lamson* v. *Clarkson*, 113 Massachusetts, 348; 18 Am. Rep. 498; *Beall* v. *Davenport*, 45 Georgia, 165; 15 Am. Rep. 656; *Hoag* v. *Hoag*, 35 New York, 469; *St. Johns* v. *Quitzow*, 72 Illinois, 384; *Otis* v. *McMillan*, 70 Alabama, 46; *Hintz* v. *Thomas*, 7 Maryland, 46; *Russell* v. *Allard*, 18 New Hampshire, 222; *Devacht* v. *Newsome*, 3 Ohio, 57; *Casey* v. *Gregory*, 13 B. Monroe (Kentucky), 505; *Wolf* v. *Johnson*, 30 Mississippi, 513; *Pentz* v. *Chester*, 41 Missouri, 447.

The tenant may show eviction by paramount title and attornment to the evictor: *Fowler* v. *Cravens*, 3 J. J. Marshall (Kentucky), 428; 20 Am. Dec. 153; and hold under it by purchase or otherwise: *Gore* v. *Stevens*, 1 Dana (Kentucky), 201; 25 Am. Dec. 141; *Fletcher* v. *McFarlane*, 12 Massachusetts, 43; *Shelton* v. *Camal*, 16 Alabama, 148; *Clapp* v. *Coble*, 1 Devereux & Battle Equity (Nor. Car.), 177; *Simers* v. *Salters*, 3 Denio (N. Y.), 214; *Kane County* v. *Herrington*, 50 Illinois, 232; and cases cited in 12 Am. & Eng. Enc. of Law, p. 758 c.

But entry under the lease is essential to the estoppel of the tenant, and therefore the estoppel does not arise where the tenant was in possession at the execution of the lease. *Franklin* v. *Merida*, 35 California, 558; 95 Am. Dec. 129; *Swift* v. *Dean*, 11 Vermont, 328; 34 Am. Dec. 698; *Fuller* v. *Sweet*, 30 Michigan, 237; 18 Am. Rep. 122.

The general doctrine is that estoppel exists only during the tenancy, express or implied. When that is ended, by surrender or otherwise, the tenant may set up title in himself or in a third person. *Page* v. *Kinsman*, 43 New Hampshire, 328. If there is no tenancy there is no estoppel. *Hughes* v. *Clarksville*, 6 Peters (U. S. Sup. Ct.), 369. See many authorities cited in 12 Am. & Eng. Enc. of Law, p. 706.

But something must be done to dissolve the relation of landlord and tenant before the tenant can set up another title, such as delivery of possession to another and attornment, or at least giving notice. *Porter* v. *Mayfield*, 21 Penn. St. 264; *Brown* v. *Keller*, 32 Illinois, 155; *Russell* v. *Erwin*, 38 Alabama, 50; *Ryerson* v. *Eldred*, 18 Michigan, 22; *Tewksbury* v. *Magraff*, 33 California, 237; *Miller* v. *Lang*, 99 Massachusetts, 18.

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No. 3. — POWLEY *v.* WALKER.

(K. B. 1793.)

No. 4. — LEGH *v.* HEWITT.

(K. B. 1803.)

RULE.

THE mere relation of landlord and tenant implies, and forms a good consideration for, a promise on the part of the tenant to manage the farm in a course of good husbandry; and the prevalent course of husbandry upon similar land in the neighbourhood is evidence of what good husbandry is.

Powley v. Walker.

5 Term Reports, 373 (2 R. R. 619).

Landlord and Tenant.— Consideration for Promise to cultivate properly.

The mere relation of landlord and tenant is a sufficient consideration [373] for the tenant's promise to manage a farm in a husbandlike manner.

The first count in this declaration alleged that on such a day "the defendant became and was tenant to the plaintiff" of a certain farm, &c., in consideration whereof he undertook and promised not to carry away from the farm any of the straw, dung, compost, &c. The second stated that for the same consideration the defendant undertook and promised to cultivate the land in a good and husbandlike manner, according to the custom of the country; and the third, to manage and cultivate the land according to the usage and course of good husbandry. After verdict for the plaintiff,

Chambre moved to arrest the judgment, on the ground that there was no consideration for the promises; observing, that it was not alleged that the defendant had become tenant to the plaintiff on the terms that he would cultivate the land in a good and husbandlike manner, &c., but merely "that he became and was tenant to the plaintiff." But

The Court said, that the bare relation of landlord and tenant was a sufficient consideration for the promises in the declaration; and therefore they *Refused the rule.*

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Legh v. Hewitt.

4 East, 154–162 (7 R. R. 545).

Landlord and Tenant. — What is Proper Cultivation.

[154] In an action against a tenant upon promises that he would occupy the farm in a good and husbandlike manner, according to the custom of the country, an allegation that he had treated the estate contrary to good husbandry and the custom of the country, is proved by showing that he had treated it contrary to the prevalent course of good husbandry in that neighbourhood, as by tilling half his farm at once, when no other farmer there tilled more than a third; though many tilled only a fourth. And it is not sufficient to show any precise definite custom or usage in respect to the quantity tilled.

The plaintiff declared in assumpsit, for that whereas on the 2nd of February, 1801, the defendant was tenant to him of a certain farm at Lymm and High Legh in the county of Chester, containing fifty-five Cheshire acres, in consideration thereof he promised that during his tenancy of the premises he would use and occupy the same in a good and husbandlike manner, according to the custom of the country where the said premises lie; and then assigned breaches, 1st, that during such tenancy the defendant wrongfully, &c., and contrary to good husbandry and the custom of the said country, ploughed up and converted into tillage divers, to wit, five Cheshire acres of grass land, parcel of the said prem-
[* 155] ises, * which according to good husbandry and the custom of the said country ought not to have been ploughed up, &c.; and the defendant afterwards took divers and excessive crops of grain therefrom. 2nd, That whereas according to good husbandry and the custom of the country the defendant as tenant ought not to have had at any one time more than a certain part, to wit, one-third of the said premises in tillage, yet he wrongfully, &c., kept in tillage a larger part, to wit, one-half at the same time, contrary to good husbandry and the custom of the country, and took excessive crops of grain therefrom. A 3rd breach was for having more at one time than a third part of the arable part of the premises sown with wheat, contrary to good husbandry and the custom of the country: by reason of which misconduct and breaches of contract the estate was impoverished, &c., to the plaintiff's damage of £500. The promises were laid in the same manner in the second count, and the breaches alleged generally. The third

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count laid the promises to be, that the defendant would use and occupy the premises in a tenantlike manner, and would not, during his tenancy, or in the year when the same should determine, take from the premises any greater crops of corn than by the custom of the said country should and ought to be by him taken. There were also the common money counts added. Plea, *non assumpsit*. At the trial at the last Chester Assizes, before the CHIEF JUSTICE, the plaintiff's counsel put his case on the implied assumpsit, founded on the course of good husbandry as known and practised in that part of the country; and many witnesses were called, who established that by the practice of good husbandmen in the neighbourhood not more than one-third of a farm, in a cold soil like this, was ever kept in tillage at the same time; and in most * other instances, where the soil was warm, not [* 156] above a fourth; and that not more than one-third of what was in tillage ought to be laid down in wheat. Whereas the defendant, who had quitted the farm in May, 1802, was proved in 1801 to have had half of it (viz., something more than twenty-seven acres) in tillage in that year, of which eleven acres were sown with wheat. It appeared, however, that this practice was governed by covenants in the leases of the respective tenants whose mode of cultivation was spoken of; and the witnesses could not speak to any custom of the country independent of the obligation of covenants: but they all agreed that a practice like that of the defendant was contrary to the course of good husbandry, and exceedingly prejudicial to an estate; and that in fact the plaintiff's farm had been materially deteriorated under the defendant's management. It was further proved that the defendant, in a conversation with the incoming tenant, had admitted that he should not have ploughed up the grass field mentioned in the first count if he had stayed in the farm, without marling it, which would have cost him £50. But there was no evidence applicable to the third count to show that the defendant had taken off a greater proportion of the corn that was sold than he was entitled to as an off-going tenant. After the plaintiff's evidence was closed, it was objected by the defendant's counsel, that the plaintiff ought to be nonsuited, as there was no evidence of any such custom of the country as was alleged in the declaration; but the Court was of opinion that the evidence, though slight, ought to go to the jury. When the plaintiff's counsel contended that it was not necessary

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for him to prove any custom, but that it was sufficient for him to show that the defendant had not managed his farm in a [*157] husbandlike manner. The * Court, however, thought that, as the declaration was framed, the plaintiff had founded his action upon what he called the custom of the country, and that it was necessary for him to prove it. The jury, hearing this opinion delivered, after the defendant's counsel had urged to them that there was no evidence of such a custom, being satisfied on that head, found a verdict for the defendant, without waiting to have the evidence summed up, or receiving the direction of the Court in point of law upon the effect of it. And therefore the CHIEF JUSTICE, in his report of the trial to this Court (upon a rule *nisi* obtained for setting aside the verdict and having a new trial), considering that the jury were influenced by the opinion which had been thrown out by the Court in the course of the trial, in answer to what was contended for by the plaintiff's counsel, concluded with stating that, if it were not necessary for the plaintiff to prove any custom, he thought there ought to be a new trial.

Manley and Wigley show cause against the rule. — The allegation that the defendant undertook to manage the farm according to the custom of the country, which is in the first two counts, to which only the evidence of mismanagement applied, is a material allegation, and essentially different from a simple allegation that the farm was managed contrary to good husbandry; for upon such a declaration, if an established course of husbandry in that part of the country had been proved from which the defendant had departed, it would have been no defence for him to have shown that he had conducted the farm upon good principles of husbandry used and approved in other places. The custom as laid is [*158] part of the specific contract, for * the breach of which the action is brought, and was therefore necessary to be proved. And in *Powley* v. *Walker*, 5 T. R. 373 (p. 307, *ante*), which was the first case of this kind reported, it is even said that the law will infer such a promise from the bare relation of landlord and tenant; much more, therefore, is it material where it is expressly stipulated in the terms of the letting. Here the jury were satisfied that there was no such custom, and consequently there could be no breach of it.

Gibbs, Topping, and J. Clarke, *contra*. — It was not necessary in this form of declaring to prove that any known certain custom

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or course of husbandry existed in that part of the country: in strictness there could be no legal custom as applicable to such a subject; but taking the allegation in its popular and lax sense, and according to the general understanding of mankind on the subject, it was sufficient to prove that the defendant's treatment of the farm was against the known good rules and prevalent course of husbandry as generally practised in that country with all its modifications and variations. It was enough to show that though some farmers might put a fourth and some a third of their lands in tillage every year, yet none put so much as half, which the defendant had done. The promise of cultivating the farm according to the custom of the country is laid with reference to and explanatory of the promise to use and occupy it in a good and husbandlike manner, — that is, "one entire term, to occupy, &c., in a good and husbandlike manner according to the custom," &c.; and it is not laid as two distinct allegations to occupy in "a husbandlike manner and according to the custom," &c.

Lord ELLENBOROUGH, Ch. J. — The jury have found a verdict for the defendant under the impression that the words in the declaration "according to the custom of the country," [159] required a more strict and specific proof in respect of the relative quantity of land allowed to be annually in tillage than I think they demanded. The words are, that the defendant promised to "use and occupy the premises in a good and husbandlike manner according to the custom of the country where the said premises lie." By which I understand the parties to have meant no more than this, that the tenant should conform to the prevalent usage of the country where the lands lie. From the subject-matter of the contract it is evident that the word "custom," as here used, cannot mean a custom in the strict legal signification of the word; for that must be taken with reference to some defined limit or space which is essential to every custom properly so called. But no particular place is here assigned to it; nor is it capable here of being so applied. What shall be considered in farming as a good and husbandlike manner must vary exceedingly according to soil, climate, and situation. And therefore the custom of the country with reference to good husbandry must be applied to the approved habits of husbandry in the neighbourhood under circumstances of the like nature. That is the fair and natural meaning of the words of the contract as laid. And perhaps a contract to occupy

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an estate in a good and husbandlike manner simply would have imposed the same duty on a tenant; because the same sort of evidence, drawn from the approved practice of that part of the country, would have been brought forward to show what was good husbandry. It would not indeed have been conclusive against a tenant under such a form of declaring, to show [*160] that he had not managed the estate according * to the custom of the country, without the addition of these words, but still they must be understood in the manner I have before mentioned. But evidence that an estate had been managed according to the custom of the country would be always a medium of proof that it had been treated in a good and husbandlike manner. Now here there was no evidence of any custom of the country to allow so much as half the farm to be in tillage at once; for in no instance was there more than a third. Here, therefore, there was clear evidence of mismanagement, contrary to the custom of the country in good husbandry; and the verdict being founded in misapprehension, there must be a new trial.

GROSE, J. — This is a promise to occupy the land conformably to the prevalent good management of it in that part of the country. Without a lease, no landlord would let his estate upon any other terms. Then the question is, whether the defendant did manage the farm in such a manner? and that is negatived most explicitly by the evidence. Some farmers put a fourth, some as much as a third, of their land in tillage at a time; but nobody did or can entertain a doubt but that ploughing half the estate in one year was bad management. The jury were misled by what was said in the course of the trial, that the custom of the country as alleged in the declaration must be shown to be founded on a precise usage obtaining throughout that part of the country; for upon the merits of the case nothing can be more dishonest than the defendant's conduct appears to have been; and there is no doubt what the verdict would have been had not the jury conceived themselves bound by the opinion delivered on the form of the declaration.

[161] LAWRENCE, J. — From what has passed upon the discussion of the case here, it is evident that the necessity of proving a precise custom of the country in respect of the course of husbandry was insisted upon before the jury, and made part of the case for their consideration at the trial; for even now it has been pressed in argument, that in order to maintain the declaration it was

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incumbent on the plaintiff to prove a definite known custom or course of husbandry in that country, and that the estate was not treated by the defendant according to that known custom. But that was not necessary: it was sufficient to show what was the prevalent course of good management there, which was the course of management according to good husbandry which the defendant undertook to observe; and by proving that the estate was not so managed, the plaintiff made out what he undertook to do, namely, that the estate was treated in a manner "contrary to good husbandry and the custom of the country."

LE BLANC, J. — The jury went on the ground that the words "custom of the country" were to be taken in a precise sense, as denoting a certain known uniform course of husbandry there established; but I think the words of the declaration altogether mean no more than if the promise had been laid to be simply to manage the farm in a good and husbandlike manner, which must always be taken with reference to the usage and mode of cultivation in that part of the country where the lands lie. For instance, it would be no breach of such a contract in Devonshire to show that the farm had not been managed according to the course of good husbandry as used in Norfolk. This, however, was a case put out of all doubt; for here it was proved that no custom of the country authorised * the man- [* 162] ner in which the defendant had treated this estate: and that was sufficient to make out the allegation that he had managed it contrary to good husbandry and the custom of the country.

Rule absolute.

ENGLISH NOTES.

Where a tenant held an agricultural farm on the borders of Middlesex and Hertford under a lease which made no other stipulation as to cultivation than that he would "cultivate the farm in a good, proper, and husbandlike manner according to the rules of good husbandry practised in the neighbourhood," and the tenant erected on part of the arable land glass houses in which he cultivated tomatoes, grapes, and other garden produce for the London market, it was held by KEKEWICH, J., that this was not a breach of the covenant, or waste at common law such as ought to be restrained by injunction. *Meux* v. *Cobley* (1892), 2 Ch. 253, 61 L. J. Ch. 449, 66 L. T. 86.

As to whether the relation of landlord and tenant implies a promise to repair, is a question dealt with under the topic "Dilapidations,"

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and notes, 9 R. C. 460 *et seq.*, especially pp. 466, 467. It is clear that a tenant at will, properly so called, of a house is not liable for permissive waste. *Harnet* v. *Maitland* (1847), 16 M. & W. 257, 16 L. J. Ex. 134. Whether an ordinary tenant from year to year is so does not appear clear from the decisions. Probably the tenant of a farm on a yearly tenancy by parol would not be bound to call in a carpenter or painter and glazier, or to put up a new gate. On the other hand he would doubtless not deny his obligation to keep up the banks and fences, and to scour and maintain ditches and watercourses.

Whether a tenant for a term of years is liable for permissive waste is questionable upon the old authorities. They are discussed by KEKEWICH, J., in *Davies* v. *Davies* (1888), 38 Ch. D. 499, 57 L. J. Ch. 1093, 58 L. T. 514, 36 W. R. 399, and he decides the question in the affirmative. This decision is merely incidental to a consideration of the effect of the express covenants; and as a lease for years almost invariably contains such covenants, the direct question of implied liability can seldom arise.

Whether the relation of landlord and tenant implies any covenant on the part of the landlord is discussed in *Baynes* v. *Lloyd* (C. A. 1895), 2 Q. B. 610, 64 L. J. Q. B. 787, 73 L. T. 250. The following points appear from the judgment of the Court of Appeal. The weight of authority is in favour of the view that no covenant in law is implied from that relation; but if any covenant is implied it is a covenant for quiet enjoyment only. There is much authority for saying that the word "demise" in a lease under seal implies a covenant for title. Whether any corresponding obligation is implied by the words "agree to let" in an instrument not under seal is questionable. But any obligation, whether of a covenant implied by the word "demise" or under an instrument with the words "agree to let," comes to an end with the determination of the lessor's estate. The case is fully reported as No. 64, *post*.

AMERICAN NOTES.

These cases are cited in 1 Wood on Landlord and Tenant, p. 696, but without American followers. Lawson on Usages also cites them (p. 267). Taylor on Landlord and Tenant cites them repeatedly.

The tenant is liable for the effects of his negligence, as by fire. *Lathrop* v. *Thayer*, 138 Massachusetts, 466; *Collins* v. *Stephens*, 58 Alabama, 543; *Mason* v. *Stiles*, 21 Missouri, 374.

The doctrine of implied good husbandry is recognized in *Willey* v. *Conner*, 44 Vermont, 68; *Lassell* v. *Read*, 6 Greenleaf (Maine), 190; and asserted in *Lewis* v. *Jones*, 17 Penn. St. 262; 55 Am. Dec. 550; *Walker* v. *Tucker*, 70 Illinois, 534.

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No. 5. — TUTTON *v.* DARKE.

NIXON *v.* FREEMAN.

(EXCH. 1860.)

RULE.

A DISTRESS for rent must be made in the daytime; that is to say, between sunrise and sunset.

Tutton v. Darke.

Nixon v. Freeman.

29 L. J. Ex. 271–274 (s. c. 5 Hurl. & N. 647; 6 Jur. (N. S.) 983; 2 L. T. 361).

Distress for Rent. — Time. — Sunrise and Sunset. — Light and Darkness. — Evidence. — Almanac. — Time by the Clock. [271]

The old common rule that a distress for rent must be taken in the daytime, and not in the night, must be taken to mean, not merely that it must not be taken in the dark, but that it must be between sunrise and sunset; and although there may be circumstances under which it may be difficult to determine what will be the proper evidence of sunrise or sunset, yet, ordinarily, the time by the clock, coupled with the almanac, will be some evidence, and, if unanswered, sufficient; and if by such evidence it clearly appears that in any view the distress was before the sun had risen or after it had set, the distress will be illegal.

Therefore, in two cases, in one of which the distress was taken at near eight o'clock on an evening when, by the almanac, the sun set just after seven, and in the other it was taken between two and three o'clock in the morning of a day on which, by the almanac, the sun rose at shortly before half-past four; and there was no other evidence upon the point, nor any evidence as to whether in either case it was dark when the distress was taken; but the jury in both cases found that it was taken between sunset and sunrise: *Held*, that the evidence was sufficient to sustain that finding, and that the distresses were therefore illegal.

Trespass for taking goods.

Plea, not guilty, by statute 11 Geo. II., c. 19; *i. e.*, justifying under a distress for rent.

At the trial, before MARTIN, B., at the sittings after Trinity Term, 1859, the only question was whether the distress was invalid as having been made after sunset, as to which the evidence was contradictory as to the time by the clock, and an almanac was produced, showing that on that day the sun set at seven minutes past seven. The learned BARON left it to the jury whether the distress was made after that time, and they found that it was. For the

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plaintiff, it was contended that this made the distress illegal; for the defendant it was contended that, as it did not appear that it was dark, the distress was not at night, and was therefore lawful. The point was reserved, and the verdict passed for the defendant, with leave to move to enter it for the plaintiff for £15, the amount of damage found by the jury.

A rule *nisi* had been obtained to set this verdict aside, and enter it for the plaintiff (for that sum), on the ground that a distress after sunset is illegal. In Michaelmas Term, 1859,

[*272] *Hawkins (Nov. 15), on the part of the defendant, showed cause. No doubt the old authorities, as the Mirror of Justice, Book ii. c. 26 [Selden Society's ed., vol. 7, p. 71], lay it down that, "in the night-time a man may not distrain, but only in the daytime, except it be for damage feasant;" and, it is added, "before sunrise or after sunset no man may distrain, except for damage feasant;" but the words "in the night-time" govern the whole sentence, and suggest the true rule; especially as in Co. Lit. 142 a nothing is said about sunrise or sunset, but it is laid down the law cannot distrain in the night, but in the daytime; so Year Book, 10 Edw. II., f. 37; 11 Edw. II., f. 1.[1]

[POLLOCK, C. B. — The "Mirror" was originally written in the time of Alfred, in whose days there were no clocks, so that we read in his Life that he measured the time by candles. It seems obvious, therefore, that the common-law rule could not have reference to the almanac, which would require a clock, even supposing that by any calendar then in use the rising or setting of the sun could be ascertained. The question being as to the meaning of the words "night and day," or "sunrise and sunset," and assuming that it must be taken that the day means the time between "sunrise and sunset," is the time of sunset to be deemed the moment when the sun is obscured, or the moment when it has gone down below the horizon? Is it to be a matter of astronomical calculation, or a matter of observation? If the former, then the rule would be the time when the diameter of the sun has touched the horizon, so that only one-half of it is obscured. But how could that nicety be ascertained? In 3 Inst. 63, Lord COKE lays it down that the day is divided into light and darkness. Probably the more ancient authorities, if looked into,[2] would show that the more practical test of actual observation was adopted.]

[1] On the other side, Year Book, 11 Hen. VII., f. 5, was cited.

[2] Thus, Co. Lit. 135 o, "There are, as ancient authors terme them" (referring to

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That is what is now contended for on the part of the defendant. There was no evidence here, except that of the almanac, that the sun had set, nor any evidence of actual darkness.

[POLLOCK, C. B. — Even if "night" is to be taken to mean the period between sunset and sunrise, it must be considered that, by reason of the refraction of the sun's rays, twilight lasts a considerable time after what may be called the astronomical sunset, and even after the whole of the sun has gone down below the horizon; and it may perhaps be said that practically, however it may be astronomically, the sun has not set to us until the twilight is over and it is really dark, for until then we really have the benefit of the sun's rays.]

Just so. In whatever way it is put, it is submitted that the rule of law, as it must be construed in a practical sense, must really mean that a distress is not to take place in the dark; for the very obvious reason assigned in Gilbert on Distress, where it is laid down that the landlord cannot distrain in the night because the tenant cannot then make a tender of the rent.

[WATSON, B. — The difficulty is how to define "night." CHANNELL, B. — It may be that the test is analogous to that given in the old law as to burglary, whether there is light enough to count the money.]

Precisely so: that is a practical test; and it is submitted that is the true one. If it is light enough to tender the money, and to see it and to count it, how is the tenant damaged by the distress being after sunset?

[POLLOCK, C. B. — And there is this difficulty in making the test "sunset" or "sunrise," that it would be a very variable kind of test. Not only would different * persons have [* 273] very different ideas as to the fact of sunset, but there really would be a considerable interval, of perhaps half an hour, after the

Bracton, b. 4, fol. 264, and Britton, fol. 209), "'dies solaris et dies lunaris; ex quibus duobus diebus efficitur, unus dies qui dicitur artificialis, ex die præcedente, et nocte subsequente, qui constat ex 12 horis.' But we, at this day, retaining the same method, do differ in words; for we say, 'dies naturalis constat ex 24 horis, et continet diem solarem et noctem. Iste dies naturalis est spatium in quo sol progreditur ab oriente in occidentem et ab occidente iterum in orientem. Dies artificialis, sive solaris, incipit in ortu solis et desinit in occasu;' and of this the law of England takes hold in many cases. The Jewes, &c., begin the day at the rising of the sun; the Romans from midnight, and so doth the law of England in many cases." In the passage cited from Bracton it is said, "Una pars incipit in *crepusculo* . . . et terminatur in *aurorâ*."

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actual or astronomical sunset, during which no person could venture positively to say perhaps whether the sun was down or not.]

Just so. In *Macally's Case*, 9 Co. Rep. 66 b, Lord COKE gives the rule as to arrests not being in the night, "because he cannot know the minister of justice in the night." That is the true principle, for it is sensible and practical. In Doctor and Student, c. 90, the rule is laid down that a man may not distrain in the night, *i. e.*, in the dark. It was only proved here that the distress was after sunset by the almanac.

[POLLOCK, C. B. — That is not sufficient. The calendar or almanac is taken notice of in *Brough* v. *Perkins*, 6 Mod. 81, but only that which is annexed to the Book of Common Prayer and sanctioned by Acts of Parliament;[1] but that does not give the time of sunrise or sunset.]

No, it does not. Then there was no evidence for the defendant.

Lush and H. T. Cole, for the plaintiff, in support of the rule. — The rule of law is clear that a distress must not be after sunset.

[POLLOCK, C. B. — But the whole difficulty is, what that means.]

It must be decided either by the almanac alone or by evidence generally; and in either view the plaintiff is right, for the almanac, at all events, is some evidence, and there was no evidence the other way. There are no authorities to show that "night" in law is to be measured in any other way than as the time between sunset and sunrise, except as to burglary. 1 Wms. Saund. 258; 1 Hawkins's Pleas of the Crown, 130. And to measure day and night for legal purposes by the degree of light or darkness would be very inconvenient, as there would be no certainty, and the evidence of different persons would vary with their senses. The Court always adopts some certain definition or limitation, and the Game Act, 1 Will. IV., c. 32, adopts the old definition of "sunrise" and "sunset." *Cur. adv. vult.*

Nixon v. Freeman.

Trespass for entering the plaintiff's house and taking his goods.

Plea, except as to taking the goods, &c., not guilty; and as to the goods, the general issue by statute (under 11 Geo. II., c. 19).

At the trial, before CROWDER, J., at the last Summer Assizes for

[1] 23 Geo. II., c. 29. *Ashpole's Case*, 7 C. B. 6 (a), was cited. Also Stanniford's Pleas of the Crown, 697, Dalton's Country Justice, 359, and Compton's Office of Justice, 155, were also cited.

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Surrey, an agreement (signed by the defendant) between the plaintiff and the defendant was put in, by which the plaintiff took of the defendant a house, at £30 a year, payable quarterly. A warrant for distress was put in, which authorised one Payne to distrain for £15, for two quarters' rent, due at Lady-day, 1858. The distress was at some time early in the morning of the 4th of May. The bailiff was seen as early as half-past two in the morning standing about the house, with a ladder. The plaintiff had kept all his windows and doors closed from the previous day; and the evidence on his part went to show that the bailiff had opened the window and got in, between two and three in the morning. There was, however, no positive evidence of the precise time when the bailiff got in, nor whether he opened the window, as he was not seen by any one in the act of entering. But a police-officer saw him loading the goods between three and four o'clock in the morning.

Upon the part of the defendant, it was endeavoured to make out that the distress was made about half-past four in the morning. The almanac showed that the sun rose at twenty minutes past four on that day. On the part of the plaintiff it was contended that the entry was illegal, as after sunrise, and also as made by opening a window.

The learned Judge left it to the jury, first, whether the entry was before sunrise; and they found that it was. In answer to a second question, they declined to return a finding as to whether the bailiff opened the window, and they gave a verdict for the plaintiff for £45 for taking the goods, * and for the [*274] defendant as to the breaking and entering.

The learned Judge reserved leave to the defendant to move to reduce the verdict to nominal damages, and to the plaintiff to enter a verdict for £5 on the count for breaking and entering. All points to be open on one rule.

A rule had been obtained accordingly, on the part of the defendant, to set aside the verdict, on the ground (*inter alia*) that the distress was at a legal time, and that the Judge should have told the jury that the levy before sunrise was not a trespass.

Hawkins and Laxton, for the plaintiff, showed cause against the rule, to reduce the verdict, or enter it for the defendant.

(It is not thought necessary to enter into the other points of the rule, which did not affect the principal question nor appear to be in themselves reportable.)

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The main point is whether the distress was illegal or made before sunrise. It is submitted that it was; and the argument is the same as in the former case. The rule of law is clear. *Tinckler* v. *Prentice*, 4 Taunt. 549 (13 R. R. 684); *Aldenborough* v. *Peaple*, 6 Car. & P. 212; Smith's Law of Landlord and Tenant, p. 59.

Wordsworth and C. Pollock, for the defendant, in support of the rule. — The right question was not whether the sun had risen, but whether it was dark. No doubt the authorities show that a distress for rent must not be taken in the night; but the question is, what portion of the twenty-four hours is to be considered as "night." The authorities show that it means the hours of darkness, the reason and sense of the rule being that there must be light to see the value of the chattels, or to count the money, &c.

Cur. adv. vult.

On the 8th of May the judgment of the Court[1] was delivered by —

MARTIN, B. — In the first of these cases (*Tutton* v. *Darke*), which was tried before me, there had been a distress for rent made by the defendant a short time after sunset; and it was contended that the distress was, therefore, illegal, and that the plaintiff was entitled to recover on that ground, although the distress was otherwise justifiable. The same question, in effect, afterwards arose in *Nixon* v. *Freeman*. It has been most learnedly argued; and I am to deliver judgment upon that point in both cases.

Now it is plain from all the authorities, that a distress for rent must be made in the daytime, within some definition of "day." The only question is, whether the day is to be taken as before sunset and after sunrise, or after daybreak and before dusk; and we think that sunrise and sunset form the true limits (for this purpose) of the "day."

So it is laid down in Co. Lit. 142 a, and the reference is to the Mirror, s. 2, which is spoken of in Lord Coke's Reports as of very high authority. So far as we can ascertain, there is not a single authority contrary to that view, nor any *dictum* to the effect that "day" meant anything but the interval between sunrise and sunset, or that a distress might be made between sunset and sunrise. And in Co. Lit. 202 a it is laid down that a demand for rent must

[1] POLLOCK, C. B., MARTIN, B., BRAMWELL, B., and CHANNELL, B.

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be made a convenient time before sunset. There is not any doubt or ambiguity in the authorities on that point.

Undoubtedly the question may, in some cases, arise as to what is the true mode of ascertaining sunrise or sunset; but as to that we give no opinion. For in one of these cases it is clear that the distress was before the sun had made its appearance at all, and in the other it was clearly after the sun had gone down; so that in no sense could the distress in either case be said to have been taken in the "day." And it is well for parties distraining to bear in mind that they are bound to take care that they distrain beyond doubt in the daytime, and that they ought not to go so very near the limits as to raise doubt or question.

In the first case, therefore, the rule will be absolute to enter the verdict for the plaintiff, and in the other case (so far as this point is concerned), the verdict for the plaintiff will be upheld.

Rules accordingly.

ENGLISH NOTES.

It is clear that where growing crops are distrained under the power of 11 Geo. II., c. 19, s. 8, they cannot be sold as growing crops, since the statute contemplates the gathering in of the crops before sale, and by sect. 9 provides that the distress shall cease if the rent be tendered at any time before the corn or other product shall "be ripe and cut, cured, or gathered." *Owen* v. *Legh* (1820), 3 B. & Ald. 470, 22 R. R. 455. This was an action upon the case under 2 W. & M. (sess. 1), c. 5, for selling the distress before five days. The verdict was set aside as to the sale of growing crops on the ground that the sale was totally unauthorised and void, and, apparently, that the Act of William and Mary did not apply to the case at all. The requirement of appraisement in the Act of William and Mary is repealed, and the period of five days extended to fifteen, — subject to certain conditions, — by the Law of Distress Amendment Act, 1888 (51 & 52 Vict., c. 21), ss. 5, 6. But there is nothing in this Act to extend the power of sale to growing crops.

AMERICAN NOTES.

Tutton v. *Darke* is cited in 2 Wood on Landlord and Tenant, p. 1316, and the doctrine is stated in 5 Am. & Eng. Enc. of Law, p. 708, citing *Brown* v. *Glenn*, 16 Q. B. 254.

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No. 6. — DENBY *v.* MOORE.

(K. B. 1817.)

RULE.

WHERE a tenant, after paying the property tax upon land occupied by him, pays the full rent to his landlord without producing the collector's receipt or claiming deduction, he is not entitled to recover from his landlord the amount so unnecessarily paid.

Denby v. Moore.

1 B. & Ald. 123–131 (18 R. R. 444).

Landlord and Tenant. — Property Tax. — Voluntary Payment.

[123] An occupier of lands having, during the course of twelve years, paid to the collector of taxes the landlord's property tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid: *Held*, that the occupier could not recover back from the landlord any part of the property tax so paid.

Assumpsit for money had and received. Pleas, first, the general issue; and, secondly, the Statute of Limitations. At the trial before BAYLEY, J., at the last Summer Assizes for the county of York, it appeared in evidence that the plaintiff for ten [* 124] years before, and also * upon the 8th day of March, 1816, had been and was occupier of a messuage and farm, situate at Cowick, in the parish of Snaith in the county of York, and rated to the property tax for the same. Although the plaintiff occupied the farm, one George Craven, the father-in-law of the plaintiff, was the tenant to the defendant, but the plaintiff paid the rent for some years before Craven's death, which happened in November, 1812; though defendant would not allow him as his tenant, but would only give receipts to Craven. After Craven's death, plaintiff, who was his executor, paid the rent until the 2nd February, 1815, when plaintiff and defendant agreed for the farm on a tenancy, under which plaintiff himself was to be tenant to the defendant. The defendant received the full amount of his rent from the hands of the plaintiff, as and when the same became due, for the said premises so situate in Cowick aforesaid, without

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deducting or allowing for the landlord's property tax charged upon the same, although the same had been and was duly paid by the plaintiff as such occupier to the proper collector thereof in that behalf appointed, from time to time as the same became due, up to the end of the assessment in 1814.

No demand of, or application or request for, the said property tax, to be paid or allowed or deducted out of the rent, was ever made at the time of payment of any rent as aforesaid, nor was any receipt from any collector ever produced, but the same was paid to the defendant until the 13th March, 1816. On the 13th March, 1816, the plaintiff paid to the defendant £112 10*s.* for half a year's rent which had become due on the 2nd February, 1816; and at the same time demanded * the landlord's property [*125] tax for the said premises for the last twelve years, and afterwards for the last six years, but did not then or at any other time produce any collector's receipt for the same, and that the defendant then and there refused to repay or allow the same or any part thereof, saying at the same time that he never had allowed, nor ever would allow, any property tax, and the full rent without any deduction for property tax was then paid; but the defendant afterwards offered to pay the plaintiff the property tax for the rent of £112 10*s.* then payable.

On the 17th February, 1815, the plaintiff and defendant settled all accounts then subsisting between them, and the defendant then paid to the plaintiff £106 9*s.* 1*d.*, and the plaintiff then said to him, "Now you and I have settled all accounts, both as executor and on your own account, and there is nothing more between us." Defendant said, Yes. The plaintiff proved no assessments later than for 1814. The plaintiff was the collector of the property tax for the district in which the premises are situate for two years preceding 1814. The jury gave a verdict for the plaintiff, damages £66, subject to the opinion of the Court, whether the plaintiff was entitled to recover for any part of the claim. If the Court shall be of opinion that the plaintiff is entitled to recover for the whole twelve years, then the present verdict to stand; if only for six years, then the verdict to be reduced to £43 11*s.* 9*d.*; if they shall be of opinion that the plaintiff is not entitled to recover anything, then a nonsuit to be entered.

[After argument:]

* Lord ELLENBOROUGH, Ch. J. — I think in this case the [*128]

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action is not maintainable. The plaintiff was certainly warranted in the payment which he at first made in redemption of his goods, which, but for such payment, might have been distrained upon. But when he went with the money for the purpose of paying to his landlord the next rent which became due he ought to have then made the deduction. This, however, he did not choose to do, but paid the sum of £10 more than was necessary. It was therefore *quoad* that sum a voluntary payment on his part. It does not appear what might be the reasons which induced him so to act, but it was a voluntary payment. Whether the transaction between him and the landlord was fraudulent with respect to the property tax is perhaps not clear. I, however, go on its being a voluntary payment, and I know of no principle of law which gives him a right to recover back money so paid. It was his own voluntary act which placed him in the situation in which he now stands.

Bayley, J. — On the discussion I am satisfied that this action cannot be maintained. The payment was made at a time when it was in the tenant's power to have deducted the sum in question. He must have known that he had a right so to deduct it. Knowing this, he chooses nevertheless to make this payment. Then that is a voluntary payment which he cannot recover back by this action. But I think, also, that he cannot recover for another reason. This was a fraud on the property-tax Act. If the tenant had insisted on deducting the tax from the next rent that became due, the landlord might and probably would have raised [* 129] the * rent. And it seems to me that the clause in the Act of Parliament enabling the tenant so to deduct it was framed with this very view, viz., that the most improved rent for the land might thus be obtained, and be the sum on which the tax is payable; but if the tenant be allowed not to deduct immediately, but to go on paying for many years, and then to call on the landlord to repay him altogether, that will have a tendency to defraud the revenue. The tenant will thereby have a great advantage. If he does not, as in the case before the Court, deduct the £10, it is an admission on his part that the land which is let to him for £100 is worth £110. But if so, the government ought to have received £11 per annum, and not £10, which they have done. And therefore on this ground also, I think this action not maintainable.

No. 6. — Denby v. Moore, 1 B. & Ald. 129, 130.

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ABBOTT, J. — The intention of the Legislature was that this tax should fall entirely on the landlord, and the Act provides that the tenant at the first payment shall have an opportunity of deducting the amount of the tax he had so paid for his landlord, and to prevent his being oppressed by the landlord, the latter is subject, by section 115, to very heavy penalties in case of refusal; and all contracts made for payment of the rent in full, without allowing such deduction, are utterly void. As soon therefore as the tenant has paid the property tax, I consider it in effect as a payment by him of so much of the next rent due by him to his landlord. But if it had been the intention of the Legislature that a tenant should go on for years paying the tax without claiming any deduction from the landlord, and then be permitted to deduct the whole amount at once, I cannot * help thinking there would [* 130] have been found in the property-tax Act some clause to that effect. The case then stands thus: either the tenant must be considered as having given so much money to his landlord — and if it be so, then he cannot recover back money which he has so parted with; or he must be taken to admit that the rent he paid for the land was less than the value which he ought to have paid, and then he would be a party to a fraud on the government in paying less property tax than he ought. I therefore think he cannot recover in this action. I do not say, however, that the clause giving the power of deduction takes away all other remedies. There may be cases suggested in which a tenant might recover, as if he had not his property-tax receipts with him at the time when he makes the next payment of rent, and the landlord, on being applied to immediately afterwards, should refuse to pay back the money.

HOLROYD, J. — This action cannot be supported: if it could, it would countervail the provisions of the property-tax Act. The tax of two shillings in the pound is laid on the property of the landlord. The effect of enabling the plaintiff to recover in this action would be to throw that tax on the occupier. This is an action for money had and received. The first payment of the tax by the occupier is a lawful payment: he had a right to pay it in the first instance, and needed not to wait till his property had been distrained upon before he did so. The statute directs that the tenant shall deduct the money from his next rent. Then that money is as so much rent already paid to the landlord. If the tenant afterwards chooses to pay the whole rent, it must be a

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[* 131] * voluntary payment on his part as to the portion paid by him before. I therefore think that, being a voluntary payment, he cannot recover it back by this form of action.

Judgment of nonsuit.

ENGLISH NOTES.

This is merely an application of the more general principle that a voluntary payment made with full knowledge of the facts cannot be recovered back. See the judgments in *Skyring* v. *Greenwood* (1825), 4 Barn. & Cress. 281, 290, 291, 28 R. R. 264, 271, 272.

It is to be observed that the principle of the above case (*Denby* v. *Moore*) is acknowledged as correct in the judgments in *Lamb* v. *Brewster* (1879), 4 Q. B. D. 220, 607, 48 L. J. Q. B. 227, 421, 40 L. T. 457, 537, 27 W. R. 395, 478, under the modern Property Tax Act (5 & 6 Vict., c. 35, ss. 60, 103), although it is there held that an agreement by the landlord that if the tenant will continue to pay his rent in full without any deduction in respect of property tax the landlord will repay him all sums he has paid or shall pay for property tax, is not illegal.

AMERICAN NOTES.

This case is cited in 2 Wood on Landlord and Tenant, p. 955, with no American cases. Also cited in Taylor on Landlord and Tenant, with the statement that the contrary is provided by statute in New York and Massachusetts, and probably in other States.

No. 7. — LLOYD *v.* DAVIES.

(EXCH. 1848.)

RULE.

THE judgment creditor who has been put into possession under an *elegit* or other execution is entitled to sue or distrain upon the tenants of the judgment debtor, without any attornment by them.

Lloyd v. Davies.

2 Exch. 103, 104 (s. c. 18 L. J. Ex. 80).

Tenants by Elegit. — Distress.

[103] A tenant by *elegit* has a right to distrain without attornment.

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The first count of the declaration in case was for an excessive distress; the second count was in trover. Plea, not guilty, "by statute."

At the trial, before CRESSWELL, J., at the last Cardigan Summer Assizes, the plaintiff, in order to show his right to distrain, put in an *elegit*, but did not prove that the defendant had attorned to him. It was thereupon contended that the defendant had no right to distrain without attornment, and of that opinion was the learned Judge, and the plaintiff had a verdict.

Lush, in Michaelmas Term last, moved for a rule calling on the plaintiff to show cause why there should not be a new trial on the ground of misdirection. There was no need of attornment. In *Rogers* v. *Pitcher*, 6 Taunt. 202, GIBBS, Ch. J., says: "If the land had been in the possession of the former owner, the sheriff might have delivered actual possession; where it is in the possession of a tenant, the sheriff sets it out by metes and bounds, and the tenant is bound thenceforth to pay rent for his moiety to the tenant by *elegit*. This is a case in which attornment was not necessary before the Statute of Attornments, because tenant by *elegit* was in by judgment of law, to whom attornment was not necessary." In Perkins, sect. 114, it is said: "But in cases of grants of reversions, there ought to be attornments; otherwise they shall not pass, if the grant be not by matter of record," &c. The Statute of 4 Anne, c. 16, only applies to the acts of the parties. [He also referred to Co. Litt., ss. 584, 585.]

The Court granted a rule *nisi;* against which

* Evans (Bramwell with him) now showed cause. The [* 104] defendant had no right to distrain without attornment. *Harris* v. *Booker*, 4 Bing. 96, is not a decision upon the point; but BEST, Ch. J., there says, in delivering the judgment of the Court: "We do not agree that an attornment would have been unnecessary, supposing the plaintiff had been in a situation to call for it. . . . In the present cause the property is claimed under a judgment; and even if the tenant by *elegit* had a right to enter, we think he could not have proceeded for rent without an attornment." [PARKE, B. — There are three authorities in the Year Books against you, cited in Roll. Abr., tit. "Attornment" (F), — 37 Hen. VI., 33; 39 Hen. VI., 24; 20 Hen. VI., 7, 6. They settle this point, and decide that attornment is not necessary; where the reversion was assigned by operation of law it was not requisite, but it was when

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assigned by the act of the parties. If a party gets the reversion, he is entitled to the rent which is attached to it. ROLFE, B., referred to Roll. Abr., tit. "Execution (B);" *Sir Thomas Cambell's Case.* PARKE, B. — There is also *The Bishop of Bristol's Case,* 3 Leon. 113. The question is clear upon the authorities.]

Watson, *contra,* was not called upon.

PER CURIAM.[1] — The rule must be *Absolute.*

ENGLISH NOTES.

By the 9th section of the statute 4 & 5 Anne, c. 3 (commonly cited as 4 Ann., c. 16), ss. 9 and 10, all conveyances are to be effectual without any attornment, provided that no tenant shall be prejudiced by payment of rent to the person conveying, before he has notice of the conveyance. It was held in the case of *Rivis* v. *Watson* (1839), 5 M. & W. 255, that a rent-charge might be legally divided by will or by deed operating under the Statute of Uses so as to make the tenant liable, without attornment, to several distresses by the devisees or persons entitled to the use. And the Court intimated an opinion that, since the statute of Anne, a rent-charge may be divided, to the same effect, by a conveyance of any kind.

AMERICAN NOTES.

This case is cited in 2 Wood on Landlord and Tenant, p. 1303, with no American cases.

No. 8. — TODD *v.* FLIGHT.

(C. P. 1860.)

No. 9. — PRETTY *v.* BICKMORE.

(C. P. 1873.)

RULE.

WHERE the owner of premises known by him to be dangerous demises them in that condition without providing for their repair, he is liable for an injury which is the natural consequence of that dangerous condition. But where he lets the premises to a responsible tenant who enters into covenants to repair which include the source of danger, the liability is shifted to the tenant.

[1] PARKE, B., ALDERSON, B., ROLFE, B., and PLATT, B.

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Todd v. Flight.

30 L. J. C. P. 21-24 (s. c. 9 C. B. (N. S.) 377; 3 L. T. 325; 9 W. R. 145).

Nuisance. — Dangerous State of Building. — Injury to Adjoining Property. — Liability of Lessor. [21]

The defendant, who was the owner of a building and a stack of chimneys, near to a building of the plaintiff, demised them when the chimneys were known by him to be ruinous and in danger of falling upon the building of the plaintiff, and kept and maintained them in such ruinous state until they afterwards fell upon the plaintiff's building, which they did during the occupation of the tenant under such demise, from no default of such tenant, but by the laws of nature. *Held*, that an action for the injury the plaintiff had sustained from the fall of the chimneys would lie against the defendant, though he was not the occupier at the time of the fall.

The first count of the declaration stated that before and at the time of the committing of the grievances hereinafter mentioned, a certain chapel and building, situate, &c., were in the possession of certain persons, to wit, Francis Cuthbertson, John Henry Adams, and Walter Arthur King, as tenants thereof to the plaintiff, the reversion of and in the same then and still belonging to the plaintiff; and before the happening of the injuries to the said chapel and building, and to the plaintiff as hereinafter next mentioned, the defendant was owner and possessed of a certain building, and a stack of chimneys, parcel of the same, near to the said chapel and building of the plaintiff; and the said chimneys then and from thence continually until and at the happening of those injuries, were in a dilapidated, decayed, ruinous, insecure, and improper state, and in danger of falling, and likely to fall upon and do damage and injury to the said chapel and building of the plaintiff; and the defendant, well knowing the premises, demised and let his said building, with the said chimneys in the said state, to another person, to wit, one Benjamin Batt, and wrongfully suffered and permitted the said chimneys to be and continue, and kept and maintained, and continued kept and maintained, the same in the said state, until the same afterwards fell, and came upon and against and through the roof and other parts of the said chapel and building of the plaintiff, and greatly broke, damaged, injured, and destroyed the same, and by means of the premises the plaintiff had been and was injured in his reversionary estate and interest of and in the said chapel and building.

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Demurrer thereto, and joinder in demurrer.

Honyman (Nov. 8), for the defendant, in support of the demurrer. — There is no ground for maintaining this action against the landlord; the liability, if any, attaches to the occupier of the premises. In *Cheetham* v. *Hampson*, 4 T. R. 318 (2 R. R. 397), it was held that an action on the case for not repairing fences, whereby another party was damnified, could only be maintained against the occupier, and not against the owner of the fee, who was not in possession. To the same effect is *Russell* v. *Shenton*, [* 22] 3 Q. B. 449, 11 L. J. Q. B. 289. The plaintiff will * rely on the cases of *Rosewell* v. *Prior*, 2 Salk. 460, and *The King* v. *Pedley*, 1 Ad. & E. 822, 3 L. J. M. C. 119, and will say that because the premises were in a dangerous state at the time of the demise, the defendant is responsible for the damage which the plaintiff has sustained. In *Rosewell* v. *Prior*, the defendant had erected a nuisance and afterwards made an underlease, and the question was, whether, after a recovery against him for the erection, an action would lie against him for the continuance after he had made the underlease; and the Court said it would lie, "for he transferred it with the original wrong, and his demise affirms the continuance of it; he hath also rent as a consideration for the continuance, and, therefore, ought to answer the damage it occasions." A similar reason for the judgment appears in the report of the same case in Ld. Raym. 713, where it is said to be "very reasonable that the action should lie against the defendant, because he erected it, and for some time continued the enjoyment of it, and then demised it to Shuttleworth, rendering rent, so that he has made an agreement with Shuttleworth that it should continue, and he has a rent for it." Now, whether that be sound reasoning or not, it cannot apply to the present case, where the facts are very different. There was an existing nuisance in *Rosewell* v. *Prior*, at the time of the demise, for which the plaintiff had at that time a right of action. That was not so in the present case, nor is there here anything to show that the defendant has received rent for the continuance of the nuisance. With respect to the case of *The King* v. *Pedley*, it is difficult to say whether it be law or not, after the decision of this Court in *Rich* v. *Basterfield*, 4 C. B. 783, 16 L. J. C. P. 273, that unless the nuisance existed at the time of the demise, the action would not lie against the lessor. There the action was brought against the owner of premises for a nuisance arising from smoke issuing out

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of a chimney which he had erected, the plaintiff contending that the defendant having let the premises with the chimney which he had so erected, had impliedly authorised the lighting of a fire therein; but the action was held not to lie, as the erection of the chimney was not itself a nuisance, but only the user of it in such a manner as to cause smoke to issue.

[KEATING, J. — There the tenant had himself to do something, viz., to light a fire, in order to occasion the nuisance, whereas in the present case, without any act of his, the chimneys fell and occasioned the injury complained of. BYLES, J. — Will an action lie against a person who has a chimney which is in danger of falling, but which does not overhang his neighbour's ground so as to encroach on the freehold? ERLE, Ch. J., referred to *The Queen* v. *Watts*, 1 Salk. 357, where it was held that in the case of a public nuisance caused by a ruinous house, the occupier is liable to an indictment for not repairing.]

The plaintiff will, perhaps, rely on the passage in Co. Lit. 56 b, which says that "if a man hath a house near to my house, and he suffereth his house to be so ruinous as it is likely to fall upon my house, I may have a *writ de domo reparanda*, and compel him to repair his house." But it was decided in *Chauntler* v. *Robinson*, 4 Ex. 163, 19 L. J. Ex. 170, that there is no obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it repaired in a substantial manner, and that his only duty is to keep it in such a state that his neighbour may not be injured by its fall. In order to render actionable what might be a public nuisance there must be some special damage to the party complaining. No right of action had, therefore, occurred here before the demise. *Bonomi* v. *Backhouse*, 28 L. J. Q. B. 378, shows that the Statute of Limitations would not begin to run until the injury had occurred from the fall of the chimneys. A man cannot maintain an action because his neighbour's premises are in such a state as reasonably to give him anxiety for the safety of his own premises. It is submitted that the plaintiff must make out, in order to maintain this action, that the premises were in such a state as to constitute an existing actionable nuisance at * the time of the [*23] demise, and that the landlord sanctioned the continuance of the premises in that state.

Phipson (Gallway with him), *contra*. — There is an allegation in the declaration that the defendant demised the premises with the

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chimneys in a dangerous state, and kept and maintained the same in the said state until the same afterwards fell. The defendant might traverse this, and the plaintiff might prove at the trial that the defendant had insisted on the buildings remaining in such ruinous state, and on the tenant not altering them; and if so, the case is precisely the same as that of *Leslie* v. *Pounds*, 4 Taunt. 649 (13 R. R. 718), and the discussion of the general law becomes unimportant.

[ERLE, Ch. J. — That allegation in the declaration would be proved by showing that the landlord did nothing; if you say it means that the tenant wanted to repair and that the landlord prevented it, that is what we cannot suppose it does.]

Then the question is, whether a landlord who has premises which he knows are likely to fall, but which he demises before they actually fall, is liable for the damage they occasion when they do fall. There is, perhaps, no decision precisely in point. It is said, on the part of the defendant, that there must be a nuisance with a pecuniary loss to an individual before the demise, in order to make the landlord responsible in an action. It is, however, submitted that the principle to be deduced from all the cases is in favour of this, — that if the owner has property in such a state that it must lead to damage, he does not get rid of his liability by demising the property to another. In *Rich* v. *Basterfield*, at the time the premises were let by the owner, there might or not be a nuisance, according as the premises were used by the occupier, and the landlord did not afterwards interfere or do anything to occasion the nuisance. But that is a very different case from the present one, where, without any act of the tenant, and without reference to his mode of occupation, the injury has arisen. Surely the defendant, who has let the building with the chimneys in a state likely to fall and injure the property of the plaintiff, and who kept them in that state, is responsible for what occurred, which was only the probable consequence of chimneys in the state in which they were in when he so demised the premises. In *The King* v. *Pedley* Lord DENMAN said, "The nuisance here has been a natural consequence of the nature of the erection; therefore, on the principle of *The King* v. *Moore*, 3 B. & Ad. 184, as well as of the earlier case, which shows that the receipt of rent is an upholding and continuing of the nuisance, the defendant is liable." It is, moreover, apprehended that it is not necessary to

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show that a pecuniary damage was sustained at the time of the demise, in order to make the owner of the premises chargeable for the nuisance. In addition to the authority in Co. Lit. 56 b, it is said in Fitz. N. B. 127, tit. *Writ de Reparatione Facienda*, "So if a man have a house adjoining to my house, and he suffer his house to lie in decay, to the annoyance of my house, I shall have a writ against him to repair in such form: command A. that, &c., he cause to be repaired his certain house in N., which threatens destruction to the nuisance of the freehold of B., in the same town, which he ought and hath been used to repair, as it is said, &c., and unless," &c. If the owner in such a case as the present cannot be made liable, he can always free himself from responsibility by letting premises to a pauper, and the adjoining owner whose property may be injured will be without remedy.

Honyman, in reply, referred to *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089; *Vaughan* v. *Menlove*, 3 Bing. N. C. 468, 6 L. J. (N. S.) C. P. 92; *Penruddock's Case*, 5 Co. Rep. 101 B, *n.*; and *Fay* v. *Prentice*, 1 C. B. 828, 14 L. J. C. P. 298. *Cur. adv. vult.*

ERLE, Ch. J., now delivered the judgment of the Court.[1] — In this case the plaintiff's right to sue some one in respect of the damage he sustained from the fall of the defendant's chimneys was not denied, so that it is not necessary for us to advert * to the authorities on the rights of parties in respect of [*24] adjoining premises, nor to say whether the writ *de domo reparanda* lay at common law, as is said in Co. Lit. 56 b; or only by local custom, as said by Lord HOLT, in *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089; or to consider what were the rights of a *quod permittat* issued in a case of nuisance. The point here in contest is, whether the defendant is the proper party to be sued? As to this point the material allegations are, that the defendant, at the time the cause of action arose, was the reversioner, he having demised the premises to Batt, who was then in occupation; that the chimneys were ruinous, and in danger of falling, and were known by him to be so at the time when he demised them to Batt; and that he, the said defendant, kept and maintained them in such ruinous and dangerous state. Upon these facts, the defendant contended that the action should be against the lessee in

[1] ERLE, Ch. J., WILLIAMS, J., BYLES, J., and KEATING, J.

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occupation, and not against himself, being only the reversioner; and he cited *Cheetham* v. *Hampson*, where the action was for non-repair of fences and was held not to lie against the landlord, and *Russell* v. *Shenton*, where the action for not cleansing the drains and premises was also held not to lie against the landlord. On the other hand, the plaintiff contended that in many cases the party suffering damage from a nuisance had the option of suing either the lessee in occupation or the lessor. Thus, where the damage was from the non-repair of a trap-door over a cellar, and it appeared that it was the duty of the lessor to do this repair, as between him and the lessee, it was held that the action lay against the lessor: *Payne* v. *Rogers*, 2 H. Bl. 350 (3 R. R. 415); and where the damage arose from a wrongful act of the defendant in erecting a wall which obstructed the plaintiff's light, and the defendant had, before action brought, leased the premises to the party who was then in possession, still the lessor was held liable for the continuance of the wall after the lease, because it existed at the time of the demise: *Rosewell* v. *Prior*. So, where the lessor demised houses, either with a privy or with a right of resorting thereto, it was held that if he demised the privy, either when it had become a nuisance, or if he had the duty of cleansing it after it became a nuisance, he might be indicted for the nuisance; and if he demised the houses, with the use of the privy only, he would be the occupier. *The King* v. *Pedley*. These cases are authorities for saying if the wrong causing the damage arises from the nonfeasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle so contended for on the part of the plaintiff is the law, and that it reconciles the cases. In *Cheetham* v. *Hampson* it was held that the action did not lie against the landlord for non-repair of the fences, because he had no duty to repair them, and therefore was guilty of no wrong in non-repair. So, in *Russell* v. *Shenton*, the Court assumed that the lessor was not bound to cleanse the drains during the demise, and so was guilty of no wrong. In *Rich* v. *Basterfield* the lessor was held not liable for the damage occasioned by smoke from the fires which the lessee chose to make; but the reasoning of the judgment assumes it to be law that the lessor may be liable in cases of nuisance if he has been guilty of a wrong, causing the damage which made a cause of action. This is expressed in many parts of the judgment, but

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more particularly in page 805, commenting on *The King* v. *Pedley*, and saying, "If the lessor had demised the buildings when the nuisance existed, or had relet them after the user of the buildings had created the nuisance, or had undertaken the cleansing and had not performed it, we think he would have been made liable properly." In the present case, it is alleged that the defendant let the house when the chimneys were known by him to be ruinous and in danger of falling, and that he kept and maintained them in that state; thus he was guilty of the wrongful non-repair which led to the damage, and after the demise the fall appears to have arisen from no default of the lessee, but by the laws of nature. We therefore hold that the action lies against the lessor, and our judgment is for the plaintiff. *Judgment for the plaintiff.*

Pretty and Wife v. Bickmore.

L. R. 8 C. P. 401–405 (s. c. 28 L. T. 704; 21 W. R. 733).

Nuisance. — Insecure Coal-plate in a Public Footway. — Liability to repair. — Metropolis Local Management Act, 1855 (18 & 19 *Vict.*, c. 120, *s.* 102. [401]

The defendant let premises to a tenant under a lease by which the latter covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate which was at the time of the demise out of repair and dangerous. A passer-by in consequence fell into the aperture and was injured.

Held, that, the obligation to repair being by the lease cast upon the tenant, the landlord was not liable for this accident.

Held, also, that the provision in s. 102 of the Metropolis Local Management Act, 1855 (18 & 19 Vict., c. 120), makes no difference in this respect.

The first count of the declaration stated that the defendant, being possessed of a messuage with an arched area and vault in front belonging thereto, in which a certain iron coal-plate was affixed over an aperture in the covering of the said vault (and which said covering was for the protection of persons using the highway there) in, under, and abutting on a highway, wrongfully, knowingly, negligently, and improperly suffered the said coal-plate and the fastening of the said coal-plate, with the stonework surrounding the same, to become and the same were out of repair and a dangerous nuisance to persons lawfully passing on and along the highway, and, whilst the same were such a dangerous nuisance as aforesaid, the defendant let the said messuage, area, and vault to a tenant

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without requiring and obliging the tenant to repair the same, and without requiring and obliging the tenant to repair the coal-plate and the fastening of such plate together with the [*402] * stonework surrounding the same; by means of which premises and of the wrongful and negligent conduct of the defendant in that behalf, the female plaintiff, at the time she was the wife of the male plaintiff, whilst passing along the said highway, and whilst the said messuage, area, vault, and premises were in the possession of the tenant of the defendant, and whilst the defendant was entitled to the premises subject to the said tenancy, fell through the said aperture from the said highway into the area or vault, and was greatly hurt, &c.

Second count, that, before the committing of the grievances thereinafter mentioned, the defendant, being possessed of the said messuage, area, and vault belonging thereto, in which a certain iron coal-plate was affixed over an aperture in the covering of the said area and vault (which said covering was for the protection of persons using the said highway there) in and abutting upon such highway let the same to a tenant upon the terms that the defendant should and would put and would keep the said covering of the said area and vault and the said coal-plate and its fastening and surrounding stonework in repair; and the said messuage, area, and vault were at the time of the committing of the said grievances in the possession of the said tenant of the defendant as the defendant's tenant on the terms aforesaid; yet the defendant wrongfully neglected to put and to keep the area and vault and the coal-plate and its fastening and surrounding stonework in repair, and wrongfully and knowingly permitted the same to become and the same then were out of repair and a dangerous nuisance to persons lawfully using the highway: by reason of which premises, &c., as in the first count.

Third count, that, after the making, passing, and coming into operation of the Act for the better local management of the Metropolis, 1855 (18 & 19 Vict., c. 120), and of divers Acts amending the same, and of divers orders in council made under and by virtue of the said Acts and Act, and at the time of the committing of the grievances thereinafter alleged, the defendant was the owner within the intent and meaning of the said Acts and Act of a house and premises to which was then belonging a certain vault, arch, and cellar made either before or after the commencement of

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the said Act or Acts under a certain street situate and * being in a parish and district subject to the said Act, [* 403] Acts, and orders in council, into which said vault, arch, and cellar there was at the time aforesaid an opening in the said street; and that, under and by virtue of the said Act, Acts, and orders in council, it became and was the duty of the defendant to repair and keep in proper order the said vault, arch, and cellar, and all openings thereto in any such street as aforesaid; yet the defendant, being such owner as aforesaid, did not repair and keep in proper order the said vault, arch, and cellar, and all the openings into the same in the said street; whereby the female plaintiff, at the time she was the wife of the male plaintiff, whilst passing along the said street, fell through the said opening in the said street into the said vault, arch, and cellar, and sustained such hurt, &c., and incurred such expenses, &c., as in the first count mentioned.

Pleas, — 1, not guilty; 2, not possessed; 3, to first and second counts, that the defendant did not let the messuage, area, and vault on the terms alleged; 4, to third count, that the defendant was not the owner of the said house, vault, arch, cellar, opening, and premises, or bound to repair and keep in proper order the same, within the meaning of the Act, as in the third count alleged. Issue thereon.

The cause was tried before BRETT, J., at the last sittings at Westminster in this term. The facts were as follows: The defendant was the owner of a house in Boundary Road, St. John's Wood, which he let in June last to one Kay on a lease for twenty-one years, determinable at the end of the first seven or fourteen years, at the yearly rent of £65, payable quarterly, with a covenant by the lessee to keep the premises in repair; the lessor having agreed to put them in repair and convert the lower part into a shop. Kay entered into possession of the premises and paid rent. Connected with the premises was a coal-cellar under the foot-path of the public highway, the flap or iron covering of the hole or shoot whereof was at the time of the demise out of repair so as to be dangerous. The female plaintiff, walking along the footway stepped upon the flap, which gave way and she was injured. At the time of the accident the defendant's workmen were still executing the repairs which he had stipulated to do. But the tenant had entered into possession and paid rent.

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[*404] *The learned Judge ruled that, as the duty of keeping the premises in repair was by the lease cast upon the tenant, the defendant, the landlord, was not liable; and he directed a nonsuit.

C. Foster moved for a new trial, on the ground of misdirection. He submitted that, the duty of putting the premises into repair being thrown upon the landlord, the action properly lay against him to avoid circuity. *Payne* v. *Rogers*, 2 H. Bl. 350 (3 R. R. 415); *Rex* v. *Pedley*, 1 Ad. & El. 822; *Todd* v. *Flight*, 9 C. B. (N. S.) 377, 30 L. J. C. P. 21 (p. 329, *ante*); *Gandy* v. *Jubber*, 5 B. & S. 78, 33 L. J. Q. B. 51; and see 9 B. & S. 15 *n*. He also referred to s. 102 of the Metropolis Local Management Act, 1855 (18 & 19 Vict., c. 120).

Bovill, Ch. J. — I am of opinion that the nonsuit was right. The person who is in possession of the premises and who allows the coal-plate to be in a dangerous condition is the person responsible to the public for any injury resulting from its being out of repair. The defendant was not in possession; he had let the premises to a tenant who was bound by his covenant to maintain and repair them. *Primâ facie*, therefore, the person liable was the tenant. In all the cases where the landlord has been held to be responsible, it will be found that he has done some act authorising the continuance of the dangerous state of the premises. The ground of the decision in *Todd* v. *Flight*, 9 C. B. (N. S.) 377, 30 L. J. C. P. 21, was, that the declaration contained an allegation that the defendant let the houses when the chimneys were known by him to be ruinous and in danger of falling, and that he kept and maintained them in that state (which allegation must on demurrer be assumed to be true); "and thus," says Erle, Ch. J., "he was guilty of the wrongful non-repair which led to the damage, and after the demise the fall appears to have arisen from no fault of the lessee, but by the laws of nature." That is wholly inapplicable to the present case; nor are any of the other cases which have been cited. Here, the coal-plate was, it seems, in a dangerous and unsafe state; and the defendant let the premises to a tenant who covenanted to maintain and keep them in repair. Under these circumstances, how can it be said that the defendant author-

[*405] ised the thing to be kept in a dangerous state? *The simple question is, whether it was the wrongful act of the landlord or of the tenant. Mr. Campbell Foster says that the

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tenant was not bound to repair it. I differ from him. The tenant, knowing that the coal-shoot wanted repair, was bound to put it in a safe and proper state. I think there was no obligation on the lessor to do it, and that the lessee would have no remedy over against him. If the duty of repairing had rested upon the landlord, no doubt he would have been liable. But I see no evidence of that, and therefore I think the nonsuit was right.

KEATING, J. — I also am of opinion that the nonsuit was right. In order to render the landlord liable in a case of this sort, there must be some evidence that he authorised the continuance of this coal-shoot in an insecure state; for instance, that he retained the obligation to repair the premises: that might be a circumstance to show that he authorised the continuance of the nuisance. There was no such obligation here. The landlord had parted with the possession of the premises to a tenant, who had entered into a covenant to repair.

HONYMAN, J. — I am of the same opinion. *Primâ facie*, the occupier of the premises is the person liable for such an act of omission as this. If he seeks to shift the liability to his landlord, he must show some circumstances such as those referred to at the end of the judgment of ERLE, Ch. J., in *Todd* v. *Flight*, 9 C. B. (N. S.) 377, 30 L. J. C. P. 21. If the tenant be under no obligation to repair, the landlord may be liable; but, if the tenant undertakes to keep the premises in repair, he thereby relieves the landlord from responsibility. *Rule refused.*

ENGLISH NOTES.

The proposition as to the liability of the owner is stated in the above rule in terms directly supported by decisions which have never been impugned. There are several cases in which the liability has been carried further; but it would not be safe to rely upon them in support of a general proposition carrying the liability higher. *Rex* v. *Pedley* (1834), 1 Ad. & El. 822, was an indictment for nuisance against the owner of premises on which were erected buildings with privies which would naturally become a nuisance if not properly cleansed. The premises were let for short terms, and had become a nuisance for want of cleansing. It did not appear whether any obligation to cleanse them had been exacted from the tenants. The owner was held responsible by LITTLEDALE, J., on the ground that as the periods of letting were short, there may be presumed to have been a reletting after the nuisance was created; by TAUNTON, J., on the ground that the owner

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of such property ought to have exacted from the tenants an obligation to cleanse with a right of re-entry in default. So that if the owner was unable to abate the nuisance, it was his own fault. WILLIAMS, J., concurred on the ground of some admissions by the defendant which implied that it was in his power to remove the nuisance.

In the case of *Gandy* v. *Jubber* (1864), 5 B. & S. 78, 33 L. J. Q. B. 151, 10 Jur. (N. S.) 652, cited in the argument for the plaintiff in the above principal case of *Pretty* v. *Bickmore*, the Court of Common Pleas had carried the responsibility of the owner to an extent which has not been followed in recent cases. There the premises in question comprised an area with a grating over it. The grating had for many years been dangerous and a nuisance owing to its faulty construction and being out of repair. In this state the premises continued to be in the possession of a yearly tenant. The defendant had succeeded to the property under a devise in a will, and without any knowledge of the nuisance had continued the tenancy by tacit reletting. The Court of Common Pleas held the defendant liable. The case was subsequently argued in the Exchequer Chamber, and a strong Court (consisting of ERLE, Ch. J., MARTIN, B., WILLES, J., CHANNEL, B., KEATING, J., PIGOTT, B., and SMITH, J.) decided upon a reversal of the judgment. Their reasons were embodied in a judgment unanimously agreed to, and which will be found reported in a note in 9 B. & S. 15. This judgment was, however, not formally delivered, the parties having agreed, on the suggestion of the Court, to a *stet processus*, see 5 B. & S. 485, 494.

The decision in *Pretty* v. *Bickmore* was followed by another judgment of the Court of Common Pleas in *Gwinnell* v. *Eames* (1875), L. R. 10 C. P. 658, 32 L. T. 835. This also arose out of an unsafe grating, on premises demised under covenant to repair. The grating was unsafe at the time of the demise, but there was no evidence that the defendant, the landlady, knew of it, and the jury found that she was not to blame for not knowing of it. The Judge nonsuited the plaintiff, and the Court sustained the nonsuit.

In *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C. P. D. 311, 46 L. J. C. P. 675, 25 W. R. 877, it was held that if there were no misfeasance in the landlord, as for instance by letting the premises in a ruinous condition, he could not become liable to a stranger unless he had expressly agreed with the tenant to do the repairs.

Sandford v. *Clarke* (1888), 21 Q. B. D. 398, 57 L. J. Q. B. 507, 59 L. T. 226, 37 W. R. 28, was a case of premises occupied by weekly tenants, and the County Court Judge at the trial had nonsuited the plaintiff on the ground that there was no evidence that the premises were out of repair at the date of the original letting. The Court allowed an appeal. WILLS, J., giving a judgment (concurred in by GRANTHAM, J.) in which

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the case of a weekly tenancy was distinguished from a yearly tenancy, and assumed to be determined without notice; so that there was a reletting at the end of the week.

In *Bowen* v. *Anderson* (1894), 1 Q. B. 164, 42 W. R. 236, there was evidence that at the time of the original letting the landlord had furnished the tenant with appliances which, if properly used, would have made the thing secure. The County Court Judge had ruled this evidence to be immaterial, as (the tenancy being weekly) there was a reletting of the premises in the dangerous state; and a verdict was given for the plaintiff accordingly. WILLS, J., expressly stated that he and his colleague, in deciding *Sandford* v. *Clark*, were mistaken in holding that a weekly tenancy came to an end at the end of each week: the contrary having been decided by *Jones* v. *Mills* (1861), 10 C. B. (N. S.) 788, 31 L. J. C. P. 66, 8 Jur. (N. S.) 387, which was not cited. An appeal was accordingly allowed, and a new trial ordered.

AMERICAN NOTES.

These cases are cited in Taylor on Landlord and Tenant, sect. 175.

This doctrine is accepted generally in this country. *Joyce* v. *Martin*, 15 Rhode Island, 558 (wharf, citing *Todd* v. *Flight*); *Dalay* v. *Savage*, 145 Massachusetts, 38 (coal-hole, citing *Todd* v. *Flight*); *Jackman* v. *Arlington Mills*, 137 Massachusetts, 277 (pollution of stream); *House* v. *Metcalf*, 27 Connecticut, 631 (exposed mill-wheel frightening horses); *Swords* v. *Edgar*, 59 New York, 28; 17 Am. Rep. 295 (defective wharf, citing *Todd* v. *Flight*); *Fisher* v. *Thirkell*, 21 Michigan, 1; 4 Am. Rep. 422, *obiter* (coal-hole in sidewalk, citing *Todd* v. *Flight*); *Fish* v. *Dodge*, 4 Denio (N. Y.), 311; 47 Am. Dec. 254 (boiler shop, the Court observing: "One who demises his property for the purpose of having it used in such a manner as must prove offensive to others, may himself be treated as the author of the mischief"); *Irvine* v. *Wood*, 51 New York, 224; 10 Am. Rep. 603 (coal-hole in sidewalk); *Campbell* v. *Portland Sugar Co.*, 62 Maine, 552; 16 Am. Rep. 503 (defective wharf); *Helwig* v. *Jordan*, 53 Indiana, 21; 21 Am. Rep. 189 (drying-kiln); *Shipley* v. *Fifty Associates*, 101 Massachusetts, 251; 3 Am. Rep. 346; 106 Mass. 194; 8 Am. Rep. 318 (sloping roof discharging snow into street; but see *Leonard* v. *Storer*, *infra*); *Ahern* v. *Steele*, 115 New York, 203; 12 Am. St. Rep. 778; 5 Lawyers' Rep. Annotated, 449 (citing both principal cases); *Wunder* v. *McLean*, 134 Penn. State, 334; 19 Am. St. Rep. 702; *Tomle* v. *Hampton*, 129 Illinois, 379; *Kern* v. *Myll*, 80 Michigan, 525; 8 Lawyers' Rep. Annotated, 682 (unwholesome well); *Albert* v. *State*, 66 Maryland, 325; 59 Am. Rep. 159 (wharf); *Stenberg* v. *Wilcox*, 96 Tennessee, 163; 34 Lawyers' Rep. Annotated, 615 (unsafe porch, citing the first principal case). In *Ahern* v. *Steele*, *supra*, the Court said: "The owner is responsible if he creates a nuisance and maintains it; if he creates a nuisance and then demises the land with the nuisance thereon, although he is out of occupation; if the nuisance was erected on the land by a prior owner or by a stranger, and he knowingly maintains it; if he has demised premises and covenanted to keep them in repair, and omits to repair, and thus they become

a nuisance; if he demises premises to be used as a nuisance, or for a business or in a way that they will necessarily become a nuisance. In all such cases I believe there is now no doubt that the owner would be liable." In the American cases *Rosewell* v. *Prior*, 2 Salk. 460, is much cited.

Some Courts hold this doctrine even in cases where the tenant has covenanted to repair and keep in good order. *Swords* v. *Edgar*, *supra*, and some other of the cases cited above. *Ingwersen* v. *Rankin*, 47 New Jersey Law, 18; 54 Am. Rep. 109, both disapproving *Pretty* v. *Bickmore*, *supra*.

It is otherwise held in Massachusetts; *Leonard* v. *Storer*, 115 Massachusetts, 86; 15 Am. Rep. 76; and so in *Fellows* v. *Gilhuber*, 82 Wisconsin, 639; 17 Lawyers' Rep. Annotated, 577 (fall of defective shelving in a shop on a customer), the Court citing the *Pretty* and *Gwinnell* cases, and the Massachusetts cases, but being decidedly in error in asserting that "most of the American follow the English authorities." The preponderance is probably the other way. It does not satisfactorily appear that the landlord can shift his responsibility to the public through the medium of the tenant's covenant. In *Ahern* v. *Steele*, *supra*, the Court say of *Gwinnell* v. *Eager* and *Leonard* v. *Storer*, *supra:* "But these cases are not in entire harmony with the decisions in our own State, and probably would not now be generally received as authority in this country or in England." The element of knowledge is ignored in *Timlin* v. *Standard Oil Co.*, 126 New York, 514; 22 Am. St. Rep. 845 (citing *Gandy* v. *Jubber*), and in *Albert* v. *State*, *supra*, the Court held the landlord liable if he "knew or could by the exercise of reasonable diligence have known of its condition."

It has even been held that where the nuisance was created by the tenant, but the landlord with knowledge of it relet, he was liable. *Ingeversen* v. *Rankin*, *supra* (citing both principal cases); *Fleischner* v. *Investment Company*, 25 Oregon, 119 (citing *Rosewell* v. *Prior*, 2 Salk. 460).

Knowledge of the nuisance in the landlord is not essential if it is of such a character that the landlord ought to have known of it. *Ingeversen* v. *Rankin*, *supra*. The Court say, *obiter:* "In some cases knowledge on the part of the lessor of the existence of the nuisance at the time of the demise is held to be an essential element of his liability. *Gwinnell* v. *Eames*, L. R. 10 C. P. 558; *State* v. *Williams*, 30 New Jersey Law, 102. A different view was expressed by the Queen's Bench, in *Gandy* v. *Jubber*, 5 B. & S. 87, but as the plaintiff in that case, upon error in the Exchequer Chamber, accepted a *stet processus* on the recommendation of the Court, the weight of that case may be considered lessened. If such knowledge is an essential element of the landlord's liability, the cases of *Pretty* v. *Bickmore* and *Gwinnell* v. *Eames* may be reconciled with the other cases. In the latter case it appears that the lessor demised in ignorance of the defect. In the former case the same ignorance may be inferred."

In *Ahern* v. *Steele*, *supra*, it is held that a reversioner of premises subject to an outstanding lease is not liable for a nuisance existing before the reversion fell in, of which he had no notice, and which the lessee was bound to remove.

The landlord is liable if he lets premises in such a condition that they necessarily must or probably may become a nuisance in the business carried

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on upon them. *Godley* v. *Hagerty*, 20 Penn. State, 387; 50 Am. Dec. 781 (a warehouse prostrated by heavy merchandise); *Owings* v. *Jones*, 9 Maryland, 108 (vault under sidewalk); *Riley* v. *Simpson*, 83 California, 217; 7 Lawyers' Rep. Annotated, 622 (awning over sidewalk). In this class of cases the element of knowledge is necessarily dispensed with, and the liability is put on the ground that the lessor ought to have known of the danger. In *Edwards* v. *N. Y., &c. R. Co.*, 98 New York, 245; 50 Am. Rep. 659, a recovery from the lessor was denied to one who had been injured by the fall of an overcrowded gallery in a leased exhibition building, because there was no evidence that the lessor knew or had reason to know that it would be so crowded as to endanger its security. Three Judges dissented. The majority opinion admitted that proof of negligence to make the building suitable for ordinary use would have produced a contrary result. In *Stenberg* v. *Wilcox*, *supra*, the landlord was held liable for injuries to a boarder in a boarding-house which he had let with a defective and unsafe porch. So of a public building leased for amusements. *Oxford* v. *Leathe*, 165 Massachusetts, 254. It has even been held that if a nuisance is created by the tenant's unusual or extraordinary use of the premises, the landlord becomes liable for injuries thereby to third persons, if he relets with the nuisance thereon. *Fleischner* v. *Investment Co.*, *supra*.

SECTION II. — *Tenancies for a Term certain under Leases and other Instruments in Writing.*

(a) *Constitution of Tenancy.*

No. 10. — CLINAN *v.* COOKE.

(LORD REDESDALE, L. C. OF IRELAND, 1802.)

No. 11. — MARSHALL *v.* BERRIDGE.

(C. A. 1881.)

RULE.

AN agreement for a lease, in order to satisfy the Statute of Frauds, must contain all the material terms of the lease to be granted.

The agreement may (under the 4th section of the statute) be made by an agent duly authorised, although his authority is not in writing.

The date from which the term is to commence is essential; and the mere fact that the agreement bears a date

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does not show that that date is intended to be the commencement of the term.

Clinan v. Cooke.

1 Schoales & Lefroy, 22–43 (9 R. R. 3).

Agreement for Lease. — Statute of Frauds. — Term of Tenancy.

An agreement in writing for a lease of lands not specifying the term, and requiring parol evidence in order to connect it with a writing in which the term is mentioned, does not satisfy the Irish Statute, 7 Will. III., c. 12, the clauses of which is copied from the English Statute of Frauds.

An agent to contract for the sale, &c., of land under the Statute of Frauds need not be authorised in writing.

[The facts of the case and the judgment are reported as No. 70 of "Contract," 6 R. C. 721. The original report in Schoales & Lefroy contains also some observations of the LORD CHANCELLOR (Lord REDESDALE) made at the close of the argument for the defendant, which may be useful to enforce the point as to the non-requirement of writing in the authority of the agent. They are as follows: —]

[27] LORD CHANCELLOR: —

The point as to the sufficiency of a parol authority ought not to remain in doubt, because if it appear to be insufficient, there is an end of the case. But, I confess, I have always had an impression on my mind that the resolutions in the first and second sections of the statute had been different, founded upon the difference in their wording, and that the statute would have used the same words in the second section as in the first, if it had meant the same thing. I am certain there are many *dicta* to that effect in the books. It has always been understood in England, that the Legislature only required such an authority under this clause, as was a lawful one at the time of passing the Act, to make contracts binding; and though at all times (as well before the Act as since) it was necessary to have an authority in writing for creating or passing an estate for another, it was otherwise as to contracts, which passed no estate. The construction insisted on by the counsel for the defendant would extend to make the acceptance of a

[*28] * bill (not payable till after twelve months) by a merchant's clerk, void, unless he was authorised in writing (sect. 13); it would extend also to all contracts for the sale of personal chattels made by an agent. . . .

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Marshall v. Berridge.

19 Ch. D. 233-245 (s. c. 51 L. J. Ch. 329; 45 L. T. 599; 30 W. R. 93).

Agreement for Lease. — Statute of Frauds. — Commencement of Term.

An executory agreement for a lease does not satisfy the Statute of [233] Frauds, unless it can be collected from it on what day the term is to begin, and there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion.

The plaintiff offered to take a lease of furnaces from the defendant conditionally upon his being able to make arrangements with other persons as to ore. A loosely drawn memorandum was shortly afterwards signed by the parties, substituting certain other rents for the rents mentioned in the letter, which in other respects was to form the basis of the agreement. The defendant, understanding that the lease was to begin immediately, offered possession to the plaintiff at once, but the plaintiff refused to take it, as he had not yet made arrangements for ores, and continued to treat the agreement as conditional on his making those arrangements. Ultimately the parties differed as to the covenants to be inserted in the lease, and the plaintiff commenced his action for specific performance.

Held, that although where an agreement is clear the Court must act upon its own view of the construction without regard to the view entertained by the parties, yet where a party has throughout insisted on one construction of an obscure agreement, he cannot get specific performance on the footing of the opposite construction.

This was an action for specific performance of an alleged agreement by the defendant to grant a lease to the plaintiff of certain furnaces, &c.

After some previous correspondence the plaintiff wrote to the defendant on the 15th of June, 1880, a letter, the material parts of which were as follows: —

"I am prepared to take the works in their present state on the following terms: Lease, three, five, seven, fourteen, twenty-one years, optional on my part only to give up at any one of the dates by giving six months' notice. Rent, £400 per annum for all as it stands, to include everything on and about the property belonging to you, including furnaces, cottages, manager's house, and all * surface required for the use of the works and used by [* 234] you and others when the furnaces were at work. That I have six months from date of agreement free from rents and royalties to enable me to do the work I require and start the furnaces. That I take any agreement you have with the Duke of Somerset

(if binding on you) on the same terms you have it, but I should prefer to be left free to get other ores, which I find can be obtained at lower prices. This offer is subject to my being able to make satisfactory arrangements for other ironstone adjoining, some of which I have been offered, and other of which I have no doubt of being able to get."

After some further correspondence the following memorandum was signed by both parties:—

"REFORM CLUB, PALL MALL, S. W., 29 June, 1880.

"Seend Furnaces, &c.

"Rent of furnaces to be £400 per annum. Of ironstone royalty to be £500 per annum certain, and in respect of this an equivalent quantity of ironstone at the following rates per ton of 20 cwt. to be worked."

[Here followed a table of rates per ton, varying according to the selling price of pig-iron.]

"The above rents to be paid upon all worked in excess of quantity required to make up certain rent of £500. The above rents to be substituted for the rents, &c., specified in Mr. Marshall's letter of 15 June to Mr. Berridge, which in other respects is to be basis of agreement. The rent of furnaces to include manager's house and cottages as well as furnaces and land heretofore held and used for the use thereof, but does not include the agricultural land of the lessor. A lease and counterpart containing all usual stipulations to be prepared and executed."

On the 12th of July, 1880, the plaintiff wrote to the defendant as follows: "There seems to be every prospect of my being able to get some adjoining ore on satisfactory terms, and shall therefore be obliged if you will let me have draft agreement that I may get early possession, so as to do what work I require while the weather is favourable. The law part is generally slow, and may cause some little delay."

The defendant replied to this letter by a letter in which [*235] he *insisted that it was understood between the parties on the 29th of June that the ores to be used in the furnaces were to be taken from the defendant. The plaintiff answered that there was no such understanding, and insisted on the right to get ore from any quarter. Afterwards, on the 22nd of July, 1880,

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he wrote to the defendant: "I wrote to you on the 12th inst. asking for draft agreement which I have not yet received. If your solicitors are likely to be much longer before sending it I must ask you to give me possession at once as there is a great deal of work to be done, particularly masonry, which cannot be done in winter, and will cause a great loss if not proceeded with at once. Please, therefore, send me authority, so that I may take possession at once." The defendant replied: "I shall be happy to facilitate your having possession of the works, but we must have agreement first completed. I would not have entertained any application to hire the works unless substantially the ore was taken of or through me. The memorandum we arrived at was made by you and Mr. Dodds, and I am willing he should settle any open point. I understand Mr. Dodds will be in London next Tuesday; will you meet him and me at Reform Club on that day to finally settle agreement?" The plaintiff wrote in answer that there were no open points, and that it was ready for the solicitors to complete the lease.

In the early part of September a draft lease was sent containing a covenant by the lessee not to buy, receive, or use upon the premises any ironstone or iron ore other than what he should have received from the lessor. This was objected to by the plaintiff, and the parties being unable to agree the present action was commenced.

By paragraph 4 of the statement of claim it was alleged that, "upon the signature of the hereinbefore stated agreement of the 29th of June, 1880, the defendant offered the plaintiff immediate possession of the premises comprised therein, but the plaintiff then declined to accept such possession until he had had an opportunity of ascertaining for certain that he could make the 'satisfactory arrangement' referred to in the latter part of his letter of the 15th of June, 1880. For some little time, that is to say, for about a fortnight after the execution of the agreement of the
*29th of June, 1880, the plaintiff delayed asking for or [*236]
accepting possession of the premises comprised in such agreement, being in the meantime occupied in negotiations for adjoining ores on favourable terms, in which negotiations he succeeded, and, by letter dated the 12th of July, 1880, sent to and duly received by the defendant, the plaintiff expressed his desire to get early possession of the premises comprised in the agreement

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so as to do what work he required while the weather was favourable, and asked the defendant to let him have the draft lease." The plaintiff claimed specific performance and damages.

The defendant by his statement of defence did not admit that any agreement was come to between him and the plaintiff for a lease, and alleged that if there was there was no memorandum thereof in writing to satisfy the Statute of Frauds, the benefit of which statute the defendant claimed. The defendant denied having offered the plaintiff possession of the premises on the signature of the memorandum of the 29th of June, 1880, or at any other time.

The case was heard before Mr. Justice FRY. The argument principally turned upon the insertion of the covenant to take ores from the defendant, and on some questions as to the property comprised in the agreement which do not present any point calling for a report. The objection that no time was fixed for the commencement of the lease was taken, but not pressed in consequence of the decision in *Jaques* v. *Millar*, 6 Ch. D. 153, and judgment for specific performance was given. The defendant appealed.

Fischer, Q. C., Davey, Q. C., and Northmore Lawrence, for the appellant: —

The letter of the 15th of June and the memorandum of the 29th of June, taken together, do not constitute an agreement which satisfies the Statute of Frauds, for they do not show from what time the lease was to commence. This letter is incorporated in the memorandum and forms the basis of it, and is conditional on the plaintiff being able to make satisfactory arrangements. On the 12th of July the plaintiff treats the agreement as still unconcluded. If it was a clear binding agreement it would not [*237] be *material that the plaintiff did not understand it to be so; but if it is uncertain, the plaintiff, after having so long contended that possession was not to be taken from the date, cannot turn round and obtain specific performance on the footing that it was an agreement for an immediate lease. The fact that the agreement does not specify the time of commencement is fatal to the plaintiff's case. This point is not adverted to in the judgment of Mr. Justice FRY, and was not much pressed in argument, being treated as concluded by *Jaques* v. *Millar*, in which his Lordship had decided that an agreement for a lease, not mentioning the date of commencement, is an agreement for a lease to

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commence from the date of the agreement. We ask the Court of Appeal to overrule that decision. It is supported by no authority. The passages in Co. Litt. 46 b, and *Doe* v. *Benjamin*, 9 Ad. & E. 644, refer to actual demises, and we do not dispute that an actual demise, in present words, not saying from when, is a demise from the date of the instrument, but that has no bearing on the case of an executory agreement for a lease. *Blore* v. *Sutton*, 3 Mer. 237 (17 R. R. 74), is directly contrary to *Jaques* v. *Millar*. Here the preparation of a lease is contemplated, and the term would begin on the execution of the lease, not on the date of the agreement. Even if *Jaques* v. *Millar* were right it would be distinguishable from this case, for there was no reference there to the preparation of a future lease; and the document was one which would, before the passing of 8 & 9 Vict., c. 106, have been an immediate demise.

Cookson, Q. C., and Archibald Brown for the respondent: —

We do not say as a proposition of law that if no time for the commencement of a lease is mentioned in an agreement the lease is to commence from the date of the agreement, but we say that it is not necessary that the agreement should specify the time of commencement in so many words if the time can be collected from the agreement. We say that here it can be collected from its terms that the lease was to run from the time of the memorandum of the 29th of June, for it is stipulated that the plaintiff shall have six months' possession rent free from the date of the agreement. *The appellant says that the word [*238] "agreement" means "lease," but there is no ground for that; "lease" and "agreement" are both mentioned in the letter of the 15th of June, and must be taken to have different meanings.

[BAGGALLAY, L. J. — Do you say that the plaintiff was to be put into possession at once?]

Yes.

[BAGGALLAY, L. J. — The correspondence shows that the plaintiff always insisted on a different view.

JESSEL, M. R. — He was to have time to make satisfactory arrangements.]

It is a reasonable construction that the plaintiff was to have possession six months' rent free from the date of the agreement, and the plaintiff's letter and the memorandum of the 29th of June

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together fairly bear this construction. The case is thus taken out of the authority of *Blore* v. *Sutton*.

[JESSEL, M. R., here read from the record of *Blore* v. *Sutton*, which was brought into Court, and from which it appeared that the memorandum ran: "26 Oct. 1807. Plans of the ground," &c.]

The offer originally made by the plaintiff was no doubt conditional, but we say that the memorandum of the 29th of June clearly dispensed with that condition.

[JESSEL, M. R. — It may have done so; but how can you say it clearly did when your client shows that he throughout understood it the other way?]

If the terms of the memorandum are clear, it makes no difference that he misunderstood them.

[JESSEL, M. R. — That no doubt is so; but it does not follow that if they are not clear he can persistently insist upon one view, and then turn round and obtain specific performance on the opposite view.]

We submit that the terms are clear.

JESSEL, M. R.: —

This is an appeal from a decision of Mr. Justice FRY [*239] granting *specific performance of an alleged agreement between the plaintiff and the defendant that the defendant should grant the plaintiff a lease of some furnaces, ironstone mines, &c. It appears to me from the judgment of the learned Judge, which I have read, I hope, with sufficient attention, that he did not consider many of the points which have been urged in argument before us. The principal point argued before us was, however, taken by Mr. Fischer, the leading counsel for the defendant in the Court below, but was not pressed because it was considered to be covered by a previous decision of the same learned Judge, which accounts for the point not being noticed in the final judgment. That point is that it cannot be discovered within the four corners of the agreement from what time the lease is to begin. Of course if that is so the agreement cannot be enforced.

The view of Mr. Justice FRY was that because the agreement itself had a date, therefore that was the date from which the lease was to begin. I must say that not only is there no authority for such a proposition as a proposition of law, but there is a good deal of authority against it. Amongst other authorities is the case of *Blore* v. *Sutton*, decided by Sir WILLIAM GRANT, which is exactly

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in point, but which Mr. Justice FRY, in his previous decision in *Jaques* v. *Millar*, attempted to distinguish on the ground that it did not appear in the report of *Blore* v. *Sutton* that the date on which the memorandum of agreement was signed appeared on the memorandum itself. I must say, speaking with deference to the learned author of that observation, that I had come to an opposite conclusion on reading the report, but in order to be quite certain I sent for the record, and there it appears, as I expected, that the date was in the memorandum, and therefore that supposed distinction between *Jaques* v. *Millar* and *Blore* v. *Sutton* does not exist. But, independently of that, I am quite unable to concur in the decision in *Jaques* v. *Millar*. No doubt there is abundant authority for saying that if on a given day A. agrees to let and B. agrees to take a house, and that operates as a lease or present demise at law, then of course the words, being in the present tense, relate to the date of the instrument, and the term commences from that date. That is what is meant by *Doe* v. *Benjamin* and that * class of cases. It is equivalent to [*240] saying, "On this day I demise," and there is no such difficulty as there is in the case of an executory agreement to grant a lease. Where you have such an agreement, not only is it not to be supposed that the lease commences from the date of the agreement, but the very contrary is to be supposed. There is always something more to be done, for at all events there is the lease to be prepared. In *Jaques* v. *Millar* the learned Judge says: "There is clearly no indication of the commencement of the term, except the date of the document; but it is equally clear that the agreement is couched in the present tense. There is no express postponement of the time at which the agreement is to come into operation: there is nothing to be done beforehand, no repairs and no stipulation as to the preparation of the lease by the lessor's solicitor, no condition precedent to the operation of the agreement." I should think that in every case where parties agree for a lease, say for thirty years, which by law must be an instrument of a solemn character and be carefully prepared, they contemplate its preparation as a condition precedent. But independently of that, in this case there is a provision, "a lease and counterpart containing all usual stipulations to be prepared and executed." Therefore, if one desired to distinguish this case from *Jaques* v. *Millar*, it could be distinguished by using the very argument used

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by the learned Judge in the Court below; but I prefer resting my decision on the general ground that the mere fact of there being a date in the agreement does not show that it is the date of the lease, and that *Jaques* v. *Millar* cannot be sustained.

As I said before, the parties, when they enter into an agreement not operating as a present demise, intend a lease to be prepared which, *primâ facie*, will be dated on a subsequent day, and possession is not given by a prudent landlord until the lease is duly executed. On the one side, it is not intended that the lessee shall have possession before the day when the lease is executed, nor, on the other, that the lessee is to pay rent without having possession. But then it is said that in this particular instance we can find within the four corners of the agreement itself a date for the beginning of the lease. I have been utterly unable to fol-
[* 241] low that * argument. There is nothing in the memorandum of the 29th of June to give a date, and all that is said in the letter of the 15th of June is, "That I have six months from date of agreement free from rents and royalties to enable me to do the work I require and start the furnaces." It is suggested that the date of the agreement means the date of the memorandum. But the letter of the 15th of June, which is made the basis of the alleged agreement, says, "This offer is subject to my being able to make satisfactory arrangements for other ironstone." It is a conditional offer, and the memorandum does not appear to me to do away with the condition.

[His Lordship then entered into a consideration of difficulties which had arisen with regard to the defendant's agreement with the Duke of Somerset, and gave his reasons for considering that the parties never were *ad idem* about the property to be included in the proposed lease.]

There is another observation which I have to make. The plaintiff succeeded in the Court below by inducing the Court to put upon the memorandum an interpretation which he had always repudiated. Now it would be a very singular thing that a man who had always insisted on one construction of the agreement, and had refused to take possession because that was its proper construction, should then come to a Court of equity insisting that the construction for which he had hitherto contended was wrong, and that the agreement had a totally different meaning, and should ask the Court to attach that meaning to it, and grant on that foot-

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ing specific performance, the granting of which is in the discretion of the Court. I admit, indeed, that where an agreement is in writing and is unambiguous, it is the duty of the Court to construe it quite independently of the ideas of the parties as to what it means; but where an agreement is, as it is here, ambiguous, or capable of two constructions, I think it would be very strange indeed if a plaintiff, who had always acted on the one construction, should succeed in persuading the Court to grant specific performance on the footing that it ought to bear the opposite construction. The original letter contained this plain condition: "This offer is subject to my being able to make satisfactory arrangements for other ironstone adjoining, some of
* which I have been offered and other of which I have no [* 242]
doubt of being able to get." That was indisputably a condition precedent. When you come to the memorandum of the 29th of June, nothing is said in terms about that condition, but it is stated that the letter in other respects is to be the basis of agreement, and then it is stipulated that a lease and counterpart are to be prepared. There are two readings of this memorandum. It may mean that the letter with the condition is to be the basis of the agreement, so that the agreement is conditional, or it may mean that the parties have come to an agreement and that the condition is waived. Now the plaintiff, on his own showing, meant to retain the condition, for he tells us that on the signature of the memorandum of the 29th of June, the defendant, taking the second view, offered to give him possession, but the plaintiff, taking the other view (and again, therefore, they are not *ad idem*), refused to take possession until he had had an opportunity of ascertaining whether he could make the satisfactory arrangements referred to in the latter part of his letter of the 15th of June. Then he says, in the 4th paragraph of the statement of claim, "The plaintiff delayed asking for or accepting possession of the premises comprised in such agreement, being in the meantime occupied in negotiations for adjoining ores on favourable terms, in which negotiations he succeeded, and, by letter dated the 12th of July, 1880, sent to and duly received by the defendant, the plaintiff expressed his desire to get early possession of the premises comprised in the agreement, so as to do what work he required." That is most uncandid pleading, for anybody reading it would conclude that the plaintiff, having succeeded in the negotiation,

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wrote a letter telling the defendant that he had succeeded, and asking him for possession, on the ground that the condition had been complied with. But the letter of the 12th of July in fact amounts to this: "There is a prospect of my being able to make arrangements; let me have a draft agreement so that we may settle the terms, and then, in case I can get the adjoining property, we shall lose no time." It is not a demand for possession, but it is a request to have a draft agreement sent so that the law part may be settled, and no time be lost when he is ready to take possession. He, therefore, never did tell the defendant that he [*243] *had made satisfactory arrangements and was ready to complete, nor did he ever treat the contract as a concluded one until they were quarrelling about the terms of the lease. It appears to me that if ever there was a case for refusing a plaintiff specific performance we have that case here; and on that ground, as well as the others I have mentioned, I think the decision of Mr. Justice FRY is unsustainable. The action must be dismissed with costs, and the appellant will have the costs of the appeal.

BAGGALLAY, L. J.:—

This is an action for specific performance of an alleged agreement to grant a lease. In my opinion no agreement in writing sufficient to satisfy the Statute of Frauds is established. I agree entirely with what has been said by the MASTER OF THE ROLLS as to the parties not having been *ad idem* even as regards the subject-matter on which they were desirous of coming to an agreement. But, apart from that, the case is to my mind disposed of by the fact that no time is limited in writing for the commencement of the term. The case of *Blore* v. *Sutton*, 3 Mer. 237, 246 (17 R. R. 74), is clear and distinct on the point. Sir WILLIAM GRANT there held that there was no sufficient agreement in writing, "because the memorandum does not contain some of the material terms of a building lease, which this was. It merely specifies the rent and the number of years. It does not even specify the commencement of the lease." There is very little substantial difference between the terms of the written document in that case and the terms of the document in this case, so far as those terms are clear. It is admitted that Mr. Fischer raised this point in the Court below, but Mr. Justice FRY considered it of slight moment and disposed of it in the course of the argument, and therefore we find no reference to it in the judgment. His

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ground for rejecting the argument was based on his own decision in *Jaques* v. *Millar*, 6 Ch. D. 153, where he had held under somewhat similar circumstances that if the memorandum of agreement bore a date, the term agreed to be created was to commence from the date of the agreement. He was under the impression that in *Blore* v. *Sutton* the memorandum contained no date, and that therefore the principle he applied in *Jaques* * v. *Millar* [* 244] would not apply to that case. I should myself have come to the conclusion, on reading the report of *Blore* v. *Sutton*, that the date did appear on the memorandum, and on examining the bill it appears that such was the case. The supposed distinction, therefore, does not exist. The decision in *Jaques* v. *Millar* is then inconsistent with *Blore* v. *Sutton*, and I feel bound to say that I must dissent from the conclusion of Mr. Justice FRY.

Then it has been contended that the letter of the 15th of June and the memorandum of the 29th of June contain sufficient indication that the parties intended the lease to commence from the date of the agreement, whenever that agreement might be executed or come to. I am unable to find any such indication. I should infer from the documents that there was an intention that so soon as the plaintiff should be able to ascertain that he could obtain mining rights on adjoining property, then an agreement should be entered into; but I can find nothing to show that the parties intended the term to commence from the day when the final agreement should be signed.

The judgment of Mr. Justice FRY chiefly deals with a contention on the part of the defendant that in the lease which was to be executed a covenant should be introduced prohibiting the plaintiff from obtaining his minerals from any other source than the property held under the Duke of Somerset. I am not disposed at the present moment to differ from the view taken by Mr. Justice FRY on that point, if there had been an agreement between the parties. But, there being no agreement capable of being enforced in a Court of equity, I am of opinion that the decision was wrong and must be reversed.

LUSH, L. J. : —

I also am of opinion that the agreement sought to be enforced is essentially defective on the ground stated by Mr. Davey, viz., that it does not define, nor can it be collected from it with reasonable certainty, from what period the term is to commence.

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The alleged agreement is for a lease for three, five, seven, fourteen, or twenty-one years. Now it is essential to the validity of a lease that it shall appear either in express terms or by [* 245] reference * to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain those elements. Now I fail to see from the documents in this case how any one can tell from what period the lease was to commence. [His Lordship then considered at some length the letter of the 15th of June, and pointed out the impossibility of determining from it at what time the term was to commence, and further stated his reasons for considering that the parties never were *ad idem* as to what was the subject-matter of the intended lease, and concluded by stating his opinion to be that the agreement was essentially defective and could not be set up or sued upon either in law or equity.]

Davey, for the appellant: —

The plaintiff insisted on our bringing the draft lease into Chambers pending the appeal, and we have incurred costs. We ought to have those costs, and probably the dismissal of the action with costs, without more, will not carry them.

JESSEL, M. R.: —

No. You require a special order, and we make it.

ENGLISH NOTES.

That, in order to constitute a valid lease by an agent, the authority need not be in writing, is confirmed by the authority of the Lord Justices of Appeal in Chancery in England in *Heard* v. *Pilley* (1869), L. R. 4 Ch. 548, 38 L. J. Ch. 718.

In other respects the authorities as to the sale of lands, &c., under the fourth section of the Statute of Frauds (see Nos. 22 and 23 of "Contract," 6 R. C. 231, and notes, pp. 249–252), will apply equally to leases and interests created under the third section.

If possession have been given under an instrument purporting to be an agreement for a lease, but which does not explicitly state when the term is to commence, if it is consistent with the writing that the date of giving possession should be the commencement of the term, that intention may be read as implied in the writing. *In re Lander and Bagley's Contract* (1892), 3 Ch. 41, 61 L. J. Ch. 707, 67 L. T. 521.

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Illustrations of the same principle in applying the fourth section of the Statute of Frauds will be found in Nos. 22 and 23 of "Contract," and notes, 6 R. C. 230 *et seq.*

AMERICAN NOTES.

Clinan v. *Cooke* is cited in 1 Wood on Landlord and Tenant, p. 268, on the point of agency, with reference to *Champlin* v. *Parish*, 11 Paige (N. Y. Ch.), 406, which also cites that case. That case is also cited in Browne on Statute of Frauds, sect. 370 a, with reference to *Inhab. of Alna* v. *Plummer*, 4 Greenleaf (Maine), 258; *Hawkins* v. *Chace*, 19 Pickering (Mass.), 502; *Yerby* v. *Grigby*, 9 Leigh (Virginia), 387; *Johnson* v. *McGruder*, 15 Missouri, 365; *Talbot* v. *Bowen*, 1 A. K. Marshall (Kentucky), 436; *Curtis* v. *Blair*, 4 Cushman (Mississippi), 309; *Johnson* v. *Dodge*, 17 Illinois, 433; *Roehl* v. *Haumesser*, 114 Indiana, 311; *Hargrove* v. *Adcock*, 111 North Carolina, 166; *Campbell* v. *Fetterman's Heirs*, 20 West Virginia, 398. That case is also cited in *Abeel* v. *Radcliff*, 13 Johnson (N. Y.), 297; 7 Am. Dec. 377: "Appears to have been settled upon great deliberation;" "the rule appears to be settled upon the firmest basis." "The term, it is well settled, cannot be ascertained by anything short of written proof." *Hodges & Co.* v. *Howard*, 5 Rhode Island, 158, citing *Clinan* v. *Cooke*. The principal cases are also cited in Taylor on Landlord and Tenant.

Marshall v. *Berridge* is cited in Browne on Statute of Frauds, sect. 385, referring to *Parker* v. *Tainter*, 123 Massachusetts, 185.

The general American doctrine is that where the contract is contained in separate writings, they must connect themselves by reference, and that parol evidence is not admissible to connect them. 30 Am. Law Rev. 864.

The general rule is correctly stated in *McConnell* v. *Brillhart*, 17 Illinois, 354; 65 Am. Dec. 661, as follows: "The writings, notes, or memoranda shall contain on their face, or by reference to others that are traceable, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the thing, interest or property, as will be capable of identification and separation from others of like kind, together with the terms, conditions, and price to be paid, or other consideration to be given." Citing *Barry* v. *Coombe*, 1 Peters (U. S. Sup. Ct.), 647; *Blagden* v. *Bradbear*, 12 Ves. 466; *Dock* v. *Hart*, 7 Watts & Sergeant (Penn.), 172; *Mactier's Adm'rs* v. *Frith*, 6 Wendell (N. Y.). 103; 21 Am. Dec. 262; *Bean* v. *Burbank*, 16 Maine, 458; 33 Am. Dec. 681; *Hill* v. *Roderick*, 4 Watts & Sergeant (Penn.), 221; *Sherburne* v. *Shaw*, 1 New Hampshire, 158; 8 Am. Dec. 47; *Fowler* v. *Lewis*, 3 A. K. Marshall (Kentucky), 443; *Dorsey* v. *Wayman*, 6 Gill (Maryland), 66; *Ide* v. *Stanton*, 15 Vermont, 685; 40 Am. Dec. 698; *Freeport* v. *Bartol*, 3 Maine, 310.

In *Hewes* v. *Taylor*, 70 Pennsylvania St. 387, it was held that parol evidence was competent to correct a mistake in the date of a letter, and in order to connect writings to prove that a letter dated the 9th was in answer to one dated the 10th of the month: "The agreement would be good without a date, or even with an impossible date. The date is a circumstance of identification as to time only; proof of it does not add to, alter, or change the terms of the

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agreement." Pennsylvania however has always been ultra liberal in admitting parol evidence.

In *Osborn* v. *Phelps*, 19 Connecticut, 63, it was held that equity would not correct a mistake by which, where an agreement for the sale of land was in two separate papers, one of sale and the other of purchase, each party signed the wrong one, and the papers did not refer to one another nor express the mutual intention. One Judge dissented. This was founded on *Clinan* v. *Cooke*, 1 Sch. & L. 22, and *Attorney-General* v. *Sitwell*, 1 Y. & C. 559. The decision seems technical, and the argument of the dissenting Judge is very convincing.

The general rule excluding parol evidence to connect writings finds support in *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. (N. Y.) 280 ("too reasonable and too well settled to be now disturbed," says Kent); *Alba* v. *Strong*, 94 Alabama, 163; *Fowler Elevator Co.* v. *Cottrell*, 38 Nebraska, 512.

In general the memorandum or agreement must contain, either in itself or by clear reference, all the terms of a complete contract, and if any essential term is absent it is insufficient and cannot be mended by parol evidence. *Abeel* v. *Radcliff*, 13 Johns. (N. Y.) 297; 7 Am. Dec. 377; *Wardwell* v. *Williams*, 62 Michigan, 50; 4 Am. St. Rep. 814; *Hazard* v. *Day*, 14 Allen (Mass.), 487; 92 Am. Dec. 790; *Tice* v. *Freeman*, 30 Minnesota, 389; *Fry* v. *Platt*, 32 Kansas, 62; *Peck* v. *Vandermark*, 99 New York, 29; *Grace* v. *Denison*, 114 Mass. 16; *Hope* v. *Dixon*, 22 Grant Ch. (U. C.) 439; *Baker* v. *Glass*, 6 Munford (Virginia), 212; *Grafton* v. *Cummings*, 99 U. S. 100 (disapproving *Salmon F. M. Co.* v. *Goddard*, 14 Howard (U. S. Sup. Ct.), 446). So an agreement for a lease of land without stating price or term is void. *Abeel* v. *Radcliff*, *supra*.

It has been held however that the reference in one paper to another need not be explicit, but that it is sufficient if it is traceable. Thus in *Beckwith* v. *Talbot*, 95 United States, 289, a letter spoke of "the agreement," simply, and this was held a sufficient reference to a written agreement signed by the other party alone. Mr. Justice BRADLEY, speaking of the rule excluding parol evidence to connect such writings, said: "But the rule is not absolute. There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof." Founded on this decision is *White* v. *Breen* (Alabama), 32 Lawyers' Reports Annotated, 127, in which the Court said: "We are of opinion that when all the writings adduced, viewed together in the light of the situation and circumstances of the parties at the time they were written, show unmistakably that they relate to the same matter and constitute several parts of one connected transaction, so that the mind can come to no other reasonable conclusion, from the evidence so afforded, than that they were each written with reference to those concurrent or preceding, then there is such a reference of the one to the other as satisfies the rule, although reference in express terms does not appear. The rule is one founded in reason; and when, as practical men, we look at the writings, and see, inhering in them, evidence which entirely satisfies the mind that they all relate to one general transaction, there is no reason why they should not be so considered. There is in such case a direct reference of the one to the other, within the meaning of the law."

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Taylor says the rule of *Marshall* v. *Berridge* is adopted by statute in most of these States, but it is otherwise in New York. *Young* v. *Dake*, 5 New York, 463. (Landlord and Tenant, sect. 30.)

No. 12.—NEALE *v.* MACKENZIE.

(EX. CH. FROM EXCH. 1837.)

RULE.

A DEMISE not under seal (by A. to B.) of premises in possession of a tenant (C.), under a previous demise by the same lessor (A.), creates no legal interest in the lessee (B.) during the term of the previous demise (to C.).

But if the later demise is by deed or can operate by estoppel, it may operate as a grant of the reversion, and create an interest to take effect with attornment, or by possession on the expiry or other determination of the term under the previous demise.

Neale v. Mackenzie.

1 Meeson & Welsby, 747–764 (s. c. 2 Gale, 174; 6 L. J. Ex. 263).

Parol Demise.—Void by Reason of Possession under Prior Lease.

A lessee (under a parol demise) of one hundred acres of land accepted [747] the lease and entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres, until half a year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. It appeared from the dates of and averments in the pleadings, that the prior lease was for a term extending beyond the duration of the latter lease. *Held*, on error (reversing the judgment of the Court of Exchequer), that the latter demise was wholly void as to the eight acres; and that the rent was not apportionable, and the lessor was not entitled to distrain for the whole rent or any part of it.

Writ of error on the judgment of the Court of Exchequer (reported in 2 C., M. & R. 84).

[The points in question sufficiently appear from the judgment of the Court, which, after a full argument and consideration, was delivered by]

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[756] Lord DENMAN, Ch. J. — This is an action of trespass for entering the plaintiff's dwelling-house and taking his goods.

The declaration is dated the 25th of April, 1834. The defendant, on the 24th of May, 1834, pleaded that he, being seised [*757] of the dwelling-house and certain other premises, *demised the same to the plaintiff for one year from the 25th of June, 1833, at the rate of £70, payable quarterly; that the plaintiff accepted the lease, and, by virtue of the said demise, entered into and upon the said demised premises, and thereupon became and yet was possessed thereof for the said term so granted to him as aforesaid; and until the 25th of December, 1833, and from thence until and at the time when, &c., held and enjoyed the dwelling-house and premises by virtue of the said demise; that, on the said 25th of December, 1833, £35 of the rent was in arrear, wherefore the defendant entered and made a distress for the same.

The plaintiff, on the 6th of December, 1834, replied that one Adam Charlton, before the demise in the plea mentioned, and from thence and still was in possession of eight acres of land of the said demised premises, under and by virtue of a demise theretofore made by the defendant to him, which demise was then and from thence had been and still was in full force and undetermined, whereby the plaintiff did not and could not enter into the possession of, or hold or enjoy the said last-mentioned land, so being parcel of the demised premises in the plea mentioned; and although he had been willing and desirous of entering, he had been kept out of possession by Adam Charlton by virtue of the demise to him, and the plaintiff had been prevented from holding and receiving the profits.

The rejoinder alleges that the plaintiff, at the time of his entering on the demised premises, had notice that Adam Charlton was in possession of the eight acres as tenant to the defendant, under a demise for a term then unexpired.

To this rejoinder there is a special demurrer, for inconsistency with the plea and departure therefrom.

The question to be determined is, whether the replication be an answer to the plea.

[*758] *It has been argued that the impediment to the plaintiff's obtaining possession of the eight acres demised to Adam Charlton by the defendant previously to the demise made to the plaintiff is in the nature of an eviction. On one side it is con-

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tended that it is analogous to an eviction by title paramount, the right of Adam Charlton being prior to the demise made by the lessor, and to the title acquired under that demise by the lessee; and on the other side, that it is analogous to an eviction by the tortious act of the lessor, since the impediment arises from the wrongful act of the lessor himself in demising land which he had already parted with, and is not to be distinguished in principle from the case of an entry upon the lessee under a demise made by the lessor to a stranger immediately after possession taken by the lessee.

If the former of these views be adopted, the rent will be apportionable, and the distress justified by the plea: for it is clear that a person may distrain for apportionable rent; and, if the defendant was entitled to distrain at all, the action of trespass cannot be maintained. If the latter view be correct, the defendant was not entitled to distrain at all, so long as the plaintiff was kept out of possession of any part by his wrongful act.

But we are of opinion that the impediment to the plaintiff's taking possession in this case is not analogous to an eviction, for it appears to us that no interest in the eight acres previously demised to Adam Charlton passed to the plaintiff by the demise subsequently made to him. The demise to Adam Charlton covered the whole time during which the rent distrained for accrued.

But it has been supposed that notwithstanding the demise to Adam Charlton, by which the defendant had parted with his right of possession in the eight acres, the plaintiff by his subsequent lease took an *interesse termini* in these eight acres for the period of his own lease, viz., one year, so as to give him a right to a term for all that * period, and to the possession on the [* 759] determination of the prior lease by efflux of time, or by any other lawful mode, whenever and in whatever way it should be determined; and that the existence of the prior demise being the impediment by which alone the plaintiff was prevented from obtaining possession under the demise to him, the case must be governed by the same principle as that of an eviction by title paramount; and, if any interest in the eight acres did pass to the plaintiff under the demise to him, we might possibly be disposed to accede to this view of the case, considering that eviction by title paramount means eviction by a title superior to the titles both of lessor and lessee, against which neither is enabled to make a defence.

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It appears to us, however, upon authority which we do not feel ourselves at liberty to dispute, that the demise to the plaintiff of the eight acres in question was wholly void.

It has been already observed that the demise to Charlton made previously to the demise to the plaintiff covers the whole of the plaintiff's term, or at least the whole period for which the distress was made. Now it is expressly laid down in Bacon's Abr., Leases (N) (which is to be considered as the language of Lord Chief Baron GILBERT), as follows: "If one make a lease to A. for ten years, and the same day make a parol lease to B. for ten years of the same lands, this second lease is absolutely void, and can never take effect either as a future *interesse termini* or as a reversionary interest, though the first lessee should forfeit or otherwise determine his estate, or though the first lease were on condition, and the condition broken within ten years; neither shall the lessor have the rent reserved upon such second lease, but such second lease is absolutely void, as if none such had been made. The reason whereof is, because the first lease being made for ten years, the lessor during that time had nothing to do with the posses-
[* 760] sion, or to contract with any other for it; * and the second lease being made the same day, and for no longer term than the first ten years, would not pass any interest as a future *interesse termini* certainly; for the first lessee had the whole interest during that time, and his forfeiture or determination of it sooner, which was perfectly contingent and accidental, shall never make good the second lease as a future *interesse termini*, when at the time of making thereof it was absolutely void for want of a power in the lessor to contract for it: and as a reversionary interest it cannot be good for want of a deed." And a little further on, "But now, if such second lease had been made for twenty years, then it had been good as a future *interesse termini* for the last ten years, and void for the first ten years for the reasons before given, but for the last ten years it had been good; because, when the first ten years were elapsed, the second lessee might then execute and reduce into possession by entry as well as if it had been at first made in possession; for it had been good for the whole twenty years if the first lease had not stood in the way, and that can stand in the way no longer than it continues, and therefore, by its termination, lets in the second lease; but, as a grant of the reversion, such second lease could not be good for want of a deed, for the rea-

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sons before given, neither could any attornment help it or let in the second lease till the first ten years ran out by effusion of time." And afterwards it is said that if, after a lease for ten years, a second lease by deed poll were made for twenty years, it might take effect with attornment as a grant of the reversion, or, if no attornment could be had, "yet it would enure as a future *interesse termini* for the last ten years, and would be absolutely void for the first ten years, as much as if it had been made by parol."

It has been remarked that the doctrine here laid down is derived from the argument of counsel in the case of *Bracebridge* v. *Clowse*, in Plowd. 421; but it may be answered, that although the matter introduced into Bacon's * Abridgment is first dis- [* 761] tinctly found in the argument set forth at length in Plowden, it now stands upon the authority of Lord Chief Baron GILBERT. Moreover, the point immediately under consideration in this case is confirmed by the opinion of GAWDY, J., in *Dove* v. *Willcot*, Cro. Eliz. 160, who says, "If a lease be made for two years, and after the lessor let the land for four years, this is but a lease for two years, although the first lessee surrender, for he had no power to contract for the first two years at the beginning; but otherwise when the estate is determinable upon an uncertainty;" and cites Plowd. Comment., *Smith & Stapleton's* case, which is the case where the argument is fully stated, fo. 432.

It may be remarked also that in Comyns's Digest, title Estates (G, 13), it is said that a lease which cannot take effect in interest, except by possibility, if it be not an estoppel, shall be void; as, if tenant in fee leases by parol to A. for nine years, and the same day to B. for nine years, the lease to B. shall be void. For this he cites Plowden, 432, and though this statement be only part of the language of the apprentice who argued the case of *Smith* v. *Stapleton*, Chief Baron COMYNS, by introducing it in this general way, must be considered as adopting it in some degree, at least, as authority: in what is said by GAWDY, as referred to in Cro. Eliz. 160, there is afterwards added *Smith* v. *Stapleton*, Plowd. 426, though it is not clear whether this be his language or that of the reporter.

This same doctrine, as far as regards a second parol lease for years after a former lease for years, appears to have been treated as clear law in various books; though the effect of such a lease made after a prior lease for life has been the subject of discussion.

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See Bro. Abr., Lease, pl. 35, 48; Plowden, 521, note of the reporter; *Welchden* v. *Elkington*, Plowd. 521; Plowden's Quæries, 122 and 161; *Sir Hugh Cholmondeley's Case*, Moore, 344, in the argument of Cook, Attorney-General. So, in *Watt* v. [*762] *Maydewell*, Hutton, 105, "If a man make a lease *for twenty-one years, and after makes a lease for twenty-one years by parol, that is merely void; but if the second lease had been by deed, and he had procured the former lessee to attorn, he shall have the reversion." *Edwards* v. *Staler*, Hardr. 345, *arguendo*. So, Sheppard's Touchst. 275 b: "If the second lease be for the same or a less time, as if the first lease be for twenty years, and the second lease be for twenty or for ten years, to begin at the same time, these second leases are for the most part void;" but if the second lease be by fine, deed indented, or poll, it may pass the reversion with attornment when attornment is necessary, and without, if not necessary. But if the second lease be by word of mouth it is otherwise:" "And if the second lease be by fine, or deed indented, then it may work by way of estoppel both against the lessor and the lessee; so that, if the first lease happen by any means, as, by surrender or otherwise, to determine before it be run out, then the second lessee shall have it."

Upon these authorities, therefore, we feel ourselves obliged to hold that the lease to the plaintiff was utterly void, so far as regarded the eight acres demised to Charlton.

If that be so, we are unable to distinguish the case in principle from that of *Gardiner* v. *Williamson*, 2 B. & Ad. 336, where the tithes of a parish, together with a messuage used as a homestead for collecting the tithes, having been demised by parol at a rent of £200 per annum, and a distress made for arrears, the Court of King's Bench held that an action of trespass would lie, because the demise of the tithes, being by parol, was void. There was no valid demise, it was said, of the whole subject-matter, nor any distinct rent reserved for that part of it upon which there might have been a legal distress. That case was the stronger, because it was contended that the whole rent must be taken to be issuable out of the corporeal hereditament, upon which alone a dis- [*763] tress could be made. *And accordingly, in a case of a lease by indenture, Dyer is reported to have held (Moore, 50), that if lands at common law and copyhold lands are leased by indenture rendering rent, all the rent is issuing out of the

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lands at common law; for the lessor had no power to make such a lease of copyhold, wherefore as to this the lease is utterly void; but it is added, that if a man lets lands, parcel of which he is seised of by disseisin, then the rent is issuing out of all the land, and by the entry of the disseisee the rent shall be apportioned, because the lease of this was not void but voidable. In this last case the tenant took an interest, and enjoyed all the lands demised till the time of his being evicted from a parcel thereof by the disseisee, and was therefore liable in respect of such interest and enjoyment to a portion of the rent. In the case before the Court, which is not the case of a demise by indenture, the rent is reserved in respect of all the land professed to be demised, and to be issuing out of the whole and every part thereof; and as the plaintiff, as to a portion of the land comprised in the demise (which might be great or small, as far as the principle is concerned), has taken no interest, and had no enjoyment, and is not bound by any estoppel, we are of opinion that the distress made by the defendant is not justifiable, either in respect to the whole rent reserved or any portion of it.

It may further be observed, that, even supposing the plaintiff to have taken an *interesse termini* in the eight acres, capable of being executed by entry in case the demise to Charlton should happen to be forfeited or surrendered, yet, as that demise to Charlton was in force at the commencement of the plaintiff's tenancy, and continued during the whole period, in respect of which the distress has been made, no demise of those eight acres to the plaintiff ever took effect; and, consequently, no right to any rent in respect of those eight acres has ever come into existence. And we are not aware of any case where an entire rent reserved has been held to be apportionable, in * which the tenant has not [* 764] been at some period subject to the entire rent by virtue of the demise. Here, the right of apportionment is not founded upon any eviction, or other matter occurring subsequently to the demise, but upon an original defect in the demise itself by which the entire rent was reserved. In this respect it is strictly analogous to *Gardiner* v. *Williamson.*

In the case of *Tomlinson* v. *Day*, 5 Moore, 558, which has been referred to, the landlord did not claim an apportioned part of an entire rent, either by avowry for a distress or by action for the rent. It was an action for use and occupation, in which he was

allowed to make use of an agreement for a lease (according to the express provision of the statute 11 Geo. II., c. 19, s. 14), "as evidence of the *quantum* of damages to be recovered;" and, as the defendant had been interrupted in the full enjoyment of what had been agreed for, the plaintiff was held "entitled to recover a reasonable compensation for the property enjoyed by the defendant as an equivalent for rent." The interruption to the defendant's right of exclusive sporting was indeed compared by Lord Chief Justice DALLAS and Mr. Justice RICHARDSON to an eviction; but, if it was an eviction, it was clearly an eviction by title paramount. The agreement for exclusive sporting was not void on account of the landlord having made a prior agreement to let it to some other person; but it was defeated, because other persons interfered who had a right superior to that of the landlord. Supposing the circumstances, therefore, to amount to an eviction, it would be a case of apportionment according to the acknowledged rule, and would not assist the argument in favour of the defendant.

Upon the whole, therefore, we are of opinion that the judgment of the Court of Exchequer ought to be reversed.

Judgment reversed.

ENGLISH NOTES.

The above case is important to show the strict rule at law. Under the modern practice since the Judicature Acts, other elements might have to be taken into consideration. For instance, if the intending tenant under the agreement had entered into occupation substantially of the property, under such circumstances that the Court would decree specific performance with or without compensation, the tenant, being in possession under an equitable right, would be in the same position for the purposes of a distress or action for rent as if he were legal tenant of the land. *Walsh* v. *Lonsdale* (C. A. 1882), 21 Ch. D. 9, 52 L. J. Ch. 2, 46 L. T. 858, 31 W. R. 109. But it is to be kept in mind that the principle of *Walsh* v. *Lonsdale* depends on the jurisdiction of the Court to enforce the remedies at law and equity concurrently; and where the Court has no such jurisdiction, cannot be applied. *Foster* v. *Reeves* (C. A. 1892), 2 Q. B. 255, 61 L. J. Q. B. 763, 67 L. T. 537, 40 W. R. 695.

The latter part of the rule is clearly implied by the expressions used by Lord DENMAN on p. 365, *supra*. The principle is explicitly confirmed on the authority of these expressions by the judgment of the Irish Court of Queen's Bench in the case of *Ecclesiastical Commissioners* v. *O'Connor* (1858), 9 Ir. C. L. Rep. 243. This was an action

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for rent under an indenture of lease for three lives of a house and lands at the yearly rent of £400. There was a defence, framed upon the lines of that in *Neale* v. *Mackenzie*, to the effect that the defendant was kept out of possession of two roods of the land by reason of a prior demise. The case was argued on a demurrer to this defence. The Court, in a judgment delivered by LEFROY, Ch. J., held that the defence was not a good answer to the claim for the whole rent. He observed that in the case of *Neale* v. *Mackenzie* the second lease was not under seal; and the ground taken in the judgment of the Exchequer Chamber delivered by Lord DENMAN was that with regard to the eight acres no interest at all — not even a reversion which can only be granted by deed under seal — passed to the lessee. In the present case, however, the plaintiffs who were in possession of the property, except two roods which were in possession of some one else under a former lease, demise the entire property by lease under seal, reserving a rent for the whole. This was, in effect, a lease in possession of the property which the lessors had in possession, and a lease of the reversion of the two roods. "Where a person has only a reversion expectant on a lease, with a rent incident thereto, he may make a lease by deed of that reversion for any term, and reserve a rent thereout; he may deal with it as if it were an interest in possession, and he cannot be said not to have a title to the rent. He cannot, it is true, recover it by ejectment, and there may be a difficulty in the way of his distraining for it; but he can recover it either by an action upon express covenant, or by an action of debt upon the implied contract which arises upon the deed between the parties." The Court accordingly held that the pleadings showed a right of action for the whole rent; and the demurrer to the defence was allowed accordingly.

AMERICAN NOTES.

This case is cited in 2 Wood on Landlord and Tenant, p. 1119, without American references, and in 1 Washburn on Real Property (5th ed.), 561, referring to *Lawrence* v. *French*, 25 Wendell (N. Y.), 443; *McElderry* v. *Flannagan*, 1 Harris & Gill (Maryland), 308; *Christopher* v. *Austin*, 11 New York, 216; *Hayner* v. *Smith*, 63 Illinois, 430. In the Maryland case it was held that where a landlord has leased to one, and subsequently leases to another, the first is not bound forcibly to resist the entry of the second, and his notice to the second that he shall consider him his tenant is nugatory. (This is the ruling also in *Cohn* v. *Norton*, 57 Conn. 480; 5 Lawyers' Rep. Annotated, 572.) The other cases are not in point nor analogous, treating of the effect of eviction and not of what constitutes eviction.

Taylor cites the principal cases (Landlord and Tenant, sects. 377, 378).

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No. 13. — NUNN *v.* FABIAN.

(CH. APP. 1865.)

No. 14. — RAMSDEN *v.* DYSON.

(H. L. 1866.)

RULE.

IF a tenant with consent of the owner enters into possession of land, or does any act such as clearly appears to have been done in pursuance and on the faith of an agreement for a lease or other interest which is not otherwise enforceable by reason of the Statute of Frauds, or if a tenant pay and the landlord receive rent under an agreement which is itself clearly proved, the acts will be treated as part performance to take the case out of the statute, and specific performance will be decreed accordingly.

And if a stranger builds upon land supposing it to be his own, and the owner, knowing that the person so building is under a mistake, abstains from setting him right, a Court of equity will not afterwards allow the real owner to assert his title to the land.

Nunn v. Fabian.

L. R. 1 Ch. 35–41 (s. c. 35 L. J. Ch. 140).

Landlord and Tenant. — Agreement for Lease. — Part Performance.

[35] A landlord having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease. Before his death the tenant had paid one quarter's rent at the increased rate.

Held, that this constituted a sufficient part performance of the agreement to take the case out of the Statute of Frauds, and specific performance was decreed.

The bill in this case was filed for the specific performance of an agreement to grant a lease of two houses at Brighton. The facts were as follows: —

In May, 1862, Edward Bruton (since deceased) was seised of two houses, Nos. 59 and 60 Western Road, Brighton, and a house in

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Castle Street at the back of them. The plaintiff, John Nunn, was the occupier of No. 60 Western Road, and of part of the house in Castle Street, as yearly tenant, at the rent of £65; and George Wymark was the occupier of No. 59 Western Road, and the rest of the house in Castle Street, as yearly tenant, at a rent of £50.

The plaintiff alleged that in that month negotiations took place between himself and his landlord respecting a grant to him of a lease of the whole of the premises, and that Bruton offered to grant a lease of the three houses for twenty-one years at a gross rent of £130, with the option of purchasing the freehold for £2500, either at once or within a limited period. No memorandum in writing of this offer appears to have been made, but on
* the 27th of May the plaintiff sent to Mr. Bruton the fol- [* 36]
lowing letter: —

"DEAR SIR, — I am sorry that I have not given you an answer before; but in consequence of my not being able to decide as soon as I had promised to do to my friend, she thought I had given the matter up, and accordingly put it into another channel. Since then I have been waiting for an answer from her, which I have now got, stating that she has let another party have the money. Therefore I will take the lease for twenty-one years, with a clause to purchase at the terms given; the period to extend as long as you can."

The plaintiff also alleged that it was verbally agreed at the same time that, in consideration of the grant of the lease, the plaintiff should make certain alterations in the house No. 60 Western Road; but the particulars of such alterations were not shown by the evidence.

On the receipt of this letter Bruton called upon his solicitor, Mr. George Faithfull (who had since died), and showed him the letter, and at the same time gave him instructions to prepare the draft of a lease. Mr. Faithfull wrote on the back of the plaintiff's letter the following memorandum, which was produced, and proved to be in Mr. Faithfull's handwriting: —

"Nunn is a confectioner. Nos. 59 and 60 Western Road, and No. 1 Castle Street. Rent £130, payable quarterly. Term 21 years, from 24th of June. Purchase in 10 years. Price £2500. No. 59, and the back portion of No. 1 Castle Street, is occupied by

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Mr. Wymark at a rent of £50, payable quarterly, as yearly tenant. The rest is in Nunn's occupation. In case of fire the landlord to rebuild."

Then followed a memorandum of Bruton's title to the freehold.

Mr. Faithfull accordingly prepared the draft of a lease on the terms mentioned in the memorandum, and on the 24th of June the plaintiff accompanied Bruton to Mr. Faithfull's office, when the draft lease, which was in the handwriting of Mr. Faithfull's clerk, was read to him, and, after some alterations were made in it, the principal of which was the extension of the period allowed for purchasing the freehold from ten to fourteen years, it was [* 37] * approved by all parties, and Mr. Faithfull was directed to have the lease engrossed for execution.

In the meantime the plaintiff laid out a considerable sum of money, amounting to more than £100, in putting a new shop front and making other alterations in No. 60 Western Road; and he stated that Bruton occasionally inspected the work, and approved it, while it was in progress.

On the 14th of January, 1863, the plaintiff paid Bruton £20 as the balance of the quarter's rent due at Michaelmas, 1862. Wymark had previously paid Bruton £12 10*s.* for the quarter's rent on his holding, which, with the £20 paid by the plaintiff, made up £32 10*s.*, being the amount of a quarter's rent of the whole premises at the rate of £130 a year according to the terms of the proposed lease. The receipt given by Bruton was in the following terms: —

"Received the 14th day of January, 1863, of Mr. J. Nunn, the sum of £20 for balance of rent due 29th of September last, for 60 Western Road, Brighton. E. Bruton."

The lease was engrossed, and several appointments were made to execute it, which failed in consequence of Bruton's engagements; and on the 16th of January Bruton made an appointment with the plaintiff to meet him at Mr. Faithfull's on the following day; but on the afternoon of the same day Bruton died suddenly.

By his will he gave the residue of his real and personal estate (including the houses in question) to the defendants upon trust to sell, and appointed them his executors. They proved the will on the 12th of March, 1863.

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The defendants refused to execute a lease to the plaintiff. In October, 1863, they advertised the property for sale, but withdrew it on the receipt of a notice from the plaintiff.

In December, 1863, they again advertised the houses for sale without regarding the claim of the plaintiff, and he accordingly filed the present bill on the 23rd of January, 1864, praying for specific performance of the agreement for a lease and an injunction to restrain the sale.

The defendants by their answers relied upon the Statute of *Frauds; and they also insisted that the plaintiff had [*38] been guilty of laches in enforcing his rights. The plaintiff contended that the agreement had been partly performed, relying on the alterations which he had made in the house, and the payment of rent on the footing of the new agreement. The MASTER OF THE ROLLS dismissed the bill, thinking that there was considerable difficulty with respect to the terms of the parol agreement, having regard to the circumstance that the lease, as engrossed, was silent as to the alterations in the house. From this decision the plaintiff appealed.

Mr. Baggallay, Q. C., and Mr. H. F. Bristowe, for the plaintiff: —

On the question of part performance we rely on *Lincoln* v. *Wright*, 4 De G. & J. 16; *Wills* v. *Stradling*, 3 Ves. 378 (4 R. R. 26). The landlord had stood by and seen his tenant lay out money on the faith of the agreement, and even if this did not amount to part performance it was ground for relief in equity. *Mundy* v. *Jolliffe*, 5 My. & Cr. 167.

With respect to the charge of laches, there was no case in which such a defence had been supported, unless the plaintiff had delayed for more than a year. Here the defendants did not prove the will till March, 1863, and afterwards they gave way to the plaintiff's claim, by withdrawing the property when advertised for sale. The plaintiff, being in possession, had not the same reason to take active measures as if he had been out of possession.

Mr. Selwyn, Q. C., and Mr. Speed, for the defendants: —

The acts relied on did not necessarily bear reference to the agreement. The payment of rent was ambiguous. It might have been in consequence of the increased value of No. 60. The alterations in the shop front had no connection with the agreement. The lease, as drawn, was silent respecting them. No doubt there was a verbal promise on the part of Bruton to grant a lease, but he

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could have revoked it at any time before his death. *Jackson* v. *Oglander*, 13 W. R. 936. On the question of laches, they referred to *Southcomb* v. *The Bishop of Exeter*, 6 Hare, 213.

Mr. Baggallay, in reply.

[*39] *Nov. 9. Lord CRANWORTH, L. C.: —

This is a bill for the specific performance of an agreement for a lease for twenty-one years. The agreement was by parol, but the plaintiff seeks to avoid the Statute of Frauds by an allegation of part performance. Now, I should yield to no Judge of a Court of equity in my desire to refrain from extending the cases in which the Court gets over the Statute of Frauds; but there being an established rule on this subject, a Judge ought not to depart from it. The Court is bound to consider, first, whether there was a parol agreement; and secondly, if so, whether there has been part performance of it; and then, if there has been part performance, it is the duty of the Court to act upon the established principle, and to decree performance of the contract.

[His Lordship then shortly stated the facts of the case as given above and continued:] The question, therefore, is, whether there was an agreement for a lease, the terms of which were settled by parol before the death of Bruton; and if so, whether there has been part performance of such agreement.

The plaintiff's case is, that the agreement was made in the previous spring, although the lease was not settled till December. This is sworn to by the plaintiff; but I agree with the MASTER OF THE ROLLS that in such a case the facts must be watched carefully to see what confirmation there is of the plaintiff's assertion. And in looking through the evidence with this view the Court is particularly careful to see if there are any documents which confirm it. Now, I think that in this case there are two very important documents: the first is the letter from the plaintiff to Bruton, of the 27th May, 1862, in which the plaintiff replies to a previous offer by Bruton, and says that he agrees to take a lease for twenty-one years, with an option of purchasing the freehold. At that time all that had been agreed upon was that there should be a lease for twenty-one years and an option of purchasing the freehold at a period not yet determined. This letter was submitted by Bruton to his solicitor, Mr. Faithfull, and that gentleman wrote on the back of it the following memorandum. [His Lordship then read the memorandum as set forth above.]

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* We have, therefore, the statement by the plaintiff of a [*40] parol agreement, confirmed by showing that he replied in writing to his landlord's offer, and that his letter was referred to the landlord's solicitor, who wrote such notes upon it as a solicitor would naturally do if an agreement had been really entered into.

In conformity with this we find the draft of a lease in the handwriting of a clerk of Mr. Faithfull, with a stipulation in it that the tenant was to have the option of purchasing within ten years, which agrees with Mr. Faithfull's indorsement. The plaintiff says, in his affidavit, that a meeting took place to settle the draft lease on the 24th June; that some alterations were made in the handwriting of Mr. Faithfull, and that the alterations were principally verbal, except that the period of ten years was extended to fourteen years. This being so, nothing remained but that the lease should be engrossed and executed. The plaintiff says that Bruton told him that he expected him to make some alterations in the house, — what they were to be does not appear; but, in fact, he laid out more than £100 in altering the shop front, which he says was done under the eye, and with the sanction, of his landlord; and he relies on this expenditure as part performance of the contract.

Now, I do not think we can exactly call this part performance. The parol agreement was embodied in the lease, which is silent about the alterations. But although it was not part performance, it is important as showing that there was an agreement for a lease. No yearly tenant would have spent that amount of money in improving the front of his house without some such agreement as is here alleged. It is certainly evidence that there was some agreement; I am not sure that even beyond this the fact of a landlord standing by and seeing his tenant laying out money on the faith of a promise of a lease, might not raise an equity, though not in a strict sense part performance, by analogy to the equity which arises in the case of a person standing by and seeing his neighbour spending money on his land. *Gregory* v. *Mighell*, 18 Ves. 328 (11 R. R. 207).

But here I am not driven to rely on this evidence, because I think that there was clear part performance by payment of the Michaelmas rent at the increased rate fixed by the agreement. The facts were these: According to the agreement a quarter's rent would be * £32 10*s*. Wymark held one of the [*41] houses at an annual rent of £50; if the lease had been

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granted he would have had to pay £12 10*s.* to the plaintiff, and the plaintiff would have had to pay £32 10*s.* to Bruton. But Wymark paid his quarter's rent, £12 10*s.*, to Bruton, leaving £20 to be paid by the plaintiff, and the plaintiff did, in fact, pay £20.

It was, indeed, suggested that the £20 may have been paid by the plaintiff, by reason of the increased value of his own house; but this is inconsistent with the form of the receipt, in which the payment is expressed to be the "balance" of the quarter's rent. Now, the rent had been all paid up to the 24th of June, 1863, and, therefore, there was nothing to which the word "balance" could apply except the payment by Wymark of his share of the rent; I think, therefore, that this payment is strongly corroborative of the agreement as alleged. It is true that Wymark paid the rent to Bruton and not to the plaintiff. But that was a mere difference of form; substantially, the payment carried into effect the rights of the parties according to the terms of the lease.

I therefore differ from the MASTER OF THE ROLLS in his view of this case; I think there is a parol agreement clearly proved, and part performance to take it out of the Statute of Frauds.

It is, however, urged that the plaintiff has been guilty of what amounts to laches, because Bruton died in January, 1863, and the bill was not filed till January, 1864. But the question of laches must depend on the special circumstances of each case, and I think that here the delay has been very venial. The plaintiff was in possession and paid his rent, and the devisees, although they refused specifically to perform the agreement, did nothing to disturb his possession until the attempted sale in October, 1863.

On the whole, therefore, I think that the plaintiff is entitled to a decree for specific performance; but I shall give no costs either in the Court below or of the appeal, on account of the plaintiff not having taken proceedings sooner.

Ramsden v. Dyson.

L. R. 1 H. L. 129–174 (s. c. 12 Jur. (N. S.) 506; 14 W. R. 926).

[129] *Parol Agreement. — Tenancy. — Right to Lease. — Equity. — Agents.*

If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of equity will not afterwards allow the real owner to assert his title to the land.

No. 14.— Ramsden v. Dyson, L. R. 1 H. L. 129, 130.

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But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it.

So, if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined.

If the tenant, being a mere tenant at will, builds on the land in the belief that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, knowing that he is acting in that belief, and does not interfere to correct the error, *semble*, that equity will interfere to compel a grant of the lease.

If a principal knows that a stranger is dealing with his agent under the belief that all statements made by the agent were warranted by the principal, and, so knowing, allows the stranger to expend money in that belief, *semble*, that a Court of equity would not afterwards allow the principal to set up want of authority in the agent. But this knowledge must be brought home to the principal.

T. took a piece of land belonging to R., from R.'s agent, by parol agreement; it was known to all parties that the land was to be built upon. A ground rent was fixed at £4. T. laid out £1800 in building. T. afterwards made a written application to R.'s agent for another piece of land, also for the purpose of building on it. In this application T. declared himself willing to take the land as "tenant at will." The land was allotted to him, and the rent fixed at £1 0*s.* 7*d.* When buildings were erected on the land, the persons who had so taken the land were entered in R.'s rental books as tenants. It was admitted on all sides that where such takings were made the tenants would never be disturbed while the ground rent fixed as above described was paid. When the tenant desired to transfer the land to another person, notice was given to the agent, and the entry of the name of the tenant in the books of rental kept by the agent was altered. In many cases the form of proceeding was, that the land was surrendered to the landlord, and the new tenant was *accepted, [*130] much after the form of a transfer of copyhold. The tenancies were very numerous. T. alleged that there was believed to exist, and that R.'s agents had, by their words and conduct, encouraged such belief, a "tenant-right tenure" on the estate, that a person who had so taken and built upon R.'s land was entitled at his pleasure to become a leaseholder, and to demand the grant of a lease for sixty years, renewable every twenty years on payment of a fine equal to double the annual ground rent. Such leases had, in fact, been granted, but there was no direct evidence of their being granted on any such claim of right; there was, however, evidence that a railway company, being desirous of obtaining some of these pieces of land held under parol agreement on the payment of a ground rent, had refused to purchase them unless such leases were granted, and that in fact such leases were granted, and then the tenants received compensation for their buildings.

Held (*diss.* Lord KINGSDOWN), reversing the decision of the Court below, that these circumstances did not show the existence of anything greater than a tenancy from year to year, and did not establish any title to compel the grant of

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a lease, and, consequently, that the landlord having brought ejectment against T., equity could neither interfere to compel the grant of a sixty years' lease, nor to stay the ejectment.

The questions raised in the appeal and the nature of the evidence sufficiently appear from the opinions of the learned Lords, which were pronounced as follows:—

[135] The LORD CHANCELLOR (Lord CRANWORTH):—

My Lords, this was an appeal from a decree of Vice-Chancellor STUART, bearing date the 2nd of March, 1864, whereby it was declared that the plaintiff, Joseph Thornton, was entitled [*136] to have a * lease or leases granted to him of two properties at Paddock, in the pleadings in the cause mentioned, at a ground rent or ground rents double the amount of the rent then payable for the same respectively, renewable at the times and on the terms therein mentioned; and it was ordered that the appellant, Sir John William Ramsden, should grant to the said plaintiff such lease or leases accordingly. The bill, which was filed by Joseph Thornton, and by the respondent, Dyson, claiming as an incumbrancer under him, stated the circumstances in which Thornton had become possessed of the land in question, and which they contended entitled them, on general principles of equity, to claim from the appellant a lease or leases, the particular terms of which I will not at present refer to. The plaintiffs did not allege that there was any contract, written or verbal, for granting any such lease, nor was relief asked or given on the ground of specific performance of a contract. But His Honour thought that though there was no contract, and so that no case was made for specific performance, yet on general principles of equity the plaintiffs were entitled to the relief which they asked, and he made a decree accordingly.

The property in question consists of a house and outbuildings, forming part of the town of Huddersfield, or its suburbs. The late Sir John Ramsden, the grandfather of the appellant, was, in and prior to the year 1780, seised in fee simple of a large tract of land which has since that time been built upon, and which now forms a large part of the town of Huddersfield.

John Charles Ramsden, the eldest son of Sir John, died in his father's lifetime, leaving the appellant, Sir John William Ramsden, his only son and heir-at-law; and Sir John himself died in 1839,

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leaving the said appellant, his grandson, then only eight years of age.

Sir John, by his will dated in 1838, and made after the death of his son, devised all his estates, except certain estates which had been settled on the marriage of his said son (the excepted estates did not include any part of the property in question in this cause), to the use (subject to several charges and trust terms) of his grandson, the appellant, for life, with remainder to his first and other sons in tail male. There were leasing powers in the will, to which I need not at present advert. Sir John resided at Byrom, about *thirty miles from Huddersfield, [*137] which latter place he rarely visited. He confided the management of that property to his steward or agent, Mr. John Bower, who resided at or near Byrom, but who was accustomed to visit Huddersfield twice a year at audits, for the purpose of receiving the rents and looking over the property.

The mode in which this Huddersfield property was managed was peculiar. A book or roll was kept of the tenants; and, as the town became extended, any person desiring to take land for the purpose of building a house, used to apply to the agents of Sir John for the land he wanted. This was then marked out for him; he erected his buildings; the ground rent was fixed, and his name was afterwards entered on the roll as a tenant, and he paid his rent at the usual day or days of audit. If he wished to sell his house, he and the purchaser used to attend on the agent, and surrender, or purport to surrender, his property into the hands of Sir John, and the name of the purchaser was substituted for that of the original tenant. The same course was followed on a mortgage, only that in that case both names, that of the mortgagor and the mortgagee, were entered as tenants on the tenant roll. In the event of death, the name of the legatee or next of kin was substituted for that of the deceased. Persons thus holding land were popularly described as holding by tenant right.

But besides these tenants by tenant right, there were other tenants who obtained regular leases; and the universal, or nearly universal, form of lease was a lease for sixty years, renewable for ever at the end of every twenty or forty years on payment of a stipulated fine. These tenants holding by lease were entered on the same tenant roll as the tenants by tenant right; but a memorandum was made against their names, signifying that they held

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by lease, and the rent at which they held was always at a considerably higher rate than that at which the other tenants held.

The plaintiff, Thornton, took the two pieces of land, the subject of this suit, on the tenant-right tenure, the one in the year 1837, in the lifetime of Sir John, the other in the year 1845, after his death. The circumstances connected with his taking the land in 1837 are thus stated by him in the bill: He says that in the year 1837, being desirous of erecting a dwelling-house on a piece of high ground at Paddock, part of the Huddersfield property, devised * by the will of Sir John, he applied to Mr. Joseph Brook (whom he describes as one of the duly authorised agents of Sir John, with respect to the management and letting of the Ramsden estates and as transacting all the business relating thereto in the absence of Mr. Bower), and stated to him his desire to become tenant of the piece of ground in question, as he wished to erect a dwelling-house thereon for himself. Brook, he says, informed Bower of what had thus passed, and Bower having afterwards come over to Huddersfield to an audit, went with Thornton to Paddock, accompanied by Thomas Brook (a son of Joseph Brook), who was then about nineteen years of age, and who acted for his father. The bill then states that Thornton pointed out to Bower the land he wished to have for his house, and that Bower assented to the application, saying that he would leave to Joseph Brook the staking out of the exact quantity of land to be taken. The precise quantity of land was afterwards agreed on between Thornton and Joseph Brook, and the ground rent was fixed by Brook at an annual sum of £4. Thornton then built his house, and has ever since paid the reserved rent of £4 per annum.

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The bill then alleges, that while the building of the house was in progress, and when it was nearly completed, Joseph Brook, accompanied by Thornton and his father, came on to the land, and on that occasion Thornton consulted Joseph Brook as to the prudence of his taking a lease of the land and buildings; when Joseph Brook stated it would be folly in him to take a lease, that he was equally safe without one, and that he could get a lease whenever he wanted it; the lease referred to being, as Thornton alleges, a lease for sixty years, renewable every twenty years on payment of two years' ground rent as a fine; no other lease then existing or being then known on the Ramsden estates, at Huddersfield.

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No paper or document was signed by Thornton, and he alleges that he took the land relying on what had been said by Joseph Brook, and on the belief, universally entertained at Huddersfield, and encouraged by Sir John and his agents, that he could have a lease of it for sixty years, renewable every twenty years, whenever he might think fit, and that he would never be disturbed so long as he paid his £4 ground rent, and in the knowledge that very many other persons who had taken plots of lands and built on them, on the * same belief and assurance, had, [*139] on application, had leases granted to them for sixty years, renewable every twenty years.

The book or roll of the tenants of the Huddersfield property was kept at Longley Hall, an old mansion-house situate on part of the property, and the bill alleges that after Thornton had taken the piece of land in question he was entered in that book as the tenant thereof, at a yearly ground rent of £4.

Mr. Bower died in the month of May, 1844, and on his death the trustees of the will of Sir John appointed Mr. George Loch, now one of Her Majesty's counsel, to succeed him as auditor and manager of the estates, and as he resided at a distance, he appointed Mr. Alexander Hathorn to be the resident agent, subject to his control and superintendence. Alexander Hathorn resided at Longley Hall.

In this state of things the bill alleges that Thornton, finding himself, in the year 1845, inconvenienced for want of outdoor offices, applied to Hathorn for a second piece of ground, and that the same was accordingly measured out for him by two persons acting under the said Thomas Brook, who had survived his father, Joseph Brook, and was then one of the authorised surveyors of the Ramsden estates; that he, Thornton, then erected thereon, under the superintendence of Hathorn, the additional buildings which he wanted, and that, after he had done so, he received from Hathorn a letter, partly printed and partly written, fixing the ground rent for this additional land at £1 0*s.* 6*d.* per annum, which additional rent has been ever since regularly paid. The bill alleges that the money expended in building on the two pieces of land amounted at least to £1850.

On occasion of the first hiring, in 1837, no paper was signed by Thornton, but on applying at Longley Hall for the second piece of land a paper, containing a form of application, was put before him

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for his signature, as follows: "Huddersfield, 16th June, 1845. Gentlemen, — I beg to make application to you for a plot of ground situate at Paddock, Huddersfield, on which I am desirous of building a mistal and other outbuildings, and which I am willing to hold under you as tenant at will, at such rent as you may think proper to fix. — I am, gentlemen, your most obedient servant. —

To the trustees and guardians of Sir John William
[*140] Ramsden, Baronet." *This he signed, but, as he says, without considering its purport or effect, without being furnished with a copy, and without having had it explained to him; he signed it in the belief that it was a mere matter of course, and in the firm persuasion that he was to hold this second piece of land on precisely the same terms as to not being disturbed in the possession, and as to a sixty years' lease, as those on which he held the other land.

These are the circumstances in which Thornton alleges that he became a tenant, first of Sir John Ramsden, and afterwards of his devisees. And there can be no doubt that he thereby became at law a mere tenant from year to year. As to the first piece of land, on which he erected the principal buildings, he took it from Bower, as agent of Sir John Ramsden, at an agreed annual rent of £4, but without any stipulation as to the term during which he was to hold it; as to the second, he took it on a written application that it might be demised to him as tenant at will. He paid for several years the rent of both those pieces of land, and so had at least a tenancy from year to year.

Notices to determine these tenancies were given by the appellant, Sir John W. Ramsden, and ejectments were brought to recover possession. There being no legal defence to those actions, the present bill was filed by Thornton and by Dyson, who claimed as mortgagee under him, on the ground that Thornton, though at law a mere tenant at will, had an equitable right to a lease for sixty years, with a covenant for perpetual renewal on payment of certain periodical fines. Whether he has established this right is the question raised in the cause. The VICE-CHANCELLOR was of opinion that he has, and so decreed accordingly.

It will be convenient to consider the case first as to the land taken in 1837, in the lifetime of Sir John. The decree proceeds on the ground that it would have been a fraud in Sir John to refuse to grant the lease demanded; and so that his grandson, the

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appellant, deriving title only as a volunteer through his will, is bound to do what it would have been a fraud in his grandfather to refuse to do. It may be well to consider shortly what the principles of equity on this subject are.

If a stranger begins to build on my land supposing it to be his own, and I perceiving his mistake, abstain from setting him right *and leave him to persevere in his error, a [*141] Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

But it will be observed that to raise such an equity two things are required: first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights.

It follows as a corollary from these rules, or, perhaps, it would be more accurate to say it forms part of them, that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end. The appellant contends that it is within this principle that Thornton is brought. He acquired, it is said, possession of the land in question as a mere tenant at will, or from year to year, to Sir John, and if on that infirm title he thought fit to expend a large sum in building, there is no principle of equity which prevents Sir John, or his devisees, from asserting their legal rights by determining the tenancy, and so obtaining the benefit of his expenditure.

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The present bill was filed, not controverting this general principle, but contending that there were special circumstances raising an equity in favour of the tenant, arising out of a long uniform course of dealing adopted on the Huddersfield estate, whereby persons taking land, though only as legal tenants at will, or [*142] from *year to year, were led by Sir John to suppose, and did suppose, that they acquired a right, when they had built on the land, to hold it for an indefinite time without disturbance, and to become, at any time they might think fit, lessees for sixty years, with a right to perpetual renewal at the expiration of every twenty or forty years on certain well-understood terms.

His Honour the VICE-CHANCELLOR thought that such a state of facts was established, that Thornton, when he laid out his money in building his house, did so in the belief, created or encouraged by Sir John, that he was at any time entitled to call for such a lease as he claimed, and that Sir John knew that he believed this to be his right, but nevertheless allowed him to proceed. His Honour, I presume, considered this to be in principle the same thing as when the owner of land sees another building on it in the mistaken belief that it is his own. If in that case equity would not allow the owner to lie by and profit by expenditure made by another in the erroneous supposition that the land on which it was made was his own, so neither would it be just to allow a landlord knowing that his tenant was building on the notion, however mistaken, that he had rights beyond those of a mere tenant from year to year, to profit by expenditure made in consequence of that mistake. There is great force in this reasoning; and if I had come to the conclusion that Thornton, when he erected his building in 1837, did so in the belief that he had against Sir John an absolute right to the lease he claims, and that Sir John knew that he was proceeding on that mistaken notion, and did not interfere to set him right, I should have been much disposed to say that he was entitled to the relief he sought. But a full consideration of the evidence has not led me to any such conclusion. It has failed to satisfy me, first, that Thornton supposed that he had against Sir John any absolute right beyond that of a tenant from year to year; or, secondly, that Sir John knew or believed that Thornton was expending his money in the mistaken belief that he possessed such a right.

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The case made by the bill is, that Sir John Ramsden, by his agents, and since his death, his trustees, in order to induce persons to build on what is called the tenant-right tenure, informed applicants for building plots that they would be equally safe, and that the rents would be less in amount without a lease than with it; *and, further, that they could have a lease [*143] whenever they required it; and that, by means of this course of dealing, entire confidence was created in the tenant-right system, as conferring a good title to hold the lands so taken for ever, provided only they paid their rent; and, lastly, that they acquired a right to call for a sixty years' renewable lease, whenever it might be desired.

The appellant, Sir J. W. Ramsden, by his answer, admits the existence of a large class of tenants holding by what is called the tenant-right tenure; but he denies that it was an incident of that tenure that persons holding under it were more than tenants from year to year, or were entitled to call for a lease. On the contrary, he says that such tenants never had any title, except as tenants at will, or tenants from year to year, and that in consequence of their holding by this precarious tenure they had their land at a rent very much less than another class of tenants who took land on sixty years' leases, renewable for ever at the end of twenty or forty years, on certain terms stipulated in each particular case.

The parties in the cause being thus at issue, the question is, What is the fair result of the evidence? Does it establish that which the plaintiffs were bound to establish? Does it show that when Thornton erected his buildings in 1837 (with which case alone we are now dealing), he did so in the belief that, though he was only at law a tenant at will, yet he had a right to hold his land to him and his personal representatives for ever, so long as he duly paid his rent; and, further, that he had a right to call for a sixty years' lease, renewable for ever, whenever he should be minded so to do? and does it also show that Sir John knew that he was laying out his money in that belief?

In support of their case the plaintiffs offered, in the first place, the evidence of about 250 persons holding land in Huddersfield by the tenant-right tenure, and they say that the bill correctly represents the tenant-right tenure as established at Huddersfield by Sir John and his representatives, on the faith of which they acquired and hold their properties, and that they never heard it questioned

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before the proceedings now set on foot by the appellant which have given rise to the present suit.

None of these witnesses states when it was that he became tenant under what he calls the tenant-right tenure. It would [*144] *have been material that they should have done so; for, as the only question on which this evidence bears on this part of the case is that relating to what was the belief of Thornton when he built his house in 1837, it would have been important for him to show that the general belief to which the witnesses refer existed at that time. It is consistent with the evidence of these witnesses, that they all acquired their interests after the death of Sir John, and that no such general reputation or belief as that to which they refer existed in his lifetime. I am the more led to advert to this distinction because I observe that they speak of the tenant-right tenure as having been established by Sir John and his representatives; and the question relating to what was done in the time of his representatives, will, I think, be found to be open to some observations not applicable to what was done in his lifetime.

It must further be observed, that these numerous deponents were all, or almost all, in stations of life, so far as we can collect from their descriptions, making it improbable that they would be able well to scan and consider the precise nature of the reputation to which they depose. About thirty of them appear to have been unable to sign their names, and it is no harsh estimate of the weight due to their testimony to say that they were very likely to have been led by an involuntary bias to give a colour to the general belief and reputation in question, to which a little closer examination, by persons in a different sphere of life, might have shown it was not entitled. With these few remarks I shall leave this part of the evidence, to which, it is but fair to say, no great weight was attributed at the bar.

What was mainly relied upon was the evidence offered in support of the allegation that Sir John and his agents by their words, acts, and deeds, and by every means in their power, encouraged persons to erect buildings on the tenant-right tenure, and stated that there was no occasion for leases, that such persons would be as safe without as with leases, and that they might have leases whenever they might require them, and that they should never be disturbed in their possession.

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In support of these allegations evidence was given of statements made by Joseph Brook, whom I will assume to have been the principal local agent of Sir John, living at Huddersfield, and *acting there for him under Mr. Bower. William [*145] Brook, the surviving brother, and John Brook, a son of Joseph Brook, were both examined as witnesses, and they both say that Joseph Brook was in the constant habit of assuring all persons who, on applying for land, consulted him as to the expediency of taking a lease, that they would be as safe without a lease as with one; that so long as they paid their rent they would never be disturbed, and that they might have a lease whenever they thought fit to apply for it.

The language, then, attributed to Joseph Brook relates to two propositions: first, that persons taking land without a lease would never be disturbed so long as they paid their rent; secondly, that persons taking land without a lease might have a lease whenever they chose to call for it. As to so much of this evidence as relates to the first proposition, I give full credit to the accuracy of the witnesses, but I cannot say the same as to the second. I think, for reasons to which I will presently advert, their recollection on that point cannot safely be trusted.

Assuming, however, that he did make the statements attributed to him by these witnesses, it becomes important to consider what is the fair import of the language used by him, supposing it to be correctly given by the witnesses who speak to having heard it. And first, as to the statement that there would be no advantage in a lease; for that so long as the rent was paid the parties taking the land would never be disturbed. The respondents say it amounted to a statement that persons taking land at a yearly rent, and building on it, would have a right to hold that land to them and their personal representatives for ever, provided the rent was paid. The appellants say, it must be interpreted as meaning only that, though the right conferred was that of a mere tenant at will, or tenant from year to year, yet so long as the ground rent was duly paid there was no intention to disturb the tenants in their possession, and that they might thus safely allow the matter to rest in the honour of the Ramsden family.

If this latter be the true construction, it is clear that even if such statements as are attributed to Joseph Brook had been made by Sir John himself, the persons taking the land would have

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acquired no right, legal or equitable, beyond that of a mere tenant from year to year. If any one makes an assurance to [*146] another, *with or without consideration, that he will do or will abstain from doing a particular act, but he refuses to bind himself, and says that for the performance of what he has promised the person to whom the promise has been made must rely on the honour of the person who has made it, this excludes the jurisdiction of Courts of equity no less than of Courts of law. The important question, therefore, is, which of these two constructions is the correct one? I have no hesitation in saying that, in my opinion, that of the appellant is the true construction.

In the first place, even taking the language to be exactly that attributed to Joseph Brook by his brother and his son, it is hardly that which he would have used if he had meant to represent to those who consulted him, that after they had taken land at a rent, and so become tenants, there would be no power in their landlord to disturb them so long as they paid their rent. What he is represented to have said to them is, that so long as they paid their ground rents, neither they nor their children after them would be molested; not that they could not, but that they would not be molested. The same observation may be made as to the evidence of the witnesses who speak to their conversations with Joseph Brook when they took their land for building. What they represent him to have said, when they asked him as to the expediency of taking a lease, is, that so long as they paid their ground rent they would never be disturbed; not that they could never be disturbed; and to one of them, Joe Moore, he added, "nor will your present rent ever be raised."

This distinction appears to me to be not unimportant, when the question is, whether it was intended to represent to the persons taking the land that they had a right to retain it for ever, or only that there was no intention on the part of the landlord to disturb them, and that they might rely on the honour of the family that no such step as evicting them from their holdings ever would be taken so long as they paid their rent. The language is at least as consistent with the latter view of the case as with the former, and must, I think, be interpreted in connection with the evidence of Thornton's solicitor, Frederick Robert Jones, who says, that for many years prior to 1858 the investment of money on the tenant-right tenure was made without hesitation because of the con-

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fidence * which the people reposed in the honour of the [* 147] Ramsden family; and many other witnesses speak to the same effect.

Thus interpreted, the language attributed to Joseph Brook would not, either at law or in equity, enlarge the interest which every tenant took as tenant at will beyond his becoming afterwards tenant from year to year.

But the more important question yet remains to be considered, namely, whether there is evidence to show that Sir John Ramsden knew, or even suspected, that representations were made which might fairly be supposed to lead his tenants at will or from year to year to expend money in building, in the belief that by building they acquired a title which he could never disturb. On this point the evidence of the respondents wholly fails.

There are only two occasions on which Sir John is alleged to have been present when anything passed countenancing the notion that the tenants by what is called tenant right had any rights beyond that of tenants from year to year. The first is that spoken to by William Brook, the surviving brother of Joseph. He tells us that in the year 1800, when Sir John and Mr. Bower were at Huddersfield, they, together with his brother Joseph and himself, were met in the road by a man named Mortimer, who had then recently erected a row of valuable buildings on his own freehold land. Mortimer, the witness says, pointed out to Sir John some old tenant-right buildings which were an eye-sore to the row of houses he had so erected, and asked Sir John to have them removed. Sir John listened to him, and then, after taking Mr. Bower, Joseph Brook, and the witness aside, and after making inquiries of them as to the name of the owner, and how long the old buildings had been erected, and after making other inquiries, turned round to Mortimer and said, "These are tenant-right buildings; those who hold them shall never be disturbed so long as they pay their rent," or to that effect.

This is part of the evidence of the respondents, and must have been offered by them for the purpose of showing that, when in 1837 Thornton built his house, Sir John must have known that he did so in the belief that he would thereby acquire an absolute right for ever against his landlord. I cannot think that the evidence leads to any such inference. Though Mortimer was not, so far at least * as appears, himself possessed of [* 148]

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any tenant-right property, yet he was the owner of property in Huddersfield, and could hardly have been ignorant of a right which, according to the case made by the bill, had prevailed and been acted on for a very long period by more than half the inhabitants of the town. And yet the application he made to Sir John was wholly inconsistent with the hypothesis, that the owner of the old buildings, which he thought to be eye-sores, had an absolute right to them independent of his landlord. He evidently supposed that Sir John could compel their removal, if he would, otherwise his application was absurd. So again, the conduct and language of Sir John are precisely what might have been expected if he thought he had the power to do what was asked of him, and that whether he should or should not comply with the request was a matter depending on his own pleasure. It is inconsistent with the notion that he understood the interest of the tenant to be one with which he had no right to interfere.

The other case in which Sir John is said to have personally interfered is that spoken to by the witness William Brier. He says, that in the month of August, 1816, he went over to Sir John at Byrom, carrying with him a plan, approved by the steward, of some land he wished to take for building; that Sir John approved the plan, and that, in answer to a question whether he could have a lease, Sir John said that a lease was unnecessary, that he should never be disturbed by him, or any Ramsden, or something to that effect, which satisfied the witness. Whether, as between Sir John and the witness, this might amount to an express contract that he should never be disturbed, is not the point to be considered; and there was certainly no such express contract with Thornton in this as in the case of Mortimer to which I have just referred. The language is not such as could induce a belief that Sir John supposed his tenants to understand that by building they acquired, to them and their representatives for ever, independently of special contract, absolute rights against him, which, so long as they paid their rents, he could never defeat.

Even supposing both these conversations, and any number of conversations to the same effect, to have been known to Thornton, and to have been present to his mind when he built his [*149] house in *1837, they could not, in my opinion, have tended to encourage the belief on which he says he acted. The obvious meaning of Sir John, in both cases, was, not that he

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could not, but that he would not dispossess the persons holding the land. No such assurance was made to Thornton, and the very foundation of his case is, that it was unnecessary, for that the right to possession for ever was created without any special contract by the mere fact of building on land held on what was called tenant-right tenure.

I have thought it right to consider to what relief, if any, Thornton would be entitled with respect to the first branch of the alleged rights of the holders by tenant right, viz., the right to hold for ever so long as they paid their rent. But it is not on this branch of the alleged right that relief is given by the decree, though perhaps it is its necessary foundation. The relief given proceeds on the other branch of the privileges said to attach to the holders of land held on tenant right, namely, their right to call at pleasure for a sixty years' lease, renewable every twenty years; and what Thornton was bound to establish was, that he built, and that Sir John knew that he built, in the belief that he had such a right.

The first observation I will make here is, that though there is a great deal of evidence that such a right was generally believed to exist, and though William Brook and John Brook say generally that Joseph Brook used constantly to tell persons taking land for building that they could have leases whenever they desired, yet none of the witnesses who actually took land from Joseph Brook in the lifetime of Sir John says that he ever made any such statement to him. Several such witnesses were examined, and say that Joseph Brook told them that so long as they paid their rent they would never be disturbed; but none of them says that anything like a statement that they could have a lease was ever made. On the contrary, Matthew Riley says that when he asked if he could have a lease, Joseph Brook said, "No; we don't grant leases." I mention this because I think it extremely doubtful whether any such statement as those spoken to by William and John Brook as to the right to a lease ever were made. Without attributing to those witnesses the intention to say what they knew to be false, I must yet observe that as no such statements were * made to the only witnesses examined who actually [*150] took land from Joseph in the lifetime of Sir John, it is by no means improbable that, after a lapse of many years, William Brook and John Brook may have confounded in their minds what

they heard Joseph say with what, since the present dispute has arisen, has become the subject of general discourse.

But it is no part of the appellant's case to contend that leases would not in general be granted by Sir John to persons applying for land, provided only that they were willing to pay a much higher rent; and nothing is more probable than that what Joseph Brook said to persons applying for land had reference, not to leases to be granted at a future time, but to a lease to be made in the first instance when the tenancy commenced.

Assuming, however, that the facts are as deposed to by William and John Brook, and that Joseph was in the habit of telling people, when they took land, that they could have leases when they thought fit to call for them, the question is, How does that affect Sir John? Where any such statement was made to a person taking land, a question might arise between such persons and Sir John whether what so passed amounted to a contract by Joseph Brook binding on Sir John. No such question is raised, or could be raised, as to Thornton, for it is not alleged that any such statement was made when he took his land from Bower. As to Thornton, the statements said to have been made by Joseph Brook to persons taking land are only material so far as they tend to make it probable that they were known to him, and so had led him to believe, when he took his land from Bower, that he had thereby a right to call for a lease whenever he should think fit.

What was the belief of any one as to his rights on any particular subject, is a matter not admitting of direct evidence. The reasonable explanation of the conversation which Thornton had with Joseph Brook when his house was nearly completed, seems to me to be, that he was considering whether it was prudent to trust to what is called the honour of the Ramsden family, or whether he ought not to bind them by a lease; not that he supposed he could compel them to grant a lease as a matter of right.

But even supposing Thornton to have built in the firm belief that he was entitled to a lease, the important question [* 151] still remains: * Did Sir John know that he was building in that belief? On this point the onus of proof is on the respondent, and he has wholly failed to satisfy me. In the first place, what was the lease on the faith of a right to which it is argued that Sir John knew Thornton was building? Thornton says it was a lease for sixty years, renewable every twenty years

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on payment of two years' ground rent as a fine, and that no other lease was at that time known at Huddersfield. This is not the nature of the lease to which the decree has declared him entitled; nor is it consistent with the terms of the leases then usually granted on the Ramsden estates when leases were granted, the fine on renewal being generally one year's improved value, not two years' ground rent.

But a much more important observation has reference to the rent. What can be the meaning of a person having a right to call for a lease at a rent to be agreed upon between him and his lessor? Suppose they do not agree. It is endeavoured to meet this by saying that the rent could not exceed double the amount of that at which the person applying had been holding as tenant from year to year. But the evidence of the plaintiff fails to establish any such limit. It is differently given by different witnesses, but I think it is fair to take it from the witness Frederick Jones, who had the best opportunity of knowing the general opinion of the place, as he had formerly been one of the solicitors of Sir John, and at the time of his examination was the solicitor of Thornton. He says: "It was part of the said system, and I have known of many instances, that tenant-right holders, or holders at will, as they have been variously termed, might have, and have had, sixty years' leases, renewable every twenty years, for ever, upon such terms with regard to rent as they could bargain for with the agents of the estate; but it was generally understood that such rent would be double the tenant right, unless the agents either had agreed or would agree for a less rent."

Now, supposing all this to have been known to Sir John, I do not think it can be treated as amounting to knowledge on his part that his tenants at will were laying out their money in the belief that they had a right to call for a lease perpetually renewable whenever they might think fit. The mere circumstance that the amount of rent remained to be settled by agreement between the *lessor and the lessee excludes the notion of [*152] there being a right to compel the grant of a lease. The statement by Jones that it was generally understood that the rent would be double that which had been paid by the lessee as tenant from year to year, unless a lower rate was agreed upon, is far too vague to be the foundation of anything like a claim of right. He does not even say that it was generally understood that the land-

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lord could not insist on a higher rate, but only that he would not; the same distinction to which I have already adverted in dealing with the alleged right to hold for ever, so long as the ground rent was duly paid. If there was nothing else, this absolute uncertainty as to rent seems to make it impossible that Sir John could have supposed his tenants at will were building in the belief that they had any right to compel their landlord to grant them a lease.

But another important observation on this part of the case is, that the supposed right is one in which there is no reciprocity. It is not alleged, indeed it is denied, that there was any right in the landlord to compel his tenants from year to year to accept a lease; and yet it is supposed that the landlord was continually making demises from year to year, with the knowledge that those who thus became his tenants supposed they acquired rights against him without his acquiring any corresponding rights against them.

The only evidence which could have satisfied me that Sir John knew, or even suspected, that such a belief was entertained, would have been a uniform practice of granting such leases as are represented to have been the right of the tenant at will whenever they were called for; but on this point the evidence wholly fails. There is no evidence that even a single lease was granted in the lifetime of Sir John, to any person holding by tenant right, though he was in the enjoyment of the property for at least fifty-nine years. During that long period of time he granted 296 leases, of which 227 were granted before, and sixty-nine after the year 1816; of the 227, five were not renewable leases, but the remaining 222 contained a covenant by Sir John to renew at the end of every twenty years on payment of a stipulated fine, or if no renewal was then made, then at the end of forty years on payment of a larger fine.

The nature and amount of the fine varied. In seventeen of the 222, the fine was one year's improved value if the lease [*153] was *renewed at the end of twenty years, or ten years' value if renewed at the end of forty years. In 174 the fines were two years' rent if renewed at the end of twenty years, or ten years' rent if renewed at the end of forty years. In the remaining thirty-one the fines were fixed sums, not depending either on the rent or value of the land. The sixty-nine leases granted after 1816 were all renewable leases like the others. Thirty-one of them were renewals of former leases, and the re-

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maining thirty-eight were all made renewable on payment of one year's value at the end of twenty years; or ten years' value at the end of forty years.

It seems to me impossible, in the face of this evidence, to believe that Sir John knew that persons taking land on the tenant-right tenure, had built or were building their houses in the belief that they were entitled, whenever they thought fit, to call for a sixty years' lease renewable at the end of every twenty years, either according to what Thornton says was his belief, namely, on payment of two years' rent, or according to the relief given by the decree, on payment of one year's improved value. Sir John could not have understood that any such belief prevailed, knowing as he must, that though he had many hundred tenant-right tenants he had never granted a lease to any of them; and, further, that in the cases in which he had granted leases to persons taking land on lease instead of by tenant right, he had from time to time changed the terms of renewal according to his pleasure.

It does not seem to me to be important that, after the death of Sir John, leases were in many cases granted to tenants holding by tenant right. The circumstances under which they were granted do not lead to the inference that Sir John knew that buildings were erected in the belief that the persons building could claim a lease as of right, which is the point we are now considering. It is no part of the appellant's case, that land was not frequently taken for building on the faith that when the buildings were erected a lease would be granted. In all such cases leases were granted. The conversations spoken to by the plaintiffs' witnesses, invariably show that it was in general optional with those who took land to take it either with or without a lease. The substance of what Joseph Brook is reputed to have said is almost invariably that the applicant might have a lease, but that he would be throwing away his *money, that it would cause him [*154] expense, and materially increase his rent, and that he would be perfectly safe without a lease. Still it is certain that many persons preferred, even at a higher rent, the ordinary security of a lease, which, however, never was granted till the buildings had been completed, or nearly completed.

The mode of dealing with this property being such as I have stated, it was almost certain that at the death of Sir John there would be, as in fact there were, many persons who had taken land

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and were building on it in the faith that, according to the usual practice, they might, when the buildings were completed, have a lease in the form then ordinarily adopted. The will, however, was thought by counsel not to contain powers sufficiently ample to enable his devisees to grant leases in that form. To obviate all difficulties on this head an Act of Parliament was passed in the year 1844, giving to the tenant for life, and to the trustees of the will during his minority, leasing powers, which it was thought had not been effectively created by the will.

The Act, after reciting the will of Sir John and his death, proceeds to state that the system of managing the Huddersfield estates had been, that no person desirous of taking land on lease for building purposes obtained any written agreement for a lease, but was permitted, after a piece of land had been appropriated to him, to build upon it, upon the understanding that after he had built a lease would be granted to him, perpetually renewable according to the form set forth in the schedule; and that many persons, relying on this system, had, in the lifetime of Sir John, erected houses on the faith of leases being granted to them, but no such leases had been granted; and, further, that since the death of Sir John, difficulties had arisen concerning the renewal of leases in pursuance of his covenant for renewal. It is enacted that it should be lawful for the trustees of the will during the minority of the appellant, Sir J. W. Ramsden, and for him after he should attain his majority, to demise and lease to any person who in the lifetime of Sir John took land (being part of the estates devised by the will of Sir John), on the faith of a lease being granted to him, according to the system aforesaid, and who had erected buildings thereon, by a lease of the same, according to the form mentioned in the schedule. This form was that of a lease for sixty [* 155] years, renewable * at the end of every twenty years, on payment of one year's improved value; or at the end of forty years, on payment of ten years' improved value. The 2nd section of the Act authorised the granting of renewed leases which Sir John would have been bound by his covenants to grant, and the 3rd and subsequent sections enabled the trustees during the minority, and Sir John himself after obtaining his majority, to grant building leases of any of the devised lands, with covenants for perpetual renewal, on terms to be agreed upon.

No leases were granted after the death of Sir John until after

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the passing of this Act; but Mr. Hathorn, who, on the death of Mr. Bower, in 1844, had become the resident local agent of the appellant at Huddersfield, informs us, that after the passing of the Act, and during the minority of the appellant, thirty leases were granted to persons who were at the times of the grant holding by tenant-right tenure. He adds, however, that in the case of fourteen out of these thirty, the parties were entitled to a lease, as they had built on an agreement that they should have a lease when the buildings were completed. All the other sixteen were granted on rents which were materially raised, and not on any claim of right by the parties who obtained them.

What was done after the death of Sir John can only be material upon this part of the case, so far as it may throw light backwards on what was the practice in his lifetime; and it seems to me impossible to deduce from what was thus done, in and after the year 1845, under the powers of this Act, anything as to what Sir John supposed to be the opinion of those who took land from him without any agreement for a lease. As to many of them, it is clear that they were entitled against Sir John to claim a lease. As to the others, the lease was granted as a matter of favour or contract, not as a matter of right, and it has not, therefore, any tendency to support the views of the respondents. But there were some other leases granted to tenant-right holders besides the thirty thus referred to, namely, those granted to persons whose tenant-right lands were compulsorily taken by railway companies. The facts as to these persons were as follows: —

Some houses in Huddersfield, held by persons on the tenant-right tenure, were, in the years 1845 and 1846, necessary for enabling * the proprietors of the Huddersfield and Shef- [*156] field Railway to make their line. Notices for taking their houses were served on the occupants, but as they were, in the eye of the law, at best, mere tenants at will, a difficulty arose as to the mode in which, and the persons to whom, the purchase-money was to be paid. If the company was to treat them as mere tenants from year to year, the purchase-money, except so much of it as would represent the very small interest of such a tenant, would be payable to the devisees of Sir John. But it had always been the practice to recognise these tenants, though at law mere tenants from year to year, yet as holding under an engagement of honour, that so long as they paid their rents they would never be dis-

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turbed. This was felt by the trustees to give the tenants a title in honour to receive such compensation as they would have been entitled to if they had derived from Sir John a legal title, and not a title depending merely on the honour of the family. It would not, however, have been just to give to them a legal title enabling them to hold for ever at the rents at which they held as tenants from year to year; for in those cases in which a legal title was granted to persons when they took land for building, it had always been done by means of a lease perpetually renewable at a rent much greater than that at which it would have been granted to them if they had taken it as tenants from year to year. The course, therefore, followed by the trustees was to treat these tenants as persons who had built on the faith of having leases, and to fix the rent at the sum at which, if that had been the case, the leases would have been granted. Leases were accordingly granted on that principle, and so the landlords and the tenants became entitled to the purchase-money between them, according to the value of their respective interests.

Sixteen such leases were granted in the year 1846; and Hathorn, who was then the local agent at Huddersfield, states in his evidence that none of them was granted on the application of the tenant or as a matter of right; and further, that these leases were entirely exceptional, and all the arrangements connected with them were carried out by Mr. Fenton, since deceased, and Frederick R. Jones, then the solicitors of the trustees. Frederick R. Jones afterwards became the solicitor of the plaintiffs, and was examined after and in answer to Hathorn, but he does [*157] not contradict him; and, on the *contrary, states that the scheme of granting these leases originated with the trustees. I am aware that two of the lessees, Prass and Tattersfield, stated, when examined in chief, that their leases had been granted to them on a claim of right. No other witness confirms this statement, which is wholly inconsistent with what was afterwards sworn, not only by Hathorn, but also by Frederick R. Jones, the plaintiff's solicitor; and I find it impossible not to believe that the account given by Hathorn is strictly accurate.

Even assuming, therefore, that what was done after the death of Sir John could be relied on as tending to show either what was the belief under which persons taking land in his lifetime acted, or what Sir John supposed it to be, I do not think that these

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leases granted on occasion of the making of the railway throw any light on the subject.

For the same reasons, I attach no weight to the fact that on other occasions, when damage was done to houses held on tenant right, by working mines or otherwise, the compensation was, with the knowledge and approbation of Sir John and his agents, paid to the tenants. So, again, local taxes for drainage and other improvements were charged on and paid by the tenants. All this was the necessary consequence of their being treated by Sir John as persons whom he felt bound in honour to consider as tenants never to be disturbed, and do not, as it appears to me, tend to support the case of the plaintiffs.

So far, therefore, as relates to the piece of land held by Thornton, in the lifetime of Sir John, I do not think it necessary to say more, except only as to a part of the argument at the bar, by which I understood counsel to suggest that it was not necessary to prove actual knowledge in Sir John to show that he knew that Thornton built on the faith that he was entitled to a lease whenever he should think fit to call for it, but that if that was known to Joseph Brook, Sir John would be bound as if it had been known to himself. I think this is a mistake as to the principles of the law of agency. Even if Joseph Brook was, what he is not shown to have been, and what, on the evidence, I do not think he was, a local agent, authorised to create tenancies without referring to Bower, still that would not enable him to bind his principal as to matters *dehors* the contract. If he had made it part of the contract with any * person whom he had accepted as [* 158] tenant at will that he, the tenant, should be at liberty to call for a lease at his pleasure, then would arise the question, whether this part of the contract was within the scope of the agent's authority? But it is not suggested that any such contract was made with Thornton. His case is, that Mr. Bower, being a person authorised by Sir John to let his land to persons taking it as tenants at will, had let to him, as tenant at will, the land on which he built his house in 1837, and that he had taken it without requiring a lease, fully believing, from what Joseph Brook stated to him, and had stated, on numerous other occasions, to other persons, and what had thereby and otherwise become the common reputation of the place, that all persons so taking land were entitled to a lease whenever they should call for it.

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Supposing such statements to have been made, however constantly and openly, they would not be binding on Sir John unless he had authorised Joseph Brook to make them, or else knew that he made them, and that persons taking land acted on the faith of them. If, indeed, the principal knows that persons dealing with his agent have so dealt in consequence of their believing that all statements made by him had been warranted by the principal, and, knowing this, allows the persons so dealing to expend money in the belief that the agent had an authority which, in fact, he had not, it may be that in such a case a Court of equity would not allow the principal afterwards to set up want of authority in the agent. But this equity, whenever it exists, depends absolutely on the fact that the knowledge on which it rests can be brought home to the principal.

Here the contract was made by Mr. Bower, on the part of Sir John, and by him only. I do not think there is any principle, either of law or equity, which can enable the tenant to say that the rights under that contract against Sir John could be affected by statements made by a local agent without the knowledge of, or authority from, either Sir John himself, or Mr. Bower.

I have now gone through the whole of the case, so far as relates to the land taken for building in the lifetime of Sir John, and I have stated my reasons for thinking that Thornton had no title, legal or equitable, beyond that of a tenant from year to year; that his claim to continue to hold so long as he paid his rent, as well as his claim to have a lease, rested entirely on the pleasure of Sir John, and on what he and those who derive title through him may think proper to concede.

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It remains only that I should consider the claim so far as it relates to the tenancy created after the death of Sir John, as to which I need not detain your Lordships long. The observations I have made on the tenancy created in the lifetime of Sir John are all applicable to this second taking; besides which, there are other reasons which, as it appears to me, show that the plaintiffs were not entitled to the relief given by the decree, or to any relief at all.

The undisputed facts as to this part of the case are as follows: In the month of June, 1845, Thornton, being desirous of obtaining more ground for the purpose of adding some outbuildings to his house, applied for that purpose to Mr. Hathorn, who, on the

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death of Mr. Bower, in 1844, had been appointed a resident agent for managing the property under Mr. Loch, who had succeeded Mr. Bower. Previously to this time a very proper system had been introduced in the management of this property, under which every person applying for land to be held by him not on lease was required to make his application in writing, stating expressly that he applied for it to be holden by him as tenant at will; and printed forms for this purpose were kept at Longley Hall, where the business of the estate was managed. When Thornton applied to Hathorn for the additional land, one of these forms, properly filled up, was put into his hands for his signature, and he signed the same. I have already mentioned its exact form and contents.

Hathorn, having obtained the consent and approbation of Mr. Loch, sent to Thornton a letter of advice, as follows: —

"LONGLEY HALL, HUDDERSFIELD,
"24th July, 1845.

"SIR, — I beg to inform you that the plan of the ground on which you propose to erect a mistal, stable, &c., at Paddock, to be held at will, has been approved of and signed by Mr. Loch. The quantity of ground to be occupied by you will be 165 square yards, which, at the rate of 1*s.* ½*d.* per yard, will make the amount of the annual ground rent payable by you to the trustees of Sir John William *Ramsden, Baronet, £1 0*s.* 7*d.* [*160] The first half-year's rent will be payable at November rent-day, 1846. As soon as your building has been completed, I will thank you to come here, for the purpose of having your name regularly entered in the rental of this estate.

"Your obedient servant,
"ALEX. HATHORN."

The ground was properly staked out. Thornton erected his new buildings, and was entered on the rental at Longley Hall, and he afterwards duly paid his rent from time to time as it became due.

That he thereby became at law tenant to the trustees from year to year, and for no greater interest, is clear; but he insists on the same equity on his second as on his first tenancy, namely, that he was entitled to treat this tenancy at will as giving him, against Sir John and the trustees, an absolute right to call for a sixty years' lease, perpetually renewable. The decree of the VICE-

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CHANCELLOR proceeds on the ground that he was so entitled, but I am quite unable to understand the principle on which this relief was given. Even if, contrary to the opinion I have formed, the facts had warranted the conclusion that Sir John was bound to consider all persons entered as tenants at will, or from year to year, on his rent-roll, as being entitled to call for such a lease as Thornton required, still I cannot comprehend how any such equity can affect the appellant, Sir J. W. Ramsden, with respect to tenancies at will created by his guardians after the death of Sir John. Every precaution was taken to show to persons who took land after the death of Sir John that they were mere tenants at will. They were always required to sign an application for land to be held by them as tenants at will, and Hathorn says that the words "tenants at will" were printed in large conspicuous text characters, so that they could not be overlooked. Thornton, indeed, says that, though he signed the application, he had no opportunity of making a copy of it. He does not suggest that he did not read and perfectly understand it; and Hathorn says he might have had a copy if he wished for it. Add to which, that in the answer which he retained, or might have retained, he was expressly told that he was to hold as tenant at will, at a rent then fixed by the lessors. I consider it, therefore, to be established beyond doubt that [*161] he knew that his title was * merely that of a tenant from year to year; though I also firmly believe that he thought, in regard to this second hiring, as in regard to the former, that he might safely rely on what was called the honour of the Ramsden family; for the evidence shows that this feeling prevailed after the death of Sir John no less than during his life. I will not repeat what I have already said, namely, that no Court can take cognisance of claims founded only on what is considered an engagement of honour.

On these grounds I think that the claim of Thornton to a lease of this second piece of ground is at least as untenable as that relating to the former.

I will only add, that the conduct of Thornton when, in 1857, he surrendered the property to the appellant, Sir J. W. Ramsden, for the purpose of the mortgage to Dyson, and caused the names of himself and Dyson to be entered as tenants at will, strongly confirms the view I have taken of the case.

The decree of the VICE-CHANCELLOR declares the plaintiff Thorn-

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ton entitled to a sixty years' lease, renewable every twenty years on payment of the fines mentioned in the schedule to the Act of Parliament, *i. e.*, a fine of one year's improved value. Even if all other difficulties were removed, I cannot understand how the plaintiff could be entitled to a lease on these terms when his case, as made by the bill, is, that he was entitled in equity to a sixty years' lease, renewable every twenty years on payment by way of fine, not of one year's improved value, but of two years' ground rent. The mere circumstance of the uncertainty as to what the terms of renewal were to be, affords cogent evidence against any claim of right whatever.

The plaintiffs, in my opinion, have wholly failed; and I shall here dismiss the case, with one observation, however, as to the claim based on the reliance placed on the honour of the Ramsden family.

It is not my intention to step out of the line of my duty by expressing or even forming an opinion as to how far this claim is well founded. Probably the system was originally adopted in the notion that it would give to a humble and not generally wealthy body of dependent tenants an easy and cheap mode of holding and disposing of their houses. It was impressed on them that by *means of the register kept in the books at Longley [*162] Hall they could sell, mortgage, or dispose of the property, so far as they had property in their houses, by will, at an expense of 2*s.* 6*d.*, instead of many pounds. Now, whatever obligations of honour the mode in which this property was managed may have created in the Ramsden family, I confess that this case has satisfied me that it was absolutely necessary, for the interest of all parties, that some mode should be adopted for putting an end to it. It was an attempt to create a new and cheap mode of conveyancing, which was certain, sooner or later, to involve in difficulties those who had relied on it. The supposed transfers were altogether ineffectual, and it is a subject of wonder to me that litigation was not long ago occasioned by it. The present appellant endeavoured to do what he thought fair and just, by obtaining powers to grant leases for ninety-nine years. Whether that was more or less than his tenants at will had a right to look for from what they call the honour of the family is a point on which I give no opinion, but that some arrangement should be adopted which should put an end to the system hitherto pursued seems to me absolutely indispensable.

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In my opinion the plaintiffs did not establish a title to any relief, and so that their bill ought to have been dismissed.

In the particular circumstance of this case, and not at all relying upon the fact that I know that the opinions of your Lordships are not unanimous, which I think is no ground for influencing your Lordships' judgment on the question of costs, but in consideration of the circumstance that this system has gone on so long, and that the parties might have thereby been misled as to what they supposed to be their rights, I shall advise your Lordships to remit the cause to the Court of Chancery, with the declaration that the bill ought to have been dismissed, without saying anything as to costs.

My Lords, I ought to have said that I have had more than one communication on the subject of this case with Lord BROUGHAM, who was present at the hearing, but is unable to attend here today, and he has desired me to say, that having communicated with me and my noble and learned friends on the subject, he entirely concurs in the views which I have expressed.

[* 163] * Lord WENSLEYDALE: —

My Lords, the questions in this case arise upon two transactions, one between Mr. Thornton, under whom the respondents claim, and the late Sir John Ramsden, then the absolute owner of this part of the Huddersfield estate, in fee, with respect to a piece of waste land alleged by the respondents to have been taken by Mr. Thornton from the agent of Sir John in the year 1837, on which Mr. Thornton built a house, and expended a sum of more than £1800 in so doing; and the second on the 10th of June, 1845, when he made application to Mr. Hathorn, appointed as manager of the estates by Mr. Loch, the agent of the trustees and guardians of the appellant, Sir J. W. Ramsden, for an additional plot of ground for building a mistal connected with the first-mentioned piece of land.

The two pieces of land in question were part of the unsettled lands belonging to the grandfather of the appellant, Sir John Ramsden, in fee, and were formerly part of the common and waste lands of the manor. He was the owner in fee simple to the time of his death in 1839. The appellant Sir John W. Ramsden, his grandson, succeeded under his father's will, and attained his majority in September, 1852.

The questions in this case to be considered are, first, whether as

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to the first transaction Mr. Thornton made with the late Sir John Ramsden any contract binding, in law or equity, on his successor, the appellant, which can be enforced against the appellant, and, if not, whether the respondents have any equity to oblige the appellant to make good, by a lease, or otherwise, the loss sustained by Mr. Thornton, under whom they claim, by expending money in building a house by his license; and, secondly, similar questions are to be decided with respect to the second take of additional land in the year 1845 for the mistal.

In the first transaction, that alleged to have taken place in 1837, Thornton informed Mr. Brook, an alleged agent of the late Sir John Ramsden, that he wished to build a house on a part of the waste land. It was agreed to by Mr. Bower, the acknowledged agent of Sir John, and the amount of the ground rent was fixed by the agent at £4 per annum.

On taking this piece of land it is alleged that Mr. Thornton asked * the alleged agent of Sir John Ramsden, [*164] Mr. Joseph Brook, his opinion as to the prudence of taking a lease or not of the land and buildings, and Mr. Brook assured him that it would be folly to have a lease when he was equally safe and secure without a lease as with one, and that he could get a lease whenever he wanted one.

The appellant disputed the date of the first application. Thornton's name as tenant of the first take does not appear in the roll of the tenant-right holders of the Ramsden estate (already explained by my noble and learned friend on the woolsack) till the year 1843; but it does not seem to me to be material to determine the precise date of the first application. The house and improvements were completed by Mr. Thornton, and he went to reside in the house in the early part of 1839, and he was entered on the roll as tenant at £4 a year in 1843. Thornton occupied, and in 1845 applied to the trustees of the estate of Sir John W. Ramsden, the appellant, and his guardians, to take an additional piece of land for a mistal. Both these pieces of land were taken without any express agreement for a lease. The rent fixed for a lease, or an agreement for a lease, was always higher than that which was fixed for a simple tenant-right holding.

A bill was filed by the respondents against the appellants on the 12th of April, 1862, and the case was fully argued before the Vice-Chancellor STUART. His Honour pronounced a decree in

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favour of the respondents, not on the ground that this was a case of a claim for specific performance, nor did the bill pray relief on that ground, but that it proceeded upon a recognised equity, much higher and more positive than the discretionary and ordinary equitable jurisdiction for specific performance, His Honour thinking that in the case of the permission to build the house given by the acknowledged agent of Sir John Ramsden in the year 1837, and by the trustees and guardians in the case of building the mistal in 1845, a lease ought in equity to be given to indemnify the tenants. His Honour seems to have thought that it would be a sort of breach of faith and a fraud on the part of the owners if they did not grant leases, and he thought they ought to do so, and that he was warranted in ordering a lease for sixty years at the double of the rent then payable.

Whether this decree for the respondents can be sup-
[*165] ported upon *the ground stated by the VICE-CHANCELLOR, is the important question in this case.

The case is of some interest with regard to the principle it involves, and of great importance, as it affects a very large and valuable property in the district of Huddersfield, with respect to which very similar questions may, no doubt, arise. It was argued for several days in your Lordships' House by very able and learned counsel on both sides. The minutest parts of the case have been investigated with great care, and the long lapse of time since the argument has enabled us to consider the whole case very carefully. I have satisfied myself that the opinion of my noble and learned friend on the woolsack, which he has just delivered, that the bill ought to be dismissed, is perfectly correct.

I am of opinion that the plaintiffs cannot support their case, either at law or in equity.

To consider the case without, for the present, adverting to the ground of the VICE-CHANCELLOR'S decision, it is perfectly clear that the respondents could not succeed on the ground of a manorial custom affecting the tenure of those lands, analogous to a copyhold custom. The alleged practice is comparatively quite modern, nor has that view of the case, very properly, ever been brought forward on the part of the defendants in error.

Nor has any express or implied contract on the part of the landlord been made out by the evidence.

Certainly there was no contract in writing by the landlord, or

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an agent competent to bind him, either express or implied, so as to bind the landlord at law. Nor was there, I clearly think, any evidence of an express or implied parol contract, which being afterwards partly performed, would be binding, notwithstanding the provisions of the Statute of Frauds.

On the part of the respondents, it was contended that Thornton took under what is termed the "tenant-right" system in the manor, which existed only, or arose, in the time of Sir John Ramsden, and is alleged to have been, that the person who took land to build upon, and did build to the satisfaction of the lord or his steward, was entitled to hold at a certain rent, and also, whenever he pleased to ask for it, to have a lease from the lord of the manor for sixty years at the rent fixed for a lease at the time of the being allowed to build by the lord or his [*166] steward, or if not then fixed was to be afterwards fixed, and the lease to be renewable at stated periods upon the payment of a fixed fine. It does not appear that any lease was ever given, as far as I can collect, to any person claiming on the ground of this tenant right, and as being entitled thereby, by Sir John Ramsden himself, or in his time.

To my mind there would be very great difficulty in making out that any such implied contract could be construed to have arisen on the part of the landlord. Sir John Ramsden, the proprietor in whose time the usage originated, does not appear to have granted any leases under this usage. But even if there had been a practice of granting leases, prevailing for a very long period of time, by the landlord who was owner in fee, and might grant any leases of any description that he pleased to any person he pleased, with any terms, it would be very difficult indeed to convert that practice into an obligatory custom or usage, especially in those cases in which the alleged custom itself contemplates a future important matter, which was left open to future agreement, namely, the amount of rent to be paid and other matters to be fixed under the lease to be granted. A thousand instances of the grant of leases, all of which may be referred to kind feeling on the part of the landlord, which will explain every part of this case (and which, I sincerely hope, will, whatever the result of this suit may be, continue still), would prove nothing. It appears to me to be perfectly out of the question to hold that there was a contract to grant a lease, the most important terms of which — the amount and time

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of payment of the rent to be paid — were not stipulated, and which would be naturally the subject of a fresh agreement. If a verbal statement to the like effect had been made by Sir John Ramsden himself to Thornton before he began to build, the precise terms being clearly in the power of Sir John Ramsden to fix, all that could be said would be that the rent and precise terms would in such case be left to the honourable feelings of Sir John Ramsden, and not create a legal obligation. I cannot see how he could be considered to have made any complete contract at all, still less is there any ground to imply on the part of the landlord an agreement that until the lease was granted the tenant was to hold as an irremovable tenant for ever at the lower rent at
[*167] which he held the *property as tenant at will, which was suggested in the course of the argument.

To me the evidence is quite satisfactory that Thornton took, in both instances, as tenant at will, both in point of law and in equity; and every claim beyond that can only be on the honourable feelings of the appellant.

On giving up the first take to the Commercial Club, on the 30th of September, 1857, he then acknowledged himself to be tenant at will in distinct terms, and at such rent as he, the landlord, would think proper. At the take of the mistal, on the 26th June, 1846, he takes it, in like manner, expressly as tenant at will from the trustees and guardians.

Afterwards, on the 16th of October, 1856, Thornton writes to Mr. Hathorn to know the conditions on which Sir J. W. Ramsden then granted leases, and how much per yard he should be charged for a house, if leased, as he thought of having a lease; which shows, distinctly and decidedly, that he did not then consider that he was in the condition of a leasehold tenant, or tenant having a right to a lease; and, therefore, there certainly was no mistake in stating himself to be tenant at will of the land in the first take, when transferring it to the Commercial Club in 1857.

These circumstances form a very strong case against the plaintiff, which is, in my mind, entirely unanswerable at law.

The words "tenant at will" were undoubtedly meant by the landlord to be understood in their proper legal sense, and must be taken to have been understood by the tenant to mean what they imported. There cannot be, I think, the slightest doubt upon this part of the case.

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Before adverting to the most important question, it remains shortly to notice an argument brought forward on the part of the respondent. It appeared that in 1845 the trustees of the Ramsden estate permitted some tenants whose holdings were required by some railway companies, and who held under the tenant-right system, to receive from such companies compensation for the buildings, as if occupying them on the footing of being entitled to leases thereof; and the guardians of the appellant granted leases to them under the Act of 1844, for the purpose of enabling them to claim such compensation. This was purely as a matter of favour to the * individuals to whom it was granted, [* 168] and not an acknowledgment of liability on the part of the trustees and guardians. I am quite satisfied that there was no contract, express or implied.

But the most material and more doubtful question remains to be considered, viz., whether the ground on which the learned VICE-CHANCELLOR has proceeded can be supported; whether there is sufficient proof of that species of fraud committed by Sir John Ramsden, or the other appellant, on which His Honour relies.

This fraud is in the nature of a personal fraud in Sir John Ramsden as to the transaction in 1837, and in the devisees and guardians in that of the year 1845; and a doubt has certainly passed through my mind whether that fraud, if it was a fraud, was not merely personal, and could in any way affect the estates in respect of which it was committed, in the hands of one to whom it was afterwards transferred, though a mere volunteer. But this point has not been argued, and I will assume that my doubt is unfounded, and that if Sir John Ramsden was guilty of the personal fraud alleged, the loss occasioned by that fraud might be satisfied out of the estate itself of the person guilty of the fraud against the appellant, who is not a purchaser for a valuable consideration, but a mere volunteer. But I still feel a difficulty how the personal fraud of the trustees and guardians, who were not absolute owners, can affect the right of the appellant, Sir John W. Ramsden, who does not claim under them.

But it is not necessary to consider this point, for I entirely agree with my noble and learned friend on the woolsack, that personal fraud of this nature on the part of Sir John Ramsden, or his trustees and guardians, on the respondent cannot be made out in this case.

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If a stranger build on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit. But if a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier has imprudently added to it. If a tenant of mine does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build.

[* 169] * In this case the respondent had most clearly, and to his own knowledge, nothing but an estate at will in both the first and second take, changed afterwards by the payment of annual rents, to tenancies, in both takes, from year to year. He has been most distinctly and clearly told that he was to be tenant at will, and he most clearly understood so. I have already stated that there was no agreement with the landlord for any further estate or interest; but if it could have been shown on the part of the respondent that the landlord, Sir John Ramsden, with respect to the first take, and the trustees and guardians in the second take, believing the tenant to be ignorant of his rights, had purposely allowed him to go on, the case might fall within the same principle as a case of fraud. But no such case has been made out to my satisfaction. There is no expression, encouragement, or conduct on the part of Sir John Ramsden himself which ought to raise that suspicion. Those on the part of Mr. Hathorn which have been given in evidence are all explained by his confidence in the honour and kind feeling of Sir John Ramsden and his family. Mr. Hathorn was only a sub-agent, and declarations made by him could not affect Sir John Ramsden or the proprietors, as those of an agent who had full power to manage the estate, and sell or demise it of his own authority, whose acts would be the same as those of Sir J. Ramsden himself would be. He was clearly a subordinate to Mr. Loch, if Mr. Loch indeed had any such power, which I much doubt. Those made by Mr. J. Brook are open to the same observation. He was not an agent with full power to manage the estate, to sell and demise it of his own authority, so as to make his statements equal to those of Sir John Ramsden himself; and Brook's observations, made at the time of the first take, were only an expression of the agent of his confidence in

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the kind and liberal disposition of Sir John Ramsden and his family. As to statements and declarations made by Sir John Ramsden himself bearing on this part of the case, they are only two: one was what passed in the presence of a person named Mortimer; the other spoken to by one Mr. Bryer, when Sir John said the tenant should never be disturbed. These related to different transactions than those in question, and are strictly inapplicable to it, as Sir John Ramsden might have reasons for approving of one demise and not another; and even if they applied
*to Thornton's take, they amounted to no more than the [*170]
expression of kind feeling on the part of the landlord of
his own liberal intention, and were not obligatory on him in point of law or equity as a promise. If a man expressly promise upon his honour, his promise does not create an obligation in point of law. If what he says must be so understood by those to whom it is addressed, it cannot amount to more, and creates no obligation in point of law. The assurance of agents of their confidence in the honour of their principals and their family cannot carry the case any further.

I have satisfied myself that this is the true view of the case, and that no liability has been proved on the appellant in any way, at law or in equity, which is all that we, in the course of our duty, have to decide. What the appellant, Sir J. W. Ramsden, may choose to do, if he succeeds in this suit, is entirely for himself to decide; his obligation, if any, being one binding only in honour.

Lord KINGSDOWN:—

My Lords, I regret that in a case of so much importance as this is there should be any difference of opinion amongst us as to the proper decision of it, and I should have been glad, if the practice of your Lordships' House allowed me, to withhold the expression of my dissent from the order proposed by the LORD CHANCELLOR. But having submitted, in writing, very fully to your Lordships the grounds of my opinion, without any success, it is unnecessary, and I think it would not be useful, that I should do more on the present occasion than state in a very few words what I understand to be the law upon the subject, and the effect generally which the evidence has produced on my mind.

The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain

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interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise
[*171] or expectation. *This was the principle of the decision in *Gregory* v. *Mighell*, 18 Ves. 328 (11 R. R. 207), and, as I conceive, is open to no doubt.

If, at the hearing of the cause, there appears to be such uncertainty as to the particular terms of the contract as might prevent a Court of equity from giving relief if the contract had been in writing, but there had been no expenditure, a Court of equity will nevertheless, in the case which is above stated, interfere in order to prevent fraud, though there has been a difference of opinion amongst great Judges as to the nature of the relief to be granted. Lord THURLOW seems to have thought that the Court would ascertain the terms by reference to the Master, and if they could not be ascertained, would itself fix reasonable terms. Lord ALVANLEY and Lord REDESDALE, and perhaps Lord ELDON, thought this was going too far; but I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a Court of equity would give relief, and protect in the meantime the possession of the tenant.

If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of law or equity can enforce. This was the principle of the decision in *Pilling* v. *Armitage*, 12 Ves. 78 (8 R. R. 295), and, like the decision in *Gregory* v. *Mighell*, seems founded on plain rules of reason and justice.

The whole question, I think, in this case, is, within which class does the present claim fall; a point which, of course, depends entirely on the effect of the evidence. The evidence, in my opinion, shows that it falls under the former. The course adopted by Sir John Ramsden, on letting his land, was this: He lived

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himself at some distance — about thirty miles — from Huddersfield. He had a principal agent or steward, Mr. Bower, who lived near him, and sub-agents, or persons in his employ, who resided at Huddersfield. If any person desired to take a plot of land for building, he applied to the steward or one of the sub-agents, and if the application was * approved, the piece [* 172] of ground required was measured and staked out, and the rent fixed. The applicant then took possession, and built his house, on the completion of which, and not before, he was charged with rent, and was entered as a tenant on the rent-books of the landlord.

Thus far there is no controversy between the parties on this record. The question is, What were the terms held out on behalf of the landlord, and on the faith of which the tenants invested their money? The appellant insists that the persons thus taking land, and building on it, were of two classes, — those who originally contracted for the leases, and those who preferred to hold at lower rents, without lease. He admits that the persons of the former class were entitled to leases renewable for ever on certain terms, but he insists that those who did not originally contract for leases were not entitled at any time afterwards to have such leases granted to them; that they were mere tenants at will in the ordinary legal acceptation of the term; had no right whatever, legal or equitable, against their landlord, but might, as soon as they had completed their buildings, be turned out of them, without any compensation or allowance for their expenditure.

The respondents, on the other hand, maintain that there was no such distinction as is alleged in the original contracts for land; that those who built and entered on their land without leases, at lower rents, did so on the assurance that they might have leases whenever they required them, and that in the meantime they should not be disturbed in their possessions, or, at all events, not without full compensation.

There is contradictory testimony upon these points; but it appears to me that the preponderance is in favour of the respondent.

I am unable to reconcile with the appellant's hypothesis of distinct contracts for leases, what was done under the Act of 1844, the grant of renewable leases in 1846 to twenty or thirty persons, as to whom there is no evidence that any of them had specially contracted for leases, or the language held by Mr. Loch, in 1851,

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when the tenants were alarmed by the apprehension that they would be required to take leases. Unless the tenants at will were entitled to leases, there was no power to grant them under the Act. With respect to the letter signed by Thornton, on [*173] the application for the *second taking, in June, 1845, more reliance was placed upon it in the argument at the bar than I think it was entitled to. The whole force of the observation consists in the use of the words "to hold as tenants at will," which it is said must mean what the words in their legal sense import. The respondents contend that these words were used just as they are used in copyholds, tenant at will of the lord, according to the custom of the manor; that the lands, though not copyhold, were dealt with very much in the manner in which copyholds are dealt with; that the tenant's title consisted in an entry of the name of the taker as tenant in the books of the lord; and that the transfer was made by a similar entry in the same books; and that the term "tenant at will" was used merely to distinguish those who had no leases from those who had leases. I confess that a reference to the rentals in evidence appears to me strongly to confirm this view.

It was argued, that whatever might have been the original position of the parties, the papers which were signed in 1857, on the occasion of the loan made by the Commercial Inn Money Club, had the effect of clearly making Thornton a tenant at will. Having regard to the circumstances under which they were signed, I can attribute no weight to these papers. No notice was given to the respondents that any change whatever was intended to be effected in their position by these papers; and it seems to me that no such change could be effected. By the hypothesis, these gentlemen, the one as tenant and the other as mortgagee, were entitled to a substantial interest in the property, and yet, without any consideration whatever of any kind, they are supposed to have voluntarily converted themselves into tenants at will in the strict sense of the term, liable not only to have their rents raised from time to time, as the landlord might think fit, but to be turned out of possession whenever he pleased.

It seems to me that the right of the parties in this case must be decided in just the same way as if these two papers had never been signed.

I have thus slightly indicated the reasons which induce me to

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think that the respondents have made out a case for relief of some kind in a Court of equity. Whether it should be of the kind given by the decree complained of, or in a different form, would, if * it were material to consider it, be a very diffi- [* 174] cult question. But the opinion of the majority of your Lordships makes any consideration of that question unnecessary. Much as I regret that opinion, and the consequences which must flow from it, I am, of course, quite satisfied that it is much more likely to be right than any that I am able to form.

Lord WESTBURY: —

My Lords, it would hardly be possible for me, at this late hour, to state in detail to your Lordships the reasons why I feel myself compelled, though reluctantly, to concur in the opinion which has been expressed by my noble and learned friend on the woolsack. But it is unnecessary that I should add anything to the clear and, to my mind, satisfactory statement of reasons which has been made by the noble and learned Lord. I shall, therefore, dispense with reading the opinion which I had prepared, inasmuch as the arguments which I should have submitted to your Lordships are substantially the same as those of my noble and learned friend, who has already expressed them in the clearest manner. I agree also in the opinion which he has expressed, that this bill should be dismissed without costs. Unquestionably, I do not believe that the appellant desires that costs should be given; but whether that is so or not, I think your Lordships will act rightly in reversing the decree appealed from, and dismissing the bill without costs.

Decree reversed; cause remitted to the Court of Chancery, with a declaration that the bill ought to have been dismissed.

Lords' Journals, May 11, 1866.

ENGLISH NOTES.

The subject of part performance is dealt with at some length under Nos. 70 and 71 of "Contract," and notes, 6 R. C. 721 *et seq.* The above principal cases and the observations which follow refer to that doctrine with special relation to leases.

Nunn v. *Fabian* is followed by the VICE-CHANCELLOR in Ireland in *Conner* v. *Fitzgerald* (1883), 11 L. R. Ir. 106.

In the judgment of the Court of Appeal in *Alderson* v. *Maddison* (C

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A. 1881), 7 Q. B. D. 174, 50 L. J. Q. B. 466, 45 L. T. 334, 29 W. R. 556 (affirmed in House of Lords, 8 App. Cas. 467; 52 L. J. Q. B. 737, 49 L. T. 303, 31 W. R. 820), the conditions under which part performance can exclude the operation of the Statute of Frauds are laid down as follows: "It is a well-recognised rule that if in any particular case the acts of part performance of a parol agreement as to an interest in land are to be held sufficient to exclude the operation of the Statute of Frauds, they must be such as are unequivocally referable to the agreement; in other words, there must be a necessary connection between the acts of part performance and the interest in the land which is the alleged subject-matter of the agreement. It is not sufficient that the acts are consistent with the existence of such an agreement, or that they suggest or indicate the existence of some agreement, unless such agreement has reference to the subject-matter. As was said by Lord HARDWICKE in the case of *Gunter* v. *Halsay*, Amb. 586, they must be such as could have been done with no other view or design than to perform the agreement. Thus payment of part, or even of the whole, of the purchase-money is not sufficient to exclude the operation of the statute, unless it is shown that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement. On the other hand the admission into possession of a stranger is, speaking in general terms, a sufficient part performance, for it is not explicable upon any other supposition than that it has resulted from a contract in respect of the land of which possession has been given. Again, the continuance in possession of a tenant is not in itself a sufficient part performance of a parol agreement for the purchase from the landlord, for it is equally consistent with a right depending upon his tenancy."

The passage above transcribed from the judgment in *Alderson* v. *Maddison* was cited in connection with the decision in *Nunn* v. *Fabian*, in the judgments of both the Lords Justices BAGGALLAY and BRETT in *Humphreys* v. *Green* (C. A. 1882), 10 Q. B. D. 148, 52 L. J. Q. B. 140, 48 L. T. 60. Lord Justice BAGGALLAY considered that the qualifying words "unless it is shown that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement" were rightly used to cover such a case as *Nunn* v. *Fabian*. Lord Justice BRETT, however, thought that *Nunn* v. *Fabian* is not an authority for these qualifying words, and that mere payment of part, or even of the whole, of the purchase-money will not be sufficient under any circumstances to exclude the operation of the statute.

Nunn v. *Fabian* was again cited by KAY, J., in *McManus* v. *Cooke* (1887), 35 Ch. D. 681, 693, 56 L. J. Ch. 662, 56 L. T. 900, 35 W. R.

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754, merely for the observation that the distinction was there drawn that the expenditure of money by a tenant, though not part of the agreement, and therefore not part performance, might be treated as evidence that there was some agreement.

It is not indeed made very clear by Lord CRANWORTH's judgment, as reported in *Nunn* v. *Fabian*, what was the principle on which his decision rested. And this is not made any more clear by the comments above referred to. Lord CRANWORTH may have meant (*a*) that motive of the expenditure in alterations was ambiguous, as there was nothing in the act itself to connect it with the alleged agreement; but that the payment of the exact rent under the agreement explained the motive, and so reinforced the equity which might be argued to arise from the former act; or (*b*) that the payment of the exact rent stipulated by the alleged agreement was itself part performance sufficient to take the case out of the statute. What he probably meant was that either of these reasons would support the judgment; but that he preferred to rely upon the latter ground as in itself sufficient and conclusive.

The principle of the latter part of the rule, and of the case of *Ramsden* v. *Dyson*, is again illustrated by *Plimmer* v. *Mayor, &c. of Wellington, New Zealand* (P. C. 1884), 9 App. Cas. 699, 53 L. J. P. C. 104, 51 L. T. 475, where a person who had for many years occupied with leave of the government, and had at the request of the government built a jetty on the foreshore, acquired a perpetual right for the purpose of the original license.

AMERICAN NOTES.

See *ante*, vol. 11, p. 102. *Nunn* v. *Fabian* is cited in 1 Wood on Landlord and Tenant, p. 377; and in 1 Pomeroy on Equity Jurisprudence, sect. 818; and in Taylor on Landlord and Tenant, sect. 49; and *Ramsden* v. *Dyson* is cited by the latter, vol. 1, sect. 390; vol. 3, sect. 1241; and both are repeatedly cited in Reed on Statute of Frauds.

This doctrine is amply sustained in this country by *Morrison* v. *Peay*, 21 Arkansas, 110; *Preston* v. *Brown*, 35 Ohio State, 18; *Green* v. *Biddle*, 8 Wheaton (U. S. Sup. Ct.), 1; *Davidson* v. *Barclay*, 63 Penn. St. 406; *Dart* v. *Hercules*, 57 Illinois, 446; *Effinger* v. *Hall*, 81 Virginia, 94; *Gordon* v. *Tweedy*, 74 Alabama, 492; 49 Am. Rep. 813; *Crocker* v. *Higgins*, 7 Connecticut, 348; *Steininger* v. *Williams*, 63 Georgia, 475; *Holmes* v. *Holmes*, 49 Illinois, 32; *Eaton* v. *Whitaker*, 18 Connecticut, 222; 44 Am. Dec. 586; *Wallace* v. *Scoggins*, 18 Oregon, 402; 17 Am. St. Rep. 749; *Arguello* v. *Edinger*, 10 California, 150; *Kidder* v. *Barr*, 35 New Hampshire, 235; *Johnson* v. *Hubbell*, 10 New Jersey Equity, 332; 66 Am. Dec. 773; *Putman* v. *Halley*, 24 Iowa, 425; *Kay* v. *Watson*, 17 Ohio, 27; *Bard* v. *Elston*, 31 Kansas, 274; *Bigler* v. *Baker*, 40 Nebraska, 325; 24 Lawyers' Rep. Annotated, 255; *Billings* v. *Canney*, 57 Michigan, 425; *Seaman* v. *Ascherman*, 51 Wisconsin, 678.

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Mr. Pomeroy observes (3 Equity Jurisprudence, sect. 1409): "The doctrine was settled at an early day in England, and has been fully adopted in nearly all the American States, that a verbal contract for the sale or leasing of land, or for a settlement made upon consideration of marriage, if part performed by the party seeking the remedy, may be specifically enforced by Courts of equity, notwithstanding the Statute of Frauds." Citing a great number of decisions, of which a type is *Freeman* v. *Freeman*, 43 New York, 34; 3 Am. Rep. 657, where the plaintiff, owning a piece of wild land, told the defendants that the premises should be theirs as long as they lived, and put them in possession, and they occupied for years and made improvements, and it was held that the expenditure for improvements constituted in equity a consideration for the promise, that it could be enforced in equity, and that ejectment would not lie. Citing *Lobdell* v. *Lobdell*, 33 Howard Practice (N. Y.), 347.

The topic is also learnedly treated, with extensive references, by Dr. Bigelow (Estoppel, citiug the second principal case).

In *Wendell* v. *Van Rensselaer*, 1 Johnson Chancery (N. Y.), 344, Chancellor KENT said: "There is no principle better established in this Court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterward be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." To the same effect, *Trenton Banking Co.* v. *Duncan*, 86 New York, 228; *Chapman* v. *Pingree*, 67 Maine, 198; *Casey* v. *Inloes*, 1 Gill (Maryland), 502; 39 Am. Dec. 658; *Jowers* v. *Phelps*, 33 Arkansas, 465; *Stone* v. *Tyree*, 30 West Virginia, 687; *Baird* v. *Jackson*, 98 Illinois, 78; *Powers* v. *Harris*, 68 Alabama, 409; *Pence* v. *Arbuckle*, 22 Minnesota, 417; *Guffey* v. *O'Reiley*, 88 Missouri, 418; 57 Am. Rep. 424 and notes, 429, citing *Ramsden* v. *Dyson*; *Alabama, &c. R. Co.* v. *South, &c. R. Co.*, 84 Alabama, 570; 5 Am. St. Rep. 401; *Georgia Pac. Ry. Co.* v. *Strickland*, 80 Georgia, 776; 12 Am. St. Rep. 282; *Marines* v. *Goblet*, 31 South Carolina, 153; 17 Am. St. Rep. 22; *Lindsay* v. *Cooper*, 94 Alabama, 170; 33 Am. St. Rep. 105; 16 Lawyer's Rep. Annotated, 813; *Terrell* v. *Weymouth*, 32 Florida, 255; 37 Am. St. Rep. 94. See notes, *ante*, vol. 11, p. 102; *O'Connor* v. *Clark*, 170 Penn. St. 318; 29 Lawyers' Rep. Annotated, 607.

Some of the foregoing cases were of parol agreements for purchase of land, but the principle is not distinguishable. To this doctrine Mr. Browne cites many cases. (Statute of Frauds, sect. 487.)

On the point of concealment of title reference may be had to *Storrs* v. *Barker*, 6 Johnson Chancery (N. Y.), 166, and 2 Pomeroy on Equity Jurisprudence, sect. 807, where that writer says: "There are many instances in which equity thus compels the owner of land to forego the benefits of his legal title and to admit the equitable claims of another, in direct contravention of all the literal requirements of the statute, but they all depend upon the same principle," namely, fraudulent intent. Citing *Boggs* v. *Merced M. Co.*, 14 California, 279; *Brant* v. *Virginia Coal Co.*, 93 United States, 326.

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The former is a very celebrated case, the opinion being written by Chief Justice FIELD, afterward a Justice of the United States Supreme Court, and involved a patent to and lease by General Fremont. There are however cases which hold that fraud in the ordinary sense is not essential to raise this estoppel. The knowledge is enough. Fraud is implied by such conduct. *Galbraith* v. *Lunsford*, 87 Tennessee, 89; 1 Lawyers' Rep. Annotated, 522; *Stevens* v. *Ludlum*, 46 Minnesota, 160; 13 Lawyers' Rep. Annotated, 270; *Town of Brookhaven* v. *Smith*, 118 New York, 634; 7 Lawyers' Rep. Annotated, 755.

But this species of estoppel must be rooted in expenditure on the land.

In *Dung* v. *Parker*, 52 New York, 494, defendant falsely represented that he had authority to act as agent for another, and in his assumed capacity made a parol contract for a leasing of a store to plaintiff for two years, in consequence of which plaintiff contracted for fixtures for the store. *Held*, that as inasmuch as the contract would have conferred no right upon plaintiff if defendant had possessed the authority pretended, he was not injured by the representation and could not maintain any action against defendant.

No. 15. — MAGDALEN HOSPITAL (GOVERNORS OF) *v.* KNOTTS.

(H. L. 1879.)

RULE.

A LEASE granted by the governors of a hospital, contrary to the provisions of the statute 13 Eliz., c. 10, s. 3, is absolutely void.

Magdalen Hospital (Governors, &c. of) v. Knotts and others.

4 App. Cas. 324–336 (s. c. 48 L. J. Ch. 579; 40 L. T. 466; 27 W. R. 682).

Charity Lands. — 13 *Eliz.*, *c.* 10. — *Lease void or voidable.* — *Statute of Limitations.* [324]

An eleemosynary corporation is within the meaning and operation of 13 Eliz., c. 10.

A lease, of land belonging to such a corporation, not in conformity with the provisions of the third section of that statute, is therefore absolutely void.

The governors of Magdalen Hospital (created a corporation, for certain charitable purposes, by the 9 Geo. III., c. 31) made, in 1783, a lease of certain land of the hospital for ninety-nine years, at the rent of "one peppercorn (if lawfully demanded)." The only covenants, on the part of the lessee, were to indemnify the governors from all taxes, &c., during the term, and to surrender the premises at its end; and, on the part of the governors, for

No. 15. — Magdalen Hospital v. Knotts, 4 App. Cas. 324, 325.

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quiet enjoyment. No act had been done until now to avoid the lease, or to interfere with the persons holding the land. In July, 1876, the governors brought an action in Chancery to recover possession of the land thus leased.

Held, that the lease was absolutely void within the provisions of the statute 13 Eliz., c. 10. That consequently the right of the governors to re-enter on the land existed from the moment of the execution of the lease, and that right not having been sought to be enforced till now, was barred by the Statute of Limitations, 3 & 4 Wm. IV., c. 27, s. 2.

Per Lord SELBORNE: If any rent, however small, had been reserved and received, it would have created the legal relation of a tenancy from year to year, and the Statute of Limitations could not have run.

Appeal against a decision of the Court of Appeal.

In the year 1758 certain persons agreed to form a charity and establish a hospital for the reception, maintenance, and employment of penitent prostitutes. Lands were bought for this purpose, and exchanges took place for other pieces of land in the parish of St. George-in-the-Fields, in the county of Surrey. In 1768 [* 325] an Act * of Parliament (9 Geo. III., c. 31) was passed constituting the persons who desired to form the charity into a corporation, with perpetual succession and a common seal, and authorising them to hold lands in mortmain. On the 4th of December, 1783, one Charles Gilbert demised to the appellants and their successors, &c., a piece of land lying to the north-east of their hospital, for the term of fourteen years from the 25th of March, 1783, at the yearly rent of £5, and on the same 4th of December the then president and governors of Magdalen Hospital executed to Charles Gilbert a lease of certain of their lands "not included within the site of a wall of the present hospital, or the gardens and yard thereof," for the term of ninety-nine years, at a peppercorn rent. The lands thus demised included those sought to be recovered in this action. The only covenants in this lease entered into by Gilbert were to indemnify the corporation from all taxes, &c., and to yield up possession at the end of the term. There was a covenant by the lessors for quiet enjoyment. Gilbert entered into possession. He became bankrupt in 1793, and on the 9th of October, 1794, the president and governors demised to his assignees the same premises for a reversionary lease for fifty years, "to commence and be completed from and at the end of the said term of ninety-nine years," to be held also at a peppercorn rent, and subject to the covenants contained in the ninety-nine years'

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lease. In 1795 Gilbert and his assignees demised to the president and governors of the hospital a piece of leasehold land for fifteen years and a half, also at a peppercorn rent, both demises being recited to be made in pursuance of an agreement to that effect made in 1793. What that agreement was did not appear, nor did any explanation of the granting of these various leases appear capable of being given. The occupiers of the land, the subject of the ninety-nine years' lease, seemed to have changed more than once, and that land was now claimed by persons of the name of Shaw as their freehold property. Knotts was their tenant, in occupation of The Tower public-house, situated at the corner of Tower Street and the Westminster Bridge Road, and Mr. Watney was a mortgagee of Knotts' leasehold interest. No claim of rent nor any assertion of title to the property had been made by the appellants for above eighty years, until they issued the writ in the * present proceeding. The appellants, on the [* 326] 11th of July, 1876, commenced an action in the Chancery Division against Knotts to recover possession of The Tower public-house, alleging that under the statute 13 Eliz., c. 10, the ninety-nine years' lease ought to be declared void as an improvident alienation of the lands of the hospital, and they asked to have an account of the rents and profits from the date of the issuing of the writ, and for further relief. The Shaws and Mr. Watney claimed to defend, and were made defendants accordingly for their respective interests.

All the defendants relied for their defence on the Statute of Limitations, and on that ground demurred to the statement of claim.

The demurrer was, on the 11th of December, 1876, argued before the MASTER OF THE ROLLS, who, following what he believed to be a decision binding on him, held that the lease was not originally void but only voidable at the option of the governors of the hospital; that the present governors had, by bringing the action exercised that option, and avoided the lease; that the Statute of Limitations did not begin to run till action brought, and therefore did not apply to the case (5 Ch. D. 175). The case then went on to trial before Mr. Justice FRY, who followed the ruling of the MASTER OF THE ROLLS as to the Statute of Limitations, and by his judgment on the 13th of November, 1877, declared that the ninety-nine years' lease was void so far as it affected The Tower public-house, and adjudged the plaintiffs to recover possession thereof,

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and £105 for mesne profits as from the date of the action brought. On appeal it was ordered, on the 16th of April, 1878, that the judgment of the Court below should be discharged, and that the action should be dismissed with costs, the Court of Appeal holding that the hospital, although an eleemosynary and not an ecclesiastical corporation, was within the 13 Eliz., c. 10,[1] that the [* 327] lease was voidable * under the 3rd section of that statute, and that the right to recover possession of the land accrued to the governors of the hospital, not at the time of action brought, but at the time of the execution of the lease, and that consequently the right of action was now barred by the effect of the Statute of Limitations. The judgment of the Court below was, therefore, reversed, and judgment ordered to be entered for the defendants (8 Ch. D. 709).

This appeal was then brought.[2]

[1] The title in the Statute Book is: "Fraudulent deeds made by spiritual persons to defeat their successors of remedy for dilapidations shall be void," &c. The recital is: "Where divers and sundry ecclesiastical persons of this realm, being endowed, &c., have suffered the edifices and buildings of their livings to go to ruin and decay, and have made deeds of gift and colourable alienations, &c., to defeat and defraud their successors, be it therefore enacted," &c.

Sect. 3: "And for that long and unreasonable leases made by colleges, deans and chapters, parsons, vicars, and others having spiritual promotions, be the chiefest cause of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverishment of all successors, incumbents in the same: Be it enacted, that from henceforth all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral, church, chapter, hospital, parsonage, vicarage, or other spiritual promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, bodies politic or corporate (other than for the term of one and twenty years, or three lives from the time as any such lease shall be made or granted, whereupon the accustomed yearly rent, or more, shall be reserved and payable yearly during the said term), shall be utterly void and of none effect, to all intents, constructions, and purposes; any law, custom, or usage to the contrary anywise notwithstanding."

The 14 Eliz., c. 14, recites the 13 Eliz., c. 10, and the enactment therein that all leases, &c., made by any of the persons therein mentioned, and among them the "master or guardian of any hospital" for more than "one and twenty years, or three lives, in manner and form as is mentioned in the said Act, should be utterly void and of none effect," and then enacts and declares "That these words, 'master or guardian of any hospital' mentioned in the said former Act, were intended and meant of all hospitals, *maisons Dieux*, bead houses, and other houses ordained for the sustentation or relief of the poor, and so shall be expounded, declared, and taken for ever."

[2] When this case was called on Lord HATHERLEY intimated his intention to take no part in the hearing, as he was himself one of the governors of the hospital. His Lordship accordingly withdrew.

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Mr. Cookson, Q. C., and Mr. Davey, Q. C. (Mr. Decimus Sturges was with them), for the appellants: —

The lease here was made by persons at the time competent to make it, and the lessee, under whom, in fact, the respondents * claim, entered into possession in virtue of it. The [* 328] respondents must therefore be considered in the light of tenants to the appellants, and, being so, they cannot dispute the appellants' title. The lease itself is voidable, but not void, and only voidable, perhaps not at the pleasure of those who made it, but certainly of their successors. Now that their successors have thought fit to declare their intention to avoid it, which they have done by means of this action, the lease is avoided and the appellants are entitled to recover. They alone could avoid it, and by this proceeding they have done so. *Kemp* v. *Westbrook*, 1 Ves. 278, *Jones* v. *Carter*, 15 M. & W. 718, 724, and *The Dean and Chapter of York* v. *Middleborough*, 2 Y. & J. 196 (31 R. R. 566), clearly established that to be the principle of the law. In the last-named case the Dean and Chapter of York were the grantees, from the Crown, of a rectory, given them for the maintenance of a grammar school. They made an arrangement by which their lessee, and the lord of the manor in the district where the rectory was situate, were to pay them a perpetual composition in lieu of tithes, and the dean and chapter entered into covenants to carry that arrangement into effect. The arrangement was in actual operation above a century, but at the end of that time the dean and chapter, having then the rectory in their own hands, refused any longer to receive the composition, and the Court held that they were not bound to receive it, but were entitled to the tithes. So in *Moore* v. *Clench*, 1 Ch. D. 447, the Court treated a lease of this kind as voidable, and incapable of being enforced against the grantors, so soon as they had expressed their will no longer to be bound by it. *Pennington* v. *Cardale*, 3 H. & N. 656, expressly declares such leases as this to be not void but voidable, and in *Davenport* v. *The Queen*, 3 App. Cas. 115; see also *Smith* v. *The Queen*, 3 App. Cas. 614; and *Fisher* v. *Tully*, 3 App. Cas. 627, that rule of construction was applied to a colonial statute in terms similar to the statute of Elizabeth.

The lease might not have been avoided by the original grantors while the corporation remained the same as at the time of the grant, but it could be avoided when the persons of the corporation

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were changed. There were many cases of that kind to be [* 329] found * in Bacon's Abridgment, tit. Leases, H. In some of them it was said that the statute was made for the benefit and protection of the successors, and of course such successors might allow the lease to run on, or could avoid it at their pleasure. Till avoided, the persons in possession stood in the relation of tenants, for "the law will refer possession to a rightful rather than to a wrongful title:" *Doe d. Batten* v. *Murless*, per Lord ELLENBOROUGH, 6 M. & S. 112 (18 R. R. 327); and the mere non-receipt of rent from them would not constitute a bar to the rights of the landlord, except only so far as to limit the number of years within which overdue rent could be sued for.

Statutes of this kind were remedial statutes, and must not be construed strictly. *Edwards* v. *Dick*, 4 B. & Ald. 212 (23 R. R. 255), where the 9 Anne, c. 14, was not so construed. That statute declared all bills, &c., given for gaming debts to be absolutely void; but in that case a bill of that sort having got into the hands of a holder for value, he was allowed to recover. The general object of the statute was alone considered; and so it ought to be here.

The lease now in question was good at law, and even under this statute could only be avoided at the will and by the act of the lessors. It was not therefore like the leases in the case of *Magdalen College* v. *The Attorney-General*, 6 H. L. C. 189; for there the leases were utterly void, and the real question was, not only by whom, but against whom, any proceeding was to be taken. The leases being void, the right of entry was perfect, and the statute attached from that time. Here the lease was only voidable at the will of the lessors, which, till now, had never been formally declared. That case, therefore, and those founded on it, were unlike the present, and did not apply.

The Dean and Chapter of Westminster's Case, Carter, 15, Co. Litt. 45 a; *Hunt* v. *Singleton*, Cro. Eliz. 564; *The Lincoln College Case*, 3 Co. Rep. 60 a; *Lyn* v. *Wyn*, Orl. Bridg. Rep. 122; *Carter and Claycoles' Case*, Leon. 306; *Archbold* v. *Scully*, 9 H. L. C. 360; *Doe* v. *Williams*, 6 B. & C. 41 (30 R. R. 244); *Garnett* v. [* 330] *Bradley*, 3 App. Cas. 944; Dwarris on * Statutes, page 159; *Doe* v. *Burrell*, 12 Q. B. 1011, *n.*; *Rickman* v. *Garth*, Cro. Jac. 173; and *Hayward* v. *Abbot of Keinsham*, Dyer, 46 b, were cited and commented on.

Sir H. M. Jackson, Q. C., and Mr. Cozens-Hardy, appeared for

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Knotts and Watney, and Mr. C. M. Warmington and Mr. T. N. Hilbery, for the Shaws.

Sir H. M. Jackson and Mr. Warmington addressed the House:—

Magdalen Hospital was a charity such as came within the description in the statutes of Elizabeth, and the provisions of the 13 Eliz., c. 10, must therefore be applied to leases granted by the governors of that charity. *The Attorney-General* v. *Glyn*, 12 Sim. 84. If they were so applied, the lease of 1783 was plainly not voidable only, but actually void. The words of the statute were express. And the decisions had been in conformity with them. *The Collegiate Church of Southwell* v. *The Bishop of Lincoln*, 1 Mod. 204, 2 Mod. 56, was a direct authority, and the case there was all the more like the present, for the lease was made, as here, by a corporation aggregate without a head. Nor could this lease be held good under the 9 Geo. I., c. 31, which incorporated the founders of the charity; for though that Act, for the benefit of the hospital, gave the founders ample powers to make exchanges of lands, and declared that all rights of common existing over such lands, when obtained by exchange, should be forever extinguished; it said not one word about granting leases for building or otherwise. And there was little doubt that the real explanation of this lease was (though no documents were now capable of being produced to prove it), that these lands had been given in exchange for others more convenient for the purposes of the hospital, and that in that way the peppercorn rent, and the total absence of subsequent interference on the part of the governors of the hospital, were to be accounted for. So far as now appeared, the long possession of the respondents had been that of persons in whom the freehold was vested, and there was nothing to justify the pretence of title on the part of the appellants.

* If the lease was void, then it was clear that the right [* 331] to re-enter arose at the moment it was granted, and the provisions of the 3 & 4 Will. IV., c. 27, therefore formed a complete answer to the present claim.

The cases cited for the appellants were commented on, and the following were mentioned in addition: *The Attorney-General* v. *The Foundling Hospital*, 2 Ves. Jr. 42; *Dumper* v. *Syms*, Cro. Eliz., at p. 816, 1 Sm. L. C. 25; *Rumball* v. *Murray*, 3 T. R. 299; *Morrice* v. *Antrobus*, Hardr. 325; *Roe d. Berkeley* v. *Archbishop of York*, 6 East, 86 (No. 32, *post*).

No. 15. — Magdalen Hospital v. Knotts, 4 App. Cas. 331, 332.

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The LORD CHANCELLOR (Earl CAIRNS) : —

My Lords, the facts of the case out of which this appeal arises are stated by Lord Justice THESIGER, in delivering the judgment of the Court of Appeal, with so much care and accuracy that I do not propose to repeat them, but I will at once approach that which is the main question in the case. Is the claim of the appellants to recover the premises known as the "Tower" public-house, in the parish of St. George the Martyr, in the county of Surrey, barred by the Statute of Limitations?

I may, in the first place, say that I entertain no doubt that the appellants are a hospital within the meaning of the 14 Eliz., c. 14, and therefore also of the 13 Eliz., c. 10. Independently of the decision in the case of *The Attorney-General* v. *Glyn*, 12 Sim. 84, at p. 87, it appears to me to be clear that upon the wording of the 3rd section of the later statute an eleemosynary corporation like that of the appellants is distinctly brought within the operation of the enactment. This being so, it is too clear for argument, and indeed it was not disputed, that the lease granted by the charity on the 4th of December, 1783, of the property in question, is a lease which is rendered invalid by the operation of the statute. So far as anything appears upon the face of the lease, it is an alienation of the charity estate for ninety-nine years, which plainly could not be supported.

The question then arises, Was the lease voidable or void? [* 332] The * Lords Justices in the Court of Appeal, considering themselves bound by authority in this respect, have treated the lease as voidable; but, treating it as voidable, have held that the right to enter and avoid it accrued to the hospital immediately after the lease was made, and was therefore barred at the end of twenty years under the 2nd section of the 3 & 4 Will. IV., c. 27. My Lords, I do not think it necessary to examine the reasoning by which the Court of Appeal arrived at this construction of the Statute of Limitations, or to say how far I should be prepared to concur in it, because I must submit to your Lordships that this lease was, *ab initio*, not merely voidable but void.

The words used by the Legislature in the statute of Elizabeth are precise, and as strong as it is possible to make them. The statute declares that every lease, such as is the one before your Lordships, shall be "utterly void and of none effect to all intents, constructions, and purposes, any law, custom, or usage to the con-

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trary, anyways notwithstanding." The *onus* lies, as it seems to me, upon those who would cut down or qualify the effect of these words to show some ground, either from the nature of the case or from authority, for doing so. As to the character of the evil which it is sought by the statute to prevent, it is clear that in the case of an eleemosynary corporation the whole property of which is devoted to charity, and where the office-bearers and other members of the corporation have no personal interest whatever, the object must be to make the property of the corporation absolutely inalienable, in any way other than by the particular form of lease which is authorised. There is no intention to protect a successor against a predecessor; there is no ground for admitting an intention that individual office-bearers of the corporation granting the lease should be bound, but that their successors should be free either to affirm or to disaffirm it. The intention is to condemn the lease as a wrong and a void thing, even though every member of the corporation should have committed himself to it, and should be anxious to maintain it.

My Lords, these considerations show how inapposite, as applied to these Acts of Parliament, is any analogy drawn from the ordinary stipulation between lessor and lessee, that if the lessee breaks certain covenants the lease shall be void. The object in such a * case is to give the lessor an opportunity of termi- [* 333] nating the lease if he is disposed to do so, but not to terminate it against his will or against his interest; and to hold that the lease must become void, even against the lessor's will, would enable the lessee to get rid of an onerous lease by wilfully breaking the covenant contained in it.

So also with regard to cases (of which a great many were cited at your Lordships' bar) where a lease, not warranted by the statutes of Elizabeth, is made by an ecclesiastical corporation having a head, and where it has been held, while the same head continues, not indeed that the lease is voidable, but that it cannot be avoided even if the corporation desires it, but that after the death of the head, the corporation, as constituted under his successor, may enter and avoid the lease, but may, on the other hand, so act as again to stop itself from so doing. A large number of these cases is collected in Bacon's Abridgment, title "Leases." There may be some difficulty in understanding how some of these cases, with regard to ecclesiastical corporations with a head, came origi-

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nally to be decided as they were; probably they proceed on the principle of a personal estoppel by reason of a personal interest in the head of the corporation; but they appear to me to have no application to the case before your Lordships.

There is, indeed, a case mentioned in Bacon's Abridgment, tit. Lease, H, p. 119, 6th ed., under this title, — the case of the Collegiate Church of Southwell, reported in Modern Reports (1 Mod. 204, 2 Mod. 56) and elsewhere, — which has some application to a corporation like the appellants, but it is an authority that the lease would be void and not voidable. It runs thus: "Where there is a chapter that hath no dean, as the chapter of the Collegiate Church of Southwell, their grants or leases made by them contrary to 13 Eliz., c. 10, are void *ab initio* against themselves, and so the leases or grants by any other corporation aggregate who have no head or principal person, for they must be either void *ab initio* or good for ever, because they" (that is to say, the corporation) "continue always the same, and one has no superiority or power more than another."

To hold, in opposition to the precise words of the statute, that a lease by a corporation like that of the appellants was only
[* 334] * voidable, would not merely be unmeaning, for to say that a lease is voidable implies a right to affirm, which the corporation would not possess, but it might also inflict serious injury on the corporation. A valuable estate of the corporation might be alienated in utter recklessness or something worse, and when the corporation was put in motion to reclaim it, then, as the grant was valid until avoided, the right to mesne profits would not exist.

The Court of Appeal, as the authority for the view that the lease is voidable only, refers to what is stated as a principle of the decision, and not a mere *obiter dictum*, in *Pennington* v. *Cardale*, 3 H. & N. 656. I cannot agree that it was any necessary part of the decision in *Pennington* v. *Cardale* that the lease was voidable. The question in that case related to the meaning of an exception of certain premises out of a lease granted by a dean and chapter in 1849. The excepted premises were described as rents reserved in any building leases granted by the dean and chapter, and the Court held that these words, upon the whole context, meant leases which *de facto* had been granted by the dean and chapter, whether interests were lawfully created by them or not. The inquiry

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whether these leases were void or voidable was immaterial. It is true that, in delivering the judgment of the Court, Mr. Baron MARTIN says of a lease granted by the dean and chapter contrary to the statute, "It seems quite clear from the authorities cited upon the argument that this lease was not void, but voidable only." These observations do not appear to me to have been necessary for the decision of the case; and even if they were accurate, they did not relate to the effect of the leases or grants by a corporation such as that of the appellants; but they referred to the class of cases relating to ecclesiastical corporations with a head, of which I have already spoken.

My Lords, holding, as I do, that the lease of 1783 was absolutely void, the respondents, or those whom they represent, must be taken to have been in possession of the property from 1783 without any title whatever; and not having paid rent to the appellants, or in any other way entered into the relation of tenants, there is nothing to prevent the full operation of the 2nd section of the Statute of Limitations, and the right of the *appellants to recover the land is, in my opinion, effectu- [*335] ally barred. I shall therefore move your Lordships that the judgment of the Court of Appeal be affirmed, and the appeal dismissed with costs.

Lord SELBORNE: —

My Lords, I am of the same opinion, and I only desire to make two observations.

The first is, that the explanation of the doctrine laid down in the authorities as to leases by deans and chapters, and by colleges in the universities, is probably to be found in the fact that they were corporations coming within the original restraining Act of Queen Elizabeth, the governing members of which received the rents reserved on their leases for their own benefit; and that the succession in them, of one head having a principal share in that beneficial interest, after another, was thought (though by a process of reasoning which I cannot think accurate) to justify the Courts in holding that the declared policy of that statute was satisfied so long as those particular successors were protected. That, however, cannot apply to a corporation under the government of persons of whom none has a beneficial interest; and the *Southwell Case*, 1 Mod. 204, 2 Mod. 56, is, *a fortiori*, an authority for not extending that doctrine to such a corporation.

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The other observation which I wish to make is, that the present case is one for which there was, probably, never any precedent, and which is never likely to be followed by another similar to it, — a long term having been attempted to be granted by a charitable corporation at a peppercorn rent. If any rent had been reserved and received, however small, the legal relation of a tenancy from year to year would have been created, and the Statute of Limitations could not have run.

Lord GORDON: —

My Lords, I concur in the judgment proposed.

I am of opinion that the provisions of the statute of Elizabeth apply to the Magdalen Hospital and to the lease in question. And [*336] * that being so, I can entertain no doubt that the lease is not only voidable, but that it was from the beginning void. The terms of the Act are, I think, so express as to leave no room for any other construction.

If the lease was *ab initio* void, it follows that the respondents and their predecessors have been all along in possession of the property without any title; and as they have not paid rent to the appellants, or in any other way entered into the relation of tenants, I think that the 2nd section of the Statute of Limitations applies, and that all rights on the part of the appellants are effectually barred.

I think, therefore, that the result arrived at by the Court of Appeal (though on different grounds) is right, and that the judgment should be affirmed.

Decree appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 5th May, 1879.

ENGLISH NOTES.

This decision is followed in *Webster* v. *Southey* (1887), 36 Ch. D. 9, 56 L. J. Ch. 785, 56 L. T. 879, 35 W. R. 622, where a lease for charitable uses failed to comply with the requirements of the Mortmain Act, 9 Geo. II., c. 36 (since repealed, see 31 & 32 Vict., c. 42, and 54 & 55 Vict., c. 73), and was held void, and the running of the Statute of Limitations accelerated accordingly. A similar decision was given by KEKEWICH, J., in *Churcher* v. *Martin* (1889), 42 Ch. D. 812, 58 L. J. Ch. 586, 61 L. T. 113, 37 W. R. 682.

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AMERICAN NOTES.

This case is cited in a learned consideration of the English doctrine of leases under Powers, in 1 Wood on Landlord and Tenant, sect. 149, but the industry of that writer seems not to have discovered any American cases in point.

No. 16. — GOODTITLE d. CLARGES *v.* FUNUCAN.

(1781.)

RULE.

A POWER to grant a lease in possession is satisfied, although the premises are occupied by tenants at will or yearly tenants, if the lessor directs them to pay their rents to the lessee.

Goodtitle d. Clarges v. Funucan.

2 Douglas, 565–574.

Lease in Possession. — Power.

Where there is a power to grant leases in possession, but not by way [565] of reversion or future interest, a lease *per verba de præsenti* is not contrary to the power, although the estate, at the time of granting the lease, was held by tenants at will, or from year to year, if, at the time, they received directions from the grantor of the lease to pay their rent to the lessee. Under a power to lease all manors, messuages, lands, &c., so as there be reserved as much rent as is now paid for the same, such parts of the estate enumerated in the power as have never been demised may be let. *Qu.* If a lease made under such a power, reserving the old rent, but with covenants less advantageous to the reversion than formerly, would not be a fraud on the power, and void.

The material facts of this case were these: —

Washington, the last Earl Ferrers, was tenant for life, under a settlement made in 1741, in which there was the following power: —

"That it shall be lawful for the tenants for life, respectively, from time to time, and at all times during their respective natural lives, and when they shall respectively come into, and be in, the actual possession of the aforesaid manors and premises, by virtue of the limitations aforesaid, by indentures under their hands and seals, to demise all or any of the said manors, messuages, lands,

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tenements, and hereditaments, hereinbefore mentioned, or any part thereof, to any person or persons whomsoever, in possession, but not by way of reversion or future interest, for the term of twenty-one years absolute, or any lesser absolute term; or for any term or number of years determinable upon one, two, or three lives, so as, upon every such lease or leases, respectively, there be reserved and made payable during the continuance of such lease or leases, respectively, to be incident to, and go along with, the immediate reversion, or remainder of the premises so leased, so much, or as great yearly rents as, or more than now is and are paid, and yielded, or agreed to be paid and yielded, for the same, or proportionably for any part thereof."

All the lands comprised in the settlement that lay in the parish of Sutton St. Anne's (except about thirteen or fourteen acres, and two or three cottages), were part of a large common field. In 1774 an Act of Parliament passed for enclosing this common, and an allotment was made to Earl Washington, in lieu of his interest in the common. On the 15th of March, 1775, before the enclosure took place, his agent, by his Lordship's authority, let the new allotted lands, by agreement in writing, to three persons, Palmer, Bramley, and Jelley, at the value set upon them by the commissioners under the Act of Parliament, to occupy till the
[566] 10th of March, 1776. On the 17th of August, 1775, Earl Washington, by indenture, reciting the power, demised to the defendant, Editha Maria Funucan, for ninety-nine years from Lady-day then last past, if she should so long live, at the yearly rent of £134 (which was recited to be more than was paid for the demised premises at the time of the settlement), all the manors and fishery, with the rights, &c., and the messuage, lands, &c., in Sutton St. Anne's, then in the occupation of Palmer, Bramley, and Jelley, as under-tenants of the said Editha, or in whose possession soever the same then were, or had been. The defendant covenanted to pay half the land-tax (amounting to about £7 10*s.*), and the Earl covenanted, for himself, his heirs, executors, administrators, and assigns, to free the defendant from tithes, and from levies and payments for the church. The rights to shoot and fish were reserved to the lessor and those in remainder. By the enclosure Act, the lands were discharged from tithes, and an allotment in lieu thereof made to the rector. The manors, or manorial rights, had never been let before. The fishery had been let before, but was not at the time of the set-

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tlement. Since that time, it had been again let at 15*s*. The £134 payable by the defendant was about £30 more than the demised premises had ever produced before. That part not comprehended in the agreement above mentioned with Palmer, Bramley, and Jelley was, at the time of the lease, in the occupation of tenants at will. At the time of making the lease, the Earl directed the occupiers to pay their rent to the defendant, and they accordingly did pay her all the rent which accrued afterwards.

After the death of Earl Washington, an ejectment was brought against Mrs. Funucan, to recover the demised premises, and a verdict found for the plaintiff. But a new trial having been granted, the cause came on, before EYRE, Baron, at the last Lent Assizes for the county of Nottingham, who left it to the jury, whether the attornment of the occupiers to the defendant, in consequence of the directions given them at the time of making the indenture, did not amount to a surrender by them, and whether they were not to be considered as having become thereby parties to the lease, and as having put the defendant in possession; and the jury were of opinion with the defendant, and found a general verdict for her.

In Easter Term, 20 Geo. III., a rule for a new trial was again granted, and in that term the case was argued by several counsel of a side. It was then insisted that some of [567] the premises for which the action was brought were situated in the parish of Sutton St. Michael's, and this appearing to be the case, the plaintiff had judgment as to them, the title of the defendant only extending to Sutton St. Anne's. But as to the rest, the Court directed that the case should stand over, to be argued again, by one counsel of a side, and that affidavits should be produced, to clear up some facts, not fully stated in the Judge's report.

In last Michaelmas Term, on Friday, the 17th of November, Hill, Serjeant, argued for the plaintiff, and the Attorney-General for the defendant.

For the plaintiff three points were made: 1. That the lease to Mrs. Funucan was a lease in reversion, and therefore contrary to the power, and void. 2. That the manors and fishery were not demisable under the power. 3. That the covenants in the lease were not so beneficial to the remainder-man as those in the ancient leases. [The line of argument is sufficiently stated in the judgment.]

The Attorney-General, on the other side. . . . [569]

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[571] Hill, Serjeant, in reply. . . .

[572] The Court took time to consider, Lord MANSFIELD saying that he was not prepared to give his opinion, having lost his papers and the notes he had taken on the former argument.[1]

This day his Lordship, after stating the case, delivered the opinion of the Court, to the following effect: —

Lord MANSFIELD. — There are three objections made to the validity of this lease: 1. That it was a lease in reversion. 2. That the manors and fishery are not within the power, because they paid no rent at the time of the settlement. 3. That the covenants are not so beneficial to the landlord as those in the ancient leases. 1. On the first head it was contended, as to the old enclosed lands, that there is no such thing now as a tenant at will; that Earl Ferrers could not have brought an ejectment for those lands, without giving six months' notice; and that whoever cannot maintain an action of ejectment is not in possession; and, as to the new allotted lands, that there were several months of the term under the agreement still to run. But three answers were given to this objection, every one of which, if valid, is decisive. The first is, that the tenants agreed to this lease, and surrendered their possession, before the execution of it, in order to make it valid. This was expressly left, by Mr. Baron EYRE, to the jury, who found that the defendant was in possession at the time of the execution. The second answer is, that if the jury had not found the defendant to have been in possession, still this would be good as a concurrent lease.

[573] For this *Read* v. *Nash*, 1 Leon. 148, was cited, where, under a proviso to grant leases only for twenty-one years, a lease had been granted in 4 Ph. & Mar. for twenty-one years, and afterwards, 18 Eliz., a year before the expiration of that lease, another was granted, of the same premises, for twenty-one years, to begin presently, and it was held that the second lease was good. The reason given is a strong one, viz., that the inheritance was not charged, in the whole, with more than twenty-one years (1 Leon. 148). No authority was cited against this case, nor any answer given to the reasoning in it. The words of 13 Eliz., c. 10, as strongly require ecclesiastical leases to be in possession, and not in reversion, as those in this, or any of the common powers to tenants for life; yet in the case of *Fox* v. *Collyer*, 1 Anders. 65, all

[1] Probably when his house was burnt by the rioters.

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the Judges held that an immediate lease for twenty-one years, of premises on which there was a subsisting lease for four years, was good. The 18 of Eliz., c. 11, restrained the right to make such concurrent leases to cases where the old lease had not more than three years to run. The third answer is, that, in respect of the power, all the subsisting leases were leases at will; there was no outstanding lease, as against the remainder-man; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately; for, except in the case of leases under the power (and these were not, in many respects, according to it), the possession would devolve upon him, the instant of the death of the tenant for life. Therefore, we are all of opinion against the first objection. 2. As to the second point: powers are now a common modification of property in land, and as such are to be carried into effect according to the intention of those who create them. There is no ground or reason of equity or policy between the tenant for life and the remainder-man for leaning on either side. It is apparent, from the statutes of 32 Hen. VIII., c. 28, and 13 Eliz., c. 10, that the Legislature meant to confine the authority to let, to lands which had been formerly letten, and were capable of producing profit. This is the true construction, if not from express words used, yet by necessary implication. In the case of *Bagot* v. *Oughton*, B. R. M. 12 Geo. I., Forte. 332, 8 Mod. 249, which has been much relied on, the nature of the thing showed that the power could not be meant to extend to letting the ancient manor- [574] house at all, much less to letting it without reserving any rent. In a family settlement of an estate consisting of some ground always occupied together with the seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, that the ancient rent must be reserved, manifestly excludes the mansion-house and lands about it, never let. No man could intend to authorise a tenant for life to deprive the representative of the family of the use of the mansion-house. The words, in such a case, show that the power is meant to extend only to what has been usually let. By that means the heir enjoys all the premises in the settlement, just as they were held and enjoyed by his ancestor, the tenant for life. He has the occupation of what was always occupied, and the rent of what was always let. We all, therefore, agree as to the rectitude of the decision in *Bagot* v. *Oughton*. The nature of the thing spoke the intent as forcibly as

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the most direct words could have done. It was demonstration. But where no intent appears, where nothing arises from the nature of the thing, the rule laid down by Lord HOLT, in the case of *Winter* v. *Loveday*, as reported in Carthew, applies, viz., "that where a qualification is annexed to a power of leasing, which, if observed, goes in destruction of the power, the law will dispense with such qualification. Carth. 429." So, in *Cumberford's Case*, T. 10 Car. I., 2 Roll. Abr. 262, pl. 15, the reasoning was, that, the power being to let all, it would go in destruction of the power to restrain the tenant for life from letting part because it had not been let before; and it was there observed that the case did not resemble leases under 32 Hen. VIII. and 13 Eliz. *Walker* v. *Wakeman*, B. R. H. 27 & 28 Car. II., is another case equally strong. Thus stand the authorities. Now, to apply them to the present case. The power is express to demise the manors and fisheries. They are particularly mentioned in the settlement,[1] and the power goes to the whole. They pay, under this lease, as great a yearly rent as at the time of the settlement, for they paid nothing then. The words, therefore, are complied with, and this objection could only stand upon intent. But we think no such intent appears. The manors are nominal, — of no value, — no object of yearly income; the fishery only worth 15*s.* a year. They are convenient to the lessee living on the land and of no use to the remainder-man. The right of shooting and fishing is reserved to him. For my own part, I think the intent was to give leave to demise all, reserving as much rent, in the whole, as had been paid before; and, in fact, £30 more has been reserved. 3. The third objection, as to the covenants, was not much relied on, and does not require much consideration. The power makes no mention of covenants. The ground, therefore, must be that the present covenants are a fraud on the power by lessening the value of the reservation, but, on considering them fully, it appears that what is thrown on the landlord is compensated by what is paid by the tenant. She is to pay half the land tax. As to the church dues, the covenant seems to be collateral, and not to go with the land nor to bind the remainder-man; resembling a covenant for quiet enjoyment. But if it did go with the land, there is no pretence of fraud on the power. The £30 is *bonâ fide* reserved as an increased rent. What is stipulated with regard

[1] That was undoubtedly the case, though, to avoid prolixity, I did not, in stating the case, set forth the words of the settlement preceding the power.

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to tithes is of no consequence, since none are payable. Upon the whole, we are all of opinion that there is no ground for a new trial.

The rule discharged.

ENGLISH NOTES.

The doctrine of concurrent leases mentioned in Lord MANSFIELD's judgment (p. 432, *supra*) is referred to by Lord ELLENBOROUGH in *Roe d. Brune* v. *Prideaux* (1808), 10 East, 158, 185, 10 R. R. 258, 263, where the distinction is taken between the case where the former lease is a freehold lease and where it is a chattel lease, as follows: "The right of granting a second chattel lease was settled in *Read* v. *Nash*, 1 Leon. 148, and is recognised as law in *Goodtitle* v. *Funucan*; but a second freehold lease cannot be granted, because it must be to take effect *in futuro*, and a freehold cannot be conveyed unless it is to take effect *in præsenti*. 2 Wils. 166. If a lease, therefore, were granted for lives, no further lease could be granted till that lease were determined: not a chattel lease, because the power does not admit of the same premises being under a chattel and a freehold lease at the same time; nor a freehold lease, because that would be to commence *in futuro*: whereas, if there were a chattel lease for ninety-nine years determinable upon three lives, and one of those lives were to drop, a second chattel lease for a new life, in addition to the other two, might be granted during the continuance of the first. Whenever a life, therefore, dropped, there would be this essential difference between a freehold and a chattel lease, that, upon the former no new life could be added, unless the termor would surrender the first lease; whereas, upon the latter, a new life might be added without any such surrender."

No. 17. — THOMPSON *v.* HAKEWELL.

(C. P. 1865.)

RULE.

A DEMISE by tenants in common, though joint in its terms, operates as a separate demise by each tenant in common of his undivided share, and a confirmation by each of his companions.

But the benefit of the covenants upon such a demise runs with the entire reversion, and therefore in an action upon such a covenant all the tenants in common or their representatives must be joined as plaintiffs.

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Thompson and others v. Hakewell.

35 L. J. C. P. 18–23 (s. c. 19 C. B. (N. S.) 713; 11 Jur. (N. S.) 732; 13 L. T. 989; 14 W. R. 11).

[18] *Lease. — Covenant with Tenants in Common demising jointly. — Parties to sue for Breach of the Covenant.*

The benefit of a covenant to repair in a joint demise by tenants in common runs with the entire reversion only; therefore, the representatives of all the tenants in common on a lease so jointly made by them must join in suing for a breach of such covenant.

Action against the defendant as the executor of Richard Monkhouse, deceased, for not repairing, according to a covenant in a lease, of which the said Richard Monkhouse was assignee.

The declaration stated, that Henry Thompson and Judith his wife, being tenants in common in fee in right of the said Judith Thompson of one undivided moiety of a messuage and land at Edmonton, in the county of Middlesex, and Sarah Thomasin Teshmaker, being tenant in common of the other undivided moiety of the said messuage and land, the said Henry Thompson and Judith Thompson and the said Sarah Thomasin Teshmaker, by a deed bearing date the 7th of January, 1793, let the said messuage and land according to their several estates to John Cobley, to hold to him, his executors, administrators, and assigns, for seventy-two years from the 24th day of June then last past; and the said John Cobley, by the said deed, covenanted with the said Henry Thompson and Judith Thompson and Sarah Thomasin Teshmaker, and their respective heirs and assigns, that he, and his executors, administrators, and assigns, would from time to time, and at all times during the continuance of the said demise, at the proper costs and charges of him and them, well and sufficiently repair, uphold, support, sustain, maintain, amend, and keep the said messuage, and all and singular other the buildings and fences which then were, or which thereafter during the continuance of the term thereby granted might be erected, built, or set up upon the said demised premises, or upon any part thereof, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, when, where, and as often as need or occasion should be or require, and the said messuage, buildings, and fences being so well and sufficiently repaired, upheld, supported, sustained, maintained,

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amended, and kept as aforesaid, should and would at the end, expiration, or other sooner determination of the said lease, peaceably and quietly leave, surrender, and yield up unto the said Henry Thompson, Judith Thompson, and Sarah Thomasin Teshmaker, their heirs or assigns, together with all locks, keys, bars, bolts, doors, shutters, chimney-pieces, dressers, shelves, pipes, gutters, wells, pumps, sinks, and other fixtures which during the said lease should be affixed or set up in or about the said thereby demised premises, or any part thereof, in good plight and condition, reasonable wear and use thereof only excepted, and likewise that it should and might be lawful to and for the said Henry Thompson, Judith Thompson, and Sarah Thomasin Teshmaker, their heirs and assigns, and every of them, with workmen and others, or without, twice or oftener in every year during the said term thereby granted, at seasonable times in the daytime, to enter and come into and upon the said demised premises, and every or any part thereof, there to view, search, and see the state * and condi- [* 19] tions of the reparations thereof, and of all such defects, decays, and wants of reparation as upon any such view should be then and there found, to give or leave notice or warning in writing at the said demised premises, to and for the said John Cobley, his executors, administrators, or assigns, to repair and amend the same within the space of three months then next following; within which said time and space of three months next after every such notice and warning, he the said John Cobley did thereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree to repair and amend the same accordingly. And the plaintiffs say, that afterwards, and during the continuance of the said term, divers other buildings and fences were erected, built, and set up upon the said demised premises by the said John Cobley; and afterwards and during the said term all the estate and interest of the said John Cobley in the said messuage vested in the said Richard Monkhouse by assignment. And the plaintiffs say, that after the making of the said lease the said Henry Thompson died, leaving the said Judith Thompson and Sarah Thomasin Teshmaker him surviving; and afterwards and during the said term the said Sarah Thomasin Teshmaker died, leaving the said Judith Thompson her surviving; and afterwards and during the said term the said Judith Thompson died seised of and in her said reversion in the demised premises; and by divers deeds and conveyances all the

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estate and interest of the said Judith Thompson in the said demised premises, and her said reversion of and in the same which was in her at the time of her death, became vested and is now vested in the plaintiffs, who are now seised of the same. And the plaintiffs say, that afterwards and during the said term, and whilst the said Richard Monkhouse was assignee as aforesaid, and whilst the said reversion was vested in the plaintiffs as aforesaid, entry was made upon the said demised premises, by and on behalf of the plaintiffs, to see the state and condition of the reparations thereof, according to the said lease; and notice and warning in writing of divers defects, decays, and wants of reparation then found, upon the said view, in and about the said demised premises and the buildings then erected and built upon the same, was then given at the said demised premises to and for the said Richard Monkhouse to repair and amend the same within the space of three months then next following, according to the said lease. And the plaintiffs say, that three months, next after the said notice and warning, elapsed, in the lifetime of the said Richard Monkhouse, before this suit, and all things have been done and have happened, and all periods of time have elapsed necessary to entitle the plaintiffs to sue the defendant on the said lease and to bring this action; and before this suit; and whilst the said Richard Monkhouse was assignee as aforesaid, and whilst the said reversion was vested in the plaintiffs as aforesaid, the said lease expired, ended, and determined: yet the said Richard Monkhouse, in his lifetime, after he became and whilst he was assignee as aforesaid, and after the said reversion came to and was vested in the plaintiffs as aforesaid, and during the continuance of the said demise, suffered the whole of the said messuage and all the other buildings and fences which were then erected, built, and set up upon the said demised premises, to be and remain greatly out of repair for want of needful and necessary reparations and amendments, contrary to the said covenant in the said lease. And the plaintiffs also say, that the said Richard Monkhouse, in his lifetime, whilst he was assignee as aforesaid, and after the said notice and warning in writing, and whilst the said reversion was vested in the plaintiffs as aforesaid, did not within the said space of three months next following the said notice and warning in writing repair or amend the defects, decays, and wants of reparation mentioned therein, or any of them, but wholly neglected so to do, contrary to the said covenant in the said

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lease. And the plaintiffs also say, that at the end, expiration, and determination of the said lease as aforesaid, the said Richard Monkhouse, in his lifetime, did not surrender or yield up the said messuage and demised premises, with the buildings then erected upon the same, or any part thereof, well or sufficiently repaired, upheld, or kept, according to the covenant in the said lease, nor did he surrender or yield up the same or any part thereof with the fixtures * or any of them which, during the said lease, had [* 20] been affixed or set up in or about the said demised premises in good plight and condition, reasonable wear and use thereof excepted; but the said Richard Monkhouse surrendered and yielded up the whole of the said messuage, buildings, premises, and fixtures greatly out of repair and in a very ruinous and bad condition, reasonable wear and use excepted, contrary to the said covenant in the lease.

Demurrer thereto, and joinder in demurrer.

F. M. White, in support of the demurrer (June 24, 26). — The declaration is bad by reason of the non-joinder of the representative of Sarah T. Teshmaker, one of the tenants in common who jointly demised the premises. The covenant for the breach of which the defendant is sued is a joint covenant with both the tenants in common, and did not run with the reversion. In *Wootton* v. *Steffenoni*, 12 M. & W. 134, 13 L. J. (N. S.) Ex. 72, PARKE, B., in the course of the argument, makes this remark: "Again, this is a demise of two undivided interests, of which the parties are tenants in common, and it is a joint covenant with both; will that run with the reversion? It does not appear on the face of the lease that they have separate interests; otherwise, the covenant might be construed to be a separate covenant with each in respect of his separate interest. Therefore this is a joint covenant with two; and though their estates are separate we cannot look out of the lease for that fact." So, here, this is a joint covenant as respects the covenantees, and they must join in the action. The case of *Foley* v. *Addenbrooke*, 4 Q. B. 197, 12 L. J. Q. B. 163, is strongly in point. It was there held, that where a demise is joint, and the covenant on which the action is brought is made jointly with both the lessors, the cause of action is joint, and both covenantees ought to sue, though as between themselves their interests may be separate. According to *Kitchen* v. *Buckly*, T. Raym. 80, 1 Lev. 109, tenants in common may join in an action for breach

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of covenant to repair; and *Petrie* v. *Bury*, 3 B. & C. 353 (27 R. R. 383), shows that who may join in suing must do so. In the present case the covenant sued on is one in the performance of which the tenants in common have a joint interest. The question whether one of several tenants in common, lessors, can sue on a covenant to repair made with all was raised, but not determined, in *Bradburne* v. *Botfield*, 14 M. & W. 559, 14 L. J. Ex. 330. There would be great inconvenience in allowing two actions on such covenant, for in one a jury might give £100 damages, and in the other action by the other tenant in common another jury might assess the damages at £200. It is stated in Co. Litt. s. 315, with respect to tenants in common, that of offences which concern their tenements in common, as for breaking their houses, fishing in their piscary, and such like, "tenants in common shall have one action jointly, and shall recover jointly their damages, because the action is in the personalty and not in the realty." So, here, it is submitted the action is a personal action, though it may concern the realty, and the representatives of all the tenants in common ought to join in the action. (He also referred to *Roach* v. *Wadham*, 6 East, 289, and *Webb* v. *Russell*, 3 T. R. 393 (1 R. R. 725), as to the covenant running with the land.)

Maude (Comyn with him), *contra*. — The plaintiffs are entitled to sue on the covenant to repair, the reversion being at the time of the breach in the plaintiffs. The parties granting the lease, and with whom the covenants were made, were not joint tenants, but tenants in common, and the latter have separate estates, and if they join in making a lease they have separate reversions. Co. Litt. 45 a, where it is stated, "If two several tenants of several lands join in a lease for years by deed indented, these be several leases and several confirmations of each of them;" and in a note thereto, in the 19th edit., by Mr. Butler, it is said, "And therefore where the declaration in ejectment was of a joint demise of A. and B., and on the evidence it appeared that they were tenants in common, the plaintiff failed." The same passage that is in Co. Litt. is given in Shep. Touch., vol. 1, p. 84, to which Mr. Preston adds: "So [*21] if two tenants in common join in a lease, this is a * several lease as to each of them as far as respects his or her share, and the confirmation of the other — see 6 Co. Rep., p. 15, *Treport's Case*; and if a demise in ejectment be laid on this lease as the lease of both, the evidence will not maintain the issue, since it ought to

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be stated in all pleadings as the lease or demise of each." To the same effect is 2 Roll. Abr. 64; Bac. Abr., tit. Joint Tenants (K). The authorities on the subject are to be found collected in *Beer* v. *Beer*, 12 C. B. 60, 21 L. J. C. P. 124, and there WILLIAMS, J., in delivering his judgment, says: "The lease upon which the question arises was made by two persons, Thomas Beer and Adam Warren Beer, who were tenants in common of the land, though that fact does not appear upon the face of the instrument. One of them dies, and it is said that the consequence is that the right to receive the entire rent survives to the other of them. I see no foundation for that; I think it is perfectly clear that the moiety of the deceased tenant in common goes to his real representative, and not to the survivor. Such a lease, it appears, has been considered to be the lease of each for his respective share." *Servante* v. *James*, 10 B. & C. 410, is also an authority for holding that each covenantee must sue severally; and in *Sorsbie* v. *Park*, 12 M. & W. 146, 13 L. J. Ex. 9, Lord WENSLEYDALE, in his judgment, says: "Where it appears upon the face of the deed that A. and B. have several interests, they must sue separately, for though the words be *primâ facie* joint, they will be construed to be several, if the interest of either party appearing upon the face of the deed shall require that construction.

[WILLES, J. — It is very unsatisfactory to decide this question upon the declaration. The proper way is to set out the lease; for perhaps it may bear a different construction from what the plaintiffs have put on it in the pleadings.]

[It was then agreed between all parties that the lease should be considered as set out in the pleadings. However, on referring to the lease, it was found not to differ in any material point from the lease as alleged in the declaration.]

The cases on the subject are to be found collected in the notes to *Eccleston* v. *Clipsham*, 1 Wms. Saund. 153. It is there said, in note 1: "So though a man covenant with two or more jointly, yet if the interest and cause of action of the covenantees be several and not joint, the covenant shall be taken to be several; and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint;" and afterwards, at p. 155 a, note (c), it is added: "From what has been said in the beginning of note 1, and which has since been acknowledged to be good law, it is clear that the insertion or omission of the words '*cum quolibet eorum*' can make no difference as to the cove-

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nantees, but that the action will in all cases follow the interest, without regard to the words of the covenant." The cases of *Yates* (or *Gates*) v. *Cole*, 2 Brod. & Bing. 660 (23 R. R. 524), and *Badeley* v. *Vigurs*, 4 El. & B. 71, 23 L. J. Q. B. 377, show that it is not necessary that the entire interest in a covenant to repair should pass to the assignees of the reversion in order to enable them to sue for its breach.

F. M. White, in reply. *Cur. adv. vult.*

BYLES, J. (July 10), delivered the judgment of the Court (WILLES, J., and BYLES, J.). — The declaration in this case was in covenant on a joint lease of certain land by two tenants in common, whereby they demised the land according to their several estates to the lessee, who covenanted with them, and their respective heirs and assigns, to repair. It then deduced a title to the plaintiffs as the assignees of one only of the undivided shares, traced the lease to the defendant's testator, and assigned a breach by him of the covenant to repair in the time of the plaintiffs.

To this declaration there was a demurrer; and the objection taken was, that both the tenants in common of the reversion at the time of the breach ought to have joined as plaintiffs in the action. The form of the covenant which we have to construe renders us little assistance. It was suggested that the words "heirs and assigns," being in the plural, assisted the plaintiffs. But [* 22] the word * "heirs" is commonly used in the plural, and is satisfied either by heirs in succession or by heirs in coparcenary. The word "assigns" imports no more than that a benefit from the covenant was intended to the assignees of the undivided estates in the reversion; but whether severally or jointly it does not help us to discover. The word "respective" is equally appropriate, whether the respective heirs and assigns of the covenantees are to join or sever in an action. On the other hand, it may be observed that the covenant is with "the lessors," and not with "the lessors and each of them."

There is no doubt that a demise by tenants in common, though joint in its terms, operates as a separate demise by each tenant in common of his undivided share, and a confirmation by each of his companions: *Eccleston* v. *Clipsham*, 1 Wms. Saund. 153, 2 Roll. Abr. 64, Shep. Touch., by Preston, 85; *Heatherley* v. *Weston*, 2 Wils. 232; and there is also no doubt that the covenants in a lease

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by several lessors may be construed as joint or several in respect of the covenantees, according to their interest in the land apparent on the face of the deed: *Sorsbie* v. *Park*.

The form of the covenant helping us little, we are at liberty to endeavour to gather the intentions of the parties by considering the consequences of construing this covenant as joint or several in respect of the covenantees. The interest of the covenantees, tenants in common, in a covenant of this nature may be of four kinds. First, the covenantees may be simply joint tenants of the covenant. This construction of the covenant is attended with the inconvenience that the right to sue vesting in the survivor and his representative, real or personal, may be severed from the estate or some of the estates, though the plaintiff at law would, no doubt, sue as a trustee for the owners of the reversion at the time of the breach. Secondly, the covenant may be split and treated as several covenants, and running respectively with each undivided share in the reversion of each tenant in common. The inconvenience of this construction is, that a plurality of actions will always be necessary, which plurality might cause great hardship both to the landlords and to the tenant. There is this further inconvenience, that the damages which a jury might give in an action by one of several tenants in common would not be binding on a jury in another action at the suit of another tenant in common, who therefore, in respect of another interest in the reversion, exactly the same in degree, might for the same breach recover damages much more or much less. Lastly, there is the inconsistency that if one of the original shares should be split up into two tenancies in common, those two tenants in common, at all events, may join in suing. *Kitchen* v. *Buckly*. Thirdly, the covenant may be treated as one entire covenant, running, not with undivided shares of the reversion, but with the whole reversion. The only inconvenienee of this construction is, that no action will lie unless the owners of the entire reversion at the time of the breach can be induced to join as plaintiffs.

It is clear that a covenant to repair may run with the entire reversion of tenants in common. *Kitchen* v. *Buckly*. But it may be observed, that in that case the covenants could not have been several, as the demise was before the severance of the reversion. Fourthly, such a covenant may be construed as a covenant in suing on which the tenants in common may join or sever, at their election; and the language of the report in *Kitchen* v. *Buckly* is in

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favour of such a construction where the severance of the reversion is after the demise.

We, however, are now called on to decide that the benefit of such a covenant contained in a joint demise originally made by tenants in common not only may, but must, run with the entire reversion; in other words, that tenants in common so situated not only may, but must, join as plaintiffs in an action of covenant. The balance of concurrence, we think, inclines in favour of this construction, and is also sustained by the authority of the case of *Foley* v. *Addenbrooke*, where the Court of Queen's Bench held that tenants in common of the reversion must join in an action on such a covenant as this, contained in a lease made by themselves jointly. It is true that one of the covenantees there did not, on the face of the dec-
[*23] laration, appear to have had an *interest in the reversion; but the Court said that they must assume that she had, and on that assumption pronounced judgment. The judgment, therefore, of the Queen's Bench, being on the very point before us, must govern our decision.

This view is also in accordance with Littleton, sec. 314, that even in the case of rent, where the thing to be rendered is indivisible and due to all, tenants in common must join. The section of Littleton is as follows: "Also if there be two tenants in common of certain land in fee, and they give this land to a man in tail, or let it to one for term of life, rendering to them yearly a certain rent and a pound of pepper and a hawk or a horse, and they be seised of this service, and afterwards the whole rent is behind, and they distrain for this, and the tenant maketh rescue. In this case, as to the rent and pound of pepper, they shall have two assises, and as to the hawk or horse, but one assise. And the reason why they shall have two assises as to the rent and pound of pepper is this, in so much as they were tenants in common in several titles, and when they were made a gift in tail or lease for life, saving to them the reversion, and rendering to them a certain rent, &c., such reservation is incident to their reversion; and for that their reversion is in common, and by several titles as their possession was before the rent, and other things which may be severed, and were reserved unto them upon the gift or upon the lease, which are incidents by the law to their reversion, such things so reserved were of the nature of the reversion. And inasmuch as the reversion is to them in common by several titles, it behoveth that the rent

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and the pound of pepper, which may be severed, be to them in common and by several titles. And of this they shall have two assises, and each of them, in his assise, shall make his plaint of the moiety of the rent, and of the moiety of the pound of pepper. But of the hawk or of the horse, which cannot be severed, they shall have but one assise, for a man cannot make a plaint in an assise of the moiety of a hawk nor of the moiety of a horse, &c. In the same manner it is of other rents and of other services which tenants in common have in gross by divers titles," &c.

The analogy of this to the case of a covenant with two tenants in common to repair a house, in every brick whereof they are jointly interested, and more especially to such a covenant to repair after notice, is too striking to require further illustration. We accordingly give our judgment for the defendant.

Judgment for the defendant.

ENGLISH NOTES.

This case may be read in connection with the notes as to parties in actions upon contract (under No. 1 of "Abatement"), 1 R. C., p. 158 *et seq.* It may here be repeated that the strict rules relating to parties to an action, though modified, are not superseded by the practice under the Judicature Acts.

AMERICAN NOTES.

One tenant cannot proceed upon a joint demise to recover for his share of the rent in his own name. *Gaines* v. *Buford*, 1 Dana (Kentucky), 481; 1 Wood on Landlord and Tenant, sect. 303, citing the principal case, which is also cited in Freeman on Cotenancy, sect. 336. In *Calvert* v. *Bradley*, 16 Howard (U. S. Sup. Ct.), 580, it was held that action for breach of covenant to repair in a lease by tenants in common must be joint, although the lease reserves rent payable to the several lessors in proportion to their respective interests. The Court said, "Each of the covenantees could sue separately for his portion of the rent expressly reserved to him;" but continued, in regard to the covenant to repair: "Are not all the covenantees interested in the preservation of the property demised, and is any one, or a greater portion of them, exclusively or separately interested in its preservation? And would not the dilapidation or destruction of that property inevitably affect and impair the interest of all, however it might and necessarily would so affect them in unequal amounts? It would seem difficult to imagine a condition of parties from which an instance of joint interests could stand out in more prominent relief. This conclusion, so obvious upon the authority of reason, is sustained by express adjudications upon covenants essentially the same with that on which the plaintiffs in the case have sued." Citing *Foley* v. *Addenbrooke*, 4 Ad. & Ell. 197.

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No. 18. — DOE d. MARTIN *v.* WATTS.

(K. B. 1797.)

No. 19. — SMITH *v.* WIDLAKE.

(C. A. 1877.)

RULE.

A LEASE by a tenant for life, which he is not empowered by any instrument or Act of Parliament to make, is void against the remainder-man, and incapable of confirmation by him; but the receipt by the remainder-man of rent, as rent which a yearly tenant might be expected to pay, raises a presumption of the new relation of a tenancy from year to year.

Doe d. Martin v. Watts.

7 Term Reports, 83–86 (4 R. R. 387).

Lease in Excess of Power. — Acceptance of Rent by Remainder-man. — Evidence of Tenancy from Year to Year.

[83] If a tenant for life, under a limited power of leasing, grant a lease exceeding his power, the lease is void, and not capable of confirmation by the remainder-man. But if the remainder-man accept rent, as rent, after the death of the tenant for life, it is an admission that the defendant is his tenant, and then he is entitled to notice to quit.

This was an ejectment to recover some premises in Bermondsey in the county of Surrey. On the trial it appeared that J. Martin, deceased, who was tenant for life under a settlement, with remainder in tail to T. Martin, one of the lessors of the plaintiff, had a power of leasing the premises in question for twenty-one years in possession, without fine, and at the best rent; and that in 1779 he granted a lease to Stubbs, under whom the defendant claimed, for twenty-one years, at the annual rent of £36; the premises being then worth £60 per annum. That J. Martin received the rent during his lifetime. That after his death, which happened on June 4th, 1794, Lane, who was authorised by T. Martin to receive rent for him, received rent of the defendant for him, and paid part of it to the executors of J. Martin and the rest to T. Martin. It was objected, on the part of the defendant, that admitting the

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lease in 1779 to be * void, the receipt of rent from the de- [* 84] fendant by T. Martin created a tenancy from year to year, and that the plaintiff could not recover, not having given the defendant notice to quit. Mr. Baron HOTHAM, who tried the cause, being of that opinion, nonsuited the plaintiff, with liberty for him to move to set aside the nonsuit without costs, if this Court should be of opinion that no notice was necessary.

A rule having been accordingly obtained for that purpose in the last term,

Garrow and Marryat were now to have shown cause against it. But

Shepherd, Serjt., and Const., *contra*, were desired to begin.

It may be admitted that if T. Martin, one of the lessors of the plaintiff, knowing his real situation, and that the lease was void, had nevertheless accepted rent from the defendant, it would have amounted to an acknowledgment by him that the defendant was his tenant, and consequently that he could not have turned him out of possession without giving him notice to quit; but that admission will not assist the defendant in this case, because here, so far from T. Martin treating the lease as a nullity when he first became entitled to the estate, he was ignorant of his real situation, and acted under a mistake in supposing that the lease was a valid one. Here the lease was void in its creation, the tenant for life having exceeded his authority in granting it; and no acceptance of rent by the remainder-man could confirm it. *Jenkins d. Yate* v. *Church*, Cowp. 482; *Doe d. Simpson* v. *Butcher*, Dougl. 50; and *Ludford* v. *Barber*, 1 T. R. 94 (1 R. R. 156); in which last case Lord MANSFIELD said, "The lease is so far void that the plaintiff need not have given notice in ejectment against the defendant." But though the lease were void and not capable of confirmation by the remainder-man accepting rent, it appears that the latter received the rent under a mistaken notion that it was due under the lease; and consequently no other agreement between the parties can be implied. This precise question arose in *Goodtitle d. Adeane* v. *Prentice*, executor of Mitchell, at the Lent Assizes in Surrey, 1790, the facts of which case were shortly these: Mr. Compton, the husband of Mrs. Compton, who was seised of the premises, being copyhold, without his wife's consent in 1780 granted a lease to the defendant for forty-one years, at a small rent; the husband received the rent until his death in 1788, and afterwards the

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[* 85] daughter, the lessor * of the plaintiff (the wife having died in the husband's lifetime), received rent to Lady-day, 1780, not knowing of the invalidity of the lease; and there Mr. Justice GOULD, who tried the cause, ruled that no notice was necessary.

Lord KENYON, Ch. J.: —

I admit all the cases that have been cited, except the last, at Nisi Prius: they only prove, what indeed is admitted by the counsel for the plaintiff in this case, that a lease made by a tenant for life, which is void in its creation, cannot be confirmed by the reversioner; but they do not show that when such a lease is abandoned another relation may not subsist between landlord and tenant, by the one paying and the other receiving rent. Here one of the lessors of the plaintiff received rent by his steward *eo nomine* as rent: if the defendant had been a trespasser, no rent could have become due, it could only be paid as rent under the idea that the defendant was a tenant; and if he were a tenant, the plaintiff cannot recover, not having given him notice to quit. It would be extremely unjust that a tenant who occupies the land should, after he has sown it, be turned out of possession by an ejectment, without any notice. And it was in order to avoid so unjust a measure that so long ago as the time of the Year Books it was held that a general occupation was an occupation from year to year, and that the tenant could not be turned out of possession without reasonable notice to quit. *Vid.* 13 Hen. VIII. 15 b. That rule has always prevailed since; and in times certainly as enlightened as those, we ought not to depart from a rule which was so wisely and justly settled. Therefore I am clearly of opinion, on the authority of all the cases that have been decided (except that at Nisi Prius, which perhaps passed without much consideration, and cannot be put in the balance against all the other decisions), and on the justice and convenience of the case, that this rule must be discharged.

ASHHURST, J.: —

It is clear that the lease which was void could not be confirmed by the reversioner. It is also clear that the reversioner received rent, as rent, after his title accrued; and by accepting the rent he acknowledged the defendant to be his tenant from year to year.

GROSE, J.: —

The question is, whether there was or was not any evidence of a tenancy between one of the lessors of the plaintiff and the defendant. It being admitted that the lease was void, the defend-

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ant was not tenant under that lease. But the plaintiff * received rent of the defendant; and from that moment he [*86] admitted that the defendant was a tenant to him of some kind; and no other tenancy appearing here, the defendant must be considered as tenant from year to year. The consequence of a contrary decision would be that, though the defendant had continued to occupy this estate for twenty years, without any other lease, the plaintiff might equally have denied that the defendant was his tenant.

LAWRENCE, J.: —

If the defendant were not a tenant, he must have been a trespasser, and so he must have continued if he had remained on the premises for any number of years; but the plaintiff has, by his own act, admitted the defendant to be his tenant, and cannot therefore now consider him as a trespasser. It has been said, however, that the plaintiff was ignorant of his title when he received this rent. But he was bound to know his own title; and he cannot be permitted to avail himself of his ignorance to the prejudice of the defendant, and to say that, because he did not examine his own title, he may consider the defendant as a trespasser, and turn him out of possession without notice. And if this is to be determined on the reason of the thing, it is much more reasonable that the plaintiff, who ought to have looked into his title, should be bound by his own act, than that the defendant should be turned out of possession without any notice, merely on account of the supposed ignorance of the plaintiff. *Rule discharged.*

Smith v. Widlake and others.

3 C. P. D. 10-17 (s. c. 47 L. J. C. P. 282; 26 W. R. 52).

Lease by Tenant for Life. — Void for Want of Power. — Evidence of Tenancy from Year to Year.

A tenant for life without leasing power demised a plot of building [10] land for the term of sixty years from the 29th of September, 1834, at the annual rent of sixpence; the lease contained a covenant by the tenant for life for quiet enjoyment. The lessee accordingly erected a house on the plot of land. After the death of the tenant for life, the fee simple ultimately vested in H., who accepted rent at the rate above mentioned from J., who was a son of the original lessee, and was then in possession of the house. H. afterwards conveyed the house and land to the plaintiff by indenture: the grant was made expressly subject to the supposed term of sixty years.

No. 19. — Smith v. Widlake, 3 P. C. D. 10, 11.

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No notice to quit had been given, and the annual value of the house and land was about £6. The plaintiff having sued to recover possession of the house and land: —

Held, that as the representatives of the original lessee, under the indenture of the 29th of September, 1834, could not have sued H. for breach of the covenant for quiet enjoyment, the void lease afforded no defence against the defendant claiming under the grant of the fee simple subject to it; that a tenancy from year to year had not been created by the payment of rent at the rate of sixpence a year; and that the plaintiff was entitled to immediate possession of the house and land.

Action to recover possession of two cottages and a garden thereto attached. The writ was issued on the 30th of January, 1877. The defendants, Widlake and Latham, were the tenants in possession; the defendant, J. A. Thorne, defended as landlord.

At the trial, before COCKBURN, Ch. J., without a jury, at the Bristol Spring Assizes, 1877, the following facts were proved: —

By indentures of lease and release, dated respectively the 22nd and 23rd of December, 1814, being a settlement executed upon the marriage of John Harris and Elizabeth Winifred Bird, certain lands, including a field called Eight Acres, situate in the parish of Eastdown, in the county of Devon, were conveyed to John Harris for life, with remainder to E. W. Bird for life, with remainder to the children of J. Harris and E. W. Bird, for [* 11] such * estates and in such shares as they should jointly appoint, and in default of a joint appointment as the survivor of J. Harris and E. W. Bird should by deed or will appoint, and in default of any appointment to the children of J. Harris and E. W. Bird in fee as tenants in common. The settlement contained other limitations and provisions which it is unnecessary to mention, but it did not contain any power to grant leases.

The marriage was afterwards solemnised.

By an indenture of lease, dated the 29th of September, 1834, John Harris and Elizabeth Winifred, his wife, demised unto Francis Maine a plot of land, being parcel of Eight Acres, and containing about forty-two perches, from the date of the indenture for the term of sixty years, at the yearly rent of 6*d*. The lease contained amongst others a covenant by F. Maine to erect within three years a dwelling-house on the plot of land, and also a covenant by J. Harris for himself and his wife for quiet enjoyment. It also contained a power of re-entry for non-payment of rent, for omission to repair after notice, and for using the dwelling-house

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as a public-house. F. Maine accordingly erected a dwelling-house upon the plot of ground, which was afterwards used as two cottages, and formed the buildings sought to be recovered in the action.

John Harris died in 1835 without having exercised the joint power of appointment conferred upon him by the settlement dated December, 1814. By her will, dated July, 1844, as altered by a codicil dated November, 1854, E. W. Harris, intending to execute the power of appointment reserved to her as the survivor of her husband, devised in fee the lands conveyed by the settlement dated December, 1814, in substance, as follows: One-fifth to her son, T. B. Harris; one-fifth to her son, John Harris; one-fifth to her son, W. H. Harris; one-fifth to T. B. Harris in trust for her daughter, M. A. Gregory; and one-fifth to W. W. Gregory in trust for the children of a deceased daughter, E. W. Gregory. The devises were subject to the condition that if the devisees should wish to sell the lands during the lifetime of her son, James Harris, the offer of purchase should be first made to him at the sum of £1000. The testatrix died in May, 1865, having had six children only by her deceased husband, namely, the above-
* mentioned James Harris, T. B. Harris, John Harris, W. [*12] H. Harris, M. A. Gregory, and E. W. Gregory, deceased.

By an indenture dated the 7th of June, 1866, after reciting that T. B. Harris, John Harris, W. H. Harris, and M. A. Gregory had determined to confirm the invalid appointment purported to be made by their mother to W. W. Gregory in favour of the children of the said E. W. Gregory, and that it had been agreed to sell to James Harris the hereditaments thereby conveyed at the price of £1000, T. B. Harris, John Harris, W. H. Harris, W. W. Gregory, and M. A. Gregory granted unto James Harris, in fee, the lands conveyed by the settlement of December, 1814.

By indenture dated the 22nd of June, 1866, James Harris mortgaged in fee the lands granted to him by the indenture dated the 7th of June, 1866, to secure a loan of £1000. The deed contained the usual mortgage powers.

By an indenture dated the 2nd of April, 1874, the then mortgagees of James Harris by his direction granted, and he himself granted and confirmed, to the plaintiff in fee the lands conveyed in the settlement dated December, 1814. It was amongst other things recited that James Harris had agreed with the plaintiff

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"for the absolute sale to him of the hereditaments intended to be hereby granted, and the inheritance thereof in fee simple in possession free from incumbrances (except only the indenture of lease hereinafter mentioned) at the price of £1350;" in the *habendum* the lands were declared to be absolutely discharged from the mortgage debt of £1000, "but subject as to the house and garden mentioned in the said first schedule to a certain indenture of lease thereof for a term of sixty years, from the day of , 1834" (*sic*) and the covenant against incumbrances by James Harris contained an exception as to "the said indenture of lease."

The house and garden mentioned in the first schedule were the cottages and garden sought to be recovered in this action.

James Harris had after the death of his mother accepted rent for the cottages and garden at the rate of 6*d.* a year from James Maine, a son of Francis Maine, and by a receipt dated the 21st of July, 1872, he acknowledged the receipt from J. Maine of "the sum of 2*s.* 6*d.* for chief rent" for the cottages. The real [* 13] value of the * cottages and garden was about £6 a year. J. Harris was aware of the lease dated the 29th of September, 1834, and wished to treat it as valid. In August, 1876, the plaintiff demanded that the tenants of the cottages should attorn to him; but this they did not do.

At the trial COCKBURN, Ch. J., ordered judgment to be entered for the defendants.[1]

The plaintiff appealed.

After argument, and consideration, the following judgments were delivered: —

[* 15] BRAMWELL, L. J. — I will first dispose of the question whether the payment of rent to James Harris created a tenancy from year to year, and therefore whether the plaintiff, who claims through him, was bound to give a six months' notice to quit before he could maintain an action to recover possession of the property in dispute. The annual value of the two cottages appears to be about £6, but the rent received by James Harris

[1] The only document put in at the trial on behalf of the defendants was the lease dated the 29th of September, 1834, and no other evidence as to the title of the defendant J. A. Thorne was then given; but in point of fact the original lessee Francis Maine made a will (which, however, was never proved), bequeathing the cottages and garden in trust for six of his children; some of these children conveyed their shares to their brother James Maine, who assigned his interest to the defendant J. A. Thorne. Francis Maine died in 1848.

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was only at the rate of 6*d.* a year, and in the receipt given by him the rent is described as " chief rent." The counsel for the defendants cited *Doe d. Martin* v. *Watts*, 7 T. R. 83 (p. 446, *ante*), as an authority against the plaintiff, but it is plain, upon looking into the decisions upon the question, that the payment of rent is at most only evidence of a tenancy from year to year; and upon the facts before us I am of opinion that James Harris did not accept the sum of 2*s.* 6*d.* as rent due upon a five years' occupation under a tenancy from year to year, but that he received it under the mistaken notion that he had power to confirm the void lease for sixty years. The acceptance of this sum, no doubt, would prevent James Maine from being treated as a trespasser, and he seems to have become tenant at will in the strict sense of the term; but I do not think that a tenancy from year to year was created between him and James Harris. I may say that *Roe d. Brune* v. *Prideaux*, 10 East, 158 (10 R. R. 258), and *Denne d. Brune* v. *Rawlins*, 10 East, 261 (10 R. R. 287), entirely support the view which we take of the facts before us.

It was also argued that, as the grant to the plaintiff was made expressly subject to the void lease, he is not entitled to possession until the expiration of the term intended to be created by the indenture dated the 29th of September, 1834; but he, as grantee under the indenture dated the 2nd of April, 1874, takes all that his grantors could convey, and as the supposed term did not exist, he became seised in fee of the cottages and garden free from incumbrances, and with the right to immediate possession. For the defendants, reliance was placed upon *Prettyman's Case*, 2 Vern. 279 (cited in *Walton* v. *Stamford*, 2 Vern. 279). As to this case, I need only remark that it does not appear what the * cir- [* 16] cumstances of the case really were, and it may well be that the intended grantee of the estate for life had an equity sufficient to entitle him to a decree that he should enjoy the land. The defendants' counsel also relied upon a principle which appears to be established by certain decisions in equity, and seems to be of the following nature, namely, that where an ineffectual lease has been granted by a tenant for life who afterwards joins with the remainder-man in selling the hereditaments to a purchaser with full notice of the agreement, the latter is liable to be restrained from ejecting those claiming under the lease; but the ground of this doctrine is that the tenant for life was bound to grant a valid

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interest to the lessee, and as the purchaser has notice of the contract, and takes an estate which enables him to perform it, he is bound to make good the term intended to be created; for otherwise the lessee would be able to maintain an action against the tenant for life; and in order to avoid this, equity compels the purchaser to leave the lessee in possession. But it is unnecessary to consider the extent of this doctrine, for it has no bearing upon the present facts; neither of the tenants for life who granted the lease in 1834 conveyed to the plaintiff; he does not claim through either of them; the vendor, James Harris, is not liable to an action for breach of the covenant for quiet enjoyment contained in that lease, and he cannot be sued by those who represent Francis Maine, the original lessee, and therefore the defendants cannot successfully defend upon the principle which I have mentioned.

I am, therefore, of opinion that the judgment must be reversed.

BRETT, L. J., concurred.

COTTON, L. J. — I think it clear that no tenancy from year to year was created.

It has been argued that the plaintiff cannot recover possession of the cottages and garden until the expiration of sixty years from the 29th of September, 1834, because the conveyance to the plaintiff in the recital in the *habendum*, and in the covenant against incumbrances, recognises as valid the indenture of lease dated as of that day; and that the deed must therefore be construed as confirming the void lease, or creating a new lease for the [* 17] remainder * of the term of sixty years. In support of this argument, reliance has been placed upon *Prettyman's Case*. The facts of that case are very shortly stated. It is not reported, but merely referred to in the case of *Walton* v. *Stamford*, 2 Vern. 279. Probably the decision was on the ground that the intended grantee for life had a claim against the vendor, and therefore against the purchaser as taking with notice. But whatever may be the true explanation of that case, I cannot recognise it as an authority in favour of the defendants' contention as to the construction and effect of the conveyance to the plaintiff. In my opinion that conveyance on its true construction refers to the lease of 1834, merely for the purpose of excepting it from the covenant against incumbrances. It has also been argued that in equity, where a fee simple is granted subject to a void lease for years, the grantee will be restrained from taking any steps to put

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an end to the term, and will be compelled to confirm it; but upon reference to the authorities it will be found that in them the grantor of the hereditaments conveyed has contracted to create a term of years, or is liable to an action at the suit of the intended lessee if the latter is ejected from the land agreed to be demised to him, and the ground of the decisions is that the purchaser taking with notice is bound to complete the contract or to indemnify his vendor against the action, or, in other words, is bound to save him from being sued. The doctrine does not apply to the facts before us; James Harris, who conveyed to the plaintiff, is not exposed to any action at the suit of those representing the original lessee.

Judgment reversed.

ENGLISH NOTES.

The principle that the remainder-man by receipt of rent or services in the nature of rent acknowledges the relation of tenancy from year to year, is confirmed by the case of *Doe d. Tucker* v. *Morse* (1830), 1 B. & Ad. 365. The latter of the above principal cases supplies a reasonable limitation to the presumption.

AMERICAN NOTES.

Doe v. *Watts* is cited in 1 Wood on Landlord and Tenant, sect. 221, and in Taylor on Landlord and Tenant, sect. 60, with *Dunne* v. *Trustees*, 39 Illinois. 378; *Chamberlain* v. *Donahue*, 45 Vermont, 50.

No. 20. — KEECH *v.* SANDFORD.

(CH. 1726.)

RULE.

WHERE a lease is renewed by a trustee in his own name, the beneficiaries under the trust are entitled to have the new lease held in trust for them.

Keech v. Sandford.

Select Cas. Ch. (*temp.* King), 61, 62.

Lease. — Renewal. — Trustee and Beneficiary.

Lease of a market devised to a trustee for the benefit of an infant; [61] lessor, before expiration of the lease, refuses to renew to the infant; trustee takes it himself, shall be obliged to convey to the infant, and account for the profits.

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A person being possessed of a lease of the profits of a market, devised his estate to trustee in trust for the infant; before the expiration of the term the trustee applied to the lessor for a renewal, for the benefit of the infant, which he refused, in regard that it being only of the profits of a market, there could be no distress, and must rest singly in covenant, which the infant could not do; there was clear proof of the refusal to renew for the benefit of the infant, on which the trustee gets a lease made to himself. Bill is now brought to have the lease assigned to him, and to account for the profits, on this principle, that wherever a lease is renewed by a trustee or executor, it shall be for the benefit of *cestui que use;* which principle was agreed on the other side; though endeavoured to be differenced, on account of the express proof of refusal to renew to the infant.

[*62] *Lord Chancellor. — I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use;* though I do not say there is a fraud in this case, yet he should rather have let it run out than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que use.* So decreed that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.

ENGLISH NOTES.

The above case is a simple example of a well-established equity. Perhaps a stronger case is that of *Griffin* v. *Griffin* (1804), 1 Sch. & Lef. 352, 9 R. R. 51, where, after the lessor had recovered possession in ejectment against the infant lessee for breach of a covenant by the infant's father and predecessor to lay out money on the premises, a renewed lease was granted to the uncle of the infant, who had assumed the management of his affairs. After the infant came of age he filed a bill against the uncle that the lease should be declared a trust for his benefit; and it was decreed accordingly.

A still stronger case is that of *Fitzgibbon* v. *Scanlan* (H. L. 1813), 1 Dow, 261, 14 R. R. 62, where a trustee having, after the expiration of a lease, renewed it for his own benefit, and although nearly twenty

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years expired before the transaction was impeached, the trustee was held to have renewed for the benefit of his beneficiaries, and the representatives of the trustee were ordered to account accordingly.

The same principles apply to a tenant for life of renewable leaseholds, who, if he renews, does so for the benefit (after his own life) of the remainder-man and not of his own representatives. *Mill* v. *Hill* (1851), 3 H. L. Cas. 828.

AMERICAN NOTES.

This case is cited in 2 Wood on Landlord and Tenant, sect. 413, and in 2 Pomeroy on Equity Jurisprudence, pp. 1558, 1561, on the general doctrine of the exaction of the strictest good faith in trustees in every point of dealing with land. In *Phyfe* v. *Wardell*, 5 Paige (N. Y. Ch.), 268; 28 Am. Dec. 430, WALWORTH, Chancellor, said: "If a person who has a special or particular interest in a lease obtains a renewal thereof from the circumstance of his being in possession as tenant, or from having such particular interest, the renewal lease is in equity considered as a mere continuance of the original lease, subject to the additional charges upon the renewal for the purpose of protecting the equitable rights of all parties who had any interest, legal or equitable, in the old lease." Citing the principal case.

Kent cites the principal case (4 Com. 438), and in the celebrated case of *Davoue* v. *Fanning*, 2 Johnson Chancery (N. Y.), 252, he says of it: "If we go through all the cases, I doubt whether we shall find the rule and the policy of it laid down with more strictness, clearness, and good sense. This decision has never been questioned." See Judge OLIVER WENDELL HOLMES' note to 4 Kent Com. (14th ed.), p. 512, approving the principle of the Rule, and citing some additional cases.

The doctrine of the Rule as applicable to partners is laid down in *Mitchell* v. *Reed*, 61 New York, 123; 19 Am. Rep. 252, citing the principal case, and observing, "The general rule is so well settled that it would be a waste of time to refer to authorities." Mr. Pomeroy cites *Leach* v. *Leach*, 18 Pickering (Massachusetts), 68; *Baker* v. *Whiting*, 3 Sumner (U. S. Circ. Ct.), 475; *Kelley* v. *Greenleaf*, 3 Story (U. S. Circ. Ct.), 93; *Huson* v. *Wallace*, 1 Richardson Equity (So. Car.), 1; *Lacy* v. *Hall*, 37 Penn. St. 360; *Winkfield* v. *Brinkman*, 21 Kansas, 682; *Jones* v. *Dexter*, 130 Massachusetts, 380; 39 Am. Rep. 459; *Laffan* v. *Naglee*, 9 California, 662; 70 Am. Dec. 678, citing the principal case. See American notes to the principal case, 1 White and Tudor's Leading Cases in Equity, p. 62 (4th Am. ed.).

A marked extension of this doctrine to confidential clerks and agents secretly obtaining leases to themselves of the premises occupied by their principals was made in *Gower* v. *Andrew*, 59 California, 119; 43 Am. Rep. 242; *Davis* v. *Hamlin*, 108 Illinois, 39; 48 Am. Rep. 541 (citing the principal case), and *Gillenwaters* v. *Miller*, 49 Mississippi, 150; *Grumley* v. *Webb*, 44 Missouri, 446.

This doctrine has been applied to a tenant for life, in possession, suffering the property to be sold for a municipal assessment and himself becoming the purchaser. *Burhans* v. *Van Zandt*, 7 New York, 523.

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The principal case is cited in *M'Clanahan's Heirs* v. *Henderson's Heirs*, 2 Marshall (Kentucky), 388; *Cox's Heirs* v. *Cox*, Peck (Tennessee), 443; *Wallington's Estate*, 1 Ashmead (Penn.), 307; *Fisk* v. *Sarber*, 6 Watts & Sergeant (Penn.), 18.

SECTION II. — *Tenancies for a Term certain under Leases and other Instruments in Writing.*

(b) *Term of Lease and Obligations during its Currency.*

No. 21. — DANN *v.* SPURRIER.

(C. P. 1803.)

RULE.

IF a lease is granted for a term stated in the alternative, it is in the option of the tenant at which of the periods the lease shall terminate.

Dann v. Spurrier.

3 Bos. & P. 399–405 (7 R. R. 797).

[This case will be found reported as No. 6 of "AMBIGUITY," 2 R. C. 756.]

ENGLISH NOTES.

See notes 2 R. C. 762, 763.

A rector agreed to let a farm, except thirty-seven acres, to a tenant. A bill having been filed by the rector for specific performance of the agreement, which still remained executory, it was held that the rector had a right to select the lands to be accepted. But it was observed in the judgment of ROMILLY, M. R., that if a lease had been executed in the terms of the agreement, the selection of the accepted acres would have lain with the tenant, provided he made a fair selection. *Jenkins* v. *Green* (1858), 27 Beav. 437, 28 L. J. Ch. 817.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sects. 290, 480, and in Taylor on Landlord and Tenant, sect. 81.

But an alternative as to the time of payment of rent is for the benefit of the landlord. *Pemberton* v. *Van Rensselaer*, 1 Wendell (N. Y.), 307.

The rule finds explicit support in *Commonwealth* v. *Sheriff*, 3 Brewster (Penn.), 537 (citing *Webb* v. *Dixon*, 9 East, 15).

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No. 22. — STEELE *v.* MART.

(K. B. 1825.)

RULE.

WHERE a lease purporting to be dated on the 25th of March, 1783, *habendum* to the lessee from the Lady-day "now last past" for a certain term, is not executed until after the 25th of March, 1783, the term runs from the 25th of March, 1783, and not from the Lady-day previous.

Steele v. Mart.

4 Barn. & Cress. 272–281 (28 R. R. 256).

Lease. — Lady-day "now last past."

A lease purported on the face of it to have been made on the 25th [272] March, 1783, *habendum* to the lessee from the 25th March now last past for thirty-five years. There was evidence to show that the lease was not executed until after the 25th March, 1783. *Held*, that it took effect from the time of delivery, and not from the day of the date, and consequently that the term commenced on the 25th March, 1783, and not on the 25th of March preceding the date of the deed.

Debt for use and occupation. Plea, *nil debet*. At the trial before ABBOTT, Ch. J., at the Middlesex sittings after last Michaelmas Term, the plaintiff proved a lease of the premises in question from Elizabeth Lorymer Walker to Joseph Dale, made on the 17th December, 1787, to hold from the feast day of the birth of our Lord Christ then next ensuing, for the term of twenty-nine years and one quarter of a year, wanting three days, at the yearly rent of £124, payable quarterly. It was further proved that the plaintiff had married Elizabeth Lorymer Walker, and that she had since died, and that the defendant had been in possession of the demised premises from the 25th March, 1817, until the * 28th [* 273] March, 1818. The plaintiff also proved the original lease of the premises to John Walker, the father of Elizabeth Lorymer Walker. That lease purported to have been made on the 25th March, 1783, by William Gooding the elder, William Gooding the younger, James Gooding, and Sampson Gooding, to John Walker, of the parish of St. Mary-le-Bone, saddler, *habendum* to him from the feast day of the Annunciation of the Blessed Virgin Mary

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then last past, for thirty-five years; and it recited that in consideration of the rents and covenants therein contained on the lessee's part to be paid and performed, and of the surrendering and giving up to be cancelled certain indentures of lease made between the same parties, bearing date the 10th April, 1776, whereby the messuage or tenement, with the appurtenances thereinafter demised and leased to the said John Walker, were demised for a term of thirty-five years from Lady-day then last, they, the lessors, had demised the premises therein particularly described, which were stated then to be in the tenure of the said J. Walker or his undertenants, &c., *habendum* from the feast day of the Annunciation of the Blessed Virgin Mary then last past, for and during, and unto the full end and term of thirty-five years then next ensuing, and fully to be complete and ended, paying during the said term of thirty-five years unto the said W. Gooding the elder, and his assigns, if he should so long live, the yearly rent of £60 on the 24th June, 29th September, 25th December, and the 25th March, by even and equal portions; and if the said W. Gooding the elder should happen to die before the expiration of that demise, then paying during the remainder of the term from his death to the said [* 274] W. Gooding the younger, J. Gooding, and * S. Gooding, their respective executors, &c., the yearly rent of £60, on the before last-mentioned days of payment, the first payment to be made on the first of the said feast days which should happen after the decease of W. Gooding the elder; yielding and paying also during the aforesaid term of thirty-five years unto W. G. the younger, J. G., and S. G., their executors, &c., the further yearly rent of £15, at the before-mentioned days of payment, the first payment thereof to begin and be made upon the 24th day of June next ensuing the date thereof. The lease contained the usual covenants for payment of rent, &c., and was attested in the usual manner; and near to the attestation there was the following memorandum signed by all the lessors: "We whose names are under mentioned do agree to the within writings that the said John Walker for the space of thirty-five years is to pay £60 per year neat money; and to prevent any dispute which might arise, we have indorsed the same from Lady-day, 1783." The lease was folded up in the usual manner, and there was the following indorsement on the back of it: "Dated the 10th of May, 1783." Upon this evidence it was contended, on the part of the defendant, that as the first lease pur-

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ported to be made on the 25th March, 1783, to hold from the 25th March then last past, that it took effect from the 25th March, 1782, and consequently that the term of thirty-five years expired on the 25th March, 1817, and that the plaintiff therefore had no interest in the premises after that period. The LORD CHIEF JUSTICE overruled the objection, and the plaintiff obtained a verdict for £250, with liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained in Hilary Term last upon the objection taken at the trial,

[After argument,]

ABBOTT, Ch. J. — I am of opinion that in point of law the [276] term began to run from the Lady-day preceding the delivery of the deed, and not from the Lady-day preceding the day inserted in the deed as the date; and then the only question is, whether there was any satisfactory proof that the first lease was executed after Lady-day, 1783. If there was, then, as the lease was to commence from Lady-day then last past, the term granted by it would commence at Lady-day, 1783, and continue until the 25th of March, 1818. I thought at the trial there was abundant evidence to show that the lease was not executed until after the 25th of March, 1783. The first lease purported on the face of it to have been made on the 25th of March, 1783, in consideration of the surrender of a former lease, which at that time had twenty-eight years to run, and the premises are demised to the lessee to hold from the 25th of March then last past. Now it is to be observed, that it is not usual to make a term commence from the year preceding the *execution of the lease, and there [*277] could be no reason for so doing in this case, inasmuch as the lessee's term under the former lease would continue until he surrendered it to the lessor, which probably he would not do until or about the time when the new lease was executed. I should conclude from the very terms of the *habendum* that the lease was not executed until some time after the 25th of March, 1783, and the mode in which the rent is reserved leads to the same conclusion. Two rents are reserved, the one payable to Gooding the elder, the other payable to his sons; they are both made payable quarterly during the term, but it is expressly stipulated that the latter rent is to begin to be payable on the 24th June then next. This shows that the parties contemplated that the term was to commence on the 25th March, 1783. Then there is a memorandum written near

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the attestation, and signed by all the lessors, whereby they say, "that to prevent disputes they had indorsed the same from Lady-day, 1783." The meaning of that phrase is not very precise. Whether they intended to declare by that memorandum that the lease was to take effect from that date, or whether it referred to any other indorsement, is not very clear; but giving any sense to the memorandum, we must infer that it was not written until after Lady-day, 1783. If it refers to any other indorsement made on the lease, it must refer to the words on the back of the lease, "dated the 10th of May, 1783." I incline to think that the memorandum refers to an indorsement already made on the lease, and it is then evidence against the lessors, that they authorised that indorsement to be written on the lease, and consequently that the lease was not executed until May, 1783. Upon the whole I [*278] am * of opinion that there was evidence to show that the lease was not executed until the 10th May, 1783, and consequently that the term began to run from the 25th of March preceding.

Bayley, J. — The defendant occupied these premises from May, 1817, to May, 1818, and was liable to pay some person for the occupation during that period. The persons claiming under Gooding or Walker are the only persons who can claim the rent. Walker or his assigns may claim if the term continued till March, 1818, but it is contended that it expired in 1817, and consequently that Walker or his representatives cannot claim the rent becoming due after that period. The lease on the face of it purports to have been made on the 25th of March, 1783, and the words of the *habendum* are, "to hold from Lady-day now last past." It is said, therefore, that the term granted by the lease began necessarily to run from Lady-day, 1782, and expired on Lady-day, 1817. It may, however, happen that the lease may be dated on one day and may, in fact, have been executed on a subsequent day; and if that be so, the lease takes effect from the day of the delivery, and not from the date. That is laid down in *Clayton's Case*, 5 Co. Rep. 1. There indentures of demise were engrossed, bearing date the 26th of May, the 25th Eliz., *habendum* for three years from henceforth, and the said indentures were delivered at four o'clock of the afternoon the 20th day of June in the same year, and the question was, when this lease by computation should have its beginning, whether from the day of the date or from the delivery; and it was resolved, that

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from henceforth should be accounted from the day of the delivery of the indentures, and not by * any computation [* 279] of date, for from henceforth is as much as to say, "from the making, or from the time of the delivery of the indentures," or *a confectione præsentium*, for the confection or making of the lease does begin by the delivery, and these words, "from henceforth, or any other words of the indenture, are not of an effect or force until delivery *quia traditio loqui facit chartam*." Now apply the doctrine of that case to this. Here the lessee was to hold from the 25th of March then last past. Now, according to *Clayton's Case*, that must mean the 25th of March preceding the execution of the lease, and not preceding the date of the lease. There must, however, be some evidence to show that the deed was not executed on the day when it bears date, and I think there is such evidence in this case. In the lease there is a memorandum by the only persons who had an adverse interest, that they had indorsed it from Lady-day, 1783, and it appears that on the back of the lease there are the words "dated the 10th of May, 1783." This is a declaration by them that the lease was not executed until after Lady-day, 1783, and if they had made a verbal declaration that the lease was not executed until after the 25th of March, 1783, it would be evidence of the fact against them. Here we have a declaration in their own handwriting. I am of opinion, therefore, that we are well warranted in assuming that the lease was executed after the 25th of March, 1783. That being so, the verdict is right, and this rule must be discharged.

Holroyd, J. — The question is, whether there was reasonable evidence to satisfy the jury that the lease was executed after the time when it purports to bear date. For it is clearly established that if it be executed afterwards it takes effect from the day of the delivery, and * not from the day of the date; and [* 280] I take it to be clear that a party may show that the deed was delivered on a different day from that on which it bears date. *Oshey* v. *Sir Baptist Hicks*, Cro. Jac. 263. In covenant upon an indenture dated the 9th of October, to pay for goods then laden, or afterwards to be laden, on board such a ship, it was held that the defendant might traverse the delivery on the 9th, and plead that the deed was sealed and delivered on the 28th, and that no goods were then or afterward shipped, for he was not bound to pay for any goods shipped after the date and before the delivery of the

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deed; and it was held, that although it should be intended that every deed was delivered on the day it bears date, unless the contrary be proved, yet that the words of the deed, that he should pay for the corn then laden, referred to the time of the essence of the deed by the delivery, and not to the date. Then that being so, the only question is, Was there evidence to satisfy the jury that the deed was executed after the time it purported to bear date? I am satisfied that from the indorsement it may reasonably be collected that it was executed after the time when it purports to bear date, and therefore the rule for entering a nonsuit must be discharged.

LITTLEDALE, J. — It appears to be clearly established, that if a lease be executed on a day after the day of the date, it takes effect from the day of delivery and not from the day of the date. My doubt has been, whether in this case there was evidence to show that the lease was executed after the 25th of March, 1783. I am inclined, however, to think that there was evidence from [*281] which a jury * might reasonably draw the conclusion that the lease was not executed until after the 25th of March, 1783, and that being so, then the lease took effect from the 25th of March preceding the execution. *Rule discharged.*

ENGLISH NOTES.

Under a power to demise for twenty-one years in possession, and not in reversion, a lease was made dated the 17th of February, 1802, *habendum* from the 25th of March next ensuing after the date thereof. The lease was not executed and delivered until after the 25th of March. It was held a good execution of the power. For although the lease took effect to pass the interest only from the delivery, which was not until after the 25th of March next ensuing the date expressed (*i. e.*, after the 25th of March, 1802), it then took effect as a lease in possession, the period of the lease being calculated from the 25th of March next ensuing the date expressed (*i. e.*, the 25th of March, 1802). *Doe d. Cox* v. *Day* (1809), 10 East, 427, 10 R. R. 345.

Where an indenture of lease has no date or an impossible date, as the 30th of February, and in the body of the deed reference is made to the "date," that word must be construed "delivery;" but if the indenture has a sensible date, the word "date," occurring in other parts of the deed, means the day of the date and not of the delivery. *Styles* v. *Wardle* (1825), 4 B. & C. 908, 28 R. R. 501.

Where an indenture of lease was dated the 1st of February, 1841, but not executed until after the 29th of September, 1841, whereby the

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premises were demised to hold from the 30th of July, 1840, the first payment of rent to be made on the 25th of March then next; it was held that, although the indenture could not confer a title to the rent due before execution, the rent for the half year ending on the 29th of September, 1841, was properly claimed under a parol agreement with the tenant who had been in possession for that period. *Cooper* v. *Robinson* (1842), 10 M. & W. 694, 12 L. J. Ex. 48

AMERICAN NOTES.

The principal case is cited in Wood on Landlord and Tenant, sects. 286, 303, and in Taylor on Landlord and Tenant, sects. 69, 71.

In *Deyo* v. *Bleakley*, 24 Barbour (N. Y. Sup. Ct.), 9, the lease was dated Jan. 25, 1853, and ran "from the 1st day of April next, for and during and until the full end and term of five years" thence next ensuing, yielding and paying therefor unto the lessor, yearly and every year, the yearly rent or sum of $4000, "in equal quarter yearly payments, to wit, on the first days of April, July, October, and January in each and every year during the said term." *Held*, that the term commenced on the 1st day of April, 1853, and included that day, and that the first quarter's rent was payable on that day in advance. Citing *Pugh* v. *Duke of Leeds*, Cowper, 714, and *Doe* v. *Wotton*, ibid., 189, and speaking of the great diversity of opinion on the subject.

A lease from the —— day of ——, 1866, for eighteen months, will be held to continue after July 1st, 1867. *Huffman* v. *McDaniel*, 1 Oregon, 259.

No. 23. — GRANT *v.* ELLIS.

(1841.)

RULE.

THE "rent," recovery of which is barred by the Statute of Limitations, does not apply to the rent incident to the reversion under an ordinary lease.

Grant v. Ellis.

9 M. & W. 113–128 (s. c. 11 L. J. Ex. 228).

Landlord and Tenant. — Lease. — Statute of Limitations. — Rent.

The Stat. 3 & 4 Will. IV., c. 27, s. 2, does not apply to rent reserved [113] on a demise.

[The question, which was argued in this case on demurrer to a plea taken by the plaintiff in replevin, appears sufficiently from the judgment of the Court delivered by]

[120] ROLFE, B. — This was an action of replevin for taking the goods of the plaintiff in his dwelling-house at Kensington.

It appears by the pleadings, that, in the year 1764, David Burnsall, being seised in fee of the land on which the house in [*121] question was afterwards built, demised the *same on a building lease for a term of ninety-nine years, at an annual rent of £25, payable on the four usual days of payment; and it further appears, that on the 13th day of June, 1836, the reversion expectant on the determination of the term became, after various mesne assignments, vested in William Pexton in fee. The defendant in replevin made cognisance as the bailiff of William Pexton, and justified the taking, as a distress for three years and three quarters of a year's rent due at Lady-day, 1840; being the rent accrued due subsequently to the time when William Pexton had acquired the reversion.

To this cognisance the plaintiff pleaded in bar, that, for a period of more than twenty years before any of the rent in question had become due, the parties entitled to the reversion, and through whom the said William Pexton claimed, had discontinued the receipt of the rent reserved by the original lease, and that during that period no rent had been paid or received. To this plea there was a demurrer; and the question for our decision is, whether the plea in bar does or does not disclose a good defence to the claim of rent on the part of William Pexton. The question turns entirely on the construction of the Real Property Limitation Act, 3 & 4 Will. IV., c. 27.

By the second section of that Act it is enacted, "that no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person through whom he claims." And by the third section it is, amongst other things, enacted, "that when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or re- [*122] ceipt, then such right shall be deemed to *have first accrued at the time of such dispossession, or discontinu-

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ance of possession, or at the last time at which such profits or rent were or was so received." It is on these two enactments that the question mainly turns.

On the part of the plaintiff it is contended, that his case comes expressly within the provisions of the Act. William Pexton, he says, derives title to the rent claimed through several persons named in the third cognisance of the defendant, who were successively the owners in fee of the reversion expectant on the termination of the lease; and those persons, being so entitled to the reversion, discontinued the receipt of the rent for a period of more than twenty years next before the time when any of the rent distrained for became due, during which period no rent has been paid or received; and this, the plaintiff contends, is precisely within the letter and spirit of the statute.

The defendant, on the other hand, contends, that this is not a case within the statute at all. He contends, that the word "rent," in the second section of the statute, cannot be taken as having any reference to rents such as that now in question, namely, rents reserved on leases for years by contract between the parties, as the conventional equivalent for the right of occupation; but must be confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assise, such as ancient rent-service, fee-farm rents, or the like. We accede to this latter view of the case.

In order to come to a just conclusion as to the meaning of the word "rent," as used in the two sections to which we have referred, it is important first to consider what is the meaning of the word "recover," as used in the second section. The enactment is, that no person shall make an entry or distress, or bring an action to "recover" any land or rent, but within twenty years, &c. Now, so far as relates to land, the word "recover," in this passage, clearly means the *same thing as "obtain possession [*123] or seisin of." The clause assumes one party to be in wrongful seisin or possession of land to which another has the right, and then limits the time within which the right must be asserted.

If such be the meaning of the word "recover," when used with reference to one of its objects — "land," it is very reasonable to suppose that the Legislature intended it to have the same meaning in respect to the other object — "rent." It is true, indeed, that

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with respect to an incorporeal hereditament like rent there cannot be strictly any wrongful adverse seisin or possession by another. If A. claims and receives the rent due to B., B. has still the same right against the terre-tenant as if no payment had been made to A. The receipt of rent by A. is not inconsistent with a similar receipt by B., as the possession of land by A. is necessarily inconsistent with possession of the same land by B. But still, before the passing of this Act, a party seised of rents, whether rents-service, rent-charges, or rents-seck, might, in case the rent was paid to another or withheld from him, consider himself, if he thought fit, as being disseised of such rent. And a party electing to consider himself so disseised, might have the same remedy by an assise to recover seisin of his rent, as a party disseised of land might have to recover seisin of his land. The judgment in each case was the same, "*quod recuperet seisinam;*" and in each case the party was entitled to a writ of *habere facias seisinam*, which, in case of a recovery of rent, was executed by the sheriff delivering to the plaintiff an ox or other chattel on the land, in lieu of execution; and in case of a subsequent withholding of rent, the party aggrieved might have his writ of re-disseisin, with all its consequences, as in the case of a subsequent disseisin of lands or houses.

Now we are of opinion, that it is to this sort of recovery only that the second section of the statute has reference; for [*124] such is clearly the meaning of the word "recover," *when used with reference to land; and the plain grammatical construction requires us to give it the same meaning when applied to rent, unless, which is not the case here, some manifest absurdity or inconvenience should result from our so doing. It follows from hence, as a matter of course, that the word "rent," in the second section, must necessarily be confined to rent which might in its nature have been the object of such a recovery; and this certainly does not include the rent reserved on common leases for years.

According to our view of this case, therefore, even if the second section had stood alone, we should have been of opinion that the pleas in bar afforded no answer to the defendant's cognisance, and consequently that he was entitled to judgment in his favour. But we think it right to add, that the correctness of the construction we put on the second section appears to us to be strongly confirmed by the subsequent parts of the statute.

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In the third and some other sections the Act proceeds to define the time, in most, though (as is noticed by Lord Chief Justice TINDAL in the case of *James* v. *Salter*, 3 Bing. N. C. 553) not in all possible cases, at which the right to make a distress, for the purpose of recovering any rent, shall be deemed to have first accrued to the party making the same. The first case put is that of a party who has himself, in respect of the estate or interest claimed, been in possession of the rent, and who afterwards has been dispossessed, or has discontinued the receipt of the rent. The estate or interest claimed must, according to the context, mean the estate or interest claimed in the rent, and not in the lands out of which the rent issues. Now, a person entitled to the rent reserved on a common lease for years has no estate in the rent at all: *Prescott* v. *Boucher*, 3 B. & Ad. 849; he is entitled to the rent, when it from time to time becomes due, as being an incident to his *reversion, and not because he has any [*125] estate in the rent itself. He is himself the freeholder of the land, and can therefore have no estate in rent issuing out of the land. The word "interest," indeed, is of so large and comprehensive a nature, as perhaps to embrace the right which the reversioner has in the rent as incident to his reversion; still that interest can in no fair sense be described as the interest claimed. What is claimed by a landlord, distraining for rent on a common lease for years, is the amount of the arrears, wholly irrespective of the extent of his estate or interest in the reversion, as an incident to which the right to those arrears has accrued; what he "recovers" by his distress is the amount due for arrears of rent, and will be the same whether he is tenant in fee simple, tenant for life, or tenant for years. The statute, in this branch of section 3, clearly looks to the party recovering the same estate or interest of which he was previously possessed, and of which he had been dispossessed; and this is altogether inapplicable to a distress for rent incident to a reversion expectant on a common lease for years. Indeed, this very distinction appears to have been contemplated by the Legislature in this Act; for by the 42nd section a limit is imposed as to the number of years' arrears for which a party entitled to rent may distrain, and there the subject-matter to be recovered by the distress is described, not as "rent," but as "arrears of rent."

It must further be observed in the present case, that at the end

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of the ninety-nine years the reversioner will clearly be entitled to the possession of the land; for by one of the express provisions of section 3, the right to the reversion is to be deemed to have first accrued when the estate falls into possession, unless, which is not the case here, some third person shall in the mean time have got into wrongful receipt of the rents; this being in certain cases treated by the Act as analogous to an actual disseisin. As, therefore, the rights of the reversioner, which are to be enforced [*126] *when the particular estate is determined, are certainly preserved, it seems impossible to imagine that those rights which exist as incidents to the reversion during the subsistence of that particular estate, could have been intended to be extinguished. The reason why, at the end of the ninety-nine years, the reversioner will be entitled to recover the land, is, that during that term the party in possession has been holding under the lease in question, one of the terms of which is, that he is to pay the rent reserved. The argument of the plaintiff goes to this, that, though the tenant is most undoubtedly holding under the lease, yet that lease is to be treated as if all that concerns the reservation of rent were struck out, and all the other provisions remained. The landlord will be bound by his covenants for title (unless made conditional on payment of rent by the tenant); he will also be bound by his covenants, if such there are, to build or repair, or furnish materials for building or repairing, and by all collateral engagements. The tenant, on the other hand, will be bound by his covenants as to cultivation, repairing, and the like; and this appears to us altogether inconsistent with the notion, that the Legislature meant to bar the reversioner of his right to recover the rent when due. A strong argument in favour of the construction which we have put on this Act may be drawn from the 9th section. It is there provided, that, where a party is in possession of land under a lease, on which a yearly rent not exceeding 20*s.* is reserved, and the rent shall have been received by some person wrongfully claiming the reversion, and no payment of rent shall have been afterwards made to the person rightfully entitled; there the right to distrain for rent, or after the termination of the term to bring an action to recover the land, shall be deemed to have first accrued when the rent was first received by the wrongful claimant, and no such right shall be deemed to have first accrued on the determination of the term. It was strongly argued on the part of the

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defendant, * that this amounts to a virtual recognition [*127] by the Legislature of the accuracy of the proposition for which he contends, namely, that where there is no receipt of rent by a party wrongfully claiming the reversion, there the right to the reversion, and to the rent as incident to it, remains unaffected. We think there is great force in this argument; and its weight may be much increased by considering what, upon the plaintiff's construction of the statute, would be the position of the reversioner if no rent should be paid for twenty years, and after that time a wrongful claim should be set up by some party not entitled. Mere non-payment of rent will certainly not bar the reversioner's right to recover the land at the end of the term. When, therefore, no rent has been paid for twenty years, the condition of the reversioner, according to the plaintiff's view of the law, is, that he has no possibility of obtaining payment of any further rent; but when the term is expired he will be entitled to recover the land. Suppose, then, that in this state of things a wrongful claimant should succeed in getting the tenant to pay rent to him, and that then, after twenty years, the term should expire; it is clear that, by the express provision of the 9th section, the right of the reversioner to the land would be barred; so that by the act of a party wrongfully obtaining rent to which he was not entitled, and which act the reversioner had, according to the plaintiff's argument, no possible means of contesting, the reversioner is at the end of the term deprived of what, but for such wrongful act, he would have been clearly entitled to, namely, his right to the possession of the land. On the view which we take of the law, no such anomaly exists; for the reversioner, by distraining for or otherwise obtaining his rent, within twenty years after the first wrongful receipt of it by the adverse claimant, effectually prevents his being, by the wrongful act of another, deprived of the estate at the expiration of the term.

* It is not unworthy of notice, that throughout the Act [*128] the receipt of rent is constantly mentioned in a mode which appears as if studiously designed to mark that the rent contemplated is not the ordinary rent reserved on leases for years — not that which is usually spoken of as the rents and profits, but something distinct from both. For instance, in the second section the language is: "When the person claiming such land or rent shall have been in possession or in receipt of the profits of

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such land, or in receipt of such rent;" and the same, or nearly the same, mode of expression is used throughout the Act. This is certainly not the ordinary mode of speaking of a person in actual possession of land, or in receipt of the rents reserved on leases for years. We do not rely very much on this argument, but the circumstance is worth adverting to.

It was pressed on the part of the plaintiff, that whatever question might have been raised as to the meaning of the word "rent," deducing that meaning from the second and subsequent section of the statute, yet that it was not competent to the Court to give to the word any but its most extended meaning, by reason of the express enactment in the first section — the interpretation clause. But we do not feel pressed by that argument, inasmuch as that clause expressly excludes from its operation all cases in which the context requires a less extended signification.

On the whole, therefore, we are of opinion, that the limitation by the 2nd section of the statute does not apply to the present case, and consequently that there must be judgment for the defendant. *Judgment for the defendant.*

ENGLISH NOTES.

The section of the Act 3 & 4 Will. IV. on which the above decision turns is repealed by The Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57); but, except that the period of twelve years is substituted for twenty years, the 1st section of the last-mentioned Act is identical with the 2nd section of the Act of 3 & 4 Will. IV.

In applying the above rule, it must be remembered that the mere circumstance that the rent is not statute barred, does not prevent any presumption of fact as to a release of the rent, which may arise from the fact of non-payment of a considerable rent for a lengthened period. Such a presumption is recognised as a possible one in *Eldridge* v. *Knott* (1774), Cowp. 214, and appears to be contemplated by the 65th section of the Conveyancing Act, 1881 (44 & 45 Vict., c. 41). The case of *Grant* v. *Ellis*, being decided on demurrer to a plea framed under the statute, decided, of course, nothing more than that the statute was not a bar.

Grant v. *Ellis* was discussed, and acknowledged to be good law in *Irish Land Commission* v. *Grant* (1884), 10 App. Cas. 14, 52 L. T. 228, 33 W. R. 357. The question there was as to tithe rent-charge, under the Irish Tithe Commutation Act (1 & 2 Vict., c. 109), which was held to be "rent" within the Statute of Limitations (3 & 4 Will. IV., c. 21).

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No. 24. — GAS LIGHT AND COKE COMPANY *v.* TURNER.

(C. P. 1839 AND EX. CH. 1840.)

RULE.

AN action will not lie to recover rent under a lease if it is shown that the premises were demised for an illegal purpose; although (probably) the landlord might succeed in an action to recover possession; as in that case he would not have to rely upon the illegal contract.

Gas Light and Coke Company v. **Turner.**

5 Bing. N. C. 666–678; 6 Bing. N. C. 324–329 (s. c. 7 Scott, 779; 8 Scott, 609).

Lease. — Illegal Purpose. — Rent.

It was held a good plea in covenant for rent, that the lease was [666] entered into by plaintiff and defendant, and that the premises were let to defendant for the express purpose of being used by defendant in drawing oil of tar and boiling oil and tar, contrary to the provisions of the Building Act.

The declaration stated, that on the 13th of August, 1833, by a certain indenture sealed with the common seal of the plaintiffs, and then made between the plaintiffs of the one part, and the defendant and one William Shackell and one Benjamin Hopkinson of the other part, the plaintiffs demised to the defendant and W. Shackell and B. Hopkinson, their executors, administrators, and assigns, certain tenements and premises with the appurtenances particularly described in the indenture, for the term of twenty-one years, at the yearly * rent of £300. Cove- [* 667] nant by the defendants to pay the same; and breach by non-payment. There was a second count upon an agreement under seal, bearing date the same day and year as the lease, and made between the same parties, by which agreement, after reciting the lease, the defendant covenanted that he would purchase of the plaintiffs at least 100,000 gallons of tar yearly, to be deliverable and paid for at the places and in the manner and proportions specified in the agreement. Breach, — refusal to purchase according to the agreement.

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Plea to the first count: that the indenture in that count mentioned was made after the making and passing of a certain Act of Parliament, made and passed in the twenty-fifth year of the reign of George III., intituled "An Act to amend so much of an Act passed in the fourteenth year of the reign of His Majesty, for the further and better regulation of buildings and party walls, and for the more effectually preventing mischiefs by fire within the cities of London and Westminster," &c., by which statute it was among other things enacted, "that from and after the 1st day of August, 1785, it should not be lawful for any person or persons within that part of Great Britain called England, to distil or boil any turpentine or tar, or to draw any oil of turpentine and rosin by distilling turpentine, or to draw any oil of tar or pitch by distilling or boiling tar, or to boil any oil and turpentine together, or to boil any oil and tar together, above the quantity of ten gallons at one time, of all or any of the said commodities, in any workhouse or place contiguous to any other building, or in any place nearer to any other building than the distance of seventy-five feet at the least (except in houses or buildings then in use for carrying on such manufactories, and then legally entitled to be used for those purposes), upon pain that every person offending [*668] therein should * for every such offence forfeit and pay the sum of £100:" that the said tenements and premises with the appurtenances in the indenture in the first count mentioned, were not, before or at the time of the making and passing of the Act, used for carrying on any such manufacture, and were not then legally entitled to be used for those purposes, or any of them: that at the time of the sealing and making of the indenture in that count mentioned, and from thence continually hitherto, the said tenements and premises with the appurtenances were situate and being in that part of Great Britain called England, and were each and all of them workhouses and places contiguous to other buildings, and in places nearer to other buildings than the distance of seventy-five feet: that the said indenture was made and entered into by and between the plaintiffs and the defendant, and W. Shackell and B. Hopkinson, in manner and form as in the first count mentioned; and the tenements and premises with the appurtenances in that count mentioned, were demised and let to the defendant and W. Shackell and B. Hopkinson, for the express purpose of being used for and applied to the drawing oil of tar or

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pitch by distilling and boiling tar, and of boiling oil and tar together, by them in larger quantities than the quantity of ten gallons at one time of the said commodities respectively, contrary to the form of the said statute; whereby the indenture was wholly void in law; and that, the defendant was ready to verify.

Plea to the second count: that the agreement made and indented as in that count mentioned, was made and entered into by and between the plaintiffs and the defendant, and W. Shackell and B. Hopkinson, after the making and passing of the Act of Parliament in the first plea mentioned, and in the introductory part of that plea recited; and that the tar and every part thereof in that agreement mentioned was to be supplied by the *plaintiffs, and sold to the defendant and W. Shackell and [*669] B. Hopkinson, for the express purpose of being distilled and boiled in and upon the said tenements and premises with the appurtenances in the first plea mentioned, and by the indenture in the first count mentioned demised to them, above the quantity of ten gallons at one time, contrary to the form of the said statute in the first plea mentioned; by means whereof, and by force of the said statute, the agreement was wholly void in law; and that, the defendant was ready to verify.

Demurrer to the first plea: that it did not distinctly appear, nor was it alleged by the plea, that the plaintiffs at the time of the making of the indenture in the first count mentioned, were cognisant of the purpose for which the lessees intended to use the demised premises: that no collateral agreement or otherwise was alleged by the plea to have been made by the plaintiffs and the lessees, that the said demised premises, or any part thereof, should be used for the purposes in the plea mentioned: that there was nothing alleged in the plea to show that the lessees were obliged to use the demised premises, or any part thereof, for the purposes mentioned in the plea; and that, by virtue of the said lease, the lessees were entitled to use the same for any purposes whatever: that an estate for twenty-one years passed to the lessees, and had not been and could not be divested out of them by any purposes to which they might have chosen to devote the premises: that the Act of Parliament in the plea mentioned did not render the lease invalid: and that it did not appear in and by the indenture that the premises were demised for the purpose in the first plea mentioned.

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To the second plea: that it was not alleged that the plaintiffs were cognisant of the purpose therein mentioned: that no such purpose appeared to have been expressed in or by the [* 670] agreement in the last count * mentioned; and that if any collateral agreement to that effect existed, it ought to have been set forth with precision in the plea, in order that the Court might judge how far the plaintiffs were implicated in the said alleged purpose: that the agreement in the last count mentioned was an executory agreement; and the lessees were bound to receive the quantities of tar therein mentioned, and to apply them to innocent and lawful purposes: that the lessees were not bound by the agreement, or otherwise, to consume the tar otherwise than in a lawful manner: that the lessees might, if they pleased, boil the tar in quantities of less than ten gallons at one time, or might resell the tar; and were not bound to violate the provisions of the Act: that the plea was uncertain, argumentative, and incomplete, in not precisely following the words of the Act, and in not precisely showing the situation of the premises therein mentioned, or the structure or position thereof: and that it did not appear in and by the agreement indented, that the tar was to be supplied by the plaintiffs and sold as in the plea mentioned, and for the purpose as in the plea mentioned.

Joinder.

[After argument, the Court took time for consideration.]

[673] TINDAL, Ch. J. — This is an action of covenant, in which the plaintiffs declare in the first count upon the [* 674] * covenant for payment of rent contained in a lease made by the plaintiffs to the defendant, and two other persons for twenty-one years from the 13th of August, 1833, of certain premises therein described. And in the second count the plaintiffs declare upon an agreement under seal, bearing date the same day and year as the lease, and made between the same parties as those between whom the lease is made, by which agreement, after reciting the said lease, the defendant covenanted that he would purchase of the plaintiffs at least 100,000 gallons of tar yearly, to be paid for and to be deliverable at the places and in the manner and proportions specified in the said agreement; and then proceed to assign three breaches on the said agreement.

The defendant pleads in answer to the first count, that the indenture therein mentioned was made after the passing of the

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statute 25 Geo. III., c. 77, by which it is enacted, that it should not be lawful for any person to distil or boil any turpentine or tar, &c., above the quantity of ten gallons at one time, in any workhouse or place contiguous to any other building, or in any place nearer to any other building than the distance of seventy-five feet at the least (with an exception, the application of which to this case is negatived by the plea), upon pain of forfeiting for every such offence £100. And the plea then proceeds to aver, that the said tenements and premises were and are contiguous to other buildings, and in places nearer to other buildings than the distance of seventy-five feet; "and that the said indenture was made and entered into by and between the plaintiffs and the defendant, and the other two persons, in manner and form as in the said first count mentioned; and the said tenements and premises with the appurtenances were demised to the defendant and the said two other persons, for the express purpose of being used for and applied to the boiling of oil and tar together, &c., by the *said defendant and the two other persons, in larger [*675] quantities than the quantity of ten gallons at one time of the said commodities respectively, contrary to the form of the said statute, whereby the said indenture was and is wholly void in law." To this plea the plaintiffs have demurred in law. And it becomes unnecessary to advert to the second count and the plea thereto, as the point raised upon it by demurrer must necessarily be governed by the decision upon the first count.

The objection that has been urged on the part of the defendant is, that this is an action founded upon a contract, and that a Court of law will not lend its aid to enforce the performance of a contract between parties, which appears, upon the face of the record, to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. And we think, both from authority and reason, this objection must be allowed to prevail. That no legal distinction can be supported between the application of this objection to parol contracts and to contracts under seal, appears the necessary inference from the cases of *Collins* v. *Blantern*, 2 Wils. 348, and *Paxton* v. *Popham*, 9 East, 408, in both which cases the principle above laid down was acted upon by the Court, and in each of which the action was upon bond; and it would indeed be inconsistent with reason and principle to hold, that by the mere cere-

mony of putting a seal to an instrument, that is, by the voluntary act of the parties themselves, a contract which was void in itself on the ground of its being in violation of the law of the land, should be deemed valid, and an action maintainable thereon, in a Court of justice.

Nor do we see any force in the objection made in the course of the argument, that the plea does not sufficiently [* 676] * allege that the plaintiffs were parties to the making of the lease for the purpose averred in the plea; for the allegation, "that the tenements and premises were demised to the defendant for the express purpose," &c., necessarily implies, and even in a more especial manner declares, that the express purpose was the purpose of the party who made the demise, that is, of the plaintiffs.

Now, we cannot distinguish the case before us, upon principle, from that of *Lightfoot* v. *Tenant*, 1 Bos. & P. 551 (4 R. R. 735). In that case the question arose upon a plea, stating the statute 7 Geo. I., c. 21, by which it is enacted that all contracts and agreements made by any of His Majesty's subjects for the loan of any money by way of bottomry on any ship or ships in the service of foreigners, and bound or designed to trade to the East Indies; "and all contracts and agreements whatsoever made by any of His Majesty's subjects, or any person or persons in trust for them, for the loading or supplying any such ship or ships with a cargo or lading of any sort of goods or merchandises," &c., shall be void; and it was then alleged by the plea in that action, and found by the special verdict, that the plaintiff sold goods to the defendant in London, well knowing that the same were intended to be, and in order that they might be, carried by the defendant to Ostend, to be thence shipped on board ships destined to trade to the East Indies without license from the East India Company, and to be carried to Calcutta, and there sold; and that the bond which was declared upon was given for the price of these goods; and this plea was held to be an answer to an action for the price of the goods. In that case it was argued, that after the goods were once delivered to the buyer he might change his mind, and use [* 677] them in a different * manner from that which was originally designed; as here, that the tenant might put the premises to a use different from that for which they were let; but it was answered, that the entering into the contract with the ille-

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gal intent tainted the contract with illegality, and prevented an action from lying thereon. And again, the case of *Langton and others* v. *Hughes and another*, 1 M. & S. 593 (14 R. R. 531), lays down the same rule of law. There the sale of drugs to the defendants, which the plaintiffs knew were intended to be used in the defendants' brewery, in violation of the 42 Geo. III., c. 38, s. 20, by which the brewer is prohibited from using anything but malt and hops in the brewing of beer, was held to be a contract on which the plaintiffs could not sue. In that case also, it was argued, that the statute neither prohibited the selling the articles nor the buying them, but only the purpose for which they were used; and that the subsequent user was a matter over which the seller had no control. But it was observed by BAYLEY, J., in giving his judgment, "that the case of *Lightfoot* v. *Tenant* answers almost all the arguments urged for the plaintiffs;" and the later authority of *Cannan* v. *Bryce*, 3 B. & Ald. 179 (22 R. R. 342), appears to us to go the full length of supporting the principle above laid down.

It was observed in the course of the argument for the plaintiffs, that, as they had granted a lease for twenty-one years, such term was vested in the defendant, and that he would be able to hold himself in for the remainder of it without payment of any rent. That point is not now before us; but, without giving any opinion how far the position is maintainable, it is obvious that, if an ejectment should be brought upon the breach of any condition in the lease, the action of ejectment would, at all events, be free from the objection * that the Court was lending its aid to [* 678] enforce a contract in violation of law.

And, further, if an ejectment were brought by the lessors to recover possession, on the ground that the lease was void, it might be difficult for the lessee to maintain his right to hold under the lease, after having pleaded in the present action, in which he and the lessors were parties, that the indenture was void, and obtained the judgment of the Court in his favour on that plea. Without, however, giving any opinion on that point, we think, for the reasons before given, that the defendant is entitled to judgment on this record. *Judgment for defendant.*

[A writ of error having been brought from the judgment of the Court of Common Pleas:—]

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[6 Bing. N. C. 326] R. V. Richards, on behalf of the plaintiffs, argued, that the lease itself disclosed no illegal purpose, and that the terms of it could not be varied by evidence *dehors* the instrument: that if there had been an illegal purpose, the defendant was not bound to carry it into effect, but rather to abandon it, and apply the premises, as he might have done, to a legal purpose: that there was no allegation of the illegal purpose having ever been carried into effect, or at least of the plaintiffs' having any cognisance of such a proceeding: that the lease itself was an executory and legal contract, and that, in the cases in which the Courts had refused to enforce a contract on the score of illegality, the contract itself had been illegal and executed, and the party seeking to enforce it had been himself privy to the illegality. *Little* v. *Poole*, 9 B. & C. 192 (32 R. R. 630); *Law* v. *Hodson*, 11 East, 300 (10 R. R. 513); *Bensley* v. *Bignold*, 5 B. & Ald. 335 (24 R. R. 401); *Brown* v. *Duncan*, 10 B. & C. 93; *Langton* v. *Hughes*, 1 M. & S. 593 (14 R. R. 531); *Clugas* v. *Penaluna*, 4 T. R. 466 (2 R. R. 442); *Armstrong* v. [* 327] * *Lewis*, 2 Cro. & M. 274, 4 M. & Scott, 1. But in *Bowry* v. *Bennett*, 1 Camp. 348 (10 R. R. 697), an action for the price of apparel was held to lie against a prostitute, notwithstanding the plaintiff knew her way of life; and Lord ELLENBOROUGH said, "It must not only be shown that he had notice of this, but that he expected to be paid from the profits of the defendant's prostitution, and that he sold the clothes to enable her to carry it on." At all events, the contract was sufficient to pass an estate and bind the defendant to the payment of rent, for the plaintiffs could not recover in an ejectment resting on the illegality of their own contract. *Doe d. Roberts* v. *Roberts*, 2 B. & Ald. 367 (20 R. R. 477); *Lord* v. *Wardell*, 3 Bing. N. C. 680. In *Lightfoot* v. *Tenant*, 1 Bos. & P. 551 (4 R. R. 735), on which the Court below mainly relied, the contract on which the plaintiff sued was expressly declared void by the statute 7 Geo. I., c. 21. Here the lease was a legal contract, and the plaintiffs ought not to suffer for any illegal conduct of the defendant of which they might be ignorant, and in which they could take no part.

Petersdorff, *contra*, was stopped by the Court.

ABINGER, C. B. — All the decisions show, that, at common law, a contract entered into to effect an illegal purpose is void, and cannot be enforced; and it makes no difference that this contract

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is under seal. It seems to me to be a void lease, having been granted expressly for an illegal object: that is not denied, but is admitted by the demurrer. It is true that you cannot add to a contract under seal anything to vary the contract; but you may show *dehors* the instrument that such contract was entered into for an illegal purpose: such proof * does not vary the [* 328] terms of the contract, but merely shows the illegal object. But I apprehend the lease here is part of the illegal contract: the plaintiffs having agreed that the defendant should manufacture this tar, oil, and other illegal matters, upon the premises, the lease is executed for the purpose of enabling the party to carry on that intended project, and I think you cannot disconnect it. According to the cases cited, where a party has granted a lease providing for the execution of an unlawful thing, it makes no difference as to the illegality of the contract that the unlawful act has not been carried into effect: it appears to me, therefore, that there is no reason for reversing the judgment of the Court of Common Pleas.

LITTLEDALE, J. — I am entirely of the same opinion. Mr. Richards relies on the circumstance of the pleas containing no allegation that the unlawful object had been carried into effect; but if parties enter into a contract, you must take it that they enter into such contract to all its extent. It is true that the lease does not mention the purpose for which it was executed; but I apprehend it may be proved by evidence *dehors* the lease that the object of the parties was the carrying this purpose into effect, it having been pleaded that such was their object, and that allegation not having been denied. If the illegal object had been carried into effect, and the plaintiffs had taken issue upon the plea that the contract was entered into for an illegal purpose, the only difference would have been that the plaintiffs would have been beaten upon that issue of fact. It does not signify, as regards the sufficiency of the plea, whether the void contract has been carried into effect or not. In this case the plea expressly alleges that the indenture was entered into by and between the plaintiffs and the defendant, and the * premises were demised for the express pur- [* 329] pose of illegally drawing oil of turpentine. I apprehend the contract is equally illegal, whether the object of the parties was carried into effect or not. In my judgment the plea is good; and the decision of the Court of Common Pleas ought to be affirmed.

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PARKE, B. — I am of the same opinion as to those points that have been alluded to by my learned brothers; and as to the argument that the plaintiffs would not be entitled to recover in ejectment, that forms no part of the question to be decided by the Court.

PATTESON, J. — I am of the same opinion. Certainly this case may go further than any that is to be found in the books, but I think it is quite right that it should.

GURNEY, B., and COLERIDGE, J., concurred.

Judgment affirmed.

ENGLISH NOTES.

The above rule is only an application of the more general principles which have been fully treated under section V. of "Contract," 6 R. C. 325–476. See in particular the rules under Nos. 31 and 32, 6 R. C. 325, 337, and Nos. 42 and 43, 6 R. C. 477–492.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sect. 222, and the doctrine of the Rule, in cases where the lessor knew at the time of the execution of the lease that the premises were to be used for an illegal purpose, is asserted (or implied) in *Way* v. *Reed*, 6 Allen (Mass.), 364; *Kreiss* v. *Seligman*, 8 Barbour (N. Y. Sup. Ct.), 439; *Mitchell* v. *Scott*, 62 New Hampshire, 596; *Ralston* v. *Boady*, 20 Georgia, 449; *Sortwell* v. *Hughes*, 1 Curtis (U. S. Circ. Ct.), 244; *Hill* v. *Spear*, 50 New Hampshire, 253; *Aiken* v. *Blaisdell*, 41 Vermont, 665; *Sherman* v. *Wilder*, 106 Massachusetts, 537; *Commonwealth* v. *Harrington*, 3 Pickering (Mass.), 26. Some of these cases are of sales of goods; as to which see note, *ante*, vol. 6, p. 335.

A lease for the purpose of keeping a bowling alley was held void in *Updyke* v. *Campbell*, 4 E. D. Smith (N. Y. Com. Pl.), 570. The Court however declared "that mere knowledge that the lessee would use the premises in violation of the statute is not sufficient to avoid the lease, unless the lessor was a party to such intent, and did some act in aid and furtherance of the intended violation of the law." And so in *Miller* v. *Maguire*, 18 Rhode Island, 770. In *Ernst* v. *Crosby*, 140 New York, 367, the Court said: "If the lessor of premises knows and intends that they will or may be used for unlawful purposes, the lease is void, and the obligations of the parties will receive no aid from the Courts for their enforcement." "Rent should not be recovered for a house knowingly let to a person who will use it or who does it, for the depraved and immoral purposes of prostitution." *Hunstock* v. *Palmer*, 4 Texas Civ. App. 461, citing *Dougherty* v. *Seymour*, 16 Colorado, 289.

A partnership formed to lease premises for the purpose of prostitution is based upon an unlawful contract. *Chateau* v. *Singla*, 114 California, 91; 33 Lawyers' Rep. Annotated, 750.

The agent's knowledge is not to be attributed to the principal. *Stanley* v. *Chamberlin*, 39 New Jersey Law, 565.

No. 25. — Baker v. Holtpzaffell. — Rule.

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The mere avowal of the lessee of his purpose to use the premises for a bawdy house does not justify the landlord in repudiating the contract. *O'Brien* v. *Brietenback*, 1 Hilton (N. Y. Com. Pl.), 304.

A contract for the sale of a house is not rendered void by the vendor's knowledge that the vendee intends it as a residence for his kept mistress. *Armfield* v. *Tate*, 7 Iredell Law (Nor. Car.), 258. The Court said: "The case cited by the defendant's counsel was not like this case; there the lessor stipulated in the lease of his rooms that the lessee might use them as a brothel. The Court held that he could not recover the rent, because such a contract was against good morals, and void as being against public policy."

In *Jackson* v. *Walker*, 5 Hill (N. Y. Sup. Ct.), 27, there was an agreement to keep open a "log cabin" in Broadway, in the city of New York, contrary to the election law, it being part of the agreement that the building should be used for the promotion of the success of the Whig party (in 1840, General Harrison being its candidate for the presidency), and the agreement was held void. This was affirmed in the Court of Errors by a tie vote (7 Hill, 387).

It was held that the lease of a hall was not binding on the lessor after he learned that it was to be used for the delivery of lectures attacking the fundamental principles of Christianity. *Pringle* v. *Corporation*, 43 Up. Can. Q. B. 258.

No. 25. — BAKER *v.* HOLTPZAFFELL.

(C. P. 1811.)

No. 26. — LOFFT *v.* DENNIS.

(Q. B. 1859.)

RULE.

THE destruction by fire of premises held under a written agreement is no defence against an action for rent, nor is the tenancy determined although the premises are rendered useless and the tenant has in fact ceased to occupy them.

Nor does the mere circumstance that the landlord has insured and received the insurance money create, as between himself and the tenant, any obligation to rebuild or to remit the rent.

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Baker v. Holtpzaffell.

4 Taunt. 45, 46 (13 R. R. 556).

Landlord and Tenant. — Destruction by Fire. — Rent.

[45] The landlord of premises demised under a written agreement may recover against his tenant, in an action for use and occupation, the rent accruing after the premises are burnt down, and no longer inhabited by the tenant.

Action for the use and occupation of certain premises in Long-Acre. At the trial before MANSFIELD, Ch. J., at the Westminster sittings, in this term, a verdict was found for the plaintiff for three quarters of a year's arrears of rent. It appeared that very shortly after the accrual of the first quarter's rent the premises had been consumed by fire, and since that time had been in a ruinous state and not inhabited by the defendant. An agreement, not by deed, was given in evidence, by which the defendant agreed to pay the rent during the demise of the term specified in the agreement.

Shepherd, Serjt., moved to set aside the verdict, except as to the first quarter's rent, on the ground that the action for use and occupation does not lie for premises which no longer exist, and therefore cannot be said to be occupied; but in such case the landlord must resort to his agreement, in order to entitle himself to the rent. He contended that as the Stat. 11 Geo. II., c. 19, s. 14, which gave this form of action for use and occupation, enables the landlord to recover a satisfaction for such premises as are held or occupied by the defendant, it must be implied from thence that [* 46] it was not meant * to be extended to premises which, so far from being held or occupied by the defendant, were not even capable of occupation.

MANSFIELD, Ch. J. — The land was still in existence, and there was no offer on the part of the defendant to deliver it up.[1] The landlord could not enter to rebuild, the tenant might have rebuilt the premises if he had so pleased, and occupied them at any time within the term, he therefore must be taken still to hold the land, which is sufficient to satisfy the words of the statute.

[1] But see *Holtpzaffell* v. *Baker*, 18 Ves. 116, where the plaintiff in equity did offer to surrender his term, praying relief from this action; but Lord ELDON, Chancellor, held he was entitled to no relief, although the agreement contained an engagement by the tenant to repair the premises and keep them in repair, "reasonable use and wear, and damage by fire excepted."

No. 26. — Lofft v. Dennis, 28 L. J. Q. B. 168, 169.

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HEATH, J. — This point has frequently been decided at Nisi Prius, though I do not recollect any case reported. The defendant might have rebuilt at any period of the term, whereas the landlord would have been a trespasser if he had entered for that purpose, which shows that the former held the land.

PER CURIAM, *Rule refused.*

Lofft and others v. Dennis.

28 L. J. Q. B. 168–172 (s. c. 1 Ell. & Ell. 474).

Landlord and Tenant. — Destruction by Fire. — Action for Rent. — Insurance by Landlord. [168]

To a declaration in an action for use and occupation, the defendant pleaded, upon equitable grounds, that (except so far, &c.) before the commencement of such use and occupation, he had become tenant of the premises and of certain buildings standing thereon; that by reason of such buildings standing thereon, he agreed to pay a larger rent than he otherwise would have done; that the plaintiffs had insured such buildings against damage by fire, by the terms of which insurance it was stipulated that in case of damage by fire, the insurance office might either pay to the plaintiffs the amount of damage or might rebuild and reinstate the buildings; that the said buildings were accidentally destroyed by fire, whereby the value of the premises * to the defendant [*169] was much lessened; that but for that insurance by the plaintiffs the defendant would have insured the buildings against damage by fire, but that by reason of his belief that in case of destruction by fire the same would be rebuilt and restored by the said office, or by the plaintiffs through the insurance money, he was induced not further to insure the same; that the plaintiffs chose to receive and had received the money from the insurance office, and that the buildings had not been rebuilt or reinstated, although the said insurance money was sufficient for that purpose; that the value of the premises was much lessened, and that the value of the use and occupation in respect whereof the plaintiffs claimed was deteriorated and reduced, and did not exceed the sum of £120, which sum was brought into Court: *Held*, upon demurrer, that this was a bad plea.

Declaration for money payable by the defendant to the plaintiffs for the use of a messuage or farm-house, lands and hereditaments of the plaintiffs, and for money found to be due on accounts stated.

The defendant pleaded, fourthly, as follows: and for a plea on equitable grounds, as to so much of the plaintiffs' claim as relates to the use by the plaintiffs' permission of the said messuage or farm-house, lands and hereditaments, with the appurtenances, in the said declaration mentioned (except as to so much of the said claim in that behalf as relates to the sum of £120, parcel of the said claim), the defendant saith, that before the time of the com-

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mencement of such use, and before accrual of the plaintiffs' claim in respect thereof, the defendant had become and was tenant to the plaintiffs of the said messuage and premises, which consisted, among other things, of divers buildings, standing and being thereon and parcel thereof, and necessary for the convenient and proper use and enjoyment thereof, and which greatly added to the value thereof, and to the value of the use and enjoyment thereof, and by reason whereof the defendant under the said terms of such tenancy had agreed to pay the plaintiffs a larger rent therefor than he otherwise, and but for the premises, would have done, as the plaintiffs well knew; which said buildings, during the said tenancy, and before and at the time of the destruction of the said buildings by fire, as hereinafter mentioned, had been and were insured, to wit, by the plaintiffs, for a large sum of money, to wit, £1000, against damage thereto by fire, in and by a certain insurance office in that behalf, by the terms of which insurance it was stipulated, among other things, that in case of damage to the said buildings, or any of them by fire, the said insurance office might either pay to the insured the amount of the damage occasioned to such buildings by fire or might rebuild, restore, or reinstate the buildings which should or might be so damaged; and the defendant further saith, that the said tenancy continued during such insurance, and that during the said tenancy and insurance divers and several of the said buildings were accidentally and without the default and against the will of the defendant damaged and destroyed by fire, within the intent and meaning of such insurance, whereby the value of the said messuage and premises and the value of the use and occupation thereof was much lessened and deteriorated, whereof the plaintiffs have always had notice; and the defendant further saith, that but for such insurance having been effected, he the defendant would have insured and kept insured the said buildings against damage by fire in some insurance office, and that by reason of such insurance and relying thereon, and on the faith and confidence that in case of the damage or destruction of the said buildings by fire, the same would be rebuilt and restored by the said insurance office, or the plaintiffs through the said insurance money, he the defendant hath been and was induced not further to insure the same; that the plaintiffs, instead of assenting, electing, and choosing to have the said buildings (so damaged and destroyed) reinstated, rebuilt, and repaired by the said insurance

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office, preferred and chose to receive and have received from the said insurance office the amount and value of the damage so occasioned to the said buildings, by the said fire, to wit, the sum of £1000, being the amount of the said insurance money from the said office, and the said buildings so damaged and destroyed were not nor have been rebuilt, reinstated, or restored, nor * hath any part of the said insurance money been laid out [* 170] in rebuilding, reinstating, or restoring the same, or any part thereof, either by the said office or the plaintiffs, or either of them; and the same before and during the time in respect whereof the plaintiffs claim for the use of the said messuage and premises were respectively unbuilt, unreinstated, and unrestored, although the said insurance money so received as aforesaid by the plaintiffs was sufficient for the purpose, and the defendant was always ready and willing to have had the same rebuilt, reinstated, and restored, whereof the plaintiffs had notice. And the defendant further saith, that before the commencement of the said use of the said premises, and after the receipt of the said insurance money by the plaintiffs, they were by and on the behalf of the defendant, requested to rebuild, reinstate, and restore the same. And the defendant further saith, that the claim of the plaintiffs, as to which this plea is pleaded, is in respect of the defendant's use and occupation of the said premises under the said tenancy and the terms thereof, after such fire and after the destruction of the said buildings so burned and destroyed, and whilst the same remained and were so destroyed, unbuilt, and unrestored, and after the receipt by the plaintiffs of the amount of the said insurance money. And the defendant further saith, that by reason of the said fire and the said destruction of the said buildings thereby, the value of the use and occupation of the said premises in respect whereof the plaintiffs claim, and under the said tenancy and the terms thereof, has been and was deteriorated and reduced to, and did not nor doth exceed, the sum of £120, which sum hath been brought into court. And the defendant further saith, that the plaintiffs are now suing, so far as relates to the matters to which this plea is pleaded, contrary to equity and good conscience and in order to compel the defendant to pay the accustomed rent under the terms of the said tenancy when the buildings existed and before the destruction thereof in the manner aforesaid, and without allowing any reduction or abatement therefrom in respect of the matters aforesaid, and

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although the use and occupation thereof by the defendant, and in respect whereof the plaintiffs' claim hath been and is after the said destruction of the said buildings by fire, and whilst the same were unrestored and unbuilt, and after the said receipt by the plaintiffs of the said insurance money, and after the neglect and refusal of the plaintiffs to rebuild, reinstate, and restore the same.

The plaintiffs demurred to this plea; and also replied that the said insurance office was not ready and willing to reinstate, rebuild, or repair the said buildings so damaged and destroyed as aforesaid, and would not reinstate, rebuild, or repair the same, nor did the plaintiffs hinder or prevent their reinstating, rebuilding, or repairing the same; and it was not in the option or election of the plaintiffs to have the same reinstated, rebuilt, or repaired by the said insurance office.

Demurrer, and joinder in demurrer.

Phipson (J. Kay with him), for the defendant. — The plea is a good plea on equitable grounds, and discloses such matter as would induce a Court of equity to give relief. It must be admitted that the case of *Leeds* v. *Cheetham*, 1 Sim. 146, 5 L. J. Ch. 105, appears to be an authority in favour of the plaintiffs, and that it shows that the VICE-CHANCELLOR, who decided it, would hold, under the circumstances disclosed in this plea, that a Court of equity would not interfere. It was held in that case that a tenant has no equity to compel his landlord to expend money received from an insurance office, on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt. There is a slight distinction between that case and the present, because there the tenant had covenanted to repair the premises; but that distinction, no doubt, cannot be much relied upon.

[Lord CAMPBELL, Ch. J. — That being a solemn judgment of the VICE-CHANCELLOR, we are bound by it. In *Cornill* v. *Hudson*, 27 L. J. Q. B. 8, which came before the Court upon the Statute of Limitations, a judgment of KINDERSLEY, V. C., in a point precisely analogous, was brought to our attention; and we considered it
[* 171] was binding, as being * a decision of a Court of co-ordinate jurisdiction.]

But the decision in *Leeds* v. *Cheetham* appears not to have been accepted as satisfactory, for in Lord St. Leonards' Handy Book, 1st ed., p. 101, it is written: "If, therefore, you mean that a tenant

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at rack-rent shall insure at his own costs, you must make him agree to do so by the contract. If you omit this, the lease must be so framed as to exempt him from making good accidents by fire. But even in this case you are not bound to insure; and although the house should be burnt down, yet the tenant must continue to pay the rent; so that each bears his burden; you lose your house, and the tenant loses his rent during the term. If however you have insured, although not bound to do so, and received the money, you cannot compel payment of the rent, if you decline to lay out the money in rebuilding." No authorities are cited for the position, but in *Brown* v. *Quilter*, Amb. 620, where an action had been brought for rent, and the defendant filed a bill for an injunction, and to compel the landlord either to rebuild the house which had been burnt down, or to pay the insurance money to the plaintiff, Lord NORTHINGTON, L. C., said, "Though this covenant does not extend to oblige the defendant to rebuild, yet, when an action is brought for rent after the house is burnt down, there is a good ground of equity for an injunction, till the house is rebuilt."

[CROMPTON, J. — The absolute relief was not granted, but it was offered to the tenant if he would give back his lease.]

In *Hare* v. *Groves*, 3 Anst. 687 (4 R. R. 835), *Brown* v. *Quilter* was brought to the attention of the Court, and commented on. The plaintiffs have actually received the insurance money, and the defendant ought not to be called upon to pay more than a *quantum valebant* upon the premises which have not been burned. In *Holtpzaffell* v. *Baker*, 18 Ves. 115, it was held, that there was no equity in favour of a lessee of a house, liable to repair, with the exception of damage by fire, for an injunction against an action under the contract for payment of rent, upon the destruction of the house by fire; but there there had not been any insurance or receipt of money, and upon these pleadings it is admitted that the defendant would have insured if the plaintiffs had not.

Godfrey, for the plaintiffs, was not heard.

Lord CAMPBELL, Ch. J. — I think that we are bound to give judgment for the plaintiffs, and to hold that the plea is bad. By the law of Scotland, if premises are burnt down by an accidental fire, the tenant is relieved from payment of the rent; but that is not so by the law of England, according to which, if there is an absolute covenant to pay rent, such covenant must be performed;

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and, where an action is brought for the rent, it is clearly no ground for the interference of a Court of equity, that the premises have been burnt down. Then, does any ground for interference arise from the fact that the landlord has insured the premises, and has received the money? I think not; the landlord may have acted unhandsomely, or he may have acted harshly; but there is no equity which prevents him from getting his rent from the tenant, and there is no ground for interference. It seems that the case of *Leeds* v. *Cheetham*, where this question was determined, is in point, and the decision has not been overruled. We are bound by it, and if the defendant wishes to have it overruled, he must go to a Court of error; but I entirely agree with it, and I see no difference between the plaintiffs getting this money, and their getting a sum of money, for instance £20,000, as a present from any person for the purpose of paying for the repair of the premises, or if they got it by means of a lottery, because there is no privity between the defendant and the insurance office. I am inclined to pay much respect to the opinion of Lord St. Leonards, as expressed by him in his Handy Book, but that which he states in the passage referred to does not appear to have been made law hitherto; if it were so, I should support it.

WIGHTMAN, J. — There is no doubt that, in law, a tenant is liable to pay rent for the buildings which he occupies, though they have been burnt down by an accidental fire; but it is said, that where the landlord has received funds from the insurance [*172] * office which might be employed in rebuilding the premises, enough is done to lay a foundation for the interference of a Court of equity. It seems to be admitted, that there is no substantial difference between money obtained in this way and money which might be got from any person who was disposed to assist the plaintiffs in rebuilding the premises which were burnt; but it is said that the plaintiffs were bound to lay out the money in that way. There is one authority which is directly opposed to this view, and by that authority we are bound. There must be judgment for the plaintiff.

CROMPTON, J. — I am of the same opinion. It would be sufficient, in deciding this case, if we went upon the principle laid down in the late decisions in the Courts of law, that a case must be made out for an order of a Court of equity for absolute relief, for in this case no such order would be made. It would also be

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sufficient to say that there is a directly conclusive authority to which we must bow. But I must say, that if it had not been for the passage in Lord St. Leonards' Handy Book, I should not have felt any difficulty in the case. There was no agreement to insure the premises, nor anything to show any obligation to insure; but it merely appears that the plaintiffs chose to do so, and then the tenant says, "Well, if you are going to insure, I will not." If any inducement had been held out to the defendant not to insure the premises, the case might have been different, but there does not appear to have been anything of that sort.

HILL, J. — I am of the same opinion. This case differs from those which have been relied upon. According to the case of *Brown* v. *Quilter*, Lord NORTHINGTON seems to have thought, that if the tenant was willing to give up his lease, and consent to its being cancelled, the relief might be given; but here the defendant does not bring himself within the terms of that case; he does not offer to give up the tenancy. It may be that the landlords insured the premises, because they intended, if they should be burnt down, to rebuild them in some other form, and for a different purpose. I agree with what has been said by the rest of the Court, and I think that we are bound by the decision of LEACH, V. C. There ought, therefore, to be judgment for the plaintiffs.

Judgment for the plaintiffs.

ENGLISH NOTES.

These cases show the strongest reason for the tenant to see that he is insured by an express contract for his own benefit. It is indeed suggested in Woodfall's Landlord and Tenant (15th ed. p. 435) that the tenant may take advantage of the Act 14 Geo. III. c. 78, s. 83, which requires the governors of an insurance office, "upon the request of any person interested," to cause the insurance money to be laid out towards rebuilding. But, assuming that the tenant is a "person interested" within the Act, it seems still clear that he has no remedy if the office has paid over the money to the landlord, without any such request having been made.

AMERICAN NOTES.

Baker v. *Holtpzaffell* is cited in Taylor on Landlord and Tenant, sect. 645, and both principal cases at sect. 329, citing *Carter* v. *Rockett*, 8 Paige (N. Y. Chanc.), 437, a case of mortgagor and mortgagee.

There is no doubt that the doctrine of the Rule prevails in these States except where the hardship has been relieved by statute. To the first branch

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of the Rule it is sufficient to cite *Gates* v. *Green*, 4 Paige Chancery (N. Y.), 355; 27 Am. Dec. 68; *Pollard* v. *Shaafer*, 1 Dallas (Penn.), 210; 1 Am. Dec. 239 (occupation of house in Philadelphia by alien enemy in 1777); *Hallett* v. *Wylie*, 3 Johnson (N. Y.), 44; 3 Am. Dec. 457; *Linn* v. *Ross*, 10 Ohio, 412; 36 Am. Dec. 95; *Womack* v. *McQuarry*, 28 Indiana, 103; 92 Am. Dec. 306; *Smith* v. *Kerr*, 108 New York, 31; 2 Am. St. Rep. 362; *Cowell* v. *Lumley*, 30 California, 151; 2 Am. Rep. 430; *Sheets* v. *Selden*, 7 Wallace (U. S. Sup. Ct.), 423.

In *Gates* v. *Green*, *supra*, Chancellor WALWORTH observed: "It appears to me a principle of natural law, that a tenant who rents a house or other tenement for a short period, and with a view to no benefit except that which may be derived from its actual use, should not be compelled to pay rent any longer than the tenement is capable of being used." Then after dropping into the laws of Scotland, Napoleon, Sesostris, and Newfoundland, and observing "that some of the English Chancellors struggled hard to introduce this principle of natural law into the administration of justice in their Courts," he concludes: "A contrary principle however finally prevailed in the equity Courts of England, as well as in the Courts of law. And it must now be considered as settled, both in England and in this State, that a lessee of premises which are burned, has no relief against an express covenant to pay the rent, either at law or in equity, unless he has protected himself by a stipulation in the lease, or the landlord has covenanted to rebuild." Kent reaches the same conclusion (3 Com., p. 465), pronouncing it an interesting question, and giving an instructive account of the long discussion in the English courts, citing *Baker* v. *Holtpzaffell*, and *Hare* v. *Grove*, 3 Anst. 687; and Judge HOLMES, his editor, adds *Fowler* v. *Bott*, 6 Massachusetts, 63; *Wagner* v. *White*, 4 Harris & Johnson (Maryland), 564. In *Hallett* v. *Wylie*, *supra*, the Court said: "We think it may safely be said, that there is not a case in the books where the destruction of the demised premises by fire has been held to excuse the tenant from the payment of rent;" citing several English cases.

It would seem that a just distinction might be drawn between a lease of a farm and that of a city lot. In the former case, the destruction of a building would still leave the land for its customary agricultural purpose, but in the latter it would prove but a small mitigation of the city tenant's misfortune to be told that he might plant potatoes in the cellar of the ruined house in which he had sold merchandise. In *Cooyan* v. *Parker*, 2 South Carolina, 255; 16 Am. Rep. 659, the defence was that the tenant had been deprived of the enjoyment of the premises by the casualties of the civil war. The Court adopted the doctrine "that where there is a substantial destruction of the subject-matter, out of which rent is reserved in a lease for years, by an act of God, or of public enemies, the tenant may elect to rescind, and on surrendering all benefit thereunder, shall be discharged from the payment of rent." This decision contains the most exhaustive and valuable review of the authorities to be found in the American books. *Baker* v. *Holtpzaffell* is cited with the remark that it "was decided on the ground that there had been no steps taken by the tenant in order to make a rescission effectual," and "Lord

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MANSFIELD put the decision upon the distinct ground that the tenant had made no offer to deliver up the premises. This case would lead to the conclusion that at that time it was not fully settled that a loss by fire conferred no right on the tenant to rescind;" and the Court cite *Brown* v. *Quilter*, Ambler, 619, as "no mean support to the more general position contended for," and continue: "In *Taverner's Case* there appears to have been a struggle between the inclinations of the common lawyers to dispose of such cases by an arbitrary rule, recommended by its simplicity and convenience of application on the one hand, and the force of the inherent equity and justice of the claim of apportionment on the other hand, in which the latter prevailed."

So where a lease covered personal property as well as real, and the personalty formed a substantial part, the tenant was allowed an abatement of the rent equivalent to the proportionate rental value of the personalty, where the buildings and personalty were totally destroyed by fire. *Whitaker* v. *Hawley*, 25 Kansas, 674; 37 Am. Rep. 277. The Court cited *Taverner's Case*, and *obiter* doubted that the general common-law rule prevailed in that State. BREWER, J. (now Mr. Justice BREWER of the United States Supreme Court), expressed this doubt as follows: "With regard to the first question, there can be little doubt that if it were presented as a new question to the Courts, the general rulings would be against the common-law doctrine. For while the argument in support of it is brief and clear, yet the practical application of the doctrine works injustice. It assumes that which is not generally true, and ignores that which is ordinarily the underlying fact. A man leases and contracts to pay rent. He puts no limitations or conditions in his contract. Therefore the Courts should insert none, and should hold him to the very letter. He knew of the possibility of destruction by fire, and if he purposed to pay only until such destruction, he should have inserted a stipulation accordingly. Omitting any such stipulation, he intended no such limitation, but meant himself to assume the risk, and contracted for rent during the entire term. Now this argument is clear and strong, and if we abide by the letter of the contract, unanswerable. But this assumes, what is not generally true, that the matter of fire enters into the thought of the parties. In nine cases out of ten, the possibility of fire is not contemplated. A party sees a store suitable for his business, or a house pleasant for a home, and if time and terms are satisfactory, he leases. Often no written contract is signed. And when a written lease is prepared, he looks simply to the amount of rent and the length of the term named. He may indeed examine it to see that nothing objectionable is inserted, but he seldom notices the omission of a stipulation for which there is apparently no present need. Destruction by fire is an unthought-of contingency. The fact is, the parties negotiate for the possession of the building during the entire term. This underlies the whole thought of lease, just as fully as when they negotiate for the hiring of a horse, or of a steamboat, or any other chattel. If fire is thought of, it will be mentioned, and if it is not mentioned, it is because it is not thought of, and because they are negotiating for a mutually understood coterminous occupation and rent. Now to ignore these facts, which actually underlie the contract, and are the very basis upon which it is made, will practically

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work out injustice, no matter how beautiful and symmetrical the legal structure we erect thereon."

But a lease of part of a building, as a cellar or upper room, forms an exception to the general rule that the lessee is not released from the obligation to pay rent by the accidental destruction of the building, for in that case nothing remains upon which the demise can operate. *Womack* v. *McQuarry*, *supra*; *Harrington* v. *Watson*, 11 Oregon, 143; 50 Am. Rep. 465, and cases cited, and in note, in latter, p. 469; *McMillan* v. *Solomon*, 42 Alabama, 356; 94 Am. Dec. 654; *Porter* v. *Tull*, 6 Washington, 408; 22 Lawyers' Rep. Annotated, 613 (where the tenant was allowed to recover rent paid in advance); *Graves* v. *Berdan*, 26 New York, 498; *Stockwell* v. *Hunter*, 11 Metcalf (Mass.), 448; 45 Am. Dec. 220.

A tenant's liability to pay rent is not affected by the condemnation of part of the premises in the exercise of the power of eminent domain. *Stubbings* v. *Evanston*, 136 Illinois, 37; 11 Lawyers' Rep. Annotated, 889. But otherwise in case of condemnation of the whole. *Corrigan* v. *Chicago*, 144 Illinois, 537; 21 Lawyers' Rep. Annotated, 212.

Mr. Wood cites *Lofft* v. *Dennis* by itself. It is also cited in a note by the present writer, in 37 Am. Rep. 283. Its doctrine is precisely sustained in *Bussman* v. *Gauster*, 72 Penn. State, 285, SHARSWOOD, J., observing: "We are bound to stand *super antiquas vias*, and not to stray aside into unknown by-paths which may lead we cannot tell where." One Judge dissented. *Lofft* v. *Dennis* is cited with approval in *Sheets* v. *Selden*, 7 Wallace (U. S. Sup. Ct.), 424, and the principle is recognized in *Kingsbury* v. *Westfall*, 61 New York, 357, where the Court observed: "The plaintiff was under no obligation to the lessees of the premises, or the defendant" (guarantor of the lessee) "to procure an insurance on the buildings against loss by fire. It was an act of prudence on his part to appropriate from his own means, derived from that property or other sources, as should be necessary to save himself from the ultimate loss of his buildings by that cause. I have not been able to discover any claim, legal or equitable, in favor of the lessees or the defendant, upon that fund or any part of it, to indemnify them against loss. It was not procured by the means or for the benefit of either of them; and notwithstanding it was thought by the Chancellor, in *Brown* v. *Quilter*, Amb. 621, that the fact that the landlord received the insurance money for the house which was burned, and did not rebuild it, raised an equity in favor of the tenant, the suit was settled; no judgment was rendered in it or principle settled justifying its being regarded as authority. If the plaintiff had the day before the fire sold the premises for their full value, subject to the lease, reserving to himself the rent to accrue, and in that way, instead of by insurance, escaped loss, it clearly would be no ground for diminishing the rent reserved for the residue of the term. No good reason can be assigned why an abatement of the rent should not be allowed as well in the one case as in the other."

The foregoing cases proceed upon the theory that rent is still due after the destruction of the buildings, because the land is left, and the tenant has the right to it for the remainder of the term. But if the land, or the entire

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thing leased, is destroyed, the obligation to pay rent is discharged. So the destruction of the property extinguishes the liability for rent, under a lease of a river front and landing, consisting of a narrow footing at the base of a bluff without any wharf, dock, or pier, where the unprecedented ravages of the river effectually took away the use of the landing by washing away all but a shallow fragment of the lot. *Wait* v. *O'Neil*, 76 Federal Reporter, 408; 34 Lawyers' Rep. Annotated, 550. The Court observed: "Upon the remaining point of decision we find ourselves unable to agree with the trial Court, which held that the covenant to pay rent was not extinguished by the destruction of the property. In support of this position the opinion cites Taylor Land. & T., §§ 329, 347, 360, 373, 386; 3 Kent Com. 465; *Balfour* v. *Weston*, 1 T. R. 310; *Doe* v. *Sandham*, Id. 705; *Hallett* v. *Wylie*, 3 Johns. 44, 3 Am. Dec. 457; *Fowler* v. *Bott*, 6 Mass. 63; and the observation of Mr. Justice GRAY as to the distinction between the rule of the civil and common law in *Viterbo* v. *Friedlander*, 120 U. S. 707–712. It will be found upon examination that these authorities correctly state the rule of the common law where lands are the subject of the demise, and the buildings or improvements are accidentally destroyed before the term ends. In such cases the destruction of buildings by fire, tempest, or flood does not discharge the covenant to pay rent, in the absence of a stipulation to that effect. The reason for this severe rule is that the land is deemed the subject of the demise, and the buildings a mere incident. If the land remained to the tenant after the buildings were destroyed, and he had a right to occupy and use it, his liability for rent, without abatement, was held to continue. To the authorities cited by the learned trial Judge we may add *Banks* v. *White*, 1 Sneed, 613, a Tennessee case, in which the common-law rule was held applicable to such leases. In view of the fact that rent is a compensation for the use of the thing demised, it has been regarded as a harsh rule, and contrary to natural justice, that liability for rent should continue after the possibility of beneficial use had been destroyed by accident, and at an early day some of the Judges struggled against its severity. *Richard le Taverner's Case*, 1 Dyer, 56 a. These early efforts to mitigate it were unavailing, and the rule was finally settled as stated. *Gates* v. *Green*, 4 Paige, 355; *Fowler* v. *Bott*, 6 Mass. 63. But the very foundation upon which the old rule was rested is removed if the subject-matter of the demise is destroyed. This exception is noticed by Justice GRAY in his statement of the common-law rule in *Viterbo* v. *Friedlander*, when he adds, 'unless at least the injury is such a destruction of the land as to amount to an eviction.' Where the subject-matter of the lease is a room or an apartment in a building, and the building is destroyed, the lease is terminated, the interest of the tenant is at an end, and the covenant to pay rent extinguished. The rule is bottomed upon the fact that under such leases it is to be presumed that the interest of the tenant in the subjacent land was to continue only so long as the subject-matter of the lease existed. This doctrine is well settled, and is clearly stated by Mr. Taylor in his admirable work upon Landlord and Tenant, § 520. As stated by him, it has never been repudiated or questioned in cases where it was applicable, so far as our researches have extended, and has been applied

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in many well-reasoned cases; among them we cite *Winton* v. *Cornish*, 5 Ohio, 477; *Kerr* v. *Merchants' Exchange Co.*, 3 Edw. Ch. 315; *Stockwell* v. *Hunter*, 11 Met. 448; 45 Am. Dec. 220; *McMillan* v. *Solomon*, 42 Ala. 356; 94 Am. Dec. 654; *Graves* v. *Berdan*, 26 N. Y. 498. In the case at bar we have already determined that the subject-matter of this lease was the landing, as it existed at date of lease. A 'landing' implies a place where vessels can be moored and loaded or discharged. This landing was effectually destroyed by the ravages of the river. If the effect of the force of the current had been limited to merely moving the shore line back, and the new shore line had been substantially as useful as the old, it might well be held that the leasehold continued in existence. But this was not the case. The bank of the river, as it existed after the caving had been arrested, was a vertical bluff, from 60 to 80 feet high. Against this a vessel could be moored, and her cargo could not be discharged. The physical aspects of the river bank had been so changed, as a consequence of the uncontrollable current of the river, that, although complainant continued to be a riparian proprietor, she no longer had a 'landing' in the sense in which the parties had used that term, nor was it possible by reasonable effort to make a landing. The shallow fragment of her lot clinging to Tennessee Street was insufficient in depth to permit the construction of a landing and roadway at its base."

But the partial decay of a wharf does not relieve the tenant from rent. *Hill* v. *Woodman*, 14 Maine, 38.

A very learned and interesting case is *Wattles* v. *South Omaha I. & C. Co.*, 50 Nebraska, 251; 36 Lawyers' Rep. Annotated, 424, where it is held that the common-law rule in question is not in force in that State, owing to a statute providing that instruments creating estates in land shall be construed so as "to carry into effect the true interest of the parties;" and so where the leased buildings were destroyed by a hurricane, the tenant was allowed a proportionate deduction from the rent reserved, although he had expressly agreed to keep and surrender the premises in good repair. To the same effect, *Ripley* v. *Wightman*, 4 McCord (So. Car.), 447.

A remarkably interesting and somewhat analogous case, almost of first impression, is *Stephens* v. *Southern P. R. Co.*, 109 California, 86; 50 Am. State Rep. 17, where it was held that a covenant in a lease between a railroad company and its lessee of land adjoining its station grounds, providing that the lessor should not be liable for damages by fire arising from any cause, is not against public policy, and that the lessee could not recover for the loss of a warehouse erected by him on the leased premises, caused by fire negligently set by the lessor on its adjoining lands for the purpose of burning grass and rubbish. The Court remark that but one case directly in point had been found (*Grinwold* v. *Illinois Cent. Ry. Co.*, 90 Iowa, 265), and that is to the same effect.

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SECTION II. — *Tenancies for a Term certain under Leases and other Instruments in Writing.*

(c) *Assignment and Surrender.*

No. 27. — BEARDMAN *v.* WILSON.
(C. P. 1868.)

RULE.

A DEMISE by deed for a term of years, extending to the whole of the term vested in the lessor, operates as an assignment of the term.

Beardman v. Wilson.

L. R. 4 C. P. 57–59 (s. c. 38 L. J. C. P. 91; 19 L. T. 282; 17 W. R. 54).

Landlord and Tenant. — Underlease of the whole Term. — Assignment. [57]

An underlease of the whole term amounts to an assignment.

Action by A., the assignee of the reversion of a lease, on a covenant to repair. The defendant was the representative of W., who was an assignee of the lease, and had made an underlease ending at the same date as the original term.

Held, that the underlease amounted to an assignment, and that A. was not entitled to recover.

This was an action by the assignee of the reversion of a lease on a covenant to repair.

At the trial before BYLES, J., at the sittings in London after Trinity Term, the plaintiff proved his title and the making of the lease, and that in 1829 the legal owners of the term were two brothers named Wilson, and that the defendant was their representative. The defendant proved that in 1829 the Wilsons executed a deed which was in form an underlease of the property, but which was for a term expiring at the same date as the original term. A verdict was thereupon entered for the defendant, with leave to move to enter it for the plaintiff.

Pollock, Q. C., moved accordingly. The question in this case is whether an underlease for the whole of the residue of the original term necessarily amounts to an assignment. In 1 Smith's Leading Cases, p. 86, 6th ed., it is said that this question cannot be con-

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sidered settled; and in *Pollock* v. *Stacy*, 9 Q. B. 1033, which is the last decision on the subject, it was held, upholding *Poultney* v. *Holmes*, 1 Str. 405, that the relation of landlord and tenant may be created by a lease of all the lessor's interest.

[Byles, J. — In that case the estate was one which could only pass by deed, and therefore the transaction between the parties could only operate as a demise, or not at all.]

In *Barrett* v. *Rolph*, 14 M. & W. 348, though a different opinion was expressed, there was no decision.

[* 58] * Bovill, Ch. J. — I am of opinion that there ought to be no rule. As far back as the year 1818, it was held in *Parmenter* v. *Webber*, 8 Taunt. 593 (20 R. R. 575), that where a lessee underlets for the whole residue of the term, it amounts to an assignment, and it was there treated as established law. In a note to Sheppard's Touchstone, p. 266, 8th edition, the law is stated in the same way, and it is in accordance with the usual practice of conveyancers. In *Wollaston* v. *Hakewill*, 3 Man. & G. 297, the same question again arose, the underlease in that case being for a term exceeding that of the original lease; and after taking time to consider, Tindal, Ch. J., delivering the judgment of the Court, said: "The only question therefore is whether, if a lessee for ninety-nine years demises for a longer term, such demise operates in law as an assignment; and we entertain no doubt but that for a very long period the law has been held that it has such operation, and may be so treated in pleading." I think, therefore, the matter must be considered to be settled. No doubt the question was sought to be in some degree raised in *Pollock* v. *Stacy*, 9 Q. B. 1033, but there the action was brought for use and occupation, and it was not necessary that there should have been any actual demise or assignment. The only question was whether the person in occupation was liable to pay rent. There was no deed in that case which could act as an assignment, and the Court say: "The parties intended to contract the relation of landlord and tenant. This they were at liberty to do by law; and we therefore carry their lawful intentions into effect." The case was decided on its special circumstances, and is no authority in support of Mr. Pollock's contention.

Byles, J. — I am of the same opinion. I have always understood that an underlease of the whole term, though in form a lease, acts as an assignment, at least in the case where it can act as an assignment. The question what its effect is where it cannot, does not

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arise in this case; when it does, it may be necessary to consider further the case of *Pollock* v. *Stacy*.

KEATING, J. — I am of the same opinion. The facts in *Pollock* v. *Stacy* were very peculiar, and it is not necessary therefore * to overrule it in arriving at our judgment in this case. If, [* 59] however, it really decided what Mr. Pollock contends that it does, I should not be prepared to follow it. *Rule refused.*

ENGLISH NOTES.

But where a lessee, pending an existing sub-lease, grants to his sub-lessee a further underlease to commence on the expiration of the existing underlease; although the term of the second underlease may end simultaneously with the end of the term held by the lessee, this latter underlease cannot, during the subsistence of the former, operate as an assignment of the term.

This appears from *Hyde* v. *Warden* (C. A. 1877), 3 Ex D. 72, 47 L. J. Ex. 121, 37 L. T. 567. On the 10th of October, 1870, A., being freeholder of X., and holding Y. under lease to expire on the 29th of September, 1884, grants to B. a lease of X. and Y. for fourteen years from the 29th of September, 1870, *i. e.* to expire on the 29th of September, 1884. By various mesne assignments B.'s term became vested in C. On the 21st of January, 1874, A. grants to C. a lease of Y. subject to the lease of the 10th of October, 1870, for five years from the 29th of September, 1884; so that the natural termination of this last underlease would be coincident with the expiration of A.'s own term. In an action for specific performance of a certain agreement made by C., with an intending assignee, the question arose whether the latter underlease operated as an assignment of A.'s term, in which case it was argued that the reversion under the lease of the 10th of October, 1870, would have been severed, and a right of entry in certain events under that lease have been extinguished. The Court held that the lease did not operate as an assignment. "It is argued," they say, "on the part of the plaintiff, that as the said further lease of Bridge Farm for five years from the 29th of September, 1884, would expire at the same time as the original lease of the Bridge Farm to A. of the 6th of January, 1869, such further lease would, according to the decisions in *Parmenter* v. *Webber* and *Beardman* v. *Wilson*, amount to an assignment of the original lease, and thus effect a severance of the reversion. But it will be observed that such further lease is not to commence until the 29th of September, 1884, when the former lease granted by A. to B., and then vested in the plaintiff, would expire. It was not, therefore, a lease of the reversion, but a reversionary lease, or, in other words, an *interesse termini*, which is only

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a right, and not an estate, and according to a well-established principle of law, would neither prevent nor cause a merger. In the mean time, therefore, until the *interesse termini* ripens into an estate, which will not be until the expiration of the lease of A. to B., the reversion will continue in A., and there will be no severance, and consequently no destruction of the right of re-entry. In fact, until that time, it cannot be ascertained whether the further lease will, or will not, operate as an assignment; for if, during the pending of the lease from A. to B., A. should obtain from the superior landlord an extension of his term in Bridge Farm, his further lease to the plaintiff would undoubtedly operate according to its purport as an underlease, and not as an assignment."

It appears from a subsequent part of the case that the Court considered that even if there had been an assignment by A. to C. of A.'s term in Y., it would not have operated so as to extinguish the right of re-entry as to X.

AMERICAN NOTES.

Mr. Wood says (Landlord and Tenant, sect. 89 and notes): "The weight of authority supports the rule that in order to create a lease instead of an assignment, there must be a reservation of a reversion in the lessor, and that no form of instrument can dispense with this requisite. A mere reservation of rent, or a reservation of a right of re-entry for a breach of any of the conditions of the lease, will not change the legal relation of the parties. The cases cited from the New York reports, *Post* v. *Kearney*, 2 New York, 394; 51 Am. Dec. 303, and *Martin* v. *O'Connor*, 43 Barbour, 522, are in conflict with the doctrine of *Bedford* v. *Terhune*, 30 New York, 454; 86 Am. Dec. 394, and are directly questioned and practically overruled by *Woodhull* v. *Rosenthal*, 61 New York, 382, and the doctrine previously stated, that where the whole term is made over by the lessee, although in the deed by which that is done the rent and the power of the entry for non-payment are reserved to him and not to the original lessor, this is an assignment and not an underlease, and that the introduction of new covenants into the instrument does not change the legal effect of giving up the reversion."

In *Woodhull* v. *Rosenthal*, *supra*, the Court said: "The essential distinction between an assignment and a sub-lease is simply this: If a lessee, by any instrument whatever, whether reserving conditions or not, parts with his entire interest, he has made a complete assignment; if he has transferred his entire interest in a part of the premises, he has made an assignment *pro tanto*. If he retains a reversion in himself, he has made a sub-lease." Citing *Bedford* v. *Terhune*, *supra*, observing that its views "are sustained by the late English decisions and the general weight of authority." To this effect, *Childs* v. *Clark*, 3 Barbour Chancery (N. Y.), 52; 49 Am. Dec. 164.

The law on this subject was well expressed in *Stewart* v. *Long Island R. Co.*, 102 New York, 601; 55 Am. Rep. 844: "The rules relating to the effect of an assignment of a lease are so well settled that it is hardly necessary to do more than refer to them. Where a lessee assigns his whole estate, without

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reserving any reversion therein for himself, a privity of estate is at once created between his assignee and the original lessor, and the latter has a right of action directly against the assignee, on the covenant to pay rent, or any other covenant in the lease which runs with the land; but if the lessee sublets the premises, reserving or retaining any such reversion, however small, the privity of the estate is not established and the original landlord has no right of action against the sub-lessee, there being neither privity of contract nor of estate between them. Where a lessee of land leases the same land to a third party, the question has often arisen whether the second lease is in legal effect an assignment of the original lease, or a mere sub-lease. The question has frequently, and probably most generally, arisen between the lessee and his transferee, and much confusion will be avoided by observing the distinction between those cases, and cases where the question has been between the transferee and the original landlord. In the latter class of cases the rule is well settled that if the lessee parts with his whole term or interest as lessee, or makes a lease for a period exceeding his whole term, it will, as to the landlord, amount to an assignment of the lease, and the essence of the instrument as an assignment, so far as the original lessor is concerned, will not be destroyed by reserving a new rent to the assignor with a power of re-entering for non-payment, nor by its assuming, by the use of the word 'demise' or otherwise, the character of a sub-lease; and the assignee, so long as he continues to hold the estate, is liable directly to the original lessor on all covenants in the original lease which run with the land, including the covenant to pay rent. Taylor's Landl. & Ten. (7th ed.) 109; *Hicks* v. *Downing*, 1 Lord Raym. 99; *Palmer* v. *Edwards*, 1 Doug. 187; *Smith* v. *Mapleback*, 1 T. R. 441; *Porter* v. *French*, 9 Irish Law R. 514; *Parmenter* v. *Webber*, 8 Taunt. 593; *Doe* v. *Bateman*, 2 Barn. & Ald. 168; *Wallaston* v. *Hakewell*, 3 Scott N. R. 616; *Pluck* v. *Digges*, 5 Bligh (N. S.), 31; *Beaumont* v. *Marquis of Salisbury*, 19 Beav. 198; *Thorne* v. *Woolcombe*, 3 Barn. & Ald. 586.

"But as between the original lessee and his lessee or transferee, even though the original lessee demises his whole term, if the parties intend a lease, the relation of landlord and tenant, as to all but strictly reversionary rights, will arise between them.

"The effect therefore of a demise by a lessee for a period equal to or exceeding his whole term is to divest him of any reversionary right and render his lessee liable, as assignee, to the original lessor, but at the same time the relation of landlord and tenant is created between parties to the second demise, if they so intended. Taylor Landl. & Ten. (7th ed.) 108, note s. 16 n. 5; 1 Washb. Real Estate, 515 (4th ed.), n. 6; *Adams* v. *Beach*, 1 Phil. 99, 178; *Indianapolis, &c. R. Co.* v. *Cleveland, &c. R. Co.*, 45 Ind. 281; *Lee* v. *Payn*, 4 Mich. 106; *Lloyd* v. *Cozens*, 2 Ashm. 138; Wood Landl. and Ten. (Banks' ed.), § 847. These rules are fully recognized in this State. *Prescott* v. *De Forest*, 16 Johns. 159; *Bedford* v. *Terhune*, 30 N. Y. 453, 457; *Davis* v. *Morris*, 36 N. Y. 569; *Woodhull* v. *Rosenthal*, 61 N. Y. 382, 391, 392."

Where a lessee leases part of the premises to another, for the remainder of his term, with easements in the other part, this is a sub-lease and not an assignment. *McNeil* v. *Kendall*, 128 Massachusetts, 245; 35 Am. Rep. 373.

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If all the lessee's estate is transferred, the instrument of transfer operates as an assignment of the lease, notwithstanding words of demise instead of assignment are used, and the reservation of rent to the grantor or assignor, and of a right of re-entry on non-payment of rent, or the non-fulfilment of other covenants in the instrument. *Sexton* v. *Chicago S. Co.*, 129 Illinois, 318; 16 Am. St. Rep. 274, citing the principal case. The Court said: "Undoubtedly many cases may be found wherein the lessee has granted to another party his entire term, retaining no reversionary interest in himself, and it has been held the relation of the parties was that of landlord and tenant, — or perhaps more correctly, lessee and sub-lessee, — because such was clearly the intention of the parties; but this was the result of contract only, and not conclusive upon the original landlord, since he was not a party to it. The relations of landlord and assignee of a term, however, it has been seen, do not result from contract, but from privity of estate, and therefore when the original lessee has divested himself of his entire term, and thus ceased to be in privity of estate with the original landlord, the person to whom he has transferred that entire term must necessarily be in privity of estate with his original landlord, and hence liable as assignee of the term." Citing *Van Rensselaer* v. *Hays*, 19 New York, 68; 75 Am. Dec. 278; *Pluck* v. *Digys*, 5 Bligh (N. S.) 31; *Thorn* v. *Woolcombe*, 3 Barn. & Ald. 586; *Indianapolis, &c. Union* v. *Cleveland, &c. Ry. Co.*, 45 Indiana, 281; *Blumenberg* v. *Myres*, 32 California, 93; 91 Am. Dec. 560. To the same effect, *Craig* v. *Summers*, 47 Minnesota, 189; 15 Lawyers' Rep. Annotated, 236.

If a lessee assigns his lease for a shorter period of time than that for which it was granted, or if he assigns or underlets for part only of the premises, the lessor cannot maintain action against the assignee or sub-lessee for rent. *Fulton* v. *Stuart*, 2 Ohio, 215; 15 Am. Dec. 542.

No. 28. — TAYLOR *v.* SHUM.

(1797.)

No. 29. — HARLEY *v.* KING.

(1835.)

RULE.

THE assignee of a lease is only liable to the original lessor by reason of privity of estate; and if he assigns over to another, he is not liable to the lessor for any breach occurring after the assignment. And if, after a refusal by the lessor to accept the assignee's offer to surrender the premises, the latter assigns to a person who cannot be made responsible (*e. g.*, to a pauper emigrant), this is no fraud upon the lessor.

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But the assignee of a lease cannot by assigning to another get rid of a liability for breach incurred during the continuance of his own estate.

Taylor v. Shum.

1 Bos. & P. 21–24 (4 R. R. 759).

Landlord and Tenant. — Assignment by Assignee. — Liability.

There is no fraud in the assignee of a term assigning over his interest, [21] to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession, nor receives the lease.

Debt for rent against the assignees of a term.

Pleas. First, That the term estate and interest in the premises did not come to the defendants by assignment: and issue thereon. Second, That the defendants did not, by virtue of any such assignment, enter into and become possessed of the premises: and issue thereon. Third, That before the rent demanded, or any part of it became due and payable, the defendants assigned to one William Bishop.

Replication. That the said supposed assignment to the said William Bishop in the third plea mentioned, was had and made by the said defendants, by the fraud and covin of the said defendants, with intent to defraud the said plaintiff of her said debt: and issue joined thereon.

* The premises in question were demised in the year 1788 [* 22] by the plaintiff to one Hannah Adams, for twenty-one years, and afterwards came by several mesne assignments to one Sibley; in the year 1792 Sibley mortgaged the lease to the defendants, who on his becoming insolvent, and abandoning the premises, took possession, and paid the rent up to Christmas, 1795; at which time they offered to surrender the premises to the plaintiff, and on his refusal to accept, assigned over to William Bishop: since that time the defendants had neither enjoyed the premises nor paid any rent: nor had Bishop taken possession, or received the lease.

This cause came on to be tried at the sittings after last Hilary Term in London, before EYRE, Ch. J., when a verdict was found for the plaintiff, with leave for the defendants to move to set it aside and enter a nonsuit.

Accordingly Le Blanc, Serjt., having on a former day obtained a rule to show cause, and cited the case of *Le Keux* v. *Nash*, Str.

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1221, where an assignment to a prisoner in the Fleet was held good,

Shepherd, Serjt., for the plaintiff, now produced an affidavit, stating that the defendants had informed the plaintiff that William Bishop, the assignee, lived in Harp Lane; but that although upon inquiry one or two persons of that name were found there, yet they had no knowledge of the assignment. He admitted that the defendants might select a pauper for the purpose of assigning over to him, but insisted that there must be a good and valid assignment, so as to give the same remedy against the pauper as might have been had against the defendants, otherwise the execution would be fraudulent. That if this were not the case they might have assigned to a nonentity.

[BULLER, J. — If they execute to a non-entity it is no assignment.]

He contended that the defendants had not legally divested themselves, for they had not made such an assignment as would bind the assignee, he never having had possession of the premises, or delivery of the lease. He cited *Philpot* v. *Hoare*, Ambl. 485, where an improper description of the residence of the assignee was one of the grounds on which the assignment was held fraudulent.

Le Blanc, *contra*, was stopped by the Court.

EYRE, Ch. J.: —

It was no part of the case at the trial that there was no such person in existence as the person described in the assignment; the assignment was admitted on the pleadings. The real ques-
[*23] tion is, whether the defendants could assign to whom * they pleased, so as to destroy their own liability. If you have no remedy against the assignee, you must lose your rent, and get possession of the premises as soon as you can. The only case in which a question of fraud could arise, is, where the assignor has kept possession of the premises, of which he makes a profit, and has made an assignment to prevent responsibility. But even there, if the possession be profitable, there will always be something on the premises for the landlord to distrain; so that I doubt whether there can ever be such a thing as a fraudulent assignment, and whether an issue on such a point can ever be well taken. It is clear that there is no fraud in assigning to a beggar (*Pitcher* v. *Tovey*, Salk. 81, 4 Mod. 71), or to a person leaving the kingdom, provided the assignment be executed before his departure. The

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defendants had a right to divest themselves of the interest, by the mere form of an assignment, which drives the plaintiff to take possession.

BULLER, J.: —

An assignee is only liable while he continues to be legal assignee; that is, while he is in possession under the assignment. *Walker* v. *Reeves*, Doug. 461 *n.*, Buller's N. P. 159. I will first consider the case as it stood at the trial, and next as it stands upon the facts of the affidavit. What was to be tried? not whether an assignment had been made or not: that was taken *ex concessis;* it was admitted on the record. Where the assignor continues in possession, is the only case where the replication *per fraudem* can be good; here the defendants were clearly not in possession, and had no use of the premises; then what becomes of the issue? Secondly, has anything appeared since the trial to show that justice has not been done? the very reverse. Was the plaintiff taken by surprise? It is true that he has found a person of the name of Bishop, respecting whom there is some doubt, if he be the person mentioned at the trial; but the defendants have received no benefit; they offered to give up the premises, which offer was refused. The plaintiff adhered to the strict point of law against the justice of the case; the law is against him and therefore he shall have no indulgence.

HEATH, J.: —

This action is founded on the privity of estate (Carth. 177); but here there is none, therefore the plaintiff is not entitled to recover. So far from fraud appearing, the defendants declared their * desire of surrendering before they assigned, but the plain- [*24] tiff refused to accept.

ROOKE, J, of the same opinion. *Rule absolute.*

Harley and another v. King.

2 Crompton, Meeson, & Roscoe, 18–23 (s. c. 5 Tyrwhitt, 692; 1 Gale, 100).

Landlord and Tenant. — Assignment by Assignee. — Liability for Breaches before Assignment.

The assignee of a lease is liable for the breach of a covenant running [18] with the land, incurred in his own time, though the action is not commenced until after he has assigned the premises.

Covenant by the plaintiffs as assignees of the reversion, against the defendant as assignee of the lessee. The declaration, after

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stating the making of the lease, and the title of the plaintiffs, and the conveyance to the defendant, assigned, by way of breach, the non-performance of a covenant in the lease to repair, alleging it to be "after the assignment to the defendant, and during the continuance of the demise, and whilst he was possessed of the demised premises with the appurtenances." Plea, that after the defendant became the assignee of the demised premises as in the declaration mentioned, and before the commencement of the suit, to wit, on the 28th day of August, in the year 1834, he the defendant, by a certain indenture of assignment then made and duly signed by him the defendant, and sealed with his seal, for the considerations therein mentioned, did bargain, sell, assign, transfer, and set over unto one William Plunkett, his executors, administrators, and assigns, all and singular the premises in the declaration mentioned, together with the said indenture of lease and the several assignments thereof, and the full benefit and advantage thereof, respectively, to have and to hold the said premises unto the said William Plunkett, his executors, administrators, and assigns, from the date thereof, for all the residue then to come and unexpired of the said term of years demised by the said indenture of lease, subject, nevertheless, to the payment of the yearly rent thereby reserved, and to the performance of the covenants therein contained, and which on the lessee's or assignee's part were to be observed and performed: by virtue of which said indenture of assignment the said William Plunkett, afterwards, to wit, on the day [* 19] and year last aforesaid, entered into the said demised * premises, with the appurtenances, and became, and was thereof possessed, for the residue of the said term then to come and unexpired, whereof the plaintiffs, on the day and year last aforesaid, had notice (concluding with a verification). Replication: That the said breach of covenant alleged and complained of in the said declaration was committed by the defendant after the said assignment to him in the said declaration, and whilst he continued such assignee, and before the making or signing of the said supposed indenture of assignment in the said plea mentioned (concluding to the country). Demurrer: That the replication is not sufficient in law, because it does not traverse any matter alleged in the plea or put in issue thereby, or confess and avoid the allegation therein, or admit or deny that the said assignment in the said plea mentioned was before the commencement of the suit or otherwise,

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and leaves the traversable fact tendered by the plea wholly unanswered, &c., &c. Joinder.

Petersdorff, in support of the demurrer. — The question in this case is, whether the assignee of a lease containing a covenant to repair is liable, after an assignment by him, for a breach incurred before such assignment; and it is submitted that he is not liable. The liability of an assignee depends upon the privity of estate between him and the assignor, and with the ceasing of that privity the liability also ceases. One of the earliest and principal cases on this subject is that of *Pitcher* v. *Tovey*, 1 Salk. 81, Holt, 73, 4 Mod. 71, 12 Mod. 23, 1 Show. 340, which was an action of covenant against an assignee for rent due after the assignment. The Court there said, that covenant * would lie against the defendant "for [* 20] rent due in his own time, but not after." This expression, it must be observed, is ambiguous, and may signify either that the action is not maintainable for rent not due in his own time, or that it is not maintainable if brought after his own time. There appears to be no other authority at common law with regard to the liability of an assignee after assignment for a cause of action accruing before assignment. There are, however, several cases in equity from which it may be collected that the liability of the assignee at law ceases with the assignment over. The first of those cases is that of *Treackle* v. *Coke*, 1 Vern. 165, 1 Eq. Ca. Ab. 47. There, an assignee of a lease, rendering rent, having enjoyed the land for six years, assigned over. The bill was to account for the time he had enjoyed. The defendant pleaded a judgment upon a demurrer at law, but the plea was overruled; for, though in strictness of law there was no privity of contract[1] to charge the assignee, yet in equity he must certainly be chargeable for such time as he received the profits. From this decision, therefore, it appears that the plaintiffs had failed in an attempt to establish the liability of the assignee at common law. Upon the authority of this case, that of *Philpot* v. *Hoare*, Amb. 480, 2 Atk. 219, was decided. There it was assumed, by the counsel in argument, that an assignee, after assignment, was discharged at law from arrears of rent accruing in his own time; and Lord HARDWICKE says: "As to the arrears of rent" (those accruing in the assignee's time), "I am clear of opinion, that the plaintiff has a remedy for them in this Court," implying,

[1] *Quære*, estate. The word "estate" is used by the VICE-CHANCELLOR in referring to this case, in *Onslow* v. *Corrie*, 2 Madd. 341.

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that at law the remedy was lost. [PARKE, B. — *Philpot* v. *Hoare* is no authority to show that in a case like the present it was [* 21] * necessary to resort to the assistance of a Court of equity. There the assignee having paid the rent incurred in her own time, assigned the premises on the 25th March, 1739, and the rent in question became due after the assignment, viz. at Lady-day, 1740; so that the question there was, whether or not the assignment was fraudulent.] In a subsequent case, Lord HARDWICKE again uses expressions showing that his opinion was, that the lessor in these cases had lost his remedy at law. In *Valliant* v. *Dodemeed*, 2 Atk. 546, he says: "As he (the assignee) has made an assignment to Lomax, Valliant has no remedy for these arrears at law, and is under a necessity for coming into this Court for its assistance." [PARKE, B. — In that case also the lessor sought to render the assignee liable for rent accruing after the assignment. It seems in these cases to have been doubted whether the assignee is liable at law for a breach in his own time; but it is quite clear that he is so liable. Are there no stronger authorities than these?] There is a judgment of Sir T. PLUMER'S to the same effect as those already cited, in which he says: "Equity gives relief to a landlord for his rent in cases of assignment; first, where the assignment is merely colourable and fictitious, the possession remaining with the assignor; or, secondly, where, though there be a real assignment, yet it has been made for the purpose of depriving the landlord of his legal remedies for rent due after breaches of covenant incurred previous to the assignment." *Onslow* v. *Corrie*, 2 Madd. 330, 341. In this case the VICE-CHANCELLOR cites a decision of Lord Chancellor COWPER to the same effect: "In a manuscript note of a case in Michaelmas Term, 12 Geo. II., furnished me by Mr. Maddock, Mr. Fazakerley cited a case which was before Lord Chancellor COWPER, in which it was agreed, that, when a lease is assigned to one, and he assigns to a third person, that though the lessor [* 22] has strictly no remedy * against the first assignee, the privity of estate being determined, yet if it appear that the second assignment was made in order to exonerate and discharge the assignor of rent due to the lessor, this Court will look upon it as a fraud, and oblige such assignor to pay the rent accrued in his own time, notwithstanding the privity of estate being determined, and there being no covenant from such second assignor."

Lord ABINGER, C. B. — This is an action brought by a lessor

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against an assignee of the lease, upon a covenant running with the land, for a cause of action accruing in the time of the assignee, and before the assignment made by him. The defence is, that the assignment by the defendant took place before the action was brought, and that, in order to render an assignee liable, it must appear not only that he is sued upon a cause of action arising in his own time, but likewise that the suit was commenced before the assignment, for that by such assignment the privity of estate upon which only the lessor can proceed is determined. By the neglect of the assignee to repair, a breach was incurred in his own time, and a right of action thereupon vested in the plaintiffs. What is there, then, to divest that right of action, and to deprive the party of his remedy, his right to which was complete before the assignment? The argument for the defendant would establish the position that all assignees, by a secret assignment to an insolvent, may divest themselves of all liability for any breach of covenant which they may have incurred. The principle of law is, that so long as the privity of estate continues, the assignee is liable upon all covenants running with the land. If, upon the breach of any such covenant, the lessor may sue him during the continuance of the assignment, what is there to prevent him from bringing his action after the assignment? There may be cases of specific breaches of covenant, where to *hold the contrary would [*23] be to commit great injustice. A covenant may exist with regard to maintaining machinery or other valuable property, the omission to perform which by the successive tenants of the premises nothing could repair. If the assignee can free himself by assignment from the liability to make good his own default, is his assignee to be charged with the whole amount, or to whom is the lessor to resort? It can never be contended, that, by an assignment to a beggar, an assignee shall be allowed to free himself from his vested liabilities.

PARKE, BOLLAND, and ALDERSON, BB., concurred.

Judgment for the plaintiff.

ENGLISH NOTES.

See this topic to some extent dealt with in the Notes to Nos. 8–10 of "Executor," 12 R. C. 61, 62.

The assignee of the term is liable by reason of privity of estate on the covenants which run with the land; and for this purpose it is

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immaterial whether he has taken possession or not. *Walker* v. *Reeves* (1781), 2 Dougl. 461 *n.*, 3 Dougl. 19. It was indeed once decided by Lord MANSFIELD that an assignee by way of mortgage who had not taken possession was not liable on the covenants. *Eaton* v. *Jaques* (1780), 2 Dougl. 455. But in the case of *Williams* v. *Bosanquet* (1819), 1 Brod. & Bing. 238, 21 R. R. 585, where an assignment of a term had been taken subject to a proviso for redemption for repayment of the mortgage money in the usual form, and the mortgagee, who had not taken possession, was sued on the covenants; the question of liability was argued before ten out of twelve Judges (the other two being unavoidably absent); and they decided that the mortgagee was liable — a great majority being of opinion that *Eaton* v. *Jaques* was not rightly decided. To avoid this liability it is the invariable practice in England for mortgages of leasehold property to be made by way of underlease for a term wanting one or more days of the full term of the principal lease.

AMERICAN NOTES.

These cases are much cited in Wood on Landlord and Tenant, sect. 337, and by Washburn on Real Property, p. 525, and in Taylor on Landlord and Tenant. See *Stewart* v. *Long Island R. Co.*, 102 New York, 601; 55 Am. Rep. 844. Mr Wood says (*supra*): "A lessee during his occupation holds both by privity of estate and contract. His privity of estate terminates with the term, and by an assignment he divests himself of this privity and transfers it to his assignee, because it is annexed to and passes with the estate. The assignee takes all the interest of his assignor, and subject to all the covenants and conditions which are annexed to the estate, and run with the land, and so long as he remains in possession must perform them, and this embraces a covenant to pay taxes on the land." Citing *Post* v. *Kearney*, 2 New York, 394; *State* v. *Martin*, 14 Lea (Tennessee), 92; 52 Am. Rep. 167. "An assignee being liable to the original lessor or his assigns only in respect of privity of estate, may get rid of such liability by an assignment over, except as to previous breaches; with respect to which he will continue liable both at law and in equity. Such an assignment may be made to a beggar or to a married woman." Citing the principal cases.

The doctrine of the Rule was held as to assignees in bankruptcy and insolvency in *Bell* v. *Am. Prot. League*, 163 Massachusetts, 558; 47 Am. St. Rep. 481: "And this assignment may be made to any one, however irresponsible he may be, provided the assignor does not retain any interest in the thing assigned." And although made for the express purpose of avoiding liability, and though a premium is given as an inducement to accept the transfer. *Johnson* v. *Sherman*, 15 California, 287; 76 Am. Dec. 481. But in *Childs* v. *Clark*, 3 Barbour Chancery (N. Y.), 52, the condition is made "that the assignment is not merely colorable or fraudulent," citing *Taylor* v. *Shum*.

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"Each successive assignee would be liable for covenants maturing while the title was held by him, because of privity of estate; but he would not be liable for those previously broken or subsequently maturing, because of the absence of any contract relations with the lessor. While he holds the estate and enjoys its benefits he bears its burdens; but he lays down both the estate and its burdens by an assignment, even though, as said in some of the cases, his assignment be to a beggar." *Washington Nat. Gas Co.* v. *Johnson*, 123 Penn. State, 553; 10 Am. St. Rep. 573. Citing *Negley* v. *Morgan*, 46 Penn. St., 281, which cites *Taylor* v. *Shum*.

But the original lessee remains liable on his covenants to pay rent, &c., even after his assignment of the term to a third. *Grommes* v. *St. Paul Trust Co.*, 147 Illinois, 634; 37 Am. St. Rep. 248, and notes; *Washington Nat. Gas Co.* v. *Johnson*, 123 Penn. State, 576; 10 Am. St. Rep. 553, and notes.

Mr. Washburn sums up the doctrine in question as follows: "There is an important distinction to be observed between express and implied covenants in a lease, since one who enters into an express covenant remains bound by it though the lease be assigned over, while such as are implied are coextensive only with the occupation of the premises, the lessee, for instance, not being liable under his implied covenant for rent after his assignment to another, and the acceptance of rent by the lessor from the assignee. The lessee remains liable upon his express covenant to pay rent, notwithstanding his having assigned his lease with the lessor's assent, and the lessor may have accepted rent from the assignee. The lessor, in such case, may sue the lessee or his assignee, or both, at his election, and at the same time, though he can have but one satisfaction. The lessee continues liable upon his personal covenant, in the nature of a surety for his assignee, who is ultimately liable to him for the amount paid by him. But the liability of a lessee upon the implied covenants in his lease continues only so long as he holds the estate, where he assigns with the consent of the lessor, as it depends upon the privity of estate. This is true in respect to assignees, both as to express and implied covenants, and their liability depends upon and ceases with the privity of estate between them and the lessors. Such assignee therefore is not liable for any breach committed before he became assignee, nor for any such breach occurring after he has parted with the estate and possession to a new assignee, although he did this for the very purpose of escaping such liability, because by so doing he destroys the privity of estate on which it depends."

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No. 30.—NICKELLS *v.* ATHERSTONE.

(Q. B. 1847.)

No. 31. — PHENÉ *v.* POPPLEWELL.

(Q. B. 1862.)

RULE.

A SURRENDER of a lease by operation of law will be effected by an agreement followed by unequivocal acts of giving up possession by the tenant and taking possession by the landlord, or by a new tenant with the concurrence of both.

Nickells v. Atherstone.

10 Queen's Bench, 944–951 (s. c. 16 L. J. Q. B. 371; 11 Jur. 778).

Landlord and Tenant. — Lease. — Surrender by Operation of Law. — Giving up Possession by Former Lessee.

[944] Defendant held premises as tenant to plaintiff under a memorandum of agreement, for three years. He left the premises in the first year. On application being then made by plaintiff for rent due, defendant, by letter, authorised plaintiff to let the premises to any one else. Plaintiff then let them to another tenant for three years, and gave him possession. *Held*, in an action of debt on the original agreement, that these facts constituted a surrender by operation of law.

Debt on a demise of rooms, &c., by plaintiff to defendant for three years from March 1st, 1844, at the yearly rent of £100 payable quarterly in advance: averment, that defendant entered, and was possessed until 1st September, 1845.

Pleas. 1. Traversing the demise. 2. Eviction by plaintiff. 3. Surrender. Traverses of pleas 2 and 3.

On the trial, before WIGHTMAN, J., at the London sittings after Easter Term, 1846, the following appeared to be the material facts. The rooms were let by plaintiff to defendant under a memorandum of agreement dated 26th February, 1844, on the terms specified in the declaration. The defendant entered, and paid rent for the first two quarters, beginning respectively March 1st and June 1st, 1844. In August, 1844, the defendant removed his property from the rooms and left them, and applied to the plaintiff to take

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them off his hands. The plaintiff refused. The defendant then asked the plaintiff to let the rooms for him; and the plaintiff said he would try to do so. On 3rd September, 1844, the defendant being then absent, the plaintiff applied to his daughter for the rent due on 1st September. In reply, the following letter was written by the defendant to the plaintiff.

"EDINBURGH, 11th September, 1844.

"SIR, — I heard from my daughter that you expressed your intention to take legal measures against me unless [* 945] the ensuing quarter rent were paid on the very day commencing the quarter. I consider such a step would be harsh; and under present circumstances it would be utterly useless. It will probably be six months before I can finally leave Scotland, as the greater part of my business connection lies in this country. I trust, however, that you may be able to let the rooms to some other person, and on better terms. E. ATHERSTONE."

On 29th September, 1844, the plaintiff, without any further communication with the defendant, let the room in question, together with some others, to a Mr. Bullock, for three years from that day, at £120 a year, payable quarterly in advance. Mr. Bullock paid the first two quarters, but subsequently became insolvent. The present action was then brought, claiming from the defendant the four quarters' rent from September 1st, 1844, to September 1st, 1845, under the agreement of February, 1844; but credit was given to the defendant for the first two quarters' rent, which the plaintiff had received from Bullock.

WIGHTMAN, J., left it to the jury to say whether the plaintiff agreed to the terms offered by the defendant in his letter of 11th September, and accepted Bullock as his tenant in substitution and discharge of the defendant. The jury found that the plaintiff did accept Bullock as his tenant in discharge of the defendant. Verdict for the plaintiff, under the direction of the learned Judge, on the first issue, for the defendant on the other issues, with leave to the plaintiff to move to enter a verdict for himself for £50 on either or both the other issues.

A rule *nisi* having been accordingly obtained,

* Bramwell, in this term, showed cause.[1] The tenant [* 946]

[1] May 25th. Before Lord DENMAN, Ch. J., PATTESON, WIGHTMAN, and ERLE, JJ.

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has by writing consented to the reletting of the premises; and the landlord has relet them; and the question is, whether the landlord can still maintain this action. In the first place, this is a surrender by act and operation of law, on the principle recognised in *Thomas* v. *Cook*, 2 B. & Ald. 119 (20 R. R. 374); *Walker* v. *Richardson*, 2 M. & W. 882, 6 L. J. (N. S.) Ex. 229; *Reeve* v. *Bird*, 1 C., M. & R. 31, 4 Tyr. 612, and *Bees* v. *Williams*, 2 C., M. & R. 581, Tyr. & G. 23; and *Thomas* v. *Cook* was treated as a case of authority in *Doe d. Hull* v. *Wood*, 14 M. & W. 682. It is true that in *Lyon* v. *Reed*, 13 M. & W. 285, 13 L. J. Ex. 377, a doubt had been previously cast by the Court of Exchequer on the authority of *Thomas* v. *Cook* and *Walker* v. *Richardson*. But it is said (p. 309) that perhaps the former "case itself, and others of the same description, might be supported upon the ground of the actual occupation by the landlord's new tenants, which would have the effect of eviction by the landlord himself in superseding the rent or compensation for use and occupation during the continuance of that occupation." If so, the defendant here has been evicted, and is entitled to succeed on that issue. [PATTESON, J. — How could there be an eviction, if the defendant assented?] If there was no surrender, the plaintiff could justify his putting in a new tenant only on the ground of leave and license: but no such leave was given; for the letter which must be relied upon as showing it was conditional on the plaintiff's allowing the defendant to give up the tenancy.

[* 947] * But, in addition to this, the letter of 11th September was itself sufficient to surrender the term, under Stat. 29 C. II., c. 3, s. 3. No particular form of words is necessary where the intention is manifest. *Farmer d. Earl* v. *Rogers*, 2 Wils. 26.

Watson and Hugh Hill, *contra*. — 1. This is no surrender by operation of law. That is defined in *Lyon* v. *Reed*, 13 M. & W. 306, to be "an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist." Therefore, as the Court goes on to show, the intention of the parties has nothing to do with it. That the particular tenant "agrees to an act done by the reversioner is not sufficient." This case, and the authorities cited in Com. Dig. Surrender, (I. 1) and (I. 2), fully bear out the proposition; and the principles established by those authorities must be looked to as fixing the principle of

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surrender by operation of law, rather than modern cases, the earliest going no farther back than 1812. A mere naked consent by the defendant is no estoppel: to which point *Swift* v. *Heath*, Carthew, 110. See Bro. Ab., tit. Surrender, pl. 48, is cited. [PATTESON, J., referred to *Gore* v. *Wright*, 8 A. & E. 118, 7 L. J. (N. S.) Q. B. 147.] There, the agreement was specially pleaded to an action of debt for rent, as a contract by the plaintiff to forego the rent. 2. Nor is the letter a surrender in writing. That no particular form of words is necessary to constitute a surrender under the Statute of Frauds is true: but the words must imply an immediate surrender: here, nothing of the kind * appears [* 948] in the letter, but a mere request to the landlord to relet, which is obviously inconsistent with its containing an immediate surrender. *Weddall* v. *Capes*, 1 M. & W. 50, Tyr. & G. 430. And *Doe d. Murrell* v. *Milward*, 3 M. & W. 328, 7 L. J. (N. S.) Ex. 57 (No. 51, *post*), and *Johnstone* v. *Hudlestone*, 4 B. & C. 922 (No. 49, *post*), equally show that these prospective words do not constitute a surrender. 3. Neither can the putting in a new tenant be regarded as an eviction by the landlord, the defendant himself having expressly assented to it.

Undoubtedly *Thomas* v. *Cook*, 2 B. & Ald. 119 (20 R. R. 374), can hardly be distinguished from this case; but that, as far as regards the points in question, must be considered as overruled, and rightly, by *Lyon* v. *Reed*, 13 M. & W. 285, 305–310.

Cur. adv. vult.

Lord DENMAN, Ch. J., now delivered judgment.

In this case, the defendant being the lessee in possession of the premises, the plaintiff, his landlord, with his consent, let them to a new tenant, and put him in possession, and discharged the defendant from his liability as tenant.

The Judge who tried the case held that these facts constituted a surrender by operation of law, and, therefore, a defence against the plaintiff's claim for rent. The correctness of that holding has been brought into question before us in consequence of the opinion expressed by the Court of Exchequer in *Lyon* v. *Reed*; but we are of opinion that it is correct. If the expression "surrender by operation of law" be properly "applied to cases where the owner of a particular estate has been party to some act, the validity of which * he is by law afterwards estopped from [* 949]

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disputing, and which would not be valid if his particular estate had continued," it appears to us to be properly applied to the present. As far as the plaintiff, the landlord, is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the defendant's term. As far as the new tenant is concerned, the same is true. As far as the defendant, the owner of the particular estate in question, is concerned, he has been an active party in this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession, and so enabling the new tenant to enter.

If the defendant cannot technically be said to be estopped from disputing the validity of the estate of the new tenant, still, according to the doctrine of *Pickard* v. *Sears*, 6 A. & E. 469, he would be precluded from denying it with effect; and the result is nearly the same as an estoppel. If an act which anciently really was, in contemplation of law, and has always continued to be, an act of "notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like (*Lyon* v. *Reed*, 13 M. & W. 309)," be required as requisite for a surrender by operation of law, and if the acts of the three parties are regarded together, this requisite is here found. Indeed the notoriety is essentially greater than that which accompanies a parol redemise between the same landlord and tenant, which is a clear surrender by operation of law. In the present case three are concerned, and there is an actual change of possession: in the other, * two are concerned, and there is no change of possession. This surrender by operation of law has been judicially recognised in each of the superior courts: *Matthews* v. *Sawell*, 8 Taunt. 270; *Thomas* v. *Cook*, 2 B. & Ald. 119 (20 R. R. 374); *Walker* v. *Richardson*, 2 M. & W. 882; *Bees* v. *Williams*, 2 C. M. & R. 581, Tyr. & G. 23; and held valid at Nisi Prius in *Stone* v. *Whiting*, 2 Stark. 235 (19 R. R. 710), and many subsequent cases. When the decisions on a point are numerous and uniform, and carry into effect the lawful intentions of the parties according to the truth, and are opposed by no principle, the law on the point ought not to be considered doubtful because the reported decisions are only of modern date, as the fact that the reports on the point do not begin till lately may arise from there being no question on the point in earlier times. Indeed, in 1809, it seems probable that

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a restoration of the possession to the landlord and a discharge of the tenant by him was considered a surrender by operation of law. The defence in *Mollett* v. *Brayne*, 2 Camp. 103 (11 R. R. 676), was shaped on that principle; but, as the evidence failed to show a change of possession by mutual consent of landlord and tenant, the defence failed. In *Whitehead* v. *Clifford*, 5 Taunt. 518 (15 R. R. 579), where there was such change of possession by mutual consent, the defence to a claim for use and occupation succeeded; and the Court distinguished the case from *Mollett* v. *Brayne* for that reason.

Where there is an agreement to surrender a particular estate, and the possession is changed accordingly, it is more probable that the Legislature intended to give effect to an agreement so proved, as a surrender * by operation of law, than to allow [* 951] either party to defeat the agreement by alleging the absence of written evidence. Although we do not assent to the observations upon the line of cases, from *Thomas* v. *Cook*, 2 B. & Ald. 119 (20 R. R. 374), downwards, in the learned and able judgment given in *Lyon* v. *Reed*, 13 M. & W. 285, 13 L. J. Ex. 377, we wish to express our entire concurrence in the decision of that case. The question there was not upon the estate of the tenant in possession of the premises, but upon the title of the plaintiff as assignee of the reversion; whether a lease of the reversion, granted to Ord and Planta in 1812, for ninety-nine years, could be presumed to be surrendered, from the fact that such lease was found among the deeds of the tenant in fee, who had granted in 1814 a term in the reversion to Osborne and Burt, through whom the plaintiff claimed. There was no change in the possession of the land. No actual change in the possession of the reversion could be made apparent; and the facts stated lead to the conclusion that Ord and Planta did not know of the demise to Osborne and Burt; but the probability is, that the term in them as trustees had been forgotten at the time when their concurrence was requisite for the new lease.

As the defendant is entitled to our judgment on this point, it is not necessary to consider the effect of his letter as evidence of a surrender.

Rule discharged.

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Phené v. Popplewell.

31 L. J. C. P. 235–237 (s. c. 12 C. B. (N. S.) 334).

[235] *Landlord and Tenant. — Surrender of Term by Operation of Law.*

A tenant from year to year, at a rent payable quarterly under the terms of a written agreement, having ceased to occupy the premises held by him in the middle of a quarter, tendered the key to his landlord: this the landlord refused to accept; but the tenant having left it behind him, the landlord in the course of the ensuing quarter made use of it to obtain access to the premises, and he also placed up a board on the premises stating that they were to let. In the following quarter he painted out the defendant's name, which was over the door of the premises, and cleaned and repaired them. *Held*, in an action brought by the landlord to recover the rent for the last two quarters, that he was not entitled to maintain such an action, for that there had been a surrender of the premises by operation of law, by agreement between the parties, followed by a taking possession on the part of the landlord.

This was an action tried before WILLES, J., at the sittings at Westminster, after Michaelmas Term. The action was brought to recover three quarters' rent of a house and premises let by the plaintiff to the defendant, in the year 1858. The letting was by agreement not under seal for seven years from the 25th of January in that year, at £75 per annum, payable quarterly. The rent claimed was for the period which elapsed between the 25th of January and the 25th of October, 1861.

The defendant had formally carried on business as an outfitter on the premises in question, and continued to do so until the month of March, 1861, when he assigned over his property for the benefit of his creditors and entered into an engagement as traveller to a firm at Bristol. There was at that time a sum of money owing by the defendant to the plaintiff for rent due previous to the 25th of January, 1861, and for which the plaintiff distrained; this rent was paid by the defendant's creditors. The defendant did not subsequently to this period occupy the premises, and on the 12th of April he tendered the key to the plaintiff. The plaintiff refused to accept the key, but in spite of this refusal the defendant left it at the plaintiff's counting-house. Early in May the plaintiff affixed a board to the premises, stating that they were to let, and on several occasions, when application was made to him by parties desirous of seeing the premises, he made use of the key which had been left

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at his counting-house to obtain access to the premises. Subsequently to the 25th of July, and before the 25th of October, the plaintiff painted out the defendant's name, which was over the door of the premises, and also cleaned and repaired them, and on the 26th of October he took entire possession of the premises.

The defendant paid into Court the rent claimed up to the 25th of April, but disputed the plaintiff's claim to the rent of the two succeeding quarters, on the ground that the possession of the premises was given up by the defendant and accepted by the plaintiff before that portion of the rent accrued due.

A verdict was found for the defendant, leave being reserved to the plaintiff to move to have the verdict entered for him for two quarters' rent, if the Court should be of opinion that, on the above facts, there was no surrender of the term by operation of law; the Court to have power to draw inferences of fact.

Karslake having obtained a rule accordingly, —

Parry, Serjt., and H. Lloyd showed cause. They referred to *Griffiths* v. *Hodges*, 1 Car. & P. 419.

[BYLES, J., referred to *Dodd* v. *Acklom*, 6 Man. & G. 653, 13 L. J. C. P. 11.]

*Karslake and Francis, *contra*. — There was no sur- [*236] render by operation of law. The landlord expressly refused to accept the key when it was offered to him, and it makes no difference that the defendant chose to leave it nevertheless.

[WILLES, J. — They will say on the other side that it was a continuing offer of the key down to the time when it was accepted by the landlord, by using it to obtain access to the premises.]

In *Doe d. Huddlestone* v. *Johnston*, 1 M'Clel. & Y. 141, where the tenant had agreed by parol with his landlord to quit the premises, and the landlord accordingly put the premises up to auction, this was held not to amount to a surrender by operation of law. *Whitehead* v. *Clifford*, 5 Taunt. 518 (15 R. R. 579), shows that mere acceptance of the key is not sufficient, unless the landlord take actual and exclusive possession of the premises. In *Bessel* v. *Landsberg*, 7 Q. B. 638, 14 L. J. Q. B. 355, there was a dispute as to what notice was necessary, and the landlord at first refused the proffered notice, but afterwards entered and did some repairs; the Court, however, held that there was no surrender by operation of law. (*Redpath* v. *Roberts*, 3 Esp. 225, was also referred to.) In *Mollet* v. *Brayne*, 2 Camp. 103 (11 R. R. 676), it was held, that a

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tenancy from year to year, though it might be created by parol, could not be determined by a parol license to quit in the middle of a quarter, and the tenant quitting accordingly.

ERLE, Ch. J. — I am of opinion that this rule ought to be discharged, and I have come to the conclusion that there was a surrender of the premises to the landlord by operation of law. The tenancy was from year to year, the rent being payable quarterly. In the month of April, the key was tendered to the landlord by the defendant, and he had the option whether to accept it or not. He does the latter; but the defendant, in spite of this, leaves the key with the landlord, who in the month of May does an act which would have been a trespass by him, had he not intended to treat the defendant's leaving the key with him as a continuing offer of surrender, and also intended then to accept that offer. In that month, the plaintiff makes use of the key to obtain access to the premises and puts up a board stating that the premises are to let, and he also shows several persons over the premises. Taking also into consideration that the plaintiff knew that the defendant was insolvent, I think this is evidence from which we may infer that the plaintiff intended to accept the defendant's offer of surrender. Then in the second quarter he paints out the defendant's name altogether, and repairs the premises. Coupling all these facts together, I think it is quite clear that there was such an offer of surrender, followed by a taking possession of the premises on the part of the landlord as to amount to a surrender by operation of law. That there may be in this way a surrender by operation of law appears from the cases of *Grimman* v. *Legge*, 8 B. & C. 324 (32 R. R. 398), and *Dodd* v. *Acklom*. The case of *Mollet* v. *Brayne*, which was referred to by Mr. Karslake, has been an abundant source of litigation, but I think the law has been put on the right footing by the cases I have referred to. An agreement between the landlord and the tenant that the possession shall be given up, followed by the landlord taking possession, amounts to a surrender by operation of law. The cases of *Redpath* v. *Roberts*, *Griffiths* v. *Hodges*, and *Bessel* v. *Landsberg*, which have been referred to, are distinguishable. The circumstances of those cases do not show an intention on the part of the tenant to surrender and the landlord to accept possession of the premises. Here we think such intention undoubtedly existed, and, therefore, that this rule ought to be discharged.

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WILLES, J. — I am of the same opinion. The doctrine of surrender by operation of law is as old as the time of Lord Coke. Before the Statute of Frauds no question could arise as to whether a writing was necessary. By that statute an instrument in writing is required in most cases in order to pass an interest in land, but surrenders * by operation of law are expressly excepted [* 237] from that requirement, which, therefore, remain as at common law. Now one mode in which a surrender by operation of law of a lease may take place is by the tenant taking a new lease, even for a shorter term than the old one, if the new term coincides with any part of the old. Thus a lease for a thousand years would be surrendered by taking a new lease for ten years, to commence at any time before the expiration of the first term of a thousand years. There are a number of other ways in which a surrender by operation of law may take place, and one is where the parties mutually agree that the term shall be put an end to, and something is done in pursuance of that agreement. It makes no difference whether the agreement is that the landlord should re-enter, or that a third person should enter; nor is there any difference between either of these and a surrender by taking a new lease. The result is, that where there is an agreement between landlord and tenant that a tenancy should cease, and that agreement is acted on, there is then a surrender of the term by operation of law. Now, there was here a continuing offer by the tenant of the key to the landlord. The tenant never retracted the offer, and the landlord, though he at first refused it, afterwards assented to it, by taking the key, using it to show the premises, and putting up a notice that the premises were to let. It is said that these acts are equivocal, and do not necessarily show that the landlord intended to take the premises, but they are not equivocal when we consider what the landlord afterwards did. He paints out the defendant's name and takes actual possession. This shows that these were acts of ownership on the part of the landlord. *Redpath* v. *Roberts* is distinguishable, because there there was no act done by the tenant which showed that he consented to what was done. The case in *M'Cleland* and *Young* is also distinguishable, because there was there no entry of the landlord in pursuance of the agreement, and perhaps that case is somewhat qualified by *Gore* v. *Wright*, 8 Ad. & E. 118, 7 L. J. (N. S.) Q. B. 147.

BYLES, J. — I am of the same opinion. Though it is difficult to

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reconcile the cases on all points, it is clear from all that where there is an agreement between the landlord and tenant that the tenancy should be put an end to, and that agreement is acted on, then there is a surrender by operation of law. There are two things to be considered, the will of the landlord and its expression, and the will of the tenant and its expression. Now, it is clear that the landlord at first was not willing to resume possession of the premises, but it is equally clear that he afterwards changed his mind. And the acts done by him which show that change of intention are not equivocal, when they are explained by what was afterwards done, namely, painting out the defendant's name and taking actual possession.

KEATING, J. — I think there is sufficient evidence of that which constitutes a surrender by operation of law, namely, an agreement between landlord and tenant that the tenancy shall be put an end to, and on acting upon that agreement by a change of possession. In my opinion, it is quite immaterial whether the landlord himself takes possession or a third person. *Rule discharged.*

ENGLISH NOTES.

The mere consent of the lessee to a new lease by the lessor to a third party, or to any other act done by the reversioner, is not a surrender by operation of law. In order to explain the principle, it seems useful here to cite at length the passage (referred to at p. 517, *supra*) of the judgment of PARKE, B., in *Lyon* v. *Reed* (1844), 13 M. & W. 285, 13 L. J. Ex. 377, 381: "This term" (surrender by operation of law) "is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainder-man comes on the land, and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainder-man; and so the law says that such acceptance of livery amounts to a surrender of his life estate. Again, if a tenant for years accepts from his lessor a grant of the rent

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issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent; and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor. It is needless to multiply examples — all the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says that the act itself amounts to a surrender. In such case, it will be observed, there can be no question of intention. The surrender is not the result of intention. It takes place independently and even in spite of intention. Thus, in the cases which we have adverted to, of a lessee taking a second lease from the lessor, or a tenant for life accepting a feoffment from the party in remainder, or a lessee accepting a rent-charge from his lessor, it would not at all alter the case to show that there was no intention to surrender the particular estate; or even that there was an express intention to keep it unsurrendered. In all these cases the surrender would be the act of the law, and would prevail in spite of the intention of the parties. . . . But in all these cases it is to be observed, that the owner of the particular estate, by granting or accepting an estate or interest, is a party to the act which operates as a surrender. That he agrees to an act done by the reversioner is not sufficient."

The facts that a tenant has gone away, and that the landlord tries to let the premises, and that he receives the key from the agent of the tenant and uses it for the purpose of showing the house, are by no means conclusive; nor do they necessarily prove the existence of such an agreement as was inferred in the case of *Phené* v. *Popplewell*. This appears from the decision of the Court of Appeal in *Oastler* v. *Henderson* (1877), 2 Q. B. D. 575, 46 L. J. Q. B. 607, 37 L. T. 22. Lord Justice BRETT there observes that the ground on which *Phené* v. *Popplewell* can be supported is not that the mere fact of letting the premises afterwards is to relate back, but that the taking possession explains the act done before, which, so explained, amounted to a resumption of possession. He apparently meant that the subsequent taking possession explained the intention of the previous use of the key, and led to the inference that the landlord who at first declined the tenant's offer to surrender did after all accept the offer and retained the key for that purpose.

In *Wallis* v. *Hands* (1893), 2 Ch. 75, 62 L. J. Ch. 586, 68 L. T. 428, 41 W. R. 471, a lessee of mining property who had not entered into possession claimed damages from the lessor upon his implied covenant for quiet enjoyment. This lease was dated in 1887, and

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appears to have been orally assented to by the lessee under a previous lease of 1884. But a rival right was now claimed by an assignee of the lease of 1884. It was held by CHITTY, J., that inasmuch as possession had not been given to the lessee under the lease of 1887, the mere oral assent of the former lessee could not operate as a surrender of the lease of 1884. He then refers to the supposed conflict between *Lyon* v. *Reed* and the case of *Thomas* v. *Cook*, referred to in the former principal case (pp. 514, 516, *supra*): "It appears to me," he says, "that this controversy was, so far as concerns the question before me, set at rest by the judgment of the Court of Exchequer in *Davison* v. *Gent* (1857, 1 Hurl. & N. 744, 26 L. J. Ex. 122). In *Thomas* v. *Cook* there was in fact a change of possession, the old tenant, Cook, having gone out of possession when the plaintiff accepted Perkes as his tenant (see the observations of Lord ST. LEONARDS in *Creagh* v. *Blood*, 3 J. & Lat. 133, 160). In his judgment in *Davison* v. *Gent*, Chief Baron POLLOCK states the law thus: 'It must therefore be taken to be established that where a lessee assents to a lease being granted to another, and gives up his own possession to a new lessee, that is a surrender by operation of law.' This statement appears to me not to be qualified by any subsequent expressions in the same judgment. It substantially reconciles *Thomas* v. *Cook* with the principles enumerated by Baron PARKE in *Lyon* v. *Reed*, so far as relates to leases in possession."

AMERICAN NOTES.

These cases are cited in Wood on Landlord and Tenant, sect. 493, and the first in 1 Washburn on Real Property, *354, and their doctrine is sustained by *Rice* v. *Dudley*, 65 Alabama, 68; *Morgan* v. *McCollister*, 110 Alabama, 319; *Allen* v. *Devlin*, 6 Bosworth (N. Y. Super. Ct.), 1; *Lamar* v. *McNamee*, 10 Gill & Johnson (Maryland), 116; 32 Am. Dec. 152; *Whitney* v. *Meyers*, 1 Duer (N. Y. Super. Ct.), 266; *Armory* v. *Kannoffsky*, 117 Massachusetts, 357; 19 Am. Rep. 416; *Hesseltine* v. *Seavey*, 16 Maine, 212; *Baker* v. *Pratt*, 15 Illinois, 569; *Schieffelin* v. *Carpenter*, 15 Wendell (N. Y.), 400; *Ghegan* v. *Young*, 23 Penn. State, 18; *Talbot* v. *Whipple*, 14 Allen (Mass.), 177; *Bedford* v. *Terhune*, 30 New York, 453; 86 Am. Dec. 395 (citing *Nickells* v. *Atherstone*); *Welcome* v. *Hess*, 90 California, 507; 25 Am. St. Rep. 145; *Kneeland* v. *Schmidt*, 78 Wisconsin, 345; *Stewart* v. *Sprague*, 76 Michigan, 184; *Williams* v. *Vanderbilt*, 145 Illinois, 238; 36 Am. St. Rep. 486; *Stobie* v. *Dills*, 62 Illinois, 432.

All these cases recognize the necessity of an agreement for surrender, express or implied. So if the tenant abandons and the landlord enters to make repairs, this is a surrender. *MacKellar* v. *Sigler*, 47 Howard Practice (N. Y.), 20; *Schnisler* v. *Ames*, 16 Alabama, 73; 50 Am. Dec. 168. But merely leaving the keys with the lessor with the statement that the tenant has abandoned does not work a surrender. *Lucy* v. *Wilkins*, 33 Minnesota, 441. And if the landlord retains the keys, but notifies the tenant that he shall hold him

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for the rent, and subsequently relets, with notice to the original tenant, he may hold the latter for deficiency in rent: *Auer* v. *Penn*, 99 Penn. State, 370; 44 Am. Rep. 114; and surrender is not implied from failure to return keys left with an agent authorized to collect rents: *Blake* v. *Dick*, 15 Montana, 236; 48 Am. St. Rep. 671; or with the lessor's wife, when the landlord afterwards repudiates her authority: *Alschuler* v. *Schiff*, 59 Illinois Appeals, 51; and so where the landlord used the keys left by the tenant at his office, cleaning the premises, making trifling repairs, and posting a notice that they were to let; the Court observing that acts constituting a surrender by operation of law must be such as are not consistent with the continuance of the term: *Ontario I. L. & I. Co.* v. *O'Dea*, 22 Ontario Appeals, 349. So mere notice by the tenant that he will pay no more rent does not constitute a surrender. *Kiernan* v. *Terry*, 26 Oregon, 494. Acceptance is not to be inferred by the landlord's putting up a sign "To let," and promising a purchaser immediate possession after the tenant abandons the premises. *Reeves* v. *McComeskey*, 168 Penn. State, 571.

A covenant to surrender at the end of the term in good repair is not waived by surrender before the end of the term. *Snowhill* v. *Reed*, 49 New Jersey Law, 292; 60 Am. Rep. 615.

An oral agreement for a term longer than a year is not a surrender of an existing written lease. *Coe* v. *Hobby*, 72 New York, 141; 28 Am. Rep. 120, citing *Foquet* v. *Moor*, 7 Exch. 870, and observing: "The farthest our Courts have gone is to hold, that to effect a surrender of an existing lease by operation of law, there must be a new lease, valid in law to pass an interest according to the contract and intention of the parties." This is the doctrine of *Smith* v. *Kerr*, 108 New York, 31; 2 Am. State Rep. 362; and see *Chamberlain* v. *Dunlop*, 126 New York, 45; 22 Am. St. Rep. 807.

A vacating of the premises by the tenant before the end of the term, and the taking possession by the landlord, and his renting to another, does not relieve the first tenant where the lease has not been surrendered with the understanding that it shall be cancelled. *Scheelky* v. *Koch*, 119 North Carolina, 80.

But a letter from the lessees of a farm to the lessor, stating that it will be impossible for them to work the place, and that they have sold all their effects to pay their debts, and it would be folly for the lessor to make them keep the farm, as they could not pay the rent, is an offer to surrender, which the lessor accepts by obtaining a new rent-note to himself from a sub-lessee in place of one given to the lessees, renting a portion of the land, and trying to rent the remainder. *Williamson* v. *Crossett*, 62 Arkansas, 393, citing *Hall* v. *Burgess*, 5 B. & C. 332.

Washburn says (1 Real Property, * 353): "The cases upon this point are numerous and often difficult to reconcile, each depending upon the peculiar circumstances upon which the decision turned. But it may be assumed that there must be a mutual agreement between the lessor and the original lessee, that the lease is terminated, in order to work a surrender. But this may be implied, and need not always be expressed." Citing the principal cases; *Elliott* v. *Aiken*, 45 New Hampshire, 30; *Hill* v. *Robinson*, 23 Michigan, 24; *Matthews* v. *Tobener*, 39 Missouri, 115.

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No. 32. — ROE d. EARL OF BERKELEY *v.* THE ARCHBISHOP OF YORK.

(K. B. 1805.)

RULE.

THE mere cancelling of a lease is not a surrender; nor is a surrender effected by the fact that the lessor, in consideration of the surrender of the old lease, has purported to grant a new lease which is void as being *ultra vires*.

Roe d. Earl of Berkeley v. The Archbishop of York.

6 East, 86–109 (8 R. R. 413).

Lease. — Cancelling not Surrender. — Recital in Void Lease.

[86] The mere cancelling in fact of a lease is not a surrender of the term thereby granted within the Statute of Frauds, which requires such surrender to be by deed or note in writing, or by act or operation of law. Nor is a recital in a second lease, that it was granted in part consideration of the surrender of a prior lease of the same premises, a surrender by deed or note in writing of such prior lease, it not purporting in the terms of it to be of itself a surrender or yielding up of the interest; though in some instances the acceptance of a second lease for part of the same term before demised, may be a surrender of such prior term by operation of law; and this, even though the second lease be voidable, if it be not merely void. But where tenant for life with a special power of leasing, reserving the best rent, in consideration (as recited) of the surrender of a prior term of ninety-nine years (of which above fifty were unexpired), and certain charges to be incurred by the tenants for repairs and improvements, &c., granted to him a new lease of the premises for ninety-nine years by virtue of the power reserved to her, or any other power vested in, or in anywise belonging to her, which new lease was void by the power for want of reserving the best rent: *Held*, that the second lease, which was intended and expressly declared to be granted by virtue of and under the power, and being apparently not intended by the parties to be carved out of the estate for life of the lessor, being void under the power, should not operate in law as a surrender of the prior term, as passing an interest out of the life estate of the grantor, contrary to the manifest intent of the parties; and, consequently, that the prior term, though the indenture of lease were in fact cancelled and delivered up when the new lease was granted, might be set up by the tenant of the premises in bar to an ejectment by the remainder-man after the death of tenant for life, however such second lease might have operated by way of estoppel as against the lessor during her life.

No. 32. — Roe d. Earl of Berkeley v. The Archbishop of York, 6 East 86, 87.

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This ejectment was brought for a messuage and appurtenances in the parish of St. George, Hanover Square, in the county of Middlesex; and at the trial before LAWRENCE, J., at the sittings at Westminster, a special verdict was found, stating in substance as follows:—

John, Lord Berkeley, of Stratton, being seised in fee of the premises in question, by indenture dated the 19th of May, 1743, demised the same to J. Lumley, his executors, &c., for a term of ninety-nine years from Lady-day, 1741, at a yearly rent (after the first two years of the term) of £32, payable quarterly on the four most usual feast days, free of all taxes, &c. J. Lumley at the same time executed a counterpart of the indenture, and delivered it to Lord Berkeley. *By virtue of this demise, J. Lumley [*87] entered into and was possessed of the premises; and afterwards assigned the term for a valuable consideration to the Archbishop, the defendant. John, Lord Berkeley, by his will dated the 21st of May, 1772, devised the reversion of the premises to the use of Mrs. Anne Egerton and her assigns for life, or till she should marry; and after several intermediate remainders, remainder to the use of the lessor of the plaintiff for life, with other remainders over. The will also contained a power to the several tenants for life, when they should be respectively in the actual possession of the messuages, lands, &c., devised to them, to lease the same by indenture to any person who should be willing to build or to repair any of the same messuages, for any term of years not exceeding ninety-nine years in possession; but not in reversion or by way of future interest, so as upon every such lease there should be reserved the best and most improved yearly rent, that at the time of making thereof could be reasonably had or gotten for the same, without taking any fine or income for making any such lease; and so as in every such lease there should be contained the like clauses, covenants, and agreements as were usual in building or repairing leases. John, Lord Berkeley, died without altering or revoking his will; and on the 14th of May, 1784, Mrs. Anne Egerton, being by virtue of the said devise seised for life of the reversion and freehold of the premises in question, executed a certain indenture of that date, whereby it was witnessed, that for and in consideration of the surrender of the said first-mentioned indenture, and also in consideration of the great charges and expenses which the said Archbishop had been and might be at in repairing

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and improving the said premises, and of the rent and covenants therein reserved and contained, and thereby covenanted to [*88] be paid and performed *on the part of the said Archbishop, his executors, &c., she the said Anne Egerton, by virtue and in execution of the power and authority therein stated to be given, and reserved to her in and by the said will of John, Lord Berkeley, of Stratton, deceased, or by any other power in the said Anne vested, or to her in anywise belonging, demised the said premises to the said Archbishop, his executors, &c., *habendum*, &c., from Lady-day then last, for the term of ninety-nine years, at the yearly rent of £36 4s., payable quarterly, and clear of all taxes, &c., payable to her for her life; and after her decease to those in remainder during the term. The Archbishop accepted the last-mentioned lease, and executed a counterpart thereof by signing and sealing the same; and at the time of the execution of the said last-mentioned lease, the said first-mentioned lease and the counterpart thereof were cancelled and exchanged; *i. e.*, the original lease was cancelled and delivered by the Archbishop to Mrs. Anne Egerton, and now remains cancelled in the hands of the said Earl; and the counterpart thereof was cancelled and delivered by Mrs. Anne Egerton to, and now remains cancelled in the hands of, the Archbishop. The jury then found that the indenture of the 14th of May, 1784, was not a lease warranted by the said power in the will of John, Lord Berkeley, of Stratton, the rent reserved thereon not being the best that could be gotten, according to the terms of the power. In May, 1803, Mrs. Anne Egerton died. The special verdict then stated the entry of the lessor of the plaintiff, the eviction of the defendant, and the demise, &c. But whether, &c.

This case was argued in Trinity Term last by Freere for the plaintiff, and Holroyd for the defendant; and again in Michaelmas Term last by Bayley, Serjt., for the plaintiff, and Gibbs for the defendant.[1]

[100] Lord ELLENBOROUGH, Ch. J., now delivered judgment (after stating the special verdict). — The question upon this special verdict is, Whether the lease of the 19th of May, 1743, was determined and put an end to by that of the 14th of May, 1784? The affirmative of this proposition [*101] *has been contended for upon the part of the plaintiff

[1] The arguments are set forth at some length in the report in 6 East.

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on three grounds: 1st, That the acceptance of the second lease was an implied surrender of the former lease; 2ndly, That the cancelling of the first lease amounts, of itself, to a surrender of the term thereby granted; and 3rdly, That the execution of the counterpart of the lease of 1784 is a surrender of that of 1743, within the provision of the Statute of Frauds. Upon the last two of these grounds the Court never entertained any doubt; for, as it is enacted by the Statute of Frauds, "that no lease of any lands or houses shall be surrendered, unless by deed or note in writing, signed by the party or his agent thereunto lawfully authorized by writing, or by act and operation of law," the act of cancellation, which can in "no allowable sense of the words be considered as either a deed or a note in writing," cannot since that statute be a surrender; nor can the counterpart of the second lease enure as such, unless it does so by operation of law, inasmuch as it does not purport in its terms to be of itself a surrender, having no words in it which denote or can amount to a yielding or rendering up of the interest of the Archbishop to Mrs. Egerton, but merely recites that the grant of the new is partly in consideration of the surrender of the first indenture (which surrender, however, if any such had in fact been made, ought to have been specially found by the jury), and which fact of previous surrender this recital by no means necessarily imports; for the statement in the counterpart will be sufficiently accurate, if the acceptance of the second lease would by operation of law be a surrender of the former. And indeed this point was not much pressed by either of the gentlemen who very ably argued this case on behalf of Lord Berkeley. But the material ground on which * they con- [*102] tended that the acceptance of the second lease was a surrender of the first, is this: That Mrs. Egerton having a life-estate, it was competent to her to make leases by virtue of such interest, independent of the power given to her by the will of Lord Berkeley, of Stratton; and that the lease of 1784 being a good lease, capable of taking effect out of her life estate, was not void *ab initio*, but passed an interest; and being accepted, worked a surrender of the first lease, inasmuch as the two leases could not stand together. In support of this position, Co. Litt. 45 was cited, where it is laid down as to ecclesiastical leases, that though not warranted by the 1st and 13th Eliz., they are good against the lessor, if a sole corporation; and during the life of the head, if

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made by an aggregate one. And *Whitley* v. *Gough*, Dyer, 140 146 (where a husband and his wife being seised of an estate tail, the husband made a lease for eighteen years to one, who had in the lands demised a term of ninety-nine years, the acceptance of which lease was holden to be a surrender of the prior term, though the wife after the death of her husband avoided the lease made by him) was, together with various other cases, cited to show that the acceptance of a voidable lease is a surrender, though the acceptance of a void lease is not; which position the counsel for the defendant did not dispute. On the other side it was contended, that as between the plaintiff, the Earl of Berkeley, and the defendant, the Archbishop, the lease must be taken to be void *ab initio*, whatever it might be as between the Archbishop and Mrs. Egerton; for that the same instrument may at different times have a different operation. As a lease by a tenant for life and him in remainder is, during the life of the tenant for life, his lease, and the confirmation of the remainder-man; and after the death
[*103] *of the tenant for life the lease of the remainder-man, and the confirmation of the tenant for life. That according to the authority of *Wilson* and *Scwell*, 4 Burr. 1945, and 1 Black. Rep. 617, and of *Davison* v. *Stanley*, 4 Burr. 2210, unless the second lease passed an interest according to the contract, it could not operate as an implied surrender; and that those cases further prove, that it is no surrender unless the lessee take all the interest which the second lease purports to grant; which, under Mrs. Egerton's lease, the Archbishop certainly did not do. In support of which position a case from 2 Rolle's Abr. 495, letter F, p. 7, was relied on; where it was laid down that a lease by a dean and chapter, not warranted by the Stat. 13th of Eliz., is not a surrender of a prior lease, it being void; and yet, according to the doctrine of Lord COKE, 1 Inst. 45 a, it is clearly good during the life of the dean. But we do not think this last case from Rolle's Abr. an authority for such a position; for although there may be now no question but that such lease would be good during the life of the dean, yet it appears not to have been so understood in the time of Lord Rolle, according to the MS. note of Lord Hale, cited by the plaintiff's counsel from the notes in Mr. Hargreave's edit. of Co. Litt., p. 45, note 4, and from the case of *Southwell College* and the *Bishop of Lincoln*, 1 Mod. 205; where ELLIS, J., said that Mr. Justice JONES, in the case of *Lloyd* and *Gregory*,

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denied *Hunt* and *Singleton's Case*, which is the authority referred to by Lord Coke in support of his opinion given in 1 Inst. 45. According to the argument used on behalf of the plaintiff, he is entitled to recover the messuage in question, because the lease of Mrs. Egerton not having been made in compliance with the condition in the leasing power, which requires the best * and most improved rent that can be got at the time of [*104] making the lease to be reserved, would not operate as an appointment of an interest to the Archbishop under that power; and that, therefore, he took no estate under the will of Lord Berkeley, of Stratton: and though the lease be void on this account as to the Archbishop, *i. e.*, "as an appointment under the power," yet that it is not void *in toto* as to him; for that it passed an interest out of Mrs. Egerton's life estate, and operated as to him as a demise for years by a tenant for life, which would pass an interest for so many years as her life should endure. For this last position no authority was cited in the argument but the passage in Lord Coke, of which I have taken notice, where he says, that a lease made by an ecclesiastical person, not according to the provisions of the restraining statutes, is good during his life; but that, it must be remembered, is the case of a lease which, but for the disabling statutes, would be good for the whole period contained in it, and which could only take effect in one way, namely, out of the estate of the lessor: and that the question there did not properly turn on the effect of the instrument, but on the construction of the disabling statutes, *i. e.*, whether they made it void *ab initio*, or only void as against the successor; leaving the lease to have the effect and operation it had prior to the statutes for so long time, as it did not prejudice the rights which those statutes were made to protect. But the provisions in Lord Berkeley's will did not contemplate, nor had in any manner for their object, the restraint of any faculty or ability to demise, which Mrs. Egerton would have in virtue of her life estate. One of the first rules for the construction of deeds is, *Verba intentioni, et non e contra, debent inservire.* Sheppard Touchstone, 86. And in the case of *Gybson* and *Searle*, Cro. Jac. 176, * the rule was [*105] recognised in the case of a surrender where "the Court resolved unanimously that it was not a surrender, for that ought to be the intent of the parties;" and it appears that there was not any intent of the parties, but, &c.; and afterwards, "this lease

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was made with an intendment to his benefit, and not to his hindrance, as it should be if it should be construed a surrender," &c. And in *Goodtitle* v. *Bailey*, Cowp. 600 (11 R. C. 48), Lord MANSFIELD lays it down that deeds shall be construed as to "operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention." And such was the law in the time of Lord COKE, as to conveyances by the common law; though the same rule did not hold as to conveyances by the Statute of Uses, which in many cases were not allowed to operate in any way but that in which the party intended they should operate; for it is laid down in 1 Inst. 49, "That where a man has two ways to pass lands, and both by the common law, and he intends to pass them by one of the ways, yet, *ut res magis valeat*, it shall pass by the other; but where a man might pass lands either by the common law or by raising a use, in many cases it is held otherwise." And even where a conveyance might operate in one of two ways under the Statute of Uses, as the intent of the parties was considered as working much in the raising and direction of uses, it has been holden, that if a man intended to pass land one way, it should not pass another way, contrary to his intent. To this effect is the case of *Samon* v. *Jones*, 2 Vent. 318, determined in the House of Lords; and though, as it is said in *Osman* v. *Sheafe*, 3 Lev. 370, "The Judges have, in later times, had more consideration to the substance, viz., the passing [* 106] the estate according to the intent of the parties, * than the shadow and manner of passing it;" and where the intent of the parties is apparent to pass a thing one way or another, a deed may be good either way, and may enure to divers purposes; and he to whom the deed is made shall have his election which way to take it, and may take it that way which is most for his advantage, — yet there is no case or authority which says, that if a conveyance cannot operate "in the way intended" to pass the estate intended, that it shall operate in another way to pass an estate which was not intended, and not within the contemplation of the parties. "And though the manner of passing an estate is not to be regarded," yet "the intent is to be regarded, What estate is to pass, and to whom?" And so it is laid down by Lord Ch. J. WILLIS in his report, 687.

Let us then examine and see what was the intent of the parties

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in this case. Was it to take an interest under the power only, or to take an interest out of Mrs. Egerton's life estate, in case the lease could not operate as an appointment under the power? As to this point it is impossible to doubt. At the time of the new lease the Archbishop had fifty-five years, the unexpired remainder of a term of ninety-eight years in the messuage in question, an interest of greater value than an estate for any single life; for this interest he could not mean to substitute a lease during Mrs. Egerton's life only. The lease itself also, by its term, shows the intention of the parties to be only an appointment under the power; for Mrs. Egerton professes to make the lease "by virtue of and in execution of the power and authority given and reserved to her by Lord Berkeley, of Stratton." Thus she in most distinct terms refers the Act she was then doing to that power, and does not in the slightest degree show any intention of granting an interest by way of demise, as owner of the life estate; for though *the lease, [*107] after referring to the power, goes on with some words more general, as "any other power," &c., yet technically speaking power does not apply to the sort of interest which the ownership gives; for which there is the authority of Lord Thurlow, in 3 Bro. Chan. Cas. 35, if any authority on this head were wanting. The *reddendum* is consistent with the same intent, and proper for a lease made in pursuance of the power; for it makes the rent payable to Mrs. E. herself for life, and "afterwards to those in remainder," who, had she intended a demise out of her life estate, would have had no claim to any rent to be reserved under it; and the rent is exclusively reserved to those in remainder, without any alternative provision for payment of an apportioned part of it, in case of Mrs. Egerton's death, to which her representatives would be entitled in the event of her dying between two rent days; and which would have been proper, if a demise by her as tenant for life had in any event been intended. From hence it appears unquestionably clear what was her intention, what the interest she meant to convey, and what the act she meant to execute. The other party to the deed, the Archbishop, by executing the counterpart, as distinctly shows on his part what he meant to accept, which could be only what by the lease Mrs. Egerton meant to grant: his object unquestionably being to come in under Lord Berkeley's will, and not under Mrs. Egerton, and to acquire an interest which might precede and take place of all

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the estates subsequent to Mrs. Egerton's which were limited by Lord Berkeley's will, and were thereby also made subject to the power, and not in any event to let in the interest of the remainder-men on the death of the tenant for life, to his own prejudice, and to the destruction of the interest he had in the prem-
[* 108] ises. If the new lease * be a surrender of the old one, it must so operate by construing the Archbishop's acceptance of it to be an assent on his part to take a demise from Mrs. Egerton as owner of the estate contrary to the plain meaning and purport of the deed, to the manifest disadvantage of himself; and this, though he now expressly disclaims, and at no time appears to have claimed any interest which Mrs. Egerton could give him independent of the power. In *Sir E. Clare's Case*, 6 Coke Rep. 18, it is laid down, that if a man make a feoffment to the use of such persons as he should appoint by will, and until appointment to the use of himself in fee, and he afterwards devise the land without any reference to his power, he shall be considered "as declaring his intent to devise the land as owner, and not to limit a use according to his authority." So here *vice versa*, as the lease expressly refers to the power, and reserves the rent to the persons in remainder, the parties have declared their intent that this deed should operate as an appointment, and not as the demise of the tenant for life. In Hobart, 159, it is laid down, "That if your act may work two ways, both arising out of your interest, election is given to the patient to use it either way;" on the other hand, "If the act will work two ways, the one by an interest, and the other by an authority or power, and the act be indifferent, the law will attribute it to the interest, and not to the authority;" and lastly, "where interest and authority meet, if the party declare clearly that his will is, that this shall take effect by his authority or power, then it shall prevail against interest; for *modus et conventio vincunt legem.*" Now, in this case the parties have declared most clearly and unequivocally that their will is, that this shall take effect by the authority of power. Whether or not this lease would operate as be-
[* 109] tween * the parties to it by estoppel, is not material for the present purpose to inquire: it is sufficient to warrant us in deciding for the defendant, if it did not pass an interest; which, we are of opinion, it did not. As in this case our judgment is formed upon this ground, viz., that Mrs. Egerton having

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a power to appoint, and an estate also which enabled her to demise independent of her power, both parties intended an appointment under the first, and not a grant out of the latter, and that the deed shall not be allowed to operate contrary to such their intention; it will not be necessary to examine the cases of *Wilson* and *Sewell*, 4 Burr. 1975 and 1 Blac. 627, and *Davison* v. *Stanley*, 4 Burr. 2210, where the lessees could have but one thing in their contemplation; viz., a demise out of the interests which the lessors in those cases either had, or were supposed to have, in the premises demised. It may, however, be observed, that the general reasoning to be found in those cases applies most strongly to the present. The effect of our opinion will be, that the period of the Earl of Berkeley coming into possession of the estate will not be postponed to any later time than was in the immediate contemplation of the devisor; that the Archbishop will acquire no advantage, and only not suffer a loss by what was probably the mistake of some less cautious or skilful adviser: and this result is what one cannot but feel to be the real justice of the case; and it would have been a circumstance to be regretted, if the law had been found to be otherwise. *Judgment for the defendant.*

ENGLISH NOTES.

The principle of the rule is exemplified in *Lord Ward* v. *Lumley* (1860), 5 Hurl. & N. 87, 29 L. J. Ex. 322, where to a declaration of a lessor suing for arrears of rent due under a lease, the defendant pleaded that the deed of lease under which the defendant had possessed the premises had been cancelled by the mutual assent of lessor and lessee. The Court held the plea to be no answer to the action. The effect of the demise was to create two estates, viz., the estate of the lessee, and the reversion of the lessor — the rent being incident to the latter estate; and the cancelling of the lease could not destroy the estates or their incidents.

AMERICAN NOTES.

This case is cited by Wood in Landlord and Tenant as authoritative (sects. 212, 222, 485), and in Taylor on Landlord and Tenant, sect. 511, and the doctrine is more or less supported by *Strong* v. *Crosby*, 21 Connecticut, 398; *Jackson* v. *Gardner*, 8 Johnson (N. Y.), 403; *Brewer* v. *Nat. Union Bldg. Assn.*, 64 Illinois Appeals, 161.

It is well settled that where a lease is by deed, the lessee is not divested by cancellation or destruction of the instrument, even if the parties intended

that effect. *Wiley* v. *Christ*, 4 Watts (Penn.), 199; *Hatch* v. *Hatch*, 9 Massachusetts, 307; 6 Am. Dec. 67; *Jackson* v. *Page*, 4 Wendell (N. Y.), 585; *Grayson* v. *Richards*, 10 Leigh (Virginia), 57; *Lawrence* v. *Lawrence*, 24 Missouri, 269; *Gilbert* v. *Bulkley*, 5 Connecticut, 262; 13 Am. Dec. 57; *Jordan* v. *Jordan*, 14 Georgia, 145; *Morgan* v. *Elam*, 4 Yerger (Tennessee), 375; *Parker* v. *Cane*, 4 Wisconsin, 1; 65 Am. Dec. 283; *Fawcetts* v. *Kimmey*, 33 Alabama, 261; *Lawton* v. *Gordon*, 34 California, 36; 91 Am. Dec. 670; *Lisloff* v. *Hart*, 25 Mississippi, 245; 57 Am. Dec. 203; *Wilson* v. *Hill*, 13 New Jersey Equity, 143; *Schaeffer* v. *Fithian*, 17 Indiana, 463; *Walters* v. *Wagley*, 53 Arkansas, 509; 22 Am. St. Rep. 232; *Potter* v. *Adams*, 125 Missouri, 118; 46 Am. St. Rep. 478; *Raynor* v. *Wilson*, 6 Hill (N. Y.), 469; *Nicholson* v. *Halsey*, 1 Johnson Chancery (N. Y.), 417; Jones on Real Property, sect. 1259.

In a few States it is held that cancellation of an unrecorded deed revests the estate in the grantor. *Mussey* v. *Holt*, 24 New Hampshire, 248; 55 Am. Dec. 254; *Nason* v. *Grant*, 21 Maine, 160; *Faulks* v. *Burns*, 1 Green's Chancery (New Jersey), 250.

A sealed lease may be surrendered by parol agreement. *Alschuler* v. *Schiff*, 164 Illinois, 298.

A new lease, to work a surrender of the first, must be valid in law. *Schieffelin* v. *Carpenter*, 15 Wendell (N. Y.), 400, a very learned opinion, citing the principal case, and observing that the principle "is conclusively settled by authority."

But a lease is effectually surrendered by a sealed agreement to surrender: *Harris* v. *Hiscock*, 91 New York, 340; and by an executed parol agreement to surrender: *Goldsmith* v. *Darling*, 92 Wisconsin, 363.

Section II. — *Tenancies for a Term certain under Leases and other Instruments in Writing.*

(d) *Rights and Duties on Expiry of Term.*

No. 33. — IBBS *v.* RICHARDSON.

(Q. B. 1839.)

RULE.

It is the the duty of the tenant on the expiry of his term to deliver up the vacant possession to the landlord. And if a sub-tenant holds over, although against the will of the principal tenant, the latter is responsible to the landlord, and the landlord may sue him either for recovery of possession, or for compensation or occupation rent for the period during which the premises have been held over.

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Ibbs v. Richardson and others.

9 Ad. & Ell. 849–853 (s. c. 1 P. & D. 618).

Landlord and Tenant. — Expiry of Lease. — Undertenants holding over.

Lessee for a term ending on 11th October underlet to C. from year [849] to year, subject to the determination of his own interest. Upon the expiration of the term, C. refused to quit, and held over against the will of the lessee. On 16th October the lessee distrained on him for rent due before the 11th. On 14th December C. quitted; and the lessee then tendered possession to the original landlord, who refused to accept it. *Held*, that the lessee was liable, in an action for use and occupation, to pay rent to his landlord for the period between the 11th October and 14th December, but not for any longer period.

Debt for the use and occupation by the defendants of certain premises of the plaintiff for one year.

Plea: *nunquam indebitatus;* issue thereon. By consent of the parties, and by a Judge's order, the following case was stated for the opinion of this Court.

On the 3rd of December, 1827, the plaintiff, by writing under seal, demised to Anna Maria Hughes, her executors, &c., the premises mentioned in the declaration, for eight years beginning from the 11th of October then last past, at the yearly rent of £20.

From and after the execution of this instrument, A. M. Hughes continued in the possession and occupation of the premises upon the terms therein mentioned, until her death, in the beginning of February, 1829. Defendants were the executors of Hughes, and had proved her will and acted in the execution thereof. After the death of A. M. Hughes, defendants, as such executors, proposed to plaintiff to surrender the premises to him, but plaintiff refused to accept such surrender; whereupon defendants underlet the premises to Robert Craik from year to year, subject to the determination of their own interest therein as executors, at the same yearly rent of £20; and Craik entered into the possession of the said premises as their undertenant, and continued in the occupation until 14th December, 1835, under the following circumstances. The original rent was duly paid to plaintiff by defendants up to the 11th day of October, 1835. On that day defendants, being desirous of delivering up *possession of [*850] the premises to plaintiff, demanded possession from their undertenant, Craik, who refused to quit, and continued, against

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defendants' will, to occupy them. On the 16th of the same October, £10 rent being in arrear from Craik to defendants, they distrained upon his goods, and continued in possession thereof upon the premises in question until the 22nd of the same month. After, as well as during the continuance of, this distress, defendants endeavoured to induce Craik to quit the premises; and on the 14th of December following he did quit. No rent or compensation of any kind was received by defendants for the period between the 11th of October and the 14th of December, 1835. Plaintiff was aware of all the above circumstances; but no direct communication took place between him and defendants until the said 14th of December. On that day, the key of the house and possession of all the premises were offered by defendants to plaintiff. Plaintiff, however, refused the key, unless defendants would pay him a quarter's rent, but stated that, if defendants would then pay a quarter's rent, he would accept the key, and release defendants from all liability. Defendants refused to make such payment; and the key remained in their possession, and the premises were in fact unoccupied, from that time to the 11th of October, 1836. Power was given to the Court to draw inferences of fact from the case stated; and if the Court should be of opinion, under the above circumstances, that the plaintiff was entitled to recover any sum of money in this action, defendants were to confess judgment, and judgment was thereupon to be entered up for such sum as the Court should think plaintiff entitled to recover, with costs, &c.

[*851] *Biggs Andrews, for the plaintiff. — The plaintiff is entitled to recover rent, if not for one year, at least for the period during which the undertenant wrongfully held over. The tenant's responsibility does not cease until redelivery of the premises to the lessor; and the exertions of the former to expel the undertenant cannot affect the plaintiff's rights. As long as the undertenant occupied, the defendants were also in sufficient occupation for the purposes of this action. *Bull* v. *Sibbs*, 8 T. R. 327; *Matthews* v. *Sawell*, 8 Taunt. 270. Actual occupation is not necessary. *Pinero* v. *Judson*, 6 Bing. 206 (31 R. R. 388). *Harding* v. *Crethorn*, 1 Esp. 57 (5 R. R. 719), is in point, and shows that nothing but redelivery of the premises, or acceptance of another tenant by the lessor, will release the lessee. Here the plaintiff expressly refused to accept the key of the premises; and

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the defendants, by distraining after the determination of their own interest, acted as owners of the property under Stat. 8 Anne, c. 14, s. 6, which gives the landlord power to distrain after the end of the tenant's term, provided such distress be made "during the continuance of the landlord's title or interest."

Platt, *contra*. — It is not denied that the holding by an undertenant, with the assent of the lessee, will make the latter liable; but the defendants are not to be made tenants against their will. The declaration in this form of action always alleges a holding at the instance and request of the defendant. Here there is no ground for saying that any part of the occupation after the 11th of October was voluntary on the part of the defendants. The declaration also alleges occupation by the permission of the plaintiff; if, therefore, the occupation of the [*852] undertenant is that upon which the plaintiff relies, then the undertenant occupied with the plaintiff's assent, and so the defendants are discharged by the acceptance of another tenant, as in *Harding* v. *Crethorn*, 1 Esp. 57 (5 R. R. 719). By offering to surrender and endeavouring to remove the undertenant, the lessees have done all that lies in their power to relieve themselves from the relation of landlord and tenant; and the plaintiff must complete his possession by bringing ejectment and suing Craik for the mesne profits. But it would be absurd to hold the defendants liable for mesne profits which they never received nor desired to receive. As to the distress by them, they had no reversion, and therefore no right to distrain. They were mere trespassers, and might be sued as such; or the plaintiff might, perhaps, sue them for not redelivering, if the *dictum* of Lord KENYON in *Harding* v. *Crethorn*, be good law.

B. Andrews, in reply. — The doctrine of Lord KENYON is decisive, and has not been answered. Until the lessee surrenders the premises, so as to enable the lessor to take possession, he continues to hold them, and to be liable for rent in respect of such holding.

Lord DENMAN, Ch. J. — The plaintiff is entitled to recover. If the defendants, after the expiration of their lease, had let the premises anew to Craik, the case would have been a very clear one. Here they distrained, as upon a continuance of their own interest, and did not offer to deliver up the key, or the possession, until the 14th of December. When Craik [*853] held over, there was a sufficient reversion, as between

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them and Craik, to enable them to distrain if they pleased. The defendants, however, are only bound to pay rent up to the 14th of December, when the undertenant had quitted and possession was tendered to the plaintiff.

LITTLEDALE, J. — No doubt the ordinary course under these circumstances would be to bring ejectment; but the plaintiff may waive the tort, and sue for use and occupation; or he might have maintained an action for not delivering up possession. After a recovery in ejectment, he might have recovered mesne profits until the day when the possession was tendered to him; so here he may recover rent for that period. Craik's possession, being obtained by and through the defendants, is to be taken as their possession. If the original tenancy had been from year to year, the defendants would have been liable for a whole year's rent. Here, the holding over being a wrongful one after the expiration of a term, the plaintiff is entitled to recover only for the period during which he was kept out of possession.

WILLIAMS and COLERIDGE, JJ., concurred.

Judgment for the plaintiff for the recovery of £5.

ENGLISH NOTES.

The *dictum* of Lord KENYON in *Harding* v. *Crethorn* (1793), 1 Esp. 57, 5 R. R. 719, referred to in the argument (p. 539, *supra*), was this: "When a lease is expired, the tenant's responsibility is not at an end; for if the premises are in possession of an undertenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term." In *Henderson* v. *Squire* (1869), L. R. 4 Q. B. 170, 173, 38 L. J. Q. B. 73, 19 L. T. 601, 17 W. R. 519, COCKBURN, Ch. J., cites this passage as "the law laid down by Lord KENYON," and says, "That has been considered law ever since." BLACKBURN, J., uses language to a similar purport. The Court applied the law accordingly to the case of a tenancy under a parol agreement, although there was no stipulation as to his delivering up possession at the end of the term; and they held the landlord entitled to recover from his tenant damages measured by what the rent would have amounted to for the time he was kept out of possession; and also the costs of an ejectment which had been rendered necessary by the tenants holding over on the principle of *Collen* v. *Wright* (2 R. C. 484).

The principal case has been distinguished in an Irish case, where, after the death of a tenant from year to year who had sublet, notice

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to quit was given to his administratrix, who gave up possession so far as she could, the subtenant refusing to quit as the term of his subtenancy was not expired. The Court held that the action being brought against the administratrix as a trespasser and a wrongdoer, she could not be made responsible for the wrong to which she was not in any way a party. *London & North-Western Railway Co.* v. *Hill* (1883), 12 L. R. Ir. 140. The distinction appears to be sound, assuming the ground of action to be a pure tort; whether the wrong is supposed to be caused by the act of the deceased tenant, in which case the cause of action would not survive on the principle of *Hambly* v. *Trott* (2 R. C. 1), or by the wrong of the undertenant, which could not be imputed to the administratrix personally.

AMERICAN NOTES.

This case is cited in Taylor on Landlord and Tenant, sects. 22, 524.

The original lessee is liable for rent, even in an action for use and occupation, as if he himself occupied the premises. *Moffatt* v. *Smith*, 4 New York, 126.

A tenant alienating a part or all of the premises remains liable to his lessor in an action to recover the whole, if possession is withheld after termination of the tenancy, whether the alienation was by sublease or by conveyance in fee with warranty. *Emerick* v. *Tavener*, 9 Grattan (Virginia), 220; 58 Am. Dec. 217: "A lessor may rest in security under a lease of his property to a tenant of his own selection, regarding the possession of his tenant as his own possession, held under his title and ready to be surrendered upon the determination of the tenancy; or if not surrendered, having a responsible man bound for it and for all costs that he may be compelled to incur if his tenant shall, by his own refusal or by putting others in possession who shall withhold the premises, render legal proceedings necessary to regain it. Citing *Roe* v. *Wiggs*, 2 B. & P. 230. See *Jackson* v. *Davis*, 5 Cowen (N. Y.), 123; 15 Am. Dec. 451.

The fact that one was in joint possession of land with plaintiff's tenant, and had title to one-half the land, will not prevent the recovery of a judgment for possession against the tenant. *Springs* v. *Schenck*, 99 North Carolina, 551; 6 Am. St. Rep. 552.

So strictly is this inference from holding over regarded in this country, that an unintentional holding over has the same effect as if intentional. As when the tenant had notified the landlord that he did not desire to renew but intended to surrender, but was prevented from doing so for two days by difficulty in procuring wagons and by sickness of a boarder. *Haynes* v. *Aldrich*, 133 New York, 287; 28 Am. St. Rep. 636. The Court said: "The rule is too well settled to be disputed that where the tenant holds over after the expiration of his term, the law will imply an agreement to hold for a year upon the terms of the prior lease; that the option to so regard it is with the landlord, and not with his tenant, and that the latter holds over his term at his peril."

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No. 34. — WIGGLESWORTH *v.* DALLISON.

(1779.)

No. 35. — HUTTON *v.* WARREN.

(EX. 1836.)

RULE.

A CUSTOM that the tenant shall have the way-going crop after the expiration of his term is effectual if not excluded by the express agreement in the lease.

So is a custom that the tenant in quitting is to have a reasonable allowance for seeds and labour bestowed on the farm in the last year of the tenancy.

Wigglesworth v. Dallison and another.

Douglas, 201–207 (1 Smith Lead. Cas.).

Landlord and Tenant. — Custom. — Way-going Crop.

[201] A custom that tenants, whether by parol or deed, shall have the way-going crop after the expiration of their terms, is good.

This was an action of trespass for mowing, carrying away, and converting to the defendant's own use the corn of the plaintiff, growing in a field called Hibaldstow Leys, in the parish of Hibaldstow, in the county of Lincoln. The defendant Dallison pleaded *liberum tenementum*, and the other defendant justified as his servant. The plaintiff replied, that true it was that the *locus in quo* was the close, soil, and freehold of Dallison; but, — after stating that one Isabella Dallison, deceased (being tenant for life), and Dallison, the reversioner in fee, made a lease on the 2nd of March, 1753, by which the said Isabella demised, and the said Dallison confirmed, the said close to the plaintiff, his executors, administrators, and assigns, for twenty-one years, to be computed from the 1st of May, 1755, and that the plaintiff, by virtue thereof, entered and continued in possession, till the end of the said term of twenty-one years, — he pleaded a custom, in the following words, viz., "That, within the parish of Hibaldstow, there now is, and from time whereof the memory of man is not to the contrary, there hath

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been a certain ancient and laudable custom, there used and approved of, that is to say, that every tenant and farmer of any lands within the same parish, for any term of years which hath expired on the first day of May in any year, hath been used and accustomed, and of right ought to have, take, and enjoy, to his own use, and to reap, cut, and carry away, when ripe and fit to be reaped, and taken away, his way-going crop, that is to say, all the corn growing upon the said lands which hath before the expiration of such term been sown by such tenant, upon any part of such lands, not exceeding a reasonable quantity thereof, in proportion to the residue of such lands, according to the course and usage of husbandry in the same parish, and which hath been left standing and growing upon such lands at the expiration of such term of years." He then stated that, in the year 1775, he sowed with corn part of the said close, being a reasonable part in proportion to the residue thereof, according to the course and usage of husbandry in the said parish, and that the corn produced and raised by such sowing of the corn so sown as aforesaid, being the corn in the declaration mentioned, at the end of the term, and at the time of the trespass committed, was standing and growing in the [202] said close, the said time not exceeding a reasonable time for the same to stand, in order to ripen and become fit to be reaped, and that he was during all that time lawfully possessed of the said corn, as his absolute property, by virtue of the custom. The defendant, in his rejoinder, denied the existence of any such custom, and concluded to the country. The cause was tried before EYRE, Baron, at the last assizes for Lincolnshire, when the jury found the custom, in the words of the replication.

Baldwin moved in arrest of judgment that such a custom was repugnant to the terms of the deed, and, therefore, though it might be good in respect to parol leases, could not have a legal existence in the case of leases by deed. He relied on *Trumper* v. *Carwardine*, before YATES, Justice (at the Summer Assizes for Herefordshire, 1769), the circumstances of which case were these:

"The plaintiff had been lessee under the corporation of Hereford for a term of twenty-one years, which expired on the 4th of December, 1767. In the lease, there was no covenant that the tenant should have his off-going crop. In the seed-time, before the expiration of the term, he sowed the fallow with wheat. The succeeding tenant obstructed him in cutting the wheat, when it became

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ripe, and cut and housed it himself, for his own use. Upon this the plaintiff brought an action on the case, and declared on a custom in Heredfordshire for tenants who quit their farms at Christmas or Candlemas to reap the corn sown the preceding autumn. YATES, Justice, held that the custom could not legally extend to lessees by deed, though it might prevail, by implication, in the case of parol agreements. That, in the case of a lease by deed, both parties are bound by the express agreements contained in it, as that the term shall expire at such a day, &c., and therefore all implication is taken away. That if such a custom could be set up, the Statute of Frauds would be thereby superseded in Herefordshire. Accordingly the plaintiff did not recover on the custom, although, on another count in trover in the same declaration, he had a verdict."

A rule to show cause was granted.

[203] The case was argued on Tuesday, the 8th of June, by Hill, Serjeant, Chambre, and Dayrell, for the plaintiff, and Cust, Baldwin, Balguy, and Gough, for the defendants; when three objections were made on the part of the defendant, viz.: 1. That the custom was unreasonable. 2. That it was uncertain. 3. That (as had been contended on moving for the rule) it was repugnant to the deed under which the plaintiff had held.

For the plaintiff it was urged, 1. That it was not an unreasonable custom, because without an express agreement, or such a custom as this, there could be no crop the last year of a term, for the tenant would not sow, if he could not reap, and the landlord would not have a right to enter till the expiration of the term. That it was for the advantage of the public, as much as customs for turning a plough, or drying nets, on another person's land, which had been held to be good. Davis, 32 b. That it bore a great analogy to the right of emblements, and was founded on the same principle, namely, the encouragement of agriculture. It was not prejudicial to any one: not to the landlord, because without it his land must be unemployed and unproductive for a whole season; nor to the succeeding tenant, because he would have his turn at the end of his term. 2. That it was sufficiently certain, by the reference to the residue of the lands not sown, and to the course and usage of husbandry in the parish. This is as much certainty as the nature of the subject will admit of, for, if it had been that so many acres might be sown and reaped, that would

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have been incompatible with those variations in the proportion of ploughed land, which arise, at different times, from circumstances in the course of cultivation and husbandry. Reasonable is an epithet which sufficiently qualifies the extent of customs, and is generally used in pleading them; as with regard to customary fines paid to the lord of a manor, estovers prescribed for by a party to be taken for the use of his house, &c. In the case of *Bennington* v. *Taylor*, reported in Lutwyche (2 Lutw. 1517, 1519), where the defendant, in an action of trespass, had pleaded a right to distrain for twelve pence for stallage, due by prescription, for the land near every stall in a fair, and, on a motion in arrest of judgment, it was objected that the prescription was uncertain, and therefore void, the quantity of land not being ascertained, the Court held it to be certain enough, because the quantity was to be ascertained by the common usage of the fair. [204] In all such cases, whether the quantity or amount is in truth reasonable or not, is for the jury to decide. 3. That the circumstances of the plaintiff's lease in this case having been by deed, made no difference. There was no agreement contained in the deed that the defendant would depart from the custom, although the parties must have known of it when the lease was executed. ' He did not claim under any parol contract express or implied, and therefore the argument of repugnancy did not apply; and the Nisi Prius case which had been cited went upon mistaken reasoning. Hill, Serjeant, admitted that he knew of no instance in the reports of a similar custom to this, in the case of freehold property, but he said, there were several with regard to copyholds that went much farther; and he cited *Eastcourt* v. *Weekes*, 1 Lutw. 799, 801, where a custom, that the executors and administrators of every customary tenant for life, if he should die between Christmas and Lady-day, should hold over till the Michaelmas following, is stated on the pleadings; and no objection taken to it on the argument of the case.

For the defendant were cited: *Grantham* v. *Hawley*, Hob. 132; *White* v. *Sayer*, Palm. 211, in which last case a custom for a lord of a manor "to have common of pasture in all the lands of his tenants for life or years," which had been pleaded in justification of a trespass in the land of a tenant for years, was held to be void and against law, for that such a privilege is contrary to the lease, being part of the thing demised, and different from a prescription

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to have a heriot from every lessee for life, because that is only collateral; cites 21 Hen. VII., 14. A case relied on by HOUGHTON, Justice, in *White* v. *Sayer*, in which he said the Court had decided that a custom for lessees for years to have half a year after the end of their term, to remove their utensils, was void, as being against law. *Startup* v. *Dodderidge*, 2 Ld. Raym. 1158, 2 Salk. 657, 1 Mod. 60, where the Court refused to grant a prohibition, on the suggestion of a *modus* "to pay, upon request, at the rate of two shillings for every pound of the improved yearly rent [*205] or value of *the land," because the yearly rent or value was variable and uncertain. *Naylor, qui tam,* v. *Scott,* 2 Ld. Raym. 1558, where a custom having been found by a jury, "that every housekeeper in the parish of Wakefield having a child born there, should, at the time when the mother was churched, or at the usual time after her delivery when she should be churched, pay ten pence to the vicar," the Court, on a motion in arrest of judgment, determined that the custom was void, being, 1, uncertain, because the usual time for women to be churched was not alleged; 2, unreasonable, because it obliged the husband to pay if the woman was not churched at all, or if she removed from the parish, or died before the time of churching. *Carleton* v. *Brightwell*, 2 P. Wms. 462, where the defendant, on a bill for tithes, set up a *modus*, "that the inhabitants of such a tenement, with the lands usually enjoyed therewith, should pay such a sum for tithe corn;" and it was held by the MASTER OF THE ROLLS to be void for uncertainty. *Harrison* v. *Sharp*, Bunb. 174, where a *modus*, "that, when any of the inclosed pastures in a certain vill were ploughed and sown with corn or grain of any kind, or laid for meadow and mown and made into hay, tithes in kind were paid to the rector, but when eaten and depastured, then the occupier paid to the vicar one shilling in the pound of the yearly rent or value thereof, and no more, upon some day after Michaelmas, yearly," was held void, on the authority of *Startup* v. *Dodderidge*. *Wilkes* v. *Broadbent*, 2 Str. 1224, where the Court of Common Pleas, and afterwards, on error brought, the Court of King's Bench, held a custom found by verdict "for the lord of a manor, or the tenants of his collieries who had sunk pits, to throw the earth and coals on the land near such pits, such land being customary tenement and part of the manor, there to continue, and to lay and continue wood there for the necessary use

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of the pits, and to take coals so laid, away in carts, and to burn, and make into cinders coals laid there, at their pleasure," to be void, because, among other reasons, the word " near " was too vague and uncertain. *Oland* v. *Burdwick*, Cro. Eliz. 460, 5 Co. Rep. 116, where a *feme*, copyholder *durante viduitate*, having sowed the land, and then married, it was determined that the lord should have the corn, upon the principle, that, when the interest in land is determined by the act of the party, he shall not [206] have the crop. An *Anonymous* case in Moore (Moore, 8, pl. 27), where it was held that a custom, " that lessee for years should hold for half a year over his term," was bad. *Roe, Lessee of Bree*, v. *Lees*, 2 Blackst. 1171, where, in an ejectment to recover a farm of about sixty acres, of which fifty-one were inclosed, and nine lay in certain open fields, a special case was reserved, which stated a custom, " that, when a tenant took a farm in which there was any open field, more or less, for an uncertain term, it was considered as a holding from three years to three years;" and though the Court decided against the custom on other grounds, yet, by their reasoning, it clearly appeared that they thought it void for uncertainty, because the quantity of open ground was not ascertained, and one rood might determine the tenure of one hundred acres of land inclosed. Besides the above authorities, the case before YATES, Justice, was much relied on. It was admitted, that, in cases where the usual crop of the country is such, that it cannot come to maturity in one year, a right to hold over after the end of the term, in a parol demise, may be raised by implication; as where saffron is cultivated (in Cambridgeshire), liquorice (near Pontefract), or tobacco (which formerly used to be planted in Lincolnshire); but it was contended, that, in such cases, a lease by deed would preclude such implication, as the parties must be supposed to have described all the circumstances relative to the intended tenure, in the written instrument. Such a custom as that set up in the present case could not, it was said, be of sufficient antiquity with respect to leases by deed, as in the time of Richard the First, and, long afterwards, tenants had no permanent interest in their lands; or, if there could be such a custom, the plaintiff's lease could not be within it, because the custom must have applied to the first of May, old style, and this lease was made and commenced after the alteration [to new style] was introduced by 24 Geo. II., c. 23.

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The Court took time to consider; and this day Lord MANSFIELD delivered their opinion, as follows: —

[207] Lord MANSFIELD. — We have thought of this case, and we are all of opinion that the custom is good. It is just, for he who sows, ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease. *The rule discharged.*

Judgment was accordingly entered for the plaintiff, upon which a writ of error was brought in the Exchequer Chamber, and the defendant assigned for errors, "that the custom contained and set forth, &c., is a custom void in law, and is contrary to, and inconsistent with, the said indenture of lease in the said replication mentioned." The case was argued at Serjeants Inn before the Judges of C. B. and the Barons of the Exchequer, by Balguy for the plaintiff in error, and Chambre for the defendant. The objection to the reasonableness of the custom was abandoned. In T. 21 Geo. III. (27th June, 1781), Lord LOUGHBOROUGH delivered the unanimous opinion of the Court of Exchequer Chamber, that the custom was good; and the judgment was affirmed.

Hutton v. Warren.

1 Meeson & Welsby, 466–479 (s. c. 2 Gale, 71).

Landlord and Tenant. — Custom. — Tenant-right.

[466] A custom of the country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled, on quitting, to receive from the landlord or incoming tenant a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord, if he will purchase it, — is not excluded by a stipulation in the lease under which he holds, that he

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will consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread on the land for the use of the landlord, on receiving a reasonable price for it.

Assumpsit. The declaration stated that the plaintiff, on the 25th of March, 1833, became tenant to the defendant, who then was rector of the parish of Wroot, in the county of Lincoln, of a certain farm, glebe land, premises, and tithes, with the appurtenances, situate in the said parish, upon the terms and conditions that the plaintiff, his executors, administrators, or assigns, should and would during the said tenancy manage, till, sow, and cultivate the said farm, &c., in a husbandlike manner, according to the custom of the country, and that the defendant should, after the expiration of the said tenancy, make and pay to the plaintiff all such reasonable allowances as the plaintiff, as off-going tenant, should, according to the custom of the country, be entitled to receive from the defendant in respect of any tillage, sowing, or cultivation of the said farm, &c., according to the custom of the country. The declaration then averred mutual promises, and proceeded to allege that the plaintiff continued such tenant until the 25th of March, 1834, when the said tenancy was determined by notice from the defendant to quit the farm; that the plaintiff, during the said tenancy, to wit, on the first of February, 1833, and on other days, &c., according to the course of good husbandry, and in tilling, &c., the said farm according to the custom of the country, bestowed his work and labour, and used seeds and corn in sowing divers parts of the said farm, &c., with barley, blend-corn, and clover, and other seeds, and also bestowed his work and labour in cultivating the said barley, &c., until the determination of the said tenancy, and was by the determination thereof prevented from enjoying the crops arising from the said barley, &c.; and the plaintiff, according to the custom of the country, was, as off-going tenant, entitled to * certain fair, reasonable, and customary [* 467] allowances in respect of such tillage, &c., amounting in the whole to the sum of £99 7*s.* 6*d.*; yet the defendant would not pay the same, &c.

Pleas: first, *non-assumpsit*; secondly, that the plaintiff was not tenant to the defendant on the terms and conditions in the declaration mentioned; thirdly, that the plaintiff, according to good husbandry, and in tilling, &c., according to the custom of the country, did not bestow his work or labour, or use any seed or

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corn, &c., or bestow his work or labour on the said barley, &c., *modo et formâ;* fourthly, that the plaintiff, according to the custom of the country, was not entitled as off-going tenant, &c.; on all which issues were joined.

At the trial before GASELEE, J., at the last Summer Assizes for the county of Lincoln, it appeared that the plaintiff took the farm, which consisted of the parsonage-house and glebe of the parish of Wroot, in the year 1811, by lease from Dr. Warren, the then incumbent, the father of the defendant, at a rent of £150, and had occupied it ever since, until he quitted it as hereafter mentioned. In October, 1832, Dr. Warren resigned the living, and the defendant was presented to it. At Michaelmas, 1833, the defendant gave the plaintiff notice to quit at the Lady-day following; and in the following October an interview took place between the plaintiff and defendant, and the attorney of the latter, when there was a discussion as to the plaintiff's sowing a particular field, and whether he was to be allowed for the crop. The defendant and his attorney insisted that the plaintiff was bound by the custom of the country to sow it, and to keep the farm in regular course; and a formal notice was accordingly given to the plaintiff by the defendant's attorney, a few days afterwards, not to neglect to cultivate the farm in due course of husbandry, according to the custom of the country. The plaintiff quitted, pursuant to the [* 468] notice, * at Lady-day, 1834. It was proved, that according to the custom of the country, a tenant was bound to cultivate the farm according to a certain course of husbandry, and was entitled, on quitting, to a fair allowance for seeds and labour on the arable land, and was bound to leave the manure on the land, if the landlord chose to purchase it; and a land-valuer, who had been employed by the defendant in 1833 to value the plaintiff's tenant-right, stated that the farm was cultivated according to the due course of husbandry, and valued the allowance to be made to him at the sum of £95 17*s.* 6½*d.* For the defendant, witnesses having been first called for the purpose of showing that the custom did not apply to glebe land, that no tenant was entitled, by the custom, to off-going allowances, who had not paid them on coming in, and that the valuation made by the plaintiff's witness was much too high; the lease under which the plaintiff originally occupied was put in; it was dated 2nd January, 1811, and was a demise for six years, to commence at Lady-day following, of the

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parsonage-house and glebe land, and the tithes of the whole parish of Wroot, at an annual rent of £150 for the house and land, and £200 for the tithes; to be void on the death, resignation, &c., of the lessor; and contained covenants by the plaintiff, that, at the end or other sooner determination of the term, he should quit, yield, and deliver up the premises in good order and condition to the lessor and his successors, "and also should spend and consume three parts in four of the hay and straw arising from the said glebe land and tithes so demised as aforesaid, upon the said glebe land, and spread and bestow the compost or manure arising therefrom or thereby upon the said glebe land, or some part or parts thereof, and should leave such part of such compost or manure as should not be so spread or bestowed on the said premises at the end or other sooner determination of the said term, upon the said premises, to and for the use of the said J. W. or * his [*469] successors, he or his successors paying a reasonable price for the same." It was contended that the effect of this latter stipulation was to exclude the custom of the country as to the allowances on quitting. The learned Judge reserved the point, and a verdict was found for the plaintiff for £95 17*s.* 6½*d.*

In Michaelmas Term, Balguy obtained a rule *nisi* for a nonsuit, pursuant to the leave reserved.

[The rule having been argued,]

PARKE, B. — We will take some time to consider this case, and will endeavour to obtain a fuller account of the decision [473] in *Senior* v. *Armitage*, Holt N. P. 197 (17 R. R. 627). It is very important to lay down the rule with clearness, if we can.

Cur. adv. vult.

* In this term the judgment of the Court was delivered [*474] by

PARKE, B. — (After stating the pleadings, he continued:) It appeared on the trial that the plaintiff took the farm of the late incumbent, the father of the defendant, on the 2nd of January, 1811, by a lease under seal, comprising the tithes of the parish also, at the rent of £150 for the farm, and £200 for the tithes, payable at Michaelmas and Lady-day, for the term of six years from Lady-day, 1811, if the lessor should so long continue incumbent. The plaintiff occupied until October, 1832, when the incumbent resigned, and the defendant, his son, succeeded him in the

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living. The plaintiff continued to occupy the farm and tithes, paying the same rent, at the same times, until Lady-day, 1834, when he quitted, in pursuance of a notice given to him by the defendant; and he claimed in this action the allowances for seed and labour due to the off-going tenant by the custom of the country.

The defendant resisted the claim, on the ground that he held under the terms of the written lease, and that by those he was not entitled to any such allowances.

It was proved, that, by the custom of the country, a tenant was bound to farm according to a certain course of husbandry for the whole of his tenancy, and at quitting was entitled to a fair allowance for seed and labour on the arable land; and was obliged to leave the manure, if the landlord would purchase it.

In October, 1833, after the notice to quit, the defendant, his agent, and the plaintiff, had an interview, and the agent insisted that the plaintiff should sow the arable land, and that he was bound to keep the farm in regular course. The plaintiff accordingly did afterwards sow the arable land, for which he claimed the compensation in question.

Two points were made on the argument before us: first, whether the plaintiff was bound by the terms of the lease at all,
[* 475] after the resignation of the lessor; secondly, * whether, if he was, those terms excluded him from this claim.

Upon the first point we think that the plaintiff must be taken, in the absence of evidence to the contrary, to have held under the defendant on the same terms that he held under his father, so far as those terms were applicable to a tenancy from year to year. No evidence was given to the contrary on the trial, and indeed this objection does not appear to have been there raised on the part of the plaintiff.

The second question requires some consideration. The custom of the country as to cultivation and the terms of quitting with respect to allowances for seed and labour is clearly applicable to a tenancy from year to year; and therefore if this custom was, by implication, imported into the lease, the plaintiff and defendant were bound by it after the lease expired.

We are of opinion that this custom was, by implication, imported into the lease.

It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents

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to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied, where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have been so long regulated upon the supposition that all customary obligations, not * altered by the contract, are to [*476] remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed.

The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the Courts should have been favourably inclined to the introduction of those regulations in the mode of cultivation which custom and usage have established in each district to be the most beneficial to all parties.

Accordingly, in *Wigglesworth* v. *Dallison*, Dougl. 201 (p. 542, *ante*), afterwards affirmed in a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right, and Lord MANSFIELD said that the custom did not alter or contradict the lease, but only superadded something to it.

This question subsequently came under the consideration of the Court of King's Bench in the case of *Senior* v. *Armitage*, reported in Mr. Holt's Nisi Prius Cases. In that case, which was an action by a tenant against his landlord for a compensation for seed and labour under the denomination of tenant-right, Mr. Justice BAYLEY, on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The Court afterwards set aside that nonsuit, and held, as appears by a manuscript note of that learned Judge, that, though there was a written contract between

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landlord and tenant, the custom of the country would be still binding, if not inconsistent with the terms of such written contract; and that, not only all common-law obligations, but those imposed by custom, were in full force where the contract did not vary them. Mr. Holt appears to have stated the case too [*477] strongly * when he said that the Court held the custom to be operative, "unless the agreement in express terms excluded it;" and probably he has not been quite accurate as attributing a similar opinion to the Lord Chief Baron THOMPSON, who presided on the second trial. It would appear that the Court held that the custom operated, unless it could be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by it.

On the second trial, the Lord Chief Baron THOMPSON held that the custom prevailed, although the written instrument contained an express stipulation that all the manure made on the farm should be spent on it or left at the end of the tenancy, without any compensation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive a compensation for seed and labour.

The next reported case on this subject is that of *Webb* v. *Plummer*, 2 B. & Ald. 746 (21 R. R. 479), in which there was a lease of down land, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also, in the last year of the term, to carry out the manure on parts of the fallowed farm pointed out by the lessor, the lessor paying for the fallowing land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground, and thrashing the corn. The claim was for a customary allowance for foldage (a mode of manuring the ground), but the Court held, that, as there was an express provision for some payment on quitting for the things covenanted to be done, and an omission of foldage, the customary obligation to pay for the latter was excluded. No doubt could exist in that case but that the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, and no more.

The question then is, whether, from the terms of the [*478] * lease now under consideration, it can be collected that the parties intended to exclude the customary obligation to make allowances for seed and labour.

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The only clause relating to the management of the farm (except the covenant to repair) is one which stipulated that the plaintiff shall spend and consume on the farm three-fourths of the hay and straw arising not only from the farm itself, but from the demised tithes of the whole parish, and spread the manure, leaving such as should not be spread at the end of the term for the use of the landlord, on paying a reasonable price for the same. This provision introduces and has a principal reference to a subject to which the custom of the country does not apply at all, namely, the tithes, and imposes a new obligation on the tenant *dehors* that custom, and then qualifies that obligation by an engagement on the landlord's part to give a remuneration, by repurchasing a part of the produce in a particular event. It is by no means to be inferred from this provision that this is the only compensation which the tenant is to receive on quitting. If, indeed, there had been a covenant by the tenant to plough and sow a certain portion of the demised land in the last year, being such as the custom of the country required, he being paid on quitting for the ploughing, or to plough, sow, and manure, he being paid for the manuring, the principle of *expressum facit cessare tacitum*, which governed the decision in *Webb* v. *Plummer*, would have applied; but that is not the case here. The custom of the country as to the obligation of the tenant to plough and sow, and the corresponding obligation of the landlord to pay for such ploughing and sowing in the last year of the term, is in no way varied. The only alteration made in the custom is, that the tenant is obliged to spend more than the produce of the farm on the premises, being paid for it in the same way as he would have been for that which the custom required him to spend.

* We are therefore of opinion that the plaintiff is en- [* 479] titled to recover, and the rule must be discharged.

Rule discharged.

ENGLISH NOTES.

The effect of custom in relation to agricultural tenancy has been to some extent considered in the notes to *Horsefall* v. *Mather*, No. 5 of "Dilapidations," 9 R. C. 465. Cases relating to custom as affecting the interpretation of contracts generally are cited in the notes to *Hussey* v. *Horne-Payne*, No. 15 of "Contract," 6 R. C. 169, 170, and see notes to No. 17 of "Agency," 2 R. C. 468. See also No. 3 of "Interpretation" and notes, 14 R. C. 656 *et seq.*; No. 5 of "Interpre-

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tation," 14 R. C. 691 *et seq.* And as to custom, generally, see "Custom," 8 R. C. 275–359.

"Where a custom of the country is once proved, it applies to all holdings, whether by parol or by lease in writing, unless shown not to apply by the terms of the writing itself," per Lord DENMAN, Ch. J. (the other Judges of the Queen's Bench concurring), in *Wilkins* v. *Wood* (1848), 17 L. J. Q. B. 319, 320, 12 Jur. 583.

The obligations implied by custom (in England) must now be considered, having regard to the provisions of the Agricultural Holdings (England) Act, 1883. See in particular sections 1–5. The particular items of compensation there mentioned in the schedule to the Act are, however, matters not provided for by the ordinary custom; and by the 60th section of the Act it is enacted that except as in the Act expressed, nothing in the Act shall take away any right of a landlord, tenant, or other person vested in or exerciseable by him under any custom of the country, &c.

AMERICAN NOTES.

The first case is cited by Wood in Landlord and Tenant, sect. 300, 410, 558, and repeatedly in Lawson on Usages and Customs, with the case in full, and is annotated by Messrs. Hare and Wallace, in 1 Smith's Leading Cases (8th Am. ed.), p. 950; and cited by Taylor in Landlord and Tenant, sect. 538.

This celebrated case has been followed in several States: *Howell* v. *Schenck*, 4 Zab. (New Jersey Law), 89; *Van Doren* v. *Everett*, 2 Southard (New Jersey), 460; 8 Am. Dec. 615; *Foster* v. *Robinson*, 6 Ohio State, 90; *Dorsey* v. *Eagle*, 7 Gill & Johnson (Maryland), 331; *Templeman* v. *Biddle*, 1 Harrington (Delaware), 523. Its doctrine is recognized in *Van Ness* v. *Pacard*, 2 Peters (U. S. Sup. Ct.), 148, and applied to a tenant at will in *Brown* v. *Thurston*, 56 Maine, 126; 96 Am. Dec. 438; and to the lessee of a tenant for life in *Bradley* v. *Bailey*, 56 Connecticut, 374; 1 Lawyers' Rep. Annotated, 427.

The same doctrine was adopted in Pennsylvania, and as it appears, before the principal case. *Stultz* v. *Dickey*, 5 Binney, 285; 6 Am. Dec. 411, where the Court held that the custom was "not to alter or contradict the agreement in the lease, but only to superadd a right which is consequential to the taking" (of fish). See also *Forsythe* v. *Price*, 8 Watts (Penn.), 282; 34 Am. Dec. 465. The tenant may also take the straw. *Craig* v. *Dale*, 1 Watts & Sergeant (Penn.), 509; 37 Am. Dec. 477.

But the doctrine is denied in Virginia: *Harris* v. *Carson*, 7 Leigh, 632; 30 Am. Dec. 510; and in Canada: *Burrowes* v. *Caines*, 2 Upper Canada, Q. B. 288; and so apparently in New York: *Reeder* v. *Sayre*, 70 New York, 180; 26 Am. Rep. 567. In the first case the Court observed: "The case of *Wigglesworth* v. *Dallison*, Doug. Rep. 201, was strongly relied upon by the counsel for the plaintiff in error, as showing that a custom would, in England, entitle the off-going tenant to the way-going crop, even where, as in this case, the lease was by writing under seal, and to end at a fixed time. But the ground on which Lord

MANSFIELD himself placed that decision, shows that it can have no weight in this country. He says: 'The custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking.' I entirely concur in the correctness of this opinion, as applied to a case in England. But it is correct, not on the ground of direct contract, nor because the parties are presumed to have contracted in reference to the custom; it is correct, because of the force of the custom, as such; for in England, where they have particular customs, the custom of the county in which the land lies is as much the law of that country, as the common law is the law of the other parts of the country where they have no such particular custom. The particular custom prevents the application of the common law to the county or district in which the custom prevails, by showing that the common law, as to this subject, never had any existence in that county or district. For a custom, to be valid, must be as old as the common law; it must be immemorial. And if the particular custom be proved to be immemorial, it necessarily excludes the general custom, or common law; for two opposite and inconsistent customs cannot have immemorially existed in the same place, and as to the same thing.

"But the case is widely different in this country. Our ancestors brought with them the common law or general customs of England, but none of the particular customs. The common law became the law of the whole State, and gave the rule to every part of it; and we have seen that by that law, the off-going tenant was not entitled to the way-going crop. Any practice or usage, however general, introduced into this country since its settlement, and in opposition to the common law, can have no force on the ground of custom; because it lacks the essential ingredient of a good custom — it is not immemorial. It is clear that it cannot have existed at any time, even as a recent custom, until after the settlement of the country, and after the common law had attached to every part of it. And nobody will contend that a recent usage or practice, however general, will change the common law. Nor is the case of the plaintiff in error helped by the argument, that the custom, although not obligatory as such, may nevertheless be looked to as having been within the contemplation of the parties at the time they contracted, and may therefore be regarded as an exponent of the contract. The principle of explaining a written instrument by parol testimony applies to those cases only where there is some latent ambiguity in the written instrument, or where its terms have not a definite legal signification. *Bowyer* v. *Martin, &c.*, 6 Rand. 525. Here there is no ambiguity, no uncertainty, no doubt whatever. It is nothing more nor less than a lease for a period fixed and certain, when the interest of the tenant is to cease and determine. To extend it beyond that period by parol testimony is contrary to received principles, and utterly inadmissible."

This reasoning does not seem very cogent, especially as the Court completely ignore the doctrine of annexing incidents to the contract by custom. In the second case the Court said: "In this country there cannot be in the

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nature of things any ancient usage of this kind, for many, now living, can well remember the time when not a lease had been made in the township where this land lies; and indeed throughout this country the system of leasing, as regards farm lands, can hardly prevail so commonly as to have given rise to anything that can deserve to be looked upon as a custom even in its popular sense. But here there is an express stipulation in the deed that the tenants *shall on a certain day deliver up to the plaintiff the whole of the lands leased*, and this express covenant would be sufficient to exclude evidence of any custom, however old and general. It is evident, on reading the lease, that the lands were demised in a great measure with a view to their coming into the possession of the landlord, at the end of the term, in a cleared state, and fit to be then cultivated by him, and on such a lease it would be an unreasonable extension of any mere usage that can have prevailed in this country, to allow the tenants to put in crops as their seven years' term was expiring, which would have kept the landlord out of the full use of his land, in effect, more than a year longer than he contemplated; for it would be too late after the crop was taken off in the one year to prepare the land and put in wheat for the next year."

In the New York case the Court simply said, on this point: "No local custom is shown. It is not hinted that there is a general custom in this State. We know of none."

But in the absence of custom to the contrary, where the term is certain and is not determined by the act of the lessor, the tenant cannot take away the after-maturing crop. "It is true that a tenant holding by a tenure which is uncertain as to the time at which it will cease, is entitled to take off, after it has ceased, the crops which he has sowed in the due course of husbandry. But if it is certain at the time when he sows how long it will continue, and it is plain that he cannot, before it comes, reap that which he may sow, then it is his own folly if he sows (per Lord MANSFIELD, *Wigglesworth* v. *Dallison*, 1 Doug. 201), and he will not be permitted to reap:" *Reeder* v. *Sayre*, *supra*; *Kiplinger* v. *Green*, 61 Michigan, 340; 1 Am. St. Rep. 584; *Henderson* v. *Cardwell*, 9 Baxter (Tennessee), 389; 40 Am. Rep. 93; *Monday* v. *O'Neil*, 44 Nebraska, 724; 48 Am. St. Rep. 760.

A crop mature at the time of a foreclosure sale belongs to the tenant: *Richards* v. *Knight*, 78 Iowa, 69; 4 Lawyers' Rep. Annotated, 453; but otherwise of one sown after judgment of foreclosure by a tenant who rented pending the suit, and not ready to harvest until after the sale and deed: *Goodwin* v. *Smith*, 49 Kansas, 351; 17 Lawyers' Rep. Annotated, 284.

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SECTION II. — *Tenancies for a Term certain under Leases and other Instruments in Writing.*

(e) *Forfeiture for Breach of Condition.*

No. 36. — DOE d. DIXON *v.* ROE.

(C. P. 1849.)

RULE.

THE landlord has no right of entry for non-payment of rent, except under the terms of an express condition made upon the demise.

Doe d. Dixon v. Roe.

7 Common Bench, 134, 135.

Landlord and Tenant. — Non-payment of Rent. — Right of re-entry.

In ejectment brought upon a right of re-entry under the 4 Geo. II., c. 28, s. 2, it must appear that the landlord had a power to re-enter, [134] in respect of the non-payment of half a year's rent, at the time of affixing the declaration and notice upon the premises.

This was an action of ejectment brought to recover the possession of a messuage, &c., in the parish of St. Mary Abbotts, Kensington, which had been held by one Samuel Marks, under and by virtue of a lease bearing date the 13th of September, 1847, at the yearly rent of £200, payable quarterly, on the usual quarter-days. The lease contained a clause of re-entry for non-payment of the rent within twenty-one days next after any of the days whereon the same ought to be paid, or for other breach of covenant.

Hawkins moved under the 4 Geo. II., c. 28, s. 2, for judgment against the casual ejector, upon an affidavit [*135] showing that the premises were deserted, that there was due, in respect of half a year's rent, at Christmas day last, the sum of £100, that there was no sufficient distress upon the premises, that the landlord had a right of re-entry under the lease, and that the declaration and notice had been served on the 10th instant, in the manner prescribed by the statute. [CRESSWELL, J. — The landlord can have no right of re-entry for non-payment of the half year's rent, the twenty-one days not having elapsed at the time of affixing the declaration and notice. The statute says

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that there shall be half a year's rent in arrear, and that the landlord shall have a right to re-enter for the non-payment thereof.] He has a right of re-entry by the terms of the lease, and half a year's rent is in arrear; and that satisfies the words of the Act.

WILDE, Ch. J. — The case is not brought within the words of the statute. The right of re-entry must be for non-payment of the half year's rent.

The rest of the Court concurring. *Rule refused.*

ENGLISH NOTES.

In *Hill* v. *Kempshall* (1849), 7 C. B. 975, it was held that where land is demised subject to a condition for re-entry on default in payment of the rent, the right of entry does not accrue until the rent has been duly demanded. This was followed in *Phillips* v. *Bridge* (C. P. 1873), L. R. 9 C. P. 48, 43 L. J. C. P. 13, 29 L. T. 692, 22 W. R. 237.

The section of the Act of 4 Geo. II., referred to in the principal case, is formally repealed by the Statute Law Revision Act, 1867. The same enactment has been substantially embodied in the Common Law Procedure Act, 1852 (15 & 16 Vict., c. 76), s. 210. The condition of this section (as amended by the Statute Law Revision Act, 1892) reads as follows: "As often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof." So that the statutory remedy by ejectment is still inapplicable in a case where the landlord has not a right of re-entry for non-payment of the rent.

AMERICAN NOTES.

Instances of leases without a clause for re-entry are probably very rare, and the defect is probably practically supplied by statutory provision in some States.

This doctrine is sustained by *Rich* v. *Keyser*, 54 Penn. St. 86; *Johnson* v. *Gurley*, 52 Texas, 222; *Dennison* v. *Read*, 3 Dana (Kentucky), 586; *Brown's Adm'rs* v. *Bragg*, 22 Indiana, 123; *Hanaw* v. *Bailey*, 83 Michigan, 24; 9 Lawyers' Rep. Annotated, 801; *De Lancey* v. *Ganong*, 9 New York, 9 (a very learned opinion by DENIO, Ch. J.); *Bartlett* v. *Greenleaf*, 11 Gray (Mass.), 98; *Chipman* v. *Emeric*, 3 California, 273; *Buckner* v. *Warren*, 41 Arkansas, 532; *Meroney* v. *Wright*, 81 North Carolina, 390; *Smith* v. *Blaisdell*, 17 Vermont, 199; *Miller* v. *Sparks*, 4 Colorado, 303; *Woodward* v. *Cone*, 73 Illinois, 241; *Byrane* v. *Rogers*, 8 Minnesota, 281; *Jackson* v. *Collins*, 11 Johnson (N. Y.), 1; *Levett* v. *Bickford*, 8 Humphrey (Tennessee), 618; *McQuesten* v. *Morgan*, 34 New Hampshire, 400; *Spear* v. *Fuller*, 8 New Hampshire, 174; 28 Am. Dec. 391; *Bowyer* v. *Seymour*, 13 West Virginia, 12; *Smith* v. *Blaisdell*, 17 Vermont, 199. These cases hold that there also must be a demand of rent with the common-law formalities.

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No. 37. — DOE d. BRYAN *v.* BANCKS.

(K. B. 1821.)

RULE.

WHERE a lease contains a provision that the lease shall become void if the lessee does or omits to do something contrary to the objects of the tenancy, the effect of such act or omission is not of itself to avoid the lease, but to give the lessor the option of avoiding it; and the lease does not become void until the lessor has exercised that option.

Doe d. Bryan v. Bancks.

4 Barn. & Ald. 401–410 (23 R. R. 318).

Lease. — Proviso. — Void, voidable.

A lease of coal mines reserved a royalty rent for every ton of coals [401] raised, and contained a proviso that the lease should be void, to all intents and purposes, if the tenant should cease working at any time two years. After the working had ceased more than two years, the lessor received rent. *Held*, that a tenancy from year to year was not thereby created; for the lease was not absolutely void by the cesser to work, but voidable only at the option of the lessor, and that he might avoid the lease upon any cesser to work commencing two years before the day of demise in the ejectment.

Ejectment to recover lands and mines in the parish of Broseley, in the county of Salop. The day of demise laid in the declaration was the 18th of April, 1820. At the trial before RICHARDSON, J., at the last Summer Assizes for the county of Salop, it appeared in evidence, that on the 14th December, 1802, Thomas Bryan, by an indenture of lease demised to Thomas * Coombe and [* 402] others all the colliery, coal-work, iron, stone-work, rocks and quarries, in and under certain pieces of ground of T. Bryan, in the parish of Broseley, except trees, &c., with liberty to make pits, &c. *Habendum* from the 1st of January next for ninety-nine years, rendering a royalty rent of 1*s.* 2*d.* for every ton of coals, and 3*s.* 6*d.* per acre for the land. The lease contained the following proviso: "Provided also, and it is mutually agreed between the parties hereto, that the aforesaid works should commence and begin within one year from the date thereof, and if the same should stop or cease working at any time two years, this lease shall be

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deemed void to all intents and purposes." In 1809 the lease was assigned to the defendant, and he worked the mines effectually till May, 1813, when he withdrew the machinery, and, in fact, abandoned them. In May, 1815, May, 1817, and April, 1819, he, for the purpose of preserving the lease, raised a few tons of coals of hardly any value. At Michaelmas, 1817, Bryan received rent, and gave a receipt in the following words: "Received, the 29th September, 1817, of Mr. Bancks, by the hands of Mr. Birch, the sum of £4 3*s.* for half a year's rent for land and pits, due this day by me." In March, 1818, Bryan took possession of the mines; but Bancks brought an ejectment, and in Trinity Term, 1819, obtained judgment by default, and a writ of possession was executed in Bancks's favour. It was objected, on the part of the defendant, that there was no forfeiture of the lease, as the works had never ceased for two years. Secondly, that the forfeiture had been waived by the receipt of rent on the 29th of September, 1817; and, thirdly, that, at any rate, by the receipt of rent since the forfeiture, a tenancy from year to year had been created, which could only be
[* 403] determined * by a notice to quit. The jury expressly found, that since 1813 the workings had been temporary, collusive, and fraudulent. RICHARDSON, J., thereupon directed a verdict to be entered for the lessor of the plaintiff, reserving to the defendant leave to move to enter a nonsuit on the objections made at the trial. A rule *nisi* for this purpose having been obtained in last Michaelmas Term [and being now argued],

[404] ABBOTT, Ch. J. — The question in this case is, whether the lessor of the plaintiff, in the month of March, 1818, when he actually entered and took possession of the farm, had a right to do so. As the judgment obtained against the lessor of the plaintiff, in 1819, is no bar to the plaintiff recovering in this action, so neither will our judgment in favour of the lessor of the
[* 405] plaintiff be conclusive * against the defendant, but he may in his turn bring another ejectment. I am clearly of opinion, that in March, 1818, the lessor of the plaintiff had a right to recover. If the defendant, the tenant of the mine, had first ceased to work on Michaelmas-day, 1815, the landlord would have had a right to receive the rent that became due on Michaelmas-day, 1817, because the cesser for two years is requisite, in order to make the lease void, and he would also have a right to enter on the day after Michaelmas-day, 1817; and if he had a right to enter,

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provided the cesser had been for two years only, terminating at Michaelmas-day, 1817, which is the day of the receipt of the rent, it remains to be considered, whether, if the tenant had ceased to work for six years, the lessor of the plaintiff would have had a right which he would have had on a cesser of two years. Unless the defendant can establish, first, that this lease became absolutely null and void, at the end of the first two years against both parties, so that no action whatever could be brought upon it, and unless he can also establish that the receipt of rent had the effect of creating a new tenancy from year to year, requiring notice to quit, the plaintiff is clearly entitled to recover. I am of opinion that, notwithstanding the language of this lease, it did not become absolutely void by a cesser of two years, unless the landlord thought fit to make it so. If, indeed, it were held, that a lease thus became absolutely null and void, even where it was made to appear that there had been a continuance of the receipt of rent afterwards, the consequence might be, that when the landlord at an advanced period brought his action of covenant, he might be told that he had no right to maintain that action, on the ground that the lease had * become void by forfeiture many years be- [*406] fore. My opinion is, that the lease did not become absolutely void at the end of the first two years, unless the landlord chose to make it so. He, however, forbears to do so, and continues receiving the rent, and giving the tenant an opportunity of setting to work at the mines, which he neglects to do. I am of opinion, that the landlord had a right, as soon as he had received the rent up to Michaelmas-day, 1817, to enter and avail himself of the forfeiture incurred during the last two years. I think he might have done so on the very next day: at any rate, he has a right, now that there has been a continued cesser for two years previous to the ejectment brought, to enter upon it. There is no distinction between the very day after the receipt of the rent and the period of a week or month. I am of opinion, that the legal effect of this instrument is, that it is voidable only at the election of the landlord, and that he is at liberty to make the lease void at the end of any two years, during which two years there had been a continued cesser to work. In the present case, the defendant had ceased to work for the period of two years previous to the commencement of the action. I think, therefore, that the plaintiff is entitled to recover. This rule, therefore, must be discharged.

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BAYLEY, J. — I am of opinion that the true construction of the proviso in this lease, "that it shall be null and void to all intents and purposes upon a cesser of two years," is, that it shall be voidable only at the option of the lessor, and that it does not lie in the mouth of the lessee, who has been guilty of a wrongful [* 407] act, in omitting to work in pursuance of his covenant, * to avail himself of that wrongful act, and to insist that thereby the lease has become void to all intents and purposes. By the express provisions of the 13 Eliz., c. 10, certain ecclesiastical leases are made void, to all intents, constructions, and purposes; yet it has been frequently held, that such leases are good, during the life of the person by whom they are made. I think, therefore, that the fair construction of this lease is, that it is void only at the option of the lessor, and that the receipt of the rent on the 29th September, 1817, has not destroyed his right to bring this ejectment. I consider the demise as being, in substance, made in March, 1818, when he entered on the premises. Now if he had then brought an ejectment, he might have called a witness to prove, that from March, 1816, down to March, 1818, he had been constantly watching the pit, and that no work had been going on. That witness may not have known the pit before; and it surely would be no answer to say, that the defendant had been guilty of a previous cesser, or, in other words, that he had not worked the mine from the 1st of March, 1813. The effect of the receipt of rent on the 29th September, 1817, cannot amount to more than an acknowledgment on the part of the lessor of the plaintiff, that no forfeiture was then complete. He does not thereby admit that a forfeiture may not have been inchoate, but merely that it was not complete, so as to entitle him to bring an ejectment. I think that the landlord has it in his election to make this lease void or not; that he is not bound to exercise that election in the first instance; and that though he may waive it from time to time, he is at liberty af- [* 408] terwards to insist on the forfeiture in respect of * subsequent misconduct. The case of *Doe, on the Demise of Boscawen*, v. *Bliss*, 4 Taunt. 735, is very much in point. There it was expressly held, that a lessor who has a right of re-entry reserved, on a breach of a covenant not to underlet, does not, by waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting. And GIBBS, J., is there reported to have said, "It might as well be contended, that if a landlord once knew that his prem-

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ises were out of repair, and did not sue instantly, he could never after re-enter for a breach of covenant committed by their not being repaired." I am of opinion that the receipt of the rent, in September, 1817, did not destroy the right of the lessor of the plaintiff to take any part of the period between September, 1815, and September, 1817, as a period in which a forfeiture was inchoate and beginning; and that if the cause of forfeiture continued, he is at liberty to add to that the subsequent period, from September till the March following, so as to complete the period of two years. For these reasons, it seems to me that the verdict was right.

HOLROYD, J. — I am of opinion that the tenant cannot insist that the lease is void against the will of his landlord, and also, that the acceptance of the rent will not create a tenancy from year to year. The tenant cannot insist that his own act amounted to a forfeiture; if he could, the consequence would be, that in every instance of an action of covenant for rent brought on a lease containing a proviso, that it should be void on the non-performance of the covenants, the landlord would * be defeated [* 409] by a tenant showing his own default at a prior period, which made the lease void. If that be so, there is nothing to prevent the landlord claiming for the forfeiture of this lease, for a ceasing to work subsequent to the 29th September, 1815. That ceasing to work for two years after the 29th of September, 1815, would not make a forfeiture until after the expiration of the day of the 29th September, 1817. Now that is not inconsistent with the receipt of the rent on that day, for supposing it to be a receipt of rent under the lease, still the landlord may consistently say that the lease was forfeited on the 30th September, or the 1st of October, 1817, for two years cesser of work prior to either of those days. Although the landlord, by the receipt of the rent on the 29th September, 1817, may have admitted that the lease was existing on that day, yet he may avoid it on a forfeiture which became complete at a subsequent period.

BEST, J. — In construing this clause of the lease, we must look to the object which the parties had in view. The rent was to depend upon the number of tons of coals raised. In order to derive any benefit from the mine, it was the object of the landlord, by introducing this clause, to compel his tenant to work it. The clause therefore was introduced solely for the benefit of the landlord, to enable him, in case of a cesser to work, to take possession of the

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mines, and either work them himself, or let them to some other tenant. That, therefore, being the object of the parties in introducing this clause, I think it will be fully answered by holding the lease to be void at the option of the landlord. Besides, I take it to be a universal principle of law and justice, that no man [* 410] can take advantage of his own wrong. * Now it would be most inconsistent with that principle to permit the defendant to protect himself against the consequences of this action, by afterwards setting up his own wrongful act at a former period. It appears to me that this was a continued forfeiture, and that the landlord had a right to take advantage of it, whenever he thought proper so to do. If the tenant be induced by the landlord's not taking advantage of the forfeiture in the first instance to make improvements, a Court of equity would perhaps grant him relief. Upon the whole, I am of opinion that the rule for a new trial should be discharged. *Rule discharged.*

ENGLISH NOTES.

This case is cited and the principle of the above rule followed by all the Judges (DENMAN, Ch. J., LITTLEDALE, J., and PARKE, J.) in *Roberts* v. *Davey* (1833), 4 B. & Ad. 664, and other cases referred to and confirmed by the judgment of the Judicial Committee in *Davenport* v. *Reg.* (1877), 3 App. Cas. 115, 47 L. J. P. C. 8, 37 L. T. 727. The same principle is applied by NORTH, J., to the forfeiture to the Crown of the mining right termed a "gale" in the Forest of Dean under the Act regulating these rights. *James* v. *Young* (1884), 27 Ch. D. 652, 53 L. J. Ch. 793, 51 L. T. 75, 32 W. R. 981.

AMERICAN NOTES.

This doctrine is accepted in this country. Wood on Landlord and Tenant, sects. 226, 510 (citing the principal case); Taylor on Landlord and Tenant, sect. 23 (citing the principal case); *Clark* v. *Jones*, 1 Denio (N. Y.), 516; 43 Am. Dec. 706, citing the principal case, and observing: "It is now held in relation to leases for years, as well as those for life, that the happening of the cause of forfeiture only renders the lease void as to the lessee. It may be affirmed by the lessor, and then the rights and obligations of both parties will continue without regard to the forfeiture." Such is also the doctrine of *Spear* v. *Fuller*, 8 New Hampshire, 174; 28 Am. Dec. 391; *Duke* v. *Harper*, 6 Yerger (Tennessee), 280; 27 Am. Dec. 462; *Ray* v. *Western Penn. N. G. Co.*, 138 Penn. State, 576; 21 Am. St. Rep. 922; *Garnhart* v. *Finney*, 40 Missouri, 449; 93 Am. Dec. 303; *Porter* v. *Merrill*, 124 Massachusetts, 534; *Gomber* v. *Hackett*, 6 Wisconsin, 323; 70 Am. Dec. 467; *Camp* v. *Scott*, 47 Connecticut, 370; *Moses* v. *Loomis*, 156 Illinois, 392; 47

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Am. St. Rep. 194; *Westmoreland, &c. N. G. Co.* v. *De Witt*, 130 Penn. St. 235; 5 Lawyers' Rep. Annotated, 731; *Wills* v. *Manuf. N. G. Co.*, 130 Penn. St. 222; 5 Lawyers' Rep. Annotated, 603 (a valuable opinion citing the principal case); *Phelps* v. *Chesson*, 12 Iredell Law (Nor. Car.), 194; *Miller* v. *Havens*, 51 Michigan, 482; *Jackson* v. *Allen*, 3 Cowen (N. Y.), 220 (citing the principal case).

In *Bowyer* v. *Seymour*, 13 West Virginia, 20, it is said: "But it is entirely optional with the lessor, whether he will avail himself of this right of entry or not, although by the terms of the proviso the term is to cease, or become void, for the non-performance of the covenants; and if the lessor does not avail himself of it, the term will continue. There was however a distinction formerly drawn between leases, that were declared to be void upon a breach of condition, and such as were to be voidable only. In the case of a lease for lives, if the lessee was guilty of any breach of the condition, the lease was only voidable, although, by its express terms, it was to become thereby absolutely void; and the landlord might waive his right to re-enter, by the acceptance of rent, or by some other act, which amounted to a dispensation of the forfeiture. But upon the breach of such a condition on a lease for years, the lease became *ipso facto* void, and no subsequent recognition could set it up again. Yet if the condition in such case was merely that the lessor might re-enter, the lease was voidable only, and might be affirmed by an acceptance of rent, if the lessor had notice of the breach at the time. But the force of this distinction has been almost, if not quite, abated by the modern decisions, which establish that the effect of a condition, making a lease void upon a certain event, is to make it void at the option of the lessor only, in cases where the condition is intended for his benefit, and he actually avails himself of his privilege.

"The English law in this respect has been generally followed in this country; and such a lease is good until avoided, though the lessee is estopped to set it up against the lessor."

Parsons on Contracts, 1st vol., 5th ed., 506, says: "A distinction formerly prevailed between a proviso declaring that the lease should be void on a specified event, and a proviso enabling the lessor to determine by re-entry; and it was held that in the former case the lease became absolutely void on the event named, and was incapable of being restored by acceptance of rent, or other act of intended confirmation; while in the latter some act, such as entry or claim, must have been performed by the lessor to manifest his intention to end the demise, which was voidable in the interval, and consequently confirmable. This distinction however is now exploded; and it is held that the lease is voidable only at the election of the lessor, but not of lessee, though the proviso expressly declare that it shall be void," &c.

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No. 38. — CADBY *v.* MARTINEZ.

(K. B. 1840.)

RULE.

WHERE a notice to determine a lease is given under a proviso of the instrument creating the lease, the notice must be strictly in the terms authorised by the proviso.

Cadby v. Martinez.

11 Adolphus & Ellis, 720–726 (s. c. 3 P. & D. 386).

Lease. — Proviso for Determination. — Notice.

[720] Lease for twenty-one years from Michaelmas, 1823, with covenant that, if the tenant should desire to determine the demise at the end of the first fourteen years, and should leave or give six calendar months' notice immediately preceding the expiration of the first fourteen years, the lease should determine.

The tenant, six months before the June preceding the expiration of the first fourteen years, gave notice that he should quit on 24th June, 1837, agreeably to the covenants of the lease.

Held, that this notice did not satisfy the covenant.

And that the jury could not be asked whether, from the landlord's conduct as shown in evidence, they believed that he understood the notice to refer to Michaelmas, 1837.

Debt for one quarter's rent, due December 25th, 1837, under a demise by plaintiff to defendant of a messuage, &c., for twenty-one years from Michaelmas-day, 1823. Plea, that the demise was by indenture, with a covenant that, if defendant, his executors, &c., should be desirous to determine the tenancy at the end of the first seven or fourteen years, and should leave or give six calendar months' notice to the plaintiff, his executors, &c., immediately preceding the expiration of the first seven or fourteen years, the demise should determine; and that defendant, to wit, on, &c., gave notice of determining, &c., at the end of the first fourteen years, to wit, at Michaelmas-day, 1837, and thereby the demise became and was then determined, long before the time mentioned in the declaration, &c. Verification. Replication (after oyer of the indenture, which contained a covenant as above stated), that defendant did not give six calendar months' notice immediately

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preceding the expiration of the first fourteen years, in manner and form, &c. Issue thereon.

On the trial, before Lord DENMAN, Ch. J., at the sittings in Middlesex after Easter Term, 1838, it appeared that defendant had, on November 1st, 1836, given notice to plaintiff by letter, as follows:—

"Sir, I hereby give you notice that I shall quit and deliver up, on the 24th day of June, 1837, the house and premises situate and being No. 1 Mabledon Place, New Road, in the parish of St. Pancras" (the premises * in question), "agreeable to [*721] the covenants of the lease subsisting between us, and dated the 22nd day of August, 1823. I am," &c.

Plaintiff, on November 27th, wrote an answer, simply acknowledging the receipt of defendant's letter. In June, 1837, no further communication having passed, defendant found that he had, by mistake, given notice for a wrong day, and wrote to plaintiff, pointing out the error, and offering to give up the premises on June 24th or September 29th, and to pay rent accordingly. Plaintiff observed, in answer, that the notice was not good; and, in a subsequent conversation with defendant's agent, he said, "Your notice is not a good one: I saw that the moment it was delivered to me; but it was not for me to say so." The LORD CHIEF JUSTICE observed that the defendant's notice was qualified by the words "agreeable to the covenants of the lease," and left it to the jury to say whether the plaintiff had not understood the notice as applying to the last day of the fourteen years, and acquiesced in it by his silence. The jury thought that the plaintiff had understood the notice as referring to the last day; and a verdict was found for the defendant, but with leave to move to enter a verdict for the plaintiff.

R. V. Richards, in the ensuing term, moved to enter a verdict accordingly, or for a new trial. He cited *Johnstone* v. *Hudlestone*, 4 B. & C. 922 (28 R. R. 505, No. 49, *post*). [Lord DENMAN, Ch. J. —There less than half a year's notice had been given. Here the notice was at all events early enough; the question at the trial was, whether or not the landlord understood it as terminating on the proper day.] The words are * "the 24th day [*722] of June, 1837," "agreeable to the covenants," &c.: that raises an ambiguity which cannot be cured. He also cited *Doe dem. Spicer* v. *Lea*, 11 East, 312. In last Hilary Term,[1]

[1] January 16th. Before Lord DENMAN, Ch. J., LITTLEDALE and COLERIDGE, JJ.

Erle and Byles showed cause. The covenant in the lease requires merely that the plaintiff should have six months' notice of the defendant's desire to determine the demise at the end of the fourteen years. The defendant could understand the notice which was actually given no otherwise than as signifying such a desire. It expressly referred to the covenant, and was unmeaning upon any other construction, since there was only one time at which, agreeably to the covenant, the premises could be quitted. The 24th of June, 1837, was not such a time; and the plaintiff must have construed the notice, which was thus far repugnant, so as to make sense. Had no day been mentioned, the notice would have been consistent; the day named must therefore be rejected. In *Doe dem. Spicer* v. *Lea* it was held that "the feast of St. Michaelmas," named in a lease as the day from which the lessee was to hold, must mean New Michaelmas-day; and that a notice to quit on 11th October, Old Michaelmas-day, was bad, though given more than six months before either. That turned entirely on the construction to be given to the lease; the notice named a particular day, and did not, as here, refer to the terms of the deed. In *Doe dem. Duke of Bedford* v. *Kightley*, 7 T. R. 63 (4 R. R. 375), the notice was to quit "at Lady-day, which will be in [*723] the year 1795;" and, *it appearing that the notice was served just before Michaelmas, 1795, the Court held that the meaning must be "Lady-day, 1796," the day actually named being impossible, and the conduct of the parties being taken into account. In *Doe dem. Williams* v. *Smith*, 5 A. & E. 350, the holding was from 2nd February; and on 22nd October notice was served to quit "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding" "shall expire after the expiration of half a year from the delivery of this notice." The "present" year's holding expired on 2nd February then next, which was less than six months from the delivery; but the Court referred it to the 2nd February next but one, rejecting the word "present" as surplusage. In *Doe dem. Cox* v. ——, 4 Esp. 185 (6 R. R. 850), the premises in question were called The Bricklayer's Arms; but the notice described them as "the premises which you hold of me, situated," &c., "commonly called or known by the name of The Waterman's Arms." There was no house called The Waterman's Arms in the parish; but it was considered that the party receiving the notice could not

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have been misled, and the notice was therefore taken to refer to The Bricklayer's Arms. In *Doe dem. Lord Huntingtower* v. *Culliford*, 4 Dowl. & Ry. 248, it was decided that a notice, dated 27th September, and served 28th September, to quit "at Lady-day next, or at the end of your current year," which in fact ended on 29th September, must be referred to the year which would begin to run after the 29th September then next. In *Doe dem. Matthewson* v. *Wrightman*, 4 Esp. 5 (6 R. R. 834), the notice was to quit "on the 25th day of March, or the 8th day of April next *ensuing," and it appeared that this was served on New [*724] Michaelmas-day; the day of the demise was after the 8th of April; and Lord Kenyon held that the notice, though in the alternative, was a good six months' notice, if the tenancy commenced on either 25th March or 8th April; and that it lay on the party receiving such six months' notice to show the true time of commencement, if material to his case. The conduct of the parties is as properly given in evidence here, as the actual day of the commencement of the holding where the notice is simply for the expiration of the year without naming a day. In *Doe dem. Eyre* v. *Lambly*, 2 Esp. 635 (5 R. R. 758), the assertion of the party receiving the notice was deemed conclusive evidence of the day of commencement; and in *Doe dem. Clarges* v. *Forster*, 13 East, 405 (12 R. R. 383), the tacit acquiescence of such party was taken as *primâ facie* evidence. Here the jury, upon the evidence, have found that the party receiving the ambiguous notice understood it rightly. Indeed it might be contended, if no words can be rejected, that the defendant gave notice to determine the demise at the proper time, intimating at the same time an intention to quit earlier, which he might lawfully do, provided he paid the rent and performed the other covenants. Or the jury might, from the plaintiff's conduct, infer a verbal notice correctly framed: a written notice was not necessary.

Sir W. W. Follett and R. V. Richards, *contra*. — It is very doubtful whether a verbal notice would have been good, especially as the covenant requires that the tenant should "leave or give" it. But here no doubt the *plaintiff's whole con- [*725] duct had reference to the notice which was in evidence; and no other view was suggested at the trial. Now the meaning of a written instrument cannot be explained by the conduct of the parties. If there be an inconsistency in the document, no reason

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can be assigned for rejecting one part rather than the other; at any rate, this should not be done in favour of the party framing the notice. In *Doe dem. Duke of Bedford* v. *Kightley*, 7 T. R. 63 (4 R. R. 375), the day named appeared to be impossible, by reference, not to the legal rights of the parties on the lease, but to the day of service. *Doe dem. Cox* v. ———, 4 Esp. 185 (6 R. R. 850), was a case of latent ambiguity. Then *Doe dem. Spicer* v. *Lea*, 11 East, 312, has not been distinguished. There the difficulty might have been got rid of, if the position of the parties had been taken into consideration, as the defendant says it may be here. That case was recognised in *Smith* v. *Walton*, 8 Bing. 235, where it was held that the words "Martinmas, 1830, to wit, on 23rd November, 1830," in a record, meant New Martinmas, 11th November, and that "Martinmas, 1830," was not controlled by what followed. In *Johnstone* v. *Hudlestone*, 4 B. & C. 922 (28 R. R. 505, No. 49, *post*), it was held, on demurrer, that a tenancy was not determined by the landlord's accepting and assenting to an insufficient notice to quit given by the tenant. Even if the parties here had met after the service of the notice, and had agreed to consider the notice good, that would not have cured the defect: they could only have waived the former notice and have given and received a new one, as in *Doe dem. Brierly* v. *Palmer*, 16 East, 53 (14 R. R. 284). *Cur. adv. vult.*

[*726] *Lord DENMAN, Ch. J., now delivered the judgment of the Court. After having shortly stated the pleadings and the notice proved, his Lordship proceeded as follows: —

It was submitted that the error of this notice in point of time was cured by the plaintiff's conduct, who had written on the 27th of November to acknowledge the receipt of the defendant's letter dated the 1st. A long time after, he told the defendant that he had perceived the defect in the notice, but that it was no business of his to point it out. The opinion of the jury was that the plaintiff understood the notice to apply to the last day of the fourteen years; and a verdict was entered for the defendant, subject to our opinion whether the term was put an end to; more correctly, perhaps, whether the evidence was admissible.

We have heard the case argued, and are of opinion that the covenant to pay rent during the whole term cannot be got rid of by any notice to quit which is not in accordance with the proviso introduced into the lease for the purpose.

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The cases that seemed to point the other way merely show that, where there is no covenant, a notice describing the premises, so as to be perfectly understood between the parties, will be sufficient; but in none has a proviso or covenant in a deed been held to be satisfied by a notice inconsistent with the terms of it. The case of *Doe dem. Spicer* v. *Lea*, 11 East, 312, is to this effect, and is indeed a strong case; but no authority is required for so plain a proposition. The rule for entering a verdict for the plaintiff must therefore be absolute.

Rule absolute, to enter verdict for plaintiff.

ENGLISH NOTES.

In *Bird* v. *Baker* (1858), 1 Ell. & Ell. 12, 28 L. J. Q. B. 7, the plaintiff in ejectment had, by indenture dated 19th July, 1851, demised to the defendant premises then occupied by him "to hold from the 25th of December, 1849, for the term of fourteen years thence next," with "a proviso that it shall be lawful for either party to determine this demise at the expiration of the first seven years thereof by six months' notice." It was held that the seven years ran from the 25th of December, 1849, and the plaintiff, having given six months' notice to quit previous to the 25th of December, 1856, was entitled to recover possession accordingly.

As to notice to quit on a yearly tenancy see Nos. 46 and 47, and notes, *post.*

AMERICAN NOTES.

This case is cited and approved in Wood on Landlord and Tenant, sects. 75, 290, 480, with no American company.

It is here held that under a statutory privilege to terminate a tenancy at will, the tenant's notice must strictly conform to the statute. *Whicher* v. *Cottrell*, 165 Massachusetts, 351.

No. 39. — DOE d. HENNIKER *v.* WATT.

(K. B. 1828.)

RULE.

WHERE by the terms of a lease it is stipulated and conditioned that the lessee should not assign or underlet, the lessor may maintain ejectment for breach of the condition.

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Doe d. Henniker v. Watt.

8 Barn. & Cress. 308–317 (32 R. R. 393).

Lease. — Condition. — Ejectment for Breach.

[308] By a memorandum of agreement, in consideration of the rent and conditions thereinafter mentioned, A. was to have, hold, and occupy, as on lease, certain premises therein specified, at a certain rent per acre. And it was stipulated that no buildings should be included or leased by virtue of the agreement; and it was further agreed and stipulated that A. should take, at the rent aforesaid, certain other parcels, as the same might fall in; and, lastly, it was stipulated and conditioned that A. should not assign, transfer, or underlet any part of the said lands and premises otherwise than to his wife, child, or children. *Held*, that by the last clause a condition was created, for the breach of which the lessor might maintain an ejectment.

Ejectment brought to recover certain lands and premises in the county of Somerset. The cause was tried before BURROUGH, J., at the Summer Assizes for the county of Somerset, 1827. It appeared that the defendant in October, 1825, became tenant to the lessor of the plaintiff of the premises in question, under and by virtue of the following instrument, signed by the defendant, and bearing date the 24th day of October, 1825: "Memorandum of agreement made with George Watt, bailiff, of the manor of Chalcott, otherwise Calcott, in the county of Somerset. The said G. Watt, in consideration of the rent and conditions hereinafter mentioned, is to have, hold, and occupy, as on lease, every part and parcel of all that piece or tract of turbary land, commonly called The Five Hundred Acres, situate in the said manor, which may now be in hand and disengaged or unlet, for the term of twenty-one years from Lady-day, 1825, at the yearly rent of 5*s.* an acre, payable quarterly, and free and clear of all charges, rates, and outgoings whatsoever; and is likewise to have, at the like rent of 5*s.* an acre, all and every parcel of the said Five Hundred Acres which may fall in hand and become unlet between this time and the expiration of the said term of twenty-one years; provided always, that the entire or total quantity of land in the [*309] *said Five Hundred Acres, occupied by the said G. Watt by virtue of this agreement, shall never exceed one hundred acres in the whole; and that the term or lease of all and every parcel occupied or possessed under this agreement shall cease or determine in twenty-one years from Lady-day aforesaid. And it

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is stipulated that no house or cottage, stable or other substantial building, nor any parcel of land on which such building now stands, or may hereafter be erected, shall be included in or leased by virtue of this agreement. And it is further stipulated and agreed that the said G. Watt shall take and occupy, at the rent aforesaid, every parcel of land in the said Five Hundred Acres, as the same may fall in hand, without choice, exception, or refusal, until the total quantity amounts to one hundred acres, as before mentioned. And also that G. Watt shall, on possession, proceed to cultivate and improve every parcel as the same comes to his occupation, whether it be late or early in the said term of twenty-one years, in like manner or method as he means towards the parcels of which he has immediate possession. And, lastly, it is stipulated and conditioned that G. Watt shall not assign, transfer, underlet, or part with any part or parcel of the said lands or premises otherwise than to his wife, child, or children." It was proved that the defendant had underlet part of the demised premises; and it was insisted, on the part of the lessor of the plaintiff, that the last clause in the agreement operated as a condition, and that the underletting was a breach of that condition. The learned Judge was of opinion that the clause did operate as a condition, but he reserved liberty to the defendant to move to enter a nonsuit on that point, if the verdict should be against him. The defendant * then gave some evidence which, it was con- [* 310] tended, clearly showed that the defendant had underlet with the knowledge, and in some degree by the directions of the lessor of the plaintiff, and amounted to a waiver, if not to an express license. The learned Judge thought that the evidence applied to other lands of the lessor's which the defendant managed as his bailiff, and directed the jury to find a verdict for the plaintiff. Jeremy in last Michaelmas Term obtained a rule *nisi* for a nonsuit, on the ground that the clause prohibiting the defendant from assigning or underletting did not operate as a condition, but merely as a covenant; and, secondly, for a new trial, on the ground that the evidence of license had not been distinctly presented to the jury.

On a former day Moody showed cause. The clause in the agreement, whereby the tenant was prohibited from underletting, is a condition. The words "*sub conditione*," "provided always," or "*ita quod*," of themselves, in a conveyance of real property, make

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estates upon condition. Litt., s. 328, 329. There are other words which, in such an instrument, make an estate upon condition, provided a power of re-entry is added to them, as the words "*si contingat.*" Litt. 330; Co. Litt. 204 a; Shepp. Touch. 120; Com. Dig., tit. Condition (A, 2). If this instrument, therefore, contained a conveyance of a freehold estate, there could not be any doubt that the last clause would operate as a condition. The instrument operates as a lease for years. Now Co. Litt. 204 a shows that conditions may be annexed to demises for years, without the formal words required in the case of freehold estates of inheritance. It is sufficient if words be used which show [* 311] the intention of the lessor to make the * estate conditional, as "*quod non licebit dare, vendere, vel concedere statum sub pœnâ forisfacturæ;*" and Litt., s. 365, shows that as to chattels real, as leases for years, a man may plead that such leases were made upon condition, without showing any writing of the condition. In Plowd. 142 it is said, "If a man make a feoffment in fee to one, *ad erudiendum* his son in an art, it is a condition, because the words purport such intent, and, therefore, they are conditional, although there are not the usual words." It may be urged, that conditions are considered to be odious in law, and that they are to be construed strictly. Co. Litt. 219 b; Vin. Abr., Condition (E, r). This is said of the construction of acts alleged to be forfeitures of admitted conditions to defeat estates, not words doubtful whether they amount to a condition. Here there can be no doubt that it was the intention of the lessor to prevent the lessee from underletting, and the most effectual mode of doing so was to make the lease void on his doing such an act. The words, "provided always, and it is covenanted and agreed," create both a condition and a covenant. Co. Litt. 203 b; the *Cromwel's Case*, 2 Co. Rep. 270.

Jeremy, *contra*. — First, this is only an agreement, and not a deed, and it is doubtful whether a condition can be reserved upon that which amounts to a mere parol contract; and although a lease of land upon condition may be pleaded without deed (1 Roll. Abr. 414; 3 Vin. Abr., Condition (R), 69), yet an estate upon condition cannot. The instrument in this case contains no words of present demise, but is only that the defendant shall [* 312] * hold "as on lease." Conditions, the effect of which is to destroy an estate, being odious in law, are to be strictly

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construed, and not to be created without sufficient words. *Machel* v. *Dunton*, 2 Leon. 33. Here, also, if the clause in question operates as a condition, all the preceding clauses must equally operate as conditions. But as the lease professes to pass land in reversion as well as in possession, the condition cannot apply to the lands which the lessee was to take in reversion after the determination of the previous estates for lives, and which might never come *in esse*. If the clause in question occurred in a deed, it would operate as a covenant, but not as a condition. *Doe d. Willson* v. *Phillips*, 2 Bing. 13 (27 R. R. 539), and *Doe d. Wilson* v. *Abel*, 2 M. & S. 541 (15 R. R. 343). The proper words, according to Lord COKE, 204 b, to make a condition, are "*sub conditione*" (which is the most express and proper), or "*proviso semper, itaquod*, or *quod si contingat*," which last words always require something else, as, a clause of re-entry, &c. Litt., s. 328. The words in this instrument, "it is stipulated and conditioned," must be construed according to the intention of the parties in reference to the particular subject-matter, and must be taken either as a covenant or condition, but not as both. 4 Cruise Dig. 378. Now looking at the nature of the subject-matter to which they apply, they could not have been intended to operate as a condition. For a condition being entire, when it is gone as to part, is gone *in toto*, and must destroy the whole estate. *Corbet's Case*, 1 Co. Rep. 86; *Cooper* v. *Andrews*, Hob. 43. Here the estate granted
*is partly in possession, partly in reversion, and some [*313]
portion of it might never arise. The condition cannot
apply to the estate in reversion, because the lessee could not assign or underlet the lands of which he was never in possession, nor could the lessor take advantage of breaches of the condition by parcels, as in waste, by which he may recover the particular place wasted. And even if the clause might be construed either as a condition or a covenant, yet upon the principle that words shall be construed most strongly against the party using them, the Court will not construe it as a condition, if by so doing it be repugnant to the estate granted, or uncertain as to the extent to which it is to operate; and at all events the instrument is equivocal, whether it passes any interest upon which a condition can operate. Assuming that the clause amounts to a condition, of the breach of which the lessor might take advantage, there was evidence that the underletting had been made by the defendant with

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the knowledge and concurrence of the lessor; no forfeiture, therefore, accrued; or if any forfeiture had been incurred, it was a clear waiver, if it did not amount to an express license to underlet the particular lands, and should have been so presented to the jury. *Cur. adv. vult.*

BAYLEY, J. — This was an ejectment brought for breach of a condition contained in an agreement for a lease. There are two questions: first, Whether the agreement contained a condition or not? the second, Whether the plaintiff had not destroyed his right to enter upon the lands demised for the breach of the con-
[*314] dition? *because the act constituting the supposed breach was done with his concurrence. The Court, at the time of the argument, felt that this question had not been submitted to the jury, and, therefore, held that there ought to be a new trial, even if there was a condition contained in the agreement. But if there was no such condition, then there ought to be a nonsuit. The parties stood in the relation of landlord and tenant. There was an agreement made between the lessor of the plaintiff and defendant, by which the defendant, in consideration of the rent and conditions thereinafter mentioned, was to have, hold, and occupy, as on lease, every part and parcel of the turbary land called the Five Hundred Acres, &c., which might then be underlet or disengaged, for twenty-one years from Lady-day, 1826, at the rent of 5*s.* per acre, payable quarterly, clear of all charges and outgoings whatsoever; and to pay the like rent of 5*s.* per acre for all and every parcel of the Five Hundred Acres which might fall into hand or come into possession before the expiration of the said term of twenty-one years. Then it was stipulated that no house, &c., should be included in or leased by virtue of the agreement; and it was further stipulated that the said G. Watt should take and occupy, at the rent aforesaid, every parcel of the land in the said Five Hundred Acres, as the same might fall in hand; and also that G. Watt should, on possession, proceed to cultivate every parcel as the same came to his occupation. And, lastly, it was stipulated and conditioned, that the said G. Watt should not assign, transfer, underlet, or part with any part of the said lands otherwise than to his wife, child, or children. The question is, Whether a condition be contained in the last clause?
[*315] This document * is not under seal; and it has been said

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by the defendant's counsel that it is not therefore calculated to raise a condition. But the circumstance of its not being under seal is immaterial. A party who demises land by an instrument not under seal may introduce a condition into it, provided he use apt and proper words for the purpose. The words "provided always, *sub conditione, ita quod,*" used in a conveyance of real estate, by themselves, make the estate conditional. But in a lease for years no precise form of words is necessary to make a condition. It is sufficient if it appear that the words used were intended to have the effect of creating a condition. They must be the words of the landlord, because he is to impose the condition. Here, first, the agreement purports to be in consideration of the rent and conditions thereinafter mentioned; and then the words "it is stipulated" occur more than once; and then, in the last sentence of the instrument, come the words, "it is lastly stipulated and conditioned, that Watt shall not assign, transfer, underlet, or part with any part of the lands, otherwise than to his wife or children." These words are clearly introduced into the instrument on the part of the lessor, for they are for his benefit. The word "conditioned" is fairly a word of condition. In pleading, a bond is stated to be conditioned for payment of money. It is said that the word "stipulated" and the word "conditioned," being used together, have the same meaning, and import a covenant, and not a condition; but there are several authorities which show that if words both of covenant and condition are used in the same instrument, they both shall operate. If the word "stipulated" import a covenant, it will operate as such; and
*if the word "conditioned" import a condition, it must [*316]
also operate. In *Simpson* v. *Titterell*, Cro. Eliz. 242,
one Benbow let the land to the defendant *proviso semper*, and it was further covenanted that the lessee should not assign except to the lessor. These words were held to create a condition; because it was a general rule that where a proviso is that the lessee shall perform or not perform a thing, and no penalty to it, this is a condition, otherwise it is void; but if a penalty is annexed, it is otherwise. So in *The Earl of Pembroke* v. *Sir H. Berkeley*, Cro. Eliz. 384, where there was a grant of a walk in a forest, "provided also, and the said grantee doth covenant not to fell or cut any wood but for necessary browse," and the heir of the grantee cut down four oaks, the question was, Whether this was a condi-

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tion or a covenant? GAWDY and CLENCH thought it was a covenant only, but POPHAM and FENNER thought it was a condition; and afterwards, upon a conference amongst all the Justices of England, it was held by the greater part of them to be a condition. In *Harrington* v. *Wise*, Cro. Eliz. 486, where the words were, "it is covenanted and agreed between the parties that Harrington doth let the lands for five years, provided always, that Wise shall pay to the defendant during the term £120 per annum," it was held to be a good reservation of rent; but POPHAM, J., said that it was a reservation and condition also, as in the case of Sir H. Berkeley, where a proviso joined with the words of covenant make it a condition and a covenant also. In Litt., s. 329, it is said, if the words be, "provided always, that B. do pay to A. [*317] such rents," the feoffee *hath but an estate on condition. Lord COKE, in commenting on that section in Co. Litt. 203 b, says, "So it is if a man by indenture letteth land for years; provided always, and it is covenanted and agreed between the said parties that the lessee shall not alien;" and it was adjudged that this was a condition by force of the proviso, and a covenant by force of the other words. We are of opinion, therefore, that by the last clause of the instrument in question a condition was created; and that being so, the rule for a nonsuit cannot be made absolute. But we think the rule should be absolute for a new trial, because there was evidence to show that the land was underlet by the defendant with the consent and express license of the lessor, and that evidence was not submitted to the jury.

Rule absolute for a new trial.

ENGLISH NOTES.

But where the lessee covenanted to pay the rent and not to assign without leave of the lessor, provided, that if the rent be in arrear, or if all or any of the covenants "hereinafter" contained on the part of the lessee should be broken, it should be lawful for the lessor to re-enter; and there were no covenants on the part of the lessee after the proviso, but only a covenant by lessor that, lessee paying the rent, &c., and performing all and every the covenants "hereinafter" contained on his part, &c., should quietly enjoy, &c. — it was held that the lessor could not re-enter for breach of the covenant not to assign, for the proviso was restrained by the word "hereinafter" to subsequent covenants; and although there were none such, the Court could not reject the word. *Doe d. Spencer* v. *Godwin* (1815), 4 M. & S. 265, 16 R. R. 463.

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A proviso in a lease giving a power of re-entry if the lessee "shall do or cause to be done any act, matter, or thing contrary to and in breach of any of the covenants" does not apply to an omission to repair. *Doe d. Abdy* v. *Stevens* (1832), 3 B. & Ad. 299.

So if the power of re-entry is in default of performance "or failure to perform," it seems that it would not apply to breach of a negative covenant. Co. Litt. 303 b; *Doe d. Palk* v. *Marchetti* (1831), 1 B. & Ad. 715; *Hyde* v. *Warden* (1877), 3 Ex. D. 72, at p. 182, 47 L. J. Ex. 121, at p. 127. It is indeed said by CHANNELL, B., in *West* v. *Dobb* (1870), L. R. 5 Q. B. 460, at p. 465, 39 L. J. Q. B. 190, at p. 194, that the proviso which there was "in case the lessee should fail in the observance or performance" of any of the covenants, applied only to the breach of an affirmative covenant. But this *dictum* was not necessary for the decision of the case. And it is clearly pointed out by BLACKBURN, J., in *Wadham* v. *Postmaster-General* (1871), L. R. 6 Q. B. 644, at p. 648, 40 L. J. Q. B. 310, 311, 24 L. T. 545, 19 W. R. 1082, that a power of re-entry, when properly worded, may apply to the breach of a negative as well as to that of an affirmative covenant. And this seems to apply to a proviso expressed to operate in case of "breach" or "non-observance" of the covenant. See also *Evans* v. *Davis* (1878), 39 L. T. 391, per FRY, J., at p. 394.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sects. 280, 510; Taylor on Landlord and Tenant, sects. 278, 412.

It is said in some cases that this power can be effectuated only by express and clear stipulations: *Robinson* v. *Perry*, 21 Georgia, 183; 68 Am. Dec. 455; and in other cases, that the landlord may waive it; *Willoughby* v. *Lawrence*, 116 Illinois, 11; 56 Am. Rep. 758, both of which classes recognize by implication the validity of such covenants.

In *Medinah Temple Co.* v. *Currey*, 162 Illinois, 441; 53 Am. St. Rep. 320, it is held that such a covenant is broken by an assignment for benefit of creditors; reversing 58 Illinois Appeals, 433. Not so however of an involuntary transfer, as by sale on execution in bankruptcy, &c. *Farnum* v. *Hefner*, 79 California, 575; 12 Am. St. Rep. 174.

But it is held in some cases that such covenants are against public policy and void. *Chipman* v. *Emeric*, 5 California, 49; 63 Am. Dec. 80 (*obiter*); *Burnes* v. *McCubbin*, 3 Kansas, 221; 87 Am. Dec. 468.

A covenant by a lessee not to assign "to any person or persons whomsoever" without the lessor's consent, covers a re-assignment to the lessee made without consent after he has assigned with such consent. *Munro* v. *Waller*, 28 Ontario, 29.

The doctrine of the principal case is held in *Lewis* v. *Sheldon*, 102 Michigan, 108, the case of a lease on shares.

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Such a covenant cannot be urged by the assignee of the lease against the landlord who has not objected to the assignment. *Sexton* v. *Chicago Storage Co.*, 129 Illinois, 318; 16 Am. St. Rep. 274.

No. 40. — DOE d. RANKIN *v.* BRINDLEY.

(K. B. 1832.)

RULE.

ACCEPTANCE of rent which becomes due pending a notice to repair is no waiver of a forfeiture on the expiry of the notice.

And an agreement to allow further time for the repairs is not a waiver of, but only suspends, the right of entry.

Doe d. Rankin v. Brindley.

4 Barn. & Adol. 84–87.

Lease. — Proviso for Re-entry. — Forfeiture.

[84] A lease contained a proviso for re-entry in case of non-repair within three months after notice. The landlord gave notice, and before the end of the three months (which would have expired in Hilary vacation, 1832), brought an ejectment. During the three months the cause came on for trial, and the parties agreed to an order of Court, directing that a juror should be withdrawn, and the repairs done by Midsummer. Default being made, the landlord brought a second ejectment, without further notice.

Held, first, that the former notice had not been waived.

Secondly, that it could not be objected at Nisi Prius that the action had not been commenced within ten days after the right of entry accrued, pursuant to the Act, 11 Geo. IV., and 1 Will. IV., c. 70, s. 36, this being merely matter of irregularity; and further, that the objection was not well founded, the right of entry having been only suspended by agreement of the parties.

Ejectment for messuages, mills, &c. At the trial before Lord TENTERDEN, Ch. J., at the last Summer Assizes for Kent, the facts appeared to be as follows: The defendant held oil-mills, &c., of the lessor of the plaintiff, by a lease containing covenants to repair, to fence and keep up fences, and to insure; and there was a proviso for re-entry, if at any time the premises or the fences should not be repaired within three months next after notice in writing given by the landlord, or in case of breach or default in the other covenants. There was no specific covenant to repair

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within three months after notice. On the 6th of January, 1832, the lessor of the plaintiff gave the defendant a written notice to do certain repairs to the mills within three months. On the 10th he served the defendant with a declaration in ejectment. That action, as appeared by the particulars of demand, was grounded on forfeitures said to be incurred by not sufficiently fencing the premises, and by not insuring; but the first ground was abandoned. The cause came on for trial at the ensuing Lent Assizes (March 12th, 1832), when an order of Court was made by consent of the parties, that a juror should be withdrawn, and that the defendant should put the mills in repair, to the satisfaction of surveyors and an umpire, on or before the following 24th of June. On the 28th of March the lessor of the *plaintiff accepted rent [*85] for the quarter ending on the 25th. The repairs were not done pursuant to the order of Court; and the defendant was thereupon served with a declaration in the present action, entitled, "Thursday, 28th of June, in Trinity Term, 2 Will. IV.," the demise being laid on the 27th under the [then existing procedure] statute 11 Geo. IV., and 1 Will. IV., c. 70, ss. 36, 37. The particulars of demand stated this action to be brought for breach of covenant in not repairing. A verdict having been found for the plaintiff,

Thesiger now moved for a new trial, on two grounds. First, no power of re-entry for non-repair is given by the lease, without a three months' notice. Here a notice was given previously to the first ejectment, but the landlord waived it by assenting to the order of Court, made at the Spring Assizes, which enlarged the time for repairing, and in other respects introduced new terms. *Doe d. Morecraft* v. *Meux*, 4 B. & C. 606 (No. 65, *post*). The acceptance of a quarter's rent afterwards was also a waiver. And no further notice having been given, it is the same with reference to this action, as if there had never been any. Secondly, if the notice of the 6th of January continued in force, the landlord became entitled to re-enter in the following April; and the statute 11 Geo. IV., and 1 Will. IV., c. 70, s. 36, which authorises the service of declaration in Hilary and Trinity vacations, requires it to be served within ten days after the right of entry accrues. The present ejectment, therefore, was improperly commenced.

*PARKE, J. — I think there ought to be no rule. As to [*86] the first point, the notice to repair was given on the 6th of January, 1832; and the right of re-entry, in default of repair,

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would have accrued in three months from that time. Before the expiration of the three months, an ejectment was brought; and the lessor of the plaintiff being unable to support that action, put an end to it by consenting to the order of Court made at the March Assizes, 1832. It was the same as if the parties after the 6th of January, and before the expiration of the three months, had made an agreement between themselves, that the time for repairing should be extended to the 24th of June; it was merely a consent to postpone the time of completing the repair for the benefit of the defendant; and on his failing to comply with the terms, the lessor of the plaintiff might justly insist on his right of entry, and bring a new ejectment after the expiration of the enlarged time. The receipt of rent was only an admission that the defendant was tenant until the 25th of March, and could not operate as a waiver of the forfeiture. As to the objection founded on the statute 11 Geo. IV., and 1 Will. IV., c. 70, s. 36, it seems to me that that could not be taken at Nisi Prius; and if it could, the answer is, that the landlord's right to re-enter, which is said not to have been enforced in proper time, was postponed by agreement of the parties.

TAUNTON, J. — I am of the same opinion. The order of Nisi Prius did not supersede the notice, but only enlarged the time and suspended the right of re-entry.

[*87] *PATTESON, J. — The notice to repair may be connected with the agreement at Nisi Prius in the first ejectment. The other point is mere matter of irregularity.

Rule refused.

ENGLISH NOTES.

The judgment of PARKE, J., in the principal case is cited at length by PATTESON, J., in *Doe d. De Rutzen* v. *Lewis* (1836), 5 Ad. & El. 277, 290, as an authority for holding that a landlord by exercising a power of giving notice, to repair, and in default that the landlord should do the repairs and charge them to the tenant, had elected to affirm the relation of landlord and tenant, and could not take advantage of a general proviso of forfeiture for non-repairs.

Apart from notice to repair, it has been held that a lessee who is bound by covenant to repair under penalty of forfeiture, must do so within a reasonable time after the premises are out of repair; and the acceptance of rent which became due before the expiry of such reasonable time does not operate to extend the time. *Doe d. Baker* v. *Jones* (1850), 5 Ex. 498, 19 L. J. Ex. 405.

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By a written agreement for a tenancy for three years commencing on the 1st of July, the rent was made payable on the 30th of September and corresponding days in each quarter, and there was a clause of re-entry for non-payment within fourteen days. The tenancy was continued (presumably as a yearly tenancy, after the expiry of the three years. Rent being in arrear, the landlords gave notice on the 30th December for the determination of the tenancy forthwith, and demanding payment of rent up to the 31st of December. The rent was paid and accepted, and a receipt given accordingly. It was held by KEKEWICH, J., that, having accepted rent for a day after the day on which the landlords purported to determine the tenancy, they must treat the tenancy as subsisting. *Keith, Prowse & Co.* v. *National Telephone Co.* (1894), 2 Ch. 147, 63 L. J. Ch. 373, 70 L. T. 276, 42 W. R. 380.

The law of forfeiture must now be considered in relation to the provisions of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41, s. 14), and the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict., c. 13), which provide for relief against forfeiture under certain conditions. It has been held that the provisions of the latter Act allowing certain costs to be recovered by the lessor upon a waiver of forfeiture, do not apply to the case where the breach has been remedied under sub-section (1) of the 14th section of the former Act, which provides that a right of forfeiture shall not be enforceable until failure to remedy the breach upon notice. *Nind* v. *Nineteenth Century Building Society* (C. A. 1894), 2 Q. B. 226, 63 L. J. Q. B. 636, 70 L. T. 831, 42 W. R. 481.

The notice must specify the particular breach complained of. *Fletcher* v. *Nokes* (1897), 1 Ch. 271, 66 L. J. Ch. 177. As to the operation of section 2 of the Conveyancing and Law of Property Act of 1892 in favour of underlessees, see *Imray* v. *Oakshette* (C. A. 1897), 2 Q. B. 218, 66 L. J. Q. B. 544.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sects. 339, 516, and in Taylor on Landlord and Tenant, sects. 497, 498.

Acceptance of rent after expiration of term is not of itself a waiver of notice to quit. *Fitzpatrick* v. *Childs*, 2 Brewster (Penn.), 365. Acceptance of rent in arrears, after notice of forfeiture and of termination of the lease, does not waive the forfeiture unless the rent fell due after the breach. *Silva* v. *Campbell*, 84 California, 420; *Jackson* v. *Allen*, 3 Cowen (N. Y.), 220. So of acceptance of rent subsequent to notice to quit and application of it to instalments falling due prior to that for which forfeiture is claimed. *Carraher* v. *Bell*, 7 Washington, 81. See *Richburg* v. *Bartley*, Busbee (Nor. Car.), 418; *Alexander* v. *Hodges*, 41 Michigan, 691.

For an explication of the doctrine, that acceptance, after forfeiture, of rent accruing after forfeiture, waives forfeiture, see notes, 47 Am. St. Rep. 198.

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SECTION III. — *Yearly and other Tenancies not necessarily constituted by Writing.*

No. 41. — BEAVAN *v.* DELAHAY.

(C. P. 1788.)

No. 42. — ROE d. JORDAN *v.* WARD.

(C. P. 1789.)

RULE.

WHERE a tenant holds premises over the term of the tenancy, whether under a tacit agreement or under a local custom, all the rights and obligations of the original contract, so far as relates to premises continued to be held, are continued likewise.

On a tacit re-letting from year to year, the year is considered to have commenced on the same day as the day of commencement of the original demise.

Beavan v. Delahay and Lewis.

1 H. Black. 5–9 (2 R. R. 728).

Landlord and Tenant. — Tacit Reletting. — Implied Continuance of Terms.

[5] A custom that a tenant may leave his away-going crop in the barns, &c., of the farm, for a certain time after the lease is expired, and he has quitted the premises, is good, and the landlord may distrain the corn so left, for rent arrear, after six months have expired from the determination of the term [notwithstanding the statute 8 Anne, c. 14, ss. 6, 7].

Replevin: for taking corn on the 20th of September, 1784, at Peterchurch in the county of Hereford.

Avowry and cognisance: *Locus in quo* part of certain lands, &c., of which the avowant Delahay was seised in fee, and which he demised on the 2nd of February, 1780, to one William Beavan for one year, and so from year to year as long as both parties should please, at the rent of £168, payable half yearly. William Beavan entered on the 3rd of February, 1780, and continued in possession till the 2nd of February, 1784, when the demise ended. Within the parish of Peterchurch an ancient custom, that every tenant and

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farmer of any lands, under any demise, from year to year, at the will of the parties, shall have to his own use, and reap at seasonable and proper times, his away-going crop, that is, all the corn growing upon the said lands, which, before the expiration of such term, hath been sown by such tenant and farmer, upon any part of such lands, being arable land, not exceeding one third part of the arable lands so held under such demise, and which hath been left standing and growing upon such lands at the expiration of such term; and also deposit such away-going crop, when reaped, in the barns and out-houses, if any such there be, parcel of such demised premises convenient in that behalf, and thresh the same there, and keep the same in the grain there then * arising, in [*6] such barns and out-houses, until the first day of May next after the reaping of such corn. On the 1st of August, 1784, William Beavan the tenant reaped his away-going crop, and placed and deposited the same in the said places in which, &c., being the barns and out-houses parcel of the said demised premises, and kept it there till the said time when, &c., which was before the 1st of May next after the reaping of the same, under the custom — rent arrear, distress, &c.

Plea in bar: protesting, no such custom, confesses that the demise ended on the 2nd of February, 1784, but says that the said goods and chattels were taken and distrained after the expiration of six calendar months next after the end and determination of the said demise, &c.

To this there was a general demurrer.

Lawrence, Serjt., in support of the demurrer, argued that although the distress was taken after six months had elapsed from the determination of the demise, yet the landlord had a good right to distrain. The case in Keilway 96 a is an express authority in point. The tenant had an interest in the premises upon which the distress was so taken, by the custom of the country. By the feudal law, non-payment of rent, and non-performance of services, occasioned a forfeiture of the feud. But in process of time, the remedy by distress was substituted in lieu of forfeiture. (Gilb. Law of Replevin, p. 3.) Wherever therefore a forfeiture might be incurred, there a distress might be taken. In the present case the tenant might have forfeited, by several means, the interest which the custom gave him, and being so liable to forfeiture, he was also liable to distress. In 1 Rol. Abr. 670, pl. 10, it is laid down, that the land-

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lord cannot distrain after the end of the term, because there is no privity of estate between him and the tenant, but this admits, that where there is such privity, a distress may be taken; and in the case before the Court there is such privity by the operation of the custom. In the case of *Stanfill* v. *Hickes*, 1 Ld. Raym. 280, it was determined, that there could be no distress, where the tenant had different interests in the estate, which implies, that where the interests of the tenant are the same, the landlord has a right to distrain; here, there is a continuation of the same interest, the custom of the country extending the term till the day specified. That such a custom is good appears from *Wigglesworth* v. *Dallison*, Dougl. 201 (No. 34, *ante*), and the case of *Lewis* v. [*7] * *Harris*, tried before Chief Baron SKYNNER, at Hereford Summer Assizes, 1778.[1]

Kerby, Serjt., contended that the avowry was inconsistent, as it states the term to have ended on the 2nd February, 1784, and that until that time the tenant continued in possession; and sets up a custom that he should keep possession of the barns, &c., for the putting in his corn till the first of May, after the reaping of the corn. By the statute 8 Anne, c. 14, s. 6, a power is given to landlords, which they had not at common law, to distrain after the expiration of the term granted, but it is expressly limited by the 7th section, to the period of six months after such expiration. In the present case it appears by the avowant's own statement, that

[1] *Lewis* v. *Harris*, Summer Assizes at Hereford, before Chief Baron SKYNNER, 1778.

Trover for a quantity of wheat — plaintiff proved the taking and conversion. — Defendant justified under a distress for rent. The distress was made in March, the term having ended the Candlemas twelvemonth before; but it was during the time the wheat was in a barn, part of the demised premises, and also during the time allowed by the custom of the country to the off-going tenant to get in and dispose of his off-going crop.

Kenyon, for the defendant, insisted, that the tenant's right to these advantages was a continuance of his term in that part of the lands to which it extended, and was, as it were, an excrescence of his term. Therefore the distress was during the term, though more than six months after it had expired in the rest of the farm.

Bearcroft insisted, for the plaintiff, that it was bad by common law, and not within the statute 8 Anne, c. 14, s. 7.

Chief Baron SKYNNER. — The question is new to me; I must resort to the reason of the thing. The tenant entered originally on part only, and could not have the benefit of the residue. During his right to continue he was immediate tenant, and could have maintained trespass while his customary right continued. ("He offered Bearcroft a case for the opinion of the Court, but the matter being of small value, it was, with Kenyon's consent, reserved for his further consideration, and the plaintiff had a verdict subject to his opinion.")

He afterwards continued of the same opinion, and a nonsuit was entered.

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the distress was taken contrary to the statute, being long after six months had expired subsequent to the determination of the demise.

The case in Keilway ought to have little or no weight, as it has been contradicted by the Legislature in the 8th of Anne, and as it appears to have been against the opinion of two Judges of the Court in which it was decided. It is also an anonymous case, and does not show upon what occasion it came before the Court.

The case of *Wigglesworth* v. *Dallison* proves only the goodness of a custom to take away an off-going crop after the expiration of the term; it does not establish a right to distrain six * months [* 8] after the term has expired, against the express authority of an Act of Parliament, nor does it authorise a tenant to keep possession of a barn, &c., after the expiration.

The case of *Lewis* v. *Harris* was trover by the tenant against the landlord, in which the tenant claimed to hold the premises beyond the term, who ought therefore to submit to all the powers which a landlord has over a tenant. There the CHIEF BARON went into the equity of the case, saying, that as the tenant did not come into possession of part of the premises, till after the commencement of the term, it was but just that he should continue, after it ended. At best that was a mere Nisi Prius decision, which appears to have been acquiesced in, because the value of the corn was too small to hazard any further expense. The case of *Stanfill* v. *Hickes* is strongly in favour of the present plaintiff, which lays it down, that where the tenant has two interests in the premises, no distress can be taken. Here the tenant had two different interests, one arising from the demise, and the other from the custom, supposing the custom to be good.

Lawrence in reply. — The term was continued by the custom of the country till the 1st of May after the harvest; and if it continued for one purpose, it must also continue for every other. As the tenant might hold possession of the barn, &c., so all the rights of the landlord attached upon him, and with those rights, that of distress.

The Court took a few days to consider, after which

Lord LOUGHBOROUGH delivered their opinion as follows: A few short principles are sufficient to determine the present case. If, by tacit consent of the landlord and tenant, the contract between them continues beyond the time for which they originally con-

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tracted, all the rights and properties belonging to the original contract must also be continued. It has been often determined, that if there be a lease, and after the determination of it the tenant holds over, he must hold upon the terms, and liable to all the conditions and covenants of the lease. The rights therefore of the landlord must in such case continue. Now it is not material whether the interest and connection between the landlord and tenant be extended, by such holding over, or by the operation of a custom like the present.

I have seen Sir JOHN SKYNNER, and consulted him on the case of *Lewis* v. *Harris*, which I find was correctly stated at the bar. On that case he took the opinions of all his brethren of the [* 9] * Exchequer, who agreed with him in his decision, which was acquiesced in, and never afterwards called in question.

Judgment for the defendants.

Roe d. Jordan v. Ward.

1 H. Black. 97–100 (2 R. R. 728).

Landlord and Tenant. — Tacit Reletting. — Presumed commencement of tenancy.

[97] Tenant for life makes a lease for years, to commence on a certain day, and dies (before the expiration of the lease) in the middle of a year. The remainder-man receives rent from the lessee (who continues in possession, but not under a fresh lease) for two years together, on the days of payment mentioned in the lease. This is evidence, from which the Court will presume an agreement between the remainder-man and the lessee, that the lessee should continue to hold from the day, and according to the terms of the original demise: so that notice to quit ending on that day is proper.

Ejectment for a messuage, &c. John Jordan was tenant for life, remainder to his son, the lessor of the plaintiff, for life; remainders over. John Jordan, the father, on the 22nd of June, 1785, made a lease of the premises by indenture, to the defendant, for twenty-one years, to commence from Old Lady-day, which was the 5th of April then last; on which day the defendant had entered. On the 30th of September, 1785, John Jordan, the father, died; on whose death the estate came to the lessor of the plaintiff, his son. The defendant continued in possession, and paid rent to the lessor of the plaintiff, after the death of his father, for two years together, on Old Lady-day and Old Michaelmas-day. Before Old Michaelmas-day, 1787, the lessor of the plaintiff gave the defendant notice to quit on Old

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Lady-day, the 5th of April then next; and on his refusing to quit brought this action.

*An objection was made at the trial, that the notice to [*98] quit on the 5th of April was bad; that it ought to have been on the 30th of September, the end of the year, dated from the death of John Jordan, the father; all the defendant's interest derived from the lease having ceased on that event, as John Jordan, the father, had no power to make a lease to endure beyond his own life.

Mr. Justice ASHHURST, who tried the cause, left it to the jury, whether they would not presume a new agreement between the lessor of the plaintiff and the defendant, that the defendant should continue to hold according to the terms of the original lease; as the lessor of the plaintiff had received rent from him during two years, after the death of John Jordan, the father, on the original days of payment, namely, Old Michaelmas and Old Lady-day; and if so, the notice to quit was proper. But a verdict was found for the defendant.

In Trinity Term last, a rule was granted to show cause why this verdict should not be set aside, and a new trial granted.

Against which, Lawrence, Serjt., now showed cause. He argued, that as the lease was made by a tenant for life, at his death all the interest of the lessee in the premises must cease: at that time, he was either a trespasser, or he still continued to be tenant. But he was clearly not a trespasser; and as there was no express agreement, as to the term for which he was to hold over, and as it is now a settled point of law, that there can be no such thing as a tenancy at will, he was tenant from year to year. If so, as during the tenancy for life of the father, there could be no contract implied between the lessor of the plaintiff and the defendant; the year must have commenced at the death of the father, namely, on the 30th of September, and on that day the notice to quit ought to have ended.

Le Blanc, Serjt., in support of the rule, contended, that though perhaps it might have been presumed, that the defendant's interest began from the 30th of September, if no rent had been paid on the 5th of April, yet as the rent was in fact paid on the 5th of April during two years, such a presumption was totally destroyed. If the interest of the defendant had, in truth, commenced on the 30th of September, on that day the rent would have been paid; but it appeared to be otherwise from the Judge's report. The law draws

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[* 99] a conclusion, that a tenant * holds from the day on which he pays rent. If the lessor of the plaintiff had given notice to quit on the 30th of September, he would have been nonsuited, since he would have been estopped, by having accepted rent on the 5th of April for two years together, from saying, that the defendant's term began on any other day. The defendant then ought also to be estopped, by his own act, having paid rent on the 5th of April during the same period of two years. The notice to quit therefore was regular, and the verdict wrong.

Lord LOUGHBOROUGH. — The jury found a wrong verdict in this case. The notice to quit on the 5th of April was proper, as payment of the rent had been made on that day. It was also fair and just in the lessor of the plaintiff, to give the tenant notice to quit when his year ended, that the course of his husbandry might not be disturbed.

HEATH, J.[1] — The defendant was tenant at sufferance, on the death of the tenant for life; and the rent being paid on the 5th of April, was evidence of an agreement to hold from that day.

WILSON, J. — As there was no express agreement between the lessor of the plaintiff and the defendant, relating to the premises given in evidence, we must collect what their agreement was, from something done by them. The payment of rent by one, and the acceptance of it by the other, on the same day on which the defendant originally entered, was sufficient evidence of a relation back between them; and though the indenture itself was made on the 22nd of June, it related back to the 5th of April. Although the title of the defendant, under the indenture, ended on the 30th of September, yet the payment of rent on the 5th of April was evidence of an agreement that he should continue to hold in the same manner as he did by the indenture; insomuch, that if in the lease there had been covenants for particular modes of husbandry, and the defendant, after the death of the tenant for life, had neglected to perform them, the lessor of the plaintiff might have maintained an action on the case against him, stated the covenants, and then averred an agreement to perform them, according to the terms of the original lease; of which agreement, the con-
[* 100] tinuing to pay rent on * the 5th of April for two years together, would have been good evidence.

Rule absolute without costs.

[1] Mr. Justice GOULD was absent.

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ENGLISH NOTES.

Where a lease contains a proviso for re-entry for non-payment of rent, that is a condition which attaches to the tacit reletting after the determination of the lease. *Thomas* v. *Packer* (1857), 1 Hurl. & N. 669, 26 L. J. Ex. 207, 3 Jur. (N. S.) 143.

A tenant entered at Michaelmas under a parol lease for five and a half years. The tenant having had possession and paid rent for more than the term contemplated, was held to be a yearly tenant from Michaelmas. *Berry* v. *Lindley* (1841), 3 Man. & Gr. 498, 4 Scott N. R. 61, 5 Jur. 1061, 11 L. J. C. P. 27.

On the other hand, where a tenant held under a demise for fourteen and a half years from Christmas, 1831, and his assignee held and paid rent after the expiry (at Midsummer, 1846) of his term, the Court held that there was a tenancy from year to year commencing from the expiration of the defendant's term (*i. e.* Midsummer). *Doe d. Buddle* v. *Lines* (1848), 11 Q. B. 402, 17 L. J. Q. B. 108. Lord DENMAN, Ch. J., in delivering the judgment of the Court, said: "This is not at variance with any of the cases (*Doe d. Collins* v. *Weller*, 7 T. R. 478, 4 R. R. 496; *Berry* v. *Lindley*, and others cited). The original entry spoken of in them is the original entry of the lessee himself. That is not so here."

Where a tenant entered at Christmas and died in June, the widow, who continued the tenancy, was held to be a yearly tenant holding from Christmas. *Humphreys* v. *Franks* (1856), 18 C. B. 323.

In *Kelly* v. *Patterson* (1874), L. R. 9 C. P. 681, 43 L. J. C. P. 320, 30 L. T. 842, BRETT, J., puts the question thus: "Is it a true proposition of law to say that wherever one is in possession of land or premises as tenant, and his tenancy comes to an end either by efflux of time or by the death or end of title of his lessor, so that either his own lessor or the representative of his lessor, or any independent owner of the property, can without notice eject him, and the person entitled to eject him does not do so, but receives rent from him without explanation or stipulation, the person so receiving rent is to be assumed to have adopted the person so in possession as his tenant, upon the terms on which the latter held in the demise originally made to him?" After citing at length all the cases on the point above cited, and observing that *Doe d. Buddle* v. *Lines* (*supra*) appears to indicate that the rule is only applicable to the entry of the lessee himself, and not to his predecessor through whom he held his lease, he continues: "Where the question arises with a lessee who is holding over the expiration of a lease originally granted, or a demise originally made to himself, the rule does apply. That is the present case. The present defendant

held over the expiration of the lease granted to himself, which lease commenced at Michaelmas. The inference as between him and the plaintiff, who allowed him to hold over, and who received rent as from year to year from him without explanation or stipulation, is, that there was a tacit agreement that the defendant should hold as tenant from year to year according to his former holding, that is to say, as from Michaelmas to Michaelmas."

Where a tenant entered under an agreement that the premises should be let to him as yearly tenant commencing on the 19th of May, and that the rent for the broken quarter should be paid immediately and the future rent should be paid in advance on the usual quarter days, it was held that the tenancy was to be considered as having commenced on the 19th of May; and a notice given accordingly was good. *Sidebotham* v. *Holland* (C. A. 1894), 1895, 1 Q. B. 378, 64 L. J. Q. B. 200, 72 L. T. 62, 43 W. R. 228. See this case referred to under Nos. 46 and 47, p. 624, *post.*

The case is of course distinguishable where there is an express agreement for a new tenancy; as, for instance, was held to be the case in *Wilkinson* v. *Peel* (1895), 1 Q. B. 516, 64 L. J. Q. B. 178, 72 L. T. 151, 43 W. R. 302.

AMERICAN NOTES.

These cases are repeatedly cited in Wood on Landlord and Tenant and in Taylor on Landlord and Tenant.

There is no doubt that it is here the general rule that when a tenant holds over with the consent of the landlord, express or implied, the law implies a continuation of the original tenancy upon the same terms, solely at the option of the landlord, even against the will of the tenant. *Wolffe* v. *Wolffe*, 69 Alabama, 549; *Le Blanc* v. *Crawford*, 60 California, 361; *Reithman* v. *Brandenberg*, 7 Colorado, 480; *Bacon* v. *Brown*, 9 Connecticut, 334; 4 Am. Dec. 640; *King* v. *Woodruff*, 23 Connecticut, 56; *Clarke* v. *Howland*, 85 New York, 204; *Emerick* v. *Tavener*, 9 Grattan (Virginia), 220; 58 Am. Dec. 217; *Webster* v. *Nichols*, 104 Illinois, 160; *New York, &c. R. Co.* v. *Randall*, 102 Indiana, 453; *Whittemore* v. *Moore*, 9 Dana (Kentucky), 315; *Classen* v. *Carrol*, 18 Louisiana Annual, 267; *Kendal* v. *Moore*, 30 Maine, 327; *Spear* v. *Orendorff*, 26 Maryland, 37; *Brown* v. *Parsons*, 22 Michigan, 24; *Gardner* v. *Dak. Co.*, 21 Minnesota, 33; *Love* v. *Law*, 57 Mississippi, 596; *Grant* v. *White*, 42 Missouri, 285; *Yates* v. *Kinney*, 19 Nebraska, 275; *Laguerrenne* v. *Dougherty*, 35 Penn. St. 45; *De Pere* v. *Reynen*, 65 Wisconsin, 271; *Dorrill* v. *Stephens*, 4 McCord (So. Car.), 59; *Noel* v. *McCrory*, 7 Coldwell (Tennessee), 623; *Fronty* v. *Wood*, 2 Hill Law (So. Car.), 367; *De Young* v. *Buchanan*, 10 Gill & Johnson, 149; 32 Am. Dec. 156; *Crommelin* v. *Thiess*, 31 Alabama, 412; 70 Am. Dec. 499; *Vrooman* v. *McKaig*, 4 Maryland, 450; 59 Am. Dec. 85; *Schuyler* v. *Smith*, 51 New York, 309; 10 Am. Rep. 609; *Coudert* v. *Cohn*, 118 New York, 309; 16 Am. St. Rep. 761; *Haynes* v. *Aldrich*, 133 New York,

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287; 28 Am. St. Rep. 636; *Providence County Sav. Bank* v. *Hall*, 16 Rhode Island, 154; *Harris* v. *Foster*, 97 California, 292; 33 Am. St. Rep. 187; 1 Washburn on Real Property, p. * 383, citing *Roe* v. *Ward*.

A tenant under a lease for five years, with a privilege of five more, holding over, is bound for the full further term of five years. *Montgomery* v. *Board of Comm'rs*, 76 Indiana, 362; 40 Am. Rep. 250.

Washburn says (1 Real Property, * 393): "It is held in New York and other States that a tenant who holds over after his term has expired may be treated by the lessor as a tenant from year to year or a trespasser, at his option, but that the tenant cannot elect in which capacity he shall be regarded." *Conway* v. *Starkweather*, 1 Denio (N. Y.), 113; *Vrooman* v. *McKaig*, 4 Maryland, 450; 59 Am. Dec. 85; *Moore* v. *Beasley*, 3 Ohio, 294; *Bacon* v. *Brown*, 9 Connecticut, 334; 4 Am. Dec. 640; *Hemphill* v. *Flynn*, 2 Penn. State, 144; *Noel* v. *McCrory*, 7 Coldwell (Tennessee), 623; *Ives* v. *Williams*, 50 Michigan, 100; *Tolle* v. *Orth*, 75 Indiana, 298; 39 Am. Rep. 147. "In Massachusetts and Maine however a contrary rule prevails, and the tenant holding over remains at sufferance until he as well as the landlord have agreed to a new tenancy; though this may be implied." Citing *Edwards* v. *Hale*, 9 Allen (Mass.), 462; *Withers* v. *Larrabee*, 48 Maine, 570; *Ackerman* v. *Lyman*, 20 Wisconsin, 454; *Russell* v. *Fabyan*, 28 New Hampshire, 543; 61 Am. Dec. 629; *Condon* v. *Barr*, 47 New Jersey Law, 113; 54 Am. Rep. 121. "And the rule in England seems to be the same." Citing *Ibbs* v. *Richardson*, *ante*, p. 536; *Levy* v. *Lewis*, 9 C. B. (N. S.) 872. The same is held in *Neumeister* v. *Palmer*, 8 Missouri Appeals, 491, of a parol lease for one month, citing *Ibbs* v. *Richardson*. That a new tenancy would be implied by payment and acceptance of rent after the expiration of the term, though not from a demand of rent, is held in *Condon* v. *Barr*, *supra*. In *Edwards* v. *Hale*, *supra*, the Court said of the decision in *Conway* v. *Starkweather*, *supra*, "We do not find it sustained by any authority." (But Washburn says it "is sustained in most of the States.") "In order that a new estate at will shall exist, there must be a new contract, either express or inferable from the dealings of the parties." (All this was *obiter*, because the lease contained an express stipulation about holding over.) *Withers* v. *Larrabee*, *supra*, was not a case of holding over, but of abandonment. *Ackerman* v. *Lyman*, *supra*, was a case of wrongful original entry. *Russell* v. *Fabyan*, *supra*, is a case of eviction by paramount title, before rent day.

A new term will not be implied against the lessor's will, by his merely suffering the tenant to hold over, without any act of assent on his part, unless for a time sufficiently long to indicate assent to a new term. *Den* v. *Adams*, 7 Halsted (New Jersey Law), 99; *Hemphill* v. *Flynn*, 2 Penn. State, 144.

The doctrine of *Roe* v. *Ward* was substantially held in *Waters* v. *Young*, 11 Rhode Island, 1; 23 Am. Rep. 409 (citing English cases), to the effect that notice to quit must not require quitting until the day corresponding with the commencement of the tenancy. In connection with this case Mr. Wood cites *Roe* v. *Ward*, and *Wilcox* v. *Wood*, 9 Wendell (N. Y.), 347, where the Court said: "In England the Courts have for centuries been vacillating between two opposite constructions, where a deed is to commence from the

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date or from the day of the date — sometimes holding that the day of the date is inclusive, and sometimes exclusive. Lord MANSFIELD'S doctrine was that there is no difference between these two forms of expression, and whether the day of the date is included or excluded depends on the subject-matter of the instrument and the intention of the parties. Cowp. 714. In this State, in questions of computation of time arising under our own rules, our statutes, and upon promissory notes, we hold that the day of the date is excluded, upon the same principle, if the lease is, to hold from and after the first day of May or from the day of the date, and the lease is dated the first day of May, then, according to the rule in England, as at present understood, the first day is included. I know of no decision in this State settling that precise point. If the good people of Albany have settled it by a custom which is of sufficient age to give it the sanction of authority, they have done more than the Courts have been able to do; and if they have settled the point that such a lease commences and terminates at twelve at noon on the first of May, in my opinion they have settled it as it should be."

In *Sheets* v. *Selden's Lessee*, 2 Wallace (U. S. Sup. Ct.), 177, it was held that "the rent becoming due on the first day of May, the one month from that time within which the payment was to be made to prevent a forfeiture, expired on the first day of June following. In the computation of the time the day upon which the rent became due was to be excluded."

Thomas v. *Packer* is cited in 1 Reed on Statute of Frauds, sect. 807.

No. 43. — DOE d. RIGGE *v.* BELL.

(K. B. 1793.)

RULE.

IF a person is let into possession as tenant under an agreement which is void by reason of the Statute of Frauds, he is tenant from year to year upon such of the terms as are consistent with a yearly tenancy.

Doe d. Rigge v. Bell.

5 Term Reports, 471, 472 (2 R. R. 642).

Landlord and Tenant. — Void Lease. — Tacit Agreement for Tenancy.

[471] If a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day and quit at Candlemas, though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can only put an end to the tenancy at Candlemas.

This ejectment was on the demise of T. Rigge, guardian of H. and M. Rigge, infants. At the trial at the last assizes at York,

before the LORD CHIEF BARON, it appeared that in January, 1790, Wilkinson, as agent for the lessor of the plaintiff, let the farm in question, called Hague's farm, to the defendant for seven years, by parol. The defendant was to enter when the former tenant quitted, namely, on the land at old Lady-day, and the house on the 25th of May following; and he was to quit at Candlemas. The defendant entered accordingly, and paid rent. A notice to quit at Lady-day last was served on the 22nd of September, 1792. It was also proved that both the daughters of the lessor of the plaintiff were above fourteen.

The defendant's counsel objected, first, that the notice to quit was insufficient; the holding being from Candlemas, and the notice requiring the defendant to quit at Lady-day; 2ndly, That the lessor of the plaintiff claimed as guardian in socage to his daughters, who were both above the age of fourteen. And the plaintiff was nonsuited.

Chambre, on a former day obtained a rule, calling on the defendant to show cause why this nonsuit should not be set aside. As to the first objection, he said, this was holding from Lady-day, and that, therefore, the notice to quit was regular; and as to * the second he produced an affidavit, in which it was [*472] stated that one of the daughters of the lessor of the plaintiff was under fourteen years of age.

Cockell, Sergeant, and Walton were now to have shown cause against the rule; but

Law, Chambre, and Barrow were desired to answer the first objection; as to which they argued, that as that agreement for seven years was void by the Statute of Frauds, it being by parol, the defendant must be considered as tenant from year to year, that year commencing at Lady-day when he entered; and that consequently the notice to quit at Lady-day, served more than half a year before, was regular.

Lord KENYON, Ch. J. — Though the agreement be void by the Statute of Frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of the year when the tenant is to quit, &c. So, where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms. Now, in this case, it was agreed that the defendant should quit at Candlemas; and though the agreement is void

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as to the number of years for which the defendant was to hold, if the lessor choose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas.

Rule discharged.

ENGLISH NOTES.

The principle is similar to that of *Roe d. Johnson* v. *Ward*, No. 42 and notes, p. 590, *ante*. On the same principle, where a remainder-man receives rent from a tenant who entered under a lease from the tenant for life, which was void against the remainder-man, there is a tacit contract for a tenancy from year to year,— the year commencing with reference to the original tenancy. *Doe d. Collins* v. *Weller* (1798), 7 T. R. 478, 4 R. R. 496. The same principle is, in effect, applied in *Knight* v. *Benett* (1826), 3 Bing. 361, 364, 28 R. R. 640, 643.

AMERICAN NOTES.

This case is cited and followed in *Schuyler* v. *Leggett*, 2 Cowen (N. Y.), 660 (as to whether the time to quit is fixed or contingent); and also in *People* v. *Rickert*, 8 ibid. 230, the Court remarking: "The above decisions are considered a correct exposition of the Statute of Frauds in England;" and the case is pronounced "the leading case" in 1 Reed on Statute of Frauds, sect. 807, and is cited in Wood on Statute of Frauds, pp. 48, 50, 56, and in Taylor on Landlord and Tenant, sect. 156. The same doctrine is found in *Strong* v. *Crosby*, 21 Connecticut, 398; *Thurber* v. *Dwyer*, 10 Rhode Island, 355, citing the principal case.

In *Brougham* v. *Balfour*, 3 U. C. C. P. 72, the principal case was cited, and its doctrine applied to an oral agreement by the lessor to pay for improvements at the end of the term.

The principal case and *Schuyler* v. *Leggett*, *supra*, are cited in *Barlow* v. *Wainwright*, 22 Vermont, 88; 52 Am. Dec. 79, holding that a parol agreement creating an estate at will, though modified by being turned into an estate from year to year, governs as to the amount of rent and times of payment.

The doctrine of the Rule is also recognized in *Coudert* v. *Cohn*, 118 New York, 309; 16 Am. St. Rep. 761, where the principal case is fully examined, and distinguished; and in *Huntington* v. *Parkhurst*, 87 Michigan, 38; 24 Am. St. Rep. 146, citing the principal case; and in *Laughran* v. *Smith*, 75 New York, 206, ANDREWS, J., citing the principal case, said: "But though a parol lease for more than a year is void, yet it has long been settled that when the tenant enters and occupies, the agreement regulates the terms on which the tenancy subsists, in all respects except as to the duration of the term. It is a reasonable inference in such case from the circumstances that the parties intended a tenancy on the terms of the original agreement, and the law implies a new contract between the parties corresponding therewith so far as it

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is not in conflict with the statute." See also *Rosenblatt* v. *Perkins*, 18 Oregon, 156; 6 Lawyers' Rep. Annotated, 257; *Friedhoff* v. *Smith*, 13 Nebraska, 5; *Koplitz* v. *Gustavus*, 48 Wisconsin, 48; *Williams* v. *Ackerman*, 8 Oregon, 405; *Railsback* v. *Walker*, 81 Indiana, 409; *Lockwood* v. *Lockwood*, 22 Connecticut, 433; *Shepherd* v. *Cummings*, 1 Coldwell (Tennessee), 354; *Thurber* v. *Dwyer*, 10 Rhode Island, 355.

No. 44. — COWPER *v.* FLETCHER.

(Q. B. 1865.)

RULE.

JOINT tenants of land may agree to the creation of the relationship of landlord and tenant between themselves, and the possession held by one under such an agreement involves all the incidents of an ordinary tenancy by him to the others as joint landlords.

Cowper v. Fletcher.

34 L. J. Q. B. 187–190 (s. c. 6 B. & S. 464; 12 L. T. 420; 13 W. R. 739).

Landlord and Tenant. — Joint Tenants. — Distress. — Estoppel. [187]

One or two joint tenants may demise his or their portion to another, so as to create the relationship of landlord and tenant between them, with a right to distrain in respect of rent in arrear. Thus, three co-executors may agree that one shall hold land, devised to them in trust, at a fixed rent, and if the rent falls into arrear, he may be distrained upon in respect of it.

Trespass for breaking and entering a timber-yard, office, and stabling of the plaintiff, and taking away fixtures, goods, and chattels of the plaintiff, and keeping him out of possession thereof, until he paid the defendant a sum of money in order to regain possession of them, whereby, &c.

There were also counts for money had and received, and on accounts stated.

The defendant pleaded not guilty to the first count, and never indebted to the residue of the declaration.

The particulars delivered in the action showed that it was brought in respect of a distress which had been put in by the defendant for rent alleged to be due from the plaintiff (James Cowper) to Joseph Cowper and John Scholes Hague; the plaintiff having been compelled to pay £87 7*s.* 6*d.*, the amount of rent claimed, and £4 13*s.* 6*d.* the amount of the expenses.

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At the trial, which took place before MELLOR, J., at the last Spring Assizes, holden at Manchester, it appeared that, under the will of William Cowper, of Oldham, in the county of Lancaster, all his real and personal estates were devised to his brothers, Joseph and James Cowper, and John Scholes Hague, in trust to pay a legacy of £100, and, subject thereto, upon trust to pay and divide the residue unto and equally amongst the grandchildren of his late brother Thomas, and his said brothers, Joseph and James, and his sister, in equal shares and proportions as tenants in common. He also appointed his said brothers Joseph and James and John Scholes Hague executors of his will. Among other property left by the testator were a timber-yard and premises at Oldham. The plaintiff was entitled to one-ninth part of the property left, and he and the other two executors divided the personalty among the persons entitled to it; but with regard to the real estate, it was determined that it should be let to a tenant.

On the 18th of October, 1855, the plaintiff sent the following proposal to his co-executors: —

"To the Executors of the late WILLIAM COWPER, deceased.

"GENTLEMEN, — I having entered upon the slate trade, and having had the offer of a yard for a timber-yard, but before accepting the same, I wish to make some proposal to you. That I will take all the slate and timber belonging to you at the yard and at the stations at Oldham at a valuation, to be made by one person, if we can agree upon one, and if not, then each party to appoint one, and they to appoint an umpire before they commence; the said valuer or valuers are then empowered also to fix the annual rent I shall pay for the timber-yard, office, and stabling, and for a term of years to be fixed upon between us. That I will receive the rents of the cottages and houses at Oldham, free of expense to you, and see that they are kept in repair as you request. The amount of the value to be secured to your satisfaction, or paid in a month from the delivery of the valuation. I must have an answer in a few days from this date or I shall consider this offer is rejected. "Yours, &c.,

(Signed) "JAS. COWPER.

"OLDHAM, October 18th, 1855."

The following document was afterwards signed by all three executors: —

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"We, the undersigned, executors of the late Mr. William Cowper, deceased, do hereby agree to the proposal of Mr. James Cowper, hereunto annexed, on condition that the slate *in transitu*, and also all the plant, moving stock, and effects belonging to the deceased's trades (excepting the gray mare), be included therein, and taken by the said James Cowper on the terms contained * in his said proposal, and that he do take the tim- [* 188] ber-yard, office, and stabling as a yearly tenant. And it is hereby further agreed between all parties undersigned that the valuation referred to in the said proposal shall be made by a person to be nominated by the undersigned John Scholes Hague, the decision of which person in the premises shall be final and binding upon all parties, the payment of the amount of the valuation to be made or secured as in the said proposal is mentioned.

"Dated this 1st day of November, 1855.

(Signed) "JOSEPH COWPER,
"JAMES COWPER,
"JOHN SCHOLES HAGUE."

The plaintiff entered into possession, and in November, 1862, £270 was due from him for a year and a half's rent, whereupon a distress was put in, and the following letter was written by the plaintiff:—

"DECEMBER 6, 1862.

"I write to you under a very painful case, but I presume you are aware of the proceedings. I only beg of you to be kind enough to accept of me £180 on Tuesday, and let the other half year be paid in May, that is, £180 when due. I have paid this morning £105 before I was aware of these proceedings, and I really can't pay any more at present, and if you be so unkind as to sell for it, I am ruined, for there is no money to buy anything here. I really beg of you to write to Mr. Littler to be so kind as to accept the £180. I have been doing all I could to get my money in for you. Mr. Littler has wrote to Mr. Robinson to-day to hear his reply to what I now have stated to you, hoping you will not see me put into distress at this time; money is very bad to get in; things is very bad here. I wish you to see Mr. Robinson before he writes to Mr. Littler; we are in great distress, and hopes you all will be satisfied with my request."

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The rent was subsequently paid; but in May, 1863, it became again necessary to press for payment, and the plaintiff then wrote the following letter:—

"OLDHAM, May 23, 1863.

"H. T. ROBINSON, Esq. — DEAR SIR, — I saw Mr. J. S. Hague on Saturday night, and he advised me to write to you to see if you could not come to some better agreement with me than selling me up for this half-year's rent, as I really can't pay it at present; if you could put it in a shape to suit both sides it perhaps would be better for both. I am in a fair way for doing something for myself, I hope. I have been sadly deceived with all I have had about me, and I now have in debts about £300, but I can't get it at present. If they will be kind enough to wait about two or three months it would suit me, but I will leave it to you to arrange. I can find a sufficient bondsman for the rent."

The plaintiff subsequently became bankrupt, and the rent was paid by his assignees; but he got into possession again, and in May, 1864, another distress was put in upon his goods in order to get the rent then in arrear. The plaintiff paid the amount claimed in order to get rid of the distress, and then commenced this action against the defendant, who, as the bailiff of John Scholes Hague and Joseph Cowper, had levied the distress.

The verdict was entered for the defendant; and leave was given to the plaintiff to move to set it aside, and enter the verdict for himself instead.

Brett moved for and obtained a rule accordingly, on the ground that, although Joseph Cowper and J. S. Hague might by agreement with the plaintiff, their co-tenant, give him as against them exclusive possession of the joint property, yet that the agreement did not create such a tenancy as carried with it a right to distrain.

R. G. Williams showed cause against the rule. The letters which passed between the defendant and the plaintiff, and the distress which was submitted to by him, conclude the case, and show that the plaintiff was a tenant, unless it is impossible that two of three joint tenants should stand in the relationship of landlords to a third. If a man takes land from others, goes into possession, and pays rent for it, there is enough to show that he is a tenant. But, further, it is laid down in 1 Bac. Abr. 5, that, "If one joint tenant or tenant in common makes a lease for years of his part to

his companion, this is good; for this only gives him a right of taking the whole profits, where before he had but a *right to the moiety thereof; and he may contract with [*189] his companion for that purpose, as well as he may with any stranger." And he refers, among other authorities, to Co. Litt. 186 a. The same passage occurs at p. 496, where a reference is given to *Pleadal's Case*, 2 Leonard, 159, where the case was, "That a man seised of lands in fee took a lease by indenture of the herbage and pannage of the same land. It was the opinion of the whole Court that the same was no estoppel to him to claim the soil or the freehold; and it was said by Plowden and agreed by the Court, that if the father and son be joint tenants for a hundred years, and the son takes a lease of his father for fifteen years, to begin, &c., the same shall conclude the son to claim the whole or parcel of it by survivor."

[MELLOR, J. — The co-executors assume that they have power to demise to the plaintiff, and instead of disputing their right, he assents to it and becomes their tenant. I think that the parol agreement is stronger than the one in the correspondence. BLACKBURN, J., referred to *James* v. *Portman*, Owen, 102, where POPHAM held that one joint tenant might make a lease to the other, although he cannot infeoff, for a lease is but a contract; but FENNER doubted whether one joint tenant could make a lease to the other, but said that "by the contract he had excluded himself from the profits," so that it seemed to be left uncertain whether there could be a lease or not.]

That view is adopted by Bacon as being correct. But, further, the plaintiff is estopped from saying that he is not tenant, that there was no demise to him, and that there is no right to distrain, inasmuch as he has assented to the demise and has paid rent.

Brett, in support of the rule. — Before the lease was granted all the executors were in possession of each and every part. There is no doubt that they intended that there should be an agreement, and it may be that two joint tenants may make an agreement with another; but it is submitted that, under the circumstances, it could not operate so as to give a right to the defendants to distrain. While the agreement lasted the plaintiff had the reversion.

[BLACKBURN, J. — May it not operate as a severance, and the defendants have power to distrain for the severed part?]

They retire and let the plaintiff have the sole and exclusive

possession of the whole. In point of law he was in possession of the whole.

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[BLACKBURN, J. — Upon referring to the Year Book, 11 Hen. VI., fol. 33, I find that it does not throw much light upon the matter, as the decision turns upon a pleading point; but it is quite clear what construction Lord COKE put upon it. See Co. Litt., book 3, note to section 288, where he says, "And one joyntenant may let his part for yeares or at will to his companion;" and he then refers to the Year Book.]

Suppose a stranger was to enter upon the land, it is probable that the plaintiff might bring an action; but if the co-executors had entered, could it have been maintained that they had no right to do so? As regards the rest of the world they continued to be in possession. Again, the only persons who could authorise a distress would be the two defendants, and the plaintiff as well, so that he would be supposed to be authorising a distress upon himself. It is submitted that the doctrine of estoppel does not apply in any way to such a case, when the law does not sanction the distress.

BLACKBURN, J. — I think that this rule must be discharged. The point which is really raised is this, that the action has been brought in respect of the distress put in by the defendants, who have justified under a plea of not guilty by statute 11 Geo. II., c. 19, s. 21, and therefore a defence is made out if there was any rent in arrear for which a distress might be made. We have to determine whether, when the cause was tried before my Brother MELLOR, there was evidence that there was some lease from the defendants and some rent in arrear. Now, the facts which were proved were a little peculiar, but there is enough to show that a sufficient relationship of landlord and tenant existed to justify a distress. Under the will of the testator the plaintiff and the two defendants were co-executors, and were also joint tenants [*190] of this property, and it appears by the agreement * that the plaintiff wrote to the executors, who, to speak literally, were himself and the defendants, and offered to take a lease of the timber-yard, office, and stabling, and then that he joined with them in the writing upon which are the words, "We, the undersigned, executors of the late William Cowper," and underneath are the names of all three of them. [The learned Judge read the agreement.] This is not the actual agreement under which the

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distress was afterwards made; but it throws light upon what occurred afterwards when a parol agreement was entered into and the plaintiff took the property at a rent, and when he afterwards submitted to a distress, evidently supposing that he was the tenant. It is now set up that this cannot operate as a lease, and that there was no rent in arrear under such lease for which a distress might be legally made; but I think that it is clear that the parties were agreeing for a lease, and that we ought to give effect to it in this way, that the two defendants who were seised of two-thirds of the land agreed to let to the plaintiff those two-thirds, and allowed him to have the exclusive possession of the remaining third, which was in him. Lord COKE says (see Co. Litt. 186 a): "And where two joyntenants be, the one of them may make the other his baylife of his moity, and have an action of account against him. And one joyntenant may let his part for yeares or at will to his companion." I can only understand by these words that he meant an ordinary lease with the incident of distress attached to it, and it would amount to making a severance of estate, and there would be a reversion and rent in arrear, with a right of distress. If this be not so, then it must come to this, that the parties have agreed together that the plaintiff should retire from the possession of his part, and that they should demise the whole to him; and I venture to think that during the continuance of such possession he would be estopped from saying that he was not tenant, and the case in Leonard seems to show that the validity of the distress might be supported on both grounds, but I would rather prefer to rest my judgment upon the first.

MELLOR, J. — I am of the same opinion. At the trial my impression was that the transaction would operate as an estoppel; when the motion was made by Mr. Brett, we thought that we ought to look for some authority upon the subject, and the rule was granted in order that the matter might be inquired into. Although, certainly, we have not met with any great amount of authority, I do not think that any more could be found; and we have really heard the case argued upon the law as laid down in the books. I now prefer to give my judgment upon the first ground taken by my Brother BLACKBURN, and I think it unnecessary to decide upon the question of estoppel, in which I do not feel much confidence. I think that the rule should be discharged.

SHEE, J. — I am of the same opinion. The authority of Lord

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COKE is quite sufficient for us. The difficulties which have been suggested by Mr. Brett did appear to exist, but ever since the opinion was expressed by Lord COKE, it does not seem to have ever been disputed that one joint-tenant could let his part to the other, and that if he did so he would be entitled to distrain.

Rule discharged.

ENGLISH NOTES.

The above case is cited and applied in the judgment of POLLOCK, B., in *Leigh* v. *Dickenson* (1883), 12 Q. B. D. 194, 53 L. J. Q. B. 120, where the inference was drawn from correspondence that the defendant was occupying not as one of the tenants in common, but as tenant on sufferance as assignee of an expired lease from the other tenants in common, and was liable to them for an occupation rent accordingly.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sect. 119, and in Freeman on Co-Tenancy, sect. 164, 268 (citing *Luther* v. *Arnold*, 8 Richardson Law (So. Car.), 24; 62 Am. Dec. 422; *O'Hear* v. *De Goesbriand*, 33 Vermont, 593, both cases of lease by tenant in common); and in 1 Washburn on Real Property, p. *420; and in Taylor on Landlord and Tenant, sect. 114, 115. See *Evans* v. *English*, 61 Alabama, 416, 427.

No. 45. — DIBBLE *v.* BOWATER.

(Q. B. 1852.)

RULE.

WHERE rent is payable at the usual quarter days, it becomes due on the morning of the day; although it is not in arrear until the ensuing midnight.

Dibble v. Bowater and another.

22 L. J. Q. B. 396–400 (s. c. 2 El. & Bl. 564; 17 Jur. 1054).

[396] *Landlord and Tenant. — Distress. — Fraudulent Removal on the Rent Day.* 11 *Geo. II., c.* 19, *s.* 1.

Where by a demise rent was reserved due quarterly, the 25th of December being one of the quarterly days of payment, and the tenant on that day, and while the quarter's rent was unpaid, fraudulently removed his goods off the demised premises for the purpose of preventing a distress: *Held* (*dissentiente* CROMPTON, J.), that the 11 Geo. II., c. 19, s. 1, enabled the landlord to follow and distrain the goods within thirty days after their removal.

No. 45. — Dibble v. Bowater, 22 L. J. Q. B. 396.

Trespass for breaking and entering the dwelling-house of the plaintiff, and seizing certain goods and chattels of the plaintiff.

Plea, that the plaintiff, before and on the 25th of December, 1852, held a certain house and premises as tenant thereof to the defendant T. Bowater, under a demise thereof to the plaintiff theretofore made by the said T. Bowater, upon which demise a yearly rent of £26 was reserved and made payable by the plaintiff to the said T. Bowater by four even and quarterly payments; and the reversion of and in the said house and premises expectant on the determination of the said demise then belonged to the said T. Bowater, and he was entitled to distrain for the said rent; that on the day and year last aforesaid one of the said quarterly payments became and was, and at the said time when, &c., remained due and payable to the said T. Bowater; that [after the same had become due, and when the same was in arrear and unpaid],[1] and within thirty days next before the said time when, &c., the plaintiff fraudulently and clandestinely removed and carried off from the said house and premises the said goods and chattels in the declaration mentioned, being the proper goods and chattels of the plaintiff, to prevent the said T. Bowater from distraining upon the same for the said rent, and for that purpose conveyed the said goods and chattels to the said dwelling-house in the declaration mentioned, in which, &c.; for which reason and because the said rent still remained in arrear and unpaid, and because there was no sufficient distress upon the said house and premises so held by the plaintiff as aforesaid, whereon the said T. Bowater could distrain for the said arrear of rent, and because the said goods and chattels still remained in the said dwelling-house, in the declaration mentioned, the said T. Bowater, in his own right, and the other defendant, as his servant, and by his command, after the said removal, and while the said rent so remained in arrear and unpaid as aforesaid, and within thirty days next after the said goods and chattels had so been fraudulently and clandestinely carried off as aforesaid, entered into the said dwelling-house in which, &c. (justifying the committing of the trespasses complained of). Issue was joined on this plea.

At the trial, before COLERIDGE, J., at the sittings at Westminster, in Easter Term last, it appeared that the plaintiff was tenant

[1] The plea was amended by striking out the words between the brackets and substituting the words "on the day and year aforesaid."

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to the defendant Bowater of a house, No. 17 Lewis Street, Kentish Town, at a yearly rent of £26, payable quarterly on the usual quarter days. On Saturday, the 25th of December, 1852, a quarter's rent became due, and between 5 and 6 o'clock in the morning of that day (the said quarter's rent being then unpaid) the plaintiff removed the goods in question from the above house to the house where they were seized, which was in Nile Place, New Kent Road. On Monday, the 27th of December, the defendant Bowater went to the latter place and signed a warrant of distress, and the goods were seized by the other defendant on the following day, the 28th, and were removed on the 29th to a sale-room, where they were ultimately sold as a distress on the 6th of January. Upon these facts the jury found that the goods had been fraudulently removed by the plaintiff for the purpose of preventing a distress for the quarter's rent; but the learned Judge, considering it doubtful whether the plea was sustained as the rent was not in arrear at the time when the goods were removed by the plaintiff, directed a verdict to be entered for the plaintiff for the value of the goods seized, with leave to the defendants to move to [* 397] enter * the verdict for themselves upon the above point.

A rule *nisi* having been accordingly obtained —

Udall now showed cause. This plea is not proved, as it alleges that the goods were removed "after the rent had become due, and when the same was in arrear." In *William Clun's Case*, 10 Co. Rep. 127 a, it is laid down that rent is not due until the last instant of the day upon which it is reserved, and is not "due and in arrear" until after that time. So in *Duppa* v. *Mayo*, 1 Wms. Saund. 286 b, it is said by HALE, Ch. J., "That although the time of sunset was the time appointed by the law to demand rent, to take advantage of a condition of re-entry, and to tender it to save a forfeiture, yet the rent is not due until midnight; for if a man seised in fee makes a lease for years, rendering rent at the Feast of St. John the Baptist, upon condition of re-entry for non-payment, now the lessor, if he will take advantage of the condition, must demand it at sunset; yet if he dies after sunset and before midnight, his heir shall have this rent, and not his executors, which proves that the rent is not due until the last minute of the natural day." To the same effect is *Lord Rockingham* v. *Oxenden*, 2 Salk. 578, 1 Williams on Executors, 654, and *Leftly* v. *Mills*, 4 T. R. 170 (2 R. R. 350), where the same doctrine was applied

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to bills of exchange. The 11 Geo. II., c. 19, s. 16, proceeds on this view, for it provides that rent shall be recoverable by the executors of tenants for life dying "before or on the day on which any rent is reserved or made payable."

[Lord CAMPBELL, Ch. J. — It is clear that this rent could not have been distrained for at the time of the removal, but the jury have found that the removal took place for the purpose of preventing a distress, and on the rent day. The question is, whether this is a case within the statute.]

[COLERIDGE, J. — The statute does not specify when the removal must be.]

The plea is not so pleaded, but the defendant is tied up to showing that rent was in arrear at the time of the removal.

[Lord CAMPBELL, Ch. J. — Still, if the question be material, the defendants should be permitted to raise it.]

Then, *Rand* v. *Vaughan*, 1 Bing. N. C. 767; 4 L. J. (N. S.) C. P. 239, is a direct authority against such a defence. TINDAL, Ch. J., there says, "The last question raised by the pleadings is, whether the statute applies to cases where the tenant removes his goods fraudulently and clandestinely before the rent becomes due; and we are of opinion that such case is not provided for by the statute." And he goes on to show that the object of the statute was to remove the difficulty at common law of taking a distress in any place except the demised premises, and that it does not apply to the time of the distress. The Court there acted upon *Watson* v. *Main*, 3 Esp. 15 (6 R. R. 806). In *Furneaux* v. *Fotherby*, 4 Camp. 136, Lord ELLENBOROUGH expressed only a doubt, but no opinion. These authorities will be considered binding, at all events, except in a Court of Error.

Warren and Bovill, in support of the rule. — The facts here proved bring the case within the 11 Geo. II., c. 19, s. 1. It is found that the removal was fraudulent and with intent to prevent a distress. Then, the rent was in point of law due at the moment of that removal. The tenant had enjoyed a quarter's occupation of the premises at midnight of the 24th of December, and the rent then became *debitum in præsenti* though *solvendum in futuro*. *Clun's Case* shows that payment at any time on the rent day, although a voluntary payment, is a good satisfaction against the heir; that could not be unless the lessor had a right to the payment then, because it is also laid down that a payment before the

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day is no satisfaction. *Lord Cromwel* v. *Andrews*, Cro. Eliz. 15. The 8 Anne, c. 14, s. 12, which is the first statute on this subject, uses the words "reserved or made payable;" the 11 Geo. II., c. 19, s. 1, has the words "reserved, due, or made payable;" but in both instances that is in describing the character of the demise and not the state of things existing at the time of the removal. But, if it be necessary, this rent was reserved and due, or, at all events, made payable on the 25th of December, [*398] *and the seizure being within five days, recourse may be had to either of the statutes. This statute should be construed so as to meet the mischief intended to be remedied by it.

[CROMPTON, J. — How do you meet the words "arrears of rent so reserved, due, or made payable?"]

The rent was in arrear within the meaning of this statute, passed to prevent fraudulent removals. According to the plaintiff's argument, every stick might have been removed on the rent-day, and so the statute made quite inoperative.

[Lord CAMPBELL, Ch. J. — *Rand* v. *Vaughan* seems in your way. How do you distinguish it?]

The removal there was on the day preceding the quarter day, and therefore before the rent became due. The same observation applies to *Watson* v. *Main* and *Furneaux* v. *Fotherby*. There does not appear to be any case in the books where the removal was, as here, on the rent day.

[COLERIDGE, J., referred to *Northfield* v. *Nightingale*, Harrison's Landlord and Tenant, 321.]

The observations of TINDAL, Ch. J., in *Rand* v. *Vaughan* assume that, according to the defendant's construction of the statute, the landlord might distrain before the rent became due. But that is a mistake. The statute only enables the landlord to distrain goods fraudulently removed off the premises when the proper time for distraining arrives, provided it be within thirty days of the removal. In truth, it is not necessary to argue that the rent must be due at the time of the removal. It is sufficient if it is "reserved, due, or made payable" by the demise, and the statute only requires that the goods should be removed in order to prevent a distress being made for the "arrears of rent so reserved, due, or made payable," that is, to prevent the goods being distrained for such rent when it is in arrear. The form of the plea, therefore, does not stand in the defendant's way, as it states that the rent

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was reserved and made payable under the demise. The averment that the quarterly payment was due and in arrear when the plaintiff removed the goods may be struck out, as immaterial to the defence.

[Lord CAMPBELL, Ch. J. — Do you agree to have the plea amended so as to meet the facts proved at the trial?]

Warren assented to this being done.

Lord CAMPBELL, Ch. J. — Then that being done, I think the defendants should have the verdict entered for them. Wherever there is a removal on the quarter day for the purpose of preventing a distress, I am of opinion that the rent has then become due for the purpose of enabling the landlord to follow and distrain the goods. Such a case is clearly within the purview of the 11 Geo. II., c. 19, s. 1, which would otherwise be wholly insufficient to answer its object. This, however, is not enough, unless it falls also within the words of the statute. And I think it does so. The statute only requires that the tenant shall fraudulently remove his goods to prevent his landlord distraining the same for arrears of rent "reserved, due, or made payable" upon a demise. It does not say that the rent shall be in arrear at the time of the removal. The arrears for which the distress would be, are arrears of that which is due and payable. I think Mr. Warren has shown conclusively that the rent is due on the quarter day, although there is no remedy to recover it until the day after. It is due, or payable, because the authorities show that, although a payment before the quarter day does not bind the heir, payment on that day is valid against him. Therefore, it may be said to be due within the meaning of this statute on the morning of the 25th. But the distress could not be made until after the rent was in arrear, which it was on the Tuesday following, when the distress was made. Therefore, the case comes within the words as well as the mischief of the statute. We should not have decided contrary to *Rand* v. *Vaughan*, if it had been directly in point; but that case decided no such thing as the present, for there the removal was on the day before the quarter day. Consequently, in no sense was the rent due at the time of the removal. TINDAL, Ch. J., proceeds chiefly on this ground, for he says, "Looking to the intention of the Act, therefore, and the great uncertainty which would arise if a removal of the goods at any time before the rent became due, would be sufficient *to let in the [*399]

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provisions of the Act; for if at any time, how long before, would be the question; we think the present distress illegal." The distress there was in respect of rent not due at the time of the removal. He certainly adds an observation not necessary for the decision of the case: that it is in respect of the place, and not of the time, that the statute intends to apply the remedy. In this I cannot agree, although one object of the statute was to fortify the power of the landlord to distrain irrespective of change of place. Therefore, consistently with prior decisions, I do not see how we can refuse to put upon this statute a construction which its words will naturally bear, and which will fully effect its object.

COLERIDGE, J. — I agree that we are not bound by any of the prior decisions, because none of them are directly in point upon the facts. They all turn upon a removal before the quarter day; and this is not merely a difference in circumstances, but was a fact relied upon by the Judges in deciding. That being so, we have a right to look to the language of the statute, which says that, "in case any tenant, &c., of any messuages, &c., upon the demise, or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away or carry off from such premises his, her, or their goods or chattels, to prevent the landlord, &c., from distraining the same for arrears of rent so reserved, due, or made payable," the landlord may follow and distrain such goods within thirty days. The first expression, "reserved, due, or made payable," has reference to the contract of demise. Where those words occur again, the utmost that can be said is, that the statute intended only to prevent the removal of goods for the purpose of preventing a distress for arrears of rent made due or payable. But that will not carry the case any further. The word "arrears" is introduced where the motive for the removal is spoken of, and there can be no distress except where rent is actually in arrear. But it does not say that rent must be in arrear at the time when the goods are removed. The landlord may follow the goods for the purpose of distraining them "for such arrears of rent." That limits him to this, that he cannot follow any goods upon which he cannot distrain. I think, therefore, that this case falls within the spirit and also within the words of the statute. The landlord may follow the goods at any time within thirty days after the removal, and when the time for distraining arrives he may distrain upon them. I cannot

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think that we are tied up, as is contended by Mr. Udall, to there being rent actually in arrear at the moment of the removal.

ERLE, J. — This question has arisen on the construction of the statute enabling landlords to follow goods fraudulently removed to prevent a distress — whether that Act applies to the facts which I am about to state. Rent became due within the words of the demise on the 25th of December. On that morning the plaintiff fraudulently removed his goods, with intent to prevent a distress. The defendant followed and distrained these goods within thirty days. It is perfectly clear law that there can be no distress until the day after the rent becomes due. In this case, therefore, the plaintiff had the whole of Christmas-day to pay in before a distress could be put in. But the rent was due at the first moment of that day, and the goods were removed to prevent a distress for arrears, which might have been distrained for on the following day. It is clear to me that the words of the statute meet such a case, and that it is within the mischief intended to be remedied. The tenant has carried off the goods after he has had the benefit of a quarter's occupation, and while the rent is due. We do not overrule any of the previous decisions, for in all of them the tenant had removed the goods before the rent became due: holding that a removal while the rent is due falls within the statute does not, therefore, conflict with any of them. Neither do we introduce any inconvenience or uncertainty, as suggested by TINDAL, Ch. J., by bringing in transactions with indefinite limits; and I agree that if the privilege given by the statute were extended to transactions occurring long before the rent day, doubtful rights would be brought in. But we draw a very different line, and say that the statute enables the landlord to follow goods removed while the rent is actually due. *The lan- [*400] guage of TINDAL, Ch. J., that the statute was intended to empower the landlord to distrain in a different place, has full effect given to it by our present decision, and I do not see that that observation has any bearing in respect of the time. The question here is, whether a removal before the goods were distrainable, but while the rent was due, is within the statute, and I answer that in the affirmative.

CROMPTON, J. — As I understand the case, we are to look at it as if the plea stated the facts which are proved to have occurred, and the present question arose on a motion for judgment *non*

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obstante veredicto. Treating it in this way, I am not prepared to come to the conclusion arrived at by the rest of the Court. Whatever might be our view of the statute, if there were no decisions upon it, and whether we should hold that the Legislature meant that the rent should only be due at the time of the removal, and that the removal should be to prevent a future distress for the arrears, I do not think we can, without overturning former cases, come to that conclusion. I do not think the word "due" is that upon which the Courts proceeded in the cases cited, but the word "arrears." It has always been understood that the object of the removal must be to prevent a distress for the arrears, and I take it that the clause has been construed to mean that at the time of the removal the tenant must have intended to prevent a distress for rent then due and in arrear. There are the observations of TINDAL, Ch. J., in *Rand* v. *Vaughan*, which, although not strictly necessary to the decision, show the ground of his judgment. He says: "By the common law, the distress for rent was necessarily made upon some part of the demised premises, otherwise the tenant might rescue the distress or bring an action of trespass. And it was only in case the landlord coming to distrain saw the cattle on the premises, and the tenant, to prevent the distress, drove them off the premises, that the landlord could justify freshly following and distraining them. And the statutes 8 Anne, c. 14, s. 12, and 11 Geo. II., c. 19, appear to have been passed with the view of removing such difficulty in the way of the landlord's remedy in the case of a fraudulent or clandestine removal of the tenant's goods off the premises." That was a very sufficient object. There might also have been a further one with regard to the time as well as the place. It is not because a case is within the mischief of a statute, that we are to put upon it a construction such as will include that case. The great object of this statute is to enable a landlord to follow his tenant's goods off the demised premises, within a certain period, and it is part of that object that the rent should be in arrear and capable of being distrained for when the goods are removed. If we do not put such a construction on the statute, I confess I do not see how we are to say that it is necessary that the rent should be due at the time of the removal. There is no such express enactment in the statute. It would do just as well, so far as the words go, to say that it applies to a removal when rent is about to become due. It would be

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sufficient that rent is reserved. If we were looking to this in a Court of Error, I do not say we might not put the construction on the words contended for by Mr. Warren. But I am not prepared to agree with the rest of the Court at present.

Lord CAMPBELL, Ch. J. added: The plea is to be altered so as to raise the question on the record for the benefit of the plaintiff.

Rule absolute accordingly.

ENGLISH NOTES.

It is to be observed that the statute of 11 Geo. II., c. 19, is intended to prevent the right of the landlord to distrain from being defeated; and where he would have had no right to distrain if the tenant had not carried off the goods, the remedy of the statute does not apply. So that where the tenancy has expired or been determined by due notice to quit, and the tenant has given up possession, the landlord has no longer any right to follow the goods under the statute of 11 Geo. II. For the statute 8 Anne, c. 14, which (by sect. 6) allows goods to be distrained after the determination of a lease, provides (sect. 7) that the distress must be made during the possession of the tenant.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sect. 449, and is directly supported by *Sherlock* v. *Thayer*, 4 Michigan, 355; *Smith* v. *Sheppard*, 15 Pickering (Mass.), 147; *Mack* v. *Burt*, 5 Hun (N. Y. Sup. Ct.), 28; *Steffens* v. *Earl*, 11 Vroom (New Jersey Law), 136; 29 Am. Rep. 214. But in Pennsylvania, where a house was leased on the 10th of January, from year to year, the rent payable quarterly, the Court held that on the 10th of January next succeeding the fourth quarter's rent was in arrear, and that on that day the landlord might take legal measures to collect it. The Court said that the expression "from the date" "may be inclusive or exclusive, according to the context or subject-matter;" that this "was a lease without any mention being made when it should commence; when there was no intention to postpone its commencement, and where consequently under Lord Coke's second rule" (in Co. Litt. 46 b), "it commenced immediately."

The question is very fully considered in *Ordway* v. *Remington*, 12 Rhode Island, 319; 34 Am. Rep. 646, where the Court say: "The question is, whether the rent which was payable December 1st, 1877, was attachable at 3.15 of the afternoon of that day? This question depends on another, to wit, whether the quarter expired on that or the previous day? For if the quarter expired on that day, then the rent, though payable, was not due until after midnight, and until due, the lessor being owner in fee of the premises demised, it was not personal estate, but the lessor dying it would have gone as realty to his heirs. *Glun's Case*, 10 Rep. 127; *Rockingham* v. *Penrice*, 1 P. Wms. 177; *Norris* v. *Harrison*, 2 Madd. 268; *Duppa* v. *Mayo*, 1 Wms. Saund. 282, 286

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and note 12; note to *Ex parte Smyth*, 1 Swanst. 342; Taylor on Land. and Ten., sect. 391; 3 Greenl. Cruise, * 283–285. Whether the quarter expired December 1st or November 30th depends on the construction of the lease. The lease, as we have seen, ran 'from the first day of September.' If the first day of September is included, the quarter expired December 1. The day is to be included or excluded according to the apparent intention of the parties to the lease; but if the demise is from a given day and there is nothing else to indicate the intention, then, unless there is some particular reason for holding otherwise, according to the weight of authority we think the given day must be excluded. Taylor on Land. and Ten., sect. 78; 4 Greenl. Cruise, * 59 and note; *Atkins* v. *Sleeper*, 7 Allen, 487; *Farwell* v. *Rogers*, 4 Cush. 460; *Bemis* v. *Leonard*, 118 Mass. 502; s. c. 19 Am. Rep. 470; *Bigelow* v. *Willson*, 1 Pick. 485; *Styles* v. *Wardle*, 4 B. & C. 908; *Clayton's Case*, 5 Rep. 1; *Webb* v. *Fairmanner*, 3 M. & W. 473; *Millard* v. *Willard*, 3 R. I. 42; *Handley* v. *Cunningham's Trustee*, 12 Bush, 401; *Sheets* v. *Selden's Lessee*, 2 Wall. 177, 190; *Weeks* v. *Hull*, 19 Conn. 376; *Blake* v. *Crowinshield*, 9 N. H. 304. The case of *Ackland* v. *Lutley*, 8 A. & E. 879, is precisely in point."

No. 46. — RIGHT d. FLOWER *v.* DARBY.

(K. B. 1786.)

No. 47. — COBB *v.* STOKES.

(K. B. 1807.)

RULE.

WHERE a lease is for a year certain, or is otherwise terminable at a certain period, no notice to quit is necessary to put an end to the tenancy at the expiration of the period. But if, at the expiration of the period, the tenancy is renewed by tacit consent, it becomes a tenancy from year to year, and a notice to quit is necessary.

By the common law six months is the time of notice both for houses and land. (This is now modified by the Agricultural Holdings (England) Act, 1883, 46 & 47 Vict., c. 61, s. 33.)

Right d. Flower v. Darby and Bristow.

1 Term Reports, 159–163 (1 R. R. 169).

Landlord and Tenant. — Yearly Tenancy. — Notice to quit.

[159] In the case of a tenancy from year to year, there must be half a year's notice to quit, ending at the expiration of the year.

No. 46. — Right d. Flower v. Darby, 1 T. R. 159, 160.

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Ejectment tried at the last assizes at Salisbury, before HOTHAM, Baron, when a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench on the following case: —

That the lessor of the plaintiff was seised in fee of the premises in question. That on the 11th day of May, 1781, the defendant Darby took the premises, which are a house in Salisbury, and occupied them as a public-house from that time under a parol demise at £10 per annum; the rent to commence from Midsummer then next following. The defendant Darby let part of the premises to the defendant Bristow. That on the 26th March, 1785, the defendant Darby was served with a notice to quit on the 29th of September following.

*The question is, Whether the lessor of the plaintiff is [*160] entitled to recover?

Le Mesurier for the plaintiff.

The question for the Court to decide is, whether the rule which requires that half a year's notice should be given to a tenant at will, before an ejectment can be brought, requires also that such notice should expire at the end of the year. Neither the case of *Parker dem. Walker* against *Constable*, 3 Wils. 25, and the cases there cited, nor any subsequent case, requires the notice to expire at the end of the year; but it is sufficient if notice be given for the space of half a year, without reference to any particular period of the term.

In the case of *Throgmorton dem. Wandby* v. *Whelpdale*, Bull. N. P. 96, it is said that half a year's notice to quit to a tenant at will is as old as Henry the Eighth's time, 13 Hen. VIII., 15 b; but no mention is there made as to the time when the notice is to be given.

But if the rule is to prevail in any instance, still there is a great difference between land and houses. The same reasons which may induce the Court to extend it to the former are not applicable to the latter. With respect to lands, there might be a hardship in suffering the landlord to oust the tenant in the middle of the year, by which he would be put to the inconvenience and expense of carrying the crops from off the premises. But no such reason could arise in the latter case from the nature of the thing itself. On the contrary, more inconvenience would ensue both to landlords and tenants from adopting the strict rule attempted to be imposed, than by adhering to that which seems originally

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to have prevailed, namely, of giving half a year's notice to quit, without reference to any particular period of the term.

If it be objected that the rent is not here stated to have been reserved quarterly, the inconvenience, if any, must fall upon the landlord, who will thereby be deprived of his rent for one quarter; as the landlord who determines a tenancy at will does it at his peril.[1]

[*161] *Gibbs for the defendant. — What was formerly a tenancy at will is now a tenancy from year to year; and a tenant from year to year must *ex vi termini* hold for a whole year. In this case the year ended at Midsummer, therefore the half year's notice ought to have been to quit at that time.

He then cited a case of *Sykes* on the several demises of *Murgatroyd & Wilkes* v. ——, before BLACKSTONE, Justice, at York Summer Assizes, 1774, where John Murgatroyd, being seised for life, remainder to his wife for life, with remainders over, in 1772 agreed with the defendants to grant them a lease for fourteen years to commence from the 13th of February, 1772, at £14 per annum. The defendants entered under that agreement, but no lease was granted. J. Murgatroyd died in July, 1773. At the latter end of the same month his widow gave the defendants a notice to quit on the 2nd of February next, and some time after made a lease to the lessor of the plaintiff Wilkes, to commence on the 2nd February. Subsequent to this she accepted half a year's rent from the defendants which was due at Martinmas, 1773. BLACKSTONE, J., seemed to think that, if no notice to quit had been given, the acceptance of rent would have been sufficient evidence of an agreement between her and the defendants, that they should continue from year to year; and therefore a notice subsequent to that acceptance of rent must have been a half year's notice to quit on the 13th February, but the acceptance of rent was only evidence of such agreement, and rebutted by the notice; and so the plaintiff had a verdict.

In another case, before Lord MANSFIELD, at Guildhall, in which Mr. Duncomb brought an ejectment against a tenant, but could not prove from what time the term commenced, the tenant prov-

[1] *Vid.* Hargrave's Co. Litt. 56 b, note 16, and the cases there cited. "If there is tenant at will rendering rent at Michaelmas, and lessor determines the will before Michaelmas, he shall not have any rent; but it has been holden that if lessee at any day before the rent day determines his will, yet lessor shall have the rent incurring the next day after such determination of the will."

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ing it to be different from the time to quit mentioned in the notice, the plaintiff was nonsuited.

And in a later case of *Doe dem. Puddicombe* v. *Harris*, at Dorchester Summer Assizes, 1784, before EYRE, Baron, the demise was laid on the 30th March, 1784. The plaintiff proved a receipt of rent from the defendant, and that he gave him six months' notice to quit at Lady-day, 1784. Among other objections against the plaintiff's recovering, the following was taken: that supposing the defendant was tenant from year to year, it was not proved that he was tenant from Lady-day to Lady-day, and so no tenancy was proved upon which a notice to quit could operate.
But EYRE, Baron, in answer to this objection, said * that [*162] as the defendant had six months' notice to quit at Lady-day, he should presume that he was tenant from Lady-day to Lady-day, unless the contrary were shown, and therefore the notice was sufficient.

All these cases prove clearly the point contended for. *Roe d. Jordan* v. *Ward*, 1 H. Bl. 97 (p. 590, *ante*).

Le Mesurier replied, that all the cases cited related to land alone and not to houses, and fell within the distinction before taken; the reasoning from them, therefore, does not apply. This species of holding is still in strictness a tenancy at will, though by construction it is considered in the case of land, for the sake of convenience, as a tenancy from year to year. There is no necessity for extending that construction to such cases as the present.

Lord MANSFIELD, Ch. J.

When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term.

If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But then it is necessary for the sake of convenience, that, if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year; now this is a notice to quit in the middle of the year, and therefore not binding, as it is contrary to the agreement.

As to the case of lodgings, that depends on a particular contract, and is an exception to the general rule. The agreement

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between the parties may be for a month or less time, and there, to be sure, much shorter notice would be sufficient, where the tenant has held over the time agreed upon, than in the other case. The whole question depends upon the nature of the first contract.

ASHHURST, J. — There is no distinction in reason between houses and lands, as to the time of giving notice to quit. It is necessary that both should be governed by one rule. There may be cases where the same hardship would be felt in determining that the rule did not extend to houses as well as lands; as in the case of a lodging-house in London, being let to a tenant at Lady-day to hold as in the present case; if the landlord should give notice to quit at Michaelmas, he would by that means deprive [*163] *the lessee of the most beneficial part of the term, since it is notorious that the winter is by far the most profitable season of the year for those who let lodgings.

BULLER, J. — It is taken for granted by the counsel for the plaintiff that the rule of law, which construes what was formerly a tenancy at will of lands into a tenancy from year to year, does not apply to the case of houses, but there is no ground for that distinction. The reason of it is, that the agreement is a letting for a year at an annual rent; then if the parties consent to go on after that time, it is a letting from year to year. This reason extends equally to the present case; an annual rent is here reserved; and upon such a holding it has been determined that half a year's notice to quit is necessary. This doctrine was laid down as early as in the reign of Henry the Eighth, 13 Hen. VIII., 15 b. The moment the year began, the defendant had a right to hold to the end of that year; therefore there should have been half a year's notice to quit before the end of the term. This gives rise to another objection in this case, upon the distinction between six months and half a year. The case in the Year Books requires half a year's notice; but here there is less than half a year's notice, and therefore it is bad on that ground also.

Judgment for the defendant.

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Cobb v. Stokes.

8 East, 358–362 (9 R. R. 464).

Landlord and Tenant. — Expiry of Term.

Where a demise is for a certain time, no notice to quit is necessary [358] at or before the end of the term to put an end to the tenancy, but a demand of possession and notice in writing, &c., are necessary to entitle the landlord to double rent or value; and such demand may be made for that purpose above six weeks afterwards, if the landlord have done no act in the mean time to acknowledge the continuation of the tenancy; and he will thereupon be entitled to double value as from the time of such demand, if the tenant held over: but if the rent were before reserved quarterly, and such demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter.

In debt for £50, the declaration stated, that on the 25th of September, 1805, it was agreed between the plaintiff and the defendant, that the defendant should take and hold a messuage, with the appurtenances, &c., at Sydenham, as the same were then late in the possession of one Turner, for one year and no longer, from the 24th of June then last; by virtue of which agreement the defendant entered and continued in possession until the 24th of June, 1806, when the term ended. That the plaintiff, on the 11th of August, whilst the defendant was in possession, gave notice and demand in writing for delivering possession to the plaintiff; but the defendant did not deliver up the possession but held over for three months. That the annual value of the messuage, &c., was £20, and the plaintiff became entitled to £10 as double rent, &c. There was a second count for £20 for use and occupation; and a third count for use and occupation upon a *quantum meruit*. The defendant pleaded *nil debet;* and also a set-off to the two first counts, for money paid for the plaintiff at his request to G. W. Meriton, then being the ground landlord of the premises, for and on account of the ground rent reserved out of the same, and for money paid, and upon an account stated. There was a similar set-off to the last count.

At the trial before the Lord Chief Baron at Maidstone, the plaintiff proved the agreement, as stated in the declaration, to occupy the premises for one whole year from the 24th of June, 1805, to the 24th of June, 1806, and no longer, at the rent of £8 8*s.* a year (payable * quarterly); and also proved a demand [*359] of possession, and notice given by him to the defendant to quit on the 11th of August, 1806, or to pay double rent. The

plaintiff's demand was reduced by a payment of £10 10*s.* by the defendant to Meriton, the ground landlord, to £4 11*s.* 3*d.*,[1] for which the jury gave a general verdict. The questions in this case were, whether the demise being for a year and no longer, any notice to quit were necessary at the end of the term; or whether the subsequent notice, so late after the 24th of June as the 11th of August, did not come too late; especially for the purpose of making the defendant a trespasser by relation, so as to fix him with double rent; or, if liable to pay double rent at all, whether the defendant were liable to pay it before the time of actual notice and demand of possession? The defendant had leave to move the Court to enter a verdict for him, if they should so think fit. A rule *nisi* was accordingly obtained for this purpose, which was supported by Shepherd and Bayley, Serjts., and opposed by Garrow, Holroyd, and Comyn.

It was admitted on the part of the defendant that the demise having been specifically for one year, no previous notice was necessary to put an end to the tenancy at that period; but that the landlord might have immediately maintained an ejectment in case the tenant had then refused to quit. But it was con-
[*360] tended that the landlord *having omitted to put an end to the tenancy at that time, and having suffered the tenant to continue so long after as the 11th of August, must be taken to have agreed to his continuing in possession upon the original terms, and could not entitle himself by any subsequent notice in the middle of a year to double rent; for that would be to entrap the tenant, and make him a trespasser by relation, when he had reason to consider that he was holding over with his landlord's consent. That in *Cutting* v. *Derby*, 2 Blac. Rep. 1075, the Court considered it more proper for the landlord to give notice even before the expiration of the term, to prevent surprise on the tenant. That this was not a case within the Stat. 4 Geo. II., c. 28, which charged the tenant with double the yearly value in case of his wil-

[1] It was thus calculated at the trial:

	£	s.	d.
One year's single rent to the 24th of June, 1806	8	8	0
Double rent from the 24th of June to the 3rd of November, when the writ issued	6	13	3
	15	1	3
Deduct for ground rent paid	10	10	0
Verdict taken for balance of	4	11	3

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fully holding over; for that was only meant to apply to cases where the holding over was plainly wrongful and without colour of title; and at any rate would only apply by the very terms of it after the demand made, and notice in writing to deliver up possession: whereas the plaintiff took a verdict upon a calculation for double rent as from the 24th of June instead of the 11th of August. But if he were not entitled to double rent as from the 24th of June, this inconsistency would follow upon the claim of it from the 11th of August, that the defendant must be acknowledged as tenant after the 24th of June when the year ended, which must be taken to be upon the terms of his former holding, which made the rent payable quarterly; and yet in the middle of a quarter he would become a trespasser: but he could not be both tenant and trespasser by implication during the same, or any part of the same period. That if the plaintiff were not entitled to any double rent, * then the set-off was sufficient to cover his de- [*361] mand; for only a year and a quarter's rent was due before the bringing of the action, and that was covered by the ten guineas paid for the ground rent; and the rent being reserved quarterly, the landlord could not recover for a fraction of a quarter. But that at any rate the verdict was taken for too much.

It was admitted on the other side that the plaintiff was only entitled to double rent from the 11th of August, when the notice to quit with a demand of possession was given. They insisted, however, at first on single rent between the 24th of June and the 11th of August; but in this they were overruled by the Court, who being with the plaintiff upon the other points, no further argument was had upon them.

The Court were finally of opinion that the demise being for one year and no longer, a notice to quit was not necessary at the end of the year in order to put an end to the tenancy; but that a demand of possession was necessary in order to entitle the plaintiff to double rent or value. That such demand, however, need not be made for that purpose on or before the expiration of the term, but might be made afterwards (the landlord, as Lord ELLENBOROUGH observed, not having in the meantime done any act to recognise the defendant as continuing to be his tenant); and that here the plaintiff having on the 11th * of August demanded the [*362] possession, and given notice in writing to the defendant to deliver up the premises, had complied with all which the Act of

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the 4 Geo. II., c. 28, required of him: after which the defendant must be taken to have wilfully held over; and then the statute entitled the plaintiff to the double value from that time. But they also held that if the plaintiff took his verdict for the double value from the 11th of August, he could not recover the single rent, as upon an implied tenancy with reference to the former holding, for the fraction of the quarter between the 24th of June and the 11th of August. The verdict, therefore, was directed to be altered accordingly; on which the rule was discharged.

ENGLISH NOTES.

The following points have been decided as to notices to quit upon yearly tenancies: —

In the case of a tenancy from year to year it has been held that where a notice was given to give up possession "at twelve at noon" on the day when the tenancy was determinable, would not support an action for double rent for holding over. *Page* v. *Moore* (1850), 15 Q. B. 684.

Where the tenancy has commenced upon one of the usual quarter days it is sufficient that a half year's notice should be given on or before the alternate quarter day in order to put an end to the tenancy at the end of the year. Thus, in case of a tenancy commencing at Michaelmas a half year's notice given on the 25th of March, but not on the 26th of March, would be good. *Morgan* v. *Davies* (1878), 3 C. P. D. 260, 26 W. R. 816. In case of a tenancy commencing at Lady-day, a notice given on the 29th of September would be good. *Doe d. Bradford* v. *Watkins* (1806), 7 East, 551, 8 R. R. 670. The notice should expire on the last day of a year of the tenancy. *Right d. Flower* v. *Darby, supra.* But a notice expiring on the anniversary of the day of commencement of the tenancy has also been held to be good. *Sidebotham* v. *Holland* (C. A. 1894), 1895, 1 Q. B. 378, 64 L. J. Q. B. 200, 72 L. T. 62, 43 W. R. 228.

By sect. 33 of the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict., c. 61), it is enacted as follows: "Where a half year's notice expiring with a year of tenancy is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half year's notice shall continue to be sufficient." This is not to extend to the case where the tenant is a bankrupt.

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The Court of Appeal have construed the expression "by law," in the introductory words, to refer only to the case where the condition of a half year's notice is introduced by implication of law; and laid down that where the contract of tenancy, whether in writing or verbal, expressly stipulates for a certain notice, the section of the Act does not apply. *Barlow* v. *Teal* (1885), 15 Q. B. D. 501, 54 L. J. Q. B. 564, 54 L. T. 63, 34 W. R. 54. A similar decision had been given by Lord COLERIDGE, Ch. J., in *Wilkinson* v. *Calvert* (1878), 3 C. P. D. 360, 47 L. J. Q. B. 679, 38 L. T. 813, 26 W. R. 829. This was under the Act of 1875 (38 & 39 Vict., c. 92), s. 51, which contained no exception for an agreement in writing. The Court of Appeal in *Barlow* v. *Teal* appear not to have thought that this exception in the Act in any way extended the scope of application of the section.

AMERICAN NOTES.

Both these cases are cited in Taylor on Landlord and Tenant, sect. 22, and elsewhere. *Right* v. *Darby* is cited in Wood on Landlord and Tenant, sect. 24, and in *Steffens* v. *Earl*, 40 New Jersey Law, 128; 29 Am. Rep. 214, both cases were cited, and the Court said: "Where there is a lease for a certain period, the term determines without notice. In uncertain tenancies, reasonable notice was necessary, which reasonable notice had, from the time of Henry VIII., according to Lord ELLENBOROUGH, been six months." "The common-law rule I take to be undoubted, that notice is necessary to determine a monthly or weekly renting, and that a month's or week's notice respectively is sufficient." See notes, 42 Am. Dec. 125, concerning the construction of the various statutes on the subject.

The doctrine of the first branch of the Rule may be found in *Stockwell* v. *Marks*, 17 Maine, 455; 35 Am. Dec. 266 (citing *Messenger* v. *Armstrong*, 1 T. R. 54); *Stedman* v. *McIntosh*, 4 Iredell Law (Nor. Car.), 291; 42 Am. Dec. 122 (citing *Messenger* v. *Armstrong*, *supra*, and *Cobb* v. *Stokes*); *Young* v. *Smith*, 28 Missouri, 65; 75 Am. Dec. 109 (citing the same two English cases).

In a note, 42 Am. Dec. 130, it is stated: "It is a universal rule, both at the common law and by statute, that where the demise is for a fixed term and is to end in a day certain, no notice to quit is necessary;" citing both principal cases, and *Hauxhurst* v. *Lobree*, 38 California, 563; *Walker* v. *Ellis*, 12 Illinois, 470; *Layman* v. *Throp*, 11 Indiana, 352; *Kellogg* v. *Groves*, 53 Iowa, 395; *Barlow* v. *Bell*, 4 Bibb (Kentucky), 106; *Lithgow* v. *Moody*, 35 Maine, 214; *Danforth* v. *Sargent*, 14 Massachusetts, 491; *Allen* v. *Jaquish*, 21 Wendell (N. Y.), 628; *Rich* v. *Keyser*, 54 Penn. State, 83; *Hendrick* v. *Cannon*, 5 Texas, 248: "The reason for this rule is obvious. The object of notice is to terminate the tenancy, and when the lease itself fixes the time at which it is to expire, the necessity for any other notice by either party to terminate it is done away with. Each party is apprised by the contract when the lease ends; further action by either to end it would be unnecessary and superfluous."

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No. 48. — BIRCH *v.* WRIGHT.

(K. B. 1786.)

RULE.

WHERE land is held by a tenant from year to year, and the estate of the landlord passes by conveyance to another, the tenant is entitled to continue the same tenancy under the new owner, and, upon notice of the conveyance, is liable to pay to the new owner as his landlord any rent accrued since the date of the conveyance, and which he has not before the notice paid over to the original landlord.

But if the new landlord obtains judgment in an action to recover possession, he is assumed to have elected to treat the tenant as a trespasser as from the day mentioned in the writ, and cannot sue him for use and occupation subsequent to that day.

Birch v. Wright.

1 Term Reports, 378–388 (1 R. R. 223).

Landlord and Tenant. — Assignment of Landlord's Interest.

[378] An action for use and occupation may be maintained by a grantee of an annuity after a recovery in ejectment against a tenant, who was in possession under a demise from year to year, 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.

This was an action for use and occupation, tried at the sittings at Westminster after last Easter Term, before BULLER, J., when a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench, on a case which stated in substance as follows: —

That the defendant, before the 18th of July, 1777, was tenant from year to year of the lands in question to Mr. Bowes, at the yearly rent of £223 10*s.* — payable half yearly, viz., on the 12th of May and the 22nd of November.

That by indenture of 18th of July, 1777, Mr. Bowes and his wife, Lady Strathmore, granted annuities to several persons therein named for the life of Lady Strathmore; and they covenanted to

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levy a fine to the use of the plaintiff and Mr. Goostrey (who is since dead), upon trust to receive the rents and pay the annuities out of them, and then to pay the residue to Mr. Bowes and Lady Strathmore. That a fine was levied accordingly.

That the defendant paid all the rent which was due on the 22nd of November, 1784, except £81 15*s.* to Mr. Bowes, which sum of £81 15*s.* is still unpaid; and no rent has been paid by the defendant since that time.

That in May, 1785, the plaintiff and Goostrey brought an ejectment against the defendant, and laid the demise on the 6th of April, 1785.

That in Trinity Term, 1785, they obtained judgment; and in September, 1785, gave notice to the defendant of their title, and required him to attorn to them and to pay to them the money already in his hands; but the defendant refused to attorn, and thereupon a writ of possession was executed, and the defendant quitted the premises mentioned in the declaration.

That Lady Strathmore is still living.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover any and what sum of money in this action?

This case was argued in last Trinity Term by Chambre for the plaintiff, and Law for the defendant; and again on this day by Cowper for the plaintiff, and Mingay for the defendant. But as the Court in giving judgment went so fully into all the points made, and cases cited at the bar, it is thought unnecessary to state the arguments at length.

* Ashhurst, J. — It is very material to distinguish the [* 379] different dates and times. From the 6th of April, 1785,
to the time of recovering in the action of ejectment, in my opinion 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. The plaintiff cannot first recover in ejectment, and then for use and occupation for the time subsequent to the day of the demise in such ejectment.

But as for the rent due antecedent to the time of the demise, there is no doubt but this action is maintainable. For the statute of the 4th of Anne having rendered attornment unnecessary, and

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having put the party in the same situation by the conveyance as if the tenant had attorned, he is to be considered in possession; and then, as there is no need between these parties, he may maintain this action for use and occupation. *Moss* v. *Gallimore*, Dougl. 265, is expressly in point, and stronger than the present case. So that the plaintiff may recover all the rent due at the time of notice given which remained in his hands, and must be considered as landlord from such time, provided the tenant be not prejudiced by the payment of any rent before notice.

The question then is, whether bringing an ejectment is a bar to an action for use and occupation for rent due before the time of the demise? In my opinion it is not, for the actions are not inconsistent. The landlord admits him to be tenant till the 6th of April, 1785, and consequently is entitled to rent before that period; and after that he considers him a trespasser.

BULLER, J. — Upon this case two questions have been argued: —

1st. Whether the plaintiff be entitled to any of the rents and profits of the lands occupied by the defendant? and

2ndly. Supposing him to be entitled to them, whether he can recover them in this form of action?

The material thing to be considered is, who are the parties in the business, and what are their respective interests.

First, I will begin with the defendant, who is the tenant. He originally came into the estate as tenant from year to year to Mr. Bowes; he was so at the time of the conveyance from Mr. Bowes to the plaintiff, and he continued to hold the estate as such, without any new agreement or notice of the conveyance till the ejectment was brought. Whilst he was tenant to Mr. Bowes, he clearly was entitled to six months' notice before
[* 380] * the end of a year to quit, and he could not have been turned out without it. I hold that he was entitled to the same notice from the plaintiff before he could be evicted; for as the plaintiff claims under a conveyance from Mr. Bowes, he cannot be in a better situation than Mr. Bowes himself was. He stands exactly in the place of Mr. Bowes, with this difference, that his title is subsequent to the title of the defendant. I mention this difference only for the purpose of at once laying the case of *Keech* and *Hall*, Dougl. 21, out of the question. There a mortgagor made a lease for years subsequent to the mortgage, and that lease was holden to be void as against the mortgagee.

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In this case I consider the defendant as holding during all the time under a demise made before the conveyance to the plaintiff. For if a tenant from year to year hold for four or five years, either he or his landlord at the expiration of that time may declare on the demise as having been made for such a number of years. So it is expressly laid down by the Court in *Legg* v. *Strudwick*, Salk. 414; though in the next preceding page there are two cases which at first seem to have been determined otherwise: the one in the Court of Common Pleas, the other by HOLT, Ch. J., at Nisi Prius; but those are short, loose notes jumbled together with others, and not to be relied on. Besides, when those cases are examined, they will be found not to contradict the case of *Legg* v. *Strudwick*. That in the Common Pleas was *Bellasis* and *Burbrich*; and Salkeld, 413, states it thus: On a lease made for a year, and so from year to year so long as both parties pleased, it was adjudged a lease for two years and afterwards at will. The same case is reported in Lutw. 213; and it was an action for a rescue; and the plaintiff stated in his declaration a demise for a year, and so from year to year, &c., and he distrained for a year and a half's rent. It was objected that the lease determined at the end of one year, and so the plaintiff could not distrain for the rent of that year and half a year more; but it was answered, and so agreed by the Court, that it was a good lease for two years at the least. Two years covered the whole time which was material in that case; it was quite unnecessary to say what would be the effect of the lease after the two years, and therefore the Court said nothing about it. Much less did they say that after the two years it was only a lease at will; on the contrary, the expression of "at the least" imports that it might be good for more. The other is a case said to have been determined by HOLT, Ch. J., at Nisi Prius at Lincoln; and Salkeld reports it thus: If A. demise lands to B. * for a [* 381] year; and so from year to year, this is not a lease for two years and afterwards at will, but it is a lease for every particular year; and after the year is begun the defendant cannot determine the lease before the year is ended. But in a lease at will, the defendant may determine his will after the payment of his rent at the end of a quarter, but not in the beginning, lest his lessor should lose his rent. In that case the question seems to have been whether, after the third year commenced, the lessor was entitled to the whole year's rent; and HOLT, Ch. J., held that he

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was, because the tenant could not determine the estate in the middle of the year. And the expression "for every particular year" does not mean that such a lease operates as a distinct demise for each year separately, but that when any year has commenced, it is good for the whole of that year. Besides, if the case admitted of any other construction, yet after *Legg* and *Strudwick*, which was decided by HOLT himself in this Court ten years afterwards, it is impossible to entertain a doubt about it.

It would be unjust to a tenant to say he should be turned out by the assignee of a reversion, or by any person claiming under his lessor, when he could not be turned out by the lessor himself. On the other hand, it is no injustice, it is no hardship on the assignee to say, he must comply with the same rules and conditions as the person of whom he bought has subjected himself to.

Whether the plaintiff be considered as a mortgagee only, or as a purchaser, or assignee of the reversion, it will make no difference in this part of the case. His title first accrued in July, 1777; it was too late then to give notice to the defendant to quit at the end of the current year, for that expired on the 22nd of November. The defendant, therefore, at the time that the plaintiff's title accrued, had as permanent an interest in the estate till the 22nd of November, 1778, as if it had been leased to him by deed till that time. He had also a further interest in it, unless determined by six months' notice previous to that time; which notice never having been given, he continued rightful tenant to some one down to the time that the ejectment was brought.

This brings me to consider who is entitled to that rent. That depends on the nature and effect of the conveyance from Mr. Bowes to the plaintiff, and the operation of the statute of the 4th Anne, c. 16. And whether it be considered as a mortgage, or as an absolute grant of the reversion, in my opinion it will make no difference.

There is in some respects an analogy between this case [* 382] * and the case of a mortgage, for it is a security for money; the annuities or rents are to be paid out of the rents and profits, and then the remainder of those rents and profits is to be paid to Mr. Bowes. So in the case of a mortgage, till the principal is called for, the interest is to be paid out of the rents and profits, and the remainder is to be retained by the mortgagor. In both cases the borrower would be liable to pay it, if the rents and profits were not sufficient; but that is by virtue of his cove-

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nant. In other respects this case is not at all like a mortgage; for a mortgage is always in its nature redeemable, but these annuities are not made so. And I hold that this is a grant of the reversion and not a mortgage.

But I will first state how the case would stand, supposing Mr. Bowes and the plaintiff are to be considered as mortgagor and mortgagee. In that light it would be said that there is an implied agreement between the mortgagor and the mortgagee, that the mortgagor shall hold as tenant at will to the mortgagee, paying the interest from time to time, and the principal when called for. If the mortgagor be tenant at will, he is entitled to the rents and profits till that will is determined; and whenever the will is determined, it cannot have relation back to a former time; because that would be by a subsequent act to make an estate tortious which was rightful at the time it existed. That a mortgagor has often been called a tenant at will to the mortgagee in courts of law and equity is undoubtedly true, but I think inaccurately so; and the expression has been used when it was not very material to ascertain what his powers or interest were, or to settle with any great precision in what respects he did, and in what respects he did not, resemble a tenant at will. In old cases he is sometimes called tenant at will, and sometimes tenant at sufferance. In *Keech* v. *Hall*, Wallace called him the agent of the mortgagee, and Lord MANSFIELD stated him to be tenant at will to some purposes, but not to others. In *Moss* v. *Gallimore*, Lord MANSFIELD said a mortgagor is not in reality a tenant to the mortgagee; if he were he must pay rent, but that is not so. To many purposes he is like a tenant at will; but he does not pay rent: he must pay interest only. Mr. Justice ASHHURST said, "In some respects a mortgagor is strictly tenant at will;" but that is not so here; for the mortgagor is not in possession, and there cannot be a tenant to a tenant at will. If a tenant at will lease, it determines the will.

* Whoever wishes to wade through all the old books [*383] on this subject will find a great collection of cases in Comyns's Digest, title Estate, l. H. But it is an herculean labour; and, with the opinion which I hold, namely, that this is not a mortgage, it would be quite useless and immaterial in the present case.

Whenever it is necessary to decide a similar question between the mortgagor and mortgagee, it seems to me that it will be quite

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sufficient to call them so, without having recourse to any other description of men, or to what they are most like. But if a likeness must be found, I think, as it was put by ASHHURST, J., in *Moss* v. *Gallimore*, a mortgagor is as much, if not more, like a receiver than a tenant at will. In truth he is not either. He is not a tenant at will, because he is not entitled to the growing crops after the will is determined. He is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee; I mean in ejectments brought for the recovery of the mortgaged lands. If he were tenant at will, the demise could not be laid on a day antecedent to the determination of the will. *Goodtitle d. Gallaway* v. *Herbert*, 4 T. R. 680. But it is every day's practice to lay the demise on a day long before there has been any actual determination of the will; sometimes back to the time when the mortgage became forfeited, and no objection has ever been made on that account. He is not a receiver; for, if he were, he would be obliged to pay all the rents and profits to the mortgagee, which is not the case. Two things which differ from each other in any respect cannot be the same; therefore, he is neither tenant at will nor receiver. Nor is it necessary that he should be so; for a mortgagor and mortgagee are characters as well known, and their rights, powers, and interests as well settled, as any in the law. The possession of the mortgagor is the possession of the mortgagee; and as to the inheritance, they have but one title between them. The mortgagor has no power of making leases to bind the mortgagee. He cannot against the will of the mortgagee do any act to disseise him. Cro. Jac. 660; Cro. Car. 304; 3 Lev. 388; and Skin. 424. And the reason is, because the mortgagee, so long as he receives his interest, is virtually and in the eye of the law in possession. The mortgagee has a right to the actual possession whenever he pleases; he may bring his ejectment at any moment that he will; and he is entitled to the estate as it is with all the crops growing on it. He is also entitled to all the rents which have [*384] become due *since his mortgage, and which are unpaid; as was determined in *Moss* and *Gallimore*, which case I hold to be sound law; and I am desired by Lord MANSFIELD to declare, that, on consideration, he is most perfectly satisfied with that decision. The case was, that one Harrison, having demised an estate to the plaintiff for twenty years, afterwards mortgaged it

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to the defendant, who, without having ever been in the actual possession of the rents, distrained on the plaintiff for rent in arrear, and the distress was held lawful. The legality of the distress depended on the Stat. 4 Anne, c. 16. Before that statute, if a reversion were granted over by deed which operated only as a common-law conveyance, without attornment the grant itself was void to all intents and purposes. But it was not so where the grant was by fine or by deed of uses, on which the Stat. 27 Hen. VIII. operated; for, in the case of a fine, the estate passed to the conusee and his heirs, and an attornment in that case was necessary only to make a privity between the tenant and the conusee, and, if made after the death of the conusee to his heirs, was sufficient. Where the reversion was conveyed by a deed of uses, the grantee might distrain without any attornment at all. Co. Litt. 309; 6 Co. 68; Cro. Jac. 192. The statute enacts that all grants or conveyances thereafter to be made by fine or otherwise, of any manors, rents, reversions, or remainders, shall be good and effectual to all intents and purposes, without any attornment of their tenants, as if their attornment had been made. This clause comprehends all grants and conveyances, and therefore whether it be a grant by way of mortgage, or of the fee simple, or only of the reversion for a term of years, as in the present case, it makes no difference. And the effect of the clause is, that it creates an immediate privity between the grantee and the tenant. It cannot be restrained merely to the making of the grant good as between the grantor and grantee: 1st, because it expressly mentions grants by fine; and they were good to all purposes before without attornment, except as to creating such a privity as would enable the grantee to distrain; 2ndly, because the statute says the conveyance shall have the same effect as if an attornment had been made. Now, if an attornment in fact were made before the statute, there can be no doubt but the grantee was perfect landlord to the tenant, and entitled to all the rents accruing due from the time of the attornment; though according to Co. Litt. 310 b, it would not have entitled him to the rents which became due between the time of the grant and the time of the attornment; which is contrary to what the plaintiff's *counsel have contended on [*385] this point, namely, that the attornment would relate back to the time of the grant.

The Legislature having gone the length of making the grantee a

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perfect landlord without the knowledge of the tenant, it occurred to them that mischiefs might ensue by leaving the tenant open to a distress or action for the rent at the suit of a person of whom he knew nothing, and after he had paid his rent to his original landlord; and therefore they prudently added the proviso, that no person should be prejudiced by payment of rent to any grantor or conusor, or by breach of any condition for non-payment of the rent, before notice should be given to him of the grant by the conusee or grantee. I say they prudently added that proviso, because perhaps it was not absolutely necessary; for the wisdom, the benevolence, and the liberality of the common law had made the same provision before.

The case of *Sir John Watts and others* v. *Ognell*, Cro. Jac. 392, is a strong proof how much equity and good sense have always prevailed in the law. That case was debt for rent by the assignees of a reversion under a fine levied to their use. Several objections were made in arrest of judgment; one of which was that the declaration was not good, because it was not alleged that the lessee upon this grant by fine attorned, nor that he had any notice of the use limited; and even if he might avow without attornment, yet notice ought to be given to the lessee, for otherwise he should be at mischief; for the use might be limited, and he not having conusance thereof might pay his rent to his ancient lessor. Of this point the Court doubted; but afterwards they held that the action was well brought, and that notice need not be alleged in the declaration. But they agreed that the lessee is not bound to pay without notice; and if he hath paid it to his ancient lessor, it is a good excuse for him, and he may plead it; and if he hath not paid it, the action gives him notice to pay it to the grantee, and then he is chargeable for all which was not paid. This case, though decided almost one hundred years before the passing of the Act of Queen Anne, where actual attornment was not necessary, established the same rule which the Act professes to make. And it is a case well worthy of observation; for, 1st, it shows how much the common law regarded and required notice, where a person had not the means of knowing; for at that time there was no statute which required notice to be given. 2ndly, It shows that, [*386] where attornment is dispensed with or supplied by a * statute, the grantee has as complete and perfect a title as if attornment had actually been made. 3rdly, This case fortifies an

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argument, on which I relied much in the case of *Moss* and *Gallimore*, drawn from the form of pleading, namely, that since the statute an attornment never is alleged either in a declaration in covenant or in an avowry; which can only be because it is supplied by the statute, and therefore unnecessary. And, 4thly, it proves that nothing can excuse the lessee from paying the rent to the assignee, but actual payment to the original lessor without notice of the grant; and, if that be his case, he may plead it.

From hence I conclude that the plaintiff was the landlord of the defendant. He had a clear legal title which he could support upon pleading, either in an action of covenant or in avowry; and the tenant was answerable to his action, unless he could allege some legal bar in his defence, and which I think he could only do by showing payment to the grantor before notice.

The first proposition which I laid down was, that the defendant under his first demise continued rightful tenant to some one till the time when the ejectment was brought. And now I say that that some one, during all the time that the rent in arrear accrued, was the plaintiff. Consequently the plaintiff is entitled to maintain an action for use and occupation against the defendant for all that is due and unpaid, as rent during the time that the plaintiff was landlord and the defendant had the premises as his tenant.

But then another question remains to be considered, namely, down to what time the plaintiff is entitled to recover that rent in the present action.

For the plaintiff it was contended that he had a right to recover it down to the time of executing the writ of possession; and to establish this point four cases were quoted.

1st, A Nisi Prius determination cited in Cowp. 246. There is no name to it; but it was tried at Launceston Assizes when GOULD, J., was at the bar; and there the lessor of the plaintiff in ejectment had likewise brought an action for use and occupation of the same premises for rent which had accrued subsequent to the time of the demise. Both actions came on to be tried at the same assizes; and in the action for use and occupation it was objected that it was an action founded on promises, and a supposed permission by the plaintiff to the defendant to occupy, therefore an acknowledgment on the part of the plaintiff that he was tenant, and consequently a waiver of his notice. But the objection * was overruled, and the plaintiff recovered, first in [*387]

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the ejectment, and afterwards in the action for use and occupation. This at best is but a Nisi Prius determination; and I can find no principle whatever on which to support it to the extent to which it goes. If the plaintiff recovered only in the action for use and occupation to the time of the demise in the ejectment, which he might do notwithstanding his declaration claimed the rent to a later period, I think the case is good law. But if he recovered rent due after the demise, I cannot give my assent to it. For the action for use and occupation is founded on contract; and unless there were a contract either express or implied, the action could not be maintained, as was held by Lord MANSFIELD in the case cited at the bar of *Carmier* v. *Mercer*, which was tried about two years ago. And if there were a contract subsisting at the time of the demise, the ejectment could not be maintained.

Two other cases quoted were *Hambly* v. *Trott*, Cowp. 371 (2 R. C. 1), and *Goodtitle* v. *North and others*, Dougl. 562. But as those cases do not seem to me to apply to the present, I shall pass them over. They only relate to the questions, what actions may be maintained against an executor or a bankrupt, and what die with the person, or are barred by the certificate.

The last quoted was *Feltham* v. *Terry* (cited in Cowp. 419), where an action for money had and received was brought against an overseer of the poor to recover money in his hands which had been levied on a conviction, but that conviction was afterwards quashed; and the Court held that the action was maintainable for the clear money in the defendant's hands, because the plaintiffs might waive the tort and sue for the clear money really due. I agree that he may do so; but 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 the tort; and he cannot be permitted to blow both hot and cold at the same time. The action for use and occupation, and the ejectment, when applied to the same time, are totally inconsistent; for in one the plaintiff says the defendant is his tenant, and therefore he must pay him rent; in the other he says he is no longer his tenant, and therefore he must deliver up the possession. He cannot do both. The plaintiff's counsel admit that an action would lie for the mesne profits; it is of course after ejectment, and may be maintained without proving any title. The ejectment is the suit in which the

[*388] *defendant is considered as a trespasser; and, unless the

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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.

Therefore, I am of opinion that the plaintiff is in this action entitled to recover the £81 15*s.*, which remained unpaid as part of the half year's rent due on the 22nd of November, and also a proportional part of the rent up to the 6th of April, 1785; the defendant having continued tenant to the plaintiff up to that time, which is the day of the demise laid in the declaration in ejectment. But I think he is not entitled in this action to recover any rent subsequent to that day.

PER CURIAM. *Let the postea be delivered to the plaintiff.*

ENGLISH NOTES.

The principle of interpretation of a lease "for a year and so from year to year" laid down by BULLER, J., in the above principal case, was adopted by the Court in *Doe d. Chadburn* v. *Green* (1839), 9 Ad. & El. 658. The agreement there was to let "for one year from the date hereof (5th January, 1836), and so on from year to year, until the tenancy hereby created shall be determined as after mentioned . . . three months shall be sufficient notice to be given from either of the parties. The landlord on the 29th of September, 1836, served a notice to quit on the 6th of January next ensuing, or whenever else your tenancy expires." It was held that the tenancy could not be determined until the end of the second year.

AMERICAN NOTES.

This case is cited in Jones on Mortgages, sect. 776, and in 2 Washburn on Real Property, p. 175, and repeatedly in Taylor on Landlord and Tenant.

When a mortgagee is entitled to possession, he may intercept the rents by notice to the tenant, and from that time the tenant must pay them to him. *Babcock* v. *Kennedy*, 1 Vermont, 457; 18 Am. Dec. 695; *Mansory* v. *U. S. Bank*, 4 Alabama, 735; *Clarke* v. *Abbott*, 1 Maryland Chancery, 474. See *Anderson* v. *Robbins*, 82 Maine, 422; 8 Lawyers' Rep. Annotated, 568; *Bartley* v. *Phillips*, 179 Penn. State, 175; *Higgins* v. *Turner*, 61 Missouri, 249. In *Nellis* v. *Lathrop*, 22 Wendell (N. Y.), 121; 34 Am. Dec. 285, COWEN, J., said: "If the landlord part with his title, pending the lease, the duty of the tenant, including that of paying rent, is due to the assignee," &c.

Where a prior mortgagee enters upon the land for condition broken, and the lessee attorns to him, the lessee becomes the tenant of the mortgagee, but until such entry and attornment, or until the mortgagee requires the tenant to pay rent to him, the mortgagee and the lessee are strangers. *Holmes* v. *Turner's Falls S. Co.*, 142 Massachusetts, 590.

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This doctrine is also found in *Breeding* v. *Taylor*, 13 Kentucky, 481; *Townsend* v. *Isenberger*, 45 Iowa, 670; *Carson* v. *Crigler*, 9 Bradwell (Illinois App. Ct.), 83. So where the lessor's interest is sold on execution or under decree. *Ferguson* v. *Hardy*, 59 Georgia, 758; *Stevenson* v. *Hancock*, 72 Missouri, 612; *Hand* v. *Liles*, 56 Alabama, 143.

The second branch of the rule is sustained by *Featherstonhaugh* v. *Bradshaw*, 1 Wendell (N. Y.), 134 (citing the principal case); *Welch* v. *Adams*, 1 Metcalf (Mass.), 494.

No. 49. — JOHNSTONE *v.* HUDLESTONE.

(K. B. 1825.)

RULE.

A TENANCY from year to year is not determined by the parol acceptance of an invalid notice to quit.

Johnstone v. Huddlestone.

4 Barn. & Cress. 922–940 (28 R. R. 505).

Landlord and Tenant. — Notice to quit. — Invalid Notice.

[922] A tenant held under a demise from the 26th day of March for one year then next ensuing, and fully to be complete and ended, and so from year to year, for so long as the landlord and tenant should respectively please. The tenant, after having held more than one year, gave a parol notice to the landlord less than six months before the 25th day of March, that he would quit on that day, and the landlord accepted and assented to the notice. *Held*, on demurrer in replevin, that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing, or by operation of law, within the meaning of the Statute of Frauds.

Held, secondly, that the tenant having holden over after the expiration of the time mentioned in the notice to quit, the landlord was not entitled to distrain for double rent under the statute 11 Geo. II., c. 19, s. 18, inasmuch as that statute applied to those cases only where the tenant had the power of determining his tenancy by a notice, and where he actually gave a valid notice sufficient to determine it.

Declaration in replevin. Avowry that before and at the time of making the demise thereinafter mentioned, and before and at the said time when, &c., the defendant Hudlestone was seised in his demesne as of fee of and in the tenements and premises demised, of which the dwelling-house and out-house in which, &c., was part and parcel, and being so seised theretofore and before the said time when, &c., to wit, on the 24th March, 1821, at, &c.,

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demised to the plaintiff certain tenements and premises of which the said dwelling-house *and out-house was part [*923] and parcel, to hold the same to the plaintiff from the 26th March, inclusive then next, for one year then next ensuing, and fully to be complete and ended, and so from year to year for so long time as the defendant and the plaintiff should respectively please, at the rent or sum of £52 10*s.*, payable half yearly, on the 29th September and 25th March, in every year. By virtue of which demise the plaintiff on the 24th March, 1821, entered into and upon the said demised tenements and premises, and was possessed thereof. And being so possessed, before the 25th of March, 1824, to wit, on the 19th December, 1823, at, &c., gave the defendant, H., notice that he, plaintiff, would quit and deliver up possession of the demised tenements so by him holden as aforesaid, on the said 25th day of March, 1824, and the defendants in fact say, that the plaintiff did not, nor would on the day and year last aforesaid, quit or deliver up possession of the said demised tenements and premises pursuant to the notice, but refused so to do, and held over and continued in possession of the demised tenements and premises from the day and year last aforesaid, until the said time when, &c., whereby the plaintiff became liable to pay to the defendant H., during the time he so continued in possession after the 25th March, 1824, as aforesaid, the yearly rent or sum of £105, being at the rate of double the rent or sum which the plaintiff would otherwise have paid in case the said notice had not been so given. And because the sum of £52 10*s.*, of the said rent or sum of £105 for one half year next before and ending on the 29th of September, 1824, and from thence, until, and at the said time when, &c., was due, &c., in arrear from the plaintiff to the defendant, H., he in his own right, well avowed, *and the other defendant, as his bailiff, acknowledged the [*924] taking of the goods and chattels as a distress. Plea in bar, that the said notice so given by the plaintiff to the defendant, H., was given less than six months before the 25th day of March, 1824, that is to say, three months and six days only before the said 25th day of March, 1824, to wit, on the said 19th day of December, 1823, and that the said notice was not in writing, and this, &c. Replication, that though true it is that the said notice so given by the plaintiff to the defendant was given less than six months before the 25th day of March, 1824, and that the said

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notice was not in writing; nevertheless, for replication the defendants say that the said demise in that avowry and cognizance mentioned was not created by deed, but was and is a parol demise, and that the said defendant, Hudlestone, accepted the said notice to quit, so given by the plaintiff to the defendant as aforesaid, and recognised, assented to, and adopted the same. Demurrer and joinder.

PATTESON in support of the demurrer. — The question in this case is, whether the landlord, who is the defendant in replevin, is entitled to distrain for double rent under the statute 11 Geo. II., c. 19, s. 18, the tenancy not having been determined by half a year's notice to quit. The notice given by the tenant, that he would quit at the end of three calendar months, of itself is clearly not sufficient to determine a tenancy from year to year. But the question raised by the pleadings is, whether the acceptance and assent to the notice to quit by the landlord made it binding on the tenant to quit at the time mentioned in the notice, so as to entitle the landlord to distrain for double rent. Now it is clear that half a year's notice to quit is necessary in order to [*925] determine a *tenancy from year to year, but it will be argued that the assent of the landlord to the notice to quit made it operate as a present surrender of the tenant's interest. At the time when that notice was given, the tenant had a subsisting term in the premises, and then by the Statute of Frauds that term could not be surrendered, except by note in writing, or by act and operation of law. *Mollet* v. *Brayne*, 2 Camp. 103 (11 R. R. 676). The notice to quit, unless it were binding on the tenant at the time when it was given, was no more than a proposal on the part of the tenant to quit at a given period, which the landlord might or might not agree to. If the landlord did assent to it immediately, it would then operate as an agreement between the landlord and tenant that the latter should yield up his interest at a given period, but a surrender is an actual yielding up of an estate for life or year to him that hath an immediate estate and reversion. It would be directly contrary to the intention of the parties to construe the agreement in this case as a surrender at the time when the notice to quit was given; and when it expired the tenant refused to yield up his interest. But assuming that such an agreement might operate as a surrender, either at the time when the notice to quit was given, or when it expired, it would

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so operate, not by act and operation of law, but by reason of the agreement of the parties; and the Statute of Frauds then requires that such a surrender should be in writing. This is distinguishable from *Thomas* v. *Cook*, 2 B. & Ald. 119 (20 R. R. 374), because, in that case, there was an actual change of possession. Besides, the Court of Exchequer have decided upon this very notice in *Doe demise of Hudleston* v. *Johnstone*, 1 McClel-
and & Younge, 141, that although *it was assented to by [*926]
the landlord, that did not entitle him to maintain an
ejectment. It appeared that after the landlord had accepted the offer, he gave notice that the estate would be let by auction on the 6th of January, 1824, and that Johnstone attended the letting, and offered a rent of £40 a year, but another person offered £52 a year, and was declared the tenant. Johnstone then proposed the same sum, but his proposal was rejected, and he refused to quit. It was contended that the tenant's offer to give up the possession at the end of the year, and the acceptance of that offer by the landlord followed by the reletting of the premises (which must be taken to have been with the tenant's consent) amounted to a surrender by act and operation of law, within the statute 29 Car. II., c. 3; and, secondly, that there was a mutual agreement to waive half a year's notice in writing, and adopt one by parol within that time; that the latter, therefore, was a reasonable notice, and that the law required nothing more; but it was held that the tenancy was not determined, there not having been either a sufficient notice to quit, or a surrender by operation of law.

Assuming, therefore, that the tenancy has not been determined, the question then is, whether the landlord is entitled to distrain for double rent under the statute 11 Geo. II., c. 19, s. 18, in consequence of the tenant's having given a notice to quit, which was not binding either upon him or the landlord. The mischiefs intended to be remedied are specified in the recital of that section. The object of the Legislature appears to have been to remedy the inconvenience resulting to landlords where tenants having power to determine leases by giving notice to quit, refuse to
deliver up possession when the landlord *has agreed with [*927]
another tenant. The statute, therefore, contemplates a
case where a landlord is put to inconvenience in consequence of the tenant's giving a notice to quit, by which the tenant had power to determine his lease. Now the tenant in this case had

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no power to determine his tenancy by the notice which he gave, and that must have been known to the landlord, and, therefore, he could not sustain the inconvenience contemplated by the statute. This, therefore, was not a case within the mischiefs intended to be remedied. It is true that the enacting words of the section are larger and sufficient to comprehend the present case, but they must be construed together with the words of the recital, and effect must be given to all the words of the section. The enacting words are "that in case the tenant give notice of his intention to quit at a time mentioned in the notice, and does not deliver up possession, then he shall pay double rent." Now construing these words with reference to the mischief to be remedied, viz., the inconvenience resulting to landlords in consequence of tenants who have power to determine their leases by giving notice to quit, refusing to deliver up possession when the landlord has agreed with another tenant; the notice of the intention to quit, mentioned in the enacting part, must be a notice by the giving of which the tenant has power to determine his tenancy.

There is no authority to show that a tenant is liable to double rent where his tenancy has not been duly determined by a valid notice to quit. In *Timmins* v. *Rowlinson*, 3 Burr. 1603, [*928] it was decided that a lease by parol was a *holding over within the statute, and that a parol notice to quit by the tenant was sufficient to make him liable for double rent in case he held over; and although the notice there was to quit at the end of three months, no question was made as to the validity of the notice in that respect. *Messenger* v. *Armstrong*, 1 T. R. 53 (1 R. R. 148), is not in point, because that was an action for double the yearly value after notice given by the landlord, as appears by Selwyn's N. P. 712 *n.* In *Farrance* v. *Elkington*, 2 Camp. 591 (11 R. R. 807), a tenant from year to year gave his landlord notice to quit as soon as he got another situation, but did not quit, and Lord ELLENBOROUGH held that he was not liable for double rent, and he intimated an opinion that the notice must be one binding upon the landlord. The statute 4 Geo. II., c. 28, applies in terms to those cases only where the tenant holds over after the determination of his term. The statute 11 Geo. II., c. 19, s. 18, is a statute *in pari materia*, and ought to be construed with reference to the enactments of the former statute. The former statute gives the landlord double the yearly value, if the

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tenant holds over after a notice to quit given by the landlord. The latter statute gives double the yearly rent, if he holds over after a notice to quit given by himself.

Parke, *contra*. — It does not appear by the allegation in the plea that the notice to quit was not a notice to quit at the end of half a year. The allegation is, that the notice was given less than six months before the 25th March, 1824. But that may mean calendar months, *and if so, there might be more [*929] than half a year's notice; and *Doe* v. *Green*, 4 Esp. 198, is an authority to show that a notice for less than six calendar months is sufficient. But, assuming that it does sufficiently appear that less than half a year's notice was given, still that notice having been accepted and assented to by the landlord, was sufficient to determine the tenancy on two grounds: first, because the parties agreed to consider it a reasonable notice to quit; secondly, because it operated as a surrender by operation of law. But assuming that the tenancy was not determined, still the tenant having held over after having given a notice to quit, the landlord was entitled to distrain for double rent. At all events he is entitled to recover the single rent. As to the first point, the parol notice to quit in less than half a year having been accepted and assented to by the landlord, is sufficient not to destroy the tenant's then subsisting term for the current year, but to prevent the commencement of a new term, which otherwise would commence at the beginning of the following year. The interest of the tenant in the premises for the current year could only be determined by a surrender in writing, but it does not therefore follow that a new interest for a second year may not be prevented from commencing, by a notice which both parties have agreed to consider reasonable. The nature of a tenancy from year to year is thus explained by Lord MANSFIELD, in *Right* v. *Darby*, 1 T. R. 159 (p. 616, *ante*): "If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But *then it is necessary, for the sake of conven- [*930] ience, that if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year." In order to determine a tenancy from year to year, the law requires only that a

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reasonable notice should be given. Per WILMOT, J., *Timmins* v. *Rawlinson*, 3 Burr. 1609. Generally speaking, half a year's notice is deemed reasonable, but it is competent to parties to agree to determine the tenancy upon a shorter notice, and here they have so done. *Shirley* v. *Newman*, 1 Esp. 266 (5 R. R. 737), is expressly in point. There three months' notice only was given, and the lessor neither expressed assent nor dissent, but he took the rent up to the time when the defendant quitted; and Lord KENYON held that this was a waiver of a regular notice to quit, and an acquiescence on the part of the lessor. He said, that, "in the case of a tenancy from year to year, no notice short of six months, and determinable with the year, was sufficient, but that by agreement the parties might dispense with the notice, and the acquiescence of the parties was presumptive evidence of such agreement." Secondly, in this case there was a surrender by operation of law. In the cases referred to on the other side, the notices given were to quit in the middle of the current year. But the tenant, having an existing interest at that time, could not surrender it except by notice in writing. This observation applies to *Thomson* v. *Wilson*, 2 Stark. 379 (20 R. R. 696), and *Mollett* v. *Brayne*, 2 Camp. 591 (11 R. R. 807). It is to be observed, however, that in *Whitehead* v. *Clifford*, 5 Taunt. 518 (15 R. R. 579),

GIBBS, Ch. J., said, that it might be proper to consider the
[*931] latter case when the like *circumstances should arise.

Suppose that the landlord and tenant had agreed at Christmas that the landlord should demise to the tenant for a quarter of a year, and that the tenant had accepted that demise, that would have operated as a surrender of the former term. Now here the notice given by the tenant, and accepted by the landlord, in point of legal effect, operated as a new demise from the landlord to the tenant for a quarter of a year from Christmas to Lady-day, and, consequently, as a surrender of the former term. *Thomas* v. *Cook* is expressly in point.

But assuming that the tenancy was not determined, still the tenant having given the landlord a notice to quit, and not having quitted in pursuance of it, was liable under the Stat. 11 Geo. II., c. 19, s. 18, to pay double rent; for here the tenant had the power to determine the tenancy, he gave the notice, and refused to deliver up the possession. It is a case, therefore, within the very words of the enacting part of the section, and this statute must be

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construed by itself, and not with reference to the enactments in the statute 4 Geo. II., c. 28. There is a material distinction between the two statutes. The statute 4 Geo. II., c. 28, requires that there should be a demand of possession, and a notice in writing by the landlord. The statute 11 Geo. II., c. 19, s. 18, requires no such thing; and it recognises the party by the name of tenant, which the first statute does not. The latter statute also gives the landlord a right to distrain for double rent, which is a remedy applicable only to the relation of landlord and tenant. It therefore contemplates a continuance of the tenancy after the time when the notice to quit has expired. At all events, the defendant is entitled to the single rent; for it appears that the plaintiff continued * to hold as tenant after an insufficient [*932] notice to quit had been given; and the defendant may recover a part of the entire sum which he claims.

BAYLEY, J. — I am of opinion that the notice to quit in this case was not sufficient to determine the tenancy from year to year, so as to enable the landlord to maintain an ejectment or to distrain for double rent under the statute of the 11 Geo. II., c. 19, s. 18, and I am also of opinion that he is not, under this avowry, entitled to claim the single rent. The original tenancy is averred in the avowry to be not a tenancy for a year only, but from the 26th of March for one year fully to be complete and ended, and so on from year to year for so long time as the plaintiff and defendant shall respectively please. So that as soon as the last half year of each year had commenced, the tenant had an interest in the premises for one year and a half. The term, therefore, was to have continuance until some act were done to determine the tenancy. Now, the law requires that there must be half a year's notice to quit in order to determine such a tenancy. It has been contended that the allegation in the plea that the notice was given less than six months before the 25th March, 1824, may be taken to mean that it was given less than six calendar months, and therefore that it may have been given more than half a year. But in legal proceedings the word "months" means lunar months, unless the contrary appear to be the meaning from the subject-matter to which that term is applied. Six lunar months must necessarily be less than half a year, and, therefore, there has not been the notice required by law to determine the tenancy. At the time when this notice was given the tenant had an interest

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[*933] for a year or more in the *land; and that could not be put an end to by a parol notice to quit at the expiration of three months. The Statute of Frauds, 29 Car. II., c. 3, s. 3, says, "that no leases or estates, or interests either of freehold or terms of years, or any uncertain interest in any lands, tenements, or hereditaments, shall be surrendered, unless it be by deed or note in writing, or by act and operation of law." It is said that although a parol notice to quit at the end of three months may not of itself be sufficient to determine a tenancy from year to year, yet that such notice having been given by the tenant, and accepted by the landlord, may operate as a surrender of the residue of the term by operation of law. And *Thomas* v. *Cook*, 2 B. & Ald. 119 (20 R. R. 374), has been relied upon as an authority in point. There Thomas had let a house to Cook as tenant from year to year; Cook underlet to one Perks, an under-tenant, commencing at Christmas, 1816, and at Lady-day, 1817, distrained upon the under-tenant for rent. Rent then being due from Cook to Thomas, he gave notice to the under-tenant not to pay the rent to Cook; and upon the latter's refusing to take the under-tenant's bill for the amount due, Thomas agreed to take it himself in payment of the rent due from Cook to him, saying that he would not have anything further to do with Cook; and afterwards, in October, 1817, Thomas himself distrained the goods of Perks for rent in arrear. Now in that case there was not only a declaration by the original landlord that he would no longer consider Cook as his tenant, but there was an acceptance by him of another person as his tenant, and that acceptance was assented to by Cook. The original tenant was not only willing to yield up his in-
[*934] terest in the premises, but *the landlord was willing to accept it; and he did accept, for he treated Perks as his tenant, thereby showing that he considered the old term as at an end. The possession of the premises had been previously transferred to the under-tenant. That case, therefore, only decided that where there had been a change of possession, and an agreement between the landlord and tenant that the former should accept the person in possession as his tenant from a given period, the law, in order to effectuate the intention of the parties, would work a surrender of the original tenant's interest in the same way as it does when a lessee for a term of years, during the term, accepts from the lessor a new lease. In that case, as the second

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lease cannot be good unless there was a previous surrender of the first, and as the lessee by accepting the second lease admits the ability of the lessor to demise, the law, in order to effectuate the intention of the parties, that the second lease shall take effect, works a surrender of the first. In this case the tenant remained in possession of the premises, and no act was done by the landlord to show that he considered the old term to be at an end. It is said that the landlord adopted the notice to quit; but assuming that the assent of the landlord to such a notice would in any case be sufficient to make it binding upon him, it ought to be shown that notice of that assent was given to the tenant. For until that assent was notified to the tenant, the notice to quit was no more than a proposal made by the latter to quit at a certain time; by law he could not compel the landlord to accept. I am of opinion, however, that even if it had appeared upon the face of the pleadings that the landlord had assented by parol to accept the possession of the premises at the time mentioned in this
* notice to quit, it would not have been such an acceptance [* 935]
of that notice to quit by the landlord as would have operated as a surrender of the tenant's interest. The notice given by the tenant being one which the landlord might treat as a nullity, it would continue inoperative until the landlord assented to it. When that assent was given, the effect of it would be to make the notice to quit operate as an agreement between the parties that the tenant should yield up his interest at the time mentioned in the notice. Assuming that the assent by the landlord to such a notice may make it operate as a surrender of the tenant's interest (upon which I give no opinion), it must operate as an actual surrender, by reason of the agreement of the parties, and not as a surrender by operation of law. But the Statute of Frauds requires that such a surrender should be by note in writing. I think, therefore, that if the landlord was willing, and intended to accept this notice to quit, he ought, in order to have made it binding on himself and on the tenant, to have expressed that assent in writing. Not having bound himself by an assent in writing to treat it as such, I think the tenant was not bound to quit at the time specified in this notice, so as to entitle the landlord to maintain an ejectment.

Then the question is, whether, although the notice be not binding so as to entitle the landlord to bring ejectment, it is so far binding on the tenant as to make him liable to pay the double

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rent under the statute 11 Geo. II., c. 19, s. 18. I am of opinion that that statute was intended to give the landlord a remedy for double rent in those cases only where the tenant has given a notice binding upon him to quit at the expiration of the time [* 936] specified in the notice, and upon which the landlord * might at that time have acted, and brought an ejectment. I think that the Legislature did not intend to punish the tenant for his caprice, but to reimburse the landlord for any injury he might sustain by losing his bargain with a new tenant. The 18th section of the statute recites, "That whereas great inconveniences have happened, and may happen to landlords whose tenants have power to determine their leases, by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession, when the landlord hath agreed with another tenant for the same." Now what inconvenience can result to a landlord from receiving a notice to quit in which he is not bound to acquiesce? The law does not warrant him to expect that the tenant will quit at the expiration of the time mentioned in such notice. Where tenants have power to determine their tenancy by giving a notice to quit, they are bound, in order to determine the tenancy, to give such a notice as the law requires; and if a landlord, without such a notice, agrees to let his lands to another tenant, he does it at his own peril. It is true that the enacting words are carried beyond the recital; but I think that effect must be given to all the words of the clause, and that the enacting words must be construed with reference to the mischief intended to be remedied. The enacting words are, "That in case any tenant shall give notice of his intention to quit the premises by him holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, that then the said tenant, his executors, &c., shall from thenceforward pay to the landlord double the rent or sum which he should otherwise have paid." The fair construction of that clause appears to be, that it shall only apply in case [* 937] * the tenant shall give the notice contemplated in the preamble, viz., such a notice as the tenant has power to give in order to determine the tenancy, and so as to make it binding on the landlord to accept possession of the premises. If that were not so, the consequence would be, that if a tenant having twenty-one years by lease, gave notice that he would quit at the end of

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the first year of the term, he would be liable to pay double rent from that period, although the landlord could not, in contemplation of law, be injured by receiving a notice which he was not bound to act upon. It is supposed that the case of *Timmins* v. *Rawlinson*, 3 Burr. 1603, has established that a notice to quit, given less than half a year before the expiration of the time mentioned in such notice, is sufficient to entitle a landlord to maintain an action for double rent; but such a conclusion is not fairly to be deduced from that case. There the lease was not alleged to be from year to year, but for one year only; and if that be so, then the tenant was bound to quit at the end of that year, without any notice whatever. The only case which raises any degree of doubt upon the question is that of *Shirley* v. *Newman*, 1 Esp. 266 (5 R. R. 737). In that case Lord KENYON seems to have thought that an agreement by the landlord to accept less than half a year's notice was sufficient to put an end to the tenancy; but the question upon the Statute of Frauds was not presented to his attention. There is also this essential difference between that case and this, that there the tenant had actually quitted possession of the premises. Upon the whole, therefore, I am of opinion that the interest of the tenant not having been * determined by [* 938] a valid notice to quit, and there being no surrender in writing, or by act and operation of law, within the Statute of Frauds, the landlord was not entitled either to bring an ejectment or to recover double rent.

Then it is said that the defendant is entitled under this avowry to claim the single rent. It is true that if a defendant in replevin claims more than is due to him, he may recover what is due, provided that be part and parcel of that which he claims by his avowry. Here the defendant claims by his avowry double rent, which became due to him under the statute 11 Geo. II., c. 19, s. 18, in consequence of his tenant's having holden over after having given a notice to quit. I think he may recover under the avowry any part of the double rent claimed; but that he cannot recover any single rent due to him by virtue of a contract made between him and his tenant, because such single rent does not constitute part and parcel of the rent which he claims to be due to him, under the statute.

HOLROYD, J. — I am of opinion that the claim for double rent cannot be supported; and that the defendant cannot recover the

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single rent under this avowry. The landlord does not claim the rent as due to him under a demise, but under the statute. In common cases where a landlord seeks to recover rent due to him under a contract, he may recover less than the sum which he claims; but in that case the sum which he does recover is part of the sum which he claims to be due by virtue of the contract. Here the landlord claims rent under the statute, and treats the tenant as a tortfeasor, by reason of his holding over after [*939] *the expiration of the time mentioned in the notice to quit. I think he may, under the avowry, recover any part of the double rent which is due to him under the statute, but that he cannot recover any part of the single rent which is due to him under a contract. I think also that the notice to quit mentioned in the pleadings must be taken to be a notice for less than half a year, and that it was not, therefore, sufficient to determine a tenancy from year to year. The notice not having been given so much as half a year before the expiration of the current year, at the time when it was given another interest had vested in the tenant to continue for the remainder of that and the whole of the following year. This notice was not binding, therefore, on the landlord or tenant, so as to enable the former to maintain ejectment. If an actual surrender of the tenant's interest were necessary in order to determine the tenancy, it is perfectly clear that such a surrender must be in writing. I am of opinion that there was not in this case any surrender by operation of law, because the tenant never yielded up the possession of the premises to the landlord, or to any person on his behalf. If, besides an agreement between the landlord and tenant, that the interest of the latter should be yielded up to the former at a particular period, there had also been an actual yielding up of the possession to another person, the law in that case might have worked a surrender. But then it would work such a surrender, not by reason of the agreement of the parties alone, but by reason of that agreement coupled with the change of possession. In *Thomas* v. *Cook*, 2 B. & A. 119 (20 R. R. 374), the tenant had yielded up [*940] possession *of the premises to another person, and with his assent the landlord accepted that person as his tenant. But in this case there is only an agreement between the parties that the possession shall be delivered up. Now it would be directly contrary to the Statute of Frauds to hold that such an

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agreement, not in writing, should take effect as a surrender. I have great difficulty in saying that there was any such agreement binding on the tenant. There could be no such agreement until the assent of the landlord to the notice to quit was made known to the tenant. Now it is not alleged that that assent was ever notified to the tenant; nor does it appear when the assent was ever given; it may not have been given until after the time mentioned in the notice to quit had expired, and if so there never was any agreement binding upon the tenant to deliver up the possession. But assuming that the assent of the landlord was given and notified to the tenant so that the legal effect of it might be to make it operate as a surrender, it could only operate as an actual surrender; and in order to make it so operate it ought to have been shown that the assent of the landlord to the notice to quit was in writing. I am, therefore, of opinion that, notwithstanding the acceptance of the notice to quit by the landlord, the tenant, in point of law, was entitled to hold for another year, and that being so entitled to hold for another year, he was not liable to pay double rent. The statute 11 Geo. II., c. 19, s. 18, applies only to cases where he has the power to give a valid notice to quit binding upon him and the landlord at the time when it is given.

Judgment for the plaintiff.

ENGLISH NOTES.

As to the terms of a valid notice, the only rule is that they must be clear and unambiguous. The case of *Bury* v. *Thompson* in the Court of Appeal (1895), 1 Q. B. 696, 64 L. J. Q. B. 500, 72 L. T. 187, 43 W. R. 338, is instructive. The tenant having the option to determine upon six months' notice at the end of seven years wrote to his landlord more than six months before that period, in these terms: "I have just been looking at my lease, and I see that my first seven years will be determined on the 25th of December, 1894. . . . I understand that the rent is £50 too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this, so that you may have ample time to consider what course you would like to adopt." The Court held that this was a clear and unambiguous intimation of a determination not to hold any longer upon the terms of the lease, and that it was a valid notice.

AMERICAN NOTES.

This case is cited in Wade on Notice, sects. 629, 645; Wood on Landlord and Tenant, sects. 494, 555; Browne on Statute of Frauds, sect. 47; Taylor on Landlord and Tenant, sects. 486, 527.

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No. 50. — DOE d. CALVERT *v.* FROWD.

(C. P. 1828.)

RULE.

A TENANT from year to year, who denies the right of the person entitled as successor to the landlord, may be treated as a trespasser; and no notice to quit from the person so entitled is necessary.

Doe d. Calvert v. Frowd.

4 Bing. 557–560 (29 R. R. 624).

Landlord and Tenant. — Title of Reversioner. — Disclaimer by Tenant.

[557] Defendant, who held under a tenant for life, received, on her death, a letter from the lessor of the plaintiff, claiming as heir, and demanding rent.

Defendant answered, that he held the premises as tenant to S.; that he had never considered lessor of plaintiff as his landlord; that he should be ready to pay the rent to any one who should be proved to be entitled to it, but that without disputing the lessor of the plaintiff's pedigree, he must decline taking upon himself to decide upon his claim, without more satisfactory proof, in a legal manner.

Held, that this was a disclaimer of lessor of plaintiff's title.

This was an ejectment to recover possession of a house in Serle Street, Lincoln's Inn Fields, and tried at the Middlesex sittings after Trinity Term, 1827, before BEST, Ch. J., when a [*558] verdict was found for the lessor of *the plaintiff, who claimed title to the premises in question as heir-at-law of Mary Whitall, deceased.

Mary Whitall was seised in fee of the premises, and died so seised in the year 1800, devising the premises for life to Margaret Hodgson, who afterwards married George Smallpiece, and received the rent during her life.

M. Hodgson died in 1826.

The lessor of the plaintiff claimed to be entitled to the premises as heir-at-law of Mary Whitall, on the decease of Margaret Hodgson, the tenant for life.

At the trial, the lessor of the plaintiff having proved that he was heir-at-law to Mary Whitall, and her seisin,

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The following letters between the lessor of the plaintiff's attorney and the defendant were put in: —

"EDWARD FROWD, Esq.

"SIR, — In order that you may be fully informed of the right and title of my client, Mr. John Calvert, to the premises in No. 14 Serle Street, in your occupation, and late the property of Mrs. Margaret Smallpiece, Kensington, deceased, I send you the particulars enclosed (these were a copy of the lessor of the plaintiff's pedigree, and a statement of his claim to the premises), which I trust will fully satisfy you of his title, and that there will be no difficulty or objection to his receiving the rent, which will be due the 25th instant. I shall readily give you any further information or satisfaction which you may require, if you will make an appointment to call on me for that purpose.

"Yours, &c.,

"17th March, 1826." "J. MANGNALL.

"SIR, — In answer to your letter respecting Mr. John Calvert's claim to the house which I hold as tenant to Mr. Smallpiece in right of his wife, I beg to inform you, I have not hitherto considered Mr. John Calvert as the landlord of the house in Serle Street, nor can I pay any *rent to him without the [*559] risk of being hereafter called upon to pay it over again to the person who may fancy and perhaps prove he has a better title. I shall be at all times ready to pay the arrears to any person who shall be proved to be either heir-at-law or otherwise entitled to receive it; and without wishing to dispute the connection of blood of Mr. John Calvert to Mrs. Mary Whitall, deceased, I must decline taking upon myself to decide upon that claim without more satisfactory proof in a legal manner.

"I am, &c.,

"4th Nov., 1826." "EDW. FROWD.

On this evidence the jury, under the direction of the LORD CHIEF JUSTICE, who thought the defendant's letter amounted to a disclaimer, found a verdict for the plaintiff.

A rule *nisi* for a nonsuit was obtained on the ground that the lessor of the plaintiff had treated the defendant as his tenant, and that, therefore, he ought to have had notice to quit.

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Bosanquet and Storks, Serjts., showed cause: —

The defendant's letter amounts to an express disclaimer of the title of the lessor of the plaintiff, and if it be such, it is clear that notice to quit is not necessary.

Wilde, Serjt., *contra*: —

The letter contains no disclaimer, but merely cautious apprehension, and a request for further information upon a matter at that time doubtful. In *Doe dem. Williams* v. *Pasquali*, 1 Peake, 259 (3 R. R. 688), it was held that a mere refusal to pay rent to a devisee under a contested will, accompanied with a declaration that the tenant was ready to pay to any person entitled, [*560] did not amount to *a disclaimer; and here there was no demand of possession by the lessor of the plaintiff, so that the defendant, being in lawfully, could not be a trespasser till the lessor of the plaintiff dissented to his possession.

Best, Ch. J.: —

Mrs. Smallpiece, the lessor of the defendant, had only a life interest in the premises; her husband had no estate by the curtesy; the moment she was dead, therefore, the lessor of the plaintiff might treat the defendant as a trespasser. If, indeed, the defendant had ever paid rent to the lessor of the plaintiff, a new term would have been created; but this was not the case, and when the lessor of the plaintiff demands his rent, the defendant says, "I will not pay, I am tenant to Smallpiece;" and at the trial puts the lessor of the plaintiff to prove his title. If this be not disclaimer, what is? But I should not have thought differently even if this case had been exactly like the case of *Doe dem. Williams* v. *Pasquali*, because a notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy, there can be no necessity for a notice to end that which he says has no existence.

Park, J.: —

There never was any relation of landlord and tenant between these parties; rent was demanded and refused, and the lessor of the plaintiff could not make the defendant tenant against his consent. The offer of the lessor of the plaintiff was only *sub modo*, and not accepted.

Gaselee, J.: —

If the defendant had held under the ancestor of the lessor of the plaintiff, the question agitated in *Doe dem. Williams* v. *Pasquali*

might have arisen, but all his interest expired on the death of Mrs. Smallpiece. *Rule discharged.*

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ENGLISH NOTES.

The case of *Doe d. Williams* v. *Pasquali*, referred to in the judgment of BEST, Ch. J., was an ejectment by a person claiming to be a devisee of the original landlord. The will being disputed in the Ecclesiastical Court, the tenant had refused payment of the rent to the plaintiff, saying he was ready to pay to any person entitled to receive it. The Court held this was not such a denial of the title as to make notice to quit unnecessary.

A tenancy from year to year does not determine by the death of the tenant; nor by the death of the landlord, if the estate passes to his heir-at-law or devisee. *Doe d. Shore* v. *Porter* (1789), 3 T. R. 13, 1 R. R. 626; *Maddon d. Baker* v. *White* (1787), 2 T. R. 159, 1 R. R. 453. Lord KENYON, Ch. J., in the former of these cases, after pointing out how the tenancy from year to year succeeded to the old tenancy at will, and how the Courts, to obviate the inconvenience of the tenancy, raised an implied contract from year to year, said: "All the inconveniences which arise between the original parties themselves, and against which the wisdom of the law has endeavoured to provide by raising the implied contract, exist equally in the case of their personal representatives." He doubtless used the word "personal" as the case in point related to the death of a tenant; but the general proposition would doubtless be more correct if this word were omitted.

In the case, however, where the original landlord is tenant for life only, the right at common law of the tenant from year to year was determined by his death. The tenant then became tenant by sufferance only, and entitled to no notice to quit. This indeed is one of the reasons of the judgments in the principal case, though the judgments of BEST, Ch. J., and PARKE, J., went also on the ground of denial of the title. The tenant was, in such a case, entitled to the emblements. (See "Emblements," 10 R. C. 380, 392.) By the Landlord and Tenant Act, 1851 (14 & 15 Vict., c. 25, s. 1), a tenant at rack rent whose right was determined in this way was given, in lieu of emblements, the right to continue to hold until the expiration of the then current year of the tenancy, and should then quit, on the terms of his lease, in the same manner as if the lease were then determined by effluxion of time; and it was provided that, in order so to determine the tenancy, no notice to quit should be necessary.

The proposition of BEST, Ch. J., that "notice to quit is only necessary where a tenancy is admitted on both sides, and if a defendant denies the tenancy, there can be no necessity for a notice to end that

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which he says has no existence," is cited, and followed by FRY, J., in *Vivian* v. *Moat* (1881), 16 Ch. D. 730, 50 L. J. Ch. 331, 44 L. T. 210, 29 W. R. 504, where, after the landlord had raised the rent, the trustees under his will claimed the enhanced rent. The correspondence which ensued was construed by FRY, J., as a denial on the part of the defendant that the landlord had power to raise the rent, which was equivalent to a denial of his title.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sect. 45, and in Taylor on Landlord and Tenant, sects. 472, 522.

If the tenant disclaims to hold under the landlord, and refuses rent, notice to quit is unnecessary, and he may be instantly proceeded against for ejection. *Bates* v. *Austin*, 2 A. K. Marshall (Kentucky), 270; 12 Am. Dec. 395; *Jackson* v. *French*, 3 Wendell (N. Y.), 337; 20 Am. Dec. 699; *Ingraham* v. *Baldwin*, 9 New York, 47; *Emerick* v. *Tavener*, 9 Grattan (Virginia), 220; 58 Am. Dec. 217; *Brown* v. *Keller*, 32 Illinois, 151; 83 Am. Dec. 258; *Duke* v. *Harper*, 6 Yerger (Tennessee), 280; 27 Am. Dec. 462; *Tillotson* v. *Kennedy*, 5 Alabama, 407; 39 Am. Dec. 330; *Whaley* v. *Whaley*, 1 Spears Law (So. Car.), 225; 40 Am. Dec. 594; *Rabe* v. *Fyler*, 10 Smedes & Marshall (Mississippi), 440; 48 Am. Dec. 763; *Springs* v. *Schenck*, 99 North Carolina, 551; 6 Am. St. Rep. 552; *Bodwell G. Co.* v. *Lane*, 83 Maine, 168; *Ramsey* v. *Henderson*, 91 Missouri, 560; *Willison* v. *Watkins*, 3 Peters (U. S. Sup. Ct.), 43; and cases in note, Taylor on Landlord and Tenant, sect. 522.

"No notice to quit is ever necessary unless the relation of landlord and tenant exists, and a disclaimer of tenancy dispenses with such notice. If one in as a tenant repudiates this relation, and denies that he holds under his landlord, the landlord may at his own election treat the tenancy as terminated." *Appleton* v. *Ames*, 150 Massachusetts, 34; 5 Lawyers' Rep. Annotated, 206; citing *Tuttle* v. *Reynolds*, 1 Vermont, 80; *Harrison* v. *Middleton*, 11 Grattan (Virginia), 527; *Duke* v. *Harper*, *supra*; *Boston* v. *Binney*, 11 Pickering (Mass.), 1.

No. 51. — DOE d. MURRELL *v.* MILWARD.

(EX. 1838.)

RULE.

A NOTICE to quit given for a date for which the party thinks himself, but is not, entitled to give notice, is inoperative, and cannot be treated by the other party as determining the tenancy at that date.

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Doe d. Murrell v. Milward and another.

3 Meeson & Welsby, 328–332 (s. c. 7 L. J. (N. S.) 57).

Landlord and Tenant. — Determination of Tenancy. — Invalid Notice to quit. — Surrender.

[328] A tenant from year to year, believing that his tenancy determined at Midsummer, gave a written notice to quit at that period, which the landlord accepted, and made no objection to. The tenant having afterwards discovered that his tenancy expired at Christmas, gave his landlord another notice accordingly, and, on possession being demanded at Midsummer, refused to quit the premises. An ejectment having been brought: *Held*, that the tenancy was not determined by notice, inasmuch as it was not good as a notice to quit, and could not operate as a surrender by note in writing within the Statute of Frauds, the first being to take effect *in futuro*.

Ejectment to recover possession of a house and premises at Horsham, in Sussex. The demise was laid on the 27th June, 1837. At the trial before LITTLEDALE, J., at the last Summer Assizes for the above county, it appeared that the defendants were yearly tenants to the lessor of the plaintiff of the house and premises in question; and being desirous of leaving and going to occupy some premises of their own, in order to determine the tenancy they gave the lessor of the plaintiff a notice to quit, which was in the following words: —

"HORSHAM, 23rd December, 1836.

"We hereby give you notice that we intend to give and deliver up the possession of the messuage or tenement we now hold of you at Midsummer-day next. "WILLIAM MILWARD.

"ROBERT MILWARD.

"To HENRY MURRELL, Horsham."

*The lessor of the plaintiff accepted the notice without [*329] making any objection to it, but he gave no assent to it in writing. The tenant of the defendants having refused to quit the premises which they intended to remove to, they felt desirous of continuing in the occupation of the plaintiff's house; and having discovered that their tenancy commenced at Christmas instead of Midsummer, they, previously to Midsummer, gave a fresh notice to quit at the Christmas following. A demand of possession having been made on the expiration of the first notice, the defendants refused to deliver up possession, on the ground that their

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tenancy expired at Christmas and not at Midsummer, and this ejectment was accordingly brought. It was contended at the trial, on the part of the lessor of the plaintiff, that although the notice might be insufficient as a notice to quit, in case the tenancy expired at Christmas, yet it would operate as a surrender by operation of law of the defendants' interest, it being a note in writing within the meaning of the 3rd section of the Statute of Frauds. The learned Judge left it to the jury to say whether, on the evidence, the tenancy commenced at Midsummer or at Christmas, and the jury found the latter. The learned Judge, however, directed a verdict for the lessor of the plaintiff on the point as to the surrender, but gave the defendants leave to move to enter a nonsuit. TYNDALE having in Michaelmas Term last obtained a rule accordingly, on the authority of *Johnstone* v. *Hudlestone*, 4 B. & C. 922 (p. 638, *ante*),

Thesiger and Ogle now showed cause. This is the case of a written notice, which distinguishes it from *Johnstone* v. *Hudlestone*, where the notice was by parol; and though it may be bad as a notice to quit, from its being given for a wrong period of the year, yet, being in writing, and having been accepted by [* 330] the landlord, it amounted to a * surrender by operation of law of the defendants' interest in the land. In *Aldenburgh* v. *Peaple*, 6 C. & P. 212, PARKE, B., said, "The landlord might, if he had chosen, have treated this irregular notice to quit as a surrender, as a term of this kind may be surrendered by a note in writing; but he has not done so." [PARKE, B. — Is not that case in effect overruled by *Weddall* v. *Capes*, 1 M. & W. 50?] There are many cases which might be cited to show that no particular form of words is necessary to constitute a surrender; all that the Statute of Frauds requires is, that an intention to surrender should be expressed in writing. The third section enacts that "no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be surrendered, unless it be by deed or note in writing, signed by the party so surrendering the same, or his agent thereunto lawfully authorised by writing, or by act and operation of law." In *Farmer* v. *Rogers*, 2 Wilson, 26, a receipt for the mortgage money on the back of a mortgage deed was held to amount to a surrender of the term created by the mortgage,

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which shows that a surrender may be without deed or sealing. Here the words are, "We hereby give you notice that we intend to give and deliver up possession of the messuage or tenement we now hold of you at Midsummer-day next." [PARKE, B. — It is *in futuro;* there is the difficulty.] It did not require the assent of the lessor at the time; but it contained a proposal which the landlord must be taken to have assented to up to Midsummer-day, and it then took effect as a surrender. The tenant had not then any power to assent or dissent. It is clear that the defendants intended to part with their whole interest, and that is sufficient, without using the term "surrender." [ALDERSON, B. — Then there is an offer by * the tenant to do a thing at a [* 331] certain day, and when the time comes he changes his mind and refuses to do so.] In *Doe d. Eyre* v. *Lambly*, 2 Esp. 635 (5 R. R. 758), where a tenant, on being applied to respecting the commencement of his holding, informed the party that it began on a certain day, and notice to quit on that day was given at a subsequent time, it was held that he was bound by the information he had so given, and was not permitted to show that in fact the tenancy commenced at a different time. This is a stronger case than that, because here there is a written notice to quit, which is not like information which may have been given by the tenant when he was unprepared, but is a deliberate act. The giving of this notice is an admission which binds the tenant, that the tenancy expired at the time mentioned in it. [ALDERSON, B. — In the case cited, Mr. Garrow asked Lord KENYON to give an opinion as to what ought to be done. It was rather a statement of facts made on the one side and assented to on the other. If the jury here had found a different verdict, it might possibly have been a more sensible course.] This notice, however, amounted to a clear surrender by operation of law. At all events, there ought to be a new trial and not a nonsuit, as this point was not put distinctly to the jury, and the plaintiff will be concluded by a nonsuit being entered.

Andrews, Serjt., and Tyndale, *contra.* — There is no authority to show that a defective notice to quit will operate as a surrender; but *Johnstone* v. *Hudlestone* appears to be a decision to the contrary. There a tenant gave a parol notice to his landlord, less than six months before his year's holding expired, that he would quit on a certain day, and the landlord accepted and assented to

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the notice; and it was held that the tenancy was not thereby determined, there not having been either a sufficient notice [* 332] * to quit, or a surrender in writing, or by operation of law, within the meaning of the Statute of Frauds. There is no distinction, for this purpose, between a parol notice and a written one. It is said that the landlord assented to the notice, but so he did in *Johnstone* v. *Hudlestone*. The landlord, however, in truth, never did any act to show his assent to it, until Midsummer-day, when the tenant dissented from it. There was no assent at that time by both parties that it should operate as a surrender; and it could not operate before, being *in futuro*. *Weddall* v. *Capes*, 1 M. & W. 50. The Court will not grant a new trial, as the case was left fully to the jury, and they found the question as to the tenancy in favour of the defendants.

PARKE, B. — I am very strongly of opinion that there cannot be a surrender to take place *in futuro*. In *Johnstone* v. *Hudlestone* it was held that an insufficient notice to quit, accepted by the landlord, did not amount to a surrender by operation of law, and it was there agreed that there could not be a surrender to operate *in futuro*. The case of *Aldenburgh* v. *Peaple* was much shaken by the decision of this Court in *Weddall* v. *Capes;* for, although this precise point is not there determined, yet it is clear that the Court were of opinion that the instrument could not operate as a surrender *in futuro*. As to granting a new trial, there appears to have been conflicting evidence as to the time at which the tenancy commenced; but that the jury have determined in favour of the defendant.

ALDERSON, B. — There was evidence to show that this was a tenancy commencing at Christmas, and the jury have so found. We cannot therefore grant a new trial. The lessor of the plaintiff can bring a fresh ejectment, if he pleases.

The other Barons concurred. *Rule absolute to enter a nonsuit.*

ENGLISH NOTES.

The rule is, in effect, a particular application of the rule already stated under *Johnstone* v. *Hudlestone*, No. 49, p. 638, *ante*.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sect. 44, and Pingrey on Real Property, sect. 506, and Taylor on Landlord and Tenant, sects. 481,

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510. The American doctrine on the point is summed up in Browne on Statute of Frauds (sect. 47), as follows: —

"Upon the question whether a surrender must have an immediate operation, or may take effect *in futuro*, there is an apparent conflict in the English cases. It is true that the Court of Exchequer has once directly decided (*Doe* v. *Milward*, 3 Mees. & W. 328), that a surrender could not be made to take effect *in futuro*, but the grounds of that conclusion are not stated, and the authorities referred to hardly sustain it. One of them, a case decided two years before, also in the Exchequer, was upon a written surrender to take effect on a future day, and on condition of a certain sum of money being paid. It did not appear that the condition had been performed, and it was held that the surrender had not operated; but Baron PARKE expressed his opinion that it should appear to be the intention of the parties that the term should immediately cease, in order to make a valid surrender. (*Weddall* v. *Capes*, 1 Mees. & W. 50.) Another case referred to in support of this doctrine is that of *Johnstone* v. *Hudlestone*, in the Queen's Bench, where an insufficient notice to quit was verbally given by the tenant and accepted by the landlord; and there, so far from deciding that there could be no surrender to operate *in futuro*, one of the Judges declined to give an opinion on the point, and the other expressed his opinion that, if acceptance by the landlord had been in writing, it would have been a good surrender. (*Johnstone* v. *Hudlestone*, 4 Barn. & C. 922.) On the other hand, it was stated by the Court, at Nisi Prius, in *Aldenburgh* v. *Peaple*, where a tenant from year to year gave an irregular notice to quit, that if the notice was in writing and signed by the tenant, the landlord might treat it as a surrender of the tenancy. (*Aldenburgh* v. *Peaple*, 6 Carr. & P. 212.) In the more recent cases of *Williams* v. *Sawyer*, in the Common Pleas, *Williams* v. *Sawyer*, 3 Brod. & B. 70, *Nickells* v. *Atherstone*, in the Queen's Bench, *Nickells* v. *Atherstone*, 10 Q. B. 944, and *Foquet* v. *Moor*, in the Court of Exchequer, *Foquet* v. *Moor*, 7 Exch. 870, the question seems to have been treated as unsettled. In the Supreme Court of New York the contrary doctrine to that of *Doe* v. *Milward* has been held, and supported by reasoning which appears satisfactory. An unsealed agreement was made by a lessee, to relinquish, upon failure to perform certain stipulations, a lease previously executed under seal, and it was decided that the agreement, though inoperative as a defeasance for want of a seal, was valid as a contingent surrender. COWEN, J., in delivering the judgment of the Court, said that a surrender, when complete, 'is, as it were, a re-demise. It may be made upon condition, that is, to become void upon condition; and though no case goes so far as to say that a surrender may be made to become good upon condition precedent, yet there seems to be no objection to that in principle, if the interest surrendered be not a freehold. That cannot in general be granted to take effect *in futuro*, but a term for years can. The surrender of a term, to operate *in futuro*, is equally free of the objection. Contracts of parties, whether by deed or otherwise, should always take effect according to their real intent, if that be possible consistently with the rules of law.' *Allen* v. *Jaquish*, 21 Wend. 635."

The mere acquiescence by a tenant in an insufficient notice to quit will not render such notice valid, so as to terminate the tenancy. *Re Magee*, 10 Manitoba, 1.

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No. 52. — DOE d. ASLIN *v.* SUMMERSETT.

(K. B. 1830.)

RULE.

A NOTICE to quit by one of joint tenants who have made a joint demise, determines the tenancy as to all.

Doe d. Aslin v. Summersett.

1 Barn. & Adol. 135–142.

Joint Tenancy. — Tenancy from Year to Year. — Notice to quit by one of Joint Tenants.

[135] A notice to quit, signed by one of several joint tenants, on behalf of the others, is sufficient to determine a tenancy from year to year, as to all.

Ejectment on the joint demise of James Aslin and John Finch. Plea, general issue. At the trial before Lord TENTERDEN, Ch. J., at the London sittings after Trinity Term, 1828, the [* 136] only question was as to * the sufficiency of the notice to quit. The lessors of the plaintiff were executors and joint devisees under the will of John Ricketts deceased. The defendant had held the premises in question under a lease from Ricketts; that lease had expired in 1822. The defendant afterwards continued to occupy the premises as tenant from year to year, and had from time to time paid rent to Aslin, one of the lessors of the plaintiff. On the 22nd of December, 1827, a notice to quit at Midsummer, 1828, signed by John Finch, one of the lessors of the plaintiff, on behalf of the trustees of the late John Ricketts, was served upon the defendant. It was contended by the defendant, on the authority of *Right* v. *Cuthell*, 5 East, 491 (7 R. R. 752), that the notice, having been signed by one of two joint tenants, was insufficient. Lord TENTERDEN was of opinion that the notice was sufficient, and directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that the notice was insufficient. A rule *nisi* having been obtained for that purpose,

The Attorney-General and R. V. Richards, on a former day in this term, showed cause. A notice to quit, signed by one of two

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joint tenants, is sufficient if it be afterwards adopted by the other. The joint tenant who signs may be considered the agent of the other. Here the bringing the ejectment in the names of the two, is not only a ratification of the act done by the one, but is evidence of a prior authority from the other. If that be so, then the notice to quit must, in this case, * be considered [* 137] to have been the notice of both joint tenants at the time when it was given. But, independently of an adoption, a notice to quit, signed by one of several joint tenants, must be considered, in point of law, as the notice of all the joint tenants, for they have a unity of interest, a unity of title, and a unity of possession. The act of one is, in many cases in law, considered the act of all. The entry of one joint tenant is the entry of all, and the seisin and possession acquired by such entry is the seisin and possession of all. Besides it is a rule of law that every act done by one joint tenant, for the benefit of himself and companion, is to be deemed the act of both. Livery of seisin made to one joint tenant will enure to both, and the entry or re-entry of one joint tenant is as effectual as that of both. A notice to quit must be taken *primâ facie* to be for the benefit of all, the object of it being to determine the tenancy. In *Right* v. *Cuthell*, 5 East, 491 (7 R. R. 752), the proviso in the lease was, that either landlord or tenant, or their executors, in case they wished to determine the lease, should give notice in writing under his or their respective hands. The lessor died, having made his will, wherein he appointed three executors. Notice to determine the lease was signed by two only. That clearly was not a sufficient compliance with the terms of the proviso, and, on that ground, the decision in that case may be supported. The opinions there expressed by Lord ELLENBOROUGH, Ch. J., and LAWRENCE, J., as to the insufficiency of such a notice by one of several joint tenants, even though there were a subsequent adoption, were extra-judicial.

* Campbell and Collins, *contra*. — There was no evidence [* 138] to show that Finch had any previous authority from Aslin to give the notice to quit. The notice ought to have been such that the tenant could act upon it with certainty at the time when it was given. There was nothing in this to prevent Aslin from saying that he had not given any notice. A subsequent adoption is not sufficient. In *Right* v. *Cuthell*, 5 East, 491 (7 R. R. 752), it was contended that the bringing of the ejectment in the name

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of all the joint tenants was not merely a recognition, but was evidence of a prior authority from the third executor. Lord ELLENBOROUGH, as to that point, said, "A ratification given afterwards will not do, because the tenant was entitled to such a notice as he could act upon with certainty at the time it was given; and he was not bound to submit himself to the hazard whether the third executor chose to ratify the act of his companion or not before the six months elapsed;" and LAWRENCE, J., seems to have concurred in that opinion. *Right* v. *Cuthell*, therefore, is an authority to show that a subsequent adoption of a notice to quit given by one of several joint tenants is not sufficient; and in *Goodtitle* v. *Woodward*, 3 B. & Ald. 689, it was admitted in argument, that if all the joint tenants had not employed an agent, but had given the notice themselves, all must have signed it; and if any one had omitted to sign, it would have been insufficient; but there an agent was deputed by the joint tenants to give the notice, and a subsequent recognition of his authority by all the trustees signing it before the ejectment, gave validity to the authority from the beginning. But, secondly, it is urged that a notice to [*139] quit by *one of several joint tenants, independently of any adoption by the others, is sufficient to determine the tenancy on the part of all. That point was made in *Right* v. *Cuthell*, and Lord ELLENBOROUGH there says: "The rule of law is, that every act of one joint tenant, which is for the benefit of his co-joint tenant, shall bind him. And it is a condition on the part of those who set it up, and would avail themselves of it as binding, to show that it was beneficial to the other." Here there is nothing to show that it is beneficial to Aslin to determine the tenancy. In *Doe* v. *Chaplin*, 3 Taunt. 120 (12 R. R. 615), the notice to quit was from three joint tenants out of four; there were several demises from each joint tenant, and the Court of Common Pleas were of opinion that the lessors of the plaintiff had a right to recover three-fourths only. *Cur. adv. vult.*

Lord TENTERDEN, Ch. J., now delivered the judgment of the Court.

This case depended upon the sufficiency of a notice to quit. The defendant had held under a lease, which expired in 1822. Before the lease expired, the lessor devised to the two lessors of the plaintiff, together with another person, who died before the transac-

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tions in question, as joint tenants; and died. Upon the expiration of the lease, the defendant continued to occupy the premises as tenant from year to year. A notice to quit was duly served upon the defendant, but it was signed by one only of the lessors of the plaintiff (though it imported to be given on behalf of himself and the other lessors), and whether that notice put an end to the defendant's *tenancy was the question. Two [*140] grounds were insisted upon by the lessors of the plaintiff: one, that the adoption of this notice by the other lessor of the plaintiff made it of the same validity as if it had been signed by both of them; the other, that without any such adoption a notice to quit by one of the joint tenants put an end to the tenancy as to both; and we are of opinion that the latter ground is right.

When joint tenants join in a lease, each demises his own share: Co. Litt. 186 a; and each may put an end to that demise as far as it operates upon his own share, whether his companions will join with him in putting an end to the whole lease or not: *Doe, Lessee of Whayman*, v. *Chaplin*, 3 Taunt. 120 (12 R. R. 615); so that upon the notice to quit in this case, no doubt a third might have been recovered, had there been a separate demise. But, though upon a joint lease by joint tenants each demises his own share, this is not the only operation of such a lease. Joint tenants are seised not only of their respective shares, *per my*, but also of the entirety, *per tout*. Litt., s. 288. The rent reserved will enure jointly to all the lessors: Co. Litt. 47 a, 192 a, 214 a; and if any of them die, the lessee shall hold the whole as tenant to the survivors. Upon a joint demise by joint tenants upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please; and as soon as any one of the joint tenants gives a notice to quit, he effectually puts an end to that tenancy; the tenant has a right upon such a notice to give up the whole, and unless he comes to a new arrangement with the *other joint tenants as to their shares, he is compellable [*141] so to do. The hardship upon the tenant, if he were not entitled to treat a notice from one as putting an end to the tenancy as to the whole, is obvious; for however willing a man might be to be sole tenant of an estate, it is not very likely he should be willing to hold undivided shares of it; and if upon

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such a notice the tenant is entitled to treat it as putting an end to the tenancy as to the whole, the other joint tenants must have the same right. It cannot be optional on one side, and on one side only.

It is certainly true that in *Doe* v. *Chaplin*, 3 Taunt. 120 (12 R. R. 615), upon a notice to quit from three joint tenants out of four, where there were separate demises from each joint tenant, the Court gave it as their opinion that the lessors of the plaintiff had a right to recover three-fourths; but it was not necessary for the Court to decide there as to the remaining fourth, for the plaintiff had recovered nothing, the jury had found for the defendant, and the Court was only granting a new trial. The case of *Right* v. *Cuthell*, 5 East, 491 (7 R. R. 752), which was relied upon at the bar, is clearly distinguishable. There a lease for twenty-one years from Adams to Cuthell was determinable at the end of fourteen years, upon six months' notice in writing by landlord or tenant, their respective heirs, executors, &c., under his or their hands. Adams made Fisher, Nash, and Hyrons executors, and Fisher and Nash only gave the notice. The case was put, not upon the ground that they were executors, but upon the ground that they were joint tenants, and that, circumstanced as that case was, where a mode specifically pointed out was to be [*142] *pursued in order to put an end to a subsisting term, and that mode required the concurrence of all the joint tenants, a notice by some of the joint tenants only would have no operation; but that concludes nothing upon a case in which a notice by one only of the joint tenants would clearly operate upon his share, and where the confining it to that share might work great injustice to the defendant.

We are, therefore, of opinion that the notice was sufficient to put an end to the tenancy *in toto*. *Rule discharged.*

ENGLISH NOTES.

It was ruled by Lord ELLENBOROUGH in *Doe d. Macartney* v. *Crick* (1805), 5 Esp. 196, 8 R. R. 848, that where two held jointly, on a yearly tenancy, notice to quit given to one, even by parol, is sufficient for both.

It will be seen that the rule in the principal case was again applied in *Alford* v. *Vickery*, No. 53, p. 668, *post*.

The reasoning of the judgment in the principal case does not apply where an estate is held by tenants in common, and each demises his

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share. In such a case the notice to quit by each would appear to affect only his own share. See, *in pari materiâ*, *Cutting* v. *Derby* (1775), 2 W. Bl. 1075; *Wilkinson* v. *Hall* (1835), 1 Bing. N. C. 713.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sect. 39, and Taylor on Landlord and Tenant. Wade (Notice, § 616), says: "There is some conflict, but the weight of authority seems to be that such notice must come, either directly or indirectly, from all, in order to be binding upon the party notified, as to the entire interest represented by the opposite parties." Citing *Right* v. *Cuthell*, 5 East, 401; *Doe* v. *Chaplin*, 3 Taunt. 120; *Goodtitle* v. *Woodward*, 3 B. & Ald. 689; *Pickard* v. *Perley*, 45 New Hampshire, 188; 86 Am. Dec. 153; *contra*, *Doe* v. *Summersett*, 1 B. & Ad. 135. The New Hampshire case however clearly recognizes the authority of the principal case, observing it "must be considered an authority directly to the point that the notice was sufficient in the case before us, unless under our statute a different rule is to prevail." Therefore I think our text-writers are in error in saying that it denies the authority of *Doe* v. *Summersett*, for it seems to be based on the State statute, and the statute was held to work a different rule. This case contains an exhaustive review of the English authorities.

Freeman on Co-Tenancy (sect. 180) cites the principal case, and says that in England "there seems to be but little doubt of its doctrine." He also cites the New Hampshire case, as "the only American case coming within our observation" on the point in question, and says: "It is also clear that the Court which determined this case was inclined to doubt the correctness of what we have stated to be the law in England," quoting language from it to the effect that the construction is dependent on the form of the lease — whether a several or a joint demise. Mr. Freeman sums up: "Whether a notice by one or more lessors shall or shall not be held to terminate the tenancy between the lessee and the lessor, who did not join in giving or authorizing such notice, it is in either event clear that neither co-tenant has, by virtue of the ordinary relations of co-tenants, any authority to act as agent of his companions in giving such notice. If the notice has any effect over the moieties of the owners who do not unite in it, this effect arises not from any presumed relation between the co-tenant authorizing one to act as agent for the other, but from the nature of the leasing, and from the natural and reasonable presumption that the lessee never contemplates being a lessee of an undivided interest."

In *State* v. *Klein*, 54 New Jersey Law, 479, it was held, on the authority of *Harrison* v. *Barnby*, 5 T. R. 246, that one joint tenant was entitled to demand and receive the rent in whole or in part, "and therefore he was the person in legal contemplation authorized and entitled, in the absence of any dissent on the part of the others, to sign and give the notice requisite by the statute to give jurisdiction in these proceedings," — summary proceedings to dispossess the tenant.

Entry by one tenant enures to the benefit of all. *Young* v. *Adams*, 14 B. Monroe (Kentucky), 127.

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No. 53. — ALFORD *v.* VICKERY.

(N. P. 1842.)

RULE.

ON the expiry of the notice the tenancy is at an end; and if the tenant holds over, compensation cannot be recovered by distress.

Alford v. Vickery.

Carrington & Marshman, 280–284.

Landlord and Tenant. — Notice to quit. — Distress for Rent after expiry of Notice.

[280] Four trustees were joint landlords of a house under a deed of trust; and notice to quit was served upon the tenant, but signed by three of them only. *Held*, that the notice was sufficient to put an end to the connection between all the parties as landlord and tenant.

Notice to quit was given, and it expired at Lady-day, 1840; the tenant held on till Lady-day, 1841, but since the former period there had been no payment of rent, nor any other overt act to show that a new tenancy was created. The landlord distrained for rent due at Lady-day, 1841. *Held*, that the distress was not justifiable. The landlord ought to have sued for use and occupation.

A notice to quit is sufficiently served upon a tenant, if it can be shown that it came to his hands before the six months previous to the expiration of his year of holding, though the notice had been served only by having been put under the door of the tenant's house.

Trespass, for breaking and entering the plaintiff's house, and seizing his goods. Plea, that one James Baker held and enjoyed the premises as tenant to the defendant and three others, — namely, the Hon. Newton Fellowes, Mr. Northcote, and Mr. Reed, — at the yearly rent of five guineas, and that the defendant entered and distrained for a year's rent in arrear at Lady-day, 1841. Replication, *non tenuit*.

There was a new assignment of trespasses on other occasions, and to them a similar plea was pleaded, justifying an entry to distrain for a year's rent due at Lady-day, 1840. Replication, *non tenuit*.

The defendant, with the others mentioned in the plea, were co-trustees of a charity estate belonging to the parish of Chawleigh in Devon. Under the provisions of their trust they appointed

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the plaintiff, in 1815, to be schoolmaster of the parish, and for many years he occupied the house in question (which belonged to the trustees, and the yearly rent of which they assumed to be five guineas) as part of his emoluments. He afterwards quitted the house, still continuing schoolmaster. It was then let at a public survey, at which both the plaintiff and defendant were present. James Baker became the tenant, and the rent was received by the defendant, and accounted for by him to the plaintiff up to the year 1838, when Baker refused any longer to pay rent to the defendant, alleging that the plaintiff was his landlord.

* One question of fact was, whether Baker were tenant [* 281] to the plaintiff or to the persons mentioned in the plea.

The defendant distrained on Baker for the year's rent due at Lady-day, 1840; and six months before that time the notice to quit, dated 7th September, 1839, was put under the door of the house. Baker's wife proved that the notice was received by her husband and taken to his attorney before the 29th of September, 1839. It was also proved that Baker quitted possession on the 25th of March, 1840, but he gave up the key to the plaintiff, not to the defendant.

The notice to quit required Baker to give up the house rented by him of the four persons named in the plea, on the 25th of March then next following. It was signed by the defendant, Mr. Fellowes, and Mr. Reed, but not by Mr. Northcote. The defendants began; and at the end of their case,

Erle and Butt, for the plaintiff, submitted, among other things, that the plaintiff was at all events entitled to recover; for Baker, supposing him to have been tenant to the four trustees up to Lady-day, 1840, had ceased to be so on the expiration of the notice to quit, and by that notice the tenancy was put an end to on that day. After that, had Baker remained in possession as he did, the landlords might have sued him for use and occupation, but they could not distrain for rent, there being no proof of any subsequent payment of rent, or any facts from which a new tenancy at the old rent could be presumed. They cited *Jenner* v. *Clegg*, 1 Moody & Rob. 213; *Doe d. Aslin* v. *Summersett*, 1 B. & Ad. 135 (p. 662, *ante*).

Bere and Rowe, for the defendant. — The notice to quit did not determine the tenancy, for it was not signed by all

* the landlords, nor was it served so as to make it binding [* 282]

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on either side. And the fact that the landlords distrained for a year's rent due at Lady-day, 1841, is evidence of their having waived the notice, even if the notice were sufficient.

Erle and Butt, for the plaintiff. — The case of *Doe d. Aslin* v. *Summersett*, 1 B. & Ad. 135 (p. 662, *ante*), decides expressly that a notice to quit by one of several joint tenants determines the tenancy as to all, and the plaintiff recovered there in the action upon a joint demise by them all.

Again, if the notice to quit determined the tenancy as
[*283] *to three only of the landlords, as the defendant says, and not as to all, then the issue upon *non tenuit* is disproved, as in *Philpott* v. *Dobbinson*, 6 Bing. 104, 3 M. & P. 320.

Then, as to the service. The notice came to the hands of the tenant before Michaelmas, 1839, and was acted upon by him, and the landlords cannot now say that the service was defective.

Lastly, the landlords could not waive their notice, at their own option; and there is no evidence of any new tenancy after Lady-day, 1840.

Bere and Rowe, for the defendant, submitted that there was evidence for the jury of a new tenancy, and also that, upon such service as that which had been proved, the landlords could not have supported ejectment. The service, therefore, was not sufficient.

Coleridge, J. — I am of opinion that the notice to quit put an end to the tenancy as to all the joint lessors; and that, consequently, the relation of landlord and tenant, on the terms stated in this plea, did not exist between the four trustees and Baker after Lady-day, 1840. The distress, therefore, for a year's rent due at Lady-day, 1841, was not justifiable. I am also of opinion that the notice to quit was sufficiently served. It came to the hands of Baker before Michaelmas-day, 1839, and he acted upon it by quitting at Lady-day, 1840. It is equally clear that there is nothing which can go to the jury to show that a new tenancy was created for the year ending at Lady-day, 1841. As to the action, therefore, I think the plaintiff is entitled to recover. The issue upon the plea to the new assignment will depend
[*284] upon the question whether the *jury think that Baker, up to Lady-day, 1840, was tenant to the trustees of this charity, or to the plaintiff.

Verdict for the plaintiff generally.

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ENGLISH NOTES.

At common law rent could not be distrained for after the determination of a tenancy by notice to quit, although the rent accrued due before the expiry of the notice. *Williams* v. *Stevens* (1846), 8 Q. B. 14. This was remedied by the Act of 8 Anne, c. 14, s. 6. But by the old rules of strict pleading, the avowry in such a case ought to be framed on the statute. Ib.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sects. 445, 539, and Taylor on Landlord and Tenant, sect. 479. This common-law rule has been changed by statute in some States, but is recognized in *Bukup* v. *Valentine*, 19 Wendell (N. Y.), 554; *Terboss* v. *Williams*, 5 Cowen, 407; *Burr* v. *Van Buskirk*, 3 id. 263.

No. 54. — DOE d. NICHOLL *v.* M'KAEG.

(K. B. 1830.)

RULE.

A TENANCY at will (strictly so called) is determined by demand of possession.

Doe d. Nicholl v. M'Kaeg.

10 Barn. & Cress. 721–724.

Tenant at Will (strictly so called). — Demand of Possession.

A minister of a dissenting congregation placed in the possession of a [721] chapel and dwelling-house by certain persons, in whom the legal estate is vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those trustees; and his tenancy is determined instanter by a demand of possession. He is not entitled *de jure*, before the determination of his tenancy, to have a reasonable time allowed him for the removal of his furniture.

Semble, that he will not be a trespasser, if he enter afterwards to remove his goods, and continue a reasonable time for that purpose.

Ejectment for a chapel, two messuages, and two yards. Plea, not guilty. At the trial before PARK, J., Sir J. A., at the last assizes for the county of York, it appeared that the defendant was a dissenting minister, the premises sought to be recovered being the meeting-house and dwelling-house adjoining thereto; that

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both the dwelling-house and meeting-house had been con-
[*722] veyed to *the lessors of the plaintiff as trustees for the congregation; that they had placed the defendant in the possession of the same on his having been elected minister by the members of the congregation; that the latter having become dissatisfied with some of the doctrines of the defendant, in consequence wished to remove him, and came to a resolution to that effect. The trustees demanded possession, and immediately served a declaration in ejectment. The defendant had an annual salary of £20; and it was objected at the trial that the defendant was entitled to some notice to quit. The learned Judge reserved the point, and a verdict passed for the plaintiff. On a former day in this term,

F. Pollock moved pursuant to such leave. The defendant was entitled to some notice, and as, without any previous notice, the declaration in ejectment was served immediately after the demand of possession, the plaintiff ought to have been nonsuited. The defendant was not, strictly speaking, a tenant at will; he was occupying the house exclusively; which distinguishes this case from that of a servant occupying part of his master's house; he was a tenant of some sort; he was, in fact, occupying the house as part of his reward for doing the duties of minister to the chapel. If he had been paid entirely by a salary, and had rented the house of the trustees, it is clear he would have been a tenant entitled to a regular notice to quit. Instead of paying rent in money, he paid rent by his services. Supposing that he was not entitled to a regular notice to quit, he was entitled to a reasonable notice, and could not, at a moment's warning, be called upon to go out with his family and furniture into the street at the
[*723] peril of being *dealt with as a trespasser. In all cases of a continuing contract, some reasonable notice must be given of putting an end to it. It is for the Court or jury to say what is a reasonable notice; but surely an exclusive occupation of a dwelling-house, as a part of a minister's reward, cannot be determined without some notice. Here there was none.

Cur. adv. vult.

Lord TENTERDEN, Ch. J. — This was an ejectment brought to recover from the defendant, who was minister of a dissenting congregation, a chapel and dwelling-house, which he was put in pos-

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session of by the lessors of the plaintiff, in whom the legal estate was vested, in trust to permit the chapel to be used for the purpose of religious worship. The defendant was tenant at will to them. It was contended that a demand of possession was not sufficient in this case to determine the tenancy, but that a reasonable time ought to have been allowed the defendant for the purpose of removing his goods. We can find no authority in the law for such a position. The general rule is, that where an estate is held at the will of another, a demand by that other determines the will. If, in this case, we were to hold otherwise, we should introduce a new rule, not to be found in the books, which might be productive of great inconvenience; for then, in every case of a tenancy at will, it might be made a question, what is a reasonable time for removing goods. If the tenant, after the determination of his tenancy in this case, by a demand of possession, had entered on the premises for the sole purpose of removing his goods, and continued there no longer than was necessary for
* that purpose, and did not exclude the landlord, perhaps [* 724]
he might not have been a trespasser; but, however that
may be, we are of opinion that he being a tenant at will, his estate was determined by a demand of possession, and, consequently, that the lessors of the plaintiff were entitled to recover.

Rule refused.

ENGLISH NOTES.

A similar case — *Doe d. Jones* v. *Jones* (1830), 10 B. & C. 718 — was decided by the same Court on the same principle. PARKE, J., says: "In this case the defendant (who had been minister of a dissenting chapel for sixteen years) had no other estate in the premises than that of tenant at will, and that had been put an end to by the demand of possession (by the trustees)."

It would not be easy to draw a clear line of distinction between the circumstances constituting the tenancy at will, which by legal presumption has grown into an implied tenancy from year to year, and the tenancy at will strictly so called. Perhaps all that can be said is, that the tenant of the latter class has been let into, or maintained in, possession by the owner or his predecessor in title under such circumstances that the intention to give or receive notice to quit in order to determine the tenancy cannot reasonably be inferred.

In *Doe d. R. Price* v. *T. Price* (1832), 9 Bing. 356, the principle of the rule was applied; and it was held that the will was sufficiently determined by a letter from the owner to the person in possession in

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these terms: "Unless you pay what you owe me, I shall take immediate measures to recover possession of the property." The property had seventeen years before been conveyed by the defendant (T. Price) to R. Price, and the defendant had been again let into possession, on what terms did not appear, and had continued in possession for about fifteen years. R. Price had offered a reconveyance upon payment of the debt, which he said amounted to more than the value of the property. TINDAL, Ch. J., from the length of possession, inferred that the defendant's interest was at least a tenancy at will, so that he might claim emblements. There was also evidence of a denial on the part of the defendant of the plaintiff's title, and this no doubt would have been a ground for the judgment even if the defendant had been entitled to the usual notice to quit. But the Judges clearly considered that he was not entitled to such notice.

Where the tenant (A.) held under an express agreement to become tenant to C. and D. of the premises "at their will and pleasure," at a rent payable quarterly, he was held to be strictly a tenant at will; and a week's notice, which had expired, was treated as a sufficient demand of possession. *Doe d. Baston* v. *Cox* (1847), 11 Q. B. 122, 17 L. J. Q. B. 3.

It has been laid down that a tenancy at will is determined by the death of either party. *James* v. *Dean* (1805), 11 Ves. 383, 391, 8 R. R. 178. But little is required to ground an inference of a fresh tenancy at will between the survivor and the representative of the other party. *Doe d. Stanway* v. *Rock* (1842), 4 Man. & Gr. 30, Car. & Marsh. 549, 6 Jur. 266. No such inference, however, arises in the case of the death of a mortgagor who has become tenant at will by attornment. The successor is only in the position of a tenant on sufferance, as the mortgagor without attornment would be. *Scobie* v. *Collins* (1895), 1 Q. B. 375, 64 L. J. Q. B. 10, 71 L. T. 775.

In the case of *Doe d. Davies* v. *Thomas* (1851), 6 Ex. 854, 20 L. J. Ex. 367, there is an instructive judgment by PARKE, B., as to the effect of acts by the owner indicating a determination of the will. He says: "I take the law on this subject to be, that if an assignment of the reversion takes place behind the back of the tenant, that does not determine the tenancy till notice, that is, until he has notice or knowledge from the assignee of the reversion, or has himself acquired the information. Then there is a determination of the tenancy. The law upon the subject is to be found fully in Co. Litt. 55 b: 'If a man leaseth a manor at will whereunto a common is appendant, if the lessor put in his beasts to use the common, this is a determination of the will. The lessor may by actual entry upon the ground determine his will in the absence of the lessee, but by words spoken from the ground, the will is

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not determined until the lessor hath notice.' If the lessor actually enter upon the land, though the lessee be not on the land, that is a determination of the tenancy. But if the matter takes places at a distance from the land, the tenant cannot be presumed to take notice of it, and such act does not determine the tenancy until he has notice. Every conveyance of the reversion is inconsistent with the will to occupy under him; but the lessee is not to be treated as a trespasser until he has had, not a formal notice, but knowledge of the conveyance, and as soon as he has that he must know that he is not to occupy; that is the effect of the passage from Co. Litt. and also of *Dimsdale* v. *Iles* (2 Lev. 88)."

"It is no determination of the tenancy at will for a man to assign over his interest to another, unless the lessor at will have notice." Per PARKE, B., in *Pinhorn* v. *Souster* (1853), 8 Ex. 763, 22 L. J. Ex. 266, 269, citing *Carpenter* v. *Collins*, Yelv. 73.

A beneficial owner let into possession by the trustee who has the legal title is tenant at will to the trustee. But this applies only when the beneficiary is in the actual possession. If he merely receives the rents from a tenant in possession, he is in the position of bailiff to the trustees, and the question whether the trustees have notice of the actual tenant being let into possession is immaterial for the purpose of determining a tenancy at will which cannot, in such circumstances, exist. *Melling* v. *Leak* (1855), 16 C. B. 652, 24 L. J. C. P. 187, 1 Jur. (N. S.) 759.

AMERICAN NOTES.

This case is cited in Pingrey on Real Property, sects. 616, 623, and in Washburn on Real Property, pp. 617, 620, 622.

The estate of a tenant at will is determined by demand of possession by the owner, and also by his own conveyance in fee. *Den* v. *Howell*, 7 Iredell Law (Nor. Car.), 496; *Dunne* v. *Trustees*, 39 Illinois, 578.

The general doctrine is that this species of tenancy may be terminated by any acts inconsistent with the continuance of the relation, such as conveyance of the fee. *Esty* v. *Baker*, 50 Maine, 325; *Jackson* v. *Aldrich*, 13 Johnson (N. Y.), 106.

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SECTION IV. — *Covenants in Leases.*

No. 55. — DUKE OF ST. ALBANS *v.* ELLIS.

(K. B. 1812.)

No. 56. — CANNOCK *v.* JONES.
JONES *v.* CANNOCK.

(EX. 1849; EX. CH. 1850; H. L. 1852).

RULE.

IN order to constitute a covenant, no technical words are necessary; it is sufficient if you can collect from the terms of the instrument an agreement that the thing is to be done, or not to be done, by the party.

Duke of St. Albans v. Ellis.

16 East, 352–355 (14 R. R. 361).

Lease. — Covenant. — Informal Words. — Intention.

[352] Covenant by lessee that he will at all times during the term plough, sow, manure, and cultivate the demised premises (except the rabbit-warren and sheep-walk) in a due course of husbandry; if lessee plough the rabbit-warren and sheep-walk, covenant lies against him.

The plaintiff declared in covenant upon an indenture of demise, dated 29th of September, 1796, whereby the late Duke demised to the defendant "all that park or place, or large tract of ground, situate in the parish of Lenton and Arnold, in the county of Nottingham, called Bestwood Park, and which was inclosed by a ring fence, and also all the messuages, &c., closes, farms, lands, tenements, and hereditaments comprehended within the said park or ring fence, with the appurtenances (except as therein excepted), to hold for twenty-one years from the date." The declaration then set forth covenants by the defendant to keep the buildings and fences in repair, and to make certain plantations yearly, "and also that the defendant should not at any time during the said term plough, break up, sow, or grow with corn, or convert into tillage any of the meadows or pasture ground thereby demised, or any part thereof, under the penalty of forfeiting and paying to the Duke, &c.,

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£20 for every acre that the defendant should so plough," &c. Then followed another covenant by the defendant, not to sell or carry off the premises straw, &c., but consume it upon the premises, &c., "and further, that the defendant should at all times during the said term plough, sow, manure, and cultivate the said premises thereby demised (except the rabbit-warren and sheep-walk), in a regular and due course of husbandry according to the custom of the country." The declaration then stated that the defendant entered on the demised premises, and that the reversion descended on the plaintiff; and then it proceeded to set out different breaches of covenant, *inter alia*, 8thly, * "that the [*353] defendant ploughed and sowed five hundred acres of the said rabbit-warren and five hundred acres of the said sheep-walk in the said indenture mentioned, contrary to the form and effect of the said indenture and of the covenant of the defendant." To this breach the defendant pleaded that he "did plough, sow, manure, and cultivate the said rabbit-warren and sheep-walk in a regular and due course of husbandry, according to the custom of the country, and according to the form and effect of the said indenture, and of the said covenant of the defendant by him in that behalf made as aforesaid." To this there was a general demurrer.

Reader, in support of the demurrer, observed, that no particular form of words was requisite towards making a covenant, and therefore wherever the intent of the parties could be collected out of a deed for the doing or not doing a thing, that was sufficient to constitute a covenant; in support of which proposition he cited *Lant* v. *Norris*, 1 Burr. 290, and *Hill* v. *Carr*, 1 Ch. Cas. 294. He then contended that the breach alleged fell either within the express covenant not to plough any of the meadow or pasture ground, under which description both the sheep-walk and rabbit-warren might well be considered, or within the implied covenant arising out of the exception of the rabbit-warren and sheep-walk; by which exception the parties clearly meant that neither the rabbit-warren nor the sheep-walk should be ploughed. The very nature of this property demands such a construction; for to allow its being ploughed would be nothing less than allowing of its destruction; and he cited *Cole's Case*, Salk. 196.

* Richardson, *contra*, argued that if it had been intended [*354] to restrain the defendant from ploughing up the sheep-walk or rabbit-warren, it would have been so expressed amongst

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the negative covenants, and not allowed to rest upon words introduced by way of exception to the affirmative covenants; which was in reality an exception for the benefit, and not in restraint of the tenant. By the covenant the tenant was bound to plough, sow, and manure in a husbandlike manner all the arable, but as to the excepted parts he was not to be under the same obligation. Suppose this, instead of being a covenant to cultivate the arable, had been a covenant to keep in repair the house, except the main timbers, would it be a breach of such covenant that the tenant had repaired the main timbers; or would he not in so doing be rather considered as having done more than by his covenant he was compellable to do? So here the object of the exception was to exempt and not to restrain the tenant. *Cur. adv. vult.*

Lord ELLENBOROUGH, Ch. J., now delivered the judgment of the Court. After stating the declaration, the plea, and the demurrer; and particularly the covenant stated in the declaration, whereby the defendant agreed that "he would from time to time, and at all times during the said term, plough, sow, manure, and cultivate the said premises thereby demised (except the rabbit-warren and sheep-walk) in a regular and due course of husbandry, according to the custom of the country," &c.; on which a breach was assigned for ploughing, &c., the rabbit-warren and sheep-walk, as upon an implied covenant that the parts so excepted should not be ploughed, &c., at all, — his Lordship continued: Upon consideration [*355] we think that the * object of introducing this exception (which is as much a covenant or agreement as the rest of the stipulation in which it is placed) was to obviate a conclusion which might otherwise be drawn from the generality of the antecedent words, that the duty of the lessee under the covenant extended to the ploughing, sowing, manuring, and cultivating all the demised premises, including the rabbit-warren and sheep-walk, which were not in their own nature the proper subject of such cultivation; and to declare that they should not be so dealt with, as indeed they could not, in any "regular and due course of husbandry according to the custom of the country," which are the words which follow the provision for ploughing, sowing, and cultivating; and not only to obviate the conclusion above mentioned, but to negative the doing thereof, or, in other words, to agree that it should not be done; considering the words "except the rabbit-

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warren and sheep-walk," in this place, as tantamount to the words "but not the rabbit-warren and sheep-walk," which would have imported more directly perhaps a negative of ploughing the rabbit-warren and sheep-walk. But by whatever words we collect an agreement that the thing should not be done, we collect enough to make an action of covenant maintainable for the doing of it. If the breach be well assigned, the plea is wholly immaterial and impertinent; for it is no answer that the lessee ploughed in a due course of husbandry that which he was bound by his covenant not to have ploughed at all. The plaintiff therefore is entitled to judgment upon his demurrer to this plea.

Judgment for the plaintiff.

Cannock v. Jones.

3 Ex. 233-239 (s. c. 18 L. J. Ex. 204).

Lease. — Covenant. — Informal Words. — Intention.

A farming lease contained the two following clauses: First, "The said [233] S. C. (the lessee) doth hereby covenant with E. J. (the lessor) in manner following: that he the said S. C. shall from time to time and at all times during the continuance of the said term hereby granted, at his own costs and charges, in all things well and sufficiently repair and glaze the windows of the said messuage, and also the hedges, ditches, etc., of and belonging to the said demised premises, and all fixtures, additions, and improvements thereto, during the said term, in and by and with all and all manner of needful and necessary reparations, cleansings, and amendments, when and as often as occasion shall require, the said farm-house and buildings being previously put in repair and kept in repair by the said E. J." The second clause was as follows: "And it is hereby agreed, by and between the said parties hereto, that the said E. J. shall and will, within eighteen months from the date of the lease, erect and build (*inter alia*) a new shed and stalls for feeding cattle, complete, at the upper end of the barn, &c.; and the whole of which is agreed to be left to the superintendence of the said S. C. and E. J., her son." *Held*, first, that the latter words in the first clause amounted to an absolute and independent covenant on the part of E. J. to put the premises into repair; and, secondly, that the provision in the latter clause, that the work should be left to the superintendence of S. C. and the son of E. J., was not a condition precedent to or concurrent with the covenant by E. J. to do the work.

Covenant. The declaration stated, that by a certain indenture made on the 29th of February, 1840, between the plaintiff of the one part, and the defendant of the other (*profert*), the defendant did demise, lease, set, and to farm let unto the plaintiff, his executors and administrators, a certain messuage or tenement, cot-

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tage, farm-house, and buildings, farm, lands and premises, with the appurtenances, in the said indenture more particularly mentioned, to have and to hold the same unto the plaintiff, his executors, administrators, and assigns, from the 20th day of March, 1840, for, and during, and unto the full end and term of seven years thence next ensuing and fully to be completed and ended; and the defendant did thereby covenant, promise, and agree to and with the plaintiff, that she the defendant would put the said farm-house and buildings in repair, and would keep them in repair during the said term; and that she the defendant should and would, within eighteen months from the date of the said indenture, erect and build a new shed and stalls for feeding cattle, complete, at the upper end of a certain barn, in and upon and parcel of the said demised premises, extending in a straight line with the said barn; and likewise erect and build a stone wall from such shed, extending to a certain gate in the said indenture mentioned, leading into a certain fold, in and parcel of the said demised premises; and new floor two rooms in the said cottage; and the whole [*234] of which to be left to * the superintendence of the plaintiff and Edwin Jones, the defendant's son. The declaration then averred that the plaintiff entered on the premises under and by virtue of the indenture, and contained an averment of general performance on the part of the plaintiff. It then proceeded to aver, that although a reasonable time, after the making of the said indenture, and also after the commencement of the said term, for the defendant to put the said farm-house and buildings into repair, had elapsed before the commencement of this suit, yet the defendant did not nor would within that time, or at any other time, put in repair the said farm-house and buildings, or any or either of them, contrary, &c.; and further, that the defendant did not nor would, after the making of the said indenture and during the said term thereby granted, keep the said farm-house and buildings in repair; and on the contrary thereof, after the making of the said indenture and during the continuance of the said term, to wit, &c., and from thence for a long time, to wit, &c., the defendant wrongfully suffered and permitted the said farm-house and buildings to be and continue, and they were for and during all that time out of repair by reason of the defendant's not keeping the same in repair, contrary, &c.; and further, that although eighteen months from the date of the said indenture had elapsed before the commence-

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ment of this suit, yet the defendant did not nor would within that period, or at any other time, erect and build a new shed and stalls for feeding cattle, complete, at the upper end of the said barn, extending in a straight line with the said barn, or otherwise; nor did nor would the defendant within that period, or at any other time, erect and build the said stone wall, so to be by her erected and built as aforesaid, from the said shed, extending to the gate leading into the fold, or otherwise; nor did nor would the defendant within that period or at any other time new floor two rooms in the said cottage, contrary, &c.

* The defendant pleaded (*inter alia*) *non est factum*, and [*235] upon that plea issue was joined. The cause was tried before PATTESON, J., at the last Spring Assizes for the county of Gloucester, when a deed under which the plaintiff held the premises in question was put in by him in support of his declaration, containing (*inter alia*) the two following clauses: "And the said Samuel Cannock doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said Elizabeth Jones, her heirs and assigns, in manner following, that the said Samuel Cannock, his executors or administrators, shall and will from time to time, and at all times during the continuance of the said term hereby granted, at his or their own costs and charges, in all things well and sufficiently repair and glaze the windows of the said messuage, and also the hedges, ditches, mounds, and fences of and belonging to the said demised premises, and all fixtures, additions, and improvements thereto, during the said term, in, by, and with all and all manner of needful and necessary reparations, cleansings, and amendments, when and as often as occasion shall require, the said farm-house and buildings being previously put in repair, and kept in repair by the said Elizabeth Jones." . . . "And it is hereby agreed by and between the said parties hereto, that she, the said Elizabeth Jones, shall and will, within ten months from the date of the within lease, erect and build a new shed and stalls for feeding cattle, complete, at the upper end of the barn, extending in a straight line with the barn, and likewise erect and build a stone wall from such shed, extending to the gate leading into the fold, and new floor two rooms in the cottage, and the whole of which is agreed to be left to the superintendence of the said Samuel Cannock and Edwin Jones her son." It was thereupon contended by the defendant's

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counsel that the words "the farm-house and buildings being previously put in repair, and kept in repair by the said [*236] Elizabeth Jones," contained * in the foregoing clause of the lease, did not amount to a covenant on the part of the lessor, and consequently that there was a variance between the declaration and the lease produced. The plaintiff had a verdict, with £60 damages, leave being reserved to the defendant to move to enter a nonsuit upon the question of variance.

A rule *nisi* having been obtained in pursuance of the leave reserved, and also to arrest the judgment upon the second breach, on the ground that it contained no allegation with reference to the work being under the superintendence of the two persons mentioned in that covenant,

Talfourd, Serjt., and Gray now showed cause. — As to the first point, the words "the said farm-house and buildings being previously put in repair, and kept in repair by the said Elizabeth Jones," are an absolute and independent covenant on the part of the defendant. [ALDERSON, B. — The covenant is insensible as it at present stands, according to strict grammatical construction, for the word "glaze" cannot apply to the word "hedges." If the word "glazed" be struck out, the covenant is sensible.] It is not necessary that there should be any technical words in an instrument, in order to constitute a covenant. The rule is shortly laid down in *Bush* v. *Coles*, Carth. 232, "that upon a reservation an action of covenant will lie, as where rent is reserved covenant will lie upon the words of reservation, without any express words of covenant." The same rule is to be found in *Sampson* v. *Easterby*, 9 B. & C. 505 (33 R. R. 239), and in Roll. Abr. 518, Com. Dig. "Covenant" (A 2). [They were then stopped as to this point.]

As to the objection raised to the breach, in arrest of judgment, it is submitted that it cannot prevail. The covenant merely means that the parties shall be at liberty to perform the work under the superintendence of the plaintiff, and of the defendant's [*237] son. It is, therefore, not a condition * precedent or concurrent that the work should be done under that superintendence.

Godson, Alexander, and Atherton, in support of the rule. — As to the first point, unless the instrument contains words amounting to an agreement, there is no covenant. Thus it is laid down in Com. Dig. "Covenant" (A 2), "But where words do not amount

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to an agreement, covenant does not lie, as if they are merely conditional to defeat the estate: as, a lease provided and upon condition that the lessee collect and pay the rents of his other houses." There must be either the word "agreed," or something equivalent to it. *Duke of St. Albans* v. *Ellis*, 16 East, 352 (p. 676, *ante*). [PARKE, B. — In that case the rule was in effect laid down that no technical words are necessary to constitute a covenant, but that it is sufficient if an agreement can be gathered from the words, whatever they may be.] In *Rigby* v. *Great Western Railway Company*, 14 M. & W. 811, there was the word "engage," which was held to have the same force as the word "covenant" would have had.

As to the second point, the word "left," in that covenant, means that the work was to be done according to the approval and satisfaction of the two parties named. [They also referred to *Slater* v. *Stone*, Cro. Jac. 645, and *Thomas* v. *Cadwallader*, Willes, 496.]

PARKE, B. — I am of opinion that this rule ought to be discharged. The first point depends upon the question, whether there is a covenant in the lease to the effect stated in the declaration, viz., "that the defendant would put the farm-house and buildings in repair, and would keep them in repair during the term." The rule of law, as laid down in the case of the *Duke of St. Albans* v. *Ellis*, is perfectly clear, that, in order to constitute a covenant, no technical words are necessary. It is sufficient * if [*238] you can collect from the terms of the instrument that the thing is to be done. The question therefore is, whether the words "the farm-house and buildings being previously put in repair, and kept in repair by the said Elizabeth Jones," amount to an absolute contract by her. I am of opinion that they do. Perhaps if the words "kept in repair" were omitted, this might amount to a condition precedent; but with these words, as they stand in the lease, it is impossible to come to that conclusion. I construe the lease to amount to a covenant on the part of the lessor to put and keep all the premises in repair, except the windows and the hedges, ditches, &c., with respect to which the lessee has bound himself. The result of this construction is, that the contract is well declared on.

The next question is, whether the second breach is properly assigned. That breach takes no notice that the work was to be left to the superintendence of the plaintiff and the defendant's son, but merely states that the defendant did not do the work.

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Now this is a perfectly good breach, unless the agreement that the work should be left to the superintendence of these parties amounts either to a condition precedent or concurrent; for then it would be necessary to aver either performance of the condition, or a readiness and willingness on the part of the plaintiff. But, although the words are extremely obscure, I cannot satisfy my mind that they amount to either a condition precedent or concurrent. I think that the parties must have intended only that the work was to be done to the satisfaction of the two; and inasmuch, therefore, as the work was not done at all, the breach is well assigned.

ALDERSON, B. — I am entirely of the same opinion. With regard to the first point, I think that the contract entered into between the parties was an independent covenant on the part [*239] of the lessor to put and keep in repair all the *farm-house and buildings, with the exception of that portion expressly excepted, and which the tenant himself contracted to repair; and I concur in the observations of my Brother PARKE upon the other point in the case.

PLATT, B., concurred. *Rule discharged.*

(IN THE EXCHEQUER CHAMBER.)

Jones v. Cannock.

5 Ex. 713, 714 (s. c. 19 L. J. Ex. 371).

Error having been brought on the above judgment, the case was now argued [1] by

[713] Atherton for the plaintiff in error, the defendant below. — The declaration is bad. The covenant alleged is, that the defendant agreed to erect certain buildings within the period of eighteen months, "the whole of which were to be left to the superintendence of the plaintiff and Edwin Jones, the defendant's son." Now it is submitted that the superintendence of the plaintiff was a condition concurrent with the duty of the defendant to erect the buildings. The declaration therefore ought to have alleged that the plaintiff was ready and willing to superintend the works; and it is bad because it does not contain that allegation. Where some

[1] Before PATTESON, J., COLERIDGE, J., WIGHTMAN, J., CRESSWELL, J., ERLE, J., WILLIAMS, J. TALFOURD, J., was present, but did not join in the judgment of the Court, he having been engaged as counsel in the case.

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act is required to be done on the part of the covenantee, at the same time as another act is to be done on the part of the covenantor, and an action is brought for the non-performance by the covenantor of the act in question, the declaration must contain an allegation that the covenantee was ready and willing to perform his part. 1 Wms. Saund. 320, notes, and 2 Wms. Saund. 352. The covenant is pleaded according to its legal effect; and if there be any ambiguity in the language of the covenant, such a construction is to be adopted as will operate most strongly against the party pleading it. It might be a matter of great importance to the * defendant that the plaintiff's son should have [* 714] the superintendence of the work, which would preclude the plaintiff from complaining of the way in which it had been executed. [CRESSWELL, J. — There is nothing in the covenant which gives the parties who are to superintend the work authority to say how it is to be done.]

Peacock, *contra*. — The declaration is good, and the judgment of the Court below ought to be affirmed. According to the legal effect of the covenant, the superintendence of either party is not made a condition precedent or concurrent. They are to be at liberty to superintend the work whilst it is going on, at any time; but no time is fixed when they are to be present. It is a mere permission, which either party may avail himself of if he thinks fit.

Atherton replied.

PATTESON, J. — We are all of opinion that the clause in question is neither a condition precedent nor concurrent. The covenant is an absolute one, that the defendant shall do the work within the period of eighteen months; and the succeeding clause was, as it appears to us, inserted for the benefit of both parties, which they were at liberty to avail themselves of if they should think fit to do so. The language of the covenant is no doubt obscure; but as we think that the words do not import a condition, the declaration, as it now stands, is good, and the judgment of the Court below must be affirmed. *Judgment affirmed.*

Jones v. Cannock.

(3 H. L. Cas. 700, 701.)

Ultimately, the case was brought by writ of error to the House of Lords. The plaintiff in error did not appear to support his case.

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The LORD CHANCELLOR (Lord COTTENHAM), after hearing a short statement from the counsel for the defendant, expressed his opinion that there was no case in point of law for the plaintiff in error, and affirmed the judgment.

ENGLISH NOTES.

The principle is stated by Sir Howard Elphinstone, "Interpretation of Deeds," Rule 151, in these terms: "No particular form of words is necessary to create a covenant. It is sufficient if, from the construction of the whole deed, it appear that the party intended to bind himself."

Of the numerous authorities which support the rule, the following are selected as particularly applying to leases: — *Bush* v. *Coles* (K. B. 1691), Carth. 232, where an exception was construed to be a covenant; *Giles* v. *Hooker* (K. B. 1689), Carth. 135, "rendering" rent so construed; *Hellier* v. *Casbard* (1677), Sid. 266, "yielding and paying" rent; *Webb* v. *Plummer* (1819), 2 B. & Ald. 746, 21 R. R. 479, "that the (tenant) shall fold his flock of sheep which he shall keep upon the demised premises upon such parts where the same have been usually folded," as implying a covenant that he should keep a flock of sheep upon the premises; *Wood* v. *Copper Miners Co.* (1849), 7 C. B. 906, 18 L. J. C. P. 292, agreement that the coals consumed by the lessee should be purchased of the lessor, provided that the lessor should not be compelled to supply more than five hundred tons per week, construed as covenant by lessor to supply the coals; *Sampson* v. *Easterby* (1829, 1830), 9 Barn. & Cress. 505, 6 Bing. 644, 33 R. R. 239, lease reciting an agreement by lessees to build a new mill on the site of one pulled down by them with consent of the lessors, and covenanting to keep in repair the mill so engaged to be erected by them, construed to comprise a covenant to build the mill; *Brookes* v. *Drysdale* (1877), 3 C. P. D. 52, 37 L. T. 467, 26 W. R. 331, "provided and . . . upon the express condition that," &c., construed as a covenant to perform the condition.

AMERICAN NOTES.

The first case is cited in Wood on Landlord and Tenant, pp. 623, 643, 697, and the second at pp. 587, 795, 818. The second case is cited in Pingrey on Real Property, sect. 1496. The first is cited in Taylor on Landlord and Tenant, sect. 248, and the second at sect. 276.

The doctrine of the Rule that the intention of the parties as expressed in the instrument is to prevail, is well settled in this country. *Hallett* v. *Wylie*, 3 Johnson (N. Y.), 44; 3 Am. Dec. 457; *Jackson* v. *Delacroix*, 2 Wendell (N. Y.), 433; *Jackson* v. *Swart*, 20 Johnson (N. Y.), 85; *Marshall* v. *Craig*, 1 Bibb (Kentucky), 379: 4 Am. Dec. 647; *Wright* v. *Tuttle*, 4 Day (Connecticut), 321; *Mitchell* v. *Hazen*, 4 Connecticut, 508; 10 Am. Dec. 169; *Randell* v. *Canal*

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Co., 1 Harrington (Delaware), 233; *Lovering* v. *Lovering*, 13 New Hampshire, 513; *Post* v. *Weil*, 115 New York, 361; 12 Am. St. Rep. 809; 5 Lawyers' Rep. Annotated, 422; *Grundy* v. *Edwards*, 7 J. J. Marshall (Kentucky), 368; 23 Am. Dec. 409.

A mere recital or an exception in a lease may be a covenant, if such appears from the whole instrument to have been the intention. *Horry* v. *Frost*, 10 Richardson Equity (So. Car.), 109; *Penn* v. *Preston*, 2 Rawle (Penn.), 14 ("intended to be recorded"); *Huff* v. *Nickerson*, 27 Maine, 106. So in *De Forest* v. *Byrne*, 1 Hilton (N. Y. Com. Pl.), 43, a recital that the premises were "to be occupied as a lumber yard" was held a covenant on the part of the tenant to occupy them for that purpose alone. A lease of a lot "with the fire-proof cotton warehouse thereon" is a covenant that it is fire-proof. *Vaughan* v. *Matlock*, 23 Arkansas, 9. "No particular form of words is necessary to create a covenant, but any words will be effectual for that purpose which show that the party sought to be charged as covenantor intended to agree to do, or to refrain from doing, something in which the other party had an interest." *Livingstone* v. *Stickles*, 8 Paige (N. Y. Chanc.), 398, citing *Harrington* v. *Wise*, Cro. Eliz. 486, and *Doe* v. *Watt*, 8 B. & C. 316.

In *Post* v. *Weil*, *supra*, the Court said: "Although the words of the clause in question are apt to describe a condition subsequent reserved by a grantor, we are in no wise obliged to take them literally. In the consideration of what, by the use of these words, was imported into the conveyance, we are at liberty to affix that meaning to them which the general view of the instrument and of the situation of the parties makes manifest. Whether they created a condition or a covenant must depend upon what was the intention of the parties; for covenants and conditions may be created by the same words. In order that a covenant shall be read from the words of an instrument, they need not be precise, nor technical, nor in any particular form. In Bacon's Abridgment, Covenant A, it is said: 'The law does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant.' In Sheppard's Touchstone, 161, 162, it is said: 'There need not be any formal words, as "covenant," "promise," and the like, to make a covenant on which to ground an action of covenant; for a covenant may be had by any other words.' Chancellor KENT, in his Commentaries (vol. 4, 132), in speaking of whether a clause in a deed shall be taken to create a covenant or a condition, says: 'Whether the words amount to a condition, or a limitation, or a covenant, may be matter of construction depending on the contract. The intention of the party to the instrument, when clearly ascertained, is of the controlling efficacy; though conditions and limitations are not readily to be raised by mere inference and argument.' The Chancellor sums up the matter in this language: 'The distinctions on this subject are extremely subtle and artificial, and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of sense and sound equity to the object and spirit of the contract in a given case.' Lord MANSFIELD said (1 Burr. 290) that no particular technical words are requisite towards making a covenant; and Lord ELDON said (15 Ves. 264) that covenants may be for almost anything. That

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they have frequently been inserted in conveyances to maintain the eligible character of property adjoining the parcel conveyed by protecting it against the erection of nuisances, or of offensive structures, or against the carrying on an injurious or offensive trade, is a familiar fact. It seems unnecessary to cite from the opinion of Judges or of the writers upon this subject of jurisprudence; for there is a general *consensus* in opinion among them that the question is one always open to the determination most consistent with the reason and the sense of the thing. Reference, whether it be to the earlier or later reports, fails to aid us in deducing from them a defined principle of construction. Many, if not most, of the early cases have been those turning upon the construction of clauses in leases, and in each case, so far as the examination I have been able to give enables me to say, the Court constructed the clause as the circumstances and facts of that particular case seemed to demand."

No. 57. — CHURCH *v.* BROWN.

(LORD ELDON, C., 1808.)

No. 58. — HAMPSHIRE *v.* WICKENS.

(M. R. 1878.)

RULE.

UNDER an agreement for a lease, whether containing a stipulation for usual covenants or not, the lessor is not entitled to require the insertion of a covenant restraining alienation without consent.

Church v. Brown.

15 Vesey, 258–273 (10 R. R. 74).

Agreement for Lease. — Usual Covenant. — Covenant against Alienation without License.

[258] Under an agreement for a lease the lessor is not, without express stipulation, entitled to a covenant restraining alienation without licenses as a proper and usual covenant.

Thomas Worsfold, of Croydon, grocer, entered into an agreement in writing, dated the 3rd of December, 1798, with the plaintiffs Church and Upton to grant them a lease for twenty-one years from Christmas next, of a house, warehouse, and other premises in High Street, Croydon, at the yearly rent of £40, clear of taxes, except the land tax; and the plaintiffs agreed to accept the said lease and

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to pay the rent; which lease it was agreed should contain a power for the plaintiffs to determine the lease at the expiration of the first seven or fourteen years on notice: and the lease was to contain a covenant on the part of Worsfold that he should not at any time within ten years set up, exercise, * or follow the trade of a tea-dealer or grocer within four miles from Croydon, but should, on the contrary, render his assistance to the plaintiffs in the business. [*259]

In pursuance of the agreement, in January, 1799, the plaintiffs entered, and carried on the business of a grocer in the premises in partnership, until they agreed to dissolve the partnership; that Church should continue the business on his separate account, and the lease should be granted to him alone. Worsfold afterwards sold the premises to the defendant, a grocer, in Croydon, in fee.

The bill, filed in November, 1803, prayed that the defendant may be decreed to execute a proper lease, conformable to the agreement.

Under a decree, directing the Master to settle a lease, a draft was carried in by each party, varying only in this respect, that the draft proposed by the defendant extended the proviso for re-entry for non-payment of rent or breach of covenants to the following case; viz., if Church or Upton, or either of them, their or either of their executors or administrators, shall assign over this present indenture of lease, or their term or interest therein or any part thereof, or demise, let, or part with the demised premises or any part thereof, to any person or persons whomsoever, without the license of Brown, his heirs or assigns, in writing, first obtained; or if Church and Upton, or either of them, &c., should become bankrupt, or make any assignment for the benefit of their or his creditors.

The Master's judgment being against the insertion of that clause, an exception was taken to the report.

* Sir Samuel Romilly and Mr. Wetherell, in support of the exception, referred to the two late cases, *Vere* v. *Loveden*, 12 Ves. 179, and *Jones* v. *Jones*, 12 Ves. 186, in which this subject, though not determined, was much considered by the MASTER OF THE ROLLS. They urged that Lord THURLOW'S distinction in the case of *Henderson* v. *Hay*, 3 Bro. C. C. 632, between common and usual covenants, is not very intelligible; nor what are incidental covenants: in the nature of a demise at common [*260]

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law it is not incidental that there should be any covenant whatsoever, even for payment of rent; that the subsequent decisions, *Morgan* v. *Slaughter*, 1 Esp. 8 (5 R. R. 715); *Folkingham* v. *Croft*, 3 Anstr. 700 (4 R. R. 844), by Lord KENYON at Nisi Prius, and by the Court of Exchequer, in favour of a covenant, restraining alienation without license, as reasonable and usual, are against the opinion, expressed in that case, which, however, it was said, ended in a compromise; and though there is no instance where such a covenant was inserted without an agreement for usual covenants, that cannot make a difference, as a proper lease must have the usual covenants. Upon the terms of this agreement, and the nature of the subject, the intention must have been, that there should not be a change of the tenant without consent. The lessor, letting this shop to persons of the same trade that he followed, and covenanting not to carry on that trade within four miles for ten years, might have looked to the possibility of his returning to his trade in that shop, especially as the lessees had an option to determine the lease at the end of seven or fourteen years. Under such circumstances it was important to him to guard against any alteration. Something also may be presumed from the circum-
[*261] stance that the word "assigns" is not * to be found in this agreement, and seems to have been studiously avoided.

Mr. Alexander, for the report, observed, that here was no stipulation for proper or usual covenants, upon which the last two decisions had been made, and which, when confined to the neighbourhood, the LORD CHANCELLOR in *Boardman* v. *Mostyn*, 6 Ves. 467, held a proper subject of inquiry, though there are in this agreement stipulations for particular purposes, anxiously expressed. All that had been determined was, that this covenant is not unfair, unreasonable, or unusual, in the lease of a public-house; in which case it may be truly represented as essential and necessary on account of the lessor's interest in the license, upon which the value of the house depends. The MASTER OF THE ROLLS observes, accordingly, that there are many covenants which it may be very proper for the lessor to take for his protection, but which, not naturally flowing from the contract to let and take, should be the subject of direct stipulation; but this exception contends that a provision of this sort requires no stipulation, being, according to Lord THURLOW'S expression, incidental to every lease.

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Sir Samuel Romilly, in the reply, mentioned the case of *Brown* v. *Raban*, 15 Ves. 528, in which, at the Rolls the evening before, it was decided, that under a stipulation for usual covenants a covenant not to assign without license should be inserted. The MASTER OF THE ROLLS, who was not, before that judgment was pronounced, apprised that this point was depending before the LORD CHANCELLOR, decided upon the authority of the cases in the Court of Exchequer and before Lord KENYON, continuing, however, to express his own opinion upon the question to agree with that of Lord THURLOW.

* The LORD CHANCELLOR. [*262]

I came into Court with an extremely strong opinion that this covenant could not be inserted in the lease; but my mind is most seriously affected, on the one hand, by the very strong reasoning of the MASTER OF THE ROLLS in the two cases (*Vere* v. *Loveden*, *Jones* v. *Jones*, 12 Ves. 179, 186) that have been mentioned, and, on the other, by the communication that, notwithstanding that reasoning, the MASTER OF THE ROLLS considers this point bound down by the decision of Lord KENYON at Nisi Prius, *Morgan* v. *Slaughter*, 1 Esp. 8 (5 R. R. 715), and that single case in the Court of Exchequer, *Folkingham* v. *Croft*, 3 Anstr. 700 (4 R. R. 844). No one will suspect me of not giving all due weight to any opinion of Lord KENYON; but I must know a great deal more than I do before that determination at Nisi Prius will decide my judgment upon such a point; and, as to the other case, I have not yet had an opportunity of learning any reasons that I can represent as satisfactory to my own mind. The case of *Henderson* v. *Hay*, 3 Bro. C. C. 632, may, as it is said, not be an authority in one sense; but that it was Lord THURLOW'S judicial opinion, and would have been his decision, if it had been necessary to decide it, I have no doubt; and I am much misled if that learned Lord, who was very apt to give his peculiar attention to legal subjects, and after he had decided upon them, ever altered his opinion under the impression of any contrary opinion or reasons that he had received.

Suppose this point altogether unprejudiced by decision. There are different sorts of landed property known to the law: land in fee simple, and leasehold property. I am not at present alluding to copyholds. *If a man covenants to sell a fee- [*263] simple estate, free from all incumbrances, and says no

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more, it is clear that covenant carries *in gremio*, and in the bosom of it, the right to proper covenants. Why? Because that sort of engagement has in all time been carried into execution in a form and mode which alter most materially, substantially, and importantly the effect of the mere conveyance. If no more is done than the agreement imports, the conveyance contains express covenants: the words operating warranties and obligations, which it was not understood between the persons contracting that the one was to undertake and the other to have the benefit of; and, accordingly, it is perfectly settled by the law what are the covenants, as applied to the case of a vendor who was himself a purchaser for valuable consideration, or who took by descent or by purchase, but not for valuable consideration; and though the agreement, if literally executed, would carry all the extensive obligations to which the legal warranties flowing from the words would bind the vendor and his heirs, yet it cannot be carried into execution without express covenants, substituted for, and limiting, the implied covenants. In such a case the law would determine, according to *Henderson* v. *Hay*, what are usual covenants.

[*264] * With regard to leasehold estates, I should lay no stress upon the word "assigns," if the lease was to be made to the lessee, his executors or administrators, his assigns being included in himself; and the right to assign, unless restrained, being incident to his estate. The letter of the agreement, however, would not in any degree determine the form of the conveyance. The effect of the lease in the warranties and obligations, as arising out of the words of the lessor and lessee "yielding and paying," and under the execution of their agreement by the Court, is perfectly different, the latter including the covenant for quiet enjoyment; and in many other respects the mutual obligations of both with reference to each other being by the express covenants very materially varied. Before the case of *Henderson* v. *Hay*, 3 Bro. C. C. 632, therefore, upon an agreement to grant a lease, with nothing more than "proper covenants," I should have said, they were to be such covenants as were just as well known in such leases as the usual covenants under an agreement to convey an estate; and though the word "incidental" is not very precise, I conceive Lord THURLOW'S meaning to have been that the party had a right to those covenants, that would be inserted in the execution of an agreement for a lease, arising out of the general, well known

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practice as to such leases, and not contradicting the incidents of the estate belonging to a lessee, one of which is the right to have the estate, without restraint, beyond what is imposed upon it by operation of law, unless there is an express contract for more.

How does the history of the law with reference to this subject stand? There may be a covenant for almost anything, and this covenant against alienation without license is as old as *Dumpor's Case*, 4 Co. Rep. 119; but how does * the fact [*265] that there was such a covenant in that case, where it was held to be gone by alienation with license, prove that this is a usual, general covenant in a lease? The conclusion is rather the other way, — that this is a special and particular covenant. Consider how this grows. This covenant, which is represented to be usual, would not prevent under-letting. Then is a covenant against under-letting a usual covenant? and is it proved to be so by the authorities that it is not restrained by the other covenant? Further, if the landlord has a covenant against both assigning and under-letting, the tenant might by an agreement, neither assigning nor under-letting, put another person in possession of the premises; and parting with the possession in that manner would not be a breach of those covenants. Is a further covenant, therefore, not to part with the possession of the premises to be given as a usual covenant? That would not have restrained the tenant from parting with a part of the premises, these covenants having been always construed by Courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation. The Court will have to consider whether all these covenants are also included under the terms "usual and proper covenants," in the construction of an equitable agreement, where the law would regard the instrument with that jealousy.

Independent, therefore, of the authorities, I should have said that the meaning of the parties to a contract for a lease was that there should be proper covenants, and that the law implies what they are, as connected with the character and title of the lessor, — covenants in this sense incidental, as regulating the obligations expressed and implied, not in contradiction to the quantity of interest which the demise itself without special words was by the agreement to give to the lessee. The case of * *Henderson* v. *Hay*, 3 Bro. C. C. 632, in its circum- [*266]

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stances shows what reliance is to be placed upon this word "usual." The assignee of the lease of a public-house, which lease contained no covenant restraining alienation without license, contracted for a lease not only of the public-house, but of other premises also. It was a case, therefore, in which not only the original lessor had no idea of such a covenant, but it could not relate to the public-house only, and it was as fair to argue from the nature of the other premises, which were part of the subject of the demise, as from the nature of the public-house. Lord THURLOW, however, conceived that this agreement to demise such an interest upon common and usual covenants meant only that an agreement to give an interest for twenty-one years in equity gave it to the party, his executors, administrators, and assigns; and that the covenants were to be such as would not break down the extent of that interest contracted for.

In the case before Lord KENYON, *Morgan* v. *Slaughter*, 1 Esp. 8 (5 R. R. 715), the agreement was for fair and usual covenants; but before the case of *Henderson* v. *Hay* there is no one instance that such a covenant as this was conceived to fall within the description of usual covenants. *Dumpor's Case*, 4 Co. Rep. 119, proves no more than the fact that there was in that instance such a covenant; not that it is a usual covenant, and on that account to be inserted in all leases. I am perfectly unable to follow that sort of reasoning. The inference from that case appears to me to be rather the other way. It is said no lease is properly drawn without this covenant. I have seen many leases without it, and lately scarcely one with it. Such leases as fall within our observation, individually, as lessees, have no such covenant.

[*267] *They have a covenant of another sort. A lease is properly drawn with or without such a covenant, according to the agreement; and the lessor must show that the restraint is to be put upon the powers which by law flow out of the interest that he has agreed to give to the other party.

The case of *Folkingham* v. *Croft*, 3 Anstr. 700 (4 R. R. 844), was upon an agreement for a lease "with all usual and reasonable covenants commonly inserted in leases of the same nature." Some construction must be given to those latter words. The explanation with reference to the peculiar property, which was the subject of that demise, is a most dangerous proceeding; but it is stated, as a fact in that case, that there was no regular, local practice upon

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the subject, it being equally common in such leases to insert or omit the covenant. The plaintiff therefore failed upon the ground of local usage; and though I say that I should not have had much difficulty in deciding that case if it had come before me without any authorities, I fear that would have been because my opinion is directly contrary to that decision.

As this case also cannot be decided upon any usage locally, I must look to general usage; and if I could see a usage, with reference to the peculiar subject of this demise, authorising the insertion of this covenant, I might say the party had contracted for it; but no such fact is made out. Can it be maintained upon a common agreement for a lease, as the meaning of the parties, that the lessee is not to make a sub-demise, to part with the possession; in short, that he is to be subject to all these restraints upon the power of alienation, flowing out of the equitable estate, if nothing is said about it, * and that under the words " usual [* 268] covenants " all such restraints are to be inserted? With respect to another species of covenant, it is now held that to avoid the consequences of bankruptcy a landlord may take a clause that the lease shall determine upon the bankruptcy of the tenant; and many prudent men take that clause. Is that also to be inserted as a usual and common covenant; and why not, if the fact that such a covenant as this occurred in *Dumpor's Case*, 4 Co. Rep. 119, makes it a proper and usual one?

I do not go through the reasoning of the MASTER OF THE ROLLS in the two late cases, *Vere* v. *Loveden*, *Jones* v. *Jones*, 12 Ves. 179, 186. It will be a satisfaction to me to learn from him how, rather than rest upon that reasoning, which his great mind then suggested, he can bend to that which appears to me very unsatisfactory in those previous cases. My opinion that, if decision has not closed this point, the grantor has no right to this covenant is formed upon grounds that make me lay out of consideration the small reasoning upon the word " assigns," and the circumstance that the lessor might at the end of ten years return to his trade in this shop. The safest rule for property is that a person shall be taken to grant the interest in an estate which he proposes to convey, or the lease he proposes to make; and that nothing which flows out of that interest, as an incident, is to be done away by loose expressions, to be construed by facts more loose; that it is upon the party who has forborne to insert a covenant for his own

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benefit to show his title to it, and that it is safer to require the lessor to protect himself by express stipulation, than for Courts of equity to hold that contracting parties shall insert not
[*269] restraints expressed * by the contract, or implied by law, but such, more or less in number, as individual conveyancers shall from day to day prescribe as proper to be imposed upon the lessee; and that all those restraints, so imposed from time to time, are to be introduced as the aggregate of the agreement.

In the case of *Boardman* v. *Mostyn*, 6 Ves. 467, the parties compelled the Court to inquire as to the usage in the neighbourhood; to be enforced not as being usual in the proper sense, but as that to which it appeared they looked. So upon many estates the expression is familiar "such covenants as are usual," as in the leases granted by the Duke of Bedford and Lord Grosvenor. The lessee may either desire to be informed what are the covenants usually inserted in their leases, or may not inquire about them, concluding that, being submitted to by the tenants, they are reasonable. In many of those leases it is not thought reasonable that the restraint of alienation should be during the whole term; but it is only for the last seven years of a term, perhaps, of sixty or seventy years. Whether that should be applied to a term of twenty-one years is another consideration.

Is it, then, to depend upon the nature of the property? Is an agreement for the lease of a public-house, where nothing more is expressed to be carried into execution in a different manner from an agreement as to property of another species, with regard to which, though there may not be the same reason, the landlord may have reasons, operating upon him just as powerfully, for requiring the restraint? The proposition would appear extraordinary as to an agreement for the lease of a public-
[*270] * house, that the tenant was to have a more extensive interest before a license was necessary than he would now be entitled to in the execution of such a contract; that on account of the alteration of the general law in that respect a different decision is to be made upon the same words.

Upon the whole, I came into Court with a firm opinion that the best, that is, the most legal, decision of this case would be that the Master is right in rejecting this covenant; but the case of *Brown* v. *Raban* having been decided yesterday an authority of

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such great weight, I will discuss the subject with the MASTER OF THE ROLLS before I decide this case. There is a specialty here that this agreement does specify some covenants that the lease is to contain, and has no reference to the general expression "usual and proper covenants;" but there is very little difference whether those words are found in it or not, with reference to the ground of my opinion, which is, that where the interest to be demised carries with it the power of alienation, it can be shut out only by express contract, and the proper and usual covenants must be such as would be inserted in a lease, giving the power of alienation for twenty-one years.

The LORD CHANCELLOR.

I have not had an opportunity of consulting the MASTER OF THE ROLLS, who has been out of town, but I understand that the words "with usual covenants" were relied on in the judgment at the Rolls. I am extremely anxious not to give my final judgment upon this case until I know what is the value which the MASTER OF THE ROLLS sets upon that distinction. The principle upon which *my opinion rests is, that before the case of [*271] *Henderson* v. *Hay*, 3 Bro. C. C. 632, there was no sort of difference whether the agreement in the terms of it did or did not refer to usual and proper covenants; that in every agreement, whether as to freehold or leasehold estate, it was implied that there were to be usual and proper covenants. It will be a great relief to me if it should appear that the decision of that case did not rest upon that distinction; of which, after repeated consideration, I cannot state the actual value, nor, looking back to the cases, can I state what is the result of them.

The LORD CHANCELLOR (on a subsequent day).

I have examined the Register's Book[1] as to the case of *Henderson* v. *Hay*, with the view to ascertain whether it is to be considered merely as the opinion or as the judgment of Lord THURLOW. The cause came on upon the objection to the clause which was proposed, as it is stated in the report, and it was declared that the defendant has not any right to insist upon the clause to restrain the alienation of the premises being inserted in such lease, reserv-

[1] Register's Book, 1791, A, fol. 337. That case was, in the argument, considered as having ended in a compromise from the observation of the MASTER OF THE ROLLS in *Brown* v. *Raban*, 15 Ves. 528, that a petition of rehearing was presented by the defendant; and the bill was afterwards by agreement dismissed without costs; which appeared by the Register's Book.

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ing the consideration of costs. It is therefore a declaration in judgment upon the very point.

I have had sufficient communication with the MASTER OF THE ROLLS for this purpose. The law of this Court is [*272] *unquestionably as Lord THURLOW there declared it; and I conceived it to have remained undoubted until the case before Lord KENYON, *Morgan* v. *Slaughter*, 1 Esp. 8 (5 R. R. 715), which cannot justly be considered merely as a decision, as his Lordship was eminently skilled in the doctrine of this Court, and could not have been ignorant of the case of *Henderson* v. *Hay*. I therefore say with reluctance that the reasoning upon which Lord KENYON determined that case does not satisfy me that it is the law. When the point was before the Court of Exchequer, *Folkingham* v. *Croft*, 3 Anstr. 700 (4 R. R. 844), it does not appear that the Court found it easy so to state the law, as they deliberated upon it a considerable time. With respect to that case I can only say that my mind is not by any means satisfied with the reasoning. I have read the two cases, *Vere* v. *Loveden*, *Jones* v. *Jones*, 12 Ves. 179, 186, before the MASTER OF THE ROLLS, which are in print, and certainly it would be very difficult to answer the reasoning that appears in those judgments. I have stated the grounds of my own opinion upon this point, and I understand the MASTER OF THE ROLLS still considers that the better opinion; but the case in the Court of Exchequer having been so decided, he thought it difficult to depart from it. With reference to that, however, it seems to me that Lord THURLOW'S authority in 1791 was not treated with all the respect that is due to it in the subsequent period; and the existence of these four cases in controversy, three at the Rolls and this one before me, is decisive evidence that the point was not set at rest by the case in the Court of Exchequer. The MASTER OF THE ROLLS also agrees with me that whether the agreement contained the clause that usual covenants should be inserted or not, would not make a material difference; and, with great anxiety to be right upon this point, I [*273] *never will consent that my opinion shall be supposed to stand upon such a distinction. Before the case of *Henderson* v. *Hay* an agreement for a lease would have been executed precisely in the same mode as to the covenants to be inserted, whether that clause had been contained in it or not; so would an agreement for the conveyance of a real estate. In this case, there-

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fore, I must act upon my clear opinion of what the law is, which is that the lessor is not entitled to such a covenant.

The exception was accordingly overruled.

Hampshire v. Wickens.

7 Ch. D. 555–562 (s. c. 47 L. J. Ch. 243; 38 L. T. 408; 26 W. R. 491).

Agreement for Lease. — "Usual Covenants." — Covenant against Assignment without License. [555]

Agreement to accept a lease of a dwelling-house in London "to contain all usual covenants and provisoes." The lease contained a covenant not to assign without lessor's consent. In an action to compel specific performance of the agreement: —

Held, that the covenant was not a "usual covenant," and that the agreement could not be enforced.

This was an action for specific performance of an agreement for a lease.

The plaintiff, Mrs. Hampshire, was at the time of the agreement mentioned in the pleadings lessee of a house in Elsham Road, Kensington, for a term of twenty-one years from the 25th of December, 1873, determinable by the lessor and lessee at the expiration of seven or fourteen years, and she had an undertaking in writing from the owners of the property that if she could obtain a responsible and respectable tenant at the rent of 100 guineas * per annum, they would accept from the plaintiff [*556] a surrender of her lease, and grant to such new tenant a lease of the house for the term of twenty-one years, determinable by the lessee only at the expiration of seven or fourteen years.

The plaintiff having placed the disposal of the house in the hands of her agent, Mr. Parkinson, the defendant on the 22nd of February, 1877, had an interview with him respecting a lease, and on the 23rd of February wrote and sent to him the following letter: —

"With reference to our interview last evening, I am willing to take 43 Holland Road" (meaning 43 Elsham Road), "at the rent of £105 per annum for twenty-one years, determinable at my option at seven or fourteen years, on all usual covenants and provisoes, provided the same be put into ornamental and substantial repair as arranged, and to pay £75 for the fixtures and fittings mentioned in the schedule you left with me. Rent to run from

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the 25th of March. Possession to be given on the 15th of March next. I shall feel obliged by a definite reply at once, as I have other offers."

The defendant also gave the names of two referees.

On the 24th of February Parkinson wrote and sent to the defendant the following letter:—

"43 Elsham Road.

"On behalf of Mrs. Hampshire, I accept the terms contained in your letter of yesterday, subject to references being approved by the landlord, which I am quite convinced in your case is simply a matter of form."

The references given by the defendant were approved of by the owners of the property, but the defendant subsequently refused to accept the lease, whereupon the plaintiff brought the present action, and claimed that the defendant might be decreed to perform specifically on his part the agreement contained in his letter of the 23rd of February, 1877, and to accept a lease of the said house and premises.

There were various grounds of defence, but the only material one relied on by the defendant was this, that the new lease proposed to be granted him contained the following covenant [*557] on the *part of the lessee, "that he would not, without the previous consent of the lessors, assign, underlet, or part with the possession of the said premises, but such consent not to be withheld to a respectable and responsible tenant, and that he would not, without the consent of the lessors, put up thereon any bill for letting apartments." The defendant alleged that this was an unusual covenant, and not within the terms of the agreement.

Chitty, Q. C., and Creed, for the plaintiff:— . . .

[559] Counsel for the defendant was not called on.

Jessel, M. R.:—

There are various objections to the contention of the plaintiff, but I only intend to refer to one of them, which arises thus: the defendant agreed to take a lease of the house "on all usual covenants and provisoes."

The lease under which this property was held contained a covenant on the part of the lessee that he would not, without the lessors' consent, "assign, underlet, or part with the possession of the said premises, but such consent not to be withheld to a respect-

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able and responsible tenant;" and, further, that he would not without their consent put up thereon any bill for letting apartments.

That was a very special and very unusual covenant, but it is said that it is less extensive than a general covenant not to assign at all, and that if no objection can be made to an unrestricted covenant against assignment none can be made to a covenant that * is restricted. I think that reasoning is sound, [*560] and shall therefore consider whether an unrestricted covenant not to assign can be inserted among "usual covenants." I am of opinion that it cannot. This was decided by Lord THURLOW in *Henderson* v. *Hay*, 3 Bro. C. C. 632, by Lord ELDON in *Church* v. *Brown*, 15 Ves. 258 (p. 688, *ante*), and more recently by the Court of Appeal in *Hodgkinson* v. *Crowe*, L. R. 10 Ch. 622, affirming a decision of Vice-Chancellor BACON (L. R. 19 Eq. 591), so that it cannot now be fairly disputed.

But I have been referred to a contrary decision in *Haines* v. *Burnett*, 27 Beav. 500. That case appears to me to be opposed both to principle and authority, and it must now be treated as distinctly overruled by *Hodgkinson* v. *Crowe*. In *Haines* v. *Burnett*, Lord ROMILLY, without any special provision having been made in the contract to that effect, held that a covenant should be inserted making the lease determinable on the bankruptcy of the lessee, or on his making any arrangement for the benefit of his creditors. That was, in fact, nothing less than a variation of the contract. I cannot see any reason for holding such a covenant to be usual. Yet it is rather difficult in looking at the case to understand how it was decided. Lord ROMILLY seems to have thought that in considering general covenants, and all such other covenants as are usually inserted in leases of property of a similar description, some regard might be had to the peculiar nature and tenure of the property. But I cannot find any evidence on that point mentioned in the report, and it would seem that the Judge, from his view of the nature of the property, inserted the clause. But when we look at the reasoning of Vice-Chancellor BACON in *Hodgkinson* v. *Crowe*, L. R. 19 Eq. 593, I think it is conclusive against any Judge being allowed to say from his own view that such a covenant ought to be introduced. The Court of Appeal affirmed that decision, and went further, and held that, under an agreement for a lease to contain "all usual and customary mining

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clauses," the landlord was not entitled to have inserted in the lease a proviso for re-entry except on non-payment of rent.

[*561] * Usual covenants may vary in different generations. The law declares what are usual covenants according to the then knowledge of mankind. Lord ELDON, in *Church* v. *Brown*, 15 Ves. 264 (p. 692, *ante*), puts it thus: "Before the case of *Henderson* v. *Hay*, therefore, upon an agreement to grant a lease with nothing more than proper covenants, I should have said they were to be such covenants as were just as well known in such leases as the usual covenants under an agreement to convey an estate." Now what is well known at one time may not be well known at another time, so that you cannot say that usual covenants never change. I have therefore looked at the last edition of Davidson's "Precedents in Conveyancing," to see whether the usage is said to have changed. He says, 3rd ed. vol. v. pp. 48, 49: "The result of the authorities appears to be that in a case where the agreement is silent as to the particular covenants to be inserted in the lease, and provides merely for the lease containing 'usual covenants,' or, which is the same thing, in an open agreement without any reference to the covenants, and there are no special circumstances justifying the introduction of other covenants, the following are the only ones which either party can insist upon, namely:—

"Covenants by the lessee

"1. To pay rent.

"2. To pay taxes, except such are expressly payable by the landlord.

"3. To keep and deliver up the premises in repair; and

"4. To allow the lessor to enter and view the state of repair.

"And the usual qualified covenant by the lessor for quiet enjoyment by the lessee."

When he refers to "special circumstances" he means peculiar to a particular trade, as, for example, in leases of public-houses, where the brewers have their own forms of leases, the "usual covenants" would mean the covenants always inserted in the leases of certain brewers.

There is no mention of any other "usual covenants," and as nothing in this case has been lost for want of industry on the part of the counsel who have argued it, I am justified in

[*562] saying that * there is nothing in any text-book or book

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of precedents to show that a covenant not to assign is a usual covenant.

I am therefore of opinion that it is not a usual covenant, and I dismiss the action with costs.

ENGLISH NOTES.

The absence of the word "assigns" in an agreement for a lease does not warrant a covenant against alienation being introduced in the lease. *Buckland* v. *Papillon* (1867), L. R. 2 Ch. 67, 36 L. J. Ch. 81, 15 L. T. 378, 15 W. R. 92.

An agreement for a mining lease, to have "all usual and customary mining clauses," does not warrant the insertion of clauses of forfeiture on bankruptcy and restraint of alienation without consent of lessor. *Hodgkinson* v. *Crowe* (1875), L. R. 19 Eq. 591, 44 L. J. Ch. 238, 33 L. T. 122. Nor does it warrant the insertion of a proviso for re-entry for any cause except the non-payment of rent. Same case, on another point, in Court of Appeal, L. R. 10 Ch. 622, 44 L. J. Ch. 680, 33 L. T. 388, 23 W. R. 885. Lord Justice JAMES expressed the opinion that such clause of re-entry is odious and oppressive.

Where an agreement was made for an underlease or assignment by A. to B. of the lease of a farm, which A. held as the assignee of C., it was held a fatal objection to A.'s title to claim specific performance, that the lease contained a power of re-entry if the lessee should become bankrupt or if any execution should issue against him — inasmuch as by taking the farm B. would be liable to be evicted on a breach of the condition not only by himself, but by the original lessee (C.), of whose circumstances he probably knew nothing. *Hyde* v. *Warden* (C. A. 1878), 3 Ex. D. 72, 47 L. J. Q. B. 121, 37 L. T. 567.

Hampshire v. *Wickens* was followed by the Queen's Bench Division in *Bishop* v. *Taylor* (1891), 60 L. J. Q. B. 556, 64 L. T. 529, 39 W. R. 542. The covenant was not to assign, &c., "without consent of the lessors, such consent not to be unreasonably withheld;" and the purchaser of a lease containing such a covenant which had not been disclosed was held not bound to complete.

AMERICAN NOTES.

Hampshire v. *Wickens* is cited in Wood on Landlord and Tenant, sect. 183, and in Taylor on Landlord and Tenant, sect. 45, and *Church* v. *Brown*, at sect. 44, 45, citing *Cooney* v. *Hayes*, 40 Vermont, 478, *Den* v. *Post*, 1 Dutcher (New Jersey Law), 285, to the effect that such covenants are not in favor.

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No. 59. — STEVENSON *v.* LAMBARD.

(K. B. 1802.)

RULE.

IN an action of covenant by the lessor against the assignee of the lessee, the rent is apportionable; and if the assignee has been evicted by title paramount for a part of the premises, the action will lie for the rent of the remainder.

Stevenson v. Lambard.

2 East, 575–581 (6 R. R. 511).

Landlord and Tenant. — Action for Rent against Assignee of Lease.

[575] An action of covenant lies against the assignee of a lessee of an estate for a part of the rent, as in such case the action is brought on a real contract in respect of the land, and not on a personal contract. And in case of eviction the rent may be apportioned, as in debt or replevin.

The plaintiff declared in covenant against the defendant as assignee of one Charles Dixon, upon an indenture made on [*576] the 1st of May, 1798, whereby the * plaintiff, for the considerations therein mentioned, demised to Dixon and his assigns two messuages and a warehouse therein described, to hold from the 25th of March then last past, for the term of thirty-one years, at the yearly rent of £105 by equal quarterly payments, viz., &c. The declaration then set forth the covenant by Dixon for himself and his assigns, &c., to pay to the plaintiff the said yearly rent at the times and in the manner above mentioned; and that Dixon entered and was possessed, &c., and that afterwards, on the 28th of March, 1801, all the right, title, &c., and term of years then to come and unexpired in the said demised premises, vested by assignment in the defendant, who by virtue thereof entered, and became and was possessed for the residue of the said demised term then unexpired; and then assigned a breach for non-payment of one year's rent, which became due on the 20th September, 1801, since the said assignment. Pleas: 1. *Non est factum.* 2. That all the interest and title, &c., of Dixon did not vest by

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assignment in the defendant; 3. No rent in arrear: on all which issues were joined. The defendant then pleaded, 4thly, That as to so much of the said supposed breach of covenant above assigned, as relates to the non-payment of the sum of £52 10*s.*, parcel of the said £105 of the rent supposed to become due on the 29th September, 1801, for one half year of the said term, *actio non*, &c., because one John Walker, before and at the time of making the said indenture, &c., and from thence until, upon, and after the said 29th September, 1801, was seised in fee of one undivided moiety of the said demised premises, and brought an ejectment in K. B. in Hil. 41 Geo. III., against the present plaintiff for the recovery of the same; in which ejectment the demise was laid before any of the said £52 10*s.* parcel of the *rent [*577] aforesaid became due, &c., and such proceedings were afterwards had, &c.; that Walker in Easter Term, 41 Geo. III., recovered judgment against the present plaintiff in the said ejectment, for the said undivided moiety of the demised premises, and afterwards, viz., on 21st of April, 1801, sued out a writ of *habere facias possessionem* upon the said judgment, under which the sheriff, before any part of the said £52 10*s.* parcel, &c., became due, delivered possession, &c., to Walker, who thereupon entered into the said undivided moiety, &c., and ejected the defendant, &c. There was a similar plea, stating generally the paramount title of Walker, and his ejection of the defendant from one moiety of the demised premises. To these there was a general demurrer and joinder.

Marryat, in support of the demurrer, said, that as it was clear that an action of debt would lie in this case, and as the authorities established generally (though he admitted without distinguishing between debt and covenant) that in case of an eviction of the tenant from part of the lands leased, the rent was apportionable, it lay on the defendant to point out the distinction between debt and covenant in this case. And he cited Bro. Abr., tit. Apportionment, pl. 24, and 1 Rol. Abr. 235, pl. 16, Gilb. on Rents, 147, *Clun's Case*, 10 Co. Rep. 128 a, and *Midgley* v. *Lovelace*, Carth. 289; and contended that a breach might be assigned in covenant merely on the *reddendum*. That supposing a contract not to be apportionable, yet there was no inconsistency in the plaintiff in this case; for he did not declare in covenant as for a moiety of the rent reserved, but for the whole; and it was not com-

[*578] petent for the defendant * to set up as a bar to the whole demand that which was only an answer to part of it.

Lawes, *contra*, relied on the want of any precedent of a recovery in covenant under similar circumstances, as a strong argument for showing that the action was not maintainable. There is a material distinction between debt and covenant in this respect; for in the former the law raises a debt in respect of the privity of estate, and therefore the amount is necessarily apportionable in respect of the *quantum* of estate. But the latter is a personal contract, and cannot be apportioned. He referred to 3 Vin. Abr. 5, as collecting all the cases. At any rate the plea is an answer to the breach assigned, which is for the non-payment of the whole rent, now admitted not to be due. In *Richards* v. *Comeford*, Com. Rep. 42, where the defendant avowed for two years and a half rent in arrear on a lease, reserving the rent yearly, the Court of B. R. on error brought, held, that though before judgment the avowant might have abated his avowry as to that part to which he had no right, yet on the whole record as it then stood, judgment must be reversed, because the avowry was for the whole rent, and he could not support his title to the whole. Here there can be no apportionment on the demurrer (Hil. 43 Eliz. B. R.; 17 Vin., tit. Apportionment, E), for apportionment is the act of a jury, and therefore as the Court must pronounce judgment for the plaintiff, if at all, to the extent of the breach assigned, and it appears that so much is not due, there must be judgment for the defendant.

[*579] * Marryat, in reply, observed that no case had been stated to show the distinction contended for. That in the case of *Richards* v. *Comeford* there was no eviction of the tenant from any part of the land, but an attempt to apportion the rent as to part of the time, before it was due, which all the books agree (Vi. 10; Co. Rep. 128 a) cannot be done. That as to the breach being assigned for the non-payment of the whole rent, instead of a proportion of it, if the plaintiff might have recovered on this declaration for what was due, provided the defendant had pleaded his defence *pro tanto*, according to the truth, it could not vary the plaintiff's right, that the defendant had pleaded the same defence in bar to the whole right of action, which he ought not to have done.

Cur. adv. vult.

No. 59. — Stevenson v. Lambard, 2 East, 579, 580.

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Lord ELLENBOROUGH, Ch. J., now delivered the judgment of the Court.

This is an action of covenant by the lessor against the assignee of the lessee for non-payment of a year's rent. Plea as to rent for half a year claimed, eviction during that time of a moiety of the premises by title paramount. To this there is a demurrer; and the question is, Whether the rent be apportionable in this action of covenant by the lessor against the assignee of the lessee? It clearly is so upon an action of debt, or upon an avowry in replevin, by all the authorities; and the only question is, Whether it be so in covenant? In covenant, as between lessor and lessee, where the action is personal, and upon a mere privity of contract, and on that account transitory as any other personal contract is, the rent is not apportionable. * Bro. Contract, pl. 16; [*580] Moore, 116; Finch's Law, lib. 2, c. 18. But an action of covenant against an assignee differs essentially from a mere covenant personal: it is in such case properly a real contract in respect of the land; it is local in its nature and not transitory. In *Barker* v. *Damer*, Carth. 183, it is said to be "adjudged in several of our books[1] that an action of debt for rent against an assignee of a term is local, and will lie nowhere but in that county where the lands are. And the same reason holds in covenant against the assignee; for this action as well as that of debt is maintainable only upon the privity of estate, and the defendant is merely charged thereby, because it is a covenant which runs with the land; for if it had been a collateral covenant, the assignee would not have been bound by it; and that proves that the action is local only with respect to the land." The objection as to the locality of this species of action of covenant, as against an assignee, was only gotten over in the case of the *Mayor of London* v. *Cole*, 7 T. R. 587, by the help of the Stat. 16 & 17 Car. II., c. 8, as being a mistrial cured by verdict. So covenant will lie against the assignee of part of an estate for not repairing his part; "for it is dividable, and follows the land," with which the defendant, as assignee, is chargeable by the common law, or by the Stat. 32 Hen. VIII., c. 37. *Congham* v. *King*, Cro. Car. 222. Upon the whole, therefore, we think that the condition of this assignee is in point of law different from that of a lessee chargeable on the privity of

[1] *Vide* all the cases collected by Serjt. Williams, in a note to the case of *Thursby* v. *Plant*, 1 Saund. 241 b.

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contract; and being chargeable on the privity of estate, [*581] and in respect of the land, *his rent is upon principle apportionable as the rent of a lessee is, or as his rent would be in an action of debt or replevin.

Judgment for the plaintiff; with leave to the defendant to amend his plea, and to plead it only to one moiety of the rent.

ENGLISH NOTES.

It has been observed that Lord ELLENBOROUGH'S *dictum* in the above principal case, that in covenants as between lessor and lessee the rent is not apportionable, if it is correct, applies only to the form and not to the substance of the action. Per POLLOCK, B., in *Mayor, &c. of Swansea* v. *Thomas* (1882), 10 Q. B. D. 48, 53, 52 L. J. Q. B. 340, 342, 47 L. T. 657, 31 W. R. 506. In that case the lessor of lands demised by deed at a certain rent, assigned the reversion in part of the lands. The lessee (who had, previously to the assignment of the reversion, assigned the term) was sued by the lessor for subsequent rent, being a fair proportion in respect of that part of the land of which the reversion remained in him. It was held that the rent was apportionable as between the parties, and that the action was maintainable.

In *Baynton* v. *Morgan* (C. A. 1888), 22 Q. B. D. 74, 58 L. J. Q. B. 139, 37 W. R. 148, the plaintiff had, by lease under seal, demised premises to the defendant for a term of years at a certain yearly rent. The defendant had assigned his interest in the term, and the assignee had afterwards, without the knowledge of the defendant, surrendered to the plaintiff a part of the demised premises. In an action by plaintiff against the defendant for subsequent rent, for which the plaintiff allowed a proportionate reduction in respect of the portion of the premises which had been surrendered, it was held by the Court of Appeal that the action was maintainable. The cases above cited were in respect of leases previous to the commencement of the Conveyancing Act, 1881. By sections 10–12 of that Act (44 & 45 Vict., c. 41) it is laid down, as to leases made after the commencement of the Act (31st December, 1881), that (s. 10) the rent and benefits of the lessee's covenants are to run with the reversion, notwithstanding severance of the reversionary estate; that (s. 11) the obligation of the lessor's covenants is to run with the reversion likewise; and that (s. 12), notwithstanding severance of the reversionary estate, every condition or right of re-entry, and every other condition of the lease, shall be apportioned.

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AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sect. 477, and in Pingrey on Real Property, sect. 552, and in Taylor on Landlord and Tenant, sect. 385.

This doctrine is sustained as to the tenant in *Lawrence* v. *French*, 25 Wendell (N. Y.), 443; *Carter* v. *Burr*, 39 Barbour (N. Y. Sup. Ct.), 67; *Christopher* v. *Austin*, 11 New York, 218; *Fillebrown* v. *Hoar*, 124 Massachusetts, 580; *Martin* v. *Martin*, 7 Maryland, 368; 61 Am. Dec. 364; 3 Kent Com. 464 (citing the principal case).

And as to an assignee of the lease in *Van Rensselaer* v. *Bradley*, 3 Denio (N. Y.), 135; 45 Am. Dec. 451; and *Babcock* v. *Scoville*, 56 Illinois, 467, both citing the principal case.

No. 60. — PAYNE *v.* BURRIDGE.

(EX. 1844.)

RULE.

A COVENANT by the tenant to pay all assessments, &c., extends to an assessment imposed by an Act of Parliament, with a clause empowering the tenant to deduct it from his rent.

Payne v. Burridge.

12 Meeson & Welsby, 727–730 (s. c. 13 L. J. Ex. 191).

Lease. — Covenant to pay Taxes, Rates, Assessments, &c.

By a local Act, the commissioners appointed thereby were authorised [727] to pave and flag footways, and the costs thereof were to be paid by the tenants or occupiers of the houses next adjoining; in default whereof, they were to be recovered by distress. Another clause empowered the tenant to deduct the costs so paid by him out of his rent. *Held*, that this charge was within the terms of a covenant in a lease subsequently made, whereby the tenant covenanted to pay all taxes, rates, duties, levies, assessments, and payments whatever, which were, or during the term might be rated, levied, assessed, or imposed on the premises.

Debt. The declaration stated a demise by the plaintiff to the defendant of a messuage and premises for the term of twenty-one years, at the yearly rent of £100, and alleged as a breach the non-payment of half a year's rent.

Plea, as to the residue of the sum of £50 (after a plea of payment into Court as to parcel), that the said demised premises were,

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and still are, within the town of Leamington, in the county
[*728] of Warwick, and within the limits of a certain *Act of Parliament (stating it) for paving and flagging the streets, &c., of the said town; that the commissioners appointed under the said Act of Parliament paved, flagged, &c., the footways adjoining to the said demised premises, and required the defendant, as the occupier thereof, pursuant to the said Act, to pay the costs and charges thereof; that such costs and charges amounted to a large sum of money, exceeding the said residue of the said sum of £50; that the defendant paid to the said commissioners the said sum of money, and, in pursuance of the said Act, retained the said residue of the said sum of £50 out of the said arrears of rent in the declaration mentioned.

Replication, that the plaintiff demised the said premises to the defendant under a written indenture of demise, for the term of twenty-one years, at the rent of £100, payable half-yearly, free and clear of and from all manner of parliamentary, parochial, and other taxes, rates, assessments, deductions, or abatements whatsoever; that by the said indenture the defendant covenanted to pay the said rent without any deduction or abatement whatsoever, and that he, the defendant, should and would, at all times during the said term, pay and discharge all taxes, rates, duties, levies, assessments, and payments whatsoever, which then were or during the said term might be rated, levied, assessed, or imposed upon, or payable in respect of, the said messuage and premises so demised to him as aforesaid.

General demurrer, and joinder.

The point stated for argument by the defendant was, that the money alleged in the plea to have been paid to the commissioners was not a tax, rate, assessment, deduction, or abatement, within the meaning of the indenture set out in the replication.

Erle, in support of the demurrer. — The question in this case depends on the construction to be put upon certain of the pro-
[*729] visions of the local Act for the improvement of the *town of Leamington, 6 Geo. IV., c. cxxxiii. The 33rd section of that Act provides, that the commissioners appointed under the Act may pave and flag the footways within the town, and that the costs and expenses of such paving and flagging shall be paid and be payable by the tenants or occupiers of the houses next adjoining which such paving and flagging shall be made, and that, in

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default of such payment, the same shall and may be levied upon such tenant or occupier by distress. Then the 35th section enacts, that it shall and may be lawful for such tenant or occupier, who shall have paid to the commissioners the expenses of such paving, flagging, &c., to deduct out of his rent the charges and expenses which he shall have so paid. This is a charge for the permanent improvement of the premises, from which the landlord is to derive a benefit, and is therefore payable by him. It ought not, therefore, to be included within the "parliamentary, parochial, or other taxes, rates, assessments, deductions, or abatements," from which, by the terms of the lease, the landlord is to be exempt during the term. It is a debt due to the commissioners from the landlord, for which the Act of Parliament gives them a summary remedy by taking his rent.

Gale, *contra*, was stopped by the Court.

POLLOCK, C. B. — This appears to me to be a very clear case. The language of the defendant's covenant leaves no doubt: it is that the tenant "shall and will well and truly pay and discharge all taxes, rates, duties, levies, assessments, and payments whatsoever, which now are, or during the said term shall or may be rated, levied, assessed, or imposed upon, or payable in respect of, the said messuage and premises." This covenant was entered into since the passing of the local Act; although, even if it had been made before, I think it must have operated in the same manner. It cannot be doubted that the charge in question is an assessment * or payment, which, according to the terms of [*730] his contract, is to be borne by the tenant. Mr. Erle urges, that by the Act of Parliament this burden is cast upon the owner of the premises; and so no doubt it is; but the same may be said of sewers' rates, the payment of which, nevertheless, by the covenants of a lease, may be thrown upon the tenant. Our judgment must therefore be for the plaintiff.

PARKE, B. — I am of the same opinion. The words of the covenant must be construed according to their natural and ordinary sense, and it seems to me that they are too strong to be got over.

ALDERSON, B. — I entirely agree. If the parties had been desirous of imposing this particular burden on the tenant, I do not see what other terms they could have used than those which are contained in this lease.

ROLFE, B., concurred. *Judgment for the plaintiff.*

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ENGLISH NOTES.

Where the tenant in a lease covenanted to pay all taxes, rates, assessments, and impositions payable in respect of the demised premises, he was held not liable to pay money paid by the owner in respect of pavement laid down before the commencement of the tenancy, by a corporation under the powers of a local Act which empowered them to call on the owner to pave, and in his default, to pave the street opposite to his premises and recover the expense from the owner. *Tidswell* v. *Whitworth* (1866), L. R. 2 C. P. 326, 36 L. J. C. P. 103, 15 L. T. 574, 15 W. R. 427.

But in *Thompson* v. *Lapworth* (1868), L. R. 3 C. P. 149, 37 L. J. C. P. 74, 17 L. T. 507, 16 W. R. 312, where the tenant who took a lease of a house in a new street and covenanted to pay "all taxes, rates, duties, and assessments whatsoever which during the continuance of the demise should be taxed, assessed, or imposed on the tenant or landlord of the premises," and the vestry paved the street and obliged the landlord to pay his proportion of the expenses under the Metropolitan Management Acts (18 & 19 Vict., c. 120, s. 105, and 25 & 26 Vict., c. 102, ss. 77 and 96), it was held that the tenant was liable to pay the expense as a "duty" within the covenant. These Acts do not impose the duty on the owner in the first instance to pave the street, so that the duty laid on the owner to pay for the paving was a "duty" laid on him directly and not merely in consequence of his default. On this ground the Judges, the same who had decided the case of *Tidswell* v. *Whitworth*, *supra*, distinguished it from the case in point (*Thompson* v. *Lapworth*), and held that the principle of *Payne* v. *Burridge* applied. It seems curious that they did not expressly advert to the obvious distinction that in *Tidswell* v. *Whitworth* the payment was claimed from the owner in respect of a default incurred by him *before* the commencement of the tenancy.

In *Budd* v. *Marshall*, decided by the Court of Appeal in 1880 (5 C. P. D. 481, 50 L. J. Q. B. 24, 42 L. T. 793, 29 W. R. 148), the defendant was tenant under a lease commencing in 1867, under which he covenanted to "bear pay and discharge the land tax (if any), sewers rate, borough rate, improvement rate, tithes and tithe-rent charge in lieu of tithes, and all other taxes, rates, duties, and assessments whatsoever, whether parliamentary, parochial, or otherwise, which during the term should be taxed, charged, rated, assessed, or imposed upon the demised premises, or upon the landlords or tenants in respect thereof." The Sanitary Authority obtained an order of Justices under sect. 96 of the Public Health Act, 1875, against the plaintiffs as owners, directing them to abate a nuisance arising from defective drainage, and for that

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purpose to make certain drains. The plaintiffs made the drains, and sued the defendant for the costs incurred. It was decided by a majority of the Court (BRAMWELL, L. J., and BAGGALLAY, L. J., against BRETT, L. J., *dissentiente*) that the plaintiffs were entitled to recover the cost under their covenant. BRETT, L. J., referred to the reasons given by the Judges in distinguishing *Thompson* v. *Lapworth* from *Tidswell* v. *Whitworth*, and held that the payment being made in consequence of a breach of duty by the owners, the case was distinguishable from *Thompson* v. *Lapworth*, and fell within the principle of *Tidswell* v. *Whitworth*. BRAMWELL, L. J., as to *Tidswell* v. *Whitworth*, said: "The covenant was to 'pay and discharge all taxes, rates, assessments, and impositions . . . payable in respect of the demised premises.' I think it was rightly held that the tenant was not liable, because the landlord had made default in a prior obligation." He considered that the obligation in the present case was clearly within the covenant. BAGGALLAY, L. J., considered that the distinction between the cases of *Tidswell* v. *Whitworth* and *Thompson* v. *Lapworth* was due to the more comprehensive terms of the covenant in the latter case. He considered the duty was clearly within the terms of the covenant in the case before the Court.

The cases on the subject are elaborately reviewed in a written judgment delivered by WRIGHT, J., and BRUCE, J., in the case of *Brett* v. *Rogers*, 1897, 1 Q. B. 525, 66 L. J. Q. B. 287, a case nearly similar to *Budd* v. *Marshall*, *supra*. The defendant held under a lease to the plaintiff, whereby the lessee covenanted to "pay the land tax, sewers rate, and all other taxes, rates, duties, assessments, and impositions, parliamentary, parochial, or otherwise, which now are or shall at any time during this demise be assessed or imposed on or in respect of the demised premises." Very shortly after the commencement of the lease the sanitary authority served a notice on the plaintiff, as owner, under the Public Health (London) Act, 1891, directing him to abate a nuisance on the premises, and for that purpose to take up a defective drain and lay a new drain throughout the premises. The plaintiff incurred expenses in complying with the notice, and sued the defendant to recover the amount. By the judgment, following *Payne* v. *Burridge*, *Thompson* v. *Lapworth*, and *Budd* v. *Marshall*, and relying chiefly on the word "duties," it was held that the defendant was liable on his covenant.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sect. 414, but with no American references, and in Taylor on Landlord and Tenant, sects. 397, 398.

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Such a covenant embraces a water rate created subsequent to the lease: *Garner* v. *Hannah*, 6 Duer (N. Y. Super. Ct.), 262. And assessments imposed under a statute enacted after the lease was executed: *Bleecker* v. *Ballou*, 3 Wendell (N. Y.), 263; *Post* v. *Kearney*, 2 New York, 394; *Des Moines* v. *Dorr*, 31 Iowa, 89; *Curtis* v. *Pierce*, 115 Massachusetts, 186. And an assessment imposed by a city under a statute in force when the lease was made: *Mayor* v. *Cashman*, 10 Johnson (N. Y.), 96; *Post* v. *Kearney*, 2 New York, 394; 51 Am. Dec. 303; *Des Moines* v. *Dorr*, 31 Iowa, 89; *Walker* v. *Whittemore*, 112 Mass. 187. An assessment for street work done before the term: *Shepardson* v. *Elmore*, 19 Wisconsin, 424. An extraordinary assessment for a permanent improvement: *Astor* v. *Miller*, 2 Paige (N. Y. Chanc.), 68; *Bleecker* v. *Ballou*, *supra*; *Harvard College* v. *Boston*, 104 Massachusetts, 470.

Under a covenant to pay "taxes, duties, and public dues," assessments for betterments are not included, but only ordinary annual taxes. *Pray* v. *Northern Liberties*, 31 Penn. State, 69; *Sharp* v. *Speir*, 4 Hill (N. Y.), 77; *Second Universalist Soc.* v. *Providence*, 6 Rhode Island, 235; *Bolling* v. *Stokes*, 2 Leigh (Virginia), 178; 21 Am. Dec. 606. *Contra*, *Simonds* v. *Turner*, 120 Massachusetts, 328.

A covenant to pay all taxes "that should be assessed on the premises during the term" does not cover an assessment for benefit for street improvements. *Beals* v. *Providence R. Co.*, 11 Rhode Island, 381; 23 Am. Rep. 472. But otherwise if the covenant uses the words "general or special." *Thomas* v. *Pump Co.*, 22 Missouri Appeals, 8.

Taylor says (Landlord and Tenant, sect. 397), citing this case: "Where the tenant's covenant is only to pay rates, taxes, or public dues, while the ordinary annual taxes are included (*Garner* v. *Hannah*, 6 Duer [N. Y.], 262), it has been held that he is not liable to an assessment of an extraordinary or unusual character, or for a permanent improvement inuring to the benefit of the reversion. *Twycross* v. *Fitchburg Railroad*, 10 Gray (Mass.), 293; *Bolling* v. *Stokes*, 2 Leigh (Virginia), 278; *Munic. No. 2* v. *Curel*, 15 Louisiana, 657; *Beals* v. *Providence Railroad*, 11 Rhode Island, 381; *Second Universalist Soc.* v. *Providence*, 6 Rhode Island, 235; *Matter of College Street*, 8 ibid. 474. It is here held that while laying an assessment either for the expense of an improvement, or for an assumed benefit resulting from it to an estate, is an exercise of the taxing power, yet it is not a tax in the ordinary sense of the term, but in the nature of a return for a benefit conferred, and therefore not included under the terms *taxes* or *taxation*. In *Harvard College* v. *Boston*, 104 Massachusetts, 476, the terms of exemption were broader, and an assessment for a betterment was held to be included under the words 'civil impositions.' A tax upon the rent reserved is not a tax which he is bound to discharge under a general covenant to pay taxes. *Van Rensselaer* v. *Dennison*, 8 Barbour (N. Y. Sup. Ct.), 23. So where the terms of the statute imposing the assessment are clearly limited to the owner, the tenant will not be liable for a permanent improvement, even under a covenant by which he agrees to pay all taxes, rates, assessments, and impositions. *Weber* v. *Reinhard*, 73 Penn. State, 370." Mr. Taylor then quotes from the principal case, approving it, and referring to *Bleecker* v. *Ballou*, *supra*; *Codman* v. *John-*

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son, 104 Massachusetts, 491; *Astor* v. *Miller*, *supra*; and concludes: "It is held in Massachusetts that under his covenant to pay taxes and assessments the tenant is liable not merely for the expense of the improvement, but in the proportion of the betterment so called, that is, of the assumed benefit resulting to the whole estate, including the reversion, from the improvement (*Codman* v. *Johnson*, *supra*; *Walker* v. *Whittemore*, 112 Massachusetts, 187), even when the covenant is to pay *taxes* and *duties* only. *Simonds* v. *Turner*, 120 Massachusetts, 328. But the current of American as well as English authority is the other way, and in one case even the word *assessments* was held insufficient to subject the tenant to this burden. *Love* v. *Howard*, 6 Rhode Island, 116; *Sharp* v. *Speir*, 4 Hill (N. Y.), 76; *Pray* v. *Northern Liberties*, 31 Penn. State, 69; *Matter of Mayor*, 11 Johnson (N. Y.), 77." This is probably as correct a statement of the outcome of these somewhat conflicting decisions as can be made. Mr. Taylor adds in a note, speaking of the Massachusetts doctrine: "It is noticeable how much the terms have been narrowed which are held to subject the tenant to this extraordinary liability. In *Codman* v. *Johnson*, *supra*, the judgment was rested in some degree on the facts that the covenant was to pay *assessments*, that the lease was for twenty years, and was made after the statute imposing the burden; and hence that an assessment for a permanent benefit might well have been in the parties' contemplation. In *Curtis* v. *Pierce*, the statute was after the lease; but the covenant was very broad, and the lease was for ten years. In *Blake* v. *Baker*, 115 Mass. 188, however, the lease was for three years, though made indeed after the passage of the statute; and the covenant was to pay *taxes or duties* only. Finally, in *Simonds* v. *Turner*, the tenant was held liable under a covenant to pay *taxes* and *duties* for an assessment for a betterment of a character unknown when the lease was made, imposed by a statute passed after the date of the lease, and when this had but a few years to run. It may be well to contrast the words of the covenant in this case with those employed in the leases in *Sweet* v. *Seager*, *Payne* v. *Burridge*, or *Thompson* v. *Lapworth*, *supra*, or with the language of the Court in *Harvard Coll.* v. *Boston*, 104 Mass. 471, 483: 'In a lease for years, especially if for a short term, containing a covenant that the tenant shall pay all taxes assessed upon the premises, it would hardly be supposed that the parties intended that the lessee should pay an extraordinary assessment laid upon the premises, in view of the permanently increased value of the estate by reason of a public improvement in the vicinity, unless the terms used were such as to admit of no other construction.'"

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No. 61. — JEFFREYS *v.* EVANS.

(C. P. 1865.)

RULE.

THE usual covenant for quiet enjoyment in a lease only extends, so far as relates to the acts of third parties, to lawful acts of disturbance in the enjoyment of the subject agreed to be let.

Jeffreys v. Evans.

34 L. J. C. P. 261–264 (s. c. 19 C. B. (N. S.) 246; 11 Jur. (N. S.) 584; 13 L. T. 72).

Lease. — Covenant for Quiet Enjoyment. — Disturbance by Unlawful Act of Stranger.

[261] A. let a farm to B., reserving the exclusive right of "hunting, shooting, fishing, and sporting," and afterwards let to C. the exclusive right of "shooting and sporting over and taking the game, rabbits, and wildfowl upon" the farm, and covenanted with C. for his quiet enjoyment of such right without interruption from persons claiming through him. B. shot rabbits, and grubbed up a large quantity of gorse, &c., whereupon C. brought an action against A. *Held*, first, that B. had no right to shoot rabbits, and that his act therefore was a wrongful one, for which A. was not liable; secondly, that B. was entitled to grub up the gorse, &c., in the reasonable use of the land as a farm, that there was no implied covenant with C. that this should not be done, and that A. was therefore not liable for such act of B.

The declaration (as far as it is necessary to refer to it) alleged that the defendant demised to the plaintiff, for seven years, a certain messuage and lands, and also the exclusive right at all times during the said term of shooting and sporting over, and taking the game, rabbits, and wildfowl upon the said premises and upon certain other manors and lands, with a certain reservation as to trees, &c., over the lands demised; and that the demise contained the usual covenant for quiet enjoyment without interruption from persons lawfully claiming under the lessor, and a covenant to repair. And it contained four breaches: 1. That one Rees, lawfully claiming under the defendant the right to shoot the rabbits in and upon the said manors and lands, and having good title under him, entered into and upon the said lands, and shot and killed and carried away large quantities of rabbits there, and

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evicted the plaintiff from the enjoyment of the said exclusive right of shooting and sporting and taking the said rabbits so to him demised and granted. 2. That the said Rees, lawfully claiming under the defendant the right to cut down divers furze coverts, woods, and plantations in and upon the said manors and lands over which the plaintiff had the said exclusive right of shooting and sporting, cut down, carried away, and destroyed large quantities of such furze coverts and plantations, and thereby evicted the plaintiff from and disturbed him in the enjoyment of his said right of shooting and sporting. 3. That there was an improper exercise of the right as to trees. 4. That there was a breach of the covenant to repair.

The defendant pleaded — to the first breach, first, that Rees did not enter the lands and shoot and kill the rabbits and evict the plaintiff from the enjoyment of his exclusive right of shooting and sporting and taking rabbits; secondly, that Rees did not lawfully claim under him the right to shoot rabbits: to the second breach, thirdly, that Rees did not cut down the furze, &c., and evict the plaintiff or disturb him in his said right; fourthly, that Rees did not lawfully claim under him to cut down the furze, &c.: to the * third breach, fifthly, payment into Court: to the [* 262] fourth breach, sixthly, a denial of the non-repair.

On these pleas issue was taken.

At the trial it appeared that the lands referred to in the declaration, and called the Upton Estate, were divided into two portions; viz., Upton Castle, with a small quantity of land attached, and Upton Castle Farm. That the said Rees was tenant of the farm under the defendant by virtue of a lease of December, 1857, which reserved to the lessor, &c., all timber and other trees, mines, minerals, and quarries on the said farm, and also the exclusive right of hunting, shooting, fishing, and sporting on the said farm. That the plaintiff was the tenant of Upton Castle and the annexed land under the defendant, by virtue of a lease of September, 1860, which also gave a right of sporting over the farm in the terms disclosed by the declaration, and contained the covenants therein set forth. Evidence was given as to the destruction of the rabbits, furze, &c., the injuries in cutting trees, and the non-repair. The learned Judge was of opinion that Rees had no right under his lease to destroy the rabbits, and could not therefore be said to claim under the defendant; and that the cutting down the furze,

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&c., was not an eviction of the plaintiff from his right of shooting; and that therefore the plaintiff was not entitled to succeed on the first two breaches. But he left it to the jury to say whether any and what damage had been done to the plaintiff on each of the breaches, assuming that he had a right to recover for damages accruing under them.

The jury found that the plaintiff had sustained damages from all the four alleged causes of action, and assessed such damages *separatim*. And the learned Judge thereupon directed a verdict to be entered for the plaintiff on the first, fifth, and sixth issues; for the defendant on the second issue, with leave to the plaintiff to move to enter a verdict for the damage assessed on that issue, if on the true construction of the lease to Rees he had a right to shoot the rabbits; and for the defendant on the third and fourth issues, with leave to the plaintiff to move to enter a verdict for the damage assessed on those issues, if the Court should think the issues in fact proved; but the rule to be drawn up so as to allow the defendant to move in arrest of judgment as to the second breach to which such pleas were pleaded on the ground that the acts complained of did not amount to a breach of the defendant's covenant.

A rule *nisi* having been obtained, and in substance drawn up pursuant to such leave (except perhaps the addition of the words, "and that on the construction of the said lease Rees had a right to cut furze and underwood," after the words "issues in fact proved"), —

Giffard, H. Allen, and G. B. Hughes now showed cause. — The first point made on the other side is, that rabbits are not game, and that therefore Rees had a right to shoot, and the defendant is consequently liable for his rightful act; and the case of *Spicer* v. *Barnard*, 1 E. & E. 874, 28 L. J. M. C. 176, is relied on. The reservation in that case was no doubt the same as it is here; but there the question was as to the meaning of "game" in a particular statute; here it is as to its meaning in a contract between private parties. The legal technical meaning may vary from time to time; but in a contract all animals generally sported after will be included. Again, rabbits have been recognised as game in various statutes from 13 Rich. II., st. 1, c. 13; and though not game within 1 & 2 Will. IV., c. 32, yet, if a man sports after them he will be surcharged; they are also within 25 & 26 Vict., c. 114, and are not mere objects of diversion, as appears from the judg-

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ment of BAYLEY, J., in *Hannam* v. *Mockett*, 2 B. & C. 934 (26 R. R. 591). The second point made was, that there was an implied covenant not to disturb by cutting the furze, &c.; but the other side is in this dilemma: if there be such a covenant implied in the lease to the plaintiff, it must equally exist in the lease to Rees, and his act, therefore, would be a wrongful one, for which we are not responsible; if there be not, then there is no covenant to break.

J. W. Bowen and C. Coleridge in support of the rule. — First, rabbits never were game: Woolrych on the Game Laws, Paterson on the Game Laws, Chitty on the Game Laws, Fitzh. Nat. Brev., 86 and 87; they are not game within 4 & 5 W. & M., c. 23: * *Rex* v. *Yaites*, 1 Ld. Raym. 151; or within 5 Anne, [*263] c. 14, s. 4: ASHHURST, J., in *Rex* v. *Thompson*, 2 T. R. 18; and on a review of the various acts that have been passed, it will be found that rabbits are always expressly mentioned in addition to game whenever they are intended to be included. The cases of *Padwick* v. *King*, 7 C. B. (N. S.) 88, 29 L. J. M. C. 42; *Thomas* v. *Fredericks*, 10 Q. B. 775, 6 L. J. (N. S.) Q. B. 393; *Graham* v. *Ewart*, 11 Ex. 326, 25 L. J. Ex. 42; and *Spicer* v. *Barnard*, are all in favour of the plaintiff. Secondly, the reservation of trees in the lease to Rees did not include underwood: 2 Platt on Leases, 42; *Berriman* v. *Peacock*, 9 Bing. 384, 2 L. J. (N. S.) C. P. 23; and there was in the lease to the plaintiff an implied covenant that the farm should be reasonably fit for his shooting: 7 Bac. Abr. 252; and therefore this is an act of Rees for which the defendant is liable to the plaintiff.

ERLE, Ch. J. — I am of opinion that the rule should be discharged, and the verdict stand as entered. The action (as far as it relates to the present rule) is brought for breach of a covenant for quiet enjoyment of the exclusive right of shooting and sporting over and taking the game, rabbits, and wildfowl upon certain lands in the occupation of Rees; and the declaration alleges that Rees, lawfully claiming under the defendant the right to shoot the rabbits upon these lands, shot, killed, and carried away large quantities of rabbits, and evicted the plaintiff from his exclusive right of shooting; and also that Rees, lawfully claiming under the defendant the right to cut down the furze, &c., upon such lands, cut down and carried away large quantities of it, and thereby also evicted the plaintiff from and disturbed him in the enjoy-

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ment of his said right of sporting. The great point is as to whether Rees had a right to shoot the rabbits, and I think he had no right to do so. The demise to Rees was of a farm, with a reservation to the landlord of the "exclusive right of hunting, shooting, fishing, and sporting" over it. And I think that the fair meaning of the words is, that there is a reservation to the landlord of whatever ordinarily is known as "hunting, shooting, fishing, and sporting." The word "game" is an indefinite word, and seems at various times to have had various meanings: to have at one time included one thing, at another time another; to have had at one time a wider, and at another time a narrower signification. And if the issue had been as to the meaning of a reservation of game, possibly we might have construed it according to the statutes for the time being in force. But the word "game" is not used. Further, in my opinion, when a tenant takes a farm with a reservation of "hunting, shooting, fishing, and sporting," he should, if afraid of destruction that may be done by rabbits, make it a matter of arrangement, and stipulate either for compensation or for some powers for destroying them. Here there is no such stipulation, and, indeed, I see no evidence of any extraordinary increase of the rabbits. The second point is as to the destruction by Rees of the furze coverts, woods, and plantations, the evidence not being definite as to its extent. It is said that the covenant for quiet enjoyment of the shooting, sporting, and taking game, rabbits, and wildfowl, by the plaintiff, contains an implied covenant not to grub up the furze coverts, woods, and plantations, and that the doing so was an eviction from the right of the shooting and sporting. The short answer is, that it was no eviction from the right of shooting and sporting, for the same right of shooting remained when the land became arable, and the covenant is only that the plaintiff shall have the shooting there. If his contention were correct, it might be said that it would be a breach of covenant for the tenant to give up growing turnips or any other crop favourable to partridges; and the same law applies where thirty or forty acres of brushwood are destroyed. If there had been a covenant for the enjoyment of shooting in a wood, it might have been different; in this case it is not so, and I am of opinion that there was no eviction. These are my two answers. There is also the dilemma which has been put by Mr. Giffard; but the foregoing are the reasons on which I decide.

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* WILLES, J. — I am of the same opinion. The reserva- [*264] tion in the lease to Rees is of "hunting, shooting, fishing, and sporting," and I can see no reason why all things generally hunted, shot, fished, or sported after should not be included. General words should receive a general construction. The consequence of the plaintiff's construction would be, that not merely might the tenant kill rabbits (which are beasts of warren), but also woodcock, snipe, quail, and landrail (which are birds of warren); and this, I think, leads to an absurdity. As to *Graham* v. *Ewart*, I have spoken to my Brother MARTIN, who delivered the judgment, and I find, as I supposed, that the words "game, commonly so called," were meant to refer to such things as are usually sported after, in contradistinction to small birds, and things of a similar character, as, for instance, rats and sparrows. I am clearly of opinion that Rees had no right to kill the rabbits; and, therefore, on the first point, my judgment is in favour of the defendant. As to the second point, the argument for the plaintiff would have been weighty if there had been a grant of woods or underwood; but that point does not arise here. I think that there is in this case nothing to hinder the landholder from using the land in the ordinary way; he is justified as long as he acts in reasonable use of the land, and does not resort to expedients for driving the game away; and I therefore am of opinion that the destruction of the furze and underwood was no eviction from the right of shooting. I am not aware of any case in which a man has succeeded in an action for breach of such a covenant for quiet enjoyment as this, where the grantor had what he professed to grant. Here, whatever was reserved by the defendant was granted to the plaintiff; and any right that there might be to keep down a nuisance was recognised equally in the leases of 1860 and 1857. The grantor in this case had the right to that which he professed to grant; the interruption, therefore, was not one which was stipulated against, and our judgment should be for the defendant.

BYLES, J. — I do not desire to be supposed to dissent from the rest of the Court; but I desire to make two observations. First, I do not think that woodcocks, snipe, quails, and landrails are on the same footing as rabbits, inasmuch as rabbits may become a nuisance. Secondly, it must not be understood that I decide that when a landlord lets land, reserving to himself the right of sport-

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ing, the tenant may not destroy the rabbits if they become a nuisance.

SMITH, J. — I am also of opinion that our judgment should be for the defendant. The first point is, whether the reservation in the lease to Rees included rabbits. I am of opinion that it did, and that the right so reserved was granted to the plaintiff. What Rees did he therefore did unlawfully and against the reservation of his landlord. The second point is, whether the defendant is entitled to keep the verdict entered for him on the third and fourth issues, and I am of opinion that he is. The cutting of the underwood may have been in the ordinary use of the farm as a farm, and it was no interruption of the grant of the shooting, as the plaintiff might still shoot over the land as before. A man taking such a grant as this must stipulate that the woods must be kept, and that the nature of the cultivation must not be changed. There, further, is this dilemma: if there be no implied covenant against the destruction of the underwood in the lease to the plaintiff, there is no covenant to break; and if there be, then there must equally be one by Rees in the lease to him, and then his act is wrongful, and an act for which the defendant is not liable.

Rule discharged.

ENGLISH NOTES.

"When a man covenants his lessee shall enjoy his term against all men, he doth neither expressly covenant for his enjoyment against tortious acts, nor doth the law so interpret his covenant." *Hayes* v. *Bickerstaffe*, Vaughan, at p. 123; cited (with numerous other cases) Elphinstone, Interpretation of Deeds, under Rule 173.

A general covenant for quiet enjoyment only extends to a disturbance under a lawful title. *Anon.*, Lofft, 460.

But the case is different where the disturbance comes from an individual named as the person against whose acts the enjoyment is assured. *Nash* v. *Palmer* (K. B. 1816), 5 M. & S. 379, 17 R. R. 364. "For there, the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be reasonably expected to stipulate against any disturbance by him, whether lawful or otherwise." Per Lord ELLENBOROUGH, *Nash* v. *Palmer*, 5 M. & S. 380, 17 R. R. 366.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sects. 360, 361.

This covenant only means that the tenant shall not be evicted or dis-

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turbed by good title in the possession of the demised premises or some part thereof; it does not mean that the tenant shall be guaranteed from all molestation or damage from the wrongful acts of strangers having no right or title to any part of the premises. So where a lease embraced a building of wood, with sides of only lath and plaster, built alongside of a brick building on another lot, owned by a third person, and the latter tore down his building, leaving the wooden building unprotected from the elements, by reason of which his goods were injured, it was held that the lessee had no cause of action against the landlord. *Chestnut* v. *Tyson*, 106 Alabama, 149; 53 Am. St. Rep. 101; *Moore* v. *Weber*, 71 Penn. State, 429; 10 Am. Rep. 708. The same doctrine is found in *Gardner* v. *Ketcltas*, 3 Hill (N. Y.), 330; 38 Am. Dec. 637; *Baugher* v. *Wilkins*, 16 Maryland, 35; 77 Am. Dec. 279; *Surget* v. *Arighi*, 11 Smedes & Marshall (Mississippi), 87 (eviction by a mob); *Crouch* v. *Fowle*, 9 New Hampshire, 219; 32 Am. Dec. 350. See also *Sherman* v. *Williams*, 113 Massachusetts, 481; 18 Am. Rep. 522.

No. 62. — LOCK *v.* FURZE.

(EX. CH. FROM C. P. 1866.)

RULE.

UNDER an express covenant for quiet enjoyment in a lease under seal, the lessee may, if ousted by a superior title, recover by way of damages the value of his lease, on the footing of the title being good; and, if the true owner grants a lease on different terms, the damages may be calculated on the basis of the difference between the rents and the difference in value of the other terms, under the two leases.

Lock v. Furze.

L. R. 1 C. P. 441–456 (s. c. 35 L. J. C. P. 141; 14 W. R. 403).

Lease under Rack-rent in Consideration of a Premium. — Covenant for [441] *Quiet Enjoyment. — Measure of Damages for Breach.*

A. was in possession of premises under a lease from B., which would expire on the 4th of December, 1864. In February, 1860, A., in consideration of a premium of £400, obtained from B. a further lease of the same premises for twenty-one years and twenty-one days, to commence from the expiration of the former lease. On the death of B., in 1863, it was found that B. was only tenant for life, with power to grant leases in possession, and not in reversion, and consequently that the lease so granted by him to A. in February, 1860, was void.

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A. thereupon obtained from the reversioners a fresh lease for seven years, at a considerable increase of rent, and sued C. (B.'s executor) upon the covenant for quiet enjoyment contained in the void lease.

Held, affirming the judgment of the Court of Common Pleas, that A. was entitled to recover, besides the £400 premium which he had paid to B., and the costs of preparing the void lease, the value of what he had lost by B.'s breach of contract, — substantially the difference between the value of the term professed to be granted to him by the lease of February, 1860, and that of the seven years' term which he obtained from the reversioners.

This was an appeal against a decision of the Court of Common Pleas.

1. The first count of the declaration alleged in sub-
[* 442] stance, that, * by an indenture dated the 14th of February, 1860, between John Furze, the testator, and the plaintiff, it was witnessed that, for and in consideration of the sum of £400 paid by the plaintiff, the said John Furze did demise and lease to the plaintiff a certain messuage and premises, No. 6 St. James's Street, from the 4th of December, 1864, at which time an existing lease would expire, for twenty-one years and twenty-one days, at a rent for the first twenty-one days of £10, and for the remainder of the term £175 a year; and that the said John Furze did thereby covenant with the plaintiff, his executors, &c., that the plaintiff should peaceably and quietly have, hold, and enjoy the premises during the said term without the lawful let, suit, trouble, denial, molestation, or disturbance of or by the said John Furze, his heirs or assigns, or any of them, or any person or persons whomsoever claiming or to claim by, from, through, under, or in trust for him, them, or any of them. It then averred the fulfilment of all conditions, and alleged by way of breach that, before and during the term, one Frances Vickers, then lawfully claiming the premises through the said John Furze, and having a good title to them and to the possession thereof, claimed and demanded them of the plaintiff, and threatened to oust him from the possession and enjoyment thereof; whereby the plaintiff could not and did not peaceably have, hold, and enjoy them, &c.; and by reason of the premises the plaintiff was forced and obliged to and did take and accept a lease of the said premises from the said Frances Vickers for seven years from December the 25th, 1864, at an increased rent of £360 a year, and was put to great trouble and expense and costs in obtaining such lease, and had lost the benefit of the lease granted by the said John Furze, and of the £400 paid for the same.

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There was also a count for money received by John Furze in his lifetime for the plaintiff's use.

2. The defendant pleaded, amongst other pleas, secondly, to the first count, that the plaintiff never had or entered into possession of the demised premises under or by virtue of the said lease, as alleged; fourthly, to the first count, that the said Frances Vickers did not claim or demand the said premises from the plaintiff, nor threaten to oust him from the possession or enjoyment * thereof, as alleged; fifthly and sixthly, to the [*443] second count, never indebted except as to £417, and payment into Court of that sum.

The plaintiff joined issue on all the pleas, and demurred to the second plea, on the ground that he was entitled to maintain the action though he should never have had possession under the lease in question.

3. The material facts, as they appeared at the trial, were as follows: The plaintiff is a hatter, and has for many years carried on his business at No. 6 St. James's Street, Westminster, where the same business was previously carried on by his father and grandfather. The house and shop, No. 6 St. James's Street, had been demised to the plaintiff by a lease dated the 9th of February, 1838, for a term of twenty-seven years, wanting twenty-one days, from December the 25th, 1837, at a rent of £140 per annum. The term expired on the 4th of December, 1864.

4. Previously to the granting of the last-mentioned lease, the premises had been conveyed, and were then held, to such uses as the testator, John Furze, should by deed appoint, with remainder to him in fee. After the granting of the last-mentioned lease, the testator, by an indenture dated the 11th of November, 1841 (being a settlement on the occasion of the marriage of his daughter, Frances Furze, with James Vickers), settled and appointed the premises to trustees to the use of himself for life, with remainder to the use of his wife (who predeceased him) for life, with remainder to the use of his said daughter, who afterwards became the wife of the said James Vickers, for life, with other limitations over.

5. The settlement of the 11th of November, 1841, contained a power to the parties interested thereunder for life, as and when they should for the time being become entitled in possession, to limit or appoint the premises, in manner and on the conditions

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therein provided, by way of demise or lease, for any term of years absolutely not exceeding twenty-one years, to take effect in possession and not in reversion or by way of future interest, and without taking any fine, premium, or foregift for the making thereof.

6. The plaintiff, being desirous of obtaining a further [*444] demise * of the premises, to commence on the expiration of his existing lease, in the early part of the year 1860, entered into negotiations for that purpose with John Furze; and on the 14th of February, 1860, John Furze, in consideration of £400 paid to him by the plaintiff, executed a fresh lease of the premises to the plaintiff, at a rent of £175 per annum, for a term of twenty-one years and twenty-one days from the 4th of December, 1864, at which time the then existing lease would expire.

7. The last-mentioned lease contained a covenant by John Furze, deceased, that the plaintiff, paying the rents reserved, and performing the covenants and conditions of the lease on his part, should have quiet enjoyment of the premises during the term, without let or disturbance by John Furze, his heirs or assigns, or any person or persons lawfully claiming by, from, through, under, or in trust for him, them, or any of them.

8. At the time of the granting of the lease of the 14th of February, 1860, the plaintiff was not aware of the existence of the settlement of the 11th of November, 1841.

9. John Furze died on the 16th of May, 1863, having by his will appointed the defendant his executor; and after his death Mr. and Mrs. Vickers, as being the persons entitled in remainder, received from the plaintiff the rent of the premises as it accrued due under the lease of 1838, until the expiration of that lease on the 4th of December, 1864. On the 4th of November, 1863, Mr. and Mrs. Vickers notified to the plaintiff that they repudiated and refused to recognise the lease of the 14th of February, 1860, and threatened to oust the plaintiff from the possession and enjoyment of the premises at the expiration of the then existing lease; and thereupon the plaintiff entered into negotiations with Mr. and Mrs. Vickers for another lease of the premises, which resulted in a lease being granted by them, dated the 26th of December, 1864, for a term of seven years only from December 25th, 1864, at a rent of £300 a year; the said Frances Vickers and her husband refusing to grant him a lease for any longer term, or at a lower rent.

10. The plaintiff, in his particulars of demand, under the

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second count, claimed £400, the amount of the premium paid to John Furze, for the lease granted on the 14th of February, *1860, and £17, the expense of preparing it; and this [*445] £417 was the sum paid into Court by the defendant.

11. The plaintiff at the trial claimed under the first count £1500 or £1600 for damages, being the difference in value between the lease of the 14th of February, 1860, which had been avoided, and that of the new lease of the 26th of December, 1864; and it was proved that in the neighbourhood of St. James's Street, and in London generally, property had much increased in value since the year 1860, and that the rent of £300 reserved by that lease was, according to the value of property in the neighbourhood at the time when that lease was granted, a reasonable rent.

12. The plaintiff further claimed under the first count a sum of £65 for the costs of the new lease which was granted by Mr. and Mrs. Vickers; but this item was withdrawn from the consideration of the jury, it being agreed that the jury should find their verdict for that sum, leave being reserved to the defendant to move to reduce it as the Court might think proper.

13. With regard to the main question of damages, the LORD CHIEF JUSTICE, in summing up, told the jury, in substance, that the covenant mentioned in the first count having been broken, the plaintiff, under the circumstances, was entitled to be indemnified for what he had lost under the breach of covenant, and to recover the difference in value between the old and new leases.

14. The jury found a verdict for the plaintiff on the first count, for £1522, including the £65, and for the defendant on the second count; and leave was reserved to the defendant to move to set aside the verdict found for the plaintiff on the second and fourth pleas, and also to reduce the damages so far as they related to the sum of £65.

15. In Easter Term, 1865, a rule *nisi* was obtained to enter the verdict for the defendant on the second and fourth pleas, pursuant to the leave reserved, on the ground that, upon the facts proved at the trial, the verdict should have been so entered; and why the damages should not be reduced to nominal damages, or to such sum as the Court might direct, on the grounds that the plaintiff was not entitled to recover more than the sum of £400, which he had paid, and the £17 expenses, which two sums the *defendant had paid into Court, and that he lost nothing [*446]

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but what he had paid; that he was not entitled to recover the £65, the costs of the second lease, or any part of it; that the plaintiff must have paid the costs of one lease, and was not entitled to throw those costs or any of them upon the defendant; and that the plaintiff was not entitled to the ten per cent which the jury gave as upon a compulsory sale: or why there should not be a new trial, on the ground that the CHIEF JUSTICE misdirected the jury in telling them that the plaintiff was entitled to recover the difference in value between the lease that was avoided and the new lease that was granted, and that the plaintiff was entitled to recover the £65, and in directing them that the plaintiff was entitled to recover the ten per cent claimed as upon a compulsory sale. It was agreed that the demurrer to the second plea should be argued with the rule.

16. Upon the rule coming on for argument, the £65, the costs of the new lease, was by consent reduced to £25; and the rule was made absolute to enter the verdict for the defendant on the second plea, and to reduce the damages to £1348, taking into consideration the reduction of the £65, and the rule was discharged as to the residue, and judgment was given on the demurrer to the second plea for the plaintiff (19 C. B. (N. S.) 96; 34 L. J. C. P. 201). The defendant had leave to appeal upon the main point as to the principle of the damages.

The question for the Court was, whether the damages should be reduced, and if so, whether they should be reduced to nominal damages, or to the sum of £25.

The case was argued before POLLOCK, C. B., MARTIN and CHANNELL, BB., BLACKBURN and MELLOR, JJ., PIGOTT, B., and LUSH, J.

Gart (Prentice with him) for the defendant. — The measure of damages sanctioned by the Court below was this: The jury were instructed to take the value of the term granted by the lease of February, 1860, and to say what was the difference between the value of that term and that of the lease of December, 1864. The difference the jury found to be £1522. That, it is submitted, was not the proper mode of estimating the damages the plaintiff was entitled to for the testator's breach of contract. What passed [*447] * to the plaintiff by the lease of February, 1860, was a mere *interesse termini;* and the lease was repudiated by the reversioners before the plaintiff entered into possession under it. The true measure of damages was the sum which the plain-

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tiff had paid for that lease and the costs of preparing it; and these two sums have been paid into Court. The same rule must obtain here as in the case of a vendor failing to complete a contract of purchase by reason of a defective title. *Flureau* v. *Thornhill*, 2 W. Bl. 1078. The authorities upon the subject in our books are very scanty: none exactly touch the point. There are many American cases, which are collected in Mayne on Damages and in Sedgwick on Damages, which throw some light upon it. In Mayne, p. 97, it is said that "a breach of the covenant for quiet enjoyment cannot occur till the plaintiff has actually been dispossessed or otherwise disturbed;" and for the measure of damages reference is made to *Williams* v. *Burrell*, 1 C. B. 402, where, a lease having been declared void as against the remainder-man, on the ground that it was not in conformity with the power, the lessee was held to be entitled to recover against the executors of the lessor the value of the term, the cost of defending an ejectment brought by the remainder-man, and the *mesne* profits in that action, but not interest. Then arises the question whether it is to be the value at the time of conveyance or at the time of eviction. In Kent's Commentaries, vol. iv., 8th edit., p. 533, it is said: "The measure of damages in actions on these personal covenants is regulated in some degree by the rule on the antient warranty. At common law, upon voucher, or upon the writ of *warrantia chartæ*, the demandant recovered of the warrantor or heir other lands of equal value with the lands from which the feoffee was evicted. The value was computed as it existed when the warranty was made; so that, though the land had afterwards become of increased value, by the discovery of a mine, or by buildings, or otherwise, yet the warrantor was not to render in value according to the then state of things, but as the land was when he made the warranty. And when personal covenants were introduced as a substitute for the remedy on the voucher and warranty, the established measure of compensation was not varied or affected. The buyer, on the covenant of seisin,
* recovers back the consideration money and interest, and [*448]
no more. The interest is to countervail the claim for
mesne profits to which the grantee is liable, and is and ought to be commensurate in point of time with the legal claim to *mesne* profits. The grantor has no concern with the subsequent rise or fall of the land by accidental circumstances, or with the beneficial

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improvements made by the purchaser, who cannot recover any damages either for the improvements or the increased value. This appears to be the general rule in this country." For this the learned author cites numerous American authorities.

[MARTIN, B. — The only sensible rule seems to me to be that which is laid down by PARKE, B., in *Robinson* v. *Harman*, 1 Ex. at p. 855, 18 L. J. Ex. 202, where he says: "The rule of the common law is, that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." That seems to me to be in accordance with every just law.]

The decision there proceeded upon the ground of fraud. The rule there stated may be a very reasonable one in the case of a breach of a contract for the sale of goods; but it can hardly be held reasonable that a vendor should be liable for the value of the land twenty years hence.

[BLACKBURN, J. — You have to make out that the exception in *Flureau* v. *Thornhill* applies where a conveyance has been executed with an express covenant for quiet enjoyment.

CHANNELL, B. — This is an action upon an express contract, or a covenant. Lord ST. LEONARDS takes that distinction pointedly in the last edition of Vendors and Purchasers, p. 236: "Where," he says, "the purchaser has paid any part of the purchase-money, and the seller does not complete his engagement, so that the contract is totally unexecuted, the purchaser may affirm the agreement by bringing an action for the non-performance of it, or he may disaffirm it, and bring an action for money had and received to his use. In this latter action the plaintiff cannot recover more than the money paid, although the estate has risen in value, while it should seem that, if the estate has experienced a diminution in value, he can only recover the damages he sustained by [*449] the estate * not having been conveyed; that being the only money retained by the defendant against conscience. But where, for example, the purchasers have had possession of the property, so that the parties cannot be placed *in statu quo*, the count for money had and received cannot be maintained." That doctrine does not apply to the case of a covenant for title or for quiet enjoyment.]

The reason is better given in *Staats* v. *Ten Eyck's Executors*,

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3 Caines, 111, cited in Sedgwick on Damages, 2nd edit., 159, and also in Kent's Commentaries, vol. iv. p. 534. In the latter, the authorities are summed up thus: "The ultimate extent of the vendor's responsibility under all or any of the usual covenants in his deed is the purchase-money, with interest; and this I presume to be the prevalent rule throughout the United States."

[MARTIN, B. — In *Hopkins* v. *Grazebrook*, 6 B. & C. 31, 9 D. & R. 22, where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him, it was held that a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect. Being pressed with the decision in *Flureau* v. *Thornhill*, 2 W. Bl. 1078, ABBOTT, Ch. J., said: "Upon the present occasion I will only say, that if it is advanced as a general proposition, that, where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point, I should desire to have time for consideration." In the face of two cases, you want us to decide that Lord TENTERDEN was wrong.]

In that case the vendor knew when he offered the estate for sale that he had no title. With respect to *Williams* v. *Burrell*, 1 C. B. 402, it may be remarked that it might not have been worth the defendant's while to urge these considerations. The lessees had enjoyed the property for several years. Here the plaintiff had a mere *interesse termini*. Sedgwick, at p. 157, quotes the following *case: "In an action of covenant it appeared [*450] that one Grylls had made a lease of the moiety of certain tithes of corn and grain to the plaintiff for years, with a covenant for title. The plaintiff was ejected by title paramount, and brought suit. On the trial it was contended for the plaintiff that the true mode of estimating his damages was to ascertain the value of the interest in the term, and to add to the amount thereof the costs of defending the ejectment. But it was insisted by the defendants that the plaintiff was only entitled to recover the fine paid on the making of the lease, the interest thereon to the time of judgment, and the costs of defending the ejectment; and, with-

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out deciding the point, the King's Bench intimated such to be their opinion. *Pomeroy* v. *Partington*, 3 T. R. 665 (1 R. R. 787)."

Mellish, Q. C. (Archibald with him), for the plaintiff. — The covenant for title is broken the moment the deed is sealed, if the lessor has no title. But the covenant for quiet enjoyment is not broken until the enjoyment by the lessee is disturbed. It would be strange, indeed, if the damages which the plaintiff is entitled to recover in such a case are not to be estimated by what he loses at the time of the breach. Here, if the seven years' lease had not been obtained, the true measure of damages would have been the value of the lease for twenty-one years. That was for the benefit of the defendant. It is like the case of a charterer hiring another ship, where the shipowner has broken his contract to have his ship ready by a given time. The question here is, not whether the jury have done right, but whether the principle upon which the assessment of damages proceeded was correct. [He was stopped by the Court.]

Martin, B. — The Lord Chief Baron, who has been obliged to leave the Court, is clearly of opinion that the decision of the Court of Common Pleas was right; and to my mind the matter is equally clear; indeed, I believe we are all now of the same opinion. The rule is correctly laid down by Parke, B., in *Robinson* v. *Harman*, 1 Ex. at p. 855, 18 L. J. Ex. 202, thus: "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed [*451] in the same * situation with respect to damages as if the contract had been performed." That seems to me to be a rule of good sense. A man enters into a contract assuming the existence of a given state of things. If it should turn out otherwise, why should he not indemnify the other contracting party for what he has lost? It is said that the case of *Flureau* v. *Thornhill*, 2 W. Bl. 1078, qualified that rule of the common law; but Parke, B., in *Robinson* v. *Harman*, 1 Ex. at p. 855, 18 L. J. Ex. 202, treats *Flureau* v. *Thornhill* as an exception; and this Court in *Sikes* v. *Wild*, 4 B. & S. 421, 32 L. J. Q. B. 375, upheld the rule there laid down, though it appears from *Hopkins* v. *Grazebrook*, 6 B. & C. 31, 9 D. & R. 22, not to have had the entire assent of Lord Tenterden. His Lordship, then Abbott, Ch. J., there says: "If it is advanced as a general proposition, that, when a vendor cannot make a good title, the purchaser shall recover

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nothing more than nominal damages, I am by no means prepared to assent to it: if it were necessary to decide that point, I should desire to have time for consideration." It is clearly an exception; it is contrary to the rule of the common law; it had not the unqualified approval of Lord TENTERDEN; and I see no reason why it should be extended.[1] As to the introduction of the seven years' lease from Vickers and wife, that is in favour of the defendant. *Primâ facie*, according to the rule stated by PARKE, B., in *Robinson* v. *Harman*, the plaintiff is entitled to be placed as nearly as possible in the position he would have stood in if the testator had performed his contract. But, if he has got any benefit out of the transaction, that should be taken into consideration in measuring the damages resulting from the breach of contract. I am of opinion that the judgment of the Court below was quite right.

CHANNELL, B. — I also am of opinion that the judgment of the Court of Common Pleas should be affirmed; and I should have thought it unnecessary to say more, but for some doubt being entertained by one member of the Court. The existence of that doubt makes it expedient that I should shortly state the grounds upon which my opinion is founded. This is an action for the breach of a covenant for quiet enjoyment, as to which it may * be observed that it differs in its consequences from [*452] the case of a breach of a covenant for title, inasmuch as in the latter case the breach occurs at the time of the contract, whereas in the former it occurs at the time of eviction. The question we have to deal with is, what is the principle upon which the damages in such a case are to be assessed? It appears from the 13th paragraph of the special case, that the LORD CHIEF JUSTICE in his summing up told the jury, in substance, that the covenant having been broken, the plaintiff was, under the circumstances, entitled to be indemnified for what he had lost by reason of that breach, and to recover the difference in value between the old and the new leases; and that his claim was not limited, as urged on the part of the defendant, to the £400 which he had paid for the new lease. I take the indisputable rule of law to be, that where a man enters into a contract, and fails to perform it, he must make compensation to the extent of the injury sustained by the person with whom he has contracted. Several cases were adverted to in the Court below which have no very close applica-

[1] See the judgments in *Pounsett* v. *Fuller*, 17 C. B. 660; 25 L. J. C. P. 145.

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tion to this case. Where a contract is *in fieri*, and the vendee chooses to rescind the contract, and sue for money had and received, he recovers only the money he has actually paid, viz., the amount in the vendor's hands. So, again, if he elects to affirm the contract, and to sue for the breach, he is entitled only to nominal damages. The present case is perfectly distinguishable from those. The defendant is not sued in respect of a contract which is *in fieri* or which has been rescinded. This is a contract which the defendant's testator has executed as far as he could: he has made a conveyance which contains a covenant for quiet enjoyment for a term of years. The plaintiff was already in possession of the premises under an unexpired lease; that which was conveyed to him, therefore, was, strictly speaking, an *interesse termini*, and consequently there was no actual eviction. But that was not necessary. Here was a contract actually executed, and no longer *in fieri*. The testator expressly bargained for that which he could not perform; and therefore I think the proper principle upon which the damages should be assessed is a full compensation to the plaintiff for that which he has lost, not limited to the amount actually paid by him. It is true that the difference in value be-
[*453] tween the old and the new * leases was not necessarily the amount; but what was done at the trial was merely a mode of working out the principle laid down by the LORD CHIEF JUSTICE, viz., that the plaintiff was entitled to recover what he had lost by the breach of contract, and it in reality was in ease of the defendant. The taking the seven years' lease was no doubt the best thing to be done under the circumstances. The finding of the jury, as corrected by the Court *in banc*, ought, I think, to stand.

BLACKBURN, J. — I also am of opinion that the judgment of the Court below should be affirmed. The general rule undoubtedly is as laid down by PARKE, B., in *Robinson* v. *Harman*, 1 Ex. at p. 855, 18 L. J. Ex. 202, that, where a contract is broken, the person injured by the breach is to be placed as far as money can do it in the same position as he would have been in if the contract had been fulfilled. Where the carrying out of the contract would give one of the contracting parties the enjoyment of a particular thing, and he has lost it, the damages he would be entitled to would be the value of that which he has lost. From that general rule so laid down by PARKE, B., there is an exception, the reason

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for which, no doubt, is this, that from the complicated nature of our law of real property no man can be certain that he has a perfect title to his estate, and therefore it is a prudent thing to make it part of every bargain for the sale of real property, that if the vendor fails to make a good title according to the conditions, he shall not be liable to reimburse the intended purchaser the full measure of damages which would be awarded to him in an ordinary case; but that the bargain should be off, and the purchaser take back the amount of deposit he has paid, together with interest, and the expenses of investigating the title, if any. That would be reasonable. *Flureau* v. *Thornhill*, 2 W. Bl. 1078, and some subsequent cases have established that such a stipulation is assumed to be part of the contract, though not actually expressed. "In contractis tacité insunt quæ sunt moris et consuetudinis." Lord WENSLEYDALE puts it in that very way in *Walker* v. *Moore*, 10 B. & C. 416, where he says: "A jury ought not, in the case of a vendor in possession, to give any other damages, in consequence of a defect being found in the title, than those which were allowed in * *Flureau* v. *Thornhill*, which was recognised [*454] in *Johnson* v. *Johnson*, 3 B. & P. 162; *Bratt* v. *Ellis*, Sugd. V. & P., 14th ed., App. 5; and *Jones* v. *Dyke*, Sugd. V. & P., 14th ed., App. 6. In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way; and that excludes the claim of damages on account of the supposed goodness of the bargain." That is the true and the only principle upon which *Flureau* v. *Thornhill* can be supported, viz., that the parties have tacitly agreed that this should be understood as a term of the bargain between them. And there is no hardship in this: it is only saving the trouble of writing at full length that which is understood as one of the terms of the contract. This, however, is not the case of a contract for the sale of land, but the case of a conveyance by which the lessor conveys out and out the thing intended to be conveyed; and the conveyance contains a covenant for quiet enjoyment by the lessee, which covenant has been broken. Why should the lessee, who has lost a valuable lease, have a less measure of damages than he would have been entitled to if by the testator's breach of contract he had lost a ship of a given value? *Flureau* v. *Thornhill* does not apply to the case of an executed contract. There is no case

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(except that of *Pomeroy* v. *Partington*, 3 T. R. 665 (1 R. R. 787), cited in Sedgwick on Damages, 157) where that has ever been suggested. The American cases are infinitely various. Some of the States seem to adopt the common law of England. It may be that there is such a well-established custom in New York and some of the other States of America as is stated by Mr. Sedgwick. But we must be governed by our own law; and the only decision upon the point now before us is in the case of *Williams* v. *Burrell*, 1 C. B. 402. There the point was given up by Sir T. Wilde, who considered it too clear for argument. Upon the whole, I am of opinion that the true measure of damages for the breach of a contract such as this, is, what has the plaintiff lost by the breach of the contract? and that there is no difference in this respect between a contract for the sale of real property and a contract for a chattel.

[*455] * MELLOR, J. — I am of the same opinion. The testator professed to grant the plaintiff a lease for twenty-one years, with a covenant for quiet enjoyment. It turns out that the lessor had no title to grant for twenty-one years, having only an estate for life. He died, and his successor avoided the lease, and made a new bargain with the lessee for a shorter lease upon higher terms. In an action for the breach of the covenant for quiet enjoyment, the jury were told that the plaintiff was entitled to recover as damages for that breach of covenant the difference in value between the old and the new leases. I entertained some doubt as to whether that was the true measure. But, upon consideration, I think we must assume that the taking the shorter lease was the best thing that could be done under the circumstances, and was in reality for the ease and benefit of the defendant. The way in which it was put to the jury was rather the mode of working it out than declaring the rule. Upon the whole, therefore, I think there was nothing erroneous in the way in which it was left to the jury, and that the judgment should be affirmed.

PIGOTT, B. — I have arrived at the same conclusion as the rest of the Court, though not without some considerable hesitation, because I have doubted whether the proper rule had been laid down to guide the jury in measuring the damages. The CHIEF JUSTICE told the jury that, the covenant having been broken, the plaintiff was entitled to be indemnified for what he had lost thereby. That was quite correct; but he went on to say that the plaintiff was

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entitled to recover "the difference in value between the old and new leases." It certainly did strike me that there was a fallacy in arriving at the damages in that way. It occurred to me that the case differed from the ordinary case of a breach of a contract for the sale of goods, where, if the seller fails to deliver, the buyer may go into the market and buy other goods. I rather thought it was like the case of a covenant for title, and that the plaintiff should be prepared to show what he had lost in money. He had been induced to suppose he had a valid lease for twenty-one years. It turns out that the lessor had no power to grant it. It does not occur to me how the imaginary lease can be taken as the basis for estimating the plaintiff's loss. In the result, however, I have come to the conclusion that the case is not * to be [*456] distinguished from that of any other ordinary breach of contract. *Judgment affirmed.*

ENGLISH NOTES.

This case is cited in the judgment of FIELD, J., in *Wigsell* v. *Corporation of School for Indigent Blind* (1882), 8 Q. B. D. 357, 51 L. J. Q. B. 330, 43 L. T. 218, 30 W. R. 474, where the purchaser of land had covenanted that it should be inclosed with a wall seven feet high. It was held that the measure of damages for breach by not building the wall was not the cost which would be incurred by building it, but a fair estimate of the consequential injury to the adjoining land.

The rule in *Flureau* v. *Thornhill*, 2 W. Bl. 1078, referred to in the principal case, is explained in the note to Nos. 58 and 59 of "Contract," 6 R. C. 622.

It is pointed out by CHITTY, J., in *Wallis* v. *Hands*, 1893, 2 Ch. 75, 62 L. J. Ch. 586, 589, 68 L. T. 428, 41 W. R. 471, that the principal case is consistent with the rule that the essence of a breach of quiet enjoyment is a disturbance of the lessee's possession; for although the lease on which the plaintiff sued was originally reversionary, the plaintiff had been in possession for a short period before the lease was avoided by title paramount.

AMERICAN NOTES.

This case is cited by Sutherland (1 Measure of Damages, p. 148), who treats the question at great length, examining a large number of cases; and by Sedgwick (2 Damages, pp. 140, 186), who says, "In England however the true rule has been finally adopted, and the actual loss is recovered." "And the same rule now prevails in America, both in case of eviction and of refusal by the landlord to deliver possession." Also by Taylor on Landlord and Tenant, s. 317.

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In *Mack* v. *Patchin*, 42 New York, 167; 1 Am. Rep. 506, EARL, Ch. J., said: "In an action by the lessee against the lessor for breach of covenant for quiet enjoyment, the lessee can ordinarily recover only such rent as he had advanced, and such mesne profits as he is liable to pay over; and in cases where the lessor is sued for a breach of a contract to give a lease or to give possession, ordinarily the lessee can recover only nominal damages and some incidental expenses, but nothing for the value of his lease. These rules, however much they may be criticised, must be regarded as settled in this State. But at an early date in England and in this country certain cases were declared to be exceptions to these rules, or more properly speaking, not to be within them: as if the vendor is guilty of fraud; or can convey but will not, either from perverseness or to secure a better bargain; or if he has covenanted to convey when he knew he had no authority to contract to convey; or where it is in his power to remedy a defect in his title and he refuses or neglects to do so; or when he refuses to incur expenses which would enable him to fulfil his contract, — in all these cases, the vendor or lessor is liable to the vendee or lessee for the loss of the bargain, under rules analogous to those applied in the sale of personal property. *Bush* v. *Cole*, 28 N. Y. 261; 84 Am. Dec. 343; *Trull* v. *Granger*, 8 N. Y. 115; *Driggs* v. *Dwight*, 17 Wend. 71; 31 Am. Dec. 283; *Brinkerhoff* v. *Phelps*, 24 Barb. 100; *Tracy* v. *Albany Exchange Co.*, 7 N. Y. 472; 57 Am. Dec. 538; *Chatterton* v. *Fox*, 5 Duer, 64; *Dean* v. *Roesler*, 1 Hilt. 420; *Grant* v. *Tallman*, 20 N. Y. 191; 75 Am. Dec. 384; *Conger* v. *Weaver*, 20 N. Y. 140; *Lock* v. *Furze*, L. R. 1 C. P. 441; *Engle* v. *Fitch*, L. R. 3 Q. B. 314."

And in the same case SMITH, J., said: "In analogy with the rule thus applied to purchasers of land in actions upon the covenant for quiet enjoyment in leases, the same rule has been applied to lessees so far as it was applicable. As no consideration is paid in such case, the rent reserved has been regarded as a just equivalent for the use of the demised premises, and as in case of eviction the rent ceases and the lessee is discharged from its payment, he recovers nominal damages, and for such mesne profits as he is liable to pay the true owner, and any costs he may have been compelled to pay in defence of his title. *Kelly* v. *Dutch Church of Schenectady*, 2 Hill, 105; *Moak* v. *Johnson*, 1 id. 99; and *Baldwin* v. *Munn*, 2 Wend. 399; 20 Am. Dec. 627.

"But this rule has not been very satisfactory to the Courts in this country, and it has been relaxed or modified more or less, to meet the injustice done by it to lessees in particular cases, as will be seen in the cases of *Driggs* v. *Dwight*, 17 Wend. 72; 31 Am. Dec. 283; *Giles* v. *O'Toole*, 4 Barb. 261; *Chatterton* v. *Fox*, 5 Duer, 64; and *Dean* v. *Roesler*, 1 Hilt. 420. In England the rule is repudiated in two well-considered cases. In *Williams* v. *Burrell*, 1 Mann., Gr. & Scott, 402; 50 Eng. C. L. 401, it was held by the Court of Common Pleas, in a case referred to that Court by the Master of the Rolls for its opinion, and upon a very elaborate argument, that the lessee, upon a covenant for quiet enjoyment, was entitled to recover the value of the term lost, as well as for mesne profits paid to the owner of the paramount title. The same question came again before that Court in *Lock* v. *Furze*, 19 J.

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Scott (N. S.), 96, and 115 Eng. C. L. 94. The case was very elaborately argued, and the English and American cases carefully reviewed, and the whole Court, in opinions given by the four Judges, sanctioned, reasserted, and reaffirmed the rule held in *Williams* v. *Burrell*, *supra*, that a lessee who had been ejected by paramount title was entitled to recover upon a covenant for quiet enjoyment the value of the term which he had lost.

"And it seems to me that the case of *Trull* v. *Granger*, 8 N. Y. 115, in principle commits this Court to the same doctrine."

It is here generally held that the tenant may recover the difference between the rent that he was to pay and the actual value of the unexpired term, as well as such other damages and extra expenses as are the natural result of the breach, as the expense of removing, &c. Wood on Landlord and Tenant, sect. 362; *Dyer* v. *Wightman*, 66 Penn. State, 425; *Ricketts* v. *Lostetter*, 19 Indiana, 125; *Wilson* v. *Raybould*, 56 Illinois, 417; *Chatterton* v. *Fox*, 5 Duer (N. Y. Super. Ct.), 64; *Snodgrass* v. *Reynolds*, 79 Alabama, 452; 58 Am. Rep. 601 (citing the principal case); *Trull* v. *Granger*, 8 New York, 115; *Newbrough* v. *Walker*, 8 Grattan (Virginia), 16; *Dexter* v. *Manley*, 4 Cushing (Mass.), 14; *Adair* v. *Bogle*, 20 Iowa, 238; *Rose* v. *Wynn*, 42 Arkansas, 257 (citing the principal case); *Messer* v. *Oestreich*, 52 Wisconsin, 684; *Poposkey* v. *Munkwitz*, 68 Wisconsin, 332; 58 Am. Rep. 608; *Porter* v. *Bradley*, 7 Rhode Island, 538; *Townsend* v. *Nickerson Wharf Co.*, 117 Massachusetts, 501; *Seager* v. *Weaver*, 64 Penn. State, 425; *Moreland* v. *Metz*, 24 West Virginia, 119; *Marvin* v. *Graver*, 8 Ontario, 39.

As to improvements: In *Shaw* v. *Hoffman*, 25 Michigan, 162, it was held, without much consideration, that a tenant unlawfully evicted from a stable may recover for loss of profits in boarding horses and difference between keeping his own and hiring them boarded. Damages for injury to business were allowed in *Seybert* v. *Bean*, 83 Penn. State, 450 (school); *St. John* v. *Mayor*, 13 Howard Practice (N. Y.), 527 (lodging-house); *Glass* v. *Garber*, 55 Indiana, 336 (inn). In *Ricketts* v. *Lostetter*, *supra*, the tenant was allowed to recover for loss of use of his improvements, and in *Wilson* v. *Raybould*, *supra*, for moving erections which he had made, and rent of another lot similarly situated. See *Hexter* v. *Knox*, 63 New York, 561. Mr. Sutherland says: "If the tenant has expended money in improvements, these will not add to the damages a lessee is entitled to recover for eviction, except as such expenditure enhance the rental value, or the value of the premises for the particular use they have been rented for, unless the tenant has some property in the improvements, and is entitled to be paid therefor and to remove them; in which latter case, to the extent to which the defendant's act of disturbing his possession injures his rights in the new erections, or entitles him to claim as for their destruction or conversion, his damages for conviction will be increased." Citing *Schlemmer* v. *North*, 32 Missouri, 206; *Flagg* v. *Dow*, 99 Massachusetts, 19; *Ricketts* v. *Lostetter*, 19 Indiana, 125.

In *Lanigan* v. *Kille*, 97 Penn. St. 120; 39 Am. Rep. 797, the lease was of ore lands, for fifteen years, the lessee covenanting to erect machinery, and the lessor covenanting that he might remove it at the end of the term. There was no express covenant of title nor for quiet enjoyment. The lessee was

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evicted in three years by paramount title. Held, that he could recover only nominal damages. The Court said: —

"It may be conceded to be settled law in England that the measure of damages for the breach of an express covenant for quiet enjoyment is the value of the property at the time of the eviction. *Williams* v. *Burrell*, 50 E. C. L. R. 401; *Lock* v. *Furze*, 115 id. 94; *Ralph* v. *Crouch*, L. R. 3 Exch. 44. These cases hold that the rule in *Flureau* v. *Thornhill*, 2 W. Bl. 1078, that where a contract of sale of real estate goes off in consequence of a defect in the vendor's title, the vendee is not entitled to damages for the loss of the bargain, does not apply to the case of a lease granted by one who has no title to grant it.

"In this State it is settled that as between vendor and vendee the measure of damages is the consideration paid. *Bender* v. *Fromberger*, 4 Dallas, 441, which expressly ruled the point, has never been questioned, but on the contrary, has been followed in a number of later cases, which it is needless to cite. While the contrary doctrine has been asserted in a few of the States, the principle of *Bender* v. *Fromberger* has been recognized in a large majority of them, and by the Supreme Court of the United States. The cases will be found collected by Mr. Rawle in his covenants for Title, p. 235.

"The question which immediately concerns us is whether the same rule applies as between lessor and lessee. In England, as we have seen, it does not, and the measure of damages is the value of the property at the time of the eviction. Upon this point the authorities are meagre, and by no means uniform. The true rule however would appear to be, that in an action by a lessee against his lessor for an eviction by a paramount title, the measure of damages is the consideration paid, and such mesne profits as he has paid or may be liable for. The consideration for a lease is usually the rent reserved. If the tenant has enjoyed the possession of the demised premises, he has had the precise equivalent for the rent; if he has paid the rent in advance, he is entitled to recover it back in the form of damages for the eviction. This is substantially the rule laid down in *Mack* v. *Patchin*, 42 N. Y. 167; s. c. 1 Am. Rep. 506, where it was said by Earl, Ch. J.: 'In an action by the lessee against the lessor for breach of covenant for quiet enjoyment, the lessee can ordinarily recover only such rent as he has advanced, and such mesne profits as he is liable to pay over; and in case where the lessor is sued for a breach of contract to give a lease or to give possession, ordinarily the lessee can recover only nominal damages and some incidental expenses, but nothing for the value of his lease. These rules, however much they may be criticised, must be regarded as settled in this State.' The learned Chief Justice then proceeds to say, that 'at an early day in England and in this country certain cases were declared to be exceptions to these rules, or more properly speaking, not to be within them: as if the vendor is guilty of fraud; or can convey but will not, either from perverseness or to secure a better bargain; or if he has covenanted to convey when he knew he had no authority to contract to convey; or where it is in his power to remedy a defect in the title and he refuses or neglects to do so; or when he refuses to incur expenses which would enable him to fulfil his contract, — in all these cases the vendor or lessor is

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liable to the vendee or lessee for the loss of the bargain, under rules analogous to those applied in the sale of personal property.' *Mack* v. *Patchin* came within the exceptions noted above. The tenant in that case was evicted under proceedings to foreclose a mortgage upon the demised premises, which mortgage antedated the lease. The foreclosure was evidently procured by the lessor. The collusion of the latter appears in the report of the facts of the case, in the opinion of the Court, and is specially referred to in the concurring opinion of Mr. Justice SMITH, who said: 'The plaintiff (tenant) was clearly evicted from the premises by the act, procurement, and fault of the defendant (lessor). He expedited, if he did not instigate, the foreclosure of the mortgage under which the eviction was had. He became a joint purchaser, on the mortgage sale, of the demised premises, and joint petitioner with Dorsheimer for the writ of assistance under which the plaintiff was evicted from the premises.' Under these circumstances it is not surprising that the Court permitted the lessee to recover, not nominal damages merely, but the value of the lease, less the rent stipulated to be paid."

"The liability of a lessor under the implied covenant for quiet enjoyment, for improvements made upon the demised premises by the lessee, may depend upon circumstances. A tenant who, upon his own motion, and for his own purposes, erects a building or other improvement upon a leasehold certainly cannot recover the value thereof from the lessor in event of an eviction. In such case the rule of *caveat emptor* would apply: It was his own folly to build upon another's land. It was contended that the case in hand does not come within such rule however, for the reason that the lessee covenanted with the lessor to erect the improvements in question. The lease does not contain such a covenant, as to a portion of the improvements. It provides that the lessee shall 'forthwith procure and set up good and approved machinery, to take out and work said ore,' and the lessor 'covenants and agrees to and with the lessee that he shall have the full privilege of building houses and erecting all necessary machinery for developing, working, and taking out the ore upon the said tract; and that at the expiration of the hereby demised term, or in case the ore shall not be found in sufficient quantity upon said tract, he shall have the right to take down and remove all buildings and machinery so put up or erected.'

"So far as the improvements which were put up by permission merely of the lessor are concerned there can be no question. There was no obligation to put them up, and there can be no recovery. But it is said that as to the machinery, there was a covenant to erect it, and therefore the lessee may recover its value in this proceeding. It will be observed that in no event was it to become the property of the lessor. The lessee was expressly authorized to remove it at the close of his term, or sooner if ore shall not be found in sufficient quantity upon the tract. We are therefore unembarrassed with the question that would arise had the covenant required the improvements to be left upon the premises at the expiration of the term. The improvements were primarily for the use and benefit of the lessee in his business. He leased the premises for the purpose of mining iron ore. This necessarily involved the use of the machinery and appliances usual in such business.

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Without them the tenant could not possibly have made the rent which he had covenanted to pay. The lessee having covenanted to mine the ore, the covenant to erect the necessary machinery added nothing to its strength, for the reason that such erection was an essential incident of such mining. He might as well have covenanted to put on the mules, carts, picks, and tools ordinarily used in mining. The lessor had neither title nor interest in the machinery. He could not be said to have derived any benefit from it, except incidentally, as it enabled the lessee to pay the rent. The most that can be said is that it increased the lessor's security for his rent. The payment of the rent upon the days and times stipulated would have been so far an answer to a suit by the lessor against the lessee for a breach of the covenant of the latter to erect the machinery, that nominal damages only could have been recovered. If then the machinery was the property of the lessee, was erected for his own convenience in the prosecution of his business, it cannot be said to have been a part of the consideration paid for the lease. Not any more than the ordinary case of the landlord and tenant, when the latter, for his own convenience, and without a covenant, erects a building or puts up machinery for the purposes of trade. In either case, the lessor has increased security for his rent, to the exact amount that property of this description is placed upon the premises.

"There was evidently a mutual mistake in regard to the title. Why should the lessee throw the consequences of that mistake wholly upon the lessor? He was neither deceived nor misled by the latter. He probably examined the lessor's title; at least he might have done so, and the omission of such examination would be negligence under the circumstances. While it may be, and doubtless is, true, that in ordinary short leases an examination of title is neither usual nor necessary, the same cannot be said in regard to leases of valuable ore-lands having fifteen years to run, and when from the necessities of the business costly improvements are required. The lessee of a small tenement has little occasion to concern himself about the title. If he is evicted, the rent ceases, and that is the end of it. But in leases of the character of the one we are considering, title is of such supreme importance that no one but a very careless man would ever think of renting without a careful examination. However careless a man may be as to title in ordinary leases, it is well to understand that when a lessee seeks to improve demised premises, the rule of *caveat emptor* applies, and he would do well to see that his lessor has the title. And if not satisfied therewith, he may further protect himself by apt words in an express covenant."

Loss of profits: If the premises were let for a particular purpose, that purpose will form the basis for determining the damages. *Hexter* v. *Knox*, 63 New York, 561; *Townsend* v. *Nickerson W. Co.*, 117 Massachusetts, 501; *Dobbins* v. *Duquid*, 65 Illinois, 464; *Dexter* v. *Manley*, 4 Cushing (Mass.), 14. And loss of profits in the particular business contemplated, and broken up by the eviction, forms a proper element of damages. Cases last cited, and *Allison* v. *Chandler*, 11 Michigan, 542; *Seyfert* v. *Bean*, 83 Penn. State, 450; *Park* v. *C. & S. W. R. Co.*, 43 Iowa, 636; *Eten* v. *Luyster*, 60 New York, 252 (destruction of building and loss of money kept in a box therein).

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Costs: The lessee may also recover his costs and expenses of defence against the paramount title. *Willson* v. *Willson*, 25 New Hampshire, 229; *Leffingwell* v. *Elliott*, 10 Pickering (Mass.), 204; *Ottumwa* v. *Parks*, 43 Iowa, 119; *McAlpin* v. *Woodruff*, 11 Ohio State, 120; *Ryerson* v. *Chapman*, 66 Maine, 557; *Keeler* v. *Wood*, 30 Vermont, 242; *Harding* v. *Larkin*, 41 Illinois, 413; *Levitzky* v. *Canning*, 33 California, 299; *Adamson* v. *Rose*, 30 Indiana, 380; *Phipps* v. *Tarpley*, 31 Mississippi, 433; *Stirling* v. *Peet*, 14 Connecticut, 245; *Welsh* v. *Kibler*, 5 South Carolina, 405.

No. 63. — ADAMS *v.* GIBNEY.

(C. P. 1830.)

No. 64. — BAYNES *v.* LLOYD.

(C. A. 1895.)

RULE.

AN express "demise" implies a covenant by the lessor for quiet enjoyment by the lessee during the continuance of the estate out of which the lease is granted. But if the lessee is ousted by a remainder-man after the death of the lessor, he has no action upon an implied covenant against the lessor's executors. And no covenant is implied by an agreement merely constituting the relation of landlord and tenant.

Adams v. Gibney.

6 Bing. 656–668 (31 R. R. 514).

Devise by Tenant for Life. — Implied Covenant for Quiet Enjoyment. — Duration of Covenant.

Tenant for life, remainder over, by indenture demises to lessee, his [656] executors, &c., for fifteen years, without any express covenant for quiet enjoyment; lessee is evicted by remainder-man after death of tenant for life, and before expiration of the fifteen years. *Held*, that lessee cannot maintain covenant against executor of tenant for life.

The declaration stated that, on the 20th of November, 1821, by indenture between J. R. Peyton of the one part, and the plaintiff of the other part, after reciting that the plaintiff had agreed with J. R. Peyton for a lease of Wakehurst Park for the term of fifteen years from March then last past, subject to the covenants therein-

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[*657] after * contained, it was witnessed that for and in consideration of the rent, covenants, and agreements thereinafter contained, J. R. Peyton had demised certain premises to the plaintiff, containing five hundred acres, &c. (subject to certain exceptions and reservations); *habendum* from the 25th of March, 1821, for fifteen years at the rent of £40 per annum, clear of all taxes except poors' rates; which poors' rates were to be paid by J. R. Peyton, his executors or administrators, or such other person or persons as should for the time being be entitled to the reversion and inheritance of the said premises.

And the plaintiff, for himself, his executors, administrators, and assigns, did thereby covenant, promise, and agree to and with the said J. R. Peyton, and to and with all and every such person and persons as should for the time being be entitled to the reversion and inheritance of the said premises, or any part thereof, in manner and form following; that is to say, that the plaintiff, his executors, administrators, or assigns, should and would from time to time, and at all times during the continuance of the term thereby demised, well and truly pay, or cause to be paid, unto the said J. R. Peyton, his heirs, executors, or administrators, or to such other person or persons as aforesaid, the said yearly rent of £40 of lawful current money as aforesaid upon the several days and times, and in the manner thereinbefore mentioned; he also covenanted not to cut down, lop, top, stub up, or destroy any of the trees thereinbefore excepted, or else to pay the sum of £20 per load for trees so lopped, &c., to the said J. R. Peyton, or such person or persons as aforesaid; a new fence was to be made all round the park, at the joint expense of both lessor and tenant; and J. R. Peyton was to put the messuage on the premises into good and tenantable repair; the said fence, building, and [*658] messuage was to be thenceforth kept in * repair by the plaintiff, and J. R. Peyton was to provide thirty new rabbit hutches for the use of the plaintiff; and it was covenanted that it should and might be lawful for the plaintiff, his executors, administrators, or assigns, at any time or times during the continuance of the term thereby demised, to cut down the underwood that might be standing and growing on the demised premises, at such age as he or they should think fit, and take and carry away the same for his and their own use and benefit; and also that he, the said J. R. Peyton, his heirs, executors, or administrators, or

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such other person or persons as aforesaid, should and would, at the end, expiration, or other sooner determination of the said demise and lease, pay the plaintiff, his executors, administrators, or assigns, for the underwood then standing and growing on the demised premises down to the stem, and also for the stock of rabbits that might then be thereon, as the same should be valued and appraised by two indifferent persons, one to be chosen by each party, and in case they could not agree, by a third person to be appointed by them for an umpire, whose valuation and appraisement should be final and conclusive, and the amount thereof be paid by the said J. R. Peyton, his heirs, executors, or administrators, to the plaintiff, his executors, administrators, or assigns.

The plaintiff entered the 20th of November, 1821, and averred that he well and truly performed all things on his part contained in the said indenture.

Breach: that before and at the time of the making the said indenture, and from thence until and at the time of the death of the said J. R. Peyton, he, the said J. R. Peyton, was only seised of the demised premises in his demesne as of freehold for the term of his natural life, and was not by law empowered, authorised, or entitled to grant or demise to the plaintiff the demised
*premises for the said term of fifteen years in manner [*659]
aforesaid, or for any period beyond the term of the life of the said J. R. Peyton, so as to bind the person entitled to the freehold of the demised premises, upon the death of the said J. R. Peyton, or to render such term and lease obligatory upon such person; that whilst the plaintiff was possessed of the said term by the said indenture granted, to wit, on the 1st of April, 1825, the said J. R. Peyton died, to wit, at, &c., and thereupon the said term ended and was determined and became void, and one Joseph John Wakehurst Peyton then and there became and was entitled to the freehold and inheritance of the demised premises and the possession thereof, and laid claim to and demanded of the plaintiff the immediate possession of the said premises in breach of the said indenture; that thereupon, afterwards, to wit, in Trinity Term in the seventh year of the reign of our lord the now King, a certain action of ejectment was commenced and prosecuted by and on the behalf of the said J. J. W. Peyton, wherein John Doe was the nominal plaintiff, against the said now plaintiff Thomas Adams, for the recovery of the possession of the premises so demised by

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the said indenture; that on the 2nd of December, 1826, notice was given to J. R. Peyton's executors that the now plaintiff would hold them responsible for all damages, costs, losses, or expenses he might sustain or incur by reason of the said action, in the event of the plaintiff therein succeeding in such action, or the said Thomas being interrupted in the possession or enjoyment of the said tenements, or any part thereof, or evicted therefrom during the remainder of the said term of fifteen years under or by virtue of the said ejectment, or by reason of any defect of title or inability of the said J. R. Peyton to grant the said lease to the said Thomas as aforesaid; that the defendants refused to [*660] * settle such action of ejectment; that the now plaintiff accordingly defended the said action, being ignorant whether J. J. W. Peyton had or not full right and title to the premises; that in Easter Term, 1827, judgment was recovered in the said action of ejectment, whereupon the now plaintiff was forced to deliver, and did deliver, up the possession of the premises to J. J. W. Peyton; that the now plaintiff sustained damage thereby for loss of the enjoyment of the premises, and also did, on the 26th May, 1827, pay the damages and costs sustained in the said action of ejectment, amounting to the sum of £189, also his own costs of defending the said action; that in Hilary Term, 1828, an action of trespass was brought by J. J. W. Peyton for mesne profits, and on the 22nd February, 1828, the now plaintiff gave the now defendants, as executrix and executors, notice of such action; that in Hilary Term, 1829, the costs and damages recovered in the last-mentioned action were £477, and that the now plaintiff's own costs incurred in the said last-mentioned action were £200; that on the 15th February, 1827, a bill in Chancery was filed by J. J. W. Peyton to restrain the commission of waste, and an injunction obtained; and that plaintiff was hindered and prevented from cutting the underwood by reason of the lease being determined.

Second breach: that there was a large quantity of underwood and stock of rabbits on the premises, which underwood and rabbits the now plaintiff resigned on the premises; and that he was always ready to appoint a proper person to value the underwood and rabbits, and on the 2nd December, 1826, gave notice to that effect, but that defendant refused to concur.

There were various pleas, which the plaintiff replied to;

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and the defendant having demurred to the replication, * upon the argument, in Easter Term, excepted to the [*661] sufficiency of the above declaration.

Scriven, Serjt., in support of the demurrer: —

The action does not lie. Where there is no express covenant for quiet enjoyment, a covenant to that effect may in general be implied from the lessor's taking on himself to demise: *Nokes's Case*, 4 Co. Rep. 81; and the lessee, or his representatives, will be liable on such a covenant, if it be violated during the term by himself or persons claiming through him: *Stile* v. *Herring*, Cro. Jac. 73; 1 Roll. Abr. 520; or if he have no title, and the lessee cannot lawfully enter. But if he have title to demise in the first instance, although the term be liable to be determined on an event over which the lessor has no control, the word "demise" will not amount to a covenant for quiet enjoyment absolutely, but merely to a warranty that the lessee shall enjoy the term as far as concerns the lessor and persons claiming through him, and independently of the collateral event over which the lessor has no control. If the lessee require an indemnity against such collateral event, he must insist on an express covenant for quiet enjoyment.

The covenant in law, giving a right to damages for eviction, ceased with the estate which passed by the demise, and determined with the death of the lessor.

In *Swan* v. *Searles*, Dyer, 257 b, 1 Leon. 179, Owen, 105, it was expressly decided that this action is not maintainable against the representatives of the lessor, if the term ends by a collateral determination, *ex. gr.*, his death; or against himself, if it ends by the death of a *cestui qui vie*, before eviction.

In *Stile* v. *Herring*, and the cases which decide that the action is maintainable where there is not any right in the lessor to make any demise, and the lessee does * not and cannot [*662] lawfully enter, the estate has not, by law, any collateral determination. It is by law a lease between the parties for certain years absolutely, and an eviction at any time during those years is a breach of the covenant, because it is an eviction while the term is, as between the parties, continuing. But in the present case, as in *Swan* v. *Searles*, and in *Bragg* v. *Wiseman*, 1 Brownl. 22, the lease has in point of law a collateral determination; the term ceases by death, and with the term ceases the covenant or warranty for enjoyment, which the law raises from the word "demise."

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As the lessee is by the determination of the lease discharged from the payment of rent and other services, so the lessor is, by the collateral determination, discharged from his warranty or covenant for quiet enjoyment. The rights and remedies are reciprocal. In Owen, 105, one of the reasons assigned against the claim of the lessee is, that the lessee is not termor at the time of the disturbance, in effect, because his estate is determined before the disturbance, by the death of the tenant for life, &c.

The same principle is established in *Hyde* v. *The Canons of Windsor*, Cro. El. 553, is recognised in Sheppard's Touchstone, 165, 178, and the following authorities: Fitz. N. B. 145, 146, and note; Year Book, 32 Hen. VI. fol. 32; Com. Dig. Cov. (F); Bac. Abr. Leases, Covenant (E); Vin. Abr. Cov. (D); 2 Bl. Com. 304; *Cheiny* v. *Langley*, 1 Leon. 179, Cro. El. 157; *Andrews's Case*, 2 Leon. 104, Cro. El. 214; *Procter* v. *Johnson*, 2 Brownl. 213. The passage in Co. Lit. 389 a, which states that there can be no warranty of chattels, real or personal, seems to conflict with the other authorities, but is clearly outweighed by them.

[663] Bompas, Serjt., *contra*: —

First, a covenant and not a mere warranty is to be implied from the word "demise;" and, secondly, an express covenant for quiet enjoyment may be collected from the whole of this contract.

A warranty doth not extend to any lease, though it be for many thousand years, or any other chattel, but only to freehold or inheritances. Co. Lit. 389 a. And a covenant is not confined to any technical form of expression — it results from the whole object of the contract between the parties: Com. Dig. Cov. (A) 2; *Holder* v. *Taylor*, Hob. 12; and when the lessor here says he has demised, the expression implies that he has the power to do so, and to secure to the lessee an enjoyment coextensive with the term: otherwise he imposes on the lessee, and obtains a consideration for that which he cannot make good.

In *Burnett* v. *Lynch*, 5 B. & C. 609 (29 R. R. 343, at p. 350), LITTLEDALE, J., says: "An action of covenant will lie by the lessee against the lessor upon the word 'demise' in the lease; that word imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term; and, therefore, if the lessee be ousted during the term, an action of covenant will lie by him against the lessor." And in *Iggulden* v. *May*, 9 Ves. 325, ELDON, C., says: "There is a covenant for

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quiet enjoyment under the words 'granted and demised;' a covenant for payment of rent under the words 'yielding and paying;' and other covenants under other general words in this lease. In a Court of law, generally, the construction ought to be as to both the express and implied covenants: more peculiarly, where there is but one express covenant; and upon the ordinary sense, it is supposed to mean express * covenants only. It was [*664] settled so long ago as the time of Siderfin, that where a bond is given, generally for performance of covenants in a lease, it extends to protect breaches of implied as well as express covenants; and if rent is not paid, or there is an eviction, the bond is forfeited for breach of the two implied covenants I have mentioned."

All the cases referred to in support of the demurrer rest on *Cheiny* v. *Langley*, which is no authority for the propositions to which the subsequent decisions have extended; for in *Cheiny* v. *Langley* the defendant only sold his interest, such as it was, without assuming to convey any other definite interest to the purchaser. *Bragg* v. *Wiseman*, therefore, cannot be law, if it rest for support solely on *Cheiny* v. *Langley*. In *Swan* v. *Searles*, as appears from the pleadings set out in Bendloe, 138, the action was brought, not for damages, but for the term itself, which, having been determined, could not be recovered; and that case has been doubted. Vin. Abr. Covenant (D); Wentw. Executor, 126; Roll. Abr. 82 a. In *Andrews's Case* and *Procter* v. *Johnson* the action was also brought to recover the term. And the passage in Fitz. N. B. 145, 146, may be explained by distributing the covenant according to the subject-matter to which it applies, *reddendo singula singulis*.

But, secondly, here is a recital of an agreement for a lease for fifteen years, and that agreement amounts to a covenant sufficiently express to support this action. In order to ascertain the covenants to which the parties have rendered themselves liable, the recital in an indenture is as operative as any other part. 3 Keble, 465.

[PARK, J.: — Lord KENYON reprimanded me when I was at the Bar for citing Keble.] *Severn* v. *Clerke*, 1 Leon. 122.

Scriven: — [665]

A recital in a deed containing express covenants cannot be set up as an express covenant in itself, contrary to the intention to be collected from the operative part of the deed; and therefore it

comes round to the same question, whether a covenant for quiet enjoyment can in this case be implied from the word "demise." *Holder* v. *Taylor* does not apply, for the action was brought in respect of a disturbance by the covenantor himself. And the *dicta* which have been cited are applicable only to cases of that description. There is no hardship in the present case, for the lessee is discharged from his obligations under the lease, and it was his business to have exacted an express covenant, if he proposed an indemnity for the loss of any portion of the fifteen years. *Caveat emptor.* He could scarcely, however, have been ignorant of his situation, for his covenants are not with the lessor, his heirs and executors, but with the party interested for the time being.

Cur. adv. vult.

TINDAL, Ch. J. :—

The question in this case arises upon a demurrer to the replication to one of the pleas of the defendant, which plea is pleaded to the breach of covenant firstly assigned in the declaration, that is, to a breach of covenant for quiet enjoyment; and as the defendant insists that it appears on the record that no action is maintainable against him as executor on such supposed breach, it becomes unnecessary to consider any of the pleadings subsequent to the declaration.

The question, therefore, becomes this: tenant for life, remainder over, by indenture demises to the lessee, his executors, &c., for the term of fifteen years, without any express covenant for quiet enjoyment; the lessee is evicted by the remainder-man, after the death of tenant for life, but before the expiration of the
[*666] fifteen years: * whether the lessee can maintain an action of covenant against the executor of tenant for life in respect of such eviction?

That the word "demise" in a lease for years imports and makes a covenant in law for quiet enjoyment by the lessee, at least during the continuance of the estate out of which the lease is granted, is clear from all the authorities, and is admitted by the defendant; but it is contended on his part, that such implied covenant ceases with his estate, as well upon the ground that it is rather in the nature of an implied warranty than an implied covenant, as upon the direct authority of decided cases.

If it had been necessary to determine this case upon the ground of distinction above referred to, considerable doubt would be

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thrown upon such distinction in the case of a chattel real, by the authority of Co. Lit. 389 a, where it is laid down "that a warranty cannot be annexed to chattels real or personal, but if a man warrant them, the party shall have covenant. We think, however, it is sufficient to say that the cases which have been decided on the precise point now raised are too strong to get over. Such is the case in Dyer, 257 a, decided in Michaelmas Term, 8 & 9 Eliz. The lease in that case, as in the present, was by indenture made by tenant for life, by the word "demise." The ouster in that case, as in this, was by the remainder-man after the death of the tenant for life, and before the effluxion of the term. The action in that case also, as in this, was an action against the executors of the lessor, to recover damages for the breach of covenant. (See the form of the declaration in Bendloe's Rep. 150.) And after two arguments it was held in that case by three of the Justices, "that the executors should not be charged by this covenant in law — because the covenant * in law ends [*667] and determines with the estate and interest of the lessor;" also, "that no cause of action is given against the testator in his lifetime." And although one of the Justices differed from the rest, yet he admitted, if the lease had been by deed-poll instead of by indenture, he should have agreed with his companions — a distinction which is not assented to by the learned reporter.

The same principle is laid down in *Hyde* v. *The Canons of Windsor*, and in the case of *Bragg* v. *Wiseman*, where covenant is brought against the executor of the husband upon a lease by husband and wife, and it is laid down "that a covenant in law shall not be extended to make one do more than he can, which was to warrant it as long as he lived, and no longer."

Unless, therefore, some very strong and insuperable objection had been raised to the principle of those decisions, which has not been done in the present case, we think it safer to adhere to them, the doctrine of which appears to have been adopted in books of high authority; amongst others see Sheppard's Touchstone, 160, and Com. Dig. Covenant (C). And no injustice can be occasioned to the lessee by this decision, who must have known, from the form of the reservation in the lease, that his lessor was no more than a tenant for life, but was contented to accept a lease without an express covenant for quiet enjoyment.

It remains only to notice one argument urged by the plaintiff;

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namely, that although the action may not be maintainable upon the covenant to be implied from the word "demise," yet that there is a recital of an agreement for a lease for fifteen years, and that such agreement would of itself be a sufficient express covenant to support the action. But the recital is not of an agreement [*668] for a lease for fifteen years absolutely, but for a *lease for fifteen years, "subject to the covenants thereinafter contained." So that the demise by the indenture is the completion and performance of that agreement, and the question still turns upon the lease itself, whether the lease contains such ground of action as is contended for.

Upon the whole, therefore, we think there must be judgment for the defendant as to so much of the declaration as is covered by the plea demurred to.

Judgment for defendant accordingly.

Baynes & Co. v. Lloyd & Sons.

1895, 2 Q. B. 610–617 (s. c. 64 L. J. Q. B. 787; 73 L. T. 250).

[610] *Landlord and Tenant. — Sublease. — Implied Covenant for Title or for Quiet Enjoyment. — Duration of Covenant.*

The defendants being possessed of a term of years in a house, of which term there were eight and a half years then unexpired, by indenture sublet the premises to the plaintiffs for a term of ten and a half years, acting under a mistake, but in good faith. The sublease did not contain any express covenant either for title or for quiet enjoyment, nor did the words of letting include the word "demise." The plaintiffs occupied the premises until the end of the eight and a half years, when they were evicted by the defendants' superior landlord. The plaintiffs having brought an action for breach of implied covenants for title and for quiet enjoyment: —

Held, that, assuming that in the absence of the word "demise" either of such covenants could be implied in the lease, the duration of the covenant was limited by that of the lessor's own estate, and that consequently the plaintiffs could not recover.

Appeal from the decision of Lord RUSSELL of Killowen, Ch. J. ([1895] 1 Q. B. 820).

By an indenture under seal dated March 31, 1885, the defendants leased to the plaintiffs certain premises for the term of ten and a half years less one day from March 25, 1885, at [*611] *a yearly rent. The operative words of the lease were, "the landlords agree to let and the tenants agree to take;"

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the word "demise" was not used, nor did the lease contain any express covenant for title or for quiet enjoyment. The defendants had only a leasehold interest in the premises, which expired on September 29, 1893, two years before the expiration of the term granted by them to the plaintiffs. In granting the sublease to the plaintiffs, the defendants acted under a *bonâ fide* mistake and in good faith. After September 29, 1893, the defendants' superior landlord commenced an action against the plaintiffs to recover possession of the premises, and the plaintiffs were evicted. The plaintiffs then brought this action against the defendants, their lessors, to recover damages for breach of implied covenants for title and for quiet enjoyment. Lord RUSSELL of Killowen, Ch. J., held that no covenant for title could be implied in the lease, and that, though a covenant for quiet enjoyment was to be implied, it enured only during the continuance of the interest of the lessors; he therefore gave judgment for the defendants. The plaintiffs appealed.

July 13. English Harrison, and Leck, for the plaintiffs. — From the relation of landlord and tenant, and also from the language of the lease, covenants by the defendants for title and for quiet enjoyment are implied, and those covenants are not limited to the duration of the defendants' own estate. Such covenants would be implied from the use of the word "demise" in the lease: Sheppard's Touchstone, pp. 160, 165, 272; *Holder* v. *Taylor*, Hob. 12; *Line* v. *Stephenson*, 5 Bing. N. C. 183 (14 R. C. 710); *Mostyn* v. *West Mostyn Coal and Iron Co.*, 1 C. P. D. 145, 152; and a covenant for quiet enjoyment may be implied even in a parol demise: *Bandy* v. *Cartwright*, 8 Ex. 913. Although the word "demise" is not used in the present lease, the word "let" is of equal force. *Hart* v. *Windsor*, 12 M. & W. 68, 85, per PARKE, B. The words "agree to let" imply an intention on the part of the lessors that the lessees shall have possession of the premises for the term for which the lessors purport to grant them. The case of *Adams* v. *Gibney*, 6 Bing. 656 (p. [*612] 743, *ante*), which at first sight seems in favour of the defendants, is distinguishable; that decision depended upon the fact that there was no breach of covenant during the life of the lessor, who was only a tenant for life. [They also cited *Burnett* v. *Lynch*, 5 B. & C. 589, 609 (29 R. R. 343); *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737; *Stranks* v. *St. John*, L. R. 2 C. P. 376.]

Swinfen Eady, Q. C. (H. Sutton with him), for the defendants. — The implication of a covenant for title or for quiet enjoyment does not arise from the relation of landlord and tenant, but from the express words used by the parties. Even if the word "demise" had been used, the authorities show that at the most a qualified covenant for title would have been implied, not an absolute covenant, and that where that word is not used no covenant for title can be implied at all. In the present case the utmost that can be implied is a covenant for quiet enjoyment, and that covenant would expire with the determination of the lessor's estate. Even where a covenant is implied from the use of the word "demise," its duration is limited to the duration of the term of the lessor: *Swan* v. *Stransham*, Dyer, 257 a; *Adams* v. *Gibney*, 6 Bing. 656 (p. 743, *ante*); and an implied covenant for quiet enjoyment where the premises are "let" and not "demised" is equally limited to the duration of the lessor's interest: *Penfold* v. *Abbott*, 32 L. J. Q. B. 67. There is no authority for the *dictum* of PARKE, B., in *Hart* v. *Windsor*, 12 M. & W. 85, that the same covenants may be implied from the use of the word "let" as from "demise." [They also cited *Andrews's Case*, 2 Leon. 104; Cro. Eliz. 214; *Bragg* v. *Wiseman*, Brownl. 22; *Williams* v. *Burrell*, 1 C. B. 402; *Schwartz* v. *Locket*, 61 L. T. 719.]

English Harrison in reply. *Cur. adv. vult.*

July 30. The written judgment of the Court (Lord ESHER, M. R., and KAY and A. L. SMITH, L. JJ.) was delivered by

KAY, L. J. — The plaintiffs sue in this action for damages for eviction from a house of which they were tenants to [*613] the *defendants. The tenancy was created by a lease under seal dated March 31, 1885. The operative words of the lease were, the defendants "agree to let." The term was ten and a half years from March 25, 1885. The defendants had only a leasehold interest, which expired on September 29, 1893. The superior landlord after that date evicted the plaintiffs. The lease to the plaintiffs did not contain any express covenant for title or for quiet enjoyment, nor was the word "demise" used in it. The plaintiffs insist that there should be implied a covenant for title, or, at least, for quiet enjoyment, and that such covenants, or one of them, was broken by the eviction by title paramount.

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These facts raise the following questions: 1. Can any covenant be implied in this case? 2. If any, is such covenant one for title, or only for quiet enjoyment? 3. Is such implied covenant an absolute covenant, or is it the ordinary limited covenant? 4. Whatever it was, did it not come to an end with the determination of the lessor's estate?

With reference to the first question, the law is thus stated in Sheppard's Touchstone, at p. 165: "If one make a lease for years of land by the words 'demise or grant,' and there is not contained in the lease any express covenant for the quiet enjoying of the land; in this case the law doth supply a covenant for the quiet enjoying of it against the lessor, and all that come in under him by title during the term. . . . But where there is an express covenant in the deed for the quiet enjoying of the land, there the law will not make this implied covenant." The learned author goes on to say that in the case of a lease for life reserving rent the law creates a warranty against all men, and this, notwithstanding a warranty expressed in the deed. *Nokes's Case*, 4 Co. Rep. 80 b, is to the same effect. In this statement of the law three things are noticeable: (1.) That the implication arises not from the mere relation of landlord and tenant, but from the use of the words "demise or grant;" (2.) That the covenant implied is for quiet enjoyment, not a covenant for title; and (3.) That it is a limited covenant, "against the lessor and all that come in under him by title." At pp. 271, 272 of the Touchstone it is said that the most usual and proper words for making a lease are "demise, *grant, and to ferme let," but that other words, — "what- [*614] soever word will amount to a grant," — such as "give, betake, or the like," will make the lease; but it is not said that there is any implication of a covenant from any of those other words. In Com. Dig. Covenant, A 4, it is stated that in a lease for years covenant lies upon the word "*demisi*" or "*concessi*," and covenant for rent on the word "*reddendo*" rent. In Viner's Abridgment, Covenant, F, "Action of covenant lies upon the words 'demise' and 'grant' in an indenture of lease, though there are no other words comprehending a warranty in them." In Bacon's Abridgment, Covenant, B, "There are some words which of themselves import no express covenant, yet being made use of in certain contracts they amount to such, and are therefore called covenants in law, and will as effectually bind the parties as if

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expressed in the most explicit terms. As if a man makes a lease for years of land by the words '*concessi*' or '*demisi*' these import a covenant." In *Nokes's Case*, 4 Co. Rep. 80 b, it is said there is a covenant in law on the words "demise, grant," &c.

All these citations are inconsistent with the view that a covenant can be implied from the mere relation of landlord and tenant, or from any words constituting that relation other than the particular words referred to. And this state of the law seems to be recognised by 8 & 9 Vict., c. 106, which in s. 4 provides that the words "give" or "grant" in a deed shall not in future imply any covenant at law, but does not take away that effect from the word "demise" in a lease for years.

On the other hand is cited a *dictum* of PARKE, B., in *Hart* v. *Windsor*, 12 M. & W. 85: "It is clear that from the word 'demise' in a lease under seal the law implies a covenant, in a lease not under seal a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word 'let' or any equivalent words (Shep. Touchstone, 272), which constitute a lease have, no doubt, the same effect, but not more. Shep. Touchstone, 165, 167." This *dictum* was cited in the judgment in *Mostyn* v. *West Mostyn* [*615] *Coal and Iron Co.*, 1 C. P. D. 145. *This statement of the law professes to be founded upon Sheppard's Touchstone. But in that book it is not said that the covenant is implied from any words sufficient to make a lease, only from certain words; nor does the implied covenant, according to that authority, extend to an eviction by title paramount, but it is only the ordinary limited covenant for quiet enjoyment.

In *Bandy* v. *Cartwright*, 8 Ex. 913, the lease was by parol; it was held that a covenant for quiet enjoyment during the term could be implied, and further, that such covenant was broken by a distress for a rent-charge granted before the parol demise by a predecessor in title of the lessor under whom he claimed by purchase. The reason for this decision is not given in the report. Probably this parol lease was made by the word "demise," or, in the absence of evidence, that was assumed to be the case. The decision was followed in *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737.

The weight of authority is in favour of the view that a covenant

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in law is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease.

But supposing any covenant could be implied, according to Sheppard's Touchstone it is a covenant for quiet enjoyment only; this is stated to be the law also by Lord ELDON in *Iggulden* v. *May*, 9 Ves. 325. In *Holder* v. *Taylor*, Hob. 12, a lease for years was made by the word "demise," and the lessee brought an action of covenant against the lessor because at the date of the lease the lessor was not seised of the land, but a stranger. The lessee had not been ejected; but the Court was of opinion that the action would lie, "for the breach of the covenant was in that the lessor had taken upon him to demise that which he could not, for the word '*demisi*' imports a power of letting. . . . But if it were an express covenant for quiet enjoying, there, perhaps, it were otherwise." The case is very shortly reported, and the words quoted seem in the former sentence to intimate that the implied covenant is a covenant for title; but this is contradicted by the last words referring to an express covenant for quiet enjoyment as rebutting the implication. In *Burnett* v. *Lynch*, 5 B. & C. 589, at p. 609 (29 R. R. 343), it was *said by LITTLEDALE, J., [*616] that the word "demise" "imports a covenant in law on the part of the lessor that he has good title and that the lessee should quietly enjoy during the term;" but he does not cite any authority for this. In *Line* v. *Stephenson*, 4 Bing. N. C. 678, 5 Bing. N. C. 183 (14 R. C. 710), it is admitted somewhat doubtfully by TINDAL, Ch. J., that the word "demise" may import a covenant for title as well as for quiet enjoyment; but it is put by ALDERSON, B., that it is a fallacy to say it imports two covenants: it imports one, of which either want of title or eviction would be a breach.

The case of *Stranks* v. *St. John*, L. R. 2 C. P. 376, was referred to, in which there was an agreement in writing to let for seven years. This, by 8 & 9 Vict., c. 106, could not be a lease for seven years, because it was not a deed. It was, therefore, treated as an agreement to grant a lease by deed, under which the intended lessee would be entitled to investigate the lessors' title, if he had not waived that right. The action seems to have been brought by the lessee on an implied contract to make a good title, the breach alleged being that the lessor never had any right or title to let for the term. WILLES, J., said, in his judgment, that a lease for

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years is really only a sale of land for that period, and all sales of land imply a stipulation that the vendor has a good title. But it is clear law that no action will lie against a vendor for damages for contracting to sell land to which he has not a good title: *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Bain* v. *Fothergill*, L. R. 7 H. L. 158, at p. 210; except perhaps to recover the expenses to which the purchaser has been put in investigating such title. The case was decided on demurrer, and is not of any value in the present discussion.

Then is the covenant absolute or limited? In *Andrews's Case*, Leon. 104, Cro. Eliz. 214, it was held to be limited, and that upon the covenant implied from the word "demise" an action would lie if the lessor himself entered upon the lessee, but not if a stranger entered. This is consistent with the statement in Sheppard's Touchstone. On the other hand, in *Holder* v. *Taylor*, Hob. 12, the implied covenant seems to have been treated [*617] as an absolute covenant broken by *the fact that the lessor had no title at the date of the lease. This seems also to have been held, as already noticed, in *Bandy* v. *Cartwright*, 8 Ex. 913.

Sufficient citations have been made to show that upon the first three questions there is considerable conflict of authority. Upon the fourth question there is more uniformity. It seems to be settled that if the lessor's interest determines during the term and the lessee is thereupon evicted, no action can be maintained upon the implied covenant. In *Swan* v. *Stransham*, Dyer, 257 a, the lease was made by tenant for life by deed using the words "grant and demise." The lessor died during the term, and the remainder-man entered and evicted the lessee. The action was brought upon the implied covenant, but it was held "that the executors of the tenant for life should not be charged by this covenant in law, because the covenant in law ends and determines with the estate of the lessor; and if it had been a covenant in fact or expressed, or warranty of the term expressed, it would be otherwise." This was followed in *Adams* v. *Gibney*, 6 Bing. 656 (p. 743, *ante*). This is different to the ordinary limitation of an express covenant for title, which, according to the Conveyancing and Law of Property Act, 1881, is worded thus: "Notwithstanding anything by the" lessor "or any one through whom he derives title otherwise than by purchase for value made, done, executed,

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or omitted, or knowingly suffered." Such a limitation would prevent the lessor being liable for the want of title in *Holder* v. *Taylor*, Hob. 12, or the interruption in *Bandy* v. *Cartwright*, both of which were by title paramount and would not have been a breach of a covenant so limited.

In this case the LORD CHIEF JUSTICE has followed the decisions in *Swan* v. *Stransham* and *Adams* v. *Gibney*, which seem fully to support his judgment. The appeal must be dismissed with costs. *Appeal dismissed.*

ENGLISH NOTES.

That the "demise" of a tenement implies a covenant for quiet enjoyment though not for good title further appears from *Bandy* v. *Cartwright* (1853), 8 Ex. 913, 22 L. J. Ex. 285; *Hall* v. *City of London Brewery Co.* (1862), 2 B. & S. 737, 31 L. J. Q. B. 257, 9 Jur. (N. S.) 18.

Adams v. *Gibney* is followed by the Queen's Bench in *Penfold* v. *Abbott* (1862), 32 L. J. Q. B. 67, 9 Jur. (N. S.) 517, 7 L. T. 384, 11 W. R. 169, where A. (a lessee) towards the end of his own lease agreed to let the premises to B. as tenant from year to year, and the tenancy was put an end to by A.'s landlord intervening at the end of A.'s lease. It was held that B. could maintain no action against A. for damages.

These cases are entirely consistent with the rule that "he who lets agrees to give possession and not merely the chance of a lawsuit." *Per Curiam* in *Coe* v. *Clay* (1829), 5 Bing. 440, 30 R. R. 699.

AMERICAN NOTES.

Adams v. *Gibney* is cited in Wood on Landlord and Tenant, sects, 314, 354; and in 1 Washburn on Real Property, p. 521; and in Rawle on Covenants, pp. 440, 441; and in Taylor on Landlord and Tenant, sects. 252, 256.

The first branch of the Rule is sustained by *Barney* v. *Keith*, 4 Wendell (N. Y.), 502; *Crouch* v. *Fowle*, 9 New Hampshire, 219; 32 Am. Dec. 350 (citing the principal case); *Dexter* v. *Manley*, 4 Cushing (Mass.), 14; *Baugher* v. *Wilkins*, 16 Maryland, 35; 77 Am. Dec. 279; *Mack* v. *Patchin*, 42 New York, 167; 1 Am. Rep. 506; *Streeter* v. *Streeter*, 43 Illinois, 155; *Duff* v. *Wilson*, 69 Penn. State, 316; *Abrams* v. *Watson*, 59 Alabama, 524; *Avery* v. *Dougherty*, 102 Indiana, 443; 52 Am. Rep. 680; *Duncklee* v. *Webber*, 151 Massachusetts, 408; *Stott* v. *Rutherford*, 92 United States, 107; *Young* v. *Hargrave's Adm'r*, 7 Ohio, 427; *Maeder* v. *Carondelet*, 26 Missouri, 112.

In *Lovering* v. *Lovering*, 13 New Hampshire, 517, this effect was denied to the words "let and leased," although they seem a fair translation of "*demisi*." The contrary was held in *Maule* v. *Ashmead*, 20 Penn. State, 482.

But this covenant is not implied in a lease for life from the mere use of words of leasing. *Black* v. *Gilmore*, 9 Leigh (Virginia), 446; 33 Am. Dec. 253.

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Some of our cases go further than *Adams* v. *Gibney*, and hold this covenant implied even without words of leasing, from the mere relation of landlord and tenant, as when the lease is by parol. This is Mr. Rawle's opinion (Covenants p. 440). In *Mack* v. *Patchin*, *supra*, SMITH, J., said that it could not be doubted that the covenant was implied, "by whatever form of words the agreement is made." To this effect *Knupp* v. *Marlboro*, 29 Vermont, 282, where the words used were "hold, use, occupy, possess and enjoy." See *Maule* v. *Ashmead*, *supra*, where the lease was by parol.

No. 65. — DOE d. MORECRAFT *v.* MEUX.

(K. B. 1825.)

No. 66. — FEW *v.* PERKINS.

(EX. 1867.)

RULE.

WHERE, under a covenant to repair upon notice, a notice is given to repair within a certain time, the notice operates as a suspension of any right within that time to enforce a forfeiture for breach of the general covenant to repair.

But the covenant to repair upon notice and the covenant to repair generally are separate covenants; and a notice to repair "according to the covenants" does not imply that the full time under the former covenant is to be allowed.

Doe d. Morecraft v. Meux and others.

4 Barn. & Cress. 606-610 (28 R. R. 426).

Lease. — Covenant to repair. — Notice. — Forfeiture.

[606] Where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant; and the premises being out of repair, the landlord gave a notice to repair within three months: *Held*, that this was a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months.

Ejectment for the recovery of certain premises in the parish of St. Paul, Covent Garden, in the county of Middlesex. The demise was laid on the 27th of December, 1823. At the trial before ABBOTT, Ch. J., at the Westminster Sittings after Trinity

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Term, 1824, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case. The lessor of the plaintiff on the day of the demise and still was and is landlord of the premises in question. By indenture of lease made the 1st of June, 1769, between S. Rowley and J. Rowley of the one part, and J. Chase and J. Cox on the other part, S. Rowley and J. Rowley demised the premises in question to J. Chase and J. Cox, for seventy-three years and a quarter, from Lady-day, 1769, with the usual *reddendum* and covenant to pay rent, and containing covenants of the lessees for themselves and assigns, and a clause of re-entry, as follows: "And the said J. Chase and J. Cox, for themselves, their executors, &c., do and each of them doth covenant, that they, their executors, &c., shall and will, at their own proper costs and charges, from time to time and at all times hereafter, during the term hereby granted, when and as often as need shall be, well and sufficiently repair, support, and keep the said messuage, &c., in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, and so yield them up at the end of the term. And further, that it shall and may * be lawful to and for the said S. Rowley [*607] and her assigns, during the continuance of her estate in the said demised premises, and after the determination thereof, to and for the said J. Rowley, his heirs and assigns, &c., at her, his, or their free wills and pleasures, at any convenient hour in the daytime, twice or oftener in every year of the said term, to enter upon the premises, and see the state and condition of the reparations of the same; and of all defects and want of reparations then and there found, to give or leave notice or warning in writing, at the said demised premises, unto or for the said J. Chase and J. Cox, their executors, &c., to repair and amend the same within three calendar months then next ensuing; within which space of three months the said J. Chase and J. Cox, for themselves, their heirs, executors, &c., do covenant to repair and amend all such defects, of which such notice or warning shall be so given. Proviso for re-entry if Chase and Cox, their executors, &c., shall not perform, fulfil, and keep all and singular the covenants in the said lease, to be by them performed," &c. The said term and interest in the premises vested in the defendants before the dilapidations and notice to repair hereinafter mentioned. The premises being in some respects out of repair, the lessor of

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the plaintiff on the 7th of August, 1823, caused a written notice to repair to be served on the defendants, requiring them to do certain necessary repairs therein mentioned, within three months then next following, in these words: "I do hereby require you to repair and amend the same within the space of three calendar months, from the delivery of this notice, as witness my hand this 6th day of August, 1823. W. Morecraft." On the 24th [* 608] of October, 1823, the lessor of the plaintiff * received of the defendants half a year's rent, to September 29th, 1823. The declaration in ejectment in this cause was served on the 28th of October, 1823, being previously to the expiration of the said three months' notice to repair. The premises were and continued out of repair from the time of serving the said notice to repair, until the time of the trial of this action.

Chitty for the plaintiff. — The covenants in this lease to keep the premises in repair generally, and to repair within three months after notice, are independent covenants, and a breach of either operated as a forfeiture of the lease. The case in this respect differs from *Horsefall* v. *Testar*, 7 Taunt. 385, where all that related to the repairs was one covenant. It will perhaps be urged that the notice to repair which was given in this case operated as a waiver of the forfeiture; but it could not have that effect, being analogous to a second notice to quit, which has been held not to be a waiver of the first. In *Roe d. Goatly* v. *Paine*, 2 Camp. 520, it appeared that a lease had been made with covenants similar to those in question; viz., to keep the premises in repair, and to repair within three months after notice. The landlord gave a notice to repair forthwith, and brought ejectment within three months after giving that notice, and Lord ELLENBOROUGH held that the notice was not a waiver of the forfeiture. The word "forthwith" in that notice may be relied on as making a distinction; but if the covenants are independent, the notice to repair within three months cannot affect the forfeiture incurred [* 609] by * a breach of the general covenant to keep the premises in repair at all times during the term.

Brougham, *contra*, was stopped by the Court.

BAYLEY, J. — The landlord in this case had an option to proceed on either covenant, and after giving notice to repair within three months, he might have brought an action against the defendant upon the former covenant for not keeping the premises in repair.

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But that is very different from insisting upon the forfeiture. It is said that the premises being out of repair on the 6th of August, when the notice was given, the lease was thereby forfeited. But the landlord has affirmed that the lease subsisted up to the 29th of September, by receiving the rent which became due at that period. It is plain, therefore, that he did not intend to insist upon an immediate forfeiture at the time when the notice was given, and I think that notice amounted to a declaration that he should be satisfied if the premises were repaired within three months, and that he thereby precluded himself from bringing an ejectment before the expiration of that period. In *Roe* v. *Paine* the language of the notice was very different, the tenant was required to put the premises in repair forthwith; that did not prevent the landlord from bringing his ejectment at any time. That case, therefore, is no authority for the present lessor of the plaintiff, and for the reasons already given I think that our judgment must be for the defendants.

HOLROYD, J. — I am of opinion that this ejectment was brought too soon, for it appears to me that the notice * re- [*610] quiring the tenant to repair within three months was equivalent to an admission that the tenancy would continue up to the expiration of that time. If it did not operate as a waiver of the forfeiture incurred by breach of the covenant to keep the premises in repair, the landlord might be able to bring ejectment after the tenant had put the premises into complete repair pursuant to the notice, which would be extremely unjust. But I think that although the action for breach of covenant would remain, yet the forfeiture was waived. The defendants are, therefore, entitled to our judgment.

LITTLEDALE, J., concurred. *Postea to the defendants.*

Few v. Perkins and others.

L. R. 2 Ex. 92–96 (s. c. 36 L. J. Ex. 54; 16 L. T. 62; 15 W. R. 713).

Landlord and Tenant. — General Covenant to repair. — Covenant to repair after Notice. — Effect of Notice. — Forfeiture, Waiver of. [92]

An indenture of lease, with a clause for re-entry, contained a general covenant on the part of the lessee to keep the premises demised in repair, and a further covenant that he would, within three months after notice being given to him by the landlord, repair all defects specified in the notice. The premises demised being out of repair, the landlord gave the lessee notice to repair, "in accordance

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with the covenants" of the lease. Before the expiration of three months, ejectment was brought.

Held, that the notice was not a waiver of the forfeiture incurred by the breach of the general covenant to repair, and that the action was maintainable.

Ejectment for a house and premises called the "Jolly Sailor," at Norwood, in the parish of Croydon, Surrey. At the trial before WILLES, J., at the Surrey Summer Assizes, 1866, it appeared that by an indenture dated the 18th of July, 1835, William Saxby had demised the "Jolly Sailor" for thirty-five years to Sir Henry Meux, Bart., and Henry N. Smith, then being brewers and co-partners in trade. The plaintiff had afterwards purchased the reversion from trustees under Saxby's will; the defendant Perkins was undertenant in possession, and the other defendants were the present partners in the brewery, in whom the lease had become vested, and who appeared to defend as landlords. The lease contained, in addition to the general covenant to keep in repair, the following clause: "It shall and may be lawful to and for [*93] William Saxby, his heirs * and assigns, twice or oftener in every year during the said term, at all seasonable times in the day, to enter upon the tenement and premises hereby demised, or any part thereof, to view, search, and see the state and condition thereof, and of all decays, defects, and wants of reparation and amendment, which upon every such view or views shall be found, to give or leave notice or warning, in writing, at or upon the said demised premises, unto or for the said Sir Henry Meux and Henry N. Smith, their executors, &c., to repair and amend the same within three calendar months then next following, within which said time or space of three calendar months next after every such notice or warning shall be so given or left, as aforesaid, they, the said Sir Henry Meux and Henry N. Smith, for themselves, their executors, &c., do hereby covenant with the said William Saxby, his heirs, &c., to repair and amend all such decays, defects, and wants of reparation and amendment accordingly." There was also a clause for re-entry on breach of any of the covenants in the lease.

On the 22nd of January, 1866, the plaintiff sent a letter to Perkins, in these terms: "I beg to hand you a specification for works to be done at the 'Jolly Sailor.'" Enclosed in the letter was the specification. On the 29th of January the plaintiff sent the following notice to the lessees, Messrs. Meux & Co.: "I hereby

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give you notice to repair the house and premises called the 'Jolly Sailor,' South Norwood, in accordance with the covenants in a lease granted by Mr. William Saxby to Sir Henry Meux, Bart., and others, dated 18th of July, 1835, and I have left the specification with Mr. Perkins, at the 'Jolly Sailor,' for that purpose." On the 27th of April, before the expiration of three calendar months from the giving of this notice, the premises still being, as the plaintiff alleged, out of repair, this action was commenced. Two days previously the plaintiff had received the rent due up to the 25th of March. Under these circumstances a verdict was entered for the plaintiff, with leave to move to enter it for the defendants, on the ground that the giving of the notice of the 29th of January was a waiver of the forfeiture.

A rule having been obtained accordingly,

Denman, Q. C., and Shaw showed cause. — The covenants in the *lease are independent, and the landlord may [*94] rely on either. *Baylis* v. *Le Gros*, 4 C. B. (N. S.) 537. The notice given was in general terms, and not as in *Doe d. Morecraft* v. *Meux*, 4 B. & C. 606 (p. 760, *ante*), a notice to repair "within three months." It calls upon the lessees to repair, "in accordance with the covenants." The landlord thus shows an intention to rely on all his rights under the lease. The case is similar to *Roe ex. d. Goatly* v. *Payne*, 2 Camp. 520.

[CHANNELL, B. — In *Doe d. Morecraft* v. *Meux* rent was paid and received, as here, between the giving of the notice and the ejectment. It may, perhaps, have been considered that the receipt of rent was a waiver of the forfeiture. According to the judgment of BAYLEY, J., in that case, that circumstance seems to have influenced the decision.]

The forfeiture is a continuing one, so that the receipt of rent is immaterial. Moreover, the only act of waiver relied on in this case is the giving of the notice.

Garth, Q. C., and Thesiger, in support of the rule. — The notice of the 29th must be construed with reference to that of the 22nd, which was only invalid because directed to the undertenant, and clearly applied to the restricted covenant in the lease alone. *Roe ex. d. Goatly* v. *Payne* is distinguishable. There the notice was to repair forthwith, and was therefore applicable, on the face of it, to the general covenant.

[KELLY, C. B. — The notice here is to repair "in accordance with the covenants," in the plural.]

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Upon a true construction of it, nevertheless, it is not clearly and unequivocally a general notice, and in case of doubt it should be construed against the landlord.

KELLY, C. B. — I am of opinion that this verdict should not be disturbed. The lessee has in his lease covenanted generally to keep the premises in repair, and in case of his committing a breach there is a condition for re-entry by the lessor. There is also in the lease a proviso or covenant that the lessor may enter to inspect the premises, and in case he should find them out of repair, [*95] give notice to the lessees to repair within three * months.

These being the terms of the lease, the lessor gave two notices. The first could not be relied on because it was not properly directed. The second was accordingly given, and required the lessees to repair the premises, "in accordance with the covenants" of the lease. This notice having been given, the repairs, we must take it for the present purpose, were not effected, and ejectment was brought. It is contended on the part of the defendants that the notice must be taken to refer to the second covenant to repair, and that the landlord was bound to continue the tenancy for three months after giving it. I cannot assent to that proposition. The case of *Doe d. Morecraft* v. *Meux*, 4 B. & C. 606 (p. 760, *ante*), does not apply to this case, for there the notice was specific to repair "within three months." If, therefore, it had been held to apply to the general covenant, it would have deluded the tenant. But here the notice is general in its terms, and similar to that which in *Roe ex. d. Goatly* v. *Payne* was held to have no effect on the right of entry for a breach of the general covenant. The only difference between the two cases is, that here the notice is general, "to repair in accordance with the covenants;" there it was to repair "forthwith," agreeably to the covenant in the lease. But a notice to repair generally is, in effect, a notice to repair as soon as may be — forthwith, or in a reasonable time. Both notices have the same legal effect. I regard this, therefore, as the ordinary case of a general covenant in a lease, with a proviso for the landlord to enter in the event of a breach. He has pursued the usual, though not necessary, course of giving his tenant notice to repair. But he does not thereby lose his right of entry if the repairs are not effected by the tenant.

CHANNELL, B. — For the purposes of this argument it is admitted that the premises are out of repair. That circumstance makes a

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primâ facie case of forfeiture under the covenants of the lease. The question is, whether that forfeiture was waived, and the answer depends on the covenants in the lease, and the terms of the notices to repair. Taking the *dicta* of BAYLEY and HOLROYD, JJ., in *Doe d. Morecraft* v. *Meux*, 4 B. & C., at pp. 609, 610 (p. 760, *ante*), as correct, I do not * think they apply to the facts [*96] of the present case. I am of opinion that there has been no waiver of the forfeiture, and that this rule should therefore be discharged.

PIGOTT, B. — I am of the same opinion. I do not think the notice of the 29th of January amounted to a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair. *Rule discharged.*

ENGLISH NOTES.

On the former branch of the rule see also *Doe d. Rankin* v. *Brindley*, No. 40, p. 582, *ante*.

A lease of lands contained a general covenant by the lessee to repair, and also a covenant that the lessor might give the lessee notice of all defects and wants of repair, and if the lessee did not repair the said defects within two months, the lessor might enter and do the repairs himself, the expense of which the lessee should repay at the time of paying his next rent, and in default the lessor might distrain as for rent in arrear. There was also a power to re-enter upon breach of any covenant. The premises being out of repair, the lessor gave notice to repair within six months, and in default the premises would be put in repair and the lessee charged with the costs, &c. After the expiry of the six months the lessor gave notice that if certain terms were not accepted within three days, the lessor must be prepared to fulfil all the covenants of the lease. In a subsequent action of ejectment by the lessor for breach of the covenants, it was held that the lessor had elected to perform the repairs and charge the lessee with the expense; that the general power to re-enter was not revived by the three days' notice; and therefore that the plaintiff could not enforce a forfeiture. *Doe d. DeRutzen* v. *Lewis* (1836), 5 Ad. & Ell. 277.

By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), s. 14, it is enacted that "(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable by action, or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee

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fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

By sub-section (2) it is enacted that pending any proceedings for enforcing forfeiture, the lessee may apply to the Court for relief, and the Court may grant relief on such terms as to costs or otherwise as the Court think fit.

By sub-section (3) a "lease" includes underlease or grant at a fee-farm rent. And the terms "lessor" and "lessee" includes assigns, &c.

By sub-section (6) the section does not extend to a covenant or condition against assigning or subletting. And by sub-section (8) it does not affect the law relating to re-entry or for forfeiture or relief in case of non-payment of rent. By sub-section (9) the section applies to leases made before as well as after the commencement of the Act, and has effect notwithstanding any stipulation to the contrary.

In the case of an agreement for a lease of which a Court of equity would decree specific performance, the matter will be treated as if there were such a lease in existence. Per Lord ESHER, M. R., in *Swain* v. *Ayres* (C. A. 1888), 21 Q. B. D. 289, 292, 57 L. J. Q. B. 428, 430, 36 W. R. 798; *Strong* v. *Stringer* (1889), 61 L. T. 470; *Lowther* v. *Heaver* (C. A. 1889), 41 Ch. D. 248, 58 L. J. Ch. 482, 60 L. T. 310, 37 W. R. 465. But the section of the Act does not apply where there is no present title to specific performance; nor where the tenant is in possession merely as a tenant from year to year on such of the terms of a lease as apply to such a tenancy. *Swain* v. *Ayres, supra; Coatsworth* v. *Johnson* (C. A. 1886), 55 L. J. Q. B. 220, 54 L. T. 520.

Where the premises have been put into repair within a reasonable term after service of the notice, the Court will not require the lessee to pay, "as compensation" under sub-section (1), the expense incurred by the lessor, before issuing a writ of ejectment, in consulting a surveyor and solicitor. *Skinner's Co.* v. *Knight*, 1891, 2 Q. B. 542, 60 L. J. Q. B. 629, 65 L. T. 240, 40 W. R. 57.

It has been decided by NORTH, J., that the demand of compensation required by section 14 (1) of the Conveyancing and Law of Property Act to be made along with the notice is sufficient, although the only compensation demanded was the surveyors' and solicitors' fees, which, according to *Skinner's Co.* v. *Knight, supra*, could not have been recovered if the premises had been put in repair. *Lock* v. *Pearce*, 1892, 2 Ch. 328, 61 L. J. Ch. 606, 67 L. T. 164, 40 W. R. 508.

Where premises comprised in a lease under which the lessee has covenanted to repair are taken for public purposes under the powers of an expropriating statute, the lessee is liable to his landlord on the covenants up to the time when the property is conveyed to and possession

taken by the undertakers of the public works. *Mills* v. *Guardians of East London Union* (1872), L. R. 8 C. P. 79, 42 L. J. C. P. 46, 27 L. T. 557, 21 W. R. 142.

Where a lessee had let premises by underlease with a general covenant to repair; and, the premises being out of repair, the lessee had entered and put the premises into repair to avoid forfeiture under his own lease: in an action by the lessee against the underlessee to recover the cost of these repairs, it was held that he could only recover nominal damages for the breach, since by having done the necessary repairs no injury had been sustained to the reversion at the time the action was brought. *Williams* v. *Williams* (1874), L. R. 9 C. P. 659, 43 L. J. C. P. 382, 30 L. T. 638, 22 W. R. 706.

AMERICAN NOTES.

Doe v. *Meux* is cited in Wood on Landlord and Tenant, sects. 820, 369, and *Few* v. *Perkins*, at sect. 368; *Doe* v. *Meux*, in Pingrey on Real Property, sect. 322; both cases in Taylor on Landlord and Tenant.

Covenants by the lessee absolutely to repair and yield up in repair, and to repair on notice, are distinct. *Kling* v. *Dress*, 5 Robertson (N. Y. Super. Ct.), 525. But in *Ball* v. *Wyeth*, 8 Allen (Mass.), 275, a covenant to repair was held qualified by a covenant to quit and deliver up, &c., wear and tear and casualties excepted.

No. 67. — BARROW *v.* ISAACS.

(C. A. 1890.)

RULE.

WHERE a lease contains a covenant (with a condition of re-entry on breach) "not to assign or sublet without the consent of the landlord first had and obtained," and an agreement by the landlord that his consent should "not be arbitrarily withheld in the case of a respectable and responsible person," — if the tenant does sublet without applying for the landlord's consent, he cannot be relieved against forfeiture by showing that the sublessee is a respectable and responsible person, and that the omission to apply for the landlord's consent was by inadvertence.

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Barrow v. Isaacs and Son.

1891, 1 Q. B. 417–430 (s. c. 60 L. J. Q. B. 179; 64 L. T. 686; 39 W. R. 338).

[417] *Right of Re-entry. — Covenant not to assign without Landlord's Consent. — Forfeiture.*

In a lease for years the lessees covenanted not to underlet the premises, or any part thereof, without the consent in writing of the lessor, which consent the lessor agreed should not be arbitrarily withheld in the case of a respectable or responsible person, and power to re-enter was given to the lessor in case the lessees did not well and truly observe and perform their covenants. The lessees underlet part of the premises without obtaining or asking for the lessor's consent. The underlease was prepared by their solicitor, who omitted to look at the head lease, and forgot that it contained the covenant not to underlet without consent. Both the lessees and their underlessees were respectable and responsible persons, and no injury was done, or likely to be done, to the lessor by reason of the underlease, nor could he have had any valid objection to it if his consent had been asked. In an action by the lessor to recover possession of the premises for breach of the covenant, —

Held, that the omission to ask the lessor's consent was not a mistake in respect of which the Court would grant the lessees equitable relief against forfeiture for breach of the covenant, and therefore that the plaintiff was entitled to succeed in the action.

Appeal from a decision of DAY, J., giving judgment for the plaintiff in an action for the recovery of land.

The facts sufficiently appear in the head-note to this report, and they are fully stated in the judgments delivered by the Court of Appeal (pp. 771, 775, *infra*). The arguments of counsel also sufficiently appear in the same judgments.

1890, Nov. 18, 19. Pollard (R. Isaacs with him), for the defendants.

Channell, Q. C. (H. A. Forman with him), for the plaintiff.

[The following cases were cited in addition to those mentioned in the judgment of KAY, L. J. (1891, 1 Q. B. 422, 423): *Sear* v. *House Property and Investment Society*, 16 Ch. D. 387; *Treloar* v. *Bigge*, L. R. 9 Ex. 151; *West* v. *Dobb*, L. R. 5 Q. B. 460; *Hack* v. *Leonard*, 9 Mod. 91; *Wafer* v. *Mocato*, 9 Mod. [*418] 112; *Rose* v. **Rose*, Amb. 331; *Eaton* v. *Lyon*, 3 Ves. 689; *Sanders* v. *Pope*, 12 Ves. 282; *Bracebridge* v. *Buckley*, 2 Price, 200; *Bargent* v. *Thompson*, 9 Jur. 1192, 4 Giff. 473; *Hughes* v. *Metropolitan Ry. Co.*, 1 C. P. D. 120, 2 App. Cas. 439; *Gregory* v. *Wilson*, 9 Hare, 683; *Reynolds* v. *Pitt*, 19 Ves. 134;

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Green v. *Bridges*, 4 Sim. 96; *Job* v. *Banister*, 2 K. & J. 374; *Nokes* v. *Gibbon*, 3 Drew. 681; *Shearman* v. *McGregor*, 11 Hare, 106; *Townsend* v. *Crowdy*, 8 C. B. (N. S.) 477; *Peachy* v. *Duke of Somerset*, 2 W. & T., 3rd ed., p. 979, 1 Str. 447; *Willmott* v. *Barber*, 15 Ch. D. 96; *Rogers* v. *Ingham*, 3 Ch. D. 351.]

Cur. adv. vult.

1890, Dec. 19. Lord ESHER, M. R. — In this case the plaintiff had let to the defendants valuable premises in the city of London, under a lease which contained a stipulation that the lessees should not underlet without the consent in writing of the plaintiff; and there was a right of re-entry for breach of any of the covenants in the lease. The plaintiff brings his action against the defendants claiming a right to re-enter under that stipulation. The defendants had underlet part of the demised premises. They had left the matter in the hands of their solicitor to prepare the underlease. The solicitor was at the moment away from his office — I believe out of London — and his clerk drew the underlease without looking at the superior lease, and he forgot the stipulation in the superior lease which required that the landlord's consent in writing was necessary to an underletting. That stipulation also provided, that although the consent of the landlord was necessary, he was not arbitrarily to refuse his consent. But, as the matter stood, his consent was never asked. It was argued by the defendants' counsel that the covenant not to underlet without the landlord's consent was a negative, not an affirmative covenant, and that therefore the stipulation for re-entry for breach of covenant did not apply. But I think that that proposition is disposed of because the word " observe " as well * as " perform " [*419] has been put in the stipulation, though I doubt whether it was necessary to put that word in. However, the stipulation for re-entry, as it stands, clearly applies to a negative as much as to an affirmative covenant. There was also a discussion as to what was the meaning of the stipulation that the superior landlord should not arbitrarily refuse his consent. I take that to mean that he should not wholly unreasonably refuse his consent. In the present case the defendants were people of the highest class in the city of London. The subletting by them was to a person of nearly equal position in the city of London. No alteration of any kind was made in the premises. There was, therefore, nothing to be

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was no negligence of the party affected. It cannot be suggested, and never has been suggested, that Sir Henry Isaacs was guilty of negligence. All that can be suggested is that he did what such a person would naturally do — leave the matter to his solicitor. But there was negligence by the lessee's agent in not looking at the superior lease. Is the negligence of an agent invariably to prevent a Court of equity giving relief, assuming that that negligence has done no harm at all, or that it has done harm which can be immediately compensated? I should be very sorry to hold that as a fixed rule. Supposing that what was required was, not that consent to the underletting should be required and given, but that a notice only should be given; and supposing a man who has a valuable property, or a valuable lease, writes out the notice, gives it to an agent to deliver, whom he has every reason to suppose will do what is right, and that agent negligently omits to give the notice. If an action were brought against any one for the negligence, there being no damage done, it could not be maintained. Nevertheless, it is suggested that equity could not relieve. I object to that proposition. I cannot find any case in equity which so decides, and I decline to think that it is a true proposition.

If, therefore, I had been alone in this case, I should, [* 422] notwithstanding * the negligence, if there was a mistake, have relieved immediately. But, as I have said before, I do not think that this is a case of mistake; it is a case of mere forgetfulness, and as I come to the conclusion, after the best consideration that I can give to the matter, that mere forgetfulness is not mistake, then this proposed relief does not come under any head of equity which the Courts have ever administered. The plaintiff, therefore, is entitled to exercise the right of re-entry which the law has given him, and the defendants have no remedy.

For these reasons, I think that the plaintiff must have judgment, and that this appeal must be dismissed.

Lopes, L. J. — The conclusion at which I have arrived is embodied in the judgment, which Kay, L. J., is about to deliver, in which judgment I entirely agree.

The following judgment was read by

Kay, L. J. — The plaintiff is a lessor who has brought an action of ejectment upon a power of re-entry in the lease for breach of a covenant against assigning or underletting without consent.

No. 67. — Barrow v. Isaacs, 1891, 1 Q. B. 422, 423.

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The lease, dated August 12, 1881, was of a warehouse in the city to Sir Henry Isaacs and his brother, trading as Messrs. Isaacs & Son, and the power of re-entry is in case the lessees "do not well and truly observe and perform" their covenants. The covenant alleged to have been broken is "not to assign, underlet, or part with the possession of the premises, or any part thereof, without such consent as aforesaid, which consent the lessor hereby agrees shall not be arbitrarily withheld in the case of a respectable and responsible person." Such consent as aforesaid is expressed a few lines earlier in a preceding covenant thus: "without the license and consent in writing of the lessor, his executors, administrators, and assigns for that purpose first had and obtained." The grammatical construction, therefore, is, that the consent to assign must be first had and obtained, and I think the nature of the case would make this clear without the words, "first had and obtained." If it had simply been "shall not assign without the lessor's consent," that would, *primâ facie*, mean a consent obtained before the assignment. It seems that * the original lease was [*423] left by Messrs. Isaacs with their solicitor, Mr. Sydney, who kept it in a safe of which he had the key. Some years ago Messrs. Isaacs underlet part of the ground floor of the warehouse to a tenant named Francis, and on this occasion the plaintiff's consent was applied for and obtained. He went to Sydney's office and signed a written consent. Recently Messrs. Isaacs were desirous of underletting another portion of the premises to persons named Henderson and Liddell, and instructed Sydney to prepare a proper underlease. He being temporarily absent, the matter was conducted by his clerk, Gamble, who had not got the lease or any copy of it, and who prepared a fresh underlease from a copy of that to Francis, which did not, upon the face of it, notice the necessity of obtaining the plaintiff's consent. Gamble was ignorant of the necessity. Before the underlease was signed, however, Sydney returned, and the completion of the matter was managed by him. He made, in his own writing, certain alterations in the draft, and obtained the execution of the underlease. He had forgotten that the plaintiff's consent was necessary, and omitted to look at the lease to Messrs. Isaacs, which was in his safe; and, accordingly, the matter was concluded without the consent of the plaintiff being obtained or asked for. Mr. Sydney in his evidence said that it was usual in such a case to examine the original lease;

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but he supposed that Gamble had done all that was necessary. He added, with a frankness which was creditable to him, that no doubt the omission to look at the lease was great neglect. There was, therefore, *primâ facie*, a breach of the covenant not to underlet without the plaintiff's consent. The plaintiff did not discover what had been done till October, 1889, when, passing along the street, he saw the names of Henderson & Liddell put up on the door. He communicated with Messrs. Isaacs without delay; and they, by letter dated October 30, 1889, applied for his consent to what they had done. This he refused by a letter of October 31, 1889. The plaintiff admits that Henderson & Liddell are respectable and responsible persons, and it has been argued that, this being so, his consent was not required. I do not agree with that argument. The terms of the covenant are quite clear. If [*424] the intended lessees are respectable * and responsible persons the consent is not to be "arbitrarily withheld." Those words simply mean that the consent must be asked for before the assignment, and that it may be withheld, even though the intended lessees are proper persons, if such withholding is not arbitrary. Many cases may be supposed in which it would not be. Respectable and responsible persons might desire to carry on a trade which would be injurious to the plaintiff, or which would depreciate the property. The plaintiff might have valid reasons for objecting to an underlease of a portion only of the warehouse. The underlessees might wish to use it for some purpose not being a trade, which would altogether change the character of the premises, and many other reasons for objecting might be suggested. Another point made was that the proviso for re-entry refers only to the breach of affirmative and not of negative covenants. This is founded on certain *obiter dicta* in *Hyde* v. *Warden*, 3 Ex. D. 72. Speaking for myself, I should think that an extremely narrow construction if the word "perform" only had been used. "Perform" has not necessarily an active meaning. We say that a man performs his duty by not answering revilings, by being silent when he ought not to speak, and by many other abstentions from acting as well as by active proceedings. But where the words are "observe and perform," as here, there is no reasonable ground for confining those words to the breach of an affirmative covenant. Then if, as I think, there was a clear breach of the covenant, and a consequent right in the plaintiff to re-enter,

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is this a case in which equity would relieve against the forfeiture? The plaintiff has been called, and has not been able to show that any actual damage has been done, or that he has any valid reason for objecting, if his consent had been duly asked. Messrs. Isaacs and Sydney have all deposed that at the time of granting this underlease they had forgotten — although they certainly once knew — that the plaintiff's consent was necessary. Gamble did not know this. It has been argued (1) that this was a mistake which enables equity to relieve against the forfeiture; (2) that it would be a proper exercise of that discretionary jurisdiction to do so in this case, as no damage has been done to the
*plaintiff by the underlease. I do not desire to cast the [*425] least doubt upon the jurisdiction of the Court to relieve in cases of what it calls mistake; what we have to determine is whether such relief would be a proper exercise of that jurisdiction in this case. Long ago Courts of equity assumed jurisdiction to relieve against forfeitures and penalties where the only object was to secure payment of a definite sum of money, even though there was no fraud, accident, surprise, or mistake. On this principle it relieved against payment of the whole penalty on a money bond before the statutes 4 & 5 Anne, c. 16, ss. 12 and 13, and 8 & 9 Wm. III., c. 11, which enabled Courts of law to give the same relief. Also against forfeiture for non-payment of rent, and by statute 4 Geo. II., c. 28, its powers in this respect were somewhat restricted by limiting the time for their exercise to six months after execution in ejectment. At first there seems to have been some hesitation whether this relief might not be extended to other cases of forfeiture for breach of covenants such as to repair, to insure, and the like, where compensation could be made; but it was soon recognised that there would be great difficulty in estimating the proper amount of compensation; and, since the decision of Lord ELDON in *Hill* v. *Barclay*, 18 Ves. 56, it has always been held that equity would not relieve, merely on the ground that it could give compensation, upon breach of any covenant in a lease except the covenant for payment of rent. But of course this left unaffected the undoubted jurisdiction to relieve in case of breach occasioned by fraud, accident, surprise, or mistake. At present the only one of these we have to deal with is mistake; and the questions are, (1) whether the facts I have described amount to mistake; and, if so, (2) whether in its discretion the Court will

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relieve. Very wisely, as I presume to think, the Courts have abstained from giving any general definition of what amounts to mistake. It is an easily arguable question whether mere forgetfulness of such a covenant — even if not negligent — can properly be called mistake. The case of *Kelly* v. *Solari*, 9 M. & W. 54, however, and the observation of Lord BLACKBURN in the House of Lords in *Brownlie* v. *Campbell*, 5 App. Cas. 952, establish [*426] that, in *an action to recover money paid by mistake, it is sufficient to prove that at the time of the payment the person paying was actually ignorant that the money was not due, although he had the means of knowledge, and it was owing to his own carelessness or forgetfulness that he was in fact ignorant. There, undoubtedly, forgetfulness of the previous payment is treated as mistake. But in those cases the payee is in possession of money which he had no right to receive, and which really belongs to the person who paid it, and no amount of carelessness on his part can justify the payee in retaining it. I feel great difficulty in saying that if this be mistake at law it would not be considered mistake in equity. It is an entirely different question whether on the ground of such a mistake equity, in the exercise of its discretionary jurisdiction, would relieve a man from a forfeiture incurred by his own gross carelessness. *Vigilantibus, non dormientibus, leges subveniunt.* Equity is bound to consider all the circumstances of each case. To a suitor asking to be relieved from forfeiture, the result of carelessness so gross that it might almost be called wilful, it can hardly be favourably disposed. I have spoken of the right of re-entry of a landlord as a "forfeiture" of the lease, but the use of the word "forfeiture" in cases of this kind is somewhat misleading. This is not like a condition in a will, non-compliance with which causes a forfeiture. It is a contract between landlord and tenant that if the latter does, or omits to do, certain specific acts then the landlord may re-enter. Lord ELDON in *Hill* v. *Barclay*, 18 Ves. 62, dealing with Lord ERSKINE'S observations as to relieving against breach of covenant to repair, said: "A particular case might perhaps occur, such as are put by Lord ERSKINE in *Sanders* v. *Pope*, 12 Ves. 282, in which it would be demonstrable that the landlord would sustain no injury by the relief; but it is taking a prodigious liberty with a contract by which a tenant has undertaken forthwith to repair." I understand that to mean that it is a very strong proceeding for equity

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to interfere with the contract of the parties that the landlord may re-enter for breach of covenant, and that it can only do so in very exceptional circumstances. In *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223, * the Court of Chancery has refused to [*427] rescind an agreement which it was sought to set aside on the ground of mistake common to both parties. The mistake alleged on the part of the Earl was that he thought he had merely a right over the surface of a certain common, called East Common, instead of being owner of the soil, as he really was. This depended upon the doubtful construction of an ancient grant in 1799, which was among his title deeds, but which the LORD CHANCELLOR was of opinion he was not guilty of any negligence in not having consulted. The LORD CHANCELLOR said (p. 230): "This is not a case of mistake, therefore, but of ignorance; and ignorance resulting from a party's own omission to avail himself of information within his power." At p. 233 he says: "The cases in which equity interferes to set aside contracts are those in which either there has been mutual mistake or ignorance in both parties affecting the essence of the contract, or a fact is known to one party and unknown to the other, and there is some fraud or surprise upon the ignorant party." At p. 235 the LORD CHANCELLOR adds that if the Earl had mistaken his right to the East Common, and that he was in law the owner of the soil, instead of having merely a right over the surface, there was jurisdiction in equity to set aside the agreement. The House came to the conclusion that there was not any mistake, and affirmed the decision. The LORD CHANCELLOR'S former words, as to the ignorance not being mistake, are probably a statement of the argument which had been addressed to the House rather than his own opinion. However, he carefully excepts the case of ignorance arising from negligence of the person who seeks relief. In the well-known case of *Duke of Beaufort* v. *Neeld*, 12 Cl. & F. 248, an exchange was made of lands under the Inclosure Act, 6 & 7 Wm. IV., c. 115, s. 35 of which Act requires the consent in writing of the proprietor. The Duke of Beaufort signed a written consent. The commissioner directed the exchange, and Neeld entered upon the lands exchanged. The Duke sent a written notice to the commissioner declaring that his consent had been signed under a misapprehension. The Duke then brought an action of trespass and ejectment, in which judgment was given against him. He then filed a bill to

[*428] rescind * the written consent. During the argument Lord Brougham said, "Equity has not relieved against gross improvidence." Lord Lyndhurst, L. C., in giving judgment, said that the Duke stated that, when he signed the consent, he did not know that the piece of land in question was included in it, because it was mentioned, not by name, but by a number which referred to a map not then in his possession. But he says it was his duty to make inquiry, and, "if he did not choose to exercise due caution in that respect, he cannot turn round and say, 'I really did not know the contents of the paper when I signed it; I signed it incautiously.' He cannot now with propriety say that so as to free himself from the consequences of his own act." Lord Brougham said: "He need not look if he does not choose; but then, if he does not look, he must bear the penalty of being held to have looked, and if he either shuts his eyes or carelessly sees, he shall not be allowed in a Court of law or equity to say, 'It is a mistake; I never knew it,' because he might have known it, and he ought to have known it, and if he signs his name, and could have looked, and did not look, still he is bound by his act." Lord Campbell, in the same case, said: "But then we come to the consent which was signed by the Duke's own hand, and at that time I believe what the Duke says, that he was ignorant of what he was doing. Because he is a man of unblemished honour, I have no doubt that everything he says is strictly and correctly true. But he has the means of knowing; he wilfully shuts his eyes (I do not say that offensively at all), with the means of knowledge within his power, and it being his duty to have ascertained the fact, can he be heard to say, 'I was ignorant; relieve me from the effects of the mistake which I have made'?" The equitable relief sought in that case was refused partly on this ground. It is a decision of the highest tribunal that equity will not relieve when the mistake arises from the negligence of the suitor who seeks its help.

I am clearly of opinion that Messrs. Isaacs must be held responsible for any negligence of Mr. Sydney. Their plea for relief therefrom, explicitly stated, would run thus: "We admit that we were aware of the necessity of obtaining the plaintiff's consent before making the underlease. The lease to us which [*429] * imposed that obligation was in our possession. We had forgotten the provisions of it. The ordinary course of

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business required that we should examine the lease before granting the underlease. We admit that we neglected to do so, but we say that no harm has been done to the plaintiff, and therefore equity should relieve against the forfeiture." There must have been thousands of cases in which leases have been forfeited owing to non-performance of covenants through *bonâ fide* forgetfulness. Counsel have not cited to us, nor have I been able to find, a single instance in which relief has been given under such circumstances. It is impossible not to see that such relief would be an incentive to negligence. If we were to grant it, hereafter lessees might avoid looking at their leases, lest they should be reminded by them of obligations which it would be more convenient to ignore. Many suits would be instituted for relief upon this ground, which, until now, is unknown in the records of the Court as one upon which relief would be granted. The course of legislation upon this subject of forfeiture of leases by breach of contract is most significant. At first, as I have pointed out, the remedial jurisdiction of equity against penalties was extended to Courts of common law. Next, the relief it gave in cases of forfeiture for non-payment of rent was limited in time. Then ensued a long period in which equity seems to have refused relief in cases of breach of any of the other covenants in a lease. Very hard cases occurred, in which unconscionable landlords insisted on their legal rights. Especially hard were these forfeitures for breach of the covenant to insure when no damage had ensued. By 22 & 23 Vict., c. 35, ss. 4–9, — extended to Courts of common law by 23 & 24 Vict., c. 126, — it was enacted that "a Court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot, at the time of the application to the Court, in conformity with the covenant to insure, upon such terms as to the Court may seem fit." The terms of that enactment, making it lawful to give this relief when the breach has been committed "through *accident or mistake, or otherwise [*430] without fraud or gross negligence," show plainly that equity had not been accustomed to relieve in such cases on the ground of accident or mistake; and, further, they provide that

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relief shall not be given, even in cases of accident or mistake, when there has been gross negligence. Now by the Conveyancing Act, 1881, these enactments are repealed; but a *locus penitentiæ* is given to the lessee by requiring, in case of any breach of covenant, that the lessor shall serve upon him a notice specifying the breach and requiring him to remedy it, and to make compensation in money, before exercising his right of re-entry; otherwise the High Court may grant relief upon proper terms. But it is expressly provided that this does not extend to a covenant against assigning, underletting, parting with the possession, or disposing of the land leased. Forfeiture for breach of this covenant is left to be dealt with according to the ordinary law and practice of Courts of equity.

Upon the whole, therefore, assuming, what I do not think it necessary to affirm or deny, that the High Court had jurisdiction to relieve in this case if in its discretion it thought fit to do so, for the reason I have given I am of opinion that to grant such relief would not be a proper exercise of that discretion; and, accordingly, I think that this appeal should be dismissed with costs. *Appeal dismissed.*

AMERICAN NOTES.

This recent case has not been cited by our text-writers, except Mr. Pingrey (Real Property, sect. 521), and it seems to have no American company.

The policy of our law is against forfeitures by reason of breach of covenant not to assign without consent. *Chipman* v. *Emeric*, 5 California, 49; 63 Am. Dec. 80. Breach of such a covenant, providing no penalty, and unconnected with other covenants for forfeiture, will not create a forfeiture by implication. *Burnes* v. *McCubbin*, 3 Kansas, 221; 87 Am. Dec. 468.

Forfeitures for breach of covenants not intended merely as security for payment of money will not generally be relieved against, for the reason that no exact compensation can be made. Notes 68 Am. Dec. 86, citing *Hill* v. *Barclay*, 16 Ves. 406, 18 id. 56. That case was cited in *Baxter* v. *Lansing*, 7 Paige (N. Y. Chanc.), 349, and approved, and the same doctrine is recognized in *Grigg* v. *Landis*, 19 New Jersey Equity (4 C. E. Green), 350.

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No. 68. — DENDY *v.* NICHOLL.

(C. P. 1858.)

RULE.

If the person entitled to the reversion, knowing that a forfeiture has been incurred by breach of a covenant or condition, does any act whereby he acknowledges the continuance of the tenancy at a later period, he thereby waives the forfeiture.

Dendy v. Nicholl.

27 L. J. C. P. 220–224 (s. c. 4 C. B. (N. S.) 376).

Ejectment. — Forfeiture; Waiver of, by suing for Rent. [220]

A right of re-entry, for breach of covenant in a lease, is waived by the lessor bringing an action for rent accrued due subsequent to the breach.

This was a writ of ejectment, dated the 16th of May, 1857, to recover possession of a piece of meadow land in the parish of Hendon, in the county of Middlesex.

The cause came on for trial, before COCKBURN, Ch. J., at the sittings for Middlesex, after last Michaelmas Term, when a verdict was taken by consent for the plaintiff, on the facts admitted on both sides, with leave to the defendant to move to enter the verdict for him; the Court to be at liberty to draw inferences of fact. The facts agreed upon were, that the defendant was tenant to the plaintiff of the land in question, under a lease dated the 30th of November, 1838, for a term of twenty-one years, from Michaelmas, 1838, at a rent of £3 a year. The lease contained the following covenant: "That (the defendant) his executors or administrators shall not, at any time during the said term hereby granted, demise, grant, set, or let or underlet the said hereby demised premises, or any part thereof, nor part with this indenture of lease (except by will), for all or any part of the said term, to any person or persons whomsoever, without the special license in writing of the said (plaintiff), his heirs or assigns, first had or obtained. Proviso, that if the said yearly rent of £3, or any part thereof, shall be behind or unpaid by the space of twenty-one days next after, &c., or if the said defendant do not well and truly perform and keep all and

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every the covenants and agreements hereinbefore expressed, and which on his or their part are or ought to be performed and kept, and that according to the true intent and meaning of these presents, then and from thenceforth, or at any time or times hereafter, it shall and may be lawful for the said plaintiff, his heirs or assigns, into and upon the said premises hereby demised, or any part thereof, to re-enter, and the same to have again, retain, repossess, and enjoy, as in his and their first and former estate, anything hereinbefore contained to the contrary thereof notwithstanding; nevertheless, this present demise shall be in force for the purpose [* 221] of compelling a due performance * of the covenants hereinbefore contained, and not then duly performed." The defendant entered under this lease, and occupied up to Michaelmas, 1854, when he underlet the demised premises by parol to one Frend, who entered and continued in occupation from that time, under an arrangement with the defendant to pay the rent half-yearly to the plaintiff. The fact that the premises were let to Frend was known to the plaintiff shortly after it took place, but he did not know what the terms were as to the rent. After the letting to Frend, neither Frend nor the defendant paid any rent to the plaintiff up to the 30th of April, 1857. On that day the plaintiff issued a writ for the recovery of the rent up to the preceding 25th of March. On the 16th of May the cause was referred by Judge's order to the Master, and the defendant paid under that order to the plaintiff's attorney the amount of rent which he admitted to be due up to the preceding 25th of March. On the same 16th of May this writ of ejectment was issued, and the breaches of covenant in respect of which the action was brought were stated in the particulars to be, first, the non-payment of rent accrued due subsequently to Michaelmas, 1854; and, secondly, the assignment, underletting, and demise of the premises, and parting with the indenture of lease, contrary to the covenant in that behalf.

H. Hill, for the defendant, in Hilary Term last, obtained a rule calling on the plaintiff to show cause why the verdict should not be set aside, and instead thereof a verdict be entered for the defendant, on the ground that the facts admitted at the trial showed that the plaintiff had waived his right of re-entry; against which —

Kinglake, Serjt., and Lloyd now showed cause. — The question is, whether the facts show that the plaintiff has waived his right of

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re-entry. The action was commenced on the 30th of April, but before judgment was obtained in that action the writ of ejectment issued. The commencing an action for rent amounted to no more than a demand of the rent, for *non constat* that the plaintiff would prosecute the claim. And there is no case in which a mere demand for rent has been held to be a waiver. The law on this head is fully considered in the notes to *Dumpor's Case*, 1 Sim. L. C. 25. The intention of the landlord to waive the right of re-entry or forfeiture must be evidenced by some unequivocal act which cannot be retracted, as in *Doe* v. *Meux*, 4 B. & C. 606 (p. 760, *ante*), and *Doe* v. *Lewis*, 5 Ad. & El. 277. A demand may at any time be retracted and the parties restored to their *status in quo*. If the tenant does not accede to the landlord's proposal, the latter does not keep his proposal open. A demand of rent does not create a new tenancy or admit an existing tenancy. *Blyth* v. *Dennett*, 13 C. B. 178, 22 L. J. C. P. 79.

[WILLES, J. — In that case it was necessary to have the assent of both parties to create a new tenancy. Here it is only a question on one side.]

In *Doe* v. *Birch*, 1 M. & W. 406, 5 L. J. (N. S.) Ex. 185, PARKE, B., says, in the course of the argument, "You may say that a demand of rent is not a waiver of a forfeiture, because the landlord in effect says, if you will pay me the rent I will accept you as tenant, and the tenant does not do so; therefore it is incomplete: some distinct act ought to be done to constitute a waiver."

[BYLES, J. — Upon the facts it can hardly be contended that the plaintiff is in the position of a landlord who has made an offer which, not being accepted, he has withdrawn, because he received the rent on the 23rd of May, demanded by the writ of the 30th of April.]

But before he received it he brought ejectment, viz., on the 16th of May. Then *Jones* v. *Carter*, 15 M. & W. 718, is an express authority that a receipt of rent after the lessor has by some unequivocal act, such as bringing ejectment, expressed his election to treat the lease as void, cannot operate to revive it.

[* CROWDER, J. — In Comyns's Digest, tit. "Condition" [* 222] (P), it is said, that if the covenantee distrains or brings an assize for rent, that is a waiver.]

There is a distinction, as regards the nature of the act, between bringing a real action, such as an assize for rent, and a mere

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personal action to recover the rent. This distinction is pointed out in Co. Litt. 145 a, cited in *Jones* v. *Carter*.

[WILLES, J. — Although in *Doe* v. *Birch* the question of waiver did not distinctly arise, yet PARKE, B., in his judgment gives it as his opinion, that an absolute unqualified demand of the rent by a period having sufficient authority would have amounted to a waiver of the forfeiture.]

They also referred to *Croft* v. *Lumley*, 25 L. J. (N. S.) Q. B. 73; s. c. in error, 223.

Maude, in support of the rule. — The simple question is, whether bringing an action for rent is not an act unequivocally indicating the intention of the landlord to continue the tenancy? Upon the authorities cited on the other side it would appear clearly that it is. In Co. Litt. sec. 219, 145 a, in commenting upon the passage, that "if the grantee of a rent-charge recovers by writ of annuity, then the land is discharged of the distress," Lord COKE says, "But if the grantee doth bring a writ of annuity, and at the return thereof appear and count, this is a determination of his election in a court of record, albeit he never proceedeth any further."

[WILLES, J. — Suppose a conversion by B. of A.'s goods by sale, and that A. brings an action for money had and received against B., and then discontinues and brings trover, could B. take advantage of the principle you are contending for and say, that A. by bringing an action for money had and received had waived the tort?]

Perhaps not. But that is not an analogous case, for here the inconsistent act was intermediate between the two acts of demand and receipt of the rent. In *Jones* v. *Carter* it is distinctly laid down that the first unequivocal act indicating the intention of the lessor determines his option. The defendant here was in possession either as tenant or as a trespasser. By demanding the rent the landlord elects to treat him as tenant, and he cannot afterwards be allowed to say that he is a trespasser. He not only demanded the rent, but enforced his demand by action, and the rent was paid by the tenant and accepted by the landlord.

[WILLES, J. — If the landlord recovers in this ejectment, as he may have judgment for the mesne profits from the determination of the tenant's interest till verdict, he will in effect recover the rent twice over.]

That the plaintiff's contention involves that inconsistency is a strong argument against it.

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CROWDER, J. — We are of opinion that this rule should be made absolute, which calls on the plaintiff to show cause why the verdict found for him should not be set aside and a verdict be entered for the defendant. It appears to me that the facts distinctly show a waiver of the plaintiff's right of re-entry. The facts are, that the defendant was tenant to the plaintiff under a lease which contained a covenant by the defendant not to underlet the premises; that covenant was broken in 1854, by the defendant underletting to one Frend, and on the 30th of April, 1858, the plaintiff brought an action to recover arrears of rent due on the 25th of March previous, the writ in that action being in the ordinary form, but the particulars showing that the sum claimed was clearly rent. For the defendant it is said that, although his covenant was broken and the plaintiff's right of re-entry had accrued, yet the plaintiff had waived his right by bringing the action on the 30th of April, which action was continued until the money was paid on the 23rd of May, under the Judge's order. On the other hand, it is said, that as this action of ejectment was commenced on the 16th of May, before the day on which the rent was paid, the plaintiff's right of re-entry was not waived. The simple question therefore is, whether the action commenced on the 30th of April, accompanied by its results, amounted to a * waiver, and I am of opinion that it [* 223] did. Authorities were cited — *Jones* v. *Carter* and *Doe* v. *Meux* — which established clearly that a landlord, by bringing ejectment, shows his determination to treat his tenant as a trespasser. PARKE, B., in delivering judgment in *Jones* v. *Carter*, says, "After such an act," that is, bringing an ejectment, "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." The act there relied on as a determination of the landlord's option was bringing an ejectment; but why should not the same reasoning apply to the present case, where the landlord demands the rent, enforces his demand by action, and receives the rent as a result of the action? Surely that is conduct as unequivocally showing a determination of the landlord to treat the defendant as tenant, as bringing an ejectment would be an act showing his determination to treat him as a trespasser. The defendant could not conceive, after having been so

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dealt with, that he was to be treated as a trespasser. There is an opinion expressed by PARKE, B., in the judgment which he delivered in *Doe* v. *Birch*, which, though not necessary for the decision of that case, is worthy of great consideration. He says, "The question of waiver does not distinctly arise in this case. If it had, the authorities cited show that this was a lease voidable at the election of the landlord. Then I think that an absolute, unqualified demand of the rent, by a person having sufficient authority, would have amounted to a waiver of the forfeiture, and it would have been like the case I cited from Coke's Reports." The learned Baron in that opinion goes beyond the present case, for he says that an absolute unqualified demand of the rent would be sufficient to waive the forfeiture; but here there has been not only an absolute unqualified demand of the rent, but an action brought to enforce that demand. That seems to me to be an unequivocal and conclusive act on the part of the landlord, showing his intention to treat the defendant as his tenant. And further, if this ejectment were allowed to proceed, there would be this inconsistency, that the plaintiff having recovered his rent in the action of the 30th of April, would recover his lands, and, as pointed out by my Brother WILLES, mesne profits too, up to the time of the verdict. Such an injustice ought not to be allowed, if possible. For these reasons, I think the rule ought to be made absolute.

WILLES, J. — I am entirely of the same opinion. It is contended by the plaintiff that bringing an ejectment is a sufficient election on the part of the landlord to put an end to the term, to prevent the tenant from setting up the lease again, and that on the authority of *Jones* v. *Carter*, an acceptance of rent after ejectment brought does not revive the lease. I am glad we are not bound to lay down such a capricious rule as that, although bringing an ejectment is an unequivocal act showing the landlord's intention to treat his tenant as trespasser, bringing an action to recover the rent is not an act equally strong to show his intention to treat him as tenant. There seems no reason why the one act should not be as strong evidence of intention as the other, unless there be a distinction between bringing an action to recover the land and bringing an action to recover the rent. It is not necessary, and it would be a waste of time, to compare a writ of ejectment under the Common Law Procedure Act with a writ of covenant, to show that real actions have a different effect from personal actions. It is enough to say that

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each is a process in a Court of record, the one to recover possession of the land and the other to recover the rent. It would be a gross inconsistency to hold that a writ of ejectment to recover the land was an election by the landlord to treat his tenant as trespasser, but that a writ of covenant to recover the rent was not an election to treat him as tenant.

BYLES, J. — The facts of the case disclose as clear a waiver of a forfeiture for breach of covenant as I ever remember. There is first an act equivalent to a demand * of the rent; [* 224] secondly, that act is enforced by action; thirdly, the action is pursued substantially to judgment; fourthly, the rent is paid by the tenant, and received by the landlord. The lease is first made use of by the landlord to get his rent; and now he says it was not in force, and no better than waste paper. On these facts the defendant is entitled to our judgment. *Rule absolute.*

ENGLISH NOTES.

But where, in ejectment by lessor for breach of covenant by lessees, the lessor included in his particulars non-payment of rent due for a period subsequent to the other breaches, the latter claim must be taken to be conditional upon non-success in the former, and is therefore not an absolute acknowledgment of the tenancy at the time of the rent becoming due; nor is it a waiver of the forfeiture on the ground first claimed. *Toleman* v. *Portbury* (1871), L. R. 6 Q. B. 245, 40 L. J. Q. B. 125, 24 L. T. 24, 19 W. R. 623 (affirmed Ex. Ch.), L. R. 7 Q. B. 344, 41 L. J. Q. B. 98, 26 L. T. 292, 20 W. R. 441.

In *Ward* v. *Day* (1864), 4 B. & S. 337, 5 B. & S. 359, 33 L. J. Q. B. 3, 254, 10 L. T. 578, 12 W. R. 829, where there was a correspondence and treaty resulting in a verbal agreement for a new lease on the footing that the lease was subsisting, it was held that the lessor could not enforce a forfeiture for breach at an earlier period.

In *Evans* v. *Wyatt* (1880), 43 L. T. 177, it was held that a statement of defence to an action of ejectment, that the plaintiff had with knowledge of the breaches, and with intent to waive them, accepted rent accrued due after the bringing of the action, was a sufficient pleading of a good defence to the action.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sect. 221, and in Pingrey on Real Property, sect. 522; and in Taylor on Landlord and Tenant, secta. 485, 497.

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This doctrine is fully accepted in *Garnhart* v. *Finney*, 40 Missouri, 449; 93 Am. Dec. 303; *Clark* v. *Jones*, 1 Denio (N. Y.), 516; 43 Am. Dec. 706; *Carroll* v. *Charter Oak Ins. Co.*, 1 Abbott, Court of Appeals Decisions, 320; *Jackson* v. *Allen*, 3 Cowen (N. Y.), 230; *Ray* v. *West Penn. N. G. Co.*, 138 Penn. State, 536; 21 Am. St. Rep. 922; *Duke* v. *Harper*, 6 Yerger (Tennessee), 280; 27 Am. Dec. 462; *McKildoe's Ex'rs* v. *Darracott*, 13 Grattan (Virginia), 278 (an elaborate review of the English cases); *Coon* v. *Brickett*, 2 New Hampshire, 164; *Newman* v. *Rutter*, 8 Watts (Penn.), 55; *Frazier* v. *Carruthers*, 44 Illinois Appeals, 61; *Thropp* v. *Field*, 26 New Jersey Equity, 82; *Allen* v. *Dent*, 4 Lea (Tennessee), 676; *Smith* v. *Rector*, &c., 107 New York, 611; *Ireland* v. *Nicholls*, 46 New York, 414; *Gomber* v. *Hackett*, 6 Wisconsin, 323; 70 Am. Dec. 467; *Camp* v. *Scott*, 47 Connecticut, 470; *Hukill* v. *Myers*, 36 West Virginia, 639; *Tuttle* v. *Bean*, 13 Metcalf (Mass.), 275. The waiver may even be by parol: *Moses* v. *Loomis*, 156 Illinois, 392; 47 Am. St. Rep. 194 (citing *Goodright* v. *Davids*, 2 Cowper, 803), and notes, 47 Am. St. Rep. 197–199. Or by silence: *Johnson* v. *Douglass*, 73 Missouri, 168. And even though the landlord when receiving the rent protests against such effect being given to his act: *Gulf, &c. Ry. Co.* v. *Settegast*, 79 Texas, 256; *Crouch* v. *Wabash, &c. Ry. Co.*, 22 Missouri Appeals, 315; but *contra*, *Kemball* v. *Rowland*, 6 Gray (Mass.), 224, (by SHAW, Ch. J.); and even if the acceptance is after re-entry: *Coon* v. *Brickett*, *supra*; and of a larger rent: *Hoff* v. *Baum*, 21 California, 120.

All these cases concur in holding that the acceptance of rent, to waive forfeiture, must be of rent accruing subsequently to the forfeiture and with knowledge of it on the part of the landlord. See *Bowman* v. *Foote*, 29 Connecticut, 331; *Kew* v. *Trainor*, 150 Illinois, 150.

No. 69. — DOE d. MUSTON *v.* GLADWIN.

(Q. B. 1845.)

RULE.

WHERE there is a continuing covenant, an act which implies a waiver of breaches of the covenant does not operate as a license to commit subsequent breaches.

Doe d. Muston v. Gladwin.

6 Queen's Bench, 953–963 (s. c. 14 L. J. Q. B. 189; 9 Jur. 508).

Lease. — Covenant to insure and keep insured. — Continuing Covenant. — Forfeiture.

[953] Lessee of buildings covenanted in the lease to "insure and continue insured" such buildings in the joint names of himself and the lessor, his executors, &c., or assigns; and there was a proviso for re-entry on breach of the

No. 69. — Doe d. Muston v. Gladwin, 6 Q. B. 953, 954.

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covenant. The lessee insured in his own name singly, but showed the policy to the lessor, who approved of it, and accepted rent during the next three years ending at Christmas, 1842. The premiums of insurance were duly paid up to that time, the premium at Christmas, 1842, covering the year 1843, and the policy continuing unaltered. In January, 1843, the lessor assigned; and the assignee, in the same year, brought ejectment for a forfeiture incurred by not insuring in the joint names. No notice had been given to the lessee to alter the policy.

Held, that the covenant to insure in the joint names was a continuing covenant, and was not waived by the conduct of the lessor, except as to past breaches; and that the ejectment lay.

EJECTMENT for messuages, &c., in Kent. Declaration of Trinity Term, 1843: demise, May 18th, 1843.

On the trial, before Lord DENMAN, Ch. J., at the Maidstone *Spring Assizes, 1844, it appeared that this eject- [*954] ment was brought on the alleged forfeiture of a lease by which defendant held the premises. The defendant was the widow and executrix of Thomas Gladwin. The lease purported to be granted, December 7th, 1819, by Lancelot Loat to Thomas Gladwin, his executors, administrators, and assigns, in consideration of the expense which the said T. G. had been at and put to in erecting and building an ice well and other erections and buildings in and upon the piece of land or ground thereinafter described and intended to be thereby demised; and also in consideration of the yearly rent and covenants thereinafter reserved and contained, and on the part of the said T. G., his executors, &c., to be paid, kept, done, and performed. The term was thirty-five years; the rent £4 4*s.*, payable on the usual quarter days. The lease contained the following covenant by the lessee: "And also that he the said Thomas Gladwin, his executors," &c., "shall and will from time to time and at all times during the said term, at his or their own expense, well and sufficiently insure and continue insured in the joint names of himself, his executors, administrators, or assigns, and the said Lancelot Loat, his executors, administrators, or assigns, all erections and buildings, except the ice well before described, which shall or may during this demise be erected and built on the said premises hereby demised, or on any part thereof, during the said term, against loss or damage by fire, in some respectable insurance office," &c. There was a proviso for re-entry if Thomas Gladwin, his executors, &c., should not perform all and every the covenants, &c. The lessor of the plaintiff alleged as a breach

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[* 955] * of covenant[1] that the premises had not been insured or continued to be insured in the joint names of the persons in whose joint names the same ought to have been insured.

The defendant became a tenant on the death of Thomas Gladwin, and, on 28th January, 1836, effected an insurance in her own name and in no other. The policy was continued in that form till the bringing of the present action; and the premium was paid, December 27th, 1842, for the ensuing year. The reversion of the demised premises came to George Oliver by assignment in 1837; and he assigned to the lessor of the plaintiff on 13th January 1843. In 1839, Oliver's attorney wrote to the defendant, requiring her to insure in her own name and that of Oliver: but it was proved on the defendant's part that, in the spring of 1840, the policy, in the defendant's sole name, was shown to and approved of by Oliver, and that he had subsequently, and down to January, 1843, accepted rent from the defendant, the last payment being for the rent due at Christmas, 1842.

It was urged on the defendant's behalf that the alleged forfeiture had been waived by Oliver, and could not be enforced by the lessor of the plaintiff till after express notice to insure according to the covenant, which notice did not appear to have been given. The Lord Chief Justice directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendant. PLATT, in the ensuing term, moved accordingly; and a rule nisi was granted. In this vacation,[2]

[* 956] * W. H. Watson and Peacock showed cause. — The covenant to insure and keep insured was a continuing covenant; and therefore, if there is a waiver of forfeiture by Oliver in 1839, that did not extend to subsequent forfeitures. *Doe dem. Flower* v. *Peck*, 1 B. & Ad. 428, proves both these points, and agrees with *Doe dem. Ambler* v. *Woodbridge*, 9 B. & C. 376 (33 R. R. 203). And the supposed assent here, if it went farther than the waiver of a past breach, must be relied upon as a parol dispensation with a contract under seal, which is contrary to the established rule of law. *West* v. *Blakeway*, 2 Man. & G. 729. Accord and satisfaction after breach is an answer to an action of covenant, but not accord and satisfaction before: Com. Dig. Accord (A 1), (A 2): the reason is stated in *Blake's Case*, 6 Co. Rep. 43 b,

[1] In a particular of breaches delivered under a Judge's order.

[2] February 5th. Before Lord DENMAN, Ch. J., PATTERSON and COLERIDGE, JJ.

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that, where the breach gives only a right of action for damages, accord after breach is only an acceptance of amends for the damages; but accord before is a dispensing with the covenant, which cannot be done by parol: and this doctrine was acted upon in *Kaye* v. *Waghorn*, 1 Taunt. 428 (10 R. R. 558). The distinction between waiver of a power of re-entry after breach and a prospective dispensation is also pointed out in note (16) to *Duppa* v. *Mayo*, 1 Wms. Saund. 288 a, b. *West* v. *Blakeway*, 2 Man. & G. 729, in an equitable view, was more strongly in favour of the defendant than this case, because there the party who brought the action had directly sanctioned the breach of covenant. Perhaps the transaction here between Oliver and the defendant might raise an equity between themselves: but it could not destroy the covenant as between the defendant and an assignee of the reversion. *Doe dem. Knight* v. * *Rowe*, Ry. & M. 343, may [*957] be cited for the defendant. There the action was brought against the assignee in whom a lease granted to one Jones became vested under the Insolvent Debtors' Act; the lease contained a covenant to insure in the joint names of the landlord (who was lessor of the plaintiff) and Jones, in two-thirds of the value: and the ejectment was brought for a forfeiture incurred by insuring in defendant's name only, and in the sum of £800, which was less than the required amount. But the landlord had always kept the lease in his own possession, and had given Jones an abstract, which did not state in whose name or names the policy was to be effected; and, the year before the defendant's insurance was effected, the landlord had himself insured the premises (Jones being unable to do so) for £800. ABBOTT, Ch. J., under these circumstances, left it to the jury to say whether the landlord's conduct in these respects might or might not have led a reasonable man to suppose that an insurance in one name only was sufficient, and that £800 was two-thirds of the value; and directed them, if their opinion was in the affirmative, to find for the defendant. It is observed in Roscoe on Evidence, 432, 6th ed., tit. Ejectment by Landlord, that "this decision, however equitable, seems to be unsatisfactory in principle." But, assuming it to be correct, the case differs from this, because here the defendant knew the terms of the lease, and had been reminded of them by letter, and, if she was not informed of Oliver's assignment to Muston, might, at least, have insured in her own name and Oliver's. *Doe dem. Pittman* v.

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Sutton, 9 C. & P. 706, is also a different case from the pres-
[*958] ent: there the lessee covenanted to insure, but the *lease provided that, if he made default, the landlord might insure, charge the lessee with the premiums, and recover them by distress: and the lessee had reason to believe, from previous transactions with the landlord, that he had exercised the option of insuring and charging the premiums to the lessee. The landlord had misled him as to the matter of fact. *Doe dem. Morecraft* v. *Meux*, 4 B. & C. 606 (p. 760, *ante*). See *Doe dem. Rankin* v. *Brindley*, 4 B. & Ad. 84 (p. 582, *ante*). *Doe dem. De Rutzen* v. *Lewis*, 5 A. & E. 277, may be cited for the defendant; but there the landlord, by giving the tenant notice to repair within three months, impliedly waived the power of re-entering for non-repair before the three months expired.

Bovill, *contra*. — First, this case falls within the authority of *Doe dem. Knight* v. *Rowe*, Ry. & M. 343. ABBOTT, Ch. J., there said: "I am of opinion that there is not in this case any dispensation or release from the covenant; nevertheless, if in this, a case of forfeiture, the conduct of the lessor of the plaintiff has been such as to induce a reasonable and cautious man to believe that he would do all that was necessary or required of him, by insuring in his own name and to the amount which has been proved, I am of opinion that, in point of law, the lessor of the plaintiff is not entitled to your verdict." "Knight might not have meant to deceive in this respect, but still if it would lead a reasonable man to the conclusion that has been stated, then as regards this ground of forfeiture, your verdict should be for the defendant." This ruling has, indeed, been questioned in Roscoe on Evidence, 432; but that of Lord DENMAN, Ch. J., in *Doe dem. Pittman* v. *Sutton*,
[*959] 9 C. & P. 706, was to the same effect. *The principle is that of *Pickard* v. *Sears*, 6 A. & E. 469, and many other cases, in which it has been held that no action can be maintained for things done under a misconception which the plaintiff himself has assisted in creating. In *Doe dem. Morecraft* v. *Meux*, 4 B. & C. 606 (p. 760, *ante*), there were two independent covenants, to repair, and to repair on three months' notice, with a proviso for re-entry if either were broken. The defendant would clearly have been liable to ejectment under the first, but was held to be protected, because the landlord, by giving him notice to repair within three months, had led him to believe that he was in a state of security.

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Here the defendant acted on such a belief, created by Oliver, down to the end of 1842, when the premium for 1843 was paid: and no cause of complaint against her existed when the lessor of the plaintiff became landlord. [PATTESON, J. — You do not put the landlord's conduct as a dispensation; and yet you assert what clearly amounts to one; an engagement by the landlord that as long as the premiums are paid he will not enforce the covenant.] He may have precluded himself from it if his conduct has prevented the defendant from doing what she otherwise would have done. [Lord DENMAN, Ch. J. — It had not led her to alter her situation.] Secondly, Oliver's conduct was an entire waiver of the covenant so far as it required insurance in the joint names. The covenant was to "insure and continue insured" in the joint names, &c., not to "insure, and keep insured," as in *Doe dem. Flower* v. *Peck*, 1 B. & Ad. 428, where, it may be observed, no insurance appears to have been effected at all. Here, one policy was to be executed and approved of, and then nothing * was to [*960] be done for the future but to continue the insurance by regularly paying the premiums. The policy in a single name was approved of by Oliver; and the insurance was duly kept alive. PARKE, J., delivering the judgment of the Court in *Doe dem. Flower* v. *Peck*, 1 B. & Ad. 438, said: "If this could be construed to be a covenant by the lessee to effect one policy of assurance immediately, and afterwards that he and his assigns should keep that particular policy on foot, by continuing to pay the annual premiums on that policy, the assignee would not have been guilty of any breach of covenant, if the lessee had never insured, for the policy never could have existed, which the assignee was to continue; and the distress for rent would have been a waiver of the breach by the original lessee. In such a case the lessor of the plaintiff could not have recovered." The present is analogous to the case there put. One policy was contemplated; and if it was effected irregularly, the acquiescence of Oliver was a waiver. It could not be intended that a new policy should be effected as soon as the premises were assigned. At all events that could not be required unless a notice had been given to the tenant to alter the insurance.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the Court.

This was an action of ejectment on a forfeiture for breach of a

covenant to insure in the joint names of landlord and tenant. The right to recover was clear, unless the lessor of plaintiff had by his conduct barred himself from proceeding.

[* 961] The reversion in the property had often changed * owners. In 1837 it was conveyed to Oliver, and on 13th January, 1843, by him to the lessor of the plaintiff. A policy was effected by the defendant on the 28th January, 1836, in the sole name of the defendant, which was kept alive by payment of the annual premium. At Christmas, 1842, the regular premium was paid for the ensuing year. There was no insurance in the joint names. The demise was laid in May, 1843. The defendant's son-in-law proved at the trial that, on the very day when Oliver parted with this property to the lessor of the plaintiff, he had paid Oliver the rent up to Christmas: he also proved that the policy effected had been previously shown to Oliver, who expressed himself perfectly satisfied with it.

Under these circumstances this ejectment must be considered as unusually harsh; and it is impossible for any Court to lend itself willingly to enforce the proceeding. The expression that the law abhors a forfeiture was never more appropriate. But we must not forget that the legal rights of parties are all that we have power to deal with. Even the Court of Chancery has refused to enjoin against proceeding at law for breach of the covenant to insure; *Green* v. *Bridges*, 4 Sim. 96; and on occasions like the present, Lord TENTERDEN was in the habit of saying that we are bound to give all instruments their natural construction, and attach to them their legal consequences, whatever our inclinations may be. *Doe dem. Davis* v. *Elsam*, M. & M. 189. This course may operate severely in particular cases; but its general effect is no doubt beneficial, by teaching all that they must fulfil their engagements, and by giving certainty to their mutual relations.

[* 962] Since this lease, then, contains a proviso for re-entry in case of a breach of this covenant as well as that of others which may be thought more important, we have only to enquire whether it has been broken so that the landlord might maintain an action of covenant for the breach. That it has been broken is unquestionable: but the present landlord is said to be bound by the act of the former, who gave the defendant to understand that he should not require the performance of the covenant,

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but was satisfied with the substitution of a different mode of insuring. The case was likened to *Pickard* v. *Sears*, 6 A. & E. 469 and to some others, where it was held that a party may by his conduct so mislead another, and so affect his interests, as to deprive himself of the right to complain of what was afterwards done under an impression which he himself had produced; and a recent case of *Doe dem. Pittman* v. *Sutton*, 9 C. &. P. 706, was particularly brought forward. It seems, however, sufficient to observe that no case has gone to the length of intimating that a breach of covenant can be justified by a parol license to break it. This would be to confound well established legal principles. The last named case of *Doe dem. Pittman* v. *Sutton*, 9 C. & P. 706, which is cited as nearest to the present, is very plainly distinguishable when examined. There the covenant to insure on the tenant's part was qualified by an option given to the landlord to insure if the tenant made default, and to add the amount of premiums to his rent; and the evidence showed that the landlord had represented to the tenant that he had availed himself of this power by insuring. This representation would naturally induce * a belief that the in- [* 963] surance was actually effected according to the terms of the lease, in the manner which the landlord proposed. Against an action of covenant, the tenant might have defended himself by showing that the landlord prevented him from insuring, by representing that he had himself insured, and that, in fact, that peculiar covenant was not broken if the landlord's statement was true. The case of *Doe dem. Knight* v. *Rowe*, Ry. & Moo. 343, before Lord TENTERDEN, was also much pressed on us in argument; but there the landlord had misled the tenant, by delivering to him a deficient abstract of the lease. But in this case there is nothing but verbal evidence that a landlord had said that he would be satisfied though the covenant should be broken, which it indisputably was during the whole time that the premises remained uninsured according to the covenant; for the waiver by acceptance of rent could not operate beyond Christmas, up to which period that rent was accepted; and, this being a continuing covenant, a subsequent breach entitled the lessor of the plaintiff to re-enter: *Doe dem. Flower* v. *Peck*, 1 B. & Ad. 428.

We think, therefore, that the rule must be discharged.

Rule discharged.

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ENGLISH NOTES.

It will be observed that in a case of similar circumstances, relief might now be obtained, under the provisions of the Conveyancing and Law of Property Act, 1881, referred to in the notes to Nos. 65 and 66, p. 767, *ante*. But the case affords a good illustration of the rule, which still holds good.

Where a lease contained a covenant by the lessee not to "assign or demise to, or permit any other person to occupy the premises" without consent of the landlord:—it was held that the lessee by underletting for a certain period committed a breach of the covenant not to demise: but while the undertenant remained in the occupation to which he was entitled under the sub-lease, there was no further breach of the covenant not to permit any other person to occupy; and, the breach by subletting having been waived, there was no continuing breach by reason of the under-tenancy. *Walrond* v. *Hawkins* (1875), L. R. 10 C. P. 342, 44 L. J. C. P. 116, 32 L. T. 119, 23 W. R. 390.

It has been, however, observed by BRAMWELL, L. J., that the case may be distinguishable where the covenant is simply not to permit the property to be used in a particular way, and the lessee has demised it without restriction. *Lawrie* v. *Lees* (C. A. 1880), 14 Ch. D. 249, 262, 49 L. J. Ch. 636, 42 L. T. 485, 28 W. R. 779 (affirmed H. L.), 7 App. Cas. 19, 51 L. J. Ch. 209, 46 L. T. 210, 30 W. R. 185.

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sect. 320; in Taylor on Landlord and Tenant, sect. 500; in Pingrey on Real Property, sect. 753, and cited and followed in *Gluck* v. *Elkan*, 36 Minnesota, 81, and followed in *Farwell* v. *Easton*, 63 Missouri, 446, and *McGlynn* v. *Moore*, 25 California, 384.

No. 70.—BAILY *v.* DE CRESPIGNY.

(Q. B. 1869.)

RULE.

A COVENANT by lessor restraining himself and his assigns from making use of his land in a particular way is discharged as to land taken by a railway company or other undertakers of public works under the compulsory powers of their Act of Parliament.

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Baily v. De Crespigny.

L. R. 4 Q. B. 180–189 (s. c. 38 L. J. Q. B. 98; 19 L. T. 681; 17 W. R. 494).

Covenant. — Meaning of "Assigns" in a Covenant. — Covenant not to [180] *build. — Assignment by Compulsion of Law.*

Declaration: that the defendant, in 1840, demised by deed certain premises to the plaintiff for a long term of years, and the defendant covenanted that "neither he nor his assigns would, during the term, permit any messuage, &c., to be built on a paddock fronting the demised premises:" alleging as breaches (1) that the defendant during the term permitted a railway station to be built on the paddock; (2) that the defendant assigned the paddock to a railway company, who erected the railway station on the paddock. Plea: that after the making of the lease the railway company required to take the paddock under powers given them by an Act of Parliament of 1862, for purposes for which they were by the Act empowered to take the same; that the paddock was land which the company were empowered to take compulsorily for the purposes of the undertaking authorised by the Act; and that the company under the powers so conferred did compulsorily purchase and take the paddock, and that the assignment by the defendant to the company was the assignment in completion of such compulsory purchase; that the company afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorised by the Act.

Replication: that though the erections were reasonable, it was not necessary or compulsory for the company to build them.

On demurrers to the plea and replication: —

Held, that the defendant was entitled to judgment: for the defendant was discharged from his covenant by the subsequent Act of Parliament, which compelled him to assign to the railway company, and so put it out of his power to perform the covenant, on the principle of the maxim, "*lex non cogit ad impossibilia;*" and that it could make no difference whether the company were only empowered or were compelled to build the station on the paddock.

Declaration: that defendant by deed demised, among other hereditaments, to the plaintiff a certain piece or parcel of ground situate in the parish of St. Giles, Camberwell, in the county of Surrey, and all that messuage or tenement, together with other erections and buildings then recently erected and built thereon by plaintiff, for eighty-nine years from the 25th of March, 1840, at a rent thereby reserved; and defendant thereby, among other things, covenanted with the plaintiff that neither he, the defendant, nor his heirs, nor his assigns, should or would, during the term, permit to be built, on the paddock fronting the premises demised by the deed towards the north, any messuage or dwelling-house, coach-house, or stable, or other erection, save and * except [* 181]

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summer or pleasure houses in private garden ground, and also a church or chapel at the eastern extremity of the paddock. Averment of the performance of all conditions precedent, &c. Breach: that during the term the defendant permitted to be built on the paddock certain erections other than those by the deed excepted, to wit, a railway station with the appurtenances thereof, including waterclosets and urinals. That by reason of the premises, the plaintiff has been greatly annoyed and damnified in the enjoyment of the land, messuage, and hereditaments demised by the deed as aforesaid, and the value of the land and messuage and of the term has been much depreciated, and the amenity and comfort of the land and messuage as a residence have been deteriorated by the interference with the prospect therefrom, by reason of the erections, and by reason of the smoke proceeding from the chimneys of the railway station and premises, and by reason of the plaintiff's messuage being overlooked by the windows of the railway station and premises; and otherwise, by reason of the premises, the plaintiff has been prevented from having as beneficial a use and occupation of the lands as he otherwise would have had, and has been otherwise damnified.

Second breach: that, after the making of the deed and demise, and during the term thereby granted, the defendant assigned the paddock to the London, Brighton, and South Coast Railway Company, and that the company, after the assignment and during the term, and while they were possessed of the paddock, by virtue of the assignment from the defendant, erected and built the railway station, with the appurtenances on the paddock, contrary to the covenant, to the damage of the plaintiff as above mentioned.

Plea: that, before the committing of the alleged breaches, and after the making of the deed, the London, Brighton, and South Coast Railway Company required to take and purchase the paddock under the powers given them by "The London, Brighton, and South Coast Railway (New Lines) Act, 1862," and for the purposes for which they were by the act empowered to purchase and take the paddock. And that the paddock was land which the company were empowered by the act to purchase and take compulsorily for the purposes of their undertaking, authorised by the act. And that, after the making of the deed, and before
[*182] the * committing of the alleged breaches, the company did, under and according to the power conferred upon

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them by the act, and by virtue of the act, compulsorily purchase and take the paddock, and for the completion of the purchase the defendant did, by deed, convey the paddock to the company and their successors, which is the assignment in the declaration mentioned; whereupon and whereby the company, under and by virtue of the act, became seised in fee of the paddock, and the company, being so seised, built on the ground or paddock the erections in the declaration mentioned, which were erections reasonably required by them for the purposes of their undertaking authorised by the act, which building by the company is the building complained of in the breaches. And that, except as aforesaid, the defendant did not permit the erections to be built.

Replication: that, although reasonable, still it was neither necessary or compulsory for the railway company to build the station on the land in question.

Demurrers to the plea and replication, and joinder.

Nov. 10. F. M. White, for the plaintiff. — The defendant is not discharged from his liability under the covenant by the act of parliament obtained by the railway company. The defendant has land with the burden of a covenant on it, and he deals with it as if there was no covenant, and gets a larger compensation for it. He is liable to the plaintiff for the difference between the value of the land sold without the covenant and the value of it if sold with the covenant. If the railway company had been compelled by their act to build the station in the paddock, then no action would lie: *Wynn* v. *Shropshire Union Railway and Canal Company*, 5 Ex. 420: but here the railway company might have built the station in another spot, and the defendant ought to have stipulated that they should not build it on the paddock.

Raymond, for the defendant. — When a covenantor covenants for himself and assigns, he means his voluntary assigns, and he never intended to covenant for the acts of any assignee that the legislature might thrust upon him. Where an assignment is compulsory upon a covenantor, it is not within his contract, and assignees who * come in under a statute can in no way [* 183] be said to be his assigns. Here it is in vain for the defendant to say he will not sell his land; he is compelled to sell, though there are three modes by which compensation may be assessed to him — by agreement, by arbitration, or by a jury. If the defendant had not executed the conveyance of the land to the

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company, the money would have been paid into court, and the company would, nevertheless, have taken the land. In *Doe* v. *Carter*, 8 T. R. 57 (4 R. R. 586), and *Doe* v. *Bevan*, 3 M. & S. 353 (16 R. R. 293), a clear distinction is drawn between assigns by act of parties and assigns by operation of law: this is essentially an assignment by compulsion of law. In *Slipper* v. *Tottenham and Hampstead Junction Railway*, L. R. 4 Eq. 112, 114, the MASTER OF THE ROLLS says: "As soon as the land is required for the purpose of the railway, and notice is given to take it under the Act, the license to assign is no longer required, being virtually taken away by the clause of the Act of Parliament, as is laid down in an analogous case in *Wadham* v. *Marlowe*, 8 East, 314, n. (9 R. R. 456). The lessor can neither refuse the license to assign nor assent to the assignment, for he has nothing more to do with it." So here the defendant ought not to be made liable for what he cannot in any way help.

White, in reply. *Cur. adv. vult.*

Jan. 20. The judgment of the Court (COCKBURN, Ch. J., LUSH, HANNEN, and HAYES, JJ.) was delivered by

HANNEN, J. — This was an action on a covenant contained in a lease of certain premises granted by the defendant to the plaintiff in 1840, for a term of 89 years, whereby the defendant covenanted that "neither he nor his assigns should or would, during the term, permit to be built any messuage, &c., on a paddock fronting the demised premises." The breaches alleged are: 1. That the defendant during the term permitted a railway station to be built on the paddock. 2. That the defendant assigned the paddock to the London and Brighton Railway Company, who erected the railway station on the paddock.

To this declaration the defendant pleaded that, after the making of the deed, the railway company required to take the [* 184] paddock * under powers given them by Act of Parliament, 1862, for purposes for which they were by the act empowered to take the same; that the paddock was land which the company were empowered to take compulsorily for the purposes of the undertaking authorised by the act; and that the company, under the powers so conferred, did compulsorily purchase and take the paddock; and that the assignment by defendant to the company was the assignment in completion of such compulsory pur-

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chase; that the company afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorised by the Act, and that, except as aforesaid, the defendant did not permit the said erections to be built. The plaintiff demurred to this plea; and also replied that the erections, though reasonable, were not necessary or compulsory for the company to build. To this replication there was a demurrer.

It must be taken on these pleadings that the assignment by the defendant to the railway company was altogether made under the requirements of the Act of Parliament, and without any stipulation introduced into the conveyance by the vendor or the purchaser, which would alter its character as an act done by the defendant in obedience to the command of the Legislature. The 75th section of the Lands Clauses Consolidation Act, 1845, is imperative that the owner of lands shall, on the performance of the conditions imposed on the company, when required so to do, duly convey the lands to the promoters, or as they shall direct, and in default thereof it shall be lawful for the promoters to execute a deed poll, declaring the fact of such default having been made, and thereupon all the estate and interest in such lands, capable of being sold and conveyed by such owner, shall vest absolutely in the promoters of the undertaking.

We think that no distinction can be drawn between the case of an owner of lands who does that which it is his duty to do, namely, conveys to the company, and one who by refusing to convey obliges the company to obtain a title to the lands by the execution of a deed poll. In the one case, as in the other, the transfer of the title is compelled by the Legislature, and it cannot be supposed that it was intended that the landowner who acts solely in obedience to the law should be in a worse position than one who refuses * compliance. In either case the railway company [* 185] must be regarded as the assignee of the land, not by the voluntary act of the former owner, but by compulsion of law.

The substantial question, therefore, raised on this record is whether the defendant is discharged from his covenant by the subsequent Act of Parliament, which put it out of his power to perform it.

We are of opinion that he is so discharged on the principle expressed in the maxim *lex non cogit ad impossibilia.*

We have first to consider what is the meaning of the covenant

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which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor.

But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract; for, as is observed by MAULE, J., in *Canham* v. *Barry*, 15 C. B. at p. 619; 24 L. J. C. P. at p. 106, a man might by apt words bind himself that it shall rain to-morrow or that he will pay damages. This is the explanation of the case put by Lord Coke in *Shelley's Case*, 1 Co. Rep. at p. 98 a. "If a lessee covenants to leave a wood in as good a plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest, he is discharged of his covenant," because it was thought that the covenant was intended [*186] to relate *only to the tenant's own acts, and not to an event beyond his control, producing effects not in his power to remedy. (See Shep. Touch. 173.) It is on this principle that it has been held that an impossibility, arising from an Act of the Legislature subsequent to the contract, discharges the contractor from liability. Again, to quote an observation of MAULE, J., in *Mayor of Berwick* v. *Oswald*, 3 E. & B. at p. 665; 23 L. J. Q. B. at p. 324, there is nothing "to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law . . . but people in general must always be considered as contracting with reference to the law as existing at the time of the contract . . . And the words showing a contrary intention ought to be pretty clear to

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rebut that presumption." To hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made. This is the principle of that which was laid down in *Brewster* v. *Kitchell*, 1 Salk. 198, that "where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed."

To apply the foregoing observations to the present case: The defendant has covenanted that his "assigns" shall not build. The word "assigns" is a term of well-known signification, comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law: *Spencer's Case*, 5 Co. Rep. 16 (p. 233, *ante*). The defendant when he contracted used the general word "assigns," knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The Legislature by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties. On the other hand, to confine [* 187] the word "assigns" to those who take by the voluntary act of the assignor would not, as was suggested in argument, limit the operation of the covenant to his immediate grantee: because all those who take from the first assignee do so in consequence of the original voluntary act of the assignor, and it was his own fault that he assigned at all, or that he did not in the original conveyance guard against the acts of subsequent assignees. To exempt him from liability for such acts would be contrary to the intention of the parties, to be collected from their words, interpreted according to their known ordinary signification.

It was, indeed, conceded on the argument by the plaintiff's counsel, that the defendant would not be liable for all acts of the railway company, as he would have been for the acts of any other assignee; but it was contended that the defendant was relieved from liability on his covenant as to those acts only which the com-

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pany was required by the Act of Parliament to do, and not as to those which the company was merely empowered to do.

We do not think that this distinction is well founded. The rule laid down in *Brewster* v. *Kitchell*, 1 Salk. 198, rests upon this ground, that it is not reasonable to suppose that the Legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the Legislature itself prevented his fulfilling; but the covenantor in this case is equally disabled from preventing the railway company from doing those things which it is empowered to do, as those which it is required to do; why then should there be a difference in the liability of the covenantor with respect to the one and the other?

But, assuming that the imposing on the defendant by the Legislature of assigns whom he could not control, would, without more, free him from the engagements which he entered into with reference to assigns whom he could control, it remains necessary to deal with the argument that, though the company was empowered to take the lands free from the restrictions upon building, this was only on condition of paying full compensation for what they got, and that it must be supposed that the defendant obtained from the company not only the value of the land as he held it, [*188] encumbered * with a covenant not to build, but also what was deemed a fair consideration for the right to build.

It appears to be assumed in this argument that the difference, between the price of the land encumbered with the covenant not to build and the price of it freed from that covenant, would be the amount of damages to be paid by the defendant to the plaintiff in the present action. But that is not so: the plaintiff, if entitled to recover at all in this action, would be entitled to the damage he had sustained by the breach of the covenant, even if these damages should exceed the whole value of the land taken. No doubt, if the Legislature had in express terms, or by necessary implication from its language, given to persons in the defendant's situation a remedy over against the railway company in respect of acts done by the company, this would have indicated that the Legislature did not intend that the defendant should be freed from liability on his covenant, although he was disabled from performing it. But we cannot find in the railway acts any express or implied enactment to this effect. It has been already pointed out that there is no

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relation between the compensation which the defendant would be entitled to for his land and the damages for which he would be liable to the plaintiff. How could it be possible for the defendant to lay before the compensation jury evidence of the extent of his liability on such a covenant as that under consideration? How could he, in an inquiry to which the plaintiff was no party, offer evidence of the injury which the plaintiff might by any possibility sustain in the uncertain event of the company erecting a station or other building on the land taken?

Further, if the covenant of the defendant is to be considered as broken by the act of the railway company so as to entitle the plaintiff to damages, it must be deemed to carry with it the other consequences of a breach of contract. Thus, if the situation of the plaintiff and the defendant in this case had been reversed, and the covenant not to build on land adjoining the demised premises had been entered into by a lessee, with the usual proviso for re-entry in the event of breach of any covenant, the lessee would have been liable to forfeiture of his whole interest by reason of an act over which he had no control; and the railway company would be liable, if the plaintiff's contention be correct, to pay, by way of * compensation for a piece of land taken, the whole value [* 189] of the interest of the lessee in the adjoining estate.

The solution of the case appears to be, that the plaintiff is one of a numerous class of persons injured by the construction of a railway, for whom the legislature has not provided compensation. This may be illustrated by reference to the special damage claimed in the declaration. It is there alleged that the amenity and comfort of the land demised have been diminished by reason of the prospect therefrom being interfered with, and by being overlooked by the windows of the station, with the appurtenances, including water-closets and urinals. These are heads of damage for which railway companies are not in ordinary circumstances bound to give compensation, but for which the defendant would be liable in an action on his covenant.

We do not think that it was the intention of the legislature to make a railway company liable for such damages in the exceptional case of a person, in the position of the plaintiff, having taken a covenant from his lessor on the terms of that under consideration, or that, if such had been the intention of the Legislature, so peculiar a head of compensation as that now suggested, namely, for liability

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to damages for breach of collateral covenants resulting from the taking of lands, would have been left to be conjectured from the vague language of the Lands Clauses Consolidation Act.

For these reasons we are of opinion that our judgment ought to be for the defendant. *Judgment for the defendant.*

ENGLISH NOTES.

The rule laid down in *Brewster* v. *Kitchell*, cited in the judgment, p. 805, *supra*, was stated in the judgment of HOLT, Ch. J., in that case, as follows: "Where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant; so if H. covenants to do a thing which is lawful and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed." This is again cited by MALINS, V. C., in *Newington Local Board* v. *Cottingham Local Board* (1872), 12 Ch. D. 731, 48 L. J. Ch. 226, 40 L. T. 58, in which the question was whether a restraint on the use of certain sewers by a local authority made between this and another local authority was overridden by the provisions of the Public Health Act, 1875, which empowered owners of premises outside the district of the local authority to connect their drains on terms to be settled by compulsory arbitration. It was held that the restraint by the agreement was removed by the Act.

So where premises were taken by a School Board under the powers of the Elementary Education Act, 1870 (which incorporates the Lands Clauses Consolidation Act, 1845), with notice of a restrictive covenant to which the land was subject in the hands of the vendor; it was held that the covenantor could not maintain an action against the School Board for breach of the covenant; his only remedy was compensation under section 68 of the Lands Clauses Consolidation Act, 1845. *Kirby* v. *School Board for Harrogate* (C. A. 1895), 1896, 1 Ch. 437, 65 L. J. Ch. 376, 74 L. T. 6.

The rule has been distinguished from the case where there is an absolute covenant to do something within a certain time; and before the expiry of the time circumstances occur which render the performance impossible. *In re Arthur's Estate, Arthur* v. *Wynne* (1880), 14 Ch. D. 603, 49 L. J. Ch. 556. See No. 10 of "Accident" and notes 1 R. C. 388, 346 *et seq.*

AMERICAN NOTES.

This case is cited in Wood on Landlord and Tenant, sect. 321; in Taylor on Landlord and Tenant, sect. 408; in Washburn on Real Property, p. 504; in Lawson on Contracts, sect. 424.

This doctrine is found in *Jackson* v. *Corliss*, 7 Johnson (N. Y.), 531 (as to

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confession of judgment in good faith, citing *Doe* v. *Carter*, 8 T. R. 57); *Jackson* v. *Silvernail*, 15 ibid. 277 (judgment); *Smith* v. *Putnam*, 3 Pickering (Mass.), 220 (attachment, citing *Doe* v. *Carter*, *supra*), and the New York cases cited above, and observing: "The English common law on this subject has been recognized and adopted in New York"); *Macon, &c., R. Co.* v. *Gibson*, 85 Georgia, 1; 21 Am. St. Rep. 135 (citing the principal case); *Bemis* v. *Wilder*, 100 Massachusetts, 446 (voluntary assignment in insolvency); McAdam on Landlord and Tenant, sect. 95 (citing *Doe* v. *Carter*).

A lessee of a wooden building, covenanting to rebuild in case of fire, is released by the enactment of a valid ordinance prohibiting the erection of wooden buildings. *Cordes* v. *Miller*, 39 Michigan, 581; 33 Am. Rep. 430.

The impossibility of repairing leased dams or races ten days after the water falls to the average winter stage, as agreed upon by the lease, because the water immediately rises again and continues high, releases the lessor from liability for breach of the covenant if he repairs as soon as possible. *Pengra* v. *Wheeler*, 24 Oregon, 532; 21 Lawyers' Rep. Annotated, 726.

A covenant in a lease for sale of the premises to the lessee at the expiration of the lease is discharged by the previous destruction of a material part of the premises by fire. *Smith* v. *Phœnix Ins. Co.* 91 California, 323; 25 Am. St. Rep. 191.

The performance of a covenant being rendered impossible by an act of eminent domain or sovereignty the covenantor is excused. *Ellis* v. *Welch*, 6 Massachusetts, 246; 4 Am. Dec. 122 (where a town way was located over leased lands); so in *Frost* v. *Earnest*, 4 Wharton (Penn.), 86, when the Court observed: "But if the vendee lose the premises, not because of defect of title in the vendor, but on the very ground that the vendee has a good title from the vendor, which the State, by virtue of its sovereign power, authorizes to be taken from him, stipulating to pay him for it, on what principle can he have recourse to the vendor on such a covenant? If the covenant is broken, the vendor is liable upon it, though he may neither have received nor been entitled to receive anything; for the vendee's remedy in that case does not depend on the vendor's having received any compensation; it arises by the mere fact of the eviction and loss of the property. The case then would present the aspect of a vendee, who, on eviction, is entitled to be paid the value of his loss by the party evicting him, and at the same time may recover from the vendor for breach of covenant. This cannot be: the covenant never was designed for such an event, and is not applicable to it. It resembles the case of eviction of the vendee by a third person who is a tort-feasor. He may have his action against such a tort-feasor; and therefore it has been decided that the vendor is not liable on this covenant. The same principle applies when the vendee is ousted by the sovereign power of the State under its right of eminent domain, or under reservations in the first settlement of the country, exercised according to the constitutional injunction of compensating every man whose property is taken for the public use. The remedy of the vendee is to look to the legislative provisions made for his indemnity and not to the covenant for quiet enjoyment, which was introduced into conveyances for purposes entirely different."

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In *Kuhn* v. *Freeman*, 15 Kansas, 426 (a case of a vendee), the court said: "The exercise of the right of eminent domain is the exercise of a sovereign power; and no person is presumed to covenant against the acts of sovereignty." See *Cooper* v. *Bloodgood*, 32 New Jersey Equity, 209; *Brimmer* v. *City of Boston*, 102 Massachusetts, 19; *Folts* v. *Huntley*, 7 Wendell (N. Y.), 210; *Schuylkill & D. R. Co.* v. *Schmoele*, 57 Penn. State, 278; *Dyer* v. *Wightman*, 66 ibid., 427; *Barclay* v. *Pickles*, 38 Missouri, 143; *Gillespie* v. *Thomas*, 15 Wendell (N. Y.), 464; *Kingsland* v. *Clark*, 24 Missouri, 24; *Foote* v. *Cincinnati*, 11 Ohio, 408; 38 Am. Dec. 737.

The liability of the tenant to pay rent is discharged by the condemnation of the whole premises. See cases above cited, and especially *Corrigan* v. *Chicago*, 144 Illinois, 537; 21 Lawyers' Rep. Annotated, 212. *Foote* v. *Cincinnati*, 11 Ohio, 408; 38 Am. Dec. 737.

But if only part of the premises is condemned, the liability for the whole rent continues: *Stubbings* v. *Evanston*, 136 Illinois, 37; 11 Lawyers' Rep. Annotated, 839; 29 Am. St. Rep. 300; *Folts* v. *Huntley*, *supra*; *Parks* v. *Boston*, 15 Pickering (Mass.), 198; *Gluck* v. *Mayor of Baltimore*, 81 Maryland, 315; 48 Am. St. Rep. 515 (a learned opinion). *Contra*, holding the rent apportionable: *Biddle* v. *Husman*, 23 Missouri, 597; *Commissioners* v. *Johnson*, 66 Mississippi, 248; *Cuthbert* v. *Kuhn*, 3 Wharton (Penn.), 357; 31 Am. Dec. 513. And in *Blair* v. *Claxton*, 18 New York, 529, where there was a lease of land with an easement in other land, with a covenant for quiet enjoyment of the whole, and a partial eviction from the easement under title paramount, it was held that there should be an abatement from the rent.

Rent payable in advance is recoverable although the premises are taken by eminent domain before the quarter for which the rent is due expires. *Gugel* v. *Isaacs*, 21 Appellate Division (N. Y.), 503.

In case of partial eviction by title paramount there is a proportionate deduction of rent: Tenant on Landlord and Tenant, sect. 378 (citing *Lansing* v. *Van Alstyne*, 2 Wendell (N. Y.), 561; *Stevenson* v. *Lambard*, 2 East 575; *Carter* v. *Burr*, 39 Barbour (N. Y. Supr. Ct.), 59; *Fillebrown* v. *Hoar*, 124 Massachusetts, 580); *Halligan* v. *Wade*, 21 Illinois, 470; 74 Am. Dec. 108; *Poston* v. *Jones*, 2 Iredell Equity (Nor. Car.), 350; 38 Am. Dec. 683. But an eviction from part by the landlord's act suspends the entire rent: *Carter* v. *Burr*, *supra* (citing *Lawrence* v. *French*, 25 Wendell (N. Y.), 443; *Ludwell* v. *Newman*, 6 T. R. 458); *Briggs* v. *Hall*, 4 Leigh (Virginia), 484; 26 Am. Dec. 326; *Camarillo* v. *Fenlon*, 49 California, 207; *Warren* v. *Wagner*, 75 Alabama, 188; *Reed* v. *Reynolds*, 37 Connecticut, 474; *Royce* v. *Guggenheim*, 106 Massachusetts, 201; 8 Am. Rep. 322; *Colburn* v. *Morrill*, 117 Massachusetts, 262; 19 Am. Rep. 415; *Hayner* v. *Smith*, 63 Illinois, 430; 14 Am. Rep. 124; *Graham* v. *Anderson*, 3 Harrington (Delaware), 364; *McClurg* v. *Price*, 59 Penn. St. 420; 98 Am. Dec. 356; *McKenzie* v. *Lexington*, 4 Dana (Kentucky), 132; *Edmidson* v. *Lowry*, 3 South Dakota, 77; 17 Lawyers' Rep. Annotated, 275.

In *Johnson* v. *Oppenheim*, 12 Abbott Practice, N. S. (N. Y.), 454, the Superior Court observe: "The adjudications of this State, bearing upon the general subject of interference by landlord with tenants, may be assorted into

three distinct and entirely different classes of cases, the remedy for each class being peculiar to it, viz.: —

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"I. Cases where the tenant is evicted without the wilful or voluntary agency of the landlord, from the whole or some part of the demised premises; as for example, an eviction of the tenant by title paramount of a contiguous proprietor. Here, if the eviction is from the whole premises, the tenant is not chargeable with rent; but if it be from a part of the premises, the law, in its inability to impute blame to the landlord for the act of another person, requires the rent to be apportioned, so that the tenant shall be liable to pay for such portions of the premises as he retains (*Moffat* v. *Strong*, 9 Bosw. 57; and see *Mack* v. *Patchin*, 29 How. Pr. 20).

"II. Cases where the landlord commits an act or acts of trespass, which interfere, more or less, with the beneficial enjoyment of the premises, but which leave the demised premises intact, and do not deprive the tenant of any part of them, so that, though he may be injured, he is not thereby dispossessed. Here the rule is, inasmuch as the wrongful act of the landlord stops short of depriving the tenant of any portion of the premises, that such trespass is no defence against the liability for rent, and the tenant's sole remedy therefore is an action for damages against the wrong-doer (*Edgerton* v. *Page*, 20 N. Y. 281; *Lounsberry* v. *Snyder*, 31 id. 514; *Cram* v. *Dresser*, 2 Sandf. 120; *Mortimer* v. *Brunner*, 6 Bosw. 653; *Peck* v. *Hiller*, 31 Barb. 117).

"III. Cases where the landlord enters wilfully upon and expels the tenant, actually or constructively, from a part of the demised premises. Here the rule is, that the whole rent is suspended during the term, though the tenant continue in possession of the residue (*Christopher* v. *Austin*, 11 N. Y. (1 Kern.) 216; *Peck* v. *Hiller*, 24 Barb. 178)."

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